Must Politics Be War?
In Defense of Public Reason Liberalism

Forthcoming with Oxford University Press

Version 2.0

Kevin Vallier
Associate Professor of Philosophy
Director, Program in Philosophy, Politics, Economics, and Law
Bowling Green State University
kevinvallier@gmail.com

Note to Readers: You **may** circulate this draft without my permission, but citations to the manuscript **must cite the version number** so that they are not confused with future drafts, which may change considerably. *Comments are welcome*.

NEW IN THIS UPDATE:

1. Moral peace is understood as the social state that results from a rational, moral trust in shared moral *rules* rather than moral conventions.
2. The discussion of intrinsic value and the realist foundation for public reason has been dramatically shortened and altered.
3. There is a new stand-alone chapter discussing the value of moral peace and how it grounds an ideal of respect for persons. The foundation is importantly distinct from the previous version.
4. The supplement has been either deleted or moved into this document.
5. At present, the book is too long by 15,000 words. Advice on what to cut is appreciated.

Table of Contents

Introduction: Must Politics Be War?

"War is politics by other means." ~ Carl von Clausewitz
"Politics is war by other means." ~ Michel Foucault

American politics is more divided today than at any point since the Civil War. There are fewer moderate politicians on either side of the political divide, and an increasing spirit of hardened partisanship has made political compromise, even on issues where compromise is desperately needed, all but impossible. With the advent of internet politics and social media, Americans can easily insulate themselves from opposing points of view, and constantly reaffirm their own prejudices, and even grow more radical and intolerant over time. We find among Republicans an almost entirely closed media circuit, with Fox News and talk radio driving even much of the political agenda of the Republican Party. While the intellectual and media base of the Democratic part is much larger, we find an increasing hostility to alternative points of view in the Academy, where membership in the Democratic Party is heavily concentrated.

In light of these social conditions, one might wonder whether American politics isn't invariably a struggle for power between the righteous and the wicked. American political life looks like a brute contest for dominion, where the victors drag the country in their direction without concern or respect for the losers.

Our present condition raises the specter of a more general concern. People have said for centuries that political life *as such* is war. Be it the orthodox vs. the heretical, the rational vs. the superstitious, the racially pure vs. the impure, the

productive vs. the parasitic, the story is the same. Politics is an arena of strategic confrontation where parties struggle to defeat their opponents. Even democracy is a gladiatorial encounter. Philosopher David Enoch's recent remarks speak for many; with respect to politics, "there is no way out of the arena," and we are all mere players. We must "enter it, to fight, shoulder to shoulder … for what is just and good."[1]

This book attempts to identify social, political, and economic institutions that could convince people with divergent worldviews that our shared political life is a fundamentally moral enterprise. That is to say, we could look at political contestation and negotiation as within the bounds of an acceptable public morality. Under these institutional conditions, social life in a diverse society would not be naked institutionalized aggression, but rather a deep, but respectful disagreement about collective choice on matters where individual and local choice is not feasible or attractive.

Some may see this aim as fundamentally utopian. But I do not contend that politics can suppose or aim at agreement about the good or about what justice requires, or other matters of deep dispute. Rather, I am asking whether there are institutional structures that can sustain a *rational social trust* in our *public moral order*. Can the ordinary practice of directing the moral and political actions of others be justified given our deep disagreements? Can we show, at least in principle, that each person has sufficient reason to endorse the social rules that

[1] Enoch 2013, p. 175.

govern us all, such that our disagreements can be governed by common rules that each regards as morally binding? I grant that it is not easy to show that this practice is justified and that there is a shared moral order that we can endorse together. But I am convinced that a book length treatment of the problem can show that the project is not beyond our ken.

This book is a work of *political philosophy*, an abstract inquiry into the conditions that would *morally justify* social and political institutions. It is not a work of history or of social science, though it appeals to both historical and social scientific considerations. Since political philosophy is invariably a lofty enterprise, one might wonder how it could be used to solve such a real-world practical problem of an overly partisan politics. The answer is that political philosophy can identify practical possibilities with attractive moral qualities. As such, it can perform some critical functions. The philosopher John Rawls argued that one practical aim of political philosophy "is to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered."[2] And if this goal is too ambitious, then political philosophy can at least help us narrow these disagreements "so that social cooperation on a footing of mutual respect among citizens can still be maintained."

My goal is similar to Rawls's, though with an important difference. Rawls came to believe that free societies invariably must face the "fact of reasonable

[2] Rawls 2001, p. 2.

pluralism," which means that persons will inevitably disagree about matters of ultimate import, such as the nature of the good and the truth or falsity of religion.[3] The fact of reasonable pluralism would destabilize a society that is governed by a single conception or account of the good life because even some reasonable people would eventually reject that conception or at least endorse goods that might override that conception. In response, Rawls concluded that the theory of justice could still perform its reconciling function, so long as people with different understandings of the good could endorse a shared conception of justice. But towards the end of his career, Rawls despaired even of this, acknowledging that reasonable people can disagree about which *liberal* conception of justice is correct, at least within a limited range. The hope, even at the end of Rawls's life, was that justice could play a central role in narrowing our divisive political questions and securing respectful social cooperation.

I believe that reasonable disagreement about justice runs as deep as reasonable disagreement about the good. Informed people of good-will disagree so much about what justice requires that we need to identify some other domain of the moral to reconcile us despite an ongoing disagreement about justice. Just as relations of justice were thought to reconcile us despite our disagreements about the good, we can identify some broader moral relation to reconcile us despite our disagreements about justice. So the project of this book is deeply Rawlsian in spirit, but follows the Rawlsian line of argument from where Rawls left it.

---

[3] Rawls 2005, p. 54-8.

In my view, securing mutually respectful social cooperation only requires *rational social trust in our shared moral order*. We are subject to a wide variety of moral and legal rules that we use to direct one another's behavior. We order one another to engage or refrain from engaging in many lines of conduct, and those orders raise the question of their justification. If our practice of insisting on certain behavior from others cannot be justified, then it looks as those these demands are small-scale acts of war. They are attempts to dominate and browbeat one another. If political philosophy is to perform its reconciling function, we must locate a *moral standard* by which we can distinguish between demands that preserve respectful social order and those that disrupt it. To put it another way, we need a moral standard that can establish *moral peace* between persons, a state of society with widespread, rationally justified social trust that our shared moral practices have *authority* such that free people can use it as an ongoing, mutually justified basis to preserve, rather than undermine, social order. The right moral standard can explain how free people who deeply disagree can requires lines of conduct from one another without risking authoritarianism, disrespect, sectarianism, and instability. If these requirements have authority, then each person can see herself as under a duty to comply with these requirements, and as such, can have no legitimate objection to them.

The moral standard I defend is *public justification*. A public justification for a moral or legal rule specifies when an *agent* has sufficient *reason* to endorse the moral or legal rule in question. If each agent in a society has sufficient reason of

her own to endorse the moral and legal rules to which she is subject, then I argue she can be said to be reconciled not merely to being subject to the rule but reconciled with others who direct her to follow the rule, including others very different from herself. Thus, an account of public justification can form the foundation for relations of trust between diverse persons. If each person is only subject to moral and legal rules that she sees herself as having reason to endorse and believes that others have sufficient reason of their own to endorse, then she sees that each person has distinctively moral reason to comply with the rule, and so she can trust others to follow it. By establishing social trust in this way, then, a standard of public justification can succeed where the theory of justice fails.

Of course, as we shall see, any account of public justification is going to be controversial among reasonable people. But if the standard of public justification is required to secure a widely endorsed and weighty moral good like social trust, then the standard is well-grounded. For insofar as persons have reason to endorse that good, they have reason to establish a moral and legal order whose rules are publicly justified.

I offer three arguments that a social trust between persons is a great moral good. First, social trust is *extrinsically* valuable because it lays the foundation for the accumulation of *social capital*, or social knowledge that persons can use to form mutually beneficial social relations. Social capital, we shall see, is critical for making any large-scale political and economic institutions work well. So social trust has extrinsic value because of its central role in making institutions work.

Second, social trust has value because it is a precondition for forming a wide array of social relations on which we place great value, such as relations of love and friendship. Without social trust, we lack the grounds for extending trust to persons we do not know, which undermines our capacity to form any moral relationship with them at all. A trustless world is one that lacks love and friendship, and relations of love and friendship are perhaps humanity's most cherished goods.

My final argument is that *rational* social trust in our shared moral order helps to specify an attractive ideal of respect for persons. When we insist upon treating persons in accord with moral and legal rules that can be justified from their perspective, we recognize that they are inviolable. That is to say that there is a real moral requirement that we treat persons with respect, which requires treating them in accord with rules that can be publicly justified. Rawls thought that the ideal of respect for persons could only be made determinate by appealing to a theory of justice, with all its attendant complications.[4] I shall argue that the standard of public justification, by establishing the conditions for rational social trust between persons, yields a superior specification of respect for persons. The standard of public justification specifies the conditions for respect even in cases of deep disagreement about what justice requires.

An ideal of respect for persons helps to explain why we should think that treating others in accord with the standard of public justification has overriding force in determining how we should interact with those we disagree with. If we

[4] Rawls 1999, p. 513. I thank Charles Larmore for this reference.

focus only on the value of social trust, we cannot explain why other values cannot override public justification. But if public justification specifies a conception of respect for persons, public justification can inherit its moral priority from respect for persons. This is because a standard of respect for persons arguably lies at he center of that part of morality that determines what we owe to one another.

The standard of public justification grounds an account of *public reason liberalism*, a liberal theory of social legitimacy and authority that emphasizes the importance of justifying coercive law to multiple reasonable points of view. As the inheritor of the social contract tradition in political philosophy, public reason liberalism attempts to create a social contract among citizens: a complex agreement on the terms of social life. But unlike the social contract tradition, which relies on the problematic notions of express and tacit consent, public reason relies on the idea of public justification.[5]

Unlike most versions of public reason liberalism, however, I do not think the most fundamental thing to be publicly justified is coercive law. Public justification applies not merely to laws but to moral rules that comprise what P.F. Strawson, Kurt Baier, Joseph Raz, and Gerald Gaus have called a *social morality*.[6] The turn towards a social morality helps demonstrate that the public reason project is not an attempt to promote the interests of the modern liberal state.

---

[5] For an analysis of the concept of public justification, see Kevin Vallier and Fred D'Agostino, "Public Justification," Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/justification-public/.

[6] Kurt Baier, *The Rational and the Moral Order* (Chicago: Open Court, 1995)., Ch. 6, pp. 195-224, P. F. Strawson, *Freedom and Resentment and Other Essays* (New York: Routledge, 1974)., Ch. 2, pp. 29-49, Joseph Raz, *The Authority of Law* (New York: Oxford University Press, 2009), pp. 41,43, Gerald Gaus, *The Order of Public Reason* (New York: Cambridge University Press, 2011)., pp. 2-13

Instead, as I will argue, the liberal state is considerably limited by the fact that moral peace between persons is most often realized through non-coercive moral rules alone.

The turn to social morality also helps to explain why coercion needs public justification. The more common respect-based defense of public reason advanced most prominently by Charles Larmore has been subjected to considerable challenge.[7] So while I agree with Larmore that respect for persons often requires that legal coercion be publicly justified, my account of respect for persons differs. As I have noted, respect for persons must be made sense of in terms of a standard of public justification that establishes rational social trust that our shared moral order can be endorsed from each person's point of view. I then argue that we can only justify a moral order if it is supplemented by a limited order of legal coercion and control.

The turn to social morality will lead the informed reader to note deep similarities between my view of public reason and the account Gaus develops in *The Order of Public Reason*.[8] The similarities are real. My project begins as much with *The Order of Public Reason* as with Rawls's *Political Liberalism*. However, my emphasis is different. Gaus argues that public justification not only avoids

---

[7] For one of Larmore's original papers on the topic, see Charles Larmore, "The Moral Basis of Political Liberalism," *The Journal of Philosophy* 96, no. 12 (1999). For criticisms, see Christopher Eberle, "What Does Respect Require?," in *Religion in the Liberal Polity*, ed. Terence Cuneo (Notre Dame: University of Notre Dame Press, 2005)., and Van Schoelandt, "Justification, Coercion, and the Place of Public Reason," *Philosophical Studies* 172 (2015).

[8] For Gaus's defense, see Gaus, *The Order of Public Reason.*, pp. 16-46. You can find one my criticisms in Kevin Vallier, "Gaus, Hayek, and the Place of Civil Religion in a Free Society," *Review of Austrian Economics* (2016). I also address Gaus in the supplement to chapter 1.

authoritarian relations between persons but establishes an ongoing, stable practice of moral responsibility that is required to sustain moral relations between persons. But as I read Gaus, the ultimate point of both is to establish, maintain, and enliven *moral relations* between persons. Gaus frequently discusses moral relations in *The Order of Public Reason*, but does not develop a further account of what these moral relations consist in.[9] While reading his work, I noticed that Gaus briefly mentions that the moral authority established by publicly justified moral rules provides the basis of "relations of trust."[10] It then struck me that trust is the common factor shared by any moral relations that we might hope to have with others. For there can be no moral relations of *any* kind without it. So while I follow Gaus in placing the value of moral relations at the heart of the public reason project, I find it more powerful and direct to hang an account of public reason on an account of social trust. Gaus's stress on avoiding authoritarianism runs the risk of detracting from what I believe is the central idea.

As noted, public justification establishes that social trust is rationally justified. Given the value of establishing a system of social trust, we have reason to establish such a system. And once a system of trust is established, respect for others requires that we honor it. The idea of social trust fleshes out both an account of peace between persons and an account of respect for persons. So if we can develop an attractive account of social trust and its value, we can advance the central aims of the Gausian project.

---

[9] In a footnote, Gaus points to the account of love and friendship developed in Gaus 1990, ch. VI.
[10] Gaus 2011, p. 315.

The *general* goal of identifying and grounding the standard of public justification is to establish that there are feasible institutional conditions under which moral peace between persons is possible. The standard of public justification helps to identify moral and legal rules that can form the foundation of enduring social trust, and so to answer those who think that politics must be a mere contest for power. These feasible institutional conditions are *liberal* in nature, or so I will argue. Liberal institutions protect the basic liberties of persons and small groups from interference or control by great social and political power. These institutions are four – constitutional rights, democratic decision-making, federalism, and the market economy. Constitutional rights give people the authority to live their own lives in their own way, democratic decision-making allows us to make collective choices as equals, federalism devolves decision-making among those who disagree about how government should be organized, and the market economy provides considerable liberty in organizing economic life and produces the wealth required for general prosperity and the creation and preservation of free institutions. I contend that a standard of public justification grounded in the value of rational social trust in our moral order can justify these institutions. My argument is that these liberal institutions are uniquely publicly justified once we realize the depth and breadth of reasonable disagreement among persons in free societies.

The book is structured into three parts. In Part I, I develop an account of moral peace and show how it grounds a standard of public justification. We can

therefore see Part I as establishing not only how to justify a society's *moral* constitution, the order or justified norms prior to government, politics, and coercive law. While I draw on the idea of a moral constitution as found in Rawls and Gaus[11], I will understand the idea of a moral constitution as the descendent of the early modern idea of the constitution of a society prior to the state, such as those found in Johannes Althusius, Franscisco Suarez, John Locke, and others.[12] I pursue these tasks in Chapters 1, 2, and 3. Chapter 1 develops the idea of moral peace, Chapter 2 explains the value of moral peace, and Chapter 3 both elaborates the structure of public justification and shows how moral peace grounds public justification.

In Part II, I develop an account of how the public justification of moral rules generates an account of how to publicly justify legal rules and the obligations generally associated with a duty to obey the law. Legal rules are publicly justified as a means to supplementing the moral order because legal rules can perform tasks that the moral order either cannot perform or cannot perform as well as members of the public would like. In this way, we will see that the public reason project proceeds in two stages: first we develop an account of a society's moral

[11] John Rawls, "Kantian Constructivism in Moral Theory," *The Journal of Philosophy* 77, no. 9 (1980)., p. 539. Gerald Gaus, "On the Appropriate Mode of Justifying a Public Moral Constitution," *The Harvard Review of Philosophy* XVIII (2013).

[12] Johannes Althusius, Politica: Politics Methodically Set Forth and Illustrated with Sacred and Profane Examples (Indianapolis: Liberty Fund, [1614] 1995)., Francisco Suarez, Selections from Three Works: A Treatise on Laws and God the Lawgiver, ed. Thomas Pink (Indianapolis: Liberty Fund, [1612] 2015)., John Locke, Two Treatises of Government (Cambridge: Cambridge University Press, [1690] 1988).

constitution and then derive a justification for its political constitution from the justification for its moral constitution. I develop this derivation in Chapter 4.

Once a social-moral order is properly constituted, members of the public do not seek to institutionalize a common conception of the good or even a common conception of justice. On my view, if we impose our sectarian conception of justice on others, there is an important sense in which we are *at war* with them. The theory of justice, then, plays a more restrained role in my theory than in other accounts of public reason. Contractors choose a set of political, economic, and civic institutions to govern persons who disagree about justice and the good. Among these institutions and procedures is the system of higher-order rules for the legitimate use of state power commonly called a constitution.

A constitution-focused conception of public reason signals two important departures from Rawlsian political liberalism. First, members of the public do not choose principles of justice to govern their society; instead, they settle on a more modest notion of *primary rights*. Rawls denied that political philosophy was in the business of determining the nature of the authentic human good, so he developed a notion of the good that was sufficiently shared that state promotion of those goods would not be authoritarian or sectarian—primary goods, resources that anyone might want given a rational conception of the good.[13] Primary rights have a similar basis: we identify a system of rights that all can converge on as necessary

[13] John Rawls, *A Theory of Justice* (New York: Oxford University Press, 1971)., pp. 90-95. [OE]

for each person or group to advance her good and her sense of justice on reciprocal terms with others. I develop an account of primary rights in Chapter 5.

The third part of political public reason involves the choice of constitutional rules of two types. First, we must choose constitutional rules designed to protect, define, harmonize, and enforce primary rights. Second, we must choose constitutional rules to govern matters of political concern other than the protection of rights, such as the production of public goods and the regulation of negative externalities. Few public reason liberals have developed accounts of constitutional choice, so I argue that we must appeal to other approaches to develop a substantive model of constitutional choice. In particular, we should appeal to constitutional political economy and the public choice contractarianism advanced by James Buchanan and Gordon Tullock.[14] So Chapter 6 is focused on the derivation of constitutional rules based on a synthesis of public reason and public choice approaches.

Chapter 6 also contains a new model of stability for the right reasons. Rawlsians all agree that a just and legitimate political order must be stable for the right reasons or in some sense self-stabilizing among reasonable persons. But the models of stability in the literature are, in my view, much too simple to be plausible. They do not recognize the complex dynamics of assuring cooperative behavior in a mass society. Further, equilibrium models that are used to describe a well-ordered society imagine such a society as coordinating around a single focal

[14] James Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, MI: University of Michigan Press, 1962).

point understood as an abstract set of substantive principles of justice and their associated institutions. To avoid these problems, I distinguish between types of stability and the appropriate political and social sites of those forms of stability.

Part III outlines some of the contours of publicly justified constitutions. In Chapter 7, I provide an account of the nature and authority of civic institutions outside of the state, such as the family and civic associations. I argue that a society's moral constitution not only protects non-state associations, but also draws on them *as sources of legitimacy*. Given that publicly justified moral rules can establish moral peace between persons, non-state institutions that establish moral peace have original legitimate authority that can compete with the state. In this way, I attempt to integrate the tradition of liberal pluralism into public reason, despite the long-standing association between public reason and rationalistic social contract theories.[15] The turn to social morality requires that we assign great authority to civic associations and intermediary institutions, social authority that can substantially limit state power.

In Chapter 8, I explain the place of markets and private property in a social-moral order. Commercial institutions, I contend, need state power more than civic associations like the family and religious organizations to function well. And yet, the publicly justified moral rules that underlie commercial institutions will constrain the reach of state power. A publicly justified constitution may allow for some redistribution of wealth, social insurance, state regulation and the provision

[15] I draw this distinction from Jacob Levy, *Rationalism, Pluralism, and Freedom* (New York: Oxford University Press, 2015).

of public goods, but it is prohibited from more radical interventions, such as those involved in establishing liberal socialism and property-owning democracy. As such, I will argue against the common view that property rights are creations of the state.[16] Property rights are, indeed, partly social creations, but they are not mere political creations. Property relations are primarily the natural product of moral rules and spontaneously evolved common law, not state design.

Finally, in Chapter 9, I develop a conception of democracy for a publicly justified constitution. It differs in three ways from the traditional deliberative democratic approach common among public reason liberals. First, it focuses on explaining the public justification of democracy given a justified moral constitution. In this way, my conception of political democracy more closely resembles Lockean theories than traditional public reason views. Second, my conception of democracy does not rely on deliberation as the sole or even the best method of public justification; other institutions can help reveal the will of the people, such as the market economy, political bargaining, and even unconventional information pooling tools like prediction markets. In this way, my conception of the general will is more closely aligned with idealist theories found in T.H. Green and Bernard Bosanquet, rather than the Rousseauvian views popular among philosophers and political theorists.[17] Third, my conception of democracy

[16] In particular, I will focus on the conventionalist line of argument found in Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002).

[17] That is, I follow T. H. Green, *Lectures on the Principles of Political Obligation* (New York: Longman's Green and Co., 1895)., and Bernard Bosanquet, *The Philosophical Theory of the State and Related Essays*, ed. Gerald Gaus and William Sweet, Key Texts: Classic Studies in the History of

does not depend on reaching or even approaching consensus on political issues, but rather seeks decision-mechanisms that minimize legislative errors. Given these three contrasts, my conception of democracy is not limited to coercive political mechanisms and public deliberation. Instead, my view is *process* democratic because it restricts the role of deliberation in social decision-making vis-à-vis other choice procedures. I also develop an account of federalist relations, which divide democratic decision-making vertically between national, provincial, and local governmental bodies. The public reason liberal case for federalism is that federal arrangements help to ensure that the laws that exist are publicly justified to diverse persons.

Returning to the big picture, my aim is to demonstrate to the reader, especially American readers, that you need not acquiesce in the view that politics is war. If I am right, liberal institutions can establish a moral peace between persons in virtue of forming the groundwork for relations of trust between persons with deeply divergent worldviews. While I think our present predicament is sustained by those who *don't want* to get along politically, and who derive meaning from political victory, it is still useful to use political philosophy and political economy to show us that there is a better way. If we wish to treat others with respect and to live under a system of mutually beneficial social cooperation, we must seek peace under liberal institutions. That quest is not in vain.

Ideas (South Bend: St. Augustine's Press, 2001). My view can be contrasted with Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy*, ed. James Bohman and William Rehg (Cambridge: MIT Press, 1997).

Chapter 1: Moral Peace and Social Trust

How hard it is to trust those who are different from us! The tendency of primates to exhibit in-group bias, to favor their tribe, predates the evolution of man, and has been a part of human social life since *homo sapiens* appeared on the Earth.[18] Psychologists find that in-group bias persists to the present day, and generates many of our pressing social ills.[19]

But we have learned from economics that the benefits of overcoming in-group bias are staggering. If we can truck, barter, and exchange with others, we can build a vastly more productive and prosperous society than we could if we only trust members of our family, tribe, or village.[20] By extending the division of labor across the world, we have become immeasurably richer, healthier, and more peaceful. Attempting to suppress our in-group bias in many cases is in our self-interest.

Moreover, there is something *morally* attractive about being able to trust strangers; by coming to see others as worthy of our trust, we can come to appreciate their dignity and form valuable relationships with them. Social trust is a precondition for valuable moral relations, including the great goods of love and friendship. And it is also a way of recognizing persons as worthy of our respect and concern.

---

[18] [cite]
[19] Tajfel 2010.
[20] Smith 1981, Ostrom and Walker 2003.

Even with appropriate moral motivation, however, we have trouble forming trusting relations with those who have competing worldviews and value systems. It is hard to see those whose values compete with our own as people of good will. And yet this is the ordinary circumstance in large-scale social orders in the modern world, for people of good will disagree deeply about what the good life consists in and what justice requires. Forming a cooperative order with these individuals, therefore, not only requires that we overcome prejudice based on biological markers like race and gender, but to overcome *viewpoint* prejudice, prejudice based on another person's religious, moral, or political convictions. While free societies have made great strides in suppressing in-group bias against other races and genders, and against other religions, our moral and political prejudices continue, and in the United States, have considerably worsened since the decades immediately following the civil war.[21]

This inability to trust those across the political isle not only prevents government from working well, it constitutes a kind of *moral loss*. When we allow our political differences to *devalue* others, we not only lose the possibility of moral relations, we lose sight of their humanity, and so fail to fully appreciate the genuine dignity and inherent value of those with who we share our social lives.

This leads us to a powerful and pressing question: is it possible for human beings to create and maintain a social order that overcomes in-group bias and establishes ongoing, rational, and *morally valuable* social trust between strangers?

[21] Campbell 2016.

Anyone steeped in American politics will be tempted to answer no. Those on the other side are mistaken, and often culpably so, and that means there is simply no alternative to defeating them. As Western European nations once thought religious difference could only be addressed by wars of conquest, so we today think that political difference can only be addressed by state-sponsored violence. *Politics is war*.

The purpose of this chapter is to develop an account of the kind of relationship that persons can establish with others that will both preserve respect for our differences and establish and maintain a system of social cooperation between persons who recognize one another's fundamental worth. I begin by developing an account of *social trust*. This form of social trust involves the belief that others will generally comply with *public moral rules*, rules that are widely regarded as in force and genuinely morally binding. It is also a *rational* trust because we see believe that both we *and others* have sufficient reason to endorse and comply with these rules. Only a rational moral trust in our shared moral practices can both capture the social and relational value of social trust while simultaneously serving as a response to the worth of others.

I proceed in six parts. In section I, I attempt to explain why even thoughtful people find viewpoint diversity hard to accept and respect. My theory is that the social fact of what Rawls called *reasonable pluralism* and that Gaus calls *evaluative pluralism* is the culprit. Well-informed and sincere people of good will can justifiably disagree with one another on a wide range of issues, but given our

greater familiarity with our own positions, we find it hard to imagine how others could sincerely hold the views they do. In section II, I develop a conception of social trust that can be held in the presence of evaluative pluralism. Section III develops an account of public moral rules, the objects of social trust. And section IV combines the two ideas to define *moral trust*, social trust that persons will comply with public moral rules. Section V explains the sense in which moral trust can be rational, and Section VI defines the idea of *moral peace* between persons as order where rational moral trust prevails. This sets the stage for Chapter 2, where I explain the value of moral peace, and chapter 3, where I show that moral peace requires public justification.

I. Admitting Evaluative Pluralism

A primary source of distrust is persistent in-group bias. Once humans draw lines between their group and other groups, hostility to the out-group comes naturally. But when such in-group bias is *irrational*, it is hard to justify. The real worry, one that requires a philosophical response, is *rational* in-group bias, or bias based on *justified belief* that the out-group is not only wrong, but dangerously so. Of course, there are many cases in which our out-group *is* dangerously wrong, but I think we are tempted to overestimate the prevalence of dangerous out-group error. That temptation is due to our inability to understand how others could both reason well and yet come to different conclusions than we have. To put it another way, we

have a hard time understanding how persons can have different *reasons* for action and belief. The atheist cannot understand how a Catholic could have good reason to believe and practice her faith. The Democrat cannot see how any good person could vote Republican. And the conservative cannot imagine how anyone could be a progressive of good will. And that's even after considering the arguments of the other side. We are sometimes deeply unimpressed by the arguments of those we disagree with despite recognizing that others think these arguments are successful. Our viewpoint diversity is so great that what looks like a good argument to one group appears to be a total non-starter to another. And this experience leads us to suspect that others are cognitively and morally flawed.

Let us call the fact that persons can *justifiably* or *reasonably* affirm different reasons for action and belief the fact of *evaluative pluralism*.[22] The term "evaluative" leads us to think of pluralism as concerning not just our evaluation of goals, means, ends, principles, and so on, but also that the disagreement can be rooted in cognitively sophisticated, yet still quite diverse, reasoning.

Explaining evaluative pluralism is difficult, but any adequate explanation surely includes Rawls's "burdens of judgment" or the factors that lead those who freely employ their practical reason to adopt different and incompatible views about matters of ultimate import. Rawls lists six such factors:

(1) The evidence bearing on the disagreement is conflicting and complex.

[22] I do not use the term "reasonable" to describe pluralism because it so often abused by public reason liberals and despised by their critics that the term is not worth the trouble.

> (2) Even when we agree on the relevant considerations, we may disagree about their weight.
>
> (3) Our concepts, not merely moral and political concepts, are often vague and subject to hard cases.
>
> (4) The way we assess evidence and weigh values is shaped by our unique, total experience.
>
> (5) We often find different kinds of normative considerations on both sides of an issue, making an overall assessment difficult. And,
>
> (6) Any system of social institutions is limited in the values that it can admit. So many hard decisions may have no easy answer.[23]

Religious, moral, and political disagreements obviously involve complex evidence, and when considered abstractly, it seems plain enough that people can look at the same evidence and come to different conclusions. The same is true when it comes to weighing different arguments and other considerations. Anyone who has taken an introductory ethics course knows that our moral concepts are vague and subject to hard cases; likewise for our political concepts. Most people will admit, when pressed, that our beliefs are based on our unique life experience. It is not hard to see how reflecting on that fact could help people see that others might have good reason for believing as they do.

[23] Rawls 2005, pp. 56-7.

The economist F.A. Hayek has a similar account of the sources of disagreement, but that is in some ways much richer. Hayek argued as early as 1944 that at least one of Rawls's burdens of judgment, disagreement about the weight of moral values, will lead to evaluative pluralism. As Hayek notes in *The Road to Serfdom*, even the "scales of value" of rational and moral persons "are inevitably different and often inconsistent with each other."[24] But Hayek develops an even more radical account of the burdens of judgment in other work. Hayek understands the mind as a system of rules that organize subjective percepts in cognitively unique ways. The mind itself is "a particular order of a set of events taking place in some organism and in some manner related to but not identical with, the physical order of events in the environment."[25] The result of this structure is that different minds will map the world differently, such that their knowledge of the world is inevitably subjective, limited, and dispersed. Hayek's famous "abuse of reason" project rests on these ideas, since social scientific inquiry must recognize "that the concrete knowledge which different individuals possess will differ in important respects.[26] Consequently, solving social problems is limited by insuperable complexity, given that "the number of separate variables which in any particular social phenomenon will determine the result of a given change will as a rule be far too large for any human mind to master and manipulate them

[24] Hayek 2007, p. 102.
[25] Hayek 1952, p. 16.
[26] Hayek 1979, p. 57.

effectively."[27] Each person only possesses a tiny, *distinct* piece of knowledge about how to create a functioning social order. Our *reasons* to accept the rules that comprise that order will, consequently, be radically situated and subjective.

Evaluative pluralism also assumes that disagreements about matters of ultimate import are largely *non-culpable*. If someone fails to believe the true religion, the fact that she has missed the truth is not cause to hold her responsible for holding false beliefs. Further, under conditions of evaluative pluralism, persons who *reason well with respect to their evidence* will come to dramatically different conclusions about what forms of life have ultimate value. In some weak sense, then, persons can be *epistemically entitled* to affirm these ends and their associated reasons. I do not mean to wed this book to the claim that all worldviews, or some restricted subset, will survive *all* rational, good-willed scrutiny. Instead, I mean that, given their reasoning up to the time of discussion, persons are rationally entitled to affirm quite different views.[28] Additional reasoning and learning may lead persons to give up their fundamental doctrines, philosophies, etc. But this does not mean that persons have easily accessible and successful counterarguments for their divergent beliefs. Again, given our radical situatedness, reasoning well with respect to our evidence can easily lead to divergent views.

---

[27] Hayek 1979, p. 73.

[28] Pollock 2006, p. 6. We can understand the justification that applies to our reasoning up to the present time as *provisional* justification, which contrasts with non-provisional justification, where we have completed all possibly relevant reasoning. We can hold that provisional justification is diverse while maintaining that non-provisional justification will vindicate our particular approach to the right, the good, and the holy.

> [A challenge to evaluative pluralism can be drawn from the peer disagreement literature.[29] It may appear that those who affirm evaluative pluralism are committed to the controversial position that epistemic peers, persons who share evidential bases and reason with similar degrees of competency, should, when confronted with one another, suspend or reduce their confidence in their disputed beliefs; "concliationism" may be the rational response to evaluative pluralism. Conciliationism holds that when "two peers who disagree about p should subsequently become substantially less confident in their opinions regarding p."[30] Fortunately, we can set aside this challenge, for evaluative pluralism is silent about how epistemic *peers* should cognitively respond to one another. Instead, the burdens of judgment and our radical cognitive situatedness suggest that interacting with an epistemic peer on an issue is highly unlikely and would be nearly impossible to discern were we to ever meet her. Even if people know all the same arguments, they could have easily encountered the arguments in a different order, or they could have non-culpably forgotten an argument they once knew, or perhaps they lack some hard to communicate insight due to life experience. Evaluative pluralism simply states that real-world persons are rationally entitled to affirm different practical reasons for action and theoretical reasons for belief on matters of ultimate import. That is a considerably weaker claim than conciliationism.[31]]

With a generic account of evaluative pluralism in hand, we can now ask which types of beliefs it applies to. Clearly evaluative pluralism applies to beliefs about the ultimate *good*. Reasonable people disagree about what the good life consists in. But it also plainly applies to disagreement about what is right and wrong and about what is just and unjust. Thus, pluralism about the good and *justice pluralism* both run deep and lead to sharp divergences between intelligent persons of good will. Some philosophers who admit pluralism about the good try to restrict the reach of justice pluralism, such as Rawls and Jonathan Quong.[32] I have argued elsewhere that the limitations they place on justice pluralism are either ad hoc, too vague, or based on contentious and unattractive conceptions of

---

[29] For a review of the literature, see Goldman and Blanchard 2015.
[30] Goldman and Blanchard 2015.
[31] I take this paragraph to explain the irrelevance of the peer disagreement literature to the public reason project, contra Enoch in "Political Philosophy and Epistemology: The Case of Public Reason," unpublished.
[32] Rawls 2005, pp. xlvii-xlviii. Quong 2011, pp. 192-220.

the public reason project.[33] I lack the space to review these arguments here. Nonetheless, we can say that, without some good reason to treat pluralism about the good and justice pluralism asymmetrically, the natural assumption is that evaluative pluralism applies to both domains.

I also believe that evaluative pluralism applies to beliefs about empirical facts. This is obviously true if we allow that persons of informed good will can have considerably different religious beliefs, since religious beliefs usually concern what exists. A theist believes God exists; an atheist denies this. Given the fair assumption that informed, intelligent persons of good will could be theists or atheists, we here have an instance where evaluative pluralism applies to empirical facts, specifically the fact of God's existence (or non-existence).[34]

A critic might worry that allowing that persons can sensibly disagree about empirical facts allows them to disagree about facts that are subject to direct scientific examination. This means that informed persons of good will can justifiably reject a number of scientific conclusions. While we can acknowledge that grossly anti-scientific beliefs are irrational, such as hostility to childhood vaccination, reasonable people could disagree about the extent to which climate change is a threat to humanity or about which macroeconomic policy is best during a recession. I suspect most readers will want to avoid a standard of reasonable disagreement this permissive, as it legitimizes too many doubts about

[33] See Vallier, "Political Liberalism and the Radical Consequences of Justice Pluralism."
[34] We can also have pluralism about *social* worlds, where people have different social ontologies. Muldoon 2017 explores what I call social worlds pluralism and the prospects for the contractarian project in light of such radical pluralism.

the verdicts of the scientific community. We can solve this problem by distinguishing between culpable and non-culpable errors in reasoning. Those who doubt the scientific consensus without good counterarguments have made a culpable error because their objections to trusting the consensus are frequently manifestly fallacious. Anti-vaxxers and those who reject anthropogenic climate change have strong counterevidence that derives from easily discoverable judgments of the relevant scientific experts.

Now that we understand the nature and sources of evaluative pluralism, we can see why it is hard to recognize. Our own perspectives on the world are sharply limited by our bounded rational cognitive abilities and our highly situated and subjective experience. From our individual vantage points, viewpoint diversity is hard to respect, since we have trouble imagining how someone could think differently from ourselves. But if evaluative pluralism hold, we should expect viewpoint prejudice, since our cognitive and environmental differences will make it hard for us to recognize when a disagreement is reasonable. This is why even many thoughtful people fail to acknowledge and respect deep differences of opinion on fundamental matters.

If we are to develop and sustain a diverse society rooted in social trust, we must acknowledge the fact of evaluative pluralism. Otherwise, we cannot see that others are people of good will who can be trusted to comply with our shared moral rules. Fortunately, reflection on evaluative pluralism quickly makes clear how pervasive the phenomenon is. And once we recognize it, we can quiet our

temptation to in-group bias against those with different religious, moral, and political viewpoints. We can begin to see those with different ideas as worthy of respect, rather than as irrational and dangerous enemies.

II. Social Trust

The goal of this book is to show how liberal institutions are uniquely suited to establishing and maintaining rational social trust based on a recognition of the worth and value of persons with diverse viewpoints. So we must begin with an account of social trust.

Broadly speaking, individuals trust one another to engage in certain lines of conduct or to do particular things. As Russell Hardin puts it, A trusts B to X.[35] I can trust my wife to have the garage opened when I bike home, so I can place my bike in the garage. John may trust Reba to stop a stop sign so that he can drive by without getting hit. Fred may even trust Kathy to continually betray his confidence. To trust another person, then, involves some kind of expectation of behavior on the part of the person who is trusted by the one who trusts. Moreover, trust also involves some kind of vulnerability. We trust others not merely when we expect them to engage in a line of conduct, but when we in some way *need* or *want* them to do so. Sometimes we speak of trust loosely, saying that "I trust you're feeling well" or that "I trust that she will make the same mistake over and over

[35] Hardin 2004 …

again." But when we appeal to paradigmatic cases of trust, we understand the truster as taking a risk in trusting others, since trust can be *betrayed*.

We often talk about trusting *persons* and whether persons are generally *trustworthy*.[36] When we speak of trusting persons, I think we often mean that we trust persons to do *the right thing*. That is, we don't speak of a person as being trustworthy when we can expect them to act badly. Instead, we think the person the person has character traits that explain and predict moral conduct, such as honesty. But trusting others to do the right thing is commonly understood as a generic judgment that the trusted person will engage in *morally acceptable lines of conduct* across a range of social contexts. That is, our judgment that someone is trustworthy can be damaged and even undermined if the person violates a public moral rule. So it seems natural to understand judgments of trustworthiness in terms of trust that persons will obey shared social norms. As a result, some even define social trust in this way. As David Messick and Roderick Kramer argue, "Trust involves taking the risk that the other person will follow more or less simple moral rules."[37] Moreover, "We will define *trust* in these situations as making the decision *as if* the other person or persons will abide by ordinary ethical rules that are involved in the situation."[38]

Cristiano Castelfranchi and Rino Falcone have provided a helpful, if complex, definition of trust that emphasizes beliefs among interacting agents who

[36] Hardin 2004 ..., Hardin article p. 7.
[37] Messick and Kramer 2001, p. 90.
[38] Messick and Kramer 2001, p. 91. Also see Hosmer 1995, p. 399.

have their own goals and beliefs. Trust is a "complex attitude of an agent x towards another agent y about the behavior/action A relevant for the result (goal) g."[39] They stress the tight relationship between trust and acts of "delegation." Delegation occurs when "delegating agent (x) needs or likes an action of the delegated agent (y) and includes it in her own plan: x relies on y or x plans to achieve g through y."[40] The trusting agent, then, has a "multi-agent plan" that includes y, where y must realize some goal or action that is part of x's plan. Trust, then, typically involves delegation.[41]

Trust requires at least two types of beliefs. For John to trust Reba, John must have a "competence" belief and a "disposition" or "willingness" belief.[42] He must believe that Reba is necessary and capable of providing the expected result, and that Reba will actually do what he needs.[43] This is a "belief relative to their willingness" which makes the trusted person predictable. From these beliefs, the trusting agent can form a "positive expectation" understood as the combination of a goal g and beliefs [B_1, B_2 … B_n] about the future.

The next belief required for trust is a "dependence" belief where John believes that he needs or depends upon Reba's help and that it is better from John's perspective to rely on Reba rather than not. John also has a "fulfillment"

---

[39] Castelfranchi and Falcone 2010, p. 39. [Referees: I've found this the best definition of trust for my purposes. If you think it necessary, I can discuss other views as well, or at least cite them.]
[40] Castelfranchi and Falcone 2010, p. 79(?).
[41] Importantly, there can be trust without delegation if "either the level of trust is not sufficient to delegate, or the level of trust would be sufficient but there are other reasons preventing delegations," like social or legal prohibitions. See Ibid.
[42] Castelfranchi and Falcone 2010, p. 16.
[43] Note that neither of these beliefs requires actual delegation, but delegation will be required if trust is to be demonstrated.

belief where he believes that the goal g will likely be achieved. Trust therefore involves some risk; John trusts Reba when he believes that it is possible that Reba will fail to do her part. Castlefranchi and Falcone claim that John takes two risks in trusting Reba: the "risk of failure" of achieving g and "wasting the efforts" of others.[44] Thus, by trusting Reba, John takes a risk and so makes himself *vulnerable* to her.[45]

Based on the foregoing, we can define trust as follows:

> *Trust:* A trusts B just when A has a goal, believes that B is necessary or helpful for achieving that goal and that B is willing and able to do B's part[46] in achieving the goal.[47]

Trust requires a goal, a belief that another agent is necessary or helpful for achieving the goal, and that the other agent will (probably) do her part in achieving the goal.

This definition of trust can be expanded to define trust that is mass and mutual—social trust. In mass society, few goals are shared among all citizens. So social trust does not require some substantive shared goal like realizing the common good. Instead, social trust requires the belief that others are necessary or helpful for achieving each person or small group's ends and that people are

[44] Castelfranchi and Falcone 2010, p. 76.
[45] The authors enumerate other belief conditions not required to advance the argument of the chapter.
[46] As A conceptualizes B's part.
[47] These beliefs are, most frequently, implicit.

generally willing and able to do so by *following publicly recognized rules of conduct*, such as prohibitions against aggression, deception, and harm. A definition:

> *Individual Social Trust*: a member of the public socially trusts other members when she believes they are necessary or helpful for achieving her goals and that they are generally willing and able to do their part, knowingly or unknowingly, to achieve those goals by following publicly recognized rules of conduct.

John must expect others to act in concert with public expectations for him to formulate his projects and plans. Social trust obtains when all or nearly all members of the public have these beliefs and expectations. Define social trust as follows:

> *Social Trust*: a public exhibits social trust to the extent that its members generally believe that others are necessary or helpful for achieving one another's goals and that (most or all) members of the public are generally willing and able to do their part to achieve those goals, knowingly or unknowingly, by following publicly recognized rules of conduct.

Large societies lack shared goals and, due to their size, they are unable to explicitly communicate the beliefs upon which trust is based. So I claim that societies

establish social trust through *mass compliance with social rules*. As long as each person believes that most or all others will comply with publicly recognized rules of conduct based on observing rule compliance, she can socially trust others.

III. Moral Rules

Now that we understand social trust, we must determine what social trust is trust *in.* In the last section, I defined social trust as involving an expectation that others will comply with publicly recognized rules of conduct. But what kind of rules are these? In my view, these social or public rules can be understood as norms.[48] They involve regular patterns of social behavior that conform to a public standard over time. In contrast to conventions, which persons follow because they believe they benefit in doing so, people follow norms less consciously and sometimes without seeing the benefits from social interactions based on the norms. Following Cristina Bicchieri, we can understand these social rules as *social norms* where the reasons we comply with the rule is not merely because of our *empirical* expectation that others will comply with the norm and that they expect us to do so, but also because of the *normative* expectation that others will mind my violation.[49] That is, they will blame or ostracize me on the basis of resentment or indignation. So at

[48] See the overlap between the two ideas in Bicchieri and Muldoon 2011, and Rescorla 2015. Bicchieri and Muldoon raise some problems with understanding norms merely as regular patterns of behavior and suggest that norms can be understood as combinations of expectations and behaviors. For our purposes, we need not settle the question of how to define a norm. I thank Steven Stich for this point.

[49] Bicchieri 2006, p. 11.

the least, the rules that we socially trust others to follow are social norms backed by both empirical and normative expectations.

I follow Gerald Gaus in expanding upon Bicchieri's notion of a social norm with normative expectations into the idea of a social rule. Gaus understands a social rule, in general, in terms of a "set/subset" analysis where rules identify "a certain set of actions" must, must not, or is permitted to perform.[50] Social rules do not identify particular actions but "issue directives for actions with these properties." Specifically, a social rule has four components. It identifies,

(i) a set of persons to whom the prescription is addressed;

(ii) a property of actions;

(iii) a deontic operator such that actions with that property may, must, or must not be performed, and,

(iv) a statement of the conditions under which the connection between (ii) and (iii) is relevant.[51]

A social rule, then, is a publicly recognized prescription for a group of persons to engage or to be allowed to engage in certain lines of conduct according to the relevant context.

Another important feature of social rules is that they must somehow "exist."[52] Following H.L.A. Hart, Gaus argues that a rule is social under two

[50] Gaus 2011, p. 123.
[51] Gaus 2011, ibid.

conditions: (a) some members of a group must view the behavior required by the rule as a general standard that binds everyone and (b) that the rule is regularly followed by most members of the group.[53] On the first requirement, each group member must see the rule as having an "internal aspect" such that members of the group think that they and others should follow the rule, and in fact, the rule may also be appropriately internalized as applying to one. We should regard the rules that apply to us as our rules, ones that we hold ourselves to. The rule must also be actually followed, for otherwise it is not a rule for the group at all. Unless the rule is followed, it cannot structure expectations or even be successfully agreed upon as applying to persons. In this way, social rules satisfy a kind of *publicity* condition, where they are the object of common recognition, where each person recognizes the rule and recognizes that all others do as well.

Social rules also involve (c) that the rule establish a practice of "reciprocal obligation" where each person sees one another as responsible for following the rule out of a sense of reciprocity.[54] Just as I follow the rule, I expect others to do likewise, and vice versa. Gaus understands reciprocal obligations in terms of establishing relations of mutual authority, where we can direct one another to comply with the rules; I develop a similar notion of authoritative rules in Chapter 3 (?).[55]

---

[52] Gaus 2011, p. 165.
[53] Gaus 2011, ibid. Hart 1961, pp. 54-6.
[54] Gaus 2011, p. 171.
[55] Gaus 2011, ibid.

Social rules are already starting to look like moral rules, and indeed, Gaus understands moral rules as a type of social rule. He distinguishes moral rules in accord with the following conditions:

1. Moral rules are emotionally infused, especially with the moral emotions. Infractions of rules yield attitudes of resentment and indignation.
2. Moral rules are seen as nonconventional. Authority figures cannot waive moral rules at all.
3. Moral rules are also seen as categorical; we are to follow moral rules because doing so is the right thing to do, and not merely because we gain some benefit from doing so.
4. And yet, moral rules are typically seen as promoting mutual benefit; genuinely *moral* rules should promote the interests of all, at least over the long run.
5. Moral rules typically concern how we treat others, and must be distinguished therefore from mere rules of prudence that concern self-preservation or avoiding harm.
6. Moral rules are enforced with social ostracism, blame, and even violence; infractions of moral rules are seen as warranting *punishment* and not mere disappointment or criticism.[56]

[56] My account draws on Gaus 2011, pp. 172-3. It yields a conception of social trust similar to Annette Baier's *generic* definition of trust which characterizes breaches of trust as "betrayals" in contrast to disappointments. See A. Baier 1986, p. 235.

Moral rules, as social rules, must also be reciprocal or universalizable. Moral rules must apply equally to those who demand compliance with them: when John demands that Reba not violate a moral rule, he must also regard himself as subject to the rule were he in Reba's circumstances. P.F. Strawson argued that moral rules cannot exist without "reciprocal acknowledgment of rights and duties.[57] A universal feature of morality is "the necessary acceptance of reciprocity of claim." Kurt Baier also claims that moral rules are "universally teachable and therefore universalizable" in virtue of the fact that they license claims against all members in the moral community.[58]

IV. Moral Trust

We can now see that social trust involves members of a society trusting that one another will conform to publicly recognized rules of conduct. And if we specify publicly recognized rules of conduct as moral rules, then we can generate a specific kind of social trust that will form the normative core of the book, what I call *moral trust*. Moral trust is trust that members of a public will comply with moral rules:

[57] Strawson 1974, p. 40.
[58] K. Baier 1954, p. 108. Also see pp. 111-2.

> *Moral Trust*: a public exhibits moral trust to the extent that its members generally believe that others are necessary or helpful for achieving one another's goals and that (most or all) members of the public are generally willing and able to do their part to achieve those goals, knowingly or unknowingly, by following publicly recognized *moral rules*.

Moral trust sometimes requires members to enforce violations of moral rules, say, by ostracism and blame, or perhaps by coercion. If members of the public merely expected others to follow moral rules most of the time but did not believe that violators would be punished, then moral trust will be weak, at best. Punishment is required to stabilize some moral rules in some cases to prevent breakdown.[59]

I believe that my notion of moral trust is well-grounded in the social trust literature. In a recent survey of conceptions of social trust, Marc Cohen develops an account of generalised trust where "social order depends on moral relationships between the persons involved."[60] He denies that we can understand social trust purely in terms of expectations by insisting that trust involves some sort of dependence relation between the truster and the trustee. Further, social trust involves reference to moral obligations; with respect to generalized trust, "A trusts B to act in accordance with some (specified) general or background moral obligation, where A can assume that B is committed to acting in that way because

[59] Moral trust may require punishing those who fail to punish; see Boyd and Richerson 2005, pp. 193-203.
[60] Cohen 2015, p. 465.

of the character of the obligation…."[61] Social trust is also understood in terms of the "fundamental constitutive practices that make a social order possible." Accordingly, moral trust, by consisting in expectations that others will comply with moral rules, which are seen as having obligatory force, lines up with Cohen's understanding. And clearly moral rules are constitutive practices that make a social order possible. So not only am I in agreement with Cohen, but according to Cohen's survey, moral trust is compatible with many conceptions of social trust in the literature (though not all).[62]

However, in a famous study of social trust, Eric Uslaner argues that generalized trust is tied to "moralistic trust" which is the belief that "others share your fundamental moral values and therefore should be treated as you would wish to be treated by them."[63] Broadly speaking, then, moralistic trust involves a "fundamental ethical assumption: that other people share your fundamental values."[64] Similarly, moralistic trust is based upon "some of belief in the goodwill of the others."[65] Generalized trust is connected to moralistic trust, as "generalized trusters see the world as a benign place with limitless opportunities. They believe that most people share the same fundamental values."[66] Uslaner's study is very influential, so one could argue that we should understand social trust in terms of

[61] Cohen 2015, p. 475.
[62] Cohen 2015. Though while, in contrast to Cohen, I do not think that *mere* social trust necessarily involves reference to moral obligations, my notion of moral trust is quite close to his definition of social trust.
[63] Uslaner 2002, p. 18.
[64] Uslaner 2002, p. 2.
[65] Uslaner 2002, p. 18.
[66] Uslaner 2002, p. 79.

person's beliefs about the world in general and about whether humans are fundamentally good or trustworthy, rather than a belief that others will comply with moral rules when one needs them to do so, as I argue.

However, there are some difficulties with Uslaner's view, especially his acknowledgement that moralistic and generalized trust do not presume deep agreement on fundamental moral matters like politics or religion: moralistic trusters "don't necessarily agree with you politically or religiously" and "placing trust in others does *not* require agreement on specific issues or even philosophies."[67] Further, we can already see the Uslaner's view oscillates between defining moralistic and social trust in terms of "values" in terms of "worldview" and in terms of "good will." So apparently social trust allowed for widespread disagreement and the belief that others reject one another's deepest commitments. I suggest that we replace the idea of shared values and worldviews with a willingness to comply with shared social norms, and moral rules specifically. Social norms can represent shared values, as compliance with these norms can be seen as grounded in shared commitments. We can share moral norms while allowing our religious, political, and even moral views to vary considerably with respect to one another, but we still can see that others share commitment to certain moral practices. So given the ambiguities in Uslaner's position, my account of social trust need not be seen as in opposition to his, but perhaps a helpful clarification and specification of his position.

[67] Uslaner 2002, pp. 2, 18.

Uslaner also prevents a further challenge to my account of social trust. Moralistic trust, for Uslaner, is a fundamental attitude towards others that is *not* baesd primarily in personal experience, but is drawn more from one's own worldview. Generalized trust, the, "is not a prediction of how others will behave. Even if other people turn out not to be trustworthy, moral values require *you* to behaved *as if they could be trusted*."[68] Uslaner presents a great deal of evidence that measures of social trust are remarkably stable over time, and so does not seem responsive to personal experience, though Uslaner does allow that moralistic trust can be learned from one's parents and that some significant experiences can shapre trust, but that is because experience can affect our "basic sense of optimism and control."[69] Moralistic trust is supposed to ground generalized or social trust, though Uslaner does admit that social trust is *less* unconditional than moral trust and that is scope is more limited and less stable over time.[70] But on my view, social trust is rooted in the belief that others are able and willing to comply with the moral rules of their society, which suggests that if persons observe that moral rules are disobeyed, that social trust should fall. Presumably observation of defection will affect the strength of the social norm, which could threaten to undermine it as a basis for social trust.

But this problem can be resolved if we note that measures of social trust in the empirical literature are based on the question of whether persons *generally*

[68] Uslaner 2002, p. 19.
[69] Uslaner 2002, pp. 77, 85, 112.
[70] Uslaner 2002, p. 27.

believe that others can be trusted. And such an assessment is sufficiently general that we needn't expect it to change based on the observance or collapse of some *particular* moral rule. Instead, social trust can be based on an overall assessment of whether most people can be expected to follow the moral rules over time. So empirical measures of social trust are not targeted enough to rule out my conception of social trust. My definition of social trust, therefore, is compatible with Uslaner's empirical work. I will say, though, that it would be good to have more of an empirical connection between norm collapse and measures of social trust.

V. Rational Moral Trust

A liberal order worthy of our allegiance is grounded in social trust of a particular kind. It must be trust that each person sees herself as having sufficient *moral reason* to endorse. Her order may achieve a high degree of social trust even if most people find the moral rules that are the object of social trust to be unacceptable. Such an order may tend to destabilize, since people will see themselves as having sufficient reason to disobey their society's moral rules, and may do so when they can get away with it. That said, I acknowledge that some kinds of social trust may be grounded in blissful ignorance or irrational factors like racial homogeneity. So sustained rational scrutiny of our practices might reduce social trust.[71]

[71] I thank Charles Larmore and Jerry Gaus for pushing me to consider this objection.

I think we have nonetheless have reason to pursue moral trust where moral rules are embraced for good moral reason. In particular, if we want moral trust that recognizes the worth of others and treats them with due respect, moral trust should be responsive to the reasons of each person. The moral value of respect for persons is sufficiently important to justify undermining moral trust that is not practically rational. I offer an argument for this claim in Chapter 2. To lay the groundwork for those arguments, I here outline what would make moral trust rational in the sense that I describe. My account here is a sketch until chapter 3, where I specify the content of rational moral trust in terms of a standard public justification.

For moral trust to be rational, the beliefs that constitute trust must be rational. To simplify, I restrict my discussion to *disposition* beliefs—beliefs that others are disposed to comply with moral rules. The epistemic question is whether each trusting agent justifiably believes that she and others are actually and rationally disposed to comply with publicly recognized moral rules, leaving us with four beliefs:

B_1: I am disposed to comply with moral rules.

B_2: I am rationally disposed to comply with moral rules.

B_3: others are disposed to comply with moral rules.

B_4: others are rationally disposed to comply with moral rules.

Beliefs B_1 and B_2 concern what the trusting agent will do, whereas beliefs B_3 and B_4 concern what the trusting agent believes others will do. B_1 and B_3 are justified when they are affirmed based on consistent, public observation of moral rule compliance or reliable testimony to this effect. They must be epistemically justified; unless public expectations are recognized, and recognized as rational, complying with the moral rule in question is irrational. In contrast, B_2 and B_4 concern rational dispositions to act. They are justified, then, when an agent has good ground for action; her dispositions are practically rational, as well as her judgment that others have similar dispositions. I take a disposition to be practically rational when an agent, given a respectable amount of reasoning, can determine that the actions to which she is disposed advance her goals, values, and principles.[72] So a disposition can be rational when the motivated acts lead the agent to choose (what her evidence suggests will be) effective means towards her ends, or to choose between alternative ends.[73] I also assume that following moral rules for their own sake can be practically rational.[74]

Taken together, then, moral trust is rational when each person's disposition beliefs (B_1-B_4) are *epistemically* justified. Consequently, we can define it as follows:

> *Rational Moral Trust:* social trust that persons will follow moral rules is rational only if each person justifiably believes (a) that she has sufficient

[72] Gaus 2011, p. 253 discusses this standard in more detail.
[73] I omit discussion of the rationality of rule-following. For discussion, see Gaus 2011, pp. 122-163.
[74] Where the reason for following a rule can be that compliance is the "right thing to do."

> practical reason to comply with the rule, (b) that others have sufficient practical reason of their own to comply with the rule, and (c) that all persons are in fact motivated to comply with the rule.

A complete definition would specify *all* the relevant beliefs, which is why the idea of rationality is here defined merely as a necessary condition.

I explain the ideas of justification and sufficient practical reasons in Chapter 3. For now, I stipulate. Justification here is to be understood as *epistemic* justification, what would justify someone in holding a belief. Specifically, I adopt a form of access internalism: S is justified in believing P just when she can make herself aware of her justifiers for P. Social trust involves *subjective* expectations, and so the notion of epistemic justification at work in social trust should also be subjective.[75] The reason that epistemic justification for moral rules is internalist is that persons need to be able to see the reasons for their beliefs if they are to trust on the basis of those reasons. The notion that a belief could be justified based, say, on whether it was formed by an objectively reliable process, renders obscure the idea of a rational expectation, which seems to be based on observation and evidence, not on reliability.

The idea of sufficient practical reasons is understood as applying to a person such that she has sufficient reason to act, which is to say that the relevant favoring reasons override or undercut reasons to act contrariwise. What counts as

[75] Pappas 2005 discusses access internalism in more detail.

good practical reasoning varies considerably between persons; so moral trust can be rational by surviving each person's diverse scrutiny.

VI. Moral Peace from Rational Moral Trust

If a society has a high degree of rational moral trust, then we can say it is in a state of *moral peace* between persons. If each person sees compliance with moral rules as rational for her and for others, then she has reason to trust others to comply with those rules. That means people will expect one another to comply with moral rules rather than engaging in actions that violate the rule. In other words, rational moral trust produces stable moral rules that effectively govern social life, which gives social interaction a *moral basis* that is publicly recognized. In such an order, abiding by the constraints of a common public morality becomes a kind of social contract in which each person complies with moral rules because each finds it rational for her to do so and for others to do so, such that people will comply with moral rules so long as others do.

We can see how rational moral trust yields a state of moral peace by analyzing the account of the state of war in classical social contract theory. Social contract theories, including contemporary ones, begin their justification of political power by describing a state of nature, identifying its flaws, and suggesting government as a remedy for those flaws. The challenges of life in the state of nature engender considerable conflict, as we see in the states of nature described

by Thomas Hobbes and John Locke.[76] In contrast, I contend that we can identify an attractive foundation for public reason if we focus on the less familiar analysis of the state of *war*. The significance of the state of war for our purposes is that characterizing it appropriately will help us identify its opposite—a state of moral peace.

Of course, analyses of the state of nature often appeal to the threat of the state of war, on the grounds that the former leads to the latter. Hobbes's theory illustrates a particularly tight connection between the two. However, even for Hobbes, the state of nature and the state of war are conceptually distinct.[77] For both Hobbes and Locke, states of nature are established merely by the absence of a public arbiter of disputes about the interpretation of natural law. In this way, states of nature can *lead to* states of war, but they are not the same.

Consider Locke's account of the state of war:

> The state of war is a state of enmity and destruction: and therefore declaring by word or action, not a passionate and hasty, but a sedate settled design upon another man's life, puts him in a *state of war* with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him, or any one that joins with him in his defense, and espouses his quarrel.[78]

---

[76] Hobbes 1994, pp. 74-9. Locke [1690] 1988, pp. 269-78.
[77] Hobbes 1994, pp. 74-6. See Rousseau 1997, p. 46 and Locke [1690] 1988, p. 280.
[78] Locke [1690] 1988, p. 278. Emphasis mine.

A society whose members use violent force against one another are in a state of war with one another. However, persons can enter a state of war merely by one person developing a "declared design" upon another's life.[79] This means that the state of war can arise even if the attacks have yet to occur. In principle, a society could enter a state of war if *everyone* were biding her time, waiting for the right moment to strike.

We can extend Locke's account of the state of war to a society in which a group *mistakenly* perceives a declared design upon their person and property. That misperception may be enough for the group to develop their own designs upon the person and property of others, if only to protect themselves. So we can establish a state of war simply by responding to the *public expectation* of aggression against person and property even if the purported aggressors *in fact* have no such plans. And this expectation can lead other groups to *properly* perceive a declared design upon themselves. States of war can arise, therefore, merely from a change in public expectations about the dispositions of groups to use force. Accordingly, we can imagine an entire society of people who are willing to cooperate and submit to a common authority but who lack *assurance* that others are so willing. A society of peace lovers can enter a state of war through false expectations alone.[80]

This disappointment of expectations can be naturally characterized as a failure of *social trust* that others will comply with peaceful public rules of conduct, enforced by a common superior, and that are based in the natural law, or some

[79] Locke [1690] 1988, p. 280.
[80] There are elements of this point in Hobbes's account, since most people want peace.

broader conception of what is morally required. Social trust breaks down when persons no longer believe that others will follow publicly recognized rules of conduct in their interactions with one another.

The conditions for establishing Locke's state of war are not obviated by leaving the state of nature, since Locke claims that society enters a state of war if its ruler abuses his power. A state of war is established by "he who attempts to get another man into his absolute power" since absolute power embodies a "declaration of design upon his life" or, less dangerously, an attempt to "take away the freedom that belongs to any one in the state [of nature]" or of the freedom "belonging to those of society or commonwealth."[81] So even the existence of a nation-state with a constitution is not sufficient to exit the state of war. Improper uses of political power can create a state of war just like improper uses of force in the state of nature. Therefore, a government creates a state of war between itself and its citizens just by *claiming* more power than the people delegated to it. The government need not even exercise that power. Combining this point with that of the previous paragraph, a government can create a state of war even when people mistakenly perceive that it has claimed more power than it has been given. That is, we can enter a state of war due to failures of a kind of *social trust*, in or out of the state of nature.

We can now begin to see how one might use the idea of social trust to distinguish between a politics of war and a politics of peace. When a society has

[81] Locke [1690] 1988, p. 279.

rational moral trust, it provides a significant social restraint on our tendency to engage in non-moral political conflict, even violent conflict, and so rational moral trust establishes a condition of peace between persons. What that means is that institutions that realize rational moral trust have the potential to establish moral peace between persons, and so give us a social and political order that is not in a state of war.[82]

The point of this chapter has been to develop the idea of rational moral trust and its connection to establishing peace between persons. That means rational moral trust can serve as the central idea in demonstrating the book's core claim that politics need not be war. But before we can draw an account of public justification out of rational moral trust, and then justify liberal institutions, we have to explain the value of rational moral trust. I turn to that task in Chapter 2.

[82] Thus, my notion of moral peace, while novel, is not particularly idiosyncratic or stipulative.

Chapter 2: The Value of Moral Peace

Now we must explain why anyone should care about establishing and maintaining moral peace between persons. My explanation has two parts. First, I must identify the goods brought about by establishing and maintaining moral peace between persons. I argue that these goods come in two types: social and relational. The social value of moral peace arises from its role in the formation of social capital, which promotes the effective functioning of all social institutions. The relational value of moral peace arises from its role in enabling the formation and maintenance of relations of bonds of romantic love and friendship. Second, I must explain how, once a morally peaceful social system is established, that maintaining it is a moral requirement. I argue that compliance with an extant system of social trust in moral rules is how we can specify an ideal of *respect for persons* between those who disagree about the good, justice, and other matters of import.

I proceed in nine parts. In section I, I contrast my moral peace foundation with other foundations for public reason views. In sections II-VII, I elaborate my three arguments for a moral peace foundation for public reason. Section II outlines the social value of moral peace, sections III and IV outline the relational value of moral peace, and sections V-VII explain how moral peace fleshes out an ideal of respect for persons. In section VIII, I show how my moral peace foundation for public reason can help to formulate an *objective* moral foundation for public reason, one that goes beyond typical constructivist defenses of public reason that ground public reason in shared ideas or practices to base public reason on

something with real moral value, namely the value of respect for persons. Section IX concludes.

I. Alternative Foundations for Public Reason

Before I defend my new foundation for public reason liberalism, I would like to contrast my view two more common approaches. In my view, there are roughly four normative foundations for public reason in the literature. Public justification is (i) required by justice,[83] (ii) expresses respect for persons as free and equal,[84] (iii) avoids moral authoritarianism,[85] and (iv) promotes relations of civic friendship.[86] I lack the space to address all of these views in detail, so I shall focus primarily on the first two defenses.

Rawls defends the idea of public justification[87] in terms of his liberal principle of legitimacy, by arguing that it would be chosen by parties to the original position: "In justice as fairness … the guidelines of inquiry and its principle of legitimacy, have the same basis as the substantive principles of justice."[88] Rawls is clear that the principle of legitimacy is part of a conception of justice, though he

[83] See Quong forthcoming and Rawls below.
[84] Larmore 2008, pp. 139-167. Rawls partly shared this foundation. Rawls 2005, pp. 156-8.
[85] Gaus 2011, p. 16.
[86] Ebels-Duggan 2010 and Lister 2013, pp. 105-134. Rawls mentions civic friendship. Rawls 2005, p. 253.
[87] Rawls used the term "public justification" to refer to the third stage of justifying a political conception of justice. See Rawls 2005, p. 386.
[88] Rawls 2005, p. 225. Jonathan Quong will respond that reasonable people will not disagree about justice, but I reject his argument for this claim in xxx, so I will not speak to it further here

also seems to think that even if reasonable people can disagree about justice, that they must agree on a principle of legitimacy.[89]

In this case, the fundamental basis of public justification is justice, and it's clear that justice both has value and expresses a weighty moral requirement. So justice appears to be an excellent candidate for a fundamental grounding value for public reason.

The problem with this approach is that reasonable people deeply disagree about what is just. Consequently, if we say that public justification is valuable because it is just, we may find that some reasonable people deny that justice essentially involves public justification. Second, I hope to use the idea of public justification to help us determine which conceptions of justice can achieve a public and publicly justified status. So if we ground public justification in justice, it will be more difficult to use the idea of public justification to sort, identify, and defend particular conceptions of justice.[90]

Perhaps the dominant foundation for public reason in the literature is respect for persons. As Christopher Eberle notes, "Respect for others requires public justification of coercion: that is the clarion call of justificatory liberalism."[91] Or as Larmore argues, the "to respect others as persons in their own right when coercion is at stake is to require that political principles be as justifiable to them as

[89] Rawls 2005, p. 226.
[90] In a future draft, I hope to add at least a brief comment on Quong's new paper for our public reason volume giving a justice-based foundation for public reason.
[91] Eberle 2002, p. 54.

they presumably are to us."[92] If we insist that others comply with our proposed coercive laws, and in fact those others, by supposition, lack moral reason to do so, there is an important sense in which we are oppressing and dominating them. The coercer can only preserve relations of freedom and equality with others if she restricts her coercion to laws that the imposed upon can endorse. Respect for persons is also an excellent candidate value for issuing overriding moral requirements that we engage in respectful action. Obviously we should treat other persons as though they have fundamental worth or dignity.

The problem with the respect-based arguments in the literature is that there seem to be many cases where respecting someone does not require that coercion be publicly justified to them. Consider aggression by psychopaths: does respect for them require not coercing them from hurting us even if they cannot see a reason not to? Or take Christopher Eberle's similar case of Jill, who cannot form the concept of genocide, and so engages in genocidal action but cannot see why it is wrong.[93] In this case, respect does not seem to require that Jill not be stopped because a genocide-prohibiting norm cannot be publicly justified to her based on her rational commitments. Further, what of defending ourselves with coercion against aggressors who care not at all about having relations of respect with us? Must we forgo coercion against them as well just because our defensive coercion cannot be publicly justified to them? Surely not.

[92] Larmore 2008, p. 149.
[93] Eberle 2002, p. 133.

Recently Gaus and Chad Van Schoelandt have argued that, while respect, public justification, and coercion are connected, any right against legal coercion must itself be publicly justified as an authoritative moral requirement.[94] This means it is an *open question when and how coercion is to be publicly justified*. Now, we typically *do* want the use of coercion to be authoritative. We want the coerced to accept that the coercion is fair and just and so binding on their hearts and minds. That is, violations of some laws should incur guilt in the violator and indignation in the observer. If so, then it is because we care about moral authority that we care about coercion. The value of respect for persons is not carrying the justificatory day any longer.

Andrew Lister also identifies an important problem with the argument from respect. Lister: "enacting laws based on non-public reasons need not involve any attempt to manipulate or circumvent citizens' capacity for justificatory reasoning, so long as citizens are in a position to know what the reasons are for a given law or policy, and citizens supporting the law do so for reasons they think truly justify the law in question."[95] The fundamental problem with Larmore's position is that "we cannot equate the exercise of political power for reasonably rejectable reasons with the naked threat of force."[96] Respect by itself does not *require* the public justification of coercion, so we need another foundation for public reason. In

[94] Van Schoelandt 2015, Gaus 2011, p. 479-81. ALSO NEW GAUS PAPER
[95] Lister 2013, p. 59.
[96] Lister 2013, p. 63.

response, I argue below that we must adjust the respect for persons approach to ground public reason in some other way (which I propose below).

Rational moral trust both has value and can figure into a moral requirement. In this way, it can play the same role as justice and respect for persons, but hopefully without their defects. I will defend this position by offering three interconnected arguments, each of which I think supplements the others. First, I will argue that rational moral trust has great *social* value because it forms the foundation for the accumulation of social capital, and social capital is required to make our social, political, and economic institutions work well. This argument is shaky on its own, since establishing that rational moral trust has social value will only give us reason to establish rational moral trust when we expect it to produce good overall societal consequences. Each of us individually might, therefore, act in an untrustworthy fashion, without undermining the overall benefits of social trust. But by allowing individual's to engage in untrustworthy behavior can undermine social trust.

Second, I will argue that rational moral trust has great *relational* value because it forms the foundation for forming any intrinsically valuable moral relations with other persons, such as relations of romantic love and friendship. Without rational moral trust, forming stable, intimate relations is difficult. This is not to say that rational moral trust is a mere means towards forming these relations, though it is that. It is rather to say that any valuable moral relation

includes a kind of moral trust. Part of describing these relations will involve describing a trusting relationship.

The relational value of trust supplements the social value by giving each individual reason to value a rational moral trust between persons, since rational moral trust is a precondition on forming relations that we individually value. The weakness of the relational argument is that it only shows that we should promote rational moral trust, not that it issues a moral requirement. That is, on the second argument alone, it will not be the case that there is an overriding or requiring moral reason that favors forming or being open to forming relations of rational moral trust. Thus, even if we show that rational moral trust has social and relational moral value, we have not yet showed that any moral requirement exists, just that rational moral trust is one of many things that have value. That is not enough to ground public reason because other, greater social and relational values might override the value of rational moral trust.

My third argument, then, is that the value of rational moral trust explains a genuine, overriding moral requirement of *respect for persons*. Above, I argued that Larmore's rendition of the argument from respect for persons needs further development. I begin a redevelopment of Larmore's argument by examining Rawls's claim, late in *A Theory of Justice*, that his account of justice explains how we can express respect for other persons in our society. My argument will be that rational moral trust helps to make sense of what respect requires in a social order where people cannot share social life based on a common conceptions of the good

or justice. When we disagree about justice, complying with the moral rules that are the object of rational moral trust expresses respect for other persons as free and equal. And since respect for persons is a plausible moral requirement with great weight, rational moral trust can ground a moral requirement of respect for persons.

The reason respect involves sustaining a system of rational moral trust is because sustaining a system of rational moral trust requires entering into the practice by which trust is typically sustained, namely a practice of moral accountability. Recognizing reason to enter into relations of trust with others involves deciding to see them as moral agents who can be held accountable for disobeying public moral rules, and then holding ourselves and others accountable for violations of those rules. Thus, when we enter into relations of trust with others, we must typically view them as moral agents, those who can freely respond to moral reasons, as this is presupposed by our practice of holding them accountable for failing to comply with moral rules. We hold persons accountable because we think they failed to act on reasons that they should have recognized as decisive in determining their actions. Thus, we confine our practice of accountability in accord with the reasons we think others have for action. That, I argue, is a way of respecting their agency, by taking them to be sources of reasons to engage in a practice of accountability and to confine the practice in accord with what we take the reasons of others to be.

The respect argument needs supplementation because respect for persons does not require *establishing* a system of rational moral trust. This means we need to establish that persons have strong reason to establish such a system, while respect requires sustaining and strengthening it once we have entered into the practice. If rational moral trust has great social and relational value, then people do have good reason to establish a system of rational moral trust and so enter into it. In this way, my three arguments are mutually supporting. Let us examine them carefully.

II. The Social Value of Rational Moral Trust

Economists, sociologists, psychologists, and many others have argued that social trust is critical for maintaining well-functioning political and economic institutions. If members of a society do not trust one another, then they have little reason to take the risks required to create, build, and sustain good institutional structures. I will argue that moral trust, understood in terms of compliance with moral and legal rules, is an attractive form of social trust. As such, moral trust will generate a great amount of the goods realized by social trust as found in the social scientific literature.[97] This is the *social* value of moral trust—its contribution to the formation and maintenance of effective economic and political institutions.

[97] Note that in this section and the next I focus primarily on the social and relational value of simple moral trust, not necessarily rational moral trust. The third argument, the argument from respect for persons, explains why the moral trust at stake must be rational.

Many researchers believe that social trust is critical for the creation of *social capital*, which Glaeser, Laibson and Sacerdote define as "a person's social characteristics—including his social skills, charisma, and the size of his Rolodex—which enable him to reap market and non-market returns from interactions with others."[98] Social capital is built in part by being trustworthy in the eyes of others, and being trustworthy requires acting in concert with public expectations of norm compliance.[99] The reason for this is that when we trust one another over a long period of time, we are able to establish social networks and other relations that we can rely upon in taking the risks required to build social institutions, from small businesses to churches. Social capital can only accumulate within a system of social trust.

The World Bank has made a significant effort to measure social capital in various populations, making comparisons not merely between nations but between intra-national organizations, regions, communities and households.[100] The Social Capital Assessment Tool (SCAT) and the Social Capital Integrated Questionnaire (SC-IQ) are now used to measure social capital around the world.[101] The SCAT collects data on social capital at the household, community and civic organizational level, providing information about how social capital is linked to the welfare and outcomes of families. The SC-IQ focuses on the degree of social

---

[98] Glaeser, et al. 2002, p. 48. For further discussion and several related definitions, see Dasgupta and Serageldin 2000.

[99] Though Ulsaner denies that social trust is built complying with public expectations, he does think that social trust leads people to comply with public expectations, which is all we need…?

[100] Grootaert, et al. 2004.

[101] Grootaert and van Bastelaer 2001.

capital found in developing nations. The World Bank keeps hundreds of studies using SCAT and SC-IQ measures in a database.[102] [explain metric]

These studies largely conclude that social capital and economic performance measures are positively correlated. Paul Whiteley has argued, "social capital, or the interpersonal trust of citizens, plays an important role in explaining the efficiency of political institutions, and in the economic performance of contemporary societies."[103] He focuses on a study of the relationship between social capital and economic growth in thirty-four countries between 1970 and 1992 suggests that the impact of social capital on growth "is at least as strong as that of human capital or education," both of which are themselves positively correlated with growth. Social capital has a similar impact on the ability of poorer nations to adopt technological innovations introduced by richer countries and to "catch up" with rich countries in terms of their level of development. Social capital is thought to reduce transaction costs in markets and reduce the burdens of enforcing agreements. It also limits fraud and theft. Recent work by Fabio Sabatini has helped to quantitatively substantiate Robert Putnam's famous comparison of northern Italian and southern Italian institutions, with the former exhibiting higher functioning and higher levels of social capital than the latter.[104] Sabatini finds that "strong ties" such as familial ties, do not promote economic development, but "weak ties" do, as weak ties act to diffuse knowledge and trust

[102] At present, the database is inaccessible through the World Bank's website. I hope to add an expanded discussion once it is back up.
[103] Whiteley 2002, p. 443.
[104] Putnam 1994.

among strangers.[105] Jankauskas and Seputiene have found that social capital, understood as a form of social trust and the maintenance of wide social networks, are positively correlated with economic performance in twenty-three European countries.[106] Reino Hjerppe, in a survey of the relationship between social capital and economic growth, argues that "generalized trust" or trust between strangers positively correlates with many measures of economic performance.[107] Robert Hall and Charles Jones find that in 130 countries, differences in "social infrastructure" lead to considerable social differences in the accumulation of capital, economic productivity and even educational attainment, which impacts income across countries.[108]

Given the foregoing, we can conclude that social trust has great social value because it is part of forming social capital, which is in turn required for effective economic transactions and economic growth.

Some readers are bound to object that economic performance, while important, is not directly related to values we care about, like personal welfare or societal well-being. But the main arguments that economic performance is *not* related to welfare or well-being are based on controversial studies about the relationship between happiness measures and income levels. For instance, the famous Easterlin paradox—that people with high incomes are happier than poorer persons, but that in the long-run, increased income does not correlate with

[105] Sabatini 2007, pp. 19-20.
[106] They find no correlation, however, between the degree of civic involvement in these societies and economic performance. See Jankauskas and Seputiene 2007.
[107] Hjerppe 1998. The term "generalized trust" derives from Fukuyama 1995, p. 29.
[108] Hall and Jones 1999, p. 84.

increased happiness—has been repeatedly critiqued.[109] Both Veenhoven and Hagerty and Stevenson and Wolfers found no Easterlin paradox in their own research.[110] The philosophical reader is bound to object that happiness studies do not use plausible measures of well-being, and so argue that the debate, on either side, is moot.[111] But whatever one thinks of happiness research, economic performance is surely critical for realizing further goods of many kinds, such that its connection with trust gives us strong reason to value trust extrinsically.[112]

One might further object that moral trust is not captured by measures of social trust for two reasons. First, my discussion has only shown that a valuable kind of trust forms around *social* rules, and not *moral rules*. But moral rules are obviously a critical subset of rule compliance that leads to social trust. Perfect public compliance with all non-moral rules, such as rules of etiquette, style and culture, without compliance with moral rules, will not establish social trust, given the importance of moral norms in sustaining social cooperation. Moreover, we saw in Chapter 1 that social trust is often *defined* in terms of compliance with moral rules, though social trust theorists are often not specific enough for this to be obvious. Social trust is often understood as compliance with moral norms, and not

---

[109] Easterlin 1974.
[110] See Veenhoven and Hagerty 2006, Stevenson and Wolfers 2008.
[111] For some philosophically informed concerns about the happiness literature, and important developments of different views, see http://plato.stanford.edu/entries/happiness/#EmpFin
[112] Jerry Gaus has objected that an environmentalist could claim that growth simply is not valuable and may actually have limited value, so the extrinsic value of social trsut in promoting economic growth will be controversial among some groups. I feel confident that if economic growth is sustainable (as I discuss in Chapter 5), it is valued by a sufficiently large portion of humanity, or would be valued if most people were informed about its benefits, that appealing to it is not *problematically* controversial.

norms in general. So it should be clear that moral trust will capture a great deal, if not the lion's share, of the social value of social trust.

A critic could also object that my discussion has only shown that *mere* moral trust has social value, and not rational moral trust. To solve this problem, I need to show that rational moral trust has greater benefits than irrational moral trust. My argument is that rational moral trust will prove more stable and enduring than irrational moral trust. If people ask whether the moral rules that apply to them are compatible with their values, commitments, and reasons, and can answer affirmatively, then they will have more and longer-lasting motivation to comply with those rules. The reason for this is that, when people see moral rules as applying to them for good reason, they will avoid socially destructive *opportunism*.[113]

David Rose defines opportunism as "acting to promote one's welfare by taking advantage of a trust extended by an individual, group, or society as a whole."[114] A critical feature of opportunism is that it does not always cause perceptible harm, or even any harm at all. If a society is sufficiently large, small acts of opportunism are not in themselves harmful. For example, taking a single bribe as a public official may not do perceptible harm, but it is opportunistic. We can understand bribe-taking and similar kinds of defection as *first-degree opportunism,* which involves taking advantage of the imperfect enforceability of

[113] Rose 2014.
[114] Rose 2014, p. 21.

contracts by reneging on contracts.[115] In our example, taking a bribe or offering one is a case of first-order opportunism. With sufficient first-order opportunism, some parties will be harmed when the legal system because judges can be convinced to rule in favor of the bribing party. Thus, opportunism chips away at social trust that persons will follow moral rules because people cannot trust that community members will follow moral rules even when they cannot detect it.

If moral trust in a moral is rational, then people accept the rule as a norm that grounds normative expectations that they comply with the rule for its own. But if people feel no sense of responsibility or guilt in violating a moral norm, such that the moral norm around which trust is based is not practically rational for the person in question to comply with, then social trust will gradually break down due to opportunistic violations. As we will see in Chapter 3, when moral rules are publicly justified, persons lack significant incentive to engage in opportunistic behavior, since the moral rules they break are ones that they've internalized, such that violations of the rule generate guilt. Guilt alone cannot prevent all cases of opportunism, but it can discourage violations to a significant enough degree to sustain compliance with moral rules in private, and so to sustain moral trust generally.

At this stage, one might wonder whether much social trust is based on irrational and biased attitudes like in-group bias. For instance, it is widely recognized that social trust is positively correlated with high societal ethnic

[115] Rose 2014 p. 30.

homogeneity. People are more likely to trust those who look and speak like them.[116] This means that a great deal of social trust may have nothing to do with rational moral trust but only simple moral trust, that is, the belief that others are willing and able to comply with shared moral rules, but not that they are *rationally* disposed to do so. Consequently, irrational moral trust might be greater than rational moral trust in many societies. One might further worry, on precisely this basis, that the rational examination of such trust will reveal its irrational basis, such that rational scrutiny will *undermine* simple moral trust.[117]

But all this depends on the assumption that homogeneity-based trust is irrational in that it is based on the mere recognition of group membership rather than the belief that group membership is a proxy for whether people have shared values and commitments. If homogeneity-based trust is a good predictor for whether persons rationally endorse the moral norms to which they are jointly subject, the homogeneity-based trust can be a form of rational moral trust. The data I'm aware of does not distinguish between whether homogeneity-based trust is based on bias or is a proxy for rational justification.

Unfortunately, accepting this means we can't show that the moral trust we want must be rational in nature, though the stability argument is still suggestive. Fortunately, there are other reasons to want rational moral trust that I will examine below.

---

[116] A summation of decades of research on systematic psychological bias can be found in Kahneman 2011. For the connection between social trust and ethnic homogeneity, see Bjørnskov 2006.

[117] I thank Jerry Gaus and Charles Larmore for pressing this objection to my view.

I conclude, then, that moral peace has great social value because moral trust is crucial for persons to create social capital, which in turn is critical for making nearly all social institutions function well. I grant that simple moral trust might be enough to garner this great social value, but rational moral trust should still have a great deal of social value, enough to give people reason to try to establish it. But additional arguments are required to establish the rational moral trust has value.

III. Eros and Philia

My second argument for the value of rational moral trust involves connecting it to intrinsically valuable moral relations—romantic love and friendship love in particular. I begin with an account of love and friendship that I think is fairly non-controversial and then try to show how it grounds the relational value of rational moral trust.

My discussion will appeal to the love we have for friends and romantic partners, which, following C.S. Lewis, I will call Philia and Eros.[118] These are the loves, and indeed, the goods, that persons value more than any other. As Peter Railton notes, "we must recognize that loving relationships, friendships, [etc.] …

[118] See Lewis 1960.

are among the most important contributor to whatever it is that makes life worthwhile."[119]

In developing a conception of love, I am primarily interested in what we might, following Kant, call "moral" love and friendship, love based not merely on emotional affect or passion, but that involves a sustained, rational commitment to maintaining a relationship with others.[120] I shall therefore focus on *moral* Philia and Eros, and not mere affective loves, such as a "crush" or finding interaction with another person pleasurable.

These loves can be understood as rational commitments to satisfying two desires. To love is to desire (a) the good of the beloved and (b) union with the beloved, a willed connection that involves both the feeling of intimacy and the commitment to living life together, sharing burdens, celebrating each other's accomplishments, serving as confidants, and so on.[121]

Eros and Philia are distinguished from one another by feature (b), the sort of union one desires with the other. Eros seeks romantic union that is often, but not always, sexual in nature. It essentially involves a kind of infatuation with the other that leads one to desire close emotional and even physical union. Philia seeks a union in shared values, shared projects, and/or shared history, and involves mutual admiration and respect. Erotic relations are inward looking: the lovers are

[119] Railton 1984, p. 139.
[120] Gaus 1990, pp. 287. Also see Kant [1797] 2009, pp. 217-8?
[121] Stump 2012, p. 91. See Aquinas, *Summa Theologica*, I-II q.26, a.4.

drawn to the beloved. Philial relations are outward looking: the lovers are united in their pursuit of certain goods.

Lewis claims that Philia is the most unnatural love, but not unnatural in a derogatory sense. It is "the least instinctive, organic, biological, gregarious, and necessary."[122] It affects our passions the least. Philia also holds "essentially between individuals" such that once two people become friends "they have in some degree drawn apart together from the herd."[123] Friendship is also distinguished from Eros because lovers discuss and obsess over their Eros much more than friends discuss and obsess over their Philia. Here is Lewis's familiar contrast: "Lovers are always talking to one another about their love; Friends hardly ever about their Friendship. Lovers are normally face to face, absorbed in each other; Friends, side by side, absorbed in some common interests."[124] Again, "we picture lovers face to face but Friends side by side; their eyes look ahead."[125] Philia ultimately rests on common interests, history, or goals. As Lewis says, "The typical expression of opening Friendship would be something like, 'What? You too? I thought I was the only one.'"[126] Friends also have an *appreciation* for one another, especially for their talents in pursuit of common interests and goals.[127]

---

[122] Lewis 1960, p. 88.
[123] Lewis 1960, p. 89.
[124] Lewis 1960, p. 91.
[125] Lewis 1960, p. 98.
[126] Lewis 1960, p. 96.
[127] Lewis 1960, p. 105.

Eros is the state of being *in* love and desiring union with another person for her sake.[128] In an important sense, "the lover desires the Beloved herself, not the pleasure she can give."[129] While Eros is familiar, since Western culture celebrates it, we can still confuse it with other forms of attachment. For instance, Lewis terms sexual love "Venus" which is often the companion of Eros, but is not a proper part of it.[130] Venus and Eros are not only different, but are sometimes in tension. As Lewis says, "A man in this state [of Erotic love] really hasn't leisure to think of sex. He is too busy thinking of a person" and while he is "full of desire" this desire isn't *necessarily* "sexually toned."[131] Without Eros "sexual desire, like every other desire, is a fact about ourselves."[132]

> [Lewis claims Eros will sometimes pit itself against the good of the beloved: "it is useless to try to separate lovers by proving to them that their marriage will be an unhappy one. This is not only because they will disbelieve you. … even if they believed, they would not be dissuaded."[133] Here I disagree with Lewis. Eros is *defective* insofar as lovers prefer being together instead wanting the beloved to have a good and happy life. This is because they prefer union to the good of the beloved. Imagine, as an illustration, a man and a woman who are deeply "in love" but who mutually encourage their respective drug addictions. Both lovers may recognize that they are bad for each other, but they nonetheless prioritize their union. This pits the two elements of love against one another. If their Eros were more perfect, they would frustrate their desire for union by seeking rehabilitation, and only then resume their relationship. When our beloved fares better without us, we should not prioritize union with them over their well-being. The old cliché that "if you love her, let her go" contains a bit of truth.]

Some philosophers deny that love includes a desire for union with the beloved. David Velleman has famously argued that, "love is an arresting awareness of value in a person" where our motivation "is to suspend our emotional self-

---

[128] Lewis 1960, p. 131.
[129] Lewis 1960, p. 135.
[130] Lewis 1960, p. 132.
[131] Lewis 1960, p. 133.
[132] Lewis 1960, p. 136.
[133] Lewis 1960, p. 154.

protection from the person rather than our self-interested designs on him."[134] If love is partly a desire for union, then Velleman would argue that, like any other theory on which love is an aim, the desire makes the beloved "instrumental … in which he is involved."[135] Instead, Velleman argues that the person who is loved is in an important sense *revered*: "he is a proper object for reverence, an attitude that stands back in appreciation of the rational creature he is, without inclining toward any particular results to be produced."[136] I agree with Velleman that the lover must regard the beloved as having value in herself as a person, but while love *per se* might be an appreciation of the beloved's value, Eros and Philia essentially involve a desire for union. Lovers and friends want to be together; they may grow tired of one another, they may come to believe that their love is unhealthy and so avoid one another, but in the normal case, these loves mean a desire to be together. And I see nothing particularly "instrumental" about this desire, since it is a desire to be with the beloved because we value them. As Niko Kolodny argues, love involves valuing some kind of relationship with the beloved, however distant, such that love involves some kind of union, and that this relationship is not valued instrumentally, but as a final end.[137]

I would like to stress an additional point, which is that both Eros and Philia require responding to the reasons the beloved takes herself to have. I contend that if John loves Reba, he not merely wills Reba's good, but wills Reba's good as she

[134] Velleman 1999, p. 362.
[135] Velleman 1999, p. 354.
[136] Velleman 1999, p. 358.
[137] Kolodny 2003, p. 151.

understands it from her own perspective. John wants to help Reba realize not merely what *he* takes to be her good but what *Reba* takes to be her good. As Rawls claimed, "Love clearly has among its main elements the desire to advance the other person's good as this person's rational self-love would require."[138] Those who love not only want the good for the beloved, but want the good as the beloved understands her good. Kyla Ebels-Duggan argues that if we care merely for the interests of the beloved, and not her own understanding of her interests, we fail to "take the beloved's agency seriously enough."[139] Instead, given that "achieving her aims is what she takes herself to have most reason to do" it will seem to the beloved that "she should be able to count on her intimates to help her enact these choices." The problem with characterizing love in terms of desiring merely the objective best for a person is that "it refuses to acknowledge the beloved's competence and right to make the decisions that significantly affect her life."[140] Similarly, Melissa Seymour Fahmy argues that Kant believes that, with respect to those we love, our duties of love mean that "we are not simply obliged to promote others' happiness: we are obliged to promote their happiness *unselfishly* and in accordance with *their* conception of happiness."[141] Dean Cocking and Jeannette Kennett agree that "we shall miss much of the good of friends, and of what we think we have reason to do on account of friendship, if we focus exclusively on our

[138] Rawls 1971, p. 190. Also see p. 487.
[139] Ebels-Duggan 2008, p. 151.
[140] Ebels-Duggan 2008, p. 153.
[141] Fahmy 2010, p. 327.

pursuit of the well-being of the other."[142] Though David Velleman disagrees with this view of love, he describes the common view as holding that all loves "necessarily [entail] a desire to 'care and share,' or to 'benefit and be with.'"[143] In short, when John loves Reba, he wants her to have the *desires of her heart*.

This account of love raises a critical question: what if we come to believe that what our lover or friend desires is, in fact, bad for her? Ebels-Duggan argues that love essentially involves what she calls "authority in judgment" by treating "her choice of an end as if it were evidence that the end is worthwhile," and while this does not require treating the lover's judgment as infallible, the lover "must operate under the presumption that [the beloved's] choices are good ones."[144] But then, what happens when you are justified in thinking the beloved's choice is good? Do you still have reason to pursue your partner's ends, or at least help her advance her own? What "if you think your beloved's ends are not worthwhile—or worse, impermissible?"[145] Importantly, Ebels-Duggan is not sure what to say, since we typically find it "uncomfortable to attribute confusion about what is worthwhile to our intimates." And yet, suppose our lover, or adult child, falls into drug addiction and she comes to affirm her addiction as good for her. In that case, does love require valuing drug use? Most people will say no, but that is likely because we think our beloved knows full well that she is fooling herself and that,

[142] Cocking and Kennett 2000, p. 284.
[143] Velleman 1999, p. 353. The account of love I offer here somewhat contrasts with Velleman's view.
[144] Ebels-Duggan 2008, p. 159.
[145] Ebels-Duggan 2008, p. 161.

even if she has formed this judgment, she has done so under the duress of physical or mental addiction to the drug.

The harder case is when two lovers reasonably disagree about what is good, say where one spouse converts to another religion while the other spouse remains within their original faith. Suppose their faiths are incompatible in important respects. Perhaps John is a Buddhist and Reba converts from Buddhism to Christianity. The two agree on the importance of moral behavior, compassion, and self-control, and both believe it important to discipline selfish attitudes and desires. But Reba now wants to have God remake her into a full human being, while John seeks to fully appreciate that the self is an illusion. Reba wants to sing praises to Jesus, whereas John wants to meditate. Should John support Reba's pursuit of her end? Or not? The answer to this question is important, since I'm drawing a connection between the considerations that explain the value of love and the considerations that explain the value of public justification with respect to those who reasonably disagree with us. I think in these cases, mature adult lovers have a few different options. First, their love may simply dissipate somewhat with respect to their previously shared religious ends. Second, they may come to hope that each spouse become the best exemplars of their faith, and to adopt more ecumenical beliefs about their eternal destinies; perhaps Reba allows that John will go to heaven, and John allows that Reba, in virtue of disciplining most of her desires, will grow closer to Enlightenment in this life. Alternatively, they can simply encourage and drive one another to abandon their faith, and perhaps the

lover, in virtue of valuing the beloved, will convert. Interfaith couples, as well as couples with some other sort of deep division in their visions of a good life and a good relationship, routinely grapple with these problems. And all of these responses are consistent with the idea that when we love someone, we desire what they want for themselves. In cases where we think that is bad, either our love diminishes, or we allow their judgment authority to change our minds, maybe towards more ecumenical beliefs, or to new beliefs. I do think it possible for the couple to maintain their love by simply setting aside the ongoing dispute about who has the correct faith, but this invariably reduces their intimacy and so, I think, the extent of their love for one another. They may preserve romantic union by setting religious union aside.

Love, therefore, not only involves considering what the beloved has reason to do, but taking the beloved's judgments and advice about the lover's own choices extremely seriously.

IV. The Trust in Love

Now that we have workable notions of the love of friends and romantic partners, we can start to assess the relation between rational moral trust and love. Before we can do so, however, I should provide an argument that love has intrinsic value. The reason to do so is to show that rational moral trust can have more than merely extrinsic value, value for the sake of something else. If rational moral trust is a

component of love, and love has intrinsic value, then rational moral trust may capture some of love's intrinsic value. And if rational moral trust has intrinsic value, people have reason to enter into a system of trust for its own sake, and not merely for the social benefits it provides. The advantage of having that sort of reason is that you have reason to pursue trust even if in some cases the extrinsic benefits of a system of social trust are insufficiently great to motivate an individual to enter into a system of trust given that she may be able to free ride on the social trust of others.

I shall understand *intrinsic value* as the value a thing has in itself, without being derived from some other sources.[146] An intrinsic value is not the same as a value that *we value* for its own sake—a *final* value. An extrinsic value is one whose *real* value derives from something or somewhere else, value distinct from *instrumental* value, something *we value* for the sake of something else. Therefore, intrinsic value and extrinsic value are not to be defined in terms of how *persons value* them.

Loves are excellent candidate intrinsic values. We typically value loving relations with others as worthwhile in themselves, and not merely because of some further goal or value that we have. In fact, if we recognize that our love for another person is merely instrumental to some further goal, we typically think that the love in question is defective. In fact, we doubt that the love is genuine at all. There may indeed be some friendships based on the utility of the connection, as Aristotle

[146] Here I follow Christine Korsgaard's distinction between intrinsic-extrinsic value and instrumental-final value. See Korsgaard 1983, p. 170.

noted, but we would not ordinarily describe two people who merely instrumentally value their relationship as loving one another.[147] Now this intuition first shows that we value love in itself, such that loving relations have final value. But we not only value love in itself, we frequently think that we *should* value love in itself even if we don't. Persons who do not care about forming loving relations with others are often regarded as having some kind of defect. Everyone, we think, wants to share love with others, and if they don't, we often think of such persons as psychologically damaged.[148] Perhaps the person has become jaded by failures in love or adopts an extreme pessimism due to depression or a cynical disposition. So persons not only place final value on love, they also think that those who fail to value love as worthwhile in itself are making some kind of mistake.

If it is fair to assume that love has intrinsic value, we can argue that rational moral trust has *relational* value in virtue of its connection to the intrinsic value of love. I see two connections. First, rational moral trust makes the formation of Eros and Philia possible. Let's call this the *enabling* element of rational moral trust. Second, rational moral trust is a central component of Eros and Philia. Let's call this the *constitutive* element of rational moral trust. The enabling and constitutive elements of rational moral trust demonstrate that it has great relational value.

I begin by demonstrating the enabling element. In a social order without *simple* moral trust, there are no stable moral rules. This is because each person denies that they and others are neither disposed or rationally justified in

[147] Aristotle 2000, book VIII.
[148] Or psychopathic.

complying with the moral rules that apply to them. As a result, compliance with moral rules will begin to fall, and eventually many moral rules will cease to be social norms because the empirical and normative expectations required for the social norm to remain a social norm will collapse. Thus, if persons cannot trust one another to follow moral rules, then their interactions will not be stable or reliable enough to make oneself vulnerable to others in ways required to form relations of Eros and Philia. If we cannot trust those we love to comply with moral rules, especially the moral rules that are part and parcel of our loving relations, then we cannot have enduring Eros and Philia with them. A society without simple moral trust is one that is likely to be at war, with persons constantly pitted against one another, or at least in constant fear that conflict could break out at any time.

The enabling element is strengthened by *rational* moral trust. A critic could argue that we can trust one another to comply with moral rules without a rational justification, such that simple moral trust should be sufficient to enable the formation of Erotic and Philial attachments. This might be true even for *moral* love, which involves a sustained rational commitment to maintaining love relations over time. However, recall that one benefit that rational moral trust has over simple moral trust is that it provides people with reason to sustain their empirical and normative expectations that others will abide by their shared public rules. Accordingly, rational moral trust should be more stable and enduring and so should enable persons to rationally let their guards down in order to form loving relations with others.

The enabling element is important enough, but the constitutive element is in many ways more important, since love and friendship have trust as a proper part. Consider, for instance, that lovers and friends frequently trust one another to keep each other's secrets.[149] Friends and lovers must also trust that the beloved will take her perspective into account. For the definition of Eros and Philia involves willing union with the beloved and willing her good as she understands it. So to love someone means trusting someone enough to form an intimate bond with her, which requires taking the other's perspective into account. Moreover, willing someone's good as she understands it requires trust that the other person is fundamentally good-willed and oriented to the good in some way or another. Friends and lovers must also trust one another to treat each other with "consideration and respect" and will not "exploit the friendship to promote other ends" no matter what.[150] The trust in love is deep and intimate.

Notice that the trust involved in sustaining Eros and Philia must be both *moral* and *rational*.[151] It must be moral trust because it involves trust that the moral rules lovers believe apply to them both will generally be followed. Following those rules is how we show the beloved our concern and respect. Further, the trust must be rational because we must believe that we both have good reason to do what is required to sustain the relationship and that we are both motivated to do so. If we do not think others have good reason to sustain the relationship, then our own

[149] Gaus 1990, p. 287.
[150] Gaus 1990, p. 287-8.
[151] Can't we distrust those we love? Yes, we can, though over time, a lack of trust tends to destroy or weaken both Eros and Philia.

confidence in the relationship is undermined, perhaps in part because we think that once the beloved understands her reasons, she might end the relationship. This might lead a lover to deceive the other in order to keep the beloved around, which itself undermines trust. Further, if the beloved isn't motivated to the relationship, that is reason to doubt that the she loves us, since love involves a desire for union, and a lack of motivation suggests the desire for union is weak or non-existent. A still further kind of trust is that friends and lovers will behave in a way that both see as reasonable given their different values and perspectives, since love involves taking the other's perspective into account in deciding how to act.

If we want Eros and Philia to endure over the long-run, as most people do, then we need enough rational moral trust to maintain that the love will survive "changing interests and periods of intense commitment to various projects."[152] If, for instance, one partner works to put another through medical school, then she has to trust that her partner will stay in the relationship once she completed her medical degree. During long nights alone, while the beloved is studying and working, the lover must trust that eventually she and the beloved will have a more intimate union. There is also a sense of entitlement at work, where the lover will *resent* the beloved if the good turn she does the beloved is not reciprocated. Trusting love involves a conception of justice and rights.

---

[152] Gaus 1990, p. 291. Gaus thinks that his point is largely confined to friendship, since one might be sufficiently attached to a romantic partner that each can rationally believe the other will sacrifice because she sees being with one's lover as the most valuable thing one can do. There is no need for trust because there is no temptation to defect from the relationship. But we know that Eros wanes with time, and that stress can undermine it. To maintain Eros for longer than a few months, and a few years at most, trust must enter into the picture. Further, insofar as lovers are friends, trust must enter into the relationship once again.

Obviously, then, Eros and Philia require rational moral trust in a variety of respects. This shows that rational moral trust has great relational value for persons who have intrinsically valuable Erotic and Philial relations with others. But not so fast. What if the trust in love is mere particularized trust, trust that persons have merely in their in-group, like an ethnic group?[153] If so, then while the trust involved in love should make complying with moral rules practically rational, the trust can be confined solely to the beliefs that the moral rules that constitute the particular loving relationship are rationally endorsed by both the lover and the beloved. So rational moral trust, as a kind of social trust, would *not* be constitutive of Eros and Philia.

To back up this point, there is evidence that particularized trust and social trust are different phenomena that are not only not well correlated, but may move in opposite directions.[154] So the worry here is that the trust that enables love could be particularized trust that is not only distinct from rational moral trust but might *cut against* rational moral trust in one's society at large. However, even Uslaner, who distinguishes sharply between particularized and social trust think that particularized trusters, those who only trust their own kind "are self-centered, have difficulties in establishing personal relationships, feel threatened by the outside world, tend towards paranoia and lean towards authoritarianism."[155] Arguably, then, persons who are mere particularized trusters will have dispositions

[153] Uslaner 2002, p. 5.
[154] Uslaner 2002, pp. 31-5. Also see Fukuyama 1999, p. 241.
[155] Uslaner 2002, p. 123.

that make them less able to love others, even those who are not members of her in-group. So love rooted in rational moral trust may make for a better sort of love. However, this does not mean that the trust that *constitutes* love must be social rather than particular.

The bigger problem with Eros and Philia rooted merely in (let's say rational) particularized trust is that friends and lovers will lack a basis for thinking that the moral rules that constitute their moral relations are genuine moral rules. Moral rules are social norms, and social norms apply to large communities and even whole societies; if they are not recognized and practiced by the group, friends and lovers are less likely to see their moral behavior as expressions of broadly moral commitments, since the trust on which their love is based is rooted solely in personal norms and not genuinely moral norms. This means that particularized trust grounds a less stable and attractive form of both Philia and Eros, since friends and lovers lack ground in saying that their lovers are following genuinely moral norms. This failure can lead to all kinds of defects, especially the inability of friends and lovers to demonstrate their moral character by complying with widely recognized moral norms. We want our friends and lovers to be generally praiseworthy, and that means trusting them to comply with moral norms broadly, and not just personal norms. A further problem is that loves based in particularized trust have fewer bases for sustaining their relationship. If we see our friends and lovers as generally moral persons who respond even to strangers with care and respect, this can strengthen our conviction that our friends and lovers are

valuable social partners even if, at the moment, we are at odds with those we love. So if Eros and Philia are rooted in moral trust, rather than particularized trust, they will be stronger and more stable.

The relational value of trust supplements the social value because it explains the value trust can have in specific cases. So if we ask why rational moral trust has value, we can answer that it has both broad social value and great relational value in enabling us to enter into loving relations with others and to have the trust that partly constitutes those relations.

But the social and relational value of love only show that rational moral trust has value. Other values might easily outweigh them in cases of conflict. So we must now argue that rational moral trust helps to ground a moral requirement that can override greater, competing value. We can do so, I will argue, because the value of rational moral trust gives us reason to establish it. And when we establish it, the way we respect those whom we have come to trust is to maintain those trustful relations with certain kinds of action.

V. Trust and Respect

On the penultimate page of *A Theory of Justice*, Rawls argues that his theory of justice provides a "rendering" of the ideas of respect and human dignity; the theory gives them a "more definite" meaning.[156] Since the theory of justice renders the

[156] Rawls 1971, p. 513.

idea of respect, we cannot formulate an ideal of respect as a "suitable basis" for arriving at principles of justice. One achievement of the theory of justice is that "respect for persons is shown by treating them in ways that they can see to be justified" and is manifest in the "content of the principles to which we appeal." In other words, the relation of determination runs from justice to respect and not the other way around.

Since, in *Political Liberalism*, Rawls argued that his liberal principle of legitimacy, his standard of public justification, is also chosen in the original position; as Rawls says, public reason's principle of legitimacy has "the same basis as the substantive principles of justice."[157] We can presume, then, that the standard of public justification *also* determines a conception of respect, and again, not the other way around.[158] Thus, when public reason liberals and their critics say that public justification is based in an ideal of respect for persons, that doesn't characterize Rawls's view correctly.[159] It is not that there is some entailment or argument from respect to a principle of public justification. Instead, there is a derivation of a conception of justice and legitimacy, and this conception fills out the content, or renders more precise, an ideal of respect for persons.

For some time, I understood the standard of public justification as rooted in a conception of respect for persons. But reflection on the inadequacy of arguments

---

[157] Rawls 2005. . 225.
[158] Rawls 2005, p. 225.
[159] Eberle 2002, pp. 52-4 appears to characterize Rawls in this way, along with other public reason liberals. Larmore 2008, pp. 148-53 explores what he regards as an ambiguity in Rawls on this point, though he recognizes the importance of the passage I cite. I thank Larmore for pushing me to take this passage in *Theory* very seriously.

from respect to public justification, and a reconceptualization of Rawls's argument, helped me to revise my understanding of the connection. For Rawls, we respect others by treating them in accord with a conception of justice, and once we add Rawls's insights in *Political Liberalism*, we can see that Rawls would argue that we also respect others when we treat them in accord with a principle of legitimacy, that is, a standard of public justification.[160]

An ideal of respect for persons identifies the most fundamental principles that govern how we are *morally required* to treat others. That is, we have overriding moral reason to treat others with respect, such that respect for persons specifies our most fundamental and weighty moral obligations to all persons. If Rawls is right that a theory of justice specifies part of the ideal of respect for persons, then his theory of justice provides an account of our most fundamental and weighty moral obligations to all persons. The same is true of his principle of legitimacy, if indeed it too is part of the true or most reasonable conception of justice. This is to say that relations of justice not only have value, but specify moral requirements.

I too am trying to fill out an ideal of respect for persons in ways that specify moral requirements. But I am operating with a deeper form of evaluative pluralism than Rawls allowed with respect to disagreement about justice (among other things). As I have mentioned, Rawls allowed for some disagreement about justice

[160] My use of "public justification" should be distinguished from Rawls's own use of the term "public justification" to refer to the third stage of political justification in Rawls 2005, pp. 387-8.

in his last writings on the ideas of political liberalism.[161] But he did not have the time to carry this insight to its logical conclusion. Some have continued to develop this idea, such as Jeremy Waldron, Amartya Sen, and Jerry Gaus.[162] But others, like Jonathan Quong, have sharply resisted the trend.[163] I have already defended my decision to side with Waldron, Sen, and Gaus. But my way of proceeding is somewhat different, and in some ways more Rawlsian in spirit than Waldron, Sen, and Gaus, but less so than Quong.

If evaluative pluralism implies a deep and permanent justice pluralism between free and equal persons, then this raises the question of how we can treat persons with respect who disagree with us about justice. We cannot appeal to a conception of justice to render the idea of respect for persons, or at least not a determinate one, because justice is precisely what we disagree about. So relations of respect cannot be fully defined by relations of justice. Similarly, we cannot appeal to a principle of legitimacy that is chosen *as part of* a conception of justice, since justice pluralism that could allow for different principles of legitimacy. No, we can only solve this problem by identifying some moral relationship between persons that can *replace* or supplement the role that justice plays in Rawls's theory. We need an account of how persons can relate to one another under conditions of deep evaluative pluralism when justice cannot resolve their disputes or establish cooperation between them.

---

[161] Rawls 2005, p. lv.
[162] Waldron 1999, p.2, Sen 2009, pp. 12-5, Gaus 2011, pp. 368. 467.
[163] Quong 2011, pp. 204-20.

Of course, we need not deny that justice can play *any* role in specifying how we are to relate to one another, anymore than we must deny that the idea of the good can play any role in specifying how we are to relate to one another. But the role of justice is truncated to a conception of justice that persons subject to evaluative pluralism can jointly endorse, much like Rawls truncates conceptions of the good to primary goods that persons subject to evaluative pluralism can jointly endorse regarding of their divergent life plans. So shared norms of justice can help specify some dimensions of an ideal of respect, and I shall develop a notion of *primary rights* that can do just that in Chapter 5, but we still need to explain how respect for persons is understood under conditions of justice pluralism.

My proposal is that we render an ideal of respect for persons by *appealing to relations of rational moral trust*. But before exploring the proposal I must deal with an obvious objection. The objection is that obligations derived from respect for persons seem *unconditional* or categorical; they apply to persons regardless of their desires. But relations of rational moral trust look morally *optional*. There is no moral requirement that we trust others. Morality gives us the option of choosing to trust others, but it does not necessarily require it. We might think that someone who refuses to trust others lives an impoverished moral life, since she can enjoy only limited relations of love and friendship, but it is not obvious that she does anything categorically morally wrong in refusing to trust others.

Gaus provides a solution to this problem in acknowledging that even the idea of respecting persons as free and equal does not impose categorical reasons to

treat others in certain ways. He allows, for instance, that it is in principle "possible to respect each as free and equal by abandoning all moral claims on them and acting simply on one's own first-person view of morality."[164] So long as someone refuses to make demands on others, and merely acts on his own personal doctrine, he does not necessarily disrespect others. Of course, Gaus thinks this solo approach to social life has major costs, and that almost no one will be willing to sacrifice making moral demands of others, but that is because of the goods that one loses, and not because respect imposes a categorical requirement. To assume that we must have a categorical requirement would be to start with what Gaus thinks a theory of public reason should show, which is that respect requires treating others in accord with a principle of public justification.[165]

So Gaus argues that the requirements of respect for persons depends upon the sorts of relations we want to have with others. If we are prepared to give up those relations (and Gaus denies that almost anyone *is* prepared to give them up[166]), then respect permits us to act according to our own commitments. But if we wish to have these moral relations, then our understanding of others as moral persons is going to require that we treat them in accord with a standard of public justification.

I would like to make a similar move. I have explained why we want to establish rational moral trust between persons. Rational moral trust has enormous

[164] Gaus 2011, p. 19.
[165] Gaus 2011, p. 20.
[166] Gaus 2011, ch 4.

social and relational value. We will often find ourselves in situations where being able to depend upon and trust others has great importance, and so having a social order sustained by rational moral trust will be essential. And, also paralleling Gaus, I would argue that once we have decided to become part of a system of rational moral trust, a system of moral rules that are the objects of trust, we will find ourselves committed to a standard of public justification. So *insofar as we decide to trust others*, we will come under a requirement of public justification. And by treating one another in accord with that standard, rational moral trust can be sustained. Consequently, respect for persons can be understood in terms of complying with that standard when we cannot secure agreement on important matters of justice.

VI. Trust and Accountability

To justify this connection between trust and respect, we must first understand how we maintain and strengthen a system of (not yet rational) moral trust once we acknowledge reason to participate in it.[167] The most obvious way in which humans maintain moral trust is by complying with the moral rules that are the object of trust. However, we are frequently tempted to disobey moral rules when those moral rules set back our goals and perceived interests. This is why it is so

[167] While we have reason to establish a system of moral trust, the vast majority of the time, such a system is already in place, so the real problem comes in determining how such a system is maintained and strengthened

important to recognize that moral rules are social norms, for we have not only *empirical* expectations that others comply with the rule, we have *normative* expectations as well. In brief, we think others *should* follow the rules. This means that we have reactions to violations of moral rules that go beyond mere frustration or disappointment. We have *reactive* attitudes towards such persons—we are indignant with them when we observe a violation, and we resent them when the violation hurts us in some way; as Gaus notes,

> … we experience resentment because those who fail to meet our demands manifest an ill will toward us; we are indignant when, as a third party, we do not really have the option of deciding whether or not we care about the attitudes of others toward us in these practices: we cannot help but react to the ill will of those with whom we interact.[168]

And in many cases, we feel guilt when *we* violate the relevant moral rule, since we regard ourselves as under the authority of the rule as well. This reactivity motivates *punishment* through blame and ostracism. When normal persons observe violations of social norms, they react with blame and even physical punishment.[169] So, as Gaus further notes,

---

[168] Gaus 2016, p. 181.

[169] Gaus has written extensively on how punishment figures into a practice of accountability; for his most recent and succinct treatment, see Gaus 2016, pp. 180-98, 212-8. For the most extensive discussion, see Gaus 2011, pp. 101-232.

> … maintaining a public moral framework requires maintaining shared expectations—rebuking people who do not act on the shared rules (their actions undermine empirical expectations) and those who make mistakes about what the rules require (and so undermine shared normative expectations.[170]

Punishment places costs on persons who violate moral rules beyond the costs of frustrating or disappointing others, given that punishment itself is a cost and often produces public shaming, which humans often prefer to avoid. Punishment is essential for incentivizing people to comply with moral rules.

Accountability is tied to trust, then, in two ways. First, a system of accountability maintains trust. By punishing those who violate rules, we give persons an incentive to comply with the rules, and so to maintain, and sometimes even increase, trustworthy behavior. Social trust is maintained by rule compliance, and punishment helps to sustain rule compliance. Second, accountability is tied to trust because trust in moral rules already presupposes that there are normative expectations that persons comply with the relevant social norms, otherwise the moral rules would be mere descriptive norms, which have only empirical expectations. But normative expectations are only sustained by the reactive attitudes that drive persons to comply with rules themselves and to punish those who disobey the rules. To have a normative expectation is to have a disposition,

[170] Gaus 2016, p. 180.

that while it may not always manifest itself in action, to resent or be indignant with violators since that is part of what it means to have a normative expectation. If people did not direct reactive attitudes towards rule violators, then the norm in question would not guide behavior in the same way; the social norm will have become a mere descriptive norm.

Another important feature of our practice of accountability is how it looks, as it were, from the inside. P.F. Strawson, in his seminal work on the reactive attitudes, distinguished between the observer and participant attitudes about other persons.[171] When we have the observer attitude, we see other persons strategically, as objects to be dealt with like physical obstacles or tools towards one's ends. But the participant attitude is one where we recognize others as moral agents and see ourselves as on a part with them, that is, as a moral agent as well.[172] From the participant perspective, we see ourselves as somehow in moral relations with those persons.

When we respond to our personal reasons to enter into an ongoing system of moral trust and commit ourselves to maintaining and strengthening it, I argue that we must regularly, if not nearly always, take the participant attitude towards others. If we trust others to comply with moral norms, and not merely expect them to act in certain ways (much as we expect the sun to rise and set), then we must see them as moral agents who are free to choose which moral norms to follow, and this acknowledgement of agency grounds our resentment and indignation when

[171] Strawson 1974, p. 10.
[172] This notion of moral personality is central in Benn 1988, pp. 90-6.

someone is observed to violate or not follow a moral rule. If we do not take the participant perspective with respect to others, I think we cannot be said to morally trust them to do anything. We have backed out of moral trust into an isolated perspective of viewing others as agents that we cannot make ourselves vulnerable towards. So a decision to enter into a system of social trust invariably involves taking up and honoring a practice of moral accountability.

Gaus has stressed the importance of punishment in motivating people to maintain compliance with moral rules. On my account, we must have a way to maintain trust, and that includes the tools of our practice of accountability, and not just our own desire to comply with moral norms. However, Strawson stresses another factor that is almost entirely absent from Gaus's account – the practice of *forgiveness* or restoring a person's status in the moral community after a moral rule is violated. Strawson, interestingly enough, describes forgiveness as "a rather unfashionable subject in moral philosophy at present" and in recent years, that has become only somewhat less true.[173] Yet he rightly notes: "to be forgiven is something we sometimes ask, and forgiving is something we sometimes say we do." Forgiveness is a persistent feature of our practice of accountability.

For Strawson, to ask for forgiveness "is in part to acknowledge that the attitude displayed in our actions was such as might properly be resented and in part to repudiate that attitude for the future" and to forgive "is to accept the repudiation and to foreswear the resentment." I do not commit myself to this

[173] Strawson 1974, p. 6.

definition of forgiveness.[174] However, acknowledging that our actions were properly resented and to repudiate those actions at least frequently *accompanies* a request for forgiveness; and forgiving typically involves a decision to repudiate our resentment.

The importance of forgiveness for our purposes is three-fold. First, it provides further incentive for persons to avoid violating moral rules for two reasons. (a) Asking for forgiveness often requires painful humility, so it is best to avoid actions that require that humility. (b) It provides a way of restoring a person to good community standing, which will also drive rule compliance in the future. The second central importance of forgiveness is that it gives us a way of maintaining our moral community in the face of inevitable violations; without forgiveness, our moral community may shrink as we continue to resent and shun rule violators. But with forgiveness, we can maintain a system of social trust because we have a mechanism to restore violators to full moral standing. The prospect of forgiveness, then, is the motivational carrot to compliment the motivational stick of punishment. The third reason that forgiveness is important is that it keeps us in the participant perspective. We do not merely want others to change their behavior, we want them to *change their attitudes* toward us, so to desire forgiveness is to stay within the participant perspective that is required to sustain social trust. Forgiveness allows us to continue to view others as moral persons and not outsiders we must relate to merely strategically. In all these ways,

[174] Warmke 2016 raises a number of important problems for Strawson's definition.

forgiveness is superior to *merely forgetting* violations, since recalling violations is a way to resurrect old conflicts and destructive attitudes.

I would like to end by explaining my reasons for stressing trust in ways that Gaus does not. Gaus has spent some time connecting public reason to the great goods of social life by means of a description of our joint practice of moral accountability. From *Value and Justification* through *Justificatory Liberalism* and *The Order of Public Reason*, up to *The Tyranny of the Ideal*, Gaus has argued that a commitment to public justification is grounded in our moral practice.[175] Important details of the account have changed, but there is a continuous project across these four works. My main innovation is to specify in some detail the nature of the moral relations that make embracing a practice of moral accountability worthwhile. Gaus speaks of trust briefly in *Value and Justification* and extremely briefly in *The Order of Public Reason* and *The Tyranny of the Ideal*, but it is not central to the analysis.[176] I think without an analysis of the nature and goodness of the moral relations that ground public reason that it is hard to see why we should endorse a public reason view. In particular, it is hard to see whether our reason to endorse the practice of accountability that, in turn, grounds public reason, is a reason *of the right kind*. Gaus stresses, in *The Order of Public Reason*, that we cannot justify our way into a system of moral accountability via instrumental rationality.[177] Instead, we must begin our account of the endorsement of moral rules from the description of moral

[175] Gaus 1990, pp. 319-29, Gaus 1996, pp.120-9, Gaus 2011, pp. 183-258, Gaus 2016, pp. 180-3, 212-5
[176] Gaus 1990, pp. 287-92. Gaus 2011, p. 315. Gaus 2016, p. 222.
[177] Gaus 2011, pp.53-100.

personality. But when Gaus cites the justification for a system of accountability by pointing to the great goods it offers, he runs the risk of giving an instrumentalist justification for the system of accountability.[178] I think by focusing on moral trust, and the manner in which moral trust presupposes a practice of accountability, we can see that the only way to achieve the goods of social trust is to trust others by ways of taking the participant perspective. We cannot enjoy trust by looking at the value of trust merely instrumentally, for once we do so, the rationale for our trust is threatened because maintaining trust requires entering into the participant perspective that involves recognizing the moral personality of others. We climb the ladder of the value of trust to enter the system of trust and accountability, such that our new drive to trust is based on our response to others as moral persons and *not* primarily because of the goods that trust realizes. Our reflection on the goods of trust can strengthen our motivation, but once we trust, we have a drive to think of others in a certain way.[179]

VII. Accountability and Reason-Giving

To morally trust others we must enter into the participant perspective with them to make proper use of a practice of accountability—the tool humans use to maintain trustful relations. But once we are in the participant perspective and view

[178] Vallier 2016 presses this point against Gaus.

[179] We also want reason to think that trust has value in itself, such that we do not need to appeal to the benefits of trust for us and for society in sustaining our commitment to trust. I answer this problem below by arguing that rational moral trust fleshes out an ideal of respect for persons that one might take to be an *objective* moral requirement. [in the main body?]

persons as moral agents, we must recognize that treating a person as a moral agent means recognizing them as possessing *moral reasons* and a capacity to act upon them. As Larmore notes, "an essential feature of persons is that they are beings capable of thinking and acting on the basis of reasons."[180]

Further, when we hold others accountable for wrongdoing, we suppose that they see themselves as having sufficient reason of their own to comply with the rule they have violated. Otherwise, there would be no point in holding another person accountable, since the person lacks access to a reason to comply with the relevant rule. This means we can only sustain a practice of accountability, and so sustain moral trust, by *restricting* our practice of accountability to reprimanding and forgiving persons whom we reasonably believe recognized or *should have* recognized reason to comply with the moral rule they broke. So the participant perspective means appealing to what persons take their reasons for action to be; otherwise, holding others accountable does not make sense.[181] And as a result, the sort of moral relations we recognize when we morally trust others can only be sustained if we attend to their reasons for action and only reprimand or punish persons for violating rules that we think they see reason of their own to endorse. If we punish or reprimand those who see no such reason, or cannot easily come to see such reason, others will resent us for wrongful treatment and are likely even to punish us in return for mistreatment. Restricting our practice of accountability to

[180] Larmore 2008, p. 148.
[181] Gaus 2011, p. 263.

the violation of moral rules we think each person *knows better* than to violate, then, helps the system of accountability sustain relations of trust.

Hopefully you can start to see the connection between moral peace and public justification. Moral peace is a kind moral trust, and maintaining and strengthening a system of moral trust requires a practice of accountability. The practice of accountability best sustains a system of moral trust if it is confined to reprimanding and punishing actions that violate moral rules that we think violators have reason of their own to endorse. Since moral peace is rational moral trust, and rational trust obtains when people see themselves and others as having reason to comply with moral rules, then moral peace is the outgrowth of rational moral trust sustained by a practice of accountability that takes others to be sources of moral reasons. Taking others to be sources of reasons means that the rules that ground of accountability practice must be *publicly justified* for each person. I explain the idea of public justification in Chapter 3. I now turn to explain how respect for persons bears on our topic.

Respect for persons enters the normative story when we recognize, from within a system of moral trust, that we must treat others as moral persons who act on moral reasons. This means that respecting them requires *altering our behavior* in accord with what we take *their reasons to be*. Otherwise, our practice of accountability cannot be sustained, such that the practice is no longer effective in maintaining trustful relations. So respect for persons is not the primary basis for public justification; rather, a conception of respect is specified in terms of acting in

ways that sustain a system of moral trust. We do so both by holding others (and ourselves) to compliance with shared moral rules that we think each person has reason to endorse. Thus, we respect persons in such a system by attending to what we take their reasons to be.

This form of respect is central to determining how we should treat others who disagree with us about the good and justice. Rawls thought that the correct conception of justice could specify an ideal of respect for persons, and I see no reason to doubt that this is true among those who can be rationally brought to agree on that conception. If we agree on justice, then respect for one another should include treating one another in accord with the right account of justice. However, our ordinary situation with respect to diverse others in a free society is that we often disagree about justice. So how are we to treat others with respect when justice can no longer fully reconcile us? My answer is that respect for persons in this condition requires a preparedness to sustain and strengthen a system of moral trust by engaging in a practice of accountability that is structured by attention to the reasons of others (and ourselves) to follow shared moral rules. When we comply and enforce moral rules in accord with the reasons of others, and when we forgive ourselves and others for violations along the same lines, our actions respond to the reasons for others and so respect others as sources of reasons, as reasoning beings. It is natural to understand respect as requiring that we treat others in accord with their rational nature, as reasoning beings who are sources of reasons. Sustaining a system of moral trust in accord with a rationally

structured practice of accountability is the primary way we can treat others as reasoning beings in cases of deep disagreement about the good life and what justice requires.

> [Another reason to think that a system of moral trust can specify an ideal of respect for persons is that, once a system of moral trust is in place, violating public moral rules becomes a way of *deceiving* others. Since we agree on a common scheme of moral rules that form our shared normative expectations, violations become breaches of social trust, which takes advantage of the fact that others have made themselves vulnerable to us by trusting us to comply with shared moral rules. But violations of the rules can often be hidden or hard to detect, such that breaches are not always open, public breaches of trust, but require that we mislead others about our actions. So this is a secondary method of disrespecting others by violating moral rules.]

We can now see how the three arguments I have given for the value of rational moral trust work together. The social and relational value of rational moral trust gives us strong reason to establish and maintain trust between persons. But they do not generate a moral requirement that we act in ways that sustain that trust. However, once we decide to establish moral trust between persons under conditions of evaluative pluralism, we come under a moral requirement to act in ways that do not violate and even preserve and expand *rational* moral trust between persons. The idea of respect for persons, therefore, is given content by actions required in order to avoid breaching social trust, to sustaining the system of social trust in the face of challenges, and to repairing the system when it has been damaged. We will see how a standard of public justification falls out of that commitment to socially trust others, but for now we can see how the standard could be derived from an ideal of respect *specified by* the requirements of relations of rational moral trust.

Given that a system of rational moral trust establishes a kind of *peace* between persons, we can also understand respect for persons as requiring that we *keep the peace*. In other words, respect for others requires that we not engage in actions that disrupt social peace between persons when that peace is rooted in rational compliance with shared moral rules. Respect for persons requires preserving moral peace between persons.

VIII. Moral Realism and Respect for Persons

Both the public reason literature and my own interactions with public reason liberals have led me to believe that the public reason project can be advanced if we can offer a compelling *moral realist* foundation for supporting a publicly justified moral and legal practice.

Typically public reason liberals eschew giving such a foundation, focusing instead on a different goal—showing that public reason is grounded in shared ideas, shared values, or shared practices. The requirement of public justification is based on a construction drawn from these shared ideas and practices. Readers will recognize that this is the dominant approach in the literature, characterizing all three of the great "tomes" of public reason: Rawls's *Political Liberalism*, Habermas's *Between Facts and Norms* and Gaus's *The Order of Public Reason*. Rawls's theory rests on the shared notions of citizenship and a well-ordered society; Habermas's

theory rests on the logic of discursive justification; and Gaus's theory rests on our shared system of social-moral practices and our normal moral agency.[182]

The motivation for my focus is that public reason is designed to transcend debates about which political principles are mind-independently true, as well as debates about whether any political principles are mind-independently true. Public reason liberalism is "political, not metaphysical," meaning that it takes no stance on such matters.[183] As Amy Gutmann and Dennis Thompson note, public reason views (which they mistakenly run together with deliberative democratic views) are *second-order* political theories, theories that concern how to deal with disagreement about the moral and political truth. They write:

> … deliberative democracy is best understood as a second-order theory. Second-order theories are *about* other theories in the sense that they provide ways of dealing with the claims of conflicting first-order theories. They make room for continuing moral conflict that first-order theories purported to eliminate. They can be held consistently without rejecting a wide range of moral principles expressed by first-order theories.[184]

---

[182] Rawls 2005, pp. 29-40, Habermas 1998, pp. 118-131, Gaus 2011, pp. 254-7.

[183] John Rawls's "Political, not Metaphysical" strategy is the most familiar. See Rawls 2005, p. 10. Though as we saw above (ft. 31?), Rawls did not claim that his political constructivism was incompatible with moral realism. Also see Habermas 1998, p. 469. Habermas thinks moral realism should simply be rejected.

[184] Gutmann and Thompson 2004, p. 13. This passage concerns the authority of democracy, but in context it also appears to be a claim about public reason views. Furthermore, Gutmann and Thompson mistakenly characterize disputes about realism in public reason as a procedure-substance dispute in Gutmann and Thompson 2004, pp. 95-124. However, one might advocate for a theory of procedural truth, where political institutions are justified based on mind-independent

So public reason views do not deny that any theories of moral and political truth are invalid. Instead, public reason views help us get traction on how to live together despite disagreements about first-order moral principles and theories.

Critics of public reason have raised concerns about attempts to avoid settling on a conception of objective moral truth.[185] But so has Charles Larmore, one of the founding public reason liberals. Larmore has argued that public reason must rest on some response-independently true moral principles.[186] Following philosophical parlance, I understand a moral realist position like Larmore's as holding that moral facts are not true in virtue of *response-dependent* facts.[187] A realist position holds that moral requirements can be adequately represented by concepts whose conditions of application do not essentially involve conditions of human response. A "response" in this sense is a form of mental activity.[188] Larmore insists that we admit that a principle of public justification is a response-independently true principle: "I am certain … that our commitment to democracy of political self-determination cannot be understood except by appeal to a higher moral authority, which is the obligation to respect one another as persons."[189] We are otherwise unable to explain why we should accept a public reason position. What I take Larmore to mean is that public reason must be grounded in some (1)

---

true moral principles that are procedural in nature, and they would raise the same issue as non-procedural moral truths do for public reason.

[185] Perhaps the most famous attempt to advance this objection can be found in Raz 1990.

[186] Larmore 2008, pp. 139-157.

[187] For a description of moral realism, see Joyce 2015, especially section 5.

[188] On response-independence, see Johnston 1991, p. 143.

[189] Larmore 2008, p. 167.

response-independent principle, (2) not justified by public reason, that (3) applies to all persons, and (4) that explains why we should engage in public reason.[190]

The foundational principle must be response-independent if it is to provide a satisfying explanation of moral normativity.[191] For moral normativity must ultimately answer the question of why I must act in particular ways, and constructivist accounts of moral truth fail this condition because they do not explain why a particular construction is the ultimately right account of what we have moral reason to do. Secondly, then, the principle itself need not be justified by public reason, since insisting upon grounding the principle in public reason would render the principle explanatorily inert. Third, the foundational principle must apply to everyone in order to explain why each person should engage in publicly justified practices of the sort I described in the last few sections. Otherwise, we have not provided a sufficiently general explanation of why we should engage in public reason. Finally, the foundational principle must explain why we should engage in public reason because we need an ultimate explanation of why we objectively morally should engage in publicly justified practices.

To be clear, Rawls and Gaus never deny that we can appeal to response-independent principles to explain why public reason liberalism is true *so long as* we do not insist (as Rawls forbids) that these principles can justify coercion or (as Gaus forbids) that our moral demands have authority over others simply in virtue

[190] I thank Gaus for pushing me to characterize Larmore's position in this way.
[191] In this way, Larmore seems to agree with Cohen 2008, pp. 229-273, who understands a theory of justice as grounded in *fact-independent* principles.

of being derived from true moral principles.[192] Rawls claims that holding "a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster political division," which is not merely to worry about the bad of instability but about the lack of respect conveyed by such behavior.[193] Gaus notes that when "one demands that others must do as he instructs because he has access to the moral truth" that he is a "small-scale authoritarian."[194] So in articulating a response-independent moral foundation for public reason, I do not depart from Rawls or Gaus.

The question, then, is why we cannot simply start an account of public from where Rawls and Gaus begin. The main reason, I think, is that not providing a realist foundation leaves realists with limited reason to buy into the public reason project, which I believe has created a great deal of confusion. A powerful illustration of this confusion can be found in G.A. Cohen's critique of Rawlsian constructivism, especially Cohen's distinction between fact-independent and fact-dependent principles. Cohen condemns the Rawlsian project on the grounds that principles of justice must ultimately be fact-independent principles, such that their normative force in no way derives from non-normative facts.[195] But Cohen's critique misses the fact that Rawlsians need not and do not deny his claim.

---

[192] With Habermas, it is less clear, as he adopts a kind of comprehensive constructivism. Habermas 1999, pp. 52-68.
[193] Rawls 2005, p. 129. Note that, for Rawls, his public justification principle is the liberal principle of legitimacy, which is adopted as part of a political conception of justice, so Rawls offers a constructivist ground for public justification, and not just a conception of justice. For discussion of this point, see the next section.
[194] Gaus 2011, pp. xv-xvi.
[195] Cohen 2008, pp. 229-273 reviews the facts and principles argument.

Instead, their view is that principles of justice and their justification can be at least *prima facie* formulated independently of our comprehensive doctrines, though the "full justification" of a conception of justice requires an overlapping consensus of reasonable comprehensive doctrines.[196] To illustrate, recall that Rawls claims that "we must distinguish between how a political conception is presented and its being part of, or as derivable within, a comprehensive doctrine."[197] There is a sense in which a political conception of justice depends on comprehensive doctrines and several senses in which it does not. A political conception can be "presented" and "expounded" independently of a comprehensive doctrine. And we can present and expound upon it without knowing anything about or even guessing the comprehensive doctrines that may support it. On the other hand, we will want a political conception "to have a justification by reference to one or more comprehensive doctrines," many of which might include objectivist conceptions of well-being and value.[198] To avoid Cohen's error, and the errors of others, it will be helpful to provide a realist foundational principle of public reason.

A second reason for offering a realist foundation is that Larmore's defense is subject to attempts to drive a wedge between respect for persons and a requirement of public justification.[199] Christopher Eberle, for instance, has worried that respect for persons only requires the *pursuit* of public justification, without showing that once public justification has been attempted and the attempt has

[196] Rawls 2005, pp. 12.
[197] Rawls 2005, pp. 12-13.
[198] Rawls 2005, p. 12.
[199] Eberle 2005, pp. 173-194. For a more recent piece, see Van Schoelandt 2015. Also see Gaus's recent criticism of Larmore's respect-based position in Gaus 2017 [E7 cite needed].

failed, that one should proceed to coercion or control anyway. Larmore wants respect for persons to require that we not impose our will on others even when acts of public justification fail. The respect foundation I've developed for public reason answers Eberle by grounding the public justification of coercion in the public justification of moral rules, grounding the public justification of moral rules in our practice of accountability, and grounding the practice of accountability in the value of moral peace.

My claim that public justification is required by respect for persons as free and equal is far from original, I admit. Even so, respect for persons can perform the four roles of a foundational principle outlined above. Respect is the sort of value that could plausibly generate moral obligations independently of any conditions of human response, if any value can.[200] A principle of respect for persons is also the sort of principle that could apply to persons without a public justification. And respect for persons is arguably something that any adult human being owes to any other.

The key difficulty for a respect for persons defense is explaining the connection between respect for persons and public justification. Fortunately, my attempt to connect respect, accountability, and trust does that work. We have good reason to establish and maintain a system of moral trust, as we saw in the

[200] Save, perhaps, well-being.

first three sections of the paper.[201] Once we have established a system of moral trust, we must enter into a practice of accountability where we confine the practice in accord with the reasons we think other persons have, if the practice is to be maintained. Moreover, we now take a participant perspective with respect to others, such that we regard them as moral persons that are sources of reasons for us to act (by structuring our choices and our practice of accountability). Within such a system, all moral persons are equals because they are all sources of reasons. So insofar as we trust others, we must treat others as moral persons in accord with their capacity as reasoning beings. That looks a whole lot like treating others with respect.

We can formalize my argument as follows.

1. There is a response-independent moral requirement to respect persons.
2. Within a system of moral trust, respecting persons requires confining our practice of accountability in accord with the reasons of others.
3. Within a system of moral trust, there is a response-independent moral requirement to confine our practice of accountability in accord with the reasons of others.[202] (1, 2)

[201] In an earlier draft, I argued that our reasons to establish a system of moral trust are also response-independent, but I think that move is not required to give the realist foundation for public reason in this section.

[202] There's an implicit premise here that requires no real defense, namely that whatever a response-independent moral requirement requires is itself response-independently required.

4. Confining our practice of accountability in accord with the reasons of others requires applying moral rules to persons only when the rules are publicly justified.
5. Within a system of moral trust, there is a response-independent moral requirement to apply moral rules to persons only when the rules are publicly justified. (3, 4)

Since respect for persons is an excellent candidate for a deontological, response-independent moral requirement, we can take premise 1 for granted. And I have spent most of this chapter trying to vindicate premise 2. Premise 3 follows from 1 and 2. The next chapter is devoted to vindicating premise 4, premise 5 follows from 3 and 4. So to give an adequate realist foundation for public reason, I only need to vindicate 4. As we shall see, establishing 4 is difficult, which is why it requires an entire chapter. But with 4 established, we have a realist, respect-based argument for public justification. We have connected respect to public reason, advancing the Larmorean project.

We can offer a closely related argument that respect for persons requires maintaining moral peace between persons. Since respect requires confining our practice of accountability in accord with the reasons of others, the system of extant moral trust is made rational when we treat others with respect. And since moral peace is a social state with a high degree of rational moral trust, then moral peace arises from acts that respect persons. So respect for persons will require

maintaining moral peace between persons, given that it requires rendering a system of moral trust rational and stable enough that rational moral trust can accumulate over time.

I suspect a critic will object that my respect foundation for public reason does not apply to all persons because it is conditional upon entering into a system of moral trust. Since persons are not morally required to enter into a system of moral trust, entering such a system is morally optional. In that case, then, respect for persons does not always require moral peace and public justification. But, of course, respect for persons still applies to everyone who has entered into a system of moral trust, and that is already basically everyone. Furthermore, people have quite strong reason to enter into a system of moral trust even if they are not morally required to do so. So technically we can have persons who choose not to enter into a system of moral trust, but since that group is sufficiently small and, I would argue, sufficiently irrational, respect for persons will require public justification for basically everyone.

Before I end, I must stress that in offering a realist foundation for public reason I do not mean to insist that there is only one realist foundation for public reason views. My goal is merely to show that there is one viable justificatory path from a foundational realist moral commitment to public reason. Let there be no confusion that my realist foundation is supposed to be the only way forward.

IX. On to the Standard of Public Justification

This chapter explains the value of moral peace between persons following a general explication of the idea in Chapter 1. I have given three interconnected arguments. First, I argued that moral peace between persons, understood as rational moral trust, has great social value because it lays the foundation for the formation of social capital, which makes nearly all of our social institutions work more effectively. Second, I argued that moral peace has relational value because it makes it easier for persons to form and maintain Erotic and Philial relationships. Not only is rational moral trust has an *enabling* element by allowing persons to securely form new relations of love and friendship with others, it also has a *constitutive* element, in that rational moral trust is frequently a component of successful, stable, and enduring Erotic or Philial relationships.

Once each person decides to extend social trust to others, she enters into a moral relationship with them, and so enters into a practice of accountability—the tool that humans use to sustain trustful relations. When persons violate moral rules they threaten social trust and trigger the practice of accountability. The practice of accountability requires treating others as sources of moral reasons and so confining our practice of punishment and reprimand to moral rules that each person sees herself as having reason to endorse. When we comply with shared moral rules and enforce the rules against violators, while being prepared to restore

them to moral community, we treat others as sources of reasons and so respect them as moral persons.

Given that moral peace renders more precise an ideal of respect for persons under conditions of evaluative pluralism, we can understand moral peace between persons as specifying a moral requirement of respect for persons. This means that we can provide moral realists with good reason to adopt public reason views. Realists who acknowledge that respect for persons specifies objective moral requirements can buy into the public reason project on the grounds that moral peace between persons specifies how to treat those who disagree with us about what the good and justice require. We may now turn to derive a standard of public justification from moral peace between persons.

Chapter 3: Public Justification

This chapter argues that confining our practice of accountability in accord with the reasons of others requires applying moral rules to persons only when the rules are publicly justified. This is because our practice of accountability sustains a system of moral trust that gives rise to moral peace, and the practice can only be rationally maintained if we regard each person as having sufficient practical reason to comply with the rules to which her community holds her. The idea of public justification specifies the idea of having sufficient practical reason to comply with moral rules.

The chapter divides into four parts. First, I must identify what is to be publicly justified. Second, I must explain what sorts of reasons complete a public justification. Third, I must show that public justification specifies the requirement that we confine our practice of accountability in accord with the reasons of others by specifying how the rules that comprise the practice of accountability must be endorsed by the reasons of each person. Once I show this, I will also have shown that each person has a moral obligation to comply with publicly justified moral rules.[203] Fourth, I will show that my approach to public justification can survive many criticisms commonly leveled at public reason views.

To elaborate, the first part of this chapter contains four sections that explain what is to be justified and the presumptions that have to be met. I claim

[203] Throughout the book, I understand obligations as a *type* of duty with an inherently social component; see section 3 for discussion.

that the most fundamental unit of public justification is an authoritative, public moral rule. I have already defined the idea of a moral rule as a social norm tied to empirical and normative expectations. So in section I, I explain my focus on rules rather than larger, unified principles. Section II explains the sense in which moral rules can be morally authoritative. I then argue in section III that our moral practices suppose a presumption in favor of liberty from moral rules; that the structure of practical reason contains a presumption against the authority and the appropriateness of moral demands. Section IV covers the ideas of freedom and equality in public justification.

The second part of the chapter offers an analysis of the *currency* of public justification, what an authoritative moral rule must be justified *by*. In section V, I develop an account of sufficient *intelligible* reasons, the whole set of which are relevant to public justification. Public justification requires an account of idealization as well, so I outline the notion of idealization required and answer some objections to idealization in section VI. I then explain, in section VII, that public justification aims at internalization, and the idea of internalizing a rule is critical for distinguishing between a morally peaceful order and a *moral modus vivendi* (a kind of truce). I argue in Section VIII that evaluative pluralism implies that persons have diverse, unshared intelligible reasons.

The third part of the chapter explains how public justification is grounded in the ideal of moral peace. I will argue in section IX that the idea of public

justification is a plausible specification of the notion of rationality contained in the idea of rational moral trust.

Finally, the last three sections, X-XII, explain how my account public justification avoids a wide range of common objections to public reason views, for example, that public reason is self-defeating and exclusionary.

Before I begin, I would like to stress two points. First, my account of moral order supposes a *deeply social* account of the human person, one whose nature involves the disposition to comply with certain kinds of rules, the vast majority of which are neither chosen nor consented to in any traditional sense. In fact, even the institutions that confer psychological identity on persons are comprised of social rules (consider, for instance, rules governing the family). I do not mean to offer a metaphysic of human nature; there is no reason to take a stand on such a controversial matter here. But I do think that persons are morally emotional rule-followers; as such, I make a verifiable claim about human nature.[204]

Second, I do not deny that we have moral duties other than duties derived from publicly justified moral rules. My aim in this work is to analyze a subset of the normative order, namely binding public moral rules that we hold others (and ourselves) to on pain of the reactive attitudes, blame, and punishment.

[204] For a review and defense of this point, though without appeal to the idea of a human "nature" see Gaus 2011, ch. 3.

I. The Object of Public Justification – the Moral Rule

As we saw in Chapter 1, moral peace between persons obtains when rational moral trust prevails among them, and rational moral trust is trust that persons have sufficient practical reason to comply with moral rules. Moral rules are understood as social norms, practices publicly believed to be in effect and publicly recognized as grounding empirical and normative expectations. This means that moral rules must meet a publicity condition, where persons recognize that each person sees herself and others as having reason to comply with the norm. [205]

Recognizing the importance of the public dimension of moral rules, we can turn to the question of *individuation*: why should we publicly justify at the level of social rules rather than more general principles?[206] This is not an easy question to address, since nearly all accounts of individuation in the public reason literature have focused on the justification of *legal coercion* rather than moral rules.[207] Nonetheless, we can still identify several attractive features of justifying at the level of moral rules.

The simplest reason is cognitive in nature. People are built to evaluate rules with quick applications of implicit cognitive judgments and emotional reactions. We are best at evaluating rules in contrast to lofty political principles, and our judgments about acts are governed by rule-based cognition, where rules classify all

[205] Though unlike Rawlsian accounts, they need not see themselves as having the same or similar reasons for endorsing the relevant norms. Rawls 2005, pp. 66-72.
[206] I take a moral rule to concern relatively specific sorts of behavior, such that they are "mid-level" rules, following Chapter 1, III.
[207] Rawls 2005, p. 140. For a discussion of this controversy, see Quong 2011, ch. 9, pp. 273-287.

kinds of percepts and evaluations and dictate many of our actions.[208] It is harder to evaluate principles given all the factors that go into justifying one, rather than evaluating a more local social regularity like a rule. In the same vein, it is difficult to detect and punish *violations* of principles and constitutions than it is to detect and punish violators of rules. Principles and constitutions are extremely general; determining violations often requires a theorist or a judge. But nearly everyone can determine, and frequently do determine, whether someone has violated a moral rule.

A second reason to justify rules is that their effects are easier to evaluate. It is much easier to assess the effects of a single moral or legal rule than of constitutions and conceptions of justice. With respect to the former, we can develop relatively simple models of the effects of this or that law or moral practice. Obviously such judgments are fraught with difficulty, but evaluating rules against a backdrop of other rules is much easier than evaluating principles and constitutions.

A third reason to justify at the level of rules is that any more general level of individuation will require assuming or imposing some sort of harmonization upon its constituent rules that may not exist; this means that justification at the level of principles could foreclose paths to moral peace between persons. Moral peace might be reached through a patchwork of distinct and often unrelated rules, rather than a unified system that can be described by generic principles.

[208] Gaus 2011, Chapter 3, reviews arguments to this effect.

A standard objection to my approach is that rule-following is irrational when doing so sets back one's interests. I do not have the space to develop an account of the rationality of following rules when doing so seems to set back the aims and achievements of the rule followers.[209] Instead, I simply assume that such an account can be given, that our best account of practical rationality permits complying with rules not to achieve something further, but because the rule is a bona fide moral requirement. My aim in assuming this is merely to develop a coherent theory of the foundations of moral and political authority in terms of moral peace between persons, not to provide a theory of practical reason; perhaps the work can be appreciated as an attempt to do just this.[210]

II. The Authority of Moral Rules

A critical part of creating, maintaining, and reforming a system of social trust is the practice of issuing *moral demands* or demands that persons comply with the moral rules of their society. Moral demands are required to sustain moral rules because demands punish rule violators and create empirical and normative expectations of compliance.

I contend that there is a paradigmatic form of moral demand that takes others to be sources of reasons, and so expresses respect for them. To distinguish it

[209] For discussion of the rationality of rule-following, see Gaus 2011, pp. 131-63.
[210] I also cannot address how we came to be rational rule-followers. Gaus has a useful discussion in Gaus 2011. Also see Bicchieri 2006, cite, and Vanderschraaf 2016.

from other demands, consider a simple *order*. John orders Reba to comply with a rule when he insists that Reba comply *regardless* of her attitude about the rule. That the rule frustrates Reba's evaluative standards, perhaps her religious conscience or her secular ethos, matters little to John. He merely wishes to alter her behavior, and is indifferent to whether the demand has any rational uptake for her. Consequently, John's demand is not confined in accord with our practice of accountability because John is indifferent to whether Reba is actually culpable for her mistake, that is, whether she sees herself as having reason to comply with the relevant rule. As a result, John's action undermines the system of moral trust. Moreover, the action is disrespectful, since respect requires that we confine our actions in accord with our practice of accountability by taking others to be sources of reasons.

An even more problematic kind of moral demand involves John issuing orders while fully realizing that the order is incompatible with Reba's evaluative standards. In this case, John flagrantly disregards Reba's perspective in issuing moral demands. Perhaps John is attempting to prod or tempt Reba into violating her conscientious convictions. This is an active refusal to take Reba to be a source of reasons.

A third form of moral demand is issued *with regard* to Reba's perspective. John issues a moral demand sincerely believing that the demand is rooted in a rule that Reba accepts, or should accept given *her*, not John's, commitments. Only this third sort of demand is capable of sustaining a system of moral trust that treats

others with respect by taking them to be sources of reasons. And so only this sort of moral demand can be part of a social system that establishes moral peace between persons.

I term this third form of moral demand an *authoritative* moral demand. An authoritative moral demand is one that has authority for the demandee. A moral demand has authority for Reba when Reba's values and principles commit her to compliance. A moral demand derived from a rule has authority over Reba when she is committed to the rule. Thus, others are permitted to demand that Reba comply with the rule in question because their demands are simply demands to comply with Reba's own standards. Consequently, authoritative moral demands will not typically lead Reba to experience the demand as alien or authoritarian. Instead, these demands will likely evoke feelings of guilt, and accordingly, motivation to behave differently or to defend one's actions as justified.

To be more precise, I understand moral authority as a claim-right that the demander has for the demandee to comply with the demand.[211] If John makes an authoritative moral demand of Reba, then Reba owes it *to John* (and others) to comply with the demand. That is just part of what it means for a person to have authority over another—that the person *under* authority owes compliance to the person *in* authority. That said, in a system of moral rules, authority does not run in one direction, that is, from authorities to subordinates. Instead, moral authority is

[211] Vallier 2014, pp. 25-6.

equal and reciprocal: we may all insist that others comply with our social order's moral rules.

I understand authoritative moral demands as issuing from *obligations*, distinguished from mere duties. A duty to engage in some action is a moral requirement, but it is not *necessarily* a requirement that others are permitted to enforce through criticism; nor is a duty necessarily the appropriate subject of the reactive attitudes when violated. I may have a duty to worship God, but my failure to comply with the duty does not license the reactive attitudes in others. On my view, obligations are a type of duty with an inherently social component. Obligations are duties *to others* that others may hold us to and that generate the rational reactive attitudes when violated.

Moral demands that lack authority undermine moral peace because they are orders that show little regard for others. The two types of non-authoritative moral demand are different ways for John to fail to account for Reba's point of view. An authoritative moral demand, in contrast, is based on a moral rule that Reba has reason of her own to accept. Reba therefore *sees the point* of the demand because it merely requires that she live up to her own commitments.[212] Consequently, moral demands that have authority are instances of respecting others by taking them to be sources of reasons, because authoritative moral demands are consistent with maintaining a system of moral trust.

[212] So long as the demander has the relevant standing. See Ch. 7 for more on this.

I recognize that my position is unusual, since most public reason liberals understand public justification as demonstrating the state's liberty-right to coerce.[213] My account of legitimacy differs because the master value at the root of public reason is moral peace. If our aim is to use public justification to establish moral peace, then our conception of political legitimacy must be more ambitious. If we only publicly justify liberty-rights to enforce legal rules, we will only justify the state's permission to create conflict and violence that disrupts moral peace. And if we only publicly justify legal rules, and not moral rules, the legal rules so justified will disrupt moral peace.

III. The Presumption in Favor of Moral Liberty

Liberals of many stripes endorse a presumption in favor of liberty with respect to *political coercion*. Without a good justification, political coercion should be regarded as unjustified. I contend, following Stanley Benn and Gaus, that social morality contains a parallel presumption in favor of *moral* liberty.[214] If we wish to coerce or ostracize others, our actions are only appropriate if others have some sufficient reason to endorse the rule upon which the coercion or ostracism is based. Without sufficient reason, persons are at moral liberty to act as they see fit.

---

[213] For example, it appears that Rawls's liberal principle of legitimacy only focuses on specifying when the state has permission to coerce and not when a citizen is obligated to comply. Rawls 2005, p. xliv.

[214] See Benn 1988, p. 112. For further discussion, see Gaus 2011, pp. 341-6.

To be more specific, persons are at moral liberty *vis-à-vis one another* to act as they see fit, as bona fide moral requirements may apply to them even in conditions of moral liberty. So "moral liberty" is a liberty with respect to the interferences of other members of the public. Consequently, a state of moral liberty is *not* a morality free zone, but a *social* morality free zone.[215] This distinction is critical. If the presumption in favor of moral liberty is applied to moral requirements *as such*, it would be extremely implausible. The presumption I defend is far more limited; it is just a presumption in favor of moral liberty with respect to what others may do to us.

The presumption in favor of moral liberty does not imply that moral demands count as interference. Instead, our practice of accountability licenses interference in many cases when the reactive attitudes are justified based on our understanding of the reasons that others take themselves to have. Demands themselves need not interfere, but if others fail to comply with moral rules, our acts of punishment, ostracism, and coercion do involve attempts to disrupt and direct the agency of others, however. So it is these attempts at interference that must be justified. When they are justified, they help to sustain a system of moral trust, since others are more likely to comply with moral rules based on their own reasons. Threats of interference may produce more compliance even in the absence of reasons, but persons may disobey the rules in private or may punish the punishers for being wrongly punished, ostracized, or coerced.

---

[215] For a contractualist theory that understands a social morality free zone as a *morality* free zone, see Gauthier 1986, pp. 83-112.

I should also distinguish the presumption in favor of liberty from the idea of a *baseline* against which something must be justified. The presumption only states that interference must be justified, not that non-interference is the justificatory default, such that if interference isn't justified we should get rid of a moral rule. I will address the justificatory baseline in more detail below.

Gaus characterizes the presumption in favor of liberty as follows:

> (1) agents are under no standing moral obligation (in social morality) to justify their choices to others; (2) it is wrong to exercise one's liberty so as to interference with, block, or thwart the agency of another without justification.[216]

The presumption assumes that there is no moral obligation to justify all of one's actions to others, just actions that involve interfering with the agency of another, either through coercion or other forms of social punishment.

Given this, *why* would the public evaluation of moral rules contain an asymmetry between the justification of action and interference with action? One argument, first explored in detail by Stanley Benn, asks us to imagine situations where one agent interferes with another and then to locate where *appropriate resentment* relies. Appealing to our shared understanding of the appropriateness of resentment turns out to be evidence that some agent or another has committed

[216] Gaus 2011, p. 341. Also see Benn 1988, pp. 87-90.

what we take to be a moral violation. Benn's case asks us to imagine Alan splitting pebbles while Betty casually observes him; Betty then asks Alan to justify his behavior to Betty, but it seems clear in this case, that Betty is the one who owes Alan a justification because she is interfering with Alan's agency when Alan is not bothering anyone else. The point is that the "burden of justification falls on the interferer, not on the person interfered with. So while Alan might properly resent Betty's interference, Betty has no ground for complaint against Alan."[217]

Benn's case illustrates that it would be inappropriate for Betty to resent Alan for failing to justify his pebble-splitting activities, but that it would be appropriate for Alan to resent Betty for interfering with his pebble-splitting. Gaus notes that if you want to reject a presumption in favor of moral liberty, then you should also reject the idea that Alan's resentment of Betty is appropriate, since he is under a standing social-moral obligation to justify his actions to Betty. But it seems rather plain that he is not.

Turning to the second argument, conforming our behavior to a presumption in favor of moral liberty helps to realize moral peace between persons. The reason is that by rendering our actions consistent with the presumption, we express our recognition that interference is meant to disrupt and direct the behaviors of others to comply with rules in accord with our practice of accountability Interference in response to the breach of a moral rule, therefore, can serve both good and bad purposes. Good purposes include prodding others to

[217] Benn 1988, p. 344-5.

comply with moral rules that are practically rational and authoritative for them. Bad purposes include insisting prodding others comply with moral rules just because they are *correct*, or because we have some form of natural or supernatural right to be obeyed. If we wish to respect others, then in cases of controversy, we should be circumspect in interfering with the choices of others by acknowledging that others could have good reasons for acting as they do. When Betty interrupts Alan and insists that he justify his behavior, she knowingly issues a kind of threat, since if Alan fails to give what Betty takes to be an adequate justification, the prospect of the reactive attitudes and blame is present. Betty disrupts harmonious relations with Alan, approaching him as though his actions are automatically under suspicion. But if Alan is committed to responding to the demand, then the demand does not undermine moral peace, but will preserve it against Alan's real or potential infraction.

To forestall a common objection, I note now that the presumption in favor of moral liberty also does not imply that moral rules must all be explicitly justified to those subject to them. Requiring express justification of all moral rules would be too cognitively demanding. Instead, the presumption is met when a moral rule that legitimizes interference is *justified for* the person subject to the rule. Given the utility of most moral rules, I contend that many moral rules meet the presumption

rather easily. This explains why the presumption in favor of moral liberty can be hard to see, since it is frequently and easily met in most cases.[218]

The presumption becomes visible when members of a society reasonably disagree about what morality requires. For instance, when an oppressive norm begins to break down through challenge, such as social prohibitions on homosexual sex, it is clear that if we are to *properly* hold persons accountable for having homosexual sex, homosexuals engaged in these acts must see themselves as having sufficient reason to refrain from those sex acts. Otherwise, we must regard them as confused or excused.

There are objections to the idea of a moral presumption in favor of liberty that I cannot review here. Gaus and Benn's discussions are more comprehensive. My aim in this section has rather been to motivate the idea of a presumption based both on their more familiar grounds and based on the value of moral peace between persons.

IV. Liberty and Equality

I must say something about how I understand the ideas of liberty and equality within the construction of an order of moral rules. One way in which the value of liberty is expressed is in the endorsement of a presumption in favor of liberty. Liberty has value because an abrogation of liberty must be justified. This is a form

[218] For an (in my view mistaken) attack on the presumption in favor of liberty, see Lister 2010, pp. 163-170.

of negative liberty.[219] In what follows, I develop an account of what reasons justify interference and claim that our freedom is maintained when others insist or force us to comply with those justificatory reasons. This is a notion of positive liberty, liberty with respect to rationality. On the classical positive liberty view, one is free when she can act on her best reasons, when she can do what it is rational for her to do.[220] The theory of public reason I develop, therefore, deploys two conceptions of liberty: a negative presumption in favor of liberty that can be overcome via the establishment of rules that enable our positive liberty. In this way, I contend that one's total liberty is preserved by a publicly justified moral order; what we have lost in negative liberty, we gain in positive liberty. This, I think, is what Rousseau was after: a way to preserve something of the liberty of the state of nature in civil legal society, despite the fact that the latter requires restricting the liberty of persons.[221] Rousseau revives the idea of positive liberty from the ancients in order to pull off this trick.

We can also see a thin idea of equality at work. Following many others, I contend that moral authority is essentially reciprocal. Given that moral rules have a generic form by not referring to particular persons and being essentially reversible, moral rules will only have authority if they have authority for all

---

[219] I discuss the notion of negative liberty at work in presumptions in favor of liberty in Vallier 2014, pp. 30-31. Though there I am focused on a presumption against coercion and not against moral ostracism and punishment.

[220] Plato argued that a person's freedom is diminished when, for instance, his actions "enslave the best part of himself to the worst." Cooper 1997, book IX, p. x.

[221] Rousseau argues that once we establish the social contract and government, persons trade their "unlimited right to everything that tempts him and he can reach; what he gains is civil freedom and property in everything he possesses." See Rousseau 1997, pp. 9, 54.

members of the relevant moral community.[222] Moral rules should also ground relations of *mutual* accountability, where each person must make publicly justified demands on others. So no person has more justificatory power than anyone else. At this stage, the notion of equality is compatible with strong forms of social hierarchy, so long as the moral rules that exist in that order are rationally validated from multiple points of view.[223] Liberal theory requires thicker, more substantive egalitarian commitments, such as the possession of equal rights, and I defend that position in Chapter 5.

V. Intelligibility and Convergence

We have established that moral demands, and the interference associated with them, must have moral authority if they are to contribute to sustaining our practice of accountability, and so to establish moral peace between persons. I now turn to describe the kind of reasons that establish that a moral demand is authoritative and that meets the presumption in favor of moral liberty. By specifying the set of justificatory reasons, we will thereby establish a conception of public justification, which is a principled, coherent description of the conditions

[222] For the most familiar articulation of this idea, see Darwall 2006, p. 21. Following Darwall, though with some revisions, Gaus argues that public justification solves the puzzles of moral authority and mutual, equal authority. Gaus 2011, pp. 22-23. In chapter 6, I will qualify this claim, since some moral rules confer special standing on persons to hold others responsible, such as voluntary members of groups.

[223] Subordinates are unlikely to see hierarchy-preserving rules as rationally justified, so that fact alone will prevent many hierarchical moral rules from being publicly justified. I discuss hierarchy and public justification in more detail in my discussion of associations in Chapter 7.

under which moral demands are authoritative for the demandee, and so compatible with our practice of accountability. The conception of public justification helps to specify what is required to sustain our practice of accountability because the demands constitutive of that practice are confined to moral rules that are *practically rational* for each person to follow. Each person must be able to see the point of complying with the moral rules to which she is subject. So we can derive a conception of public justification from the more general idea of practical rationality.

This idea of practical rationalityis subjectivist, as the notion of moral peace involves each person's belief that she and others have practical reason of their own to comply with moral rules. If moral rules cannot be rationally validated by those subject to them, agents will regard the interference associated with the rules as arbitrary browbeating and control, and the demands to comply with the rules as illegitimate. Rational validation, then, requires that each person can trace an inferential path from her commitments to the moral rule to be justified.

This *rational validation* constraint applies not merely to our own interrogation of moral rules, but also to our assessment of the prospects for rational validation by other persons, who frequently have quite different views about how to conduct their lives from our own. Moral trust requires not merely that we think norms will survive our rational scrutiny but that they will also survive the rational scrutiny of others. Otherwise, moral trust lacks adequate rational ground. So if we are to respect others, we must allow our assessments of

the general prospect of a moral rule to survive rational scrutiny and to ultimately guide our actions.

To further flesh out the idea of rational endorsement, let us begin with the observation that respecting others as sources of reasons is not to cordon off some part of their values and concerns and then only take these privileged reasons or considerations seriously. If we wish to establish moral peace, we must establish a scheme of moral rules that take each person's full deliberative perspective into account. Now, taking the perspective of others seriously does not require that we take another's reasons and values seriously as options *for us*. But we must take their reasons and values seriously as options *for them*. Establishing moral peace means establishing a system of moral rules compatible with the diverse reason (and diverse *reasons*) of all.

Many public reason liberals insist that justificatory reasons be shared, shareable, or accessible.[224] In contrast, I defend a convergence conception of reasons that allows inaccessible and unshared reasons into public justification.[225] In this book, my defense of convergence is based on the value of moral peace between persons. I offer two such arguments. First, as we have seen, moral peace between persons is established when we take others to be sources of reasons in constructing and reforming our joint moral order. But taking someone's reasons into account involves taking her *full* panoply of reasons into account, diversity and

[224] For my critique shared and accessible reasons requirements, see Vallier 2014, Ch.4, especially pp. 104-111, and for criticisms, see pp. 121-3.
[225] Vallier 2014, pp. 124-130.

all. Were we to appeal merely to the reasons other agents share with us (a restriction widely endorsed in the public reason literature, though applied solely to laws), we would not treat them as sources of reasons and so with respect. In fact, there's a sense in which we don't take *their* reasons into account at all since we are only focused on reasons each person shared with others.

Second, if we restrain the reasons people may appeal to in order to justify endorsing moral rules, restraint will prove *incredibly* burdensome. Restraint would bar persons from using their diverse reasons to shape their shared moral order, in discourse and in action, inside and outside the traditional strictures of the public square. These means that persons would be prevented from building their lives around diverse rules that other persons have no shared reason to accept.[226]

VI. The Intelligibility Requirement

I turn now to a positive account of the reasons that can justify moral rules, which I term an intelligible reasons requirement (IRR). The intelligible reasons requirement expands the set of justificatory reasons to its outer limit. That is, it counts as justificatory any reason that can be recognized as such by members of the public. If R_A can be seen as a reason for agent A to act, then it can potentially play a justificatory role, so long as R_A is relevant and not overridden or undercut by

[226] Importantly, one could agree that restraint with respect to the reasons justifying moral rules should be rejected but still maintain shared reasons requirements on public discourse.

another justificatory reason. That is, R_A can figure into a public justification if it is relevant and sufficient.

I take a reason R_A to be relevant just in case it counts in favor or against some proposed social-moral rule that members of the public are presently evaluating. For example, John's reason to refine his ability to pitch a fastball does not speak to whether his country should adopt a lax or strict norm on the moral obligation to vaccinate children. Similarly, Sarah's reason to go on a bike ride neither supports nor undermines the case for a rule concerning morally offensive clothing. Further, reasons must be sufficient in the sense that they are not rebutted or undercut by other reasons. They must be sufficient reasons to justify action and belief. Sufficient reasons are those that remain undefeated, in that they are neither rebutted nor undercut.

Qualifications made, we can now define the intelligible reasons requirement. I define the IRR in terms of the idea of the property of intelligibility:

> *Intelligibility*: A's reason R_A is intelligible for member of the public P if and only if P regards A as entitled to affirm R_A according to A's evaluative standards.[227]

The IRR counts all and only intelligible reasons as justificatory.

[227] I here modify the definition of intelligibility found in Vallier and D'Agostino 2012. I also appeal to the definition of intelligibility in Vallier 2014, pp. 104-108.

> *Intelligible Reasons Requirement*: A's reason R_A can figure in a justification for (or rejection of) a moral rule M only if it is intelligible to all members of the public.

Intelligibility has four elements that require explication: (i) the idea of members of the public, (ii) the idea of regarding an individual as entitled to affirm a reason, and (iii) the idea of an individual's evaluative standards, and finally (iv) the moral restrictions on what count as a justificatory reason. I expand upon these ideas in detail in another paper.[228] Here I summarize.

Regarding (i), members of the public are rational representations of those citizens on whom moral rules are imposed and the reasons moral persons affirm. Thus, John is represented among members of the public as an idealized version of himself, one that only affirms reasons based on sound information and valid inference. John is said to have a reason on this view if he would affirm it in light of adequate information and reasoning. In this way, John is characterized as a reason-possessor at the appropriate level of idealization. It is John who has the reasons. As a group, then, members of the public denote the set of all reason possessors on whom moral rules are imposed, and so whose endorsements bear on the justification of a moral rule.[229]

---

[228] Vallier 2016.

[229] Gaus 2011, pp. 232-258 provides a detailed explanation of what it means for a member of the public to "have" a reason.

The IRR requires unanimity because if members of the public cannot see the reason as intelligible, it is hard to understand how they can see it as a reason at all. If members of the public cannot even regard the reason as having epistemic credibility based on the evaluative standards of the person who offers it, then they cannot regard it as even minimally epistemically credible, and so cannot ascribe it normative force. Further, without epistemic credentials, it is hard to determine whether the reason is held sincerely or, perhaps, even genuinely affirmed at all. A final consideration is that if we were to weaken the IRR to allow, say, a majority to regard the reasons as justified, then reasons can enter into public justification even if some members of the public cannot ascribe them epistemic credibility. This implies that members of the public would allow themselves to be coerced or morally ostracized, or at least the moral order to be shaped by considerations that they cannot in any sense regard as normatively effective. This permission does not comport with a commitment to take seriously the diverse perspectives of members of the public rather than their utterances or non-rational sentiments.

Regarding element (ii), we now turn to explain what it means for a member of the public P to regard an agent A as entitled to affirm the reason based on A's evaluative standards. Remember first that P is idealized in accord with a here-unspecified notion of idealization, so the notion of regard is epistemic, not factual.[230] A member of the public regards the agent as entitled when a suitably rational and informed individual would regard the agent as entitled, so an agent

[230] For this reason, I use the terms "entitlement" and "epistemic entitlement" and their respective grammatical variations interchangeably throughout.

understood as rational and informed makes the determination. What, then, does entitlement come to? The notion of epistemic entitlement in epistemology is historically tied to the notion of one having a right or permission to believe a claim versus the idea that one has an epistemic duty to believe a claim. Many entitlement theorists also hold that one can have an epistemic right to believe something for which one has no articulable or specifiable or recognizable evidence. [231] Infants are presumably epistemically entitled to trust their perceptions, even if they are not cognitively sophisticated enough to make themselves aware of any justification or evidence for their views. Epistemic entitlement does not require that, in being entitled to hold a belief, that one be able to engage in "some sophisticated mental exercise."[232]

On to (iii): an evaluative standard is a set of prescriptive and descriptive norms a member of the public takes to justify her reason affirmations by providing standards that enable her to order her moral and political proposals. Consider Roman Catholicism as providing a set of evaluative standards. Roman Catholic social thought is rooted in complex notions of natural law and the common good, which has led to a variety of social and political positions, many of which are hard to classify along traditional left-right spectra. Pope Francis has argued both against abortion and for the restrictions on carbon emissions based on doctrines that he believes lie at the core of the Catholic social thought.[233] He sees no tension

[231] Wolterstorff 2010, ch. 4.
[232] For a general overview, see Altschul 2014.
[233] Francis 2015.

between the two views but rather a substantial unity. Catholic evaluative standards, then, are partly modes of prescription, moral and political considerations that lead Catholics to make certain proposals, reject others and generally order their social and political priorities.

But notice that Catholic doctrine also has a descriptive component. Catholics believe that God imbues fetuses with souls at conception, or more accurately, that in the act of the creation of a human person, God creates a being with both substantial form (the soul) and matter. Catholics, thus, rely heavily both on theism and Aristotelian metaphysics, most often in the combination developed by Thomas Aquinas. So Catholics develop and order their moral and political proposals not merely in accord with their values but by their beliefs about the nature of the social world, which for Catholics includes God and the unborn. In fact, arguably much of Catholic opposition to abortion is not based on their unique moral evaluative standards, but rather their descriptive ones. It is because human fetuses are persons that it is wrong to kill them. Everyone agrees that innocent persons should not be killed without a good reason, but in the Catholic social world, fetuses are persons, hence the moral and political prohibition on abortion.

Finally, we should focus on (iv), the intuitive moral limits on what reasons count as relevant to some justificatory question. Gaus puts the general idea like so: "Certainly we must exclude … evaluative standards that disvalue the very idea of morality, value immoral acts qua immoral acts, disvalue conformity to justified

moral rules, or value forcing people to conform to unjustified moral rules."[234] The question is on what basis we may do so and still realize moral peace between members of the public. The traditional weapon in the public reason armory is the idea of "reasonableness," where parties are interested in the moral enterprise of building a cooperative order with others who have a functioning sense of justice, who affirm the value of reciprocity, and who recognize the depth of pluralism.[235]

But appeals to reasonableness run afoul of a dilemma. First, the only way that "reasonableness" can give us a basis for excluding some evaluative standards from public justification is if it has some intuitive content, such that it is more than a mere term of art. Otherwise "reasonableness" only has normative force by stipulation. But public reason liberals build a great deal of content into the idea of the reasonable, which potentially renders it a normatively inert term of art. Accordingly, uses of reasonableness are torn between the intuitive notion, which lacks specific and substantive content, and the technical notion, which leaves the reasonableness's normative force unexplored. Rawlsians maintain that the notion of the reasonable is both an intuitive notion and that it can be fleshed out in specific ways. But I submit that this is a challenge has yet to be met.

The best alternative, in my opinion, is to work with a more deflationary or thin moral notion than reasonableness that, while less able to rule out certain evaluative standards as immoral, will in combination with other features of a

[234] Gaus 2011, p. 282.
[235] See Rawls 2005, pp. 54-66 for the dominant exposition of the idea of the reasonable in political liberalism.

theory of public justification prevent some of the coercion we regard as unjustified. One key feature of reasonableness is that reasonable agents are normally prepared to play assurance games rather than prisoners' dilemmas.[236] An agent will cooperate when she believes others are prepared to do likewise even if she could do better by defecting. In Rawlsian terms, contractors are prepared to go beyond appealing to their threat advantage—the minimal share required to make cooperation in their instrumental interest.[237] Contractors are reasonable in a second sense as well, for they must recognize the burdens of judgment, though my theory does not require that they hold this belief, as we will see below.[238]

My deflationary notion of reasonableness is broad. To illustrate, consider the ethical egoism advanced by followers of Ayn Rand's Objectivism. Rawlsians could maintain that Objectivism is not a genuinely moral view, as it has no built-in notion of other-concern. But the Objectivist position resembles familiar forms of eudemonism; it is distinct in emphasizing that one can flourish in commercial activity and that the expression of ingenuity in the form of profit-seeking is a great life good.[239] Rawlsians may worry that Objectivists are not interested in developing a common, cooperative, public framework for social life. But Objectivists

---

[236] For this formulation, see Gerald Gaus, "Reasonable Utility Functions and Playing the Cooperative Way," *Critical Review of International Social and Political Philosophy* 11(2008). By "playing assurance games" I mean that she conceives of the payoffs of cooperation vs the payoffs of defection in terms of assurance game payoffs, not because she is maximizing self-interest. I understand the game theoretic modeling of choice much as Gaus does: as making use of purely formal utility theory that is compatible with almost any psychological assumptions.

[237] John Rawls, *The Law of Peoples with "the Idea of Public Reason Revisited"* (Cambridge: Harvard University Press, 2002)., p. 15.

[238] *Political Liberalism*., pp. 54-58.

[239] For a review of Rand's position, see Badhwar and Long 2014.

champion the voluntary formation of complex social orders based on positive sum games and innovation. They are reciprocal cooperators. Objectivists just have a different conception (even if false and ultimately unjustified) of what it means to form a cooperative order, rather than no conception. I think it is rather difficult, then, to show that Objectivists are unreasonable in any but the technical Rawlsian sense, which, again, doesn't get us very far.

The deeper Rawlsian concern is that allowing Objectivist reasons into public justification would generate injustice or illegitimate social and political arrangements. But remember that permitting reasons into public justification does not imply or even render probable that members of the public will be justifiably coerced or ostracized solely on the basis of those reasons. If Objectivists insist on implementing strong rights of private property, then whatever their reasons, Rawlsians will have their own reasons to object, in which case the Objectivist proposal is defeated. As a result, even if we allow Objectivist evaluative standards to count as reasonable, we are a far cry from being stuck with a publicly justified Objectivist legal order. Though, if Objectivism is a reasonable comprehensive doctrine, then Objectivists can reasonably reject the extensive states Rawlsians typically endorse. What economic structures can survive this contest is the subject of Chapter 8.

While a deflationary notion of reasonableness rules out few evaluative standards, our intuitive notion of reasonableness prevents obviously defective evaluative standards from generating justificatory reasons. As we have seen, being

reasonable requires being prepared to propose reciprocal terms of cooperation. If you insist on getting your own way and are unwilling to compromise in the formation of moral institutions, then it is natural to say that demands made in accord with those terms are morally inappropriate. As a result, evaluative standards that directly imply the permissibility of such demands are morally inappropriate and can be ruled out of bounds as sources of justificatory reasons.

Similarly, and more generally, normal moral persons are interested in having moral trust with others, and within a system of trust they see others as ends and not as mere means. So, reasonable evaluative standards recognize that people are interested in moral relationships with one another. In this way, we can rule out deeply egoistic evaluative standards as unable to generate justificatory reasons. We can rule out sadistic and masochistic evaluative standards on the same basis, as both insist on valuing the destruction of value for its own sake, either for others or for the agent in question.

Beyond this we cannot say much. But I do not think this is problematic, as there are many ways to block coercion and moral authority other than condemning a host of evaluative standards as unreasonable. Given that the standard for allowing reasons into the justificatory process is not the only factor determining when rules and laws are justified, intelligibility theorists are not committed to regarding immoral or wicked proposals as just or legitimate or authoritative.[240]

[240] I have more to say about reasonableness in Vallier 2014, pp. 146-151.

VII. Idealization

The intelligibility requirement appeals to idealization to explicate its conception of a reason that can justify endorsing a moral rule and holding someone else to the rule. While I developed a conception of moderate idealization in *Liberal Politics and Public Faith*, I only applied idealization to the justification of legal coercion, I need an account of idealization regarding the public justification of moral rules generally.[241]

Idealization is used to characterize the relevant justificatory public and the idea of a sufficient reason to endorse or reject a moral rule. Idealization is not meant to provide an account of all our normative reasons, or even all deontological reasons relevant to justice and right action. Instead, idealization focuses entirely on identify the reasons that can justify public moral and political power, and their associated forms of punishment, ostracism, and coercion. Further, it is critical to recognize that idealization is not an attempt to defend a hypothetical consent theory. Instead, hypothetical models in public reason, going back to Rawls, are *heuristics* for determining the reasons real persons – "you and me" – possess.[242] So, idealization works as follows: a justificatory reason is one that an individual would endorse if she were suitably idealized, say as fully rational, informed, and reasonable. The endorsements of the idealized person are *models* that output the reasons that apply to us in the context of justifying moral and legal rules.

[241] Vallier 2014, Chapter 5.
[242] Rawls 2005, p. 28.

Public reason liberals also idealize to avoid attributing reasons to persons based on what real-world persons presently endorse (or, at least, the reasons real-world persons *claim* they endorse, since what current individuals claim to endorse is surely corrupted by inferential errors and ignorance). We should not tie the justification of moral rules to these factors, not only because we would end up with worse moral orders, but also that it is hard to see how such reasons could form a bona fide justification for ostracism or punishment in the first place. So the pressure to idealize is the pressure to not base a moral order on ignorance and irrationality.

As I read the literature, standard conceptions of idealization contain two epistemic dimensions, a rationality dimension and an information dimension.[243] These dimensions regulate what citizens believe about what they have reason to do. The rationality dimension regulates how citizens reason with respect to their beliefs, i.e., how they draw inferences from more fundamental beliefs to more complex beliefs and how they revise their beliefs in response to new data. The information dimension determines the non-normative facts that persons can access – facts about the world and their present circumstances. The standard, radical approach to idealization pushes both dimensions to their limit, assuming the public's reasons are modeled by what their perfectly rational and informed representatives would affirm.[244] The reasons identified by this process should

[243] I do not have the space to review standard conceptions of idealization, but for two familiar models, see Rawls 1971, pp. 16-17, 119-121 and Gauthier 1986, pp. 233-58.
[244] Rawls 1971, pp. 118-123.

comprise the most coherent and plausible harmonization of real-world persons' considered judgments. Consequently, the original position idealization ascribes reasons to real persons, in particular reasons to comply with the two principles of justice.

But there are more moderate conceptions of idealization, such as the models advanced by Gaus and myself, that rely on more modest notions of rationality and information, such as the rationality and information necessary for real moral agents to navigate the world given normal environmental constraints.[245] Individuals are boundedly rational and informed. I cannot here review all the reasons that one might radically or moderately idealize along both epistemic dimensions. But the trade-offs are relatively simple to state. If we radically idealize, public justification will not be subject to any irrationalities or ignorance, but we face the cost that the models of idealization we use generate reason-ascriptions that are too far removed from ordinary agents' concerns. However, if we moderately idealize, we allow reason-ascriptions to be based on some non-trivial amount of irrationality and ignorance.

In this book, the core case for idealization in justifying moral rules is that idealization is required to explicate the idea of rational scrutiny and validation. Rational validation is understood as a condition through which an agent can begin with her own evaluative commitments and trace an inferential path towards endorsing (or at least not rejecting) a moral rule her society applies to her. We

[245] Gaus 2011, pp. 244-258. Also see my Vallier 2014, Chapter 5.

cannot appeal to radical idealization to develop the idea of rational validation because it involves changing far more beliefs than the idea of rational validation warrants. The entire point of rational validation is to show how people, *as they are*, can assess moral rules from their own perspectives. Radical idealization permits dramatic revisions to our beliefs and values, such that a radically idealized individual may lack the core commitments of her real-world counterpart.

In the same way, we must idealize some if we are to establish that rational moral trust is *practically rational*. Persons can only have sufficient reason to comply with a rule if the reasons they have possess at least some epistemic pro-status. Present acceptances frequently lack any epistemic pro-status because they are defeated, so by being based in bad inference or in culpably failures to gather relevant information. So if we are to insist on rational endorsement, we must insist on using idealized accounts of the reasons we have.

Another argument for moderate idealization is that it plausibly specifies what it means to take others to be sources of reasons and so to treat her with respect by treating her *perspective* with respect. A person's perspective is not merely her present set of acceptances, but rather consists in the reasons a person has given her core values and commitments. If we do not idealize, then the justificatory reasons we ascribe to persons may bear no necessary inferential connection to that person's core values and beliefs. By responding to those reasons, we would therefore not take her perspective into account, just her present acceptances, however biased or irrational. Similarly, we cannot appeal to radical

idealization because radical idealization threatens to erase a person's values and commitments. Consequently, by responding to the radically idealized reasons of persons we would not be responding to *them* at all. Similarly, if trusting others is a way of taking their perspectives into account, then if we appeal to radical idealization, we will not trust the person in question, but a rationally exemplary phantom.

Given the importance of moral peace, I do not think that the fact that moderate idealization allows justification based on reasons that lack the best epistemic credentials is problematic. If our aim in a diverse society with people that deeply disagree about justice and the good is to establish moral trust, then responding to moderately idealized reasons seems more appropriate than responding to present acceptances of rationally exemplary reasons that cannot be plausibly ascribed to those with whom we wish (and with whom we *ought* to wish) to establish moral relationships with. Yes, moral and legal rules will be based in some rational errors, but that is the consequence of being concerned with moral peace.

VIII. Wolterstorff and Enoch Contra Idealization

Christopher Eberle, David Enoch, and Nicholas Wolterstorff have all complained that idealization risks authoritarianism and paternalism by forcing people to comply with laws or moral rules that they would accept if properly idealized

despite the fact that they in fact reject.[246] I have elsewhere offered a generic reply to these criticisms, but here I want to defend my account of idealization against these new criticisms.[247]

Wolterstorff has worried that idealization severs the connection between respecting persons as free and equal and respecting their rational autonomy on the one hand and only taking the concerns of their idealized counterpart into account. Wolterstorff:

> Why does respect for a person's rational autonomy, thus understood, justify us in ignoring his views, if he in fact disagrees with the legislation, and in coercing him? For that is what the proposal amounts to: ignoring the actual views of all those who are not fully rational. Why do only the rational people, along with everybody's fictional rational counterpart, count in the political calculus? Do we not deserve respect in our actuality as persons with political beliefs?[248]

For Wolterstorff, there is no clear argumentative connection between respecting persons and basing law on reason those persons would affirm if idealized. In fact, there is serious risk of disrespect.

---

[246] Eberle 2002, pp. 209-233, Wolterstorff 2012, pp. 31-5, 68-75, 83-5, 103-110, Enoch 2013, pp. 159-160.

[247] Vallier unpublished.

[248] Wolterstorff 2012, p. 33.

Similarly, Enoch complains that moderate (in this case Gausian) idealization permits us to treat persons in a condescending or patronizing fashion. If we treat people in accord with what their idealized counterparts would endorse, rather than what they actually endorse, we are condescending and patronizing. We certainly do not treat them as free and equal. This is why Enoch claims "the thought that by offering such a response [as Gaus's] any progress at all has been achieved in dealing with authoritarianism sounds ridiculous."[249] In fact, by treating people in accord with moderate idealization, we do something morally worse than treating them in accord with a mind-independent, transcendentally true moral principle. For the treatment literally "adds insult to inquiry." Gaus is both "willing to coerce his interlocutor based on a rule she doesn't endorse" and tells her "she misunderstands her own deep normative commitments."

What unites the two criticisms is the idea that the grounding value of public reason (be it respect or anti-authoritarianism) prevents treating people according to what their idealized counterparts endorse. Wolterstorff cannot see how the value of autonomy permits us to disregard what persons actually, freely claim to endorse, whereas Enoch cannot see how the value of avoiding authoritarianism permits us to disregard what persons, actually, freedom claim to endorse. If we care about autonomy and would like to prevent authoritarianism, appealing to idealization *frustrates* our goals.

[249] Enoch 2013, p. 166.

But the form of idealization I favor serves the realization of moral peace between persons; idealization is not a proxy for consent or autonomy, nor does it seek to avoid authoritarianism. To establish moral peace, diverse persons must rationally endorse a social order's moral rules; rules must be those each person has sufficient reason to accept, such that the rules survive the criticism of each person's moral point of view. This means there is little motivation to appeal to what persons actually endorse, save for the fact that what others say they endorse may be our best indicator of what reasons they have. Since we should be humble in idealizing, appealing to real-world others for information is critical. But our account of their *reasons* is not settled by what they presently endorse. Again, the source of normativity is not consent, but peace based in moral reasoning.

To put it another way, even if John manages to get Reba to agree with his proposal, the terms of the peace will be dishonest or insincere. John secures the agreement while simultaneously believing that his best model of her reasons would lead her to reject the terms. Perhaps John knows that Reba only agrees to comply with a moral rule because she has not thought things through; like a disreputable car salesman, he must close the deal before Reba thinks too much about it. In an important sense, then, John pulls the wool over Reba's eyes and the eyes of all other people who cannot or have not rationally interrogated their social morality. In this way, basing moral rules on what we presently claim to accept cannot establish a long-term, stable moral peace.

In contrast, John treats Reba in a morally peaceful fashion when he insists that Reba comply with moral rules that John believes could survive Reba's rational evaluation. He does *not* treat Reba in a morally peaceful fashion by modeling her reasoning based on the cognitive capacities of a god with full information and perfect rationality, but he must idealize all the same.

Moral-peace based idealization, then, need not fall victim to Wolterstorff's criticisms because idealization is not an attempt to secure the consent of persons or to protect their autonomy. Instead, idealization demonstrates that some moral rules realize moral peace because each person has sufficient practical reason to comply with the rule. And widespread compliance with moral rules generates social trust. Failing to idealize would lead us to base social trust on weak or no rational evaluation.

Part of the force of Wolterstorff and Enoch's critique arises from imagining someone browbeating another person based on what the browbeater believes the browbeaten has most reason to do, even when the browbeaten person is telling him otherwise. But this is not an objection to idealization; instead, it is a complaint that the browbeater is misunderstanding the reasons of the browbeaten. That is why it is vital to listen to real world others. John may be prone to error regarding Reba's evaluative standards. Wolterstorff and Enoch worry that John discounts the complaints of real-world Reba when he appeals to idealization to discount Reba's real-world objections to his demands, or, at least public reason *permits* John to discount Reba's objections. But John only discounts Reba if he

makes moral demands of her despite realizing that she lacks sufficient reason to endorse the moral rule that John demands Reba follow. If John sincerely and carefully considers her objection, and his best model of her commitments indicates that Reba is mistaken about her commitments, then he can make a demand of her anyway. This is because his actions are shaped by his decision to take Reba to be a source of reasons, even if she herself explicitly disagrees with his demand. I recognize that my suggestion may sound counterintuitive, but just consider any case where we make moral demands of persons that they *know* better than to resist. We think they're just making excuses and trying to justify themselves based on bad reasons. A common example would be an addict who refuses to check into a rehabilitation facility so that she won't lose her children to local child services. If John demands that Reba go to rehab, and Reba refuses, John may nonetheless demand that she go anyway, since he knows that she does not *really* want to keep hurting her children. In Chapter 4, I will argue that in some cases, we may coerce persons to comply with laws on a similar basis.

IX. Internalization and *Modus Vivendis*

I understand public justification as a means of preserving moral peace between persons. When moral rules have authority based on the intelligible reasons of moderately idealized members of the public, moral trust is rational, and a society can achieve a great measure of moral peace. With this understanding, I turn to

explain what endorsement involves. I argue that publicly justified moral rules should be *candidates for internalization*, rules that people accept as their own and hold themselves to given their own moral emotions. The idea of internalization is critical for distinguishing a morally peaceful society from one whose stability and persistence is based on mere power relations. In the latter *modus vivendi* society, people have *some* reason to comply with the rules to which they are subject, but these are not reasons to internalize those rules. As such, any peace imposed is not *moral* because it is based merely on coercion, fear, and intimidation. The idea of internalization should help us distinguish between a morally peaceful order based on a social peace treaty from the peace that comes with one group surrendering to another.

Sometimes *modus vivendi* regimes are understood as those whose stability is based primarily on a contingent balance of power rather than the fact that people can see themselves as its authors.[250] This is why *modus vivendi* regimes are said to rest on mere force rather than reason. In contrast, a publicly justified polity should be stable based on the *moral* reasons of persons. David McCabe, who defends a version of *modus vivendi* liberalism, argues that public reason liberals draw too hard and fast a distinction between our pragmatic reasons to follow laws under a *modus vivendi* regime and our principled reasons to follow laws in a publicly justified polity. The only way to defend such a distinction is to accept the "power-independence" assumption, which holds that "one's endorsement of some policy

[250] Rawls 2005, p. 147.

or principle is morally grounded only if one would not support a different policy or principle under a different balance of power."[251] On the power-independence assumption, a regime can only be publicly justified if citizens would support their favored laws if power relations differed. McCabe rightly points out, however, that every regime's stability depends on a balance of power because our moral judgments are often contingent on arrangements of power, and that it is hard to imagine laws that are *not* contingent in this way. For instance, we might support a law based on the fact that our favored party is out of power, but my reasons for such support are surely consonant with living in a publicly justified polity. I agree with McCabe that it is hard to distinguish our pragmatic reasons for supporting laws under a *modus vivendi* regime from our principled moral reasons for supporting laws in a publicly justified polity. A *modus vivendi* regime provides us with powerful reasons to comply with its laws. Similarly, a *modus vivendi* social-moral order also gives us powerful reasons to act. We act to avoid ostracism and resentment, if not because we think the moral rule at issue is authoritative for us. Thus, if we are to characterize a morally peaceful society correctly, we need an account of the specific sorts of reasons generated by publicly justified polities that *modus vivendi* regimes, by and large, do not.

In my view, the reasons prescribed by publicly justified social orders have three features. They are reasons to follow moral and legal rules because (a) the rules advance one's conception of the good and (b) the rules are publicly

[251] McCabe 2010, p. 126.

recognized as just or fair. Further, (c) the reasons must be considerations that count in favor of internalizing the rules rather than merely complying with them.[252]

In publicly justified polities, members of the public see moral and legal rules as authorized by their fundamental evaluative commitments. Only when rules are publicly believed to advance the common good and publicly believed to treat all fairly and equally do they make a full contribution to a morally peaceful order. Thus, rules characteristic of *modus vivendi* orders can be distinguished from rules characteristic of publicly justified polities in two ways: (i) *modus vivendi* rules may be seen as advancing one's personal good, but doing so unfairly, (ii) *modus vivendi* rules may be seen as fair but not as advancing each citizen's good.

The third feature—the internalization condition—is also critical, for the best public justifications require more than mere compliance with a moral rule.[253] An agent conforms to a moral rule just when she regards herself as having reason to follow it, but the agent *internalizes* the rule when she takes it to be personally binding, which will often generate guilt and other moral emotions when she fails to meet the requirement, "even if by doing so she gets what she wants."[254] The person who complies with the rule based on a simple balance of reasons may well refuse to accord the rule authority over her. Again, a person can have a balance of reasons to comply with moral rules in a *modus vivendi* regime: she sees herself as

[252] I have refined and distinguished these conditions elsewhere. See Vallier 2015.
[253] Gaus 2011, pp. 202-4.
[254] Gaus 2011, p. 203. Gaus relies heavily on the relevant research found in Nunner-Winkler and Sodian 1988.

having good reason to avoid legal and social penalties. But *that* is not the ideal of public justification. Instead, a society at moral peace is one where people endorse the rules that apply to them as their own; they internalize the rules and regard them as personally binding.

I follow Bicchieri, Gaus, and a number of others in understanding internalization as involving the reactive attitudes and responsibility claims.[255] A failure to comply with an internalized moral rule licenses both John and others to resent John and hold him responsible for violating the rule. If John has internalized the rule, then, in an important sense, he *knows better* than to violate it. He accepts the rule as morally binding on his actions, not merely as posing an external threat if he fails to comply. If we justify a rule based solely on reasons to comply and do not appeal to reasons to internalize the rule, then we may as well count reasons to fear reprisal as justificatory. By appealing to internalization via the reactive attitudes and our practices of trusting and holding responsible, we can distinguish reasons based on a *modus vivendi* from reasons derived from a publicly justified polity.

We now have a normative basis for distinguishing between modus vivendi regimes and publicly justified polities, between societies at *moral peace* and societies *at war*. We can say that a moral rule is publicly justified for John when John has sufficient, intelligible reasons of goodness and justice to comply with and internalize the rule. Let us, therefore, understand publicly justified moral rules as

[255] Bicchieri 2006, p. 93. Taylor 1985, p. 85.

the building blocks of a morally peaceful society. A *modus vivendi* regime can be defined as one where some sizeable portion of moral and legal rules fail to be publicly justified, but whose institutions are nonetheless stable and effective.[256]

X. Eligible Sets and Social Choice

I note here, in passing, but drawing on the discussion of evaluative pluralism in Chapter 1, that evaluative pluralism implies that intelligible reasons can vary dramatically between persons. Again, in a homogenous society, where people have the same religion, philosophy, geography, education level, family structure, race, and sexual orientation, we *might* be entitled to assume that people have more or less similar intelligible reasons. But in any large-scale social order, intelligible reasons are bound to differ dramatically. Let us now further specify the fact of evaluative pluralism as a fact that persons' intelligible reasons will differ dramatically in a free, mass moral order.

Consequently, persons will disagree about which proposals are best. For this reason, my conception of public justification will take the diverse reasons of persons as inputs and generate an *eligible set of proposals* as its output. An eligible set of proposals is a set of laws, policies, moral rules, etc. that no suitably idealized member of the public has sufficient intelligible reason to reject. No member of the

[256] I have elsewhere characterized an ideal public justification as a *congruent* justification, one that realizes the ideal of congruence found in Rawls and other public reason liberals. See Vallier 2015. For an analysis of congruence as Rawls understood it, see Rawls 1971, pp. 496-503.

set is defeated, however; all members of the public regard the proposals in the eligible set as superior to no proposal at all.

An eligible set can be narrowed with a Pareto criterion, which holds that if each member of the public believes that a is superior to b, then the eligible set ranks a over b. If a proposal is Pareto superior to another, then the latter proposal is *dominated* and, by dominance reasoning, we can remove the dominated option from the eligible set of proposals in order to generate an *optimal* eligible set.[257] Importantly, dominated proposals are still *socially* eligible in the sense that members of the public regard the rule as better than nothing. But they can nonetheless be excluded from the optimal set.

Now, given evaluative pluralism, how many elements should we expect the optimal eligible set to contain: zero, one, or more than one? An optimal eligible set cannot be empty if the socially eligible set has at least one member, since the optimal eligible set is formed by all proposals superior to otherwise socially eligible proposals. Thus, when the optimal eligible set is empty, we can infer that all (in this case) moral rules are defeated, such that no moral rules have authority, and so cannot be the object of rational moral trust. Given enough diversity, there will be many null optimal eligible sets.

Some optimal eligible sets will contain one and only one member, but this state of affairs should prove exceptional. Diverse intelligible reasons will arguably place more than one eligible proposal in many optimal eligible sets. Evaluative

[257] Gaus 2011, p. 323.

pluralism will also ensure that members of the public rank members of the optimal eligible set differently (after all, if they ranked them identically, Pareto shrinks the set). Consequently, we can expect more than one eligible moral rule for regulating harmful, non-cooperative behavior in many cases.

Optimal eligible sets with more than one member raise the question of how we are to select a proposal from the set, given that members of the public will want to institutionalize at least one member of the set as a real-world rule. Given the diverse reasoning of members of the public, further reasoning is unlikely to generate consensus. This means that we need some publicly justified *decision procedure* for social choice.

Loren Lomasky addresses the possibility of an optimal eligible set of proposals with more than one member.[258] In Lomasky's view, there are many combinations of rights that adequately split the difference between our desire to protect our holdings and to aggress against the holdings of others. A social contract cannot tell us which option is best, so we must appeal to social evolution to converge on a scheme of basic rights. Gaus develops a similar insight and applies it to public reason liberalism. Rawls would eventually admit that multiple conceptions of justice are eligible and that reasonable persons will rank them differently, though he resisted this conclusion for some time.[259]

Gaus has spent the greatest effort to explain how decision procedures are justified. In *Justificatory Liberalism*, Gaus argues that we should use publicly

[258] Lomasky 1987, p. 79.
[259] See the Introduction to the Paperback Edition in Rawls 2005, p. xxix-xxxvi.

justified decision procedures to select a proposal from the optimal eligible set, which he then understood as a set of inconclusively justified proposals.[260] So long as we can publicly justify a decision procedure, appealing to that procedure to select a member of the optimal eligible set is permitted and can lead to the conclusive justification of at least one proposal because the proposal is both a member of the optimal eligible set and is selected by a publicly justified decision procedure.

In *The Order of Public Reason*, Gaus identifies a problem with using decision procedures in this way: if one procedure is publicly justified, others might be as well.[261] This raises the question of how members of the public are to choose decision procedures.[262] We might attempt to solve this problem by employing a *second-order* decision procedure to select a first-order decision procedure from an optimal eligible set of procedures. But this will quickly generate a regress by requiring a third-order decision procedure to resolve dissensus about second-order decisions procedures, a fourth-order decision procedure, and so on. Gaus attempts to avoid the regress by denying that we must publicly justify the processes by which we settle on a moral rule and that we can converge on inconclusively moral rules via cultural evolution.[263] So Gaus now denies that we must conclusively justify decision procedures. I will follow him in this.

---

[260] Gaus 1996, pp. 223-6.
[261] Gaus 2011, pp. 391-393, 407 discusses related concerns.
[262] It is also possible that the eligible set of decision procedures is empty …
[263] Gaus 2011, pp. 389-409.

XI. Veto Power and the Justificatory Baseline

We can now see that evaluative pluralism means that different people have different intelligible reasons and that, as a result, many proposals may be optimally eligible even if members of the public rank them differently. Moreover, the intelligible reasons of persons will also lead to the *defeat* of many proposed moral rules. In this section, I want to say more about what this defeat consists in. In brief, it is a kind of *veto power*.

When a person has sufficient intelligible reason to reject a proposed moral rule, then the rule has no authority over her and, as a result, holding her to the rule violates our practice of accountability. That is all the mere present of defeater reasons in one member of the public implies. This raises the distinct question of what we must do to repair our practice, which in turn should give us a sense for what should happen to a defeated moral rule. The most obvious thing to do is to stop demanding that the person who has defeater reasons to comply with the moral rule and to stop interfering with her to ensure that she complies. In so doing, however, the moral rule will remain a social norm, even if its status is weakened, since it still governs the behavior of the group by forming empirical and normative expectations. In this case, members of the public who recognize the defeater reasons in another person have at least three possible courses of action if they wish to respect that individual: (i) they can selectively apply the rule, maintaining its status as a social norm for the vast majority of the populace, (ii)

they can attempt to change the rule from a social norm to a descriptive norm by only resisting normative expectations to follow the rule, or (iii) they can seek to deprive the moral rule from its status as any kind of norm by resisting both empirical and normative expectations to follow the rule. Confining our practice of accountability to the reasons of others permits any of these responses.

My sense is that members of the public will assume that if the moral rule lacks authority for one individual that it probably lacks authority for many others who are not disobeying the rule. Moreover, tracking and distinguishing between people who have reason to go along with the norm and those who do not is quite cognitively demanding.[264] So for the most part, option (i) is off the table. I think it's clear that action (iii) is required, since imposing normative expectations on others will be seen as inappropriate and as a failure to treat others with respect. I also expect that moral rules that *need* normative expectations to remain stable, as many social norms require, that degrading the moral rule to a descriptive norm will gradually lead to its evaporation. That means, in practice, when a moral rule is defeated, it will gradually cease to exist, and that if we respect others as sources of reasons, that this will be the normal fate of defeated rules. So for the remaining of the book, we can understand defeat as implying that moral demands in accord with the rule are inappropriate, as are the forms of interference required to enforce

[264] Though that doesn't mean it can't happen. We can only enforce some moral rules within our particular family, race, or religion. It happens quite a bit. I discuss these cases in Chapter 7.

the rule. This will ordinarily lead the moral norm to collapse.[265]

My conception of veto power helps to define a conception of the justificatory baseline, the state of affairs that morally ought to obtain when a rule is defeated. The baseline is for the proposed or extant moral rule to cease to be a social norm, and become either a descriptive norm or not a norm at all. And in the ordinary case, a defeated moral rule should cease to be a norm at all. This implies that the baseline for justification is *having no moral rule* backed by normative expectations. Thus, we have a presumption in favor of moral liberty, where normative expectations should not apply to persons in the absence of a public justification. So to show that a moral rule ought to be in effect – normative expectations and all – requires overcoming the presumption by providing a public justification for the rule.

XII. Public Justification and Moral Peace

So far I have outlined the object of public justification (authoritative, internalized moral rules), the currency of public justification (a positive balance of intelligible reasons to internalize moral rules as authoritative) and the subject of public justification (a member of the public idealized through a moderate, practiced-derived model). I can now provide a formal definition of when a moral rule is publicly justified. Let's begin with the idea of public justification for a single agent:

[265] Unless, of course, the law enforces it. And if the law is defeated, then the law should probably not exist, though I'll discuss this case further in Chapter 4.

> *Public Justification Principle for an Agent*: a moral rule is publicly justified for a member of the public only if the member of the public has sufficient intelligible reason to internalize the rule.

We can also define a generic principle of public justification for moral rules:

> *Public Justification Principle*: a moral rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the rule.

The case for the public justification principle is that it specifies that conditions for realizing moral peace between persons by specifying the ideal of practical rationality in rational moral trust in a society replete with evaluative pluralism. If a moral rule is publicly justified for John, then it is practically rational for him to internalize and comply with it, so long as others do likewise, even when compliance comes at some cost to him. In this way, John can rationally endorse the rule because a balance of his subjectively accessible reasons favors following the rule. The moral rule survives John's rational interrogation. And unless the rule is publicly justified, it cannot survive John's interrogation. Thus, the moral rule is rational for John if *and only if* it is publicly justified for John.

If the moral rule is publicly justified for *community members*, John can be epistemically justified in believing that each member of the public has sufficient

practical reason to endorse the rule. And so can everyone else. The chance of jointly recognizing that the moral rule is justified for each person is a critical basis for establishing moral trust, since persons come to see that others have good reason to comply with the moral rule and probably will do so. Publicly justified moral rules are ones that persons take themselves to have reason to internalize, such that the formation of one's goals should generally be congruent with the moral rules one affirms as binding. And if the moral rule is publicly justified generally, that suggests others are generally willing to do their part to facilitate each person's goals (admittedly unknowingly) by complying with the rule. They are willing because the moral rule is publicly justified for them. And since the moral rule is a social norm, each member of the public already knows that others are *able* to do their part by complying with the rule. Consequently, when the moral rule is publicly justified, John can have rational moral trust that others will comply with the rule for moral reasons. Public justification establishes "relations of trust."[266]

For example, if John believes that a speed limit law is publicly justified for other people on the road, then he believes that compliance with the speed limit law in some way facilitates his aims, even if it sometimes holds him back. He also believes that others regard the moral rule as binding, and so believes that they are generally and genuinely willing to comply with the moral rule. And since the traffic law is a social norm, he knows that others are able to comply with the traffic

[266] Gaus 2011, p. 315.

law. In this way, the traffic law is the object of moral trust. Persons socially trust one another to comply with the moral rule.

Further, if a moral rule is publicly justified, deviations from the moral rule will be culpable, and so will warrant punishment under normal conditions, and they will be understood as such.[267] Punishment should therefore help to stabilize the moral rule, and so maintain it as a public norm. This will help to ensure compliance, and so increase moral trust.[268] Speed limits are not always observed, but when people go much faster than the driving public regards as acceptable, they will ostracize him by honking their horns, yelling, and the like, and so punish the speeder for speeding. This will help to enforce the traffic law on top of the threat of police penalty. And so the speed limit law will be more stable than otherwise, and further form the basis of trust between persons.

Assuming that the speed limit law is a moral rule, as speed limit laws often are, then we have moral trust. And since the moral rule is publicly justified, we have rational moral trust. This rational moral trust contributes to a society's overall degree of moral peace. With enough publicly justified moral rules like the speed limit law, a society will have a high degree of rational moral trust, which establishes moral peace between persons.

I can now summarize the main argument of this chapter, which is to establish the following premise: confining our practice of accountability in accord

[267] Sometimes deviation might indicate a failure of rational scrutiny, as someone might deviate from the norm because she comes to believe that others are deviating from the norm. Deviation might also indicate that the norm is not publicly justified for the deviator, as noted above.
[268] As will forgiveness in cases where norm violations harm individuals or groups and the violator cares about being restored to full community standing.

with the reasons of others requires applying moral rules to persons only when the rules are publicly justified. This is because our practice of accountability sustains a system of moral trust that gives rise to moral peace, and the practice can only be rationally maintained if we regard each person as having sufficient practical reason to comply with the rules to which her community holds her. The idea of public justification specifies the idea of having sufficient practical reason to comply with moral rules. The reason it specifies the idea of having sufficient practical reason is because public justification is focused on showing that each person has reason of her own, that is, intelligible reasons, sufficient to justify complying with and internalizing a moral rule, and so making the moral rule subject to our practice of accountability. The reasons that justify must be intelligible if they are to represent a person's deep commitments and values, and so to show that she has, on balance, sufficient reason to comply with an internalize a rule. The reasons must be rooted in moderate idealization if they are to be both the *reasons* of persons, rather than mere affirmation, which is the result of eschewing idealization, and if they are to be the reasons of *persons* rather than philosophical phantoms, which is the result of radical idealization.

In this way, we establish my overall conclusion from Chapter 2: within a system of moral trust, there is a response-independent moral requirement to apply moral rules to persons only when the rules are publicly justified. I advance a realist foundation for public reason liberalism by connecting respect for persons to our practice of accountability, and connecting our practice of accountability to a

conception of public justification. In Chapter 4, we will extend my argument to requiring the public justification of law.

XIII. Objections Addressed

I would like to end the chapter by addressing a number of common objections to public reason liberalism. In this section, I briefly review a variety of objections that I have already implicitly answered. These are the incompleteness, integrity, indeterminacy, theoretical indeterminacy, insincerity, arbitrary idealization, anti-democratic, and unreasonableness objections.[269]

The incompleteness objection holds that public reason cannot address a number of important questions because it restricts public reasoning in public life. Typical public reason views restrict public reasoning to, say, shared reasons, and so cannot resolve a variety issues that one must appeal to one's comprehensive doctrine to resolve. Similarly, some object that the restrictions on reasons advocated by public reason liberals burdens the integrity of religious citizens. But my view does not raise these objections because the intelligible reasons requirement allows for far more reasons to enter public justification and places no restraint on citizens qua citizens.

Complaints about indeterminacy come in two varieties. The first objection holds that many conceptions of justice adopted by public reason liberals are

[269] For a review of the objections and citations to those who advance them, see sections 5.1, 5.2, 5.4, 5.10, 5.11, and 5.12 in Vallier and D'Agostino 2012.

indeterminate in that they do not generate clear solutions to political problems. This is often true of views that rely heavily on the theory of justice to develop a conception of public reason, but in following the Gausian project of allowing, even embracing indeterminacy, I am not vulnerable to this objection. Fred D'Agostino has argued that there is no non-arbitrary way to determine the conception of public reason we ought to use, such that there is indeterminacy in public reason at the level of theory, that is, in deciding which version of public reason is correct.[270] I avoid this concern by granting that some versions of public reason might be better suited to realize values other than moral peace between persons. But I think Chapters 2-3 demonstrate that moral peace has value and that it implies a particular version of public reason.

Some complain that convergence views like mine allow for persons to be insincere with one another by offering one another reasons that they reject. If I offer someone an intelligible reason that is not a reason for me, Quong has worried that in doing so, I am trying to manipulate people to accept a reason that I think is invalid. In reply, I have maintained that we can offer one another intelligible reasons because we recognize the reason as a reason for the person we offer the reason based on that person's evaluative standards. Quong has countered that a move like this one requires public reason liberals to adopt a controversial conception of epistemic justification, but I have argued that the notion of epistemic justification at work in public reason as set by the value of moral peace

[270] D'Agostino 1996, p. 19.

between persons; it is not drawn from a comprehensive epistemology.[271]

The arbitrary idealization objection holds that there is no way to idealize persons in a non-arbitrary fashion. Eberle has argued that any idealization will tend to reflect the biases and values of the theorists who engage in the idealization. But I think I have shown above that my notion of idealization follows from the value of realizing moral peace between persons, such that the level of idealization set is not arbitrary or driven by my own bias. I think this is especially true because I allow for radical disagreement under conditions of moderate idealization, so I am not smuggling my views into public reason.

The antidemocratic objection holds that Rawlsian versions of public reason fix the content of, say, principles of justice, in advance of real deliberation. Habermas famously advanced this criticism against Rawls.[272] But on my conception of public justification, the content of principles of justice is not fixed in advance. I have already argued that there is reasonable pluralism about conceptions of justice, so the process of public justification must involve negotiation over the public content of justice.

I now want to address the unreasonableness objection, which holds that public reason liberals often appeal to the controversial idea of reasonableness when delineating the scope of members of the public. Some see this as inegalitarian and elitist. But I do not rely heavily on a technical idea of the reasonable. I have other means of ruling out various problematic proposals, such

[271] I provide additional objections to Quong's critique in my previous book. Vallier 2014, pp. 123-4.
[272] Habermas 1995, pp. 127-8.

as appealing to the formal restrictions on moral rules, and by arguing that it is hard to publicly justify many laws and policies that we would find inegalitarian, racist, etc. I deny that my view requires marginalization; if anything, it is too permissive.

It is also worth noting that my view does not permit the mistreatment of persons who offer unintelligible reasons or insist upon using them in politics. If they attempt to impose coercion that cannot be publicly justified, then good and just persons must resist them on the grounds that they attempt to disrupt moral peace. And it is critical to recognize that in acting as they do, persons who support publicly defeated coercion are disrupting the moral peace and effectively attacking others in an attempt to dominate or oppress them. This means that by stopping them, we are not undermining moral peace between persons. Rather, we are using coercion in ways that *preserve* moral peace from those who would undermine it. So the value of moral peace requires the public justification of moral rules, but it also permits coercion to prohibit people from disrupting the moral peace with publicly unjustified coercion.[273]

XIV. Perfectionism, Asymmetry, and Empty Sets

I will now briefly review three more objections: the perfectionism objection, the

[273] There might be other ways of disrupting moral peace between persons that are accidental, say by offering arguments in public discourse that lead to confusion and so to attempts to use coercion in ways that only appear to be publicly justified.

asymmetry objection, and the empty set objection. The perfectionism objection holds that public reason views prevent states from promoting the good and the flourishing of its citizens. The forms of "neutrality" or "restraint" entailed by the idea of public justification cannot be justified, though perfectionists substantiate this objection in different ways.[274] Without public justification, ostracism and coercion that promote the true good and flourishing of citizens undermines the good of moral peace between persons. My response to the perfectionist, then, is that the forms of coercion that they typically support that public reason liberals reject will actually frustrate the fundamental good of respect for persons. I expect the perfectionist to reply by stressing the loss of goods other than moral peace, and then to claim that, on balance, more good can be realized by giving up moral peace. My response, given in Chapter 2, is that respect for persons is a generic moral requirement that overrides the pursuit of objective goods.

The asymmetry objection holds that public reason liberalism acquires much of its intuitiveness from pointing out that reasonable people disagree about their conceptions of the good, and then use this fact of disagreement to help generate a common conception of justice. But critics argue that public reason denies reasonable pluralism about justice, and thus prefers agreement about rightness over agreement about goodness. They thus point to an asymmetry.[275] My response, given in chapter 1, is to deny asymmetry and to treat pluralism about the good and justice pluralism similarly, and I have argued elsewhere that Quong's response to

[274] Wall 1998, pp. 29-43.
[275] Quong 2011, pp. 192-220.

the asymmetry objection fails.[276]

The empty set objection holds that my view permits too many defeater reasons for proposed laws.[277] When the diversity of citizens' reasons is brought to bear on the process of public justification, it may turn out that very few proposals can be publicly justified, so few, in fact, that intuitively legitimate political orders could not permissibly engage in the forms of coercion required to maintain even a society's basic structure. The most prominent arguments against the debilitating presence of empty sets are sociological, arguing that our shared ideas and practices make empty sets unlikely. Both Rawls and Gaus give various sociological arguments to suspect that the set is not empty.[278] One strategy for resolving the empty set objection is to provide a ranking of eligible laws or proposals in accord with what members of the public have reason to accept or reject. Given the interest members of the public have in using at least a few laws to generate public order, empty set problems may be manageable given that many laws will be preferred to none. This implies that citizens must accept non-optimal proposals so long as they are not defeated.

I will say more in future chapters by arguing that, on a number of issues, my version of public reason will not leave us with debilitating empty sets. My argument that we are not stuck with empty sets will span much of the rest of the book. In future chapters, I try to show that a scheme of primary rights can be

[276] Vallier 2016 (E7).
[277] I have addressed this objection with respect to expressly political public reason in Vallier 2014, pp. 130-4.
[278] Rawls 2002, pp. 124-8. Gaus 2011, pp. 303-333, 389-408, 424-447.

justified and that we can publicly justify democratic processes to choose among members of the eligible set (showing that the set of decision procedures is not empty).

XV. Self-Defeat

We are left with the objection public reason liberalism is somehow self-defeating.[279]

One potentially powerful objection to any conception of public justification is that it is self-defeating. Steven Wall claims, for instance, that the rationale for public justification requirements entails that the requirements themselves must be publicly justified.[280] But given that many, if not most, reasonable people reject public justification requirements, due to evaluative pluralism, such requirements cannot be publicly justified. Define public reason's *reflexivity requirement* as the view that public justification requirements must be publicly justified if they are to determine which laws (or, in our case, moral rules) are publicly justified. The argument from self-defeat combines the reflexivity requirement with the attractive claim that many reasonable people do or would reject public justification requirements.

To run a successful self-defeat objection against my moral peace foundation

[279] I have addressed the self-defeat objection in detail in an article, so those unsatisfied with this degree of detail should read my article on the matter. Vallier 2016b (E7).
[280] For criticism of the mainstream version, see Wall 2002. For criticism of the Gausian version, see Wall 2013. Enoch has recently run a very similar argument against Gaus. See Enoch 2013, pp. 170-173.

for public reason, we need an argument that moral peace between persons requires the public justification of my public justification requirement. Wall's arguments can be retrofitted for this purpose. He argues that we must endorse the reflexivity requirement because public reason liberals implicitly use public justification requirements to justify moral rules and coercive laws.[281] We are not entitled to assume "that people can be given a reasonably acceptable justification for coercive political authority, independently of whether they have been given a reasonably acceptable justification for the condition that legitimates it."[282] Public justification requirements, for Wall, are components of the justification of much moral and political authority. Briefly, the justification for a moral rule and the justification for its justificatory test cannot be separated.

To answer Wall, I want to weaken the reflexivity to the point where the self-defeat objection no longer succeeds. The reflexivity requirement says that a given public justification requirement is a genuine moral requirement only if it is publicly justified. But I claim that Wall demonstrates, at best, a weaker claim, namely that a public justification requirement cannot be a genuine moral requirement if it is used *as a reason* to impose publicly *unjustified* ostracism or coercion. The self-defeat objection only works if we propose to coerce or control others based on a principle they reject and that they have no other reason to

[281] Ibid., p. 388.

[282] Ibid., pp. 388-389. The text implies that Wall's self-defeat claim should be interpreted strictly, as the claim that the reasons that favor a PJR also favor endorsing RR, which in turn implies self-defeat. We are not dealing with a looser objection, where the values underlying PJR may be generally in tension with applying it in cases whether PJRs are not themselves publicly justified. I thank an anonymous referee for pushing me to consider a looser interpretation of the objection.

accept it. It is true that we are not at moral peace with one another if I coerce you based on a public justification requirement you reject, but only so long as the public justification requirement is a necessary basis for the coercion in your system of commitments. If I stick to coercing or controlling you based on other sufficient reasons, then moral peace is preserved. Further, the self-defeat objector must show that the defeat of a public justification requirement in particular cases will undermine the justification of critically important moral and legal rules. If public justification requirements cannot justify relatively minor laws and norms, then we might do better to simply reject those rules than to give up on public reason.

Extrapolating from these arguments, I contend that, on my account of public reason, self-defeat is only a problem if five conditions hold. (i) Members of the public must have *views* at the right level of idealization about public justification requirements in the relevant cases. (ii) Members of the public must have sufficient reason to reject, at the right level of idealization, the relevant public justification requirement. (iii) The moral or legal rule proposed must not be able to be publicly justified on any *other* basis than those that include the endorsement of the relevant public justification requirements. (iv) The moral or legal rule must be sufficiently necessary. (v) The group of members of the public cannot be trivially small. I argue that these conditions will almost never be satisfied.

In sum, the fourth and final part of this chapter shows that my account of public reason survives the *twelve* most common objections to public reason. I have

not made a full case here, but I hope to have pointed the skeptical reader to arguments and sources that elaborate the full case.

XVI. On to Legal Systems

We now move towards an account of political public reason, the public justification of coercive law. The motivation for publicly justifying coercive law, I will argue, is that an order of moral rules that forgoes the public use of coercion will suffer from a number of critical defects. Legal rules, and constitutional rules that select legal rules, can help to remedy those defects. A society at moral peace, then, must be one with publicly justified political institutions. We shall see that, in a morally peaceful society, coercion is used only to enable moral rules to conform to the public justification principle. In this way, we can determine which political institutions preserve moral peace and show that *politics is not war*.

Chapter 4: Legal Systems

To establish moral peace in our societies, the moral rules that comprise our social order must be publicly justified. In this chapter, I argue that we can only ensure that our moral order is publicly justified by introducing a publicly justified system of coercive law to organize and complete that order.[283] I begin the chapter by explaining the notions of law and legal systems that I will use throughout the remainder of the book.

I. Law and Legal Systems

My definition of law or legal rules[284] follows a form of weak legal positivism, where laws need only have what Joseph Raz calls a "source" such that the "contents and existence of law can be determined without using moral arguments (but allowing for arguments about people's moral views and institutions, which are necessary for interpretation)."[285] That is the conception of law that I think is most useful for public reason liberals, at least for illustrating the rationale for publicly justifying laws. Since laws must be justified, it is helpful to be able to identify laws and their contents to determine whether they are morally justified or not. We do not need

[283] As I will explain below, the system of law itself must be publicly justified for the same reasons social-moral rules must be publicly justified: that only publicly justified laws preserve moral peace. So a legal system is not a *mere* instrument or tool for the social-moral order. It must be publicly justified as well.
[284] I will use the terms "law" and "legal rule" interchangeably throughout.
[285] Raz 2009, p. 47.

to appeal to antecedent moral truths to say what the law of a community is. This is all to the good given that public reason liberalism is supposed to account for disagreement about what morality requires. But notice that I do not employ this weak form of legal positivism about law in general, just about laws *with their justificatory status unspecified*. A publicly justified law is one which members of the public regard as moral, such that we cannot identify publicly justified laws without appealing to what is justified or not, as specified by the public justification principle. I will assume that legal positivism is true about law *as such* but not about publicly justified law.

I understand laws as *supremely authoritative social rules typically coercively enforced through legal sanction by publicly recognized law-applying institutions*. Laws are social rules because they are recognized as a matter of social fact.[286] Social facts can be understood as "subjective facts that concern *interaction between subjects* – facts about subjects, their beliefs, desires, objectives, aims, choices, points of view…."[287] Ultimately, then, laws are social rules in the same way that moral rules are social rules. Laws are social norms in that they are rules that come with empirical and normative expectations; we ordinarily expect others to comply with the law and we think they ought to do so. Raz remarks that, "all agree that a legal system is not the law in force in a certain community unless it is generally adhered to and is accepted or internalized by at least certain sections of the

[286] Murphy 2006, p. 4.
[287] Murphy 2006, p. 5.

population."[288] So law is not only a social fact, as a rule that exists because it is recognized as existing, but it must be generally complied with and in some cases internalized by some sectors of the population. The recognition dimension implies the existence of empirical expectation, whereas the internalization dimension implies normative expectations.

Law is *authoritative* in that it "does not request: it commands."[289] Like moral rules, laws are also *de facto* regarded as obligatory; those who violate them are guilty. So laws are not mere advice or counsel, or good rules of thumb. They purport to have *de facto* (but not necessarily *justified*) authority over those to whom they apply. But legal rules go beyond moral rules because legal rules are often regarded as the "supreme authority within a certain society" such that they have authority over the obligatory power of competitor rules.[290] This supreme authority implies that, if laws are efficacious, those who apply and enforce the law will typically have the *de facto* power to impose the law in opposition to any challenge. A further claim is that, in virtue of having supreme authority, laws attempt to provide practical reasons for action, reasons to comply with the law. For Raz, the authority of law implies an exclusionary reason for action; it excludes as practical reasons any reasons to disregard or not conform to the law.[291] For

[288] Raz 2009, p. 43.
[289] Murphy 2006, p. 9.
[290] Raz 2009, p. 43. I do not mean here to imply that law can always limit the moral rules we might have; as we will see below, laws can only limit moral rules under certain conditions.
[291] Raz 2009, p. 30.

other legal theorists, the authority of law provides weighty reasons for action that outweigh competitor reasons.[292]

We can further specify the authority of law by observing that the law provides the "machinery for the authoritative settlement of disputes" that cannot be effectively resolved by other rules or practices.[293] Law necessarily implies the existence of "adjudicative institutions charged with regulating disputes arising out of the application of the norms of the system."[294] Thus, critically, law is *not* legislation (not necessarily, anyway).[295] But it is still distinct from custom in that it is formalized by an adjudicative system. Laws require courts. This does not mean adjudicative systems need to be complex. A primitive tribe can have laws if it has authoritative social rules that are enforced by its authorities.

Laws are also typically backed by *coercive* force. In some cases, laws do not claim coercive authority, such as laws passed by legislators to celebrate a national holiday or mint coins in certain way. But the vast majority of laws with which we are concerned are authoritative social rules backed by violence. Laws are typically physically enforced against violators, either by the community, or by agents of the community or the nation-state. These enforcers act in concert with adjudicative institutions, such that enforcers typically obey the dictates of the adjudicator.

---

[292] For a detailed argument against Raz's position and in favor of the weightiness approach, see Gur 2007

[293] Raz 2009, p. 110.

[294] Raz 2009.

[295] I self-consciously draw on Hayek here, whose work in *Rules and Order* has the same theme. See Hayek 1973, especially pp. 72-4. Raz also notes that "not every law is created by law-creating organs, and though the importance of legislation as a law-creating method is characteristic of modern legal systems, it is not characteristic of every legal system, nor is any other law-creating method." Raz 1970, p. 191. Also see Hasnas 2013, p. 450.

Raz distinguishes laws from ordinary social rules (akin to my definition of moral rules) in part by distinguishing the idea of the *sanctions* of law from the penalties imposed by ordinary moral rules. Sanctions must be serious matters, such that they should lead to the deprivation of life, liberty, health, or possessions. And the performance of the sanctions should be "guaranteed by the use of force to prevent possible obstructions" in contrast to moral rules, where ostracism might be prevented by other moral rules.[296] Further, the sanction is "determined with relative precision in the law, and only a small and predetermined number of sanctions are applied for each violation" of the duty associated with the law.[297] Ostracism in response to the violation of moral rules is less limited and formalized. Finally, only certain persons, expressly determined by the law, may apply legal sanctions. Ostracism in response to the violation of moral rules is more open-ended; violations are in some sense everyone's business.[298]

The final feature of our definition of law is that laws require formal institutions that apply the law, namely courts. Raz defines a "primary law-applying organ" as an organ that "is authorized to decide whether the use of force in certain circumstances is forbidden or permitted by law."[299] This determination includes the capacity to determine what the law *is* in certain cases, including cases of conflict between laws, and to resolve conflicting claims about whether a law has or

[296] Raz 1970, p. 150.
[297] Raz 1970, p. 151.
[298] Though see my complication of this point in Chapter 6.
[299] Raz 1970, p. 192.

has not been violated. Primary organs include all norm-applying institutions, not merely courts, such as the police.

Legal systems are complexes of laws and adjudicative institutions. So legal systems themselves must be social facts in the same sense as laws and moral rules are; a legal system only exists when it is in force in a certain community. Legal systems must have adjudicative institutions, which regulate "disputes arising out of the application of the norms of the system."[300] A legal system must also claim supreme authority in a society, as having the in principle right of guidance and adjudication, and when the legal system is efficacious, it has the *de facto* authority and power to impose and enforce laws. A legal system also "mark[s] the point at which a private view of members of the society … ceases to be their private view and becomes (i.e. lays a claim to be) a view binding on all members notwithstanding their disagreement with it" so legal systems are taken to resolve social disputes about how to behavior.[301] The legal system's public character provides "publicly ascertainable ways of guiding behavior and regulating aspects of social law" such that "law is a public measure by which one can measure one's own as well as other people's behavior."[302]

Legal systems are also essentially "institutional, normative systems" such that *the law* is comprised of "norms, rules, and principles, that are presented to individuals and institutions as guides to their behavior by the body of legal

[300] Raz 2009, p. 43.
[301] Raz 2009, p. 51.
[302] Raz 2009.

institution as a whole."[303] Legal systems can therefore be understood as consisting of laws "which the courts are bound to apply and are not at liberty to disregard whenever they find their application undesirable, all things considered."[304] As such, legal systems have primary organs that have the *de facto* power to make "binding applicative determinations."[305] Legal systems typically, but not always, include norm-*creating* institutions like parliaments. But, you can have a legal system without norm-creating institutions I set the public justification of norm-creating systems aside for later chapters.

Raz identifies three necessary conditions for a legal system beyond what we've discussed. Legal systems must (i) "contain norms establishing primary institutions" like courts, and (ii) regard as a law as belonging to the legal system "only if the primary institutions are under a duty to apply it."[306] Raz also stresses that legal systems are (iii) "open systems" where a system is open "to the extent that it contains norms the purpose of which is to give binding force within the system to norms which do not belong to it" such that it can appropriate other systems of norms, like the canon law of churches, or local customs.[307]

Raz then distinguishes between the direct and indirect functions of law. Direct functions "are those the fulfillment of which is secured by the law being obeyed and applied," whereas indirect functions consist in "attitudes, feelings, opinions, and modes of behavior which are not obedience to laws or the

[303] Raz 2009, p. 88.
[304] Raz 2009, p. 113.
[305] Raz 2009, p. 110.
[306] Raz 2009, p. 115.
[307] Raz 2009, p. 119.

application of laws, but which result from the knowledge of the existence of laws or from compliance with and application of laws."[308] I set aside the indirect functions of law in this book, save to say that they play an important role in creating and maintaining moral peace, as social trust is arguably produced in part by widespread attitudes and feelings about the law beyond mere compliance, i.e., public opinion.

Direct functions can be divided into primary and secondary functions. Raz describes primary functions as "outward-looking" such that they apply to the general population; the primary functions are justified in terms of the effects that laws have on the population.[309] The secondary functions concern the maintenance of the legal system, making its existence and operation possible. The secondary functions are justified in virtue of how effectively they facilitate "the fulfillment of the primary functions by the law."[310] I will set aside the justification of laws that perform the secondary function to future chapters, as they include procedures for changing the law and regulating the operation of law-applying organs.[311] I focus on the primary functions of law here.

The primary functions of law are (a) preventing undesirable behavior and securing desirable behavior, (b) providing facilities for private arrangements between individuals, such as criminal law and the law of torts, (c) the provision of services and the redistribution of goods, such as defense services, road

[308] Raz 2009, pp. 167-8.
[309] Raz 2009, p. 168.
[310] Raz 2009.
[311] Raz 2009, p. 175.

construction, and (d) settling unregulated disputes.[312] A moral order without laws, then, typically cannot perform these functions to an adequate extent, or so I will argue below. But before examining this point, I should translate these functions into the idiom of public reason as elaborated in the previous three chapters.

Since I analyze the justification of law as a method of establishing moral peace between persons, I modify Raz's understanding of the four primary functions of the law into four primary functions of the moral order. These involve securing moral peace by: (1) discouraging the violation of moral rules, (2) facilitating private arrangements, (3) settling unregulated disputes and (4) delivering goods and services.

Regarding (1), we should avoid using the law to promote desirable behavior and discouraging undesirable behavior because the notion of "desirable" behavior is too broad and vague. So I argue that the legal order should generally discourage the violation of publicly justified moral rules. In many cases, moral rules and social ostracism will be enough to prevent the relevant violations. But legal systems will sometimes be required to enforce publicly justified moral rules.

Regarding (2), the legal order must facilitate private arrangements, such as the protection of interpersonal contracts regarding property transfers, marital contracts, and the like. In many cases, moral rules like promise-keeping rules are sufficient to facilitate private arrangements. But in many cases the relevant parties,

[312] Raz 2009, pp. 169-172.

and society as a whole, will benefit from formalized legal arrangements for establishing and enforcing these contracts.

Regarding (3), the legal order should be capable of providing important goods and services to its members, such as the provision of food, healthcare, and shelter. But I understand provision more broadly than Raz's phrasing implies, even if he intends something relatively capacious. For instance, the legal order should be involved not only in the redistribution of goods and services, but in their production. A primary function of the legal order, then, is to allow for the formation of economic systems whose general operation results in the provision of the relevant goods and services. Often the moral order is sufficient for these purposes, but the economy generally requires legal coercion to sustain mutually beneficial commercial activity. Raz's stress on the *re*distribution of goods suggests that the legal order should be used to forcibly remove goods from one party and given to another. Sometimes this is appropriate, but it is better if the social order can ensure good distributions in the first place.

Regarding (4), the legal order should provide a means for settling unregulated disputes, since societies are in flux with respect to their moral orders. Since moral rules change and conflict, many disputes cannot be settled in advance. Given that the moral order cannot always resolve these disputes, laws and legal systems will sometimes be required to give parties the opportunity to settle these disputes in a calm, orderly fashion. In contrast to Raz, however, I restrict the legal

resolution of disputes to legal solutions that are socially eligible, such that no party to the dispute, or affected third parties, has a defeater for the solution.[313]

In this chapter, I will appeal to the four primary functions of the social order to explain how to publicly justify a legal system. First, I will argue that a moral order without law has defects that only law can adequately remedy. Second, I will argue that a legal system can efficiently perform these functions. Third, I will argue that a legal system is not justified merely in terms of its value in improving the moral order, but rather must itself be publicly justified. Finally, I will develop an account of when laws that perform these functions have authority; that is, I develop a theory of legal (falling short of political) obligation understood as the duty to comply with laws that are *necessary components* of a legal system.

I do not provide an account of the justification or obligatory force of *legislation*, just the obligatory force of the necessary features of a legal system. As John Hasnas notes, "the duty to obey the law is not the same thing as political obligation," since legal systems can and do exist "that are not associated with any particular government or centralized political structure."[314] I develop an account of legislative authority in Chapters 5, 6, and 9.

My theory of legal obligation builds legal obligation out of social-moral obligations—our obligations to follow moral rules. Like social-moral obligations, legal obligations are justified in terms of intelligible reasons. But legal obligations

[313] The solutions might need to be in an *optimal* eligible set, but I will not impose that requirement here, since I think undefeated, yet dominated legal solutions to unregulated conflicts can be normatively binding, especially if we are unaware of the fact that the eligible rule is dominated.
[314] Hasnas 2013, p. 451.

can only generated by publicly justified legal rules, and legal rules can only be publicly justified when moral rules cannot themselves perform the four primary functions of the law.

To flesh out the conditions of legal authority, I draw on Raz's theory of political authority. Raz argues that one person has authority over another if the authority's commands, when followed, better enable persons to act on their *external* reasons for action. I revise Raz's account to replace external reasons with intelligible reasons. So I contend that laws and law-applying bodies have authority if they *efficiently* enable persons to fulfill their publicly justified social-moral obligations; that is, law and legal systems must improve upon our capacity to satisfy our social-moral obligations on balance; the benefits of the law must outweigh the costs.[315] Raz's view might be described as a "reasons-in, obligation-out" account of authority, whereas my account of legal obligation is "obligation-in, obligation-out" given that I justify legal obligation in terms of social-moral obligation, which I think enables us to avoid some concerns about Raz's position.[316] So, my account of legal obligation should not only help us explain why moral peace requires legal institutions, but solve problems with related accounts of authority.[317] For instance, I will argue below [that my account of legal authority

[315] For the classic presentation of Raz's theory of authority, see Raz 1986, ch. 3.
[316] For instance, it enables us to avoid the concern about Raz's view that it does not take disagreement seriously enough. See Christiano 2010, pp. 234-7. By understanding authority-justifying reasons as public reason liberals often have, no one must be subject to an authority if she disagrees with its dictates, since she is only bound to the authority by her own intelligible reasons.
[317] Importantly, Raz rejects that the law itself has *de jure* authority over persons, but that the law is owed respect.

and legal obligation avoids common concerns about natural duty accounts of political obligation.

This chapter is divided into ten further parts. Section II describes a *legal state of nature*, an order with justified moral rules but that lacks a publicly recognized system of law; in section III, I identify some difficulties it faces. I also insist upon the priority of moral rules in resolving social problems, such that establishing laws are only justified or appropriate when moral rules have failed or are widely expected to fail. I also make the case that a legal system has a limited capacity to remedy these difficulties. Section IV then argues that the public system of law must be publicly justified if it is to both fulfill its main functions and contribute to the realization of moral peace. In this way, I offer a novel *moral peace* foundation for the public justification of coercion, which contrasts with other foundations for public reason, more fully explained in Section V. I then review how legal obligation stands between moral and political obligation in Section VI. Section VII develops my modified Razian account of legal obligation. I term this a *social obligation* account of legal obligation in Section VIII, as it holds that one is obligated to comply with a law whenever compliance with a law enables persons to best fulfill their social-moral obligations given the costs of the law. I contrast my view favorably with Razian and natural duty accounts of political obligation in Section IX. I conclude in Section X.

II. The Legal State of Nature

Imagine that an advanced alien species descends upon the Earth and abolishes all legal systems. All courts are destroyed, as are all legislative bodies and executive offices. No coercive laws may be imposed on anyone by anyone. The aliens leave humanity with the capacity to create, alter, remove, enforce, or resist moral rules, but not by means of law as I have defined it above. So the aliens permit moral orders to continue, such that systems of moral rules can generate some social order via ostracism, shunning, and blame. Assume, as is likely, that many of these moral rules are publicly justified.

Private parties may use coercion, but only as a liberty-right—a moral permission—not as a claim right—where others have the duty to permit one to act permissibly. Private parties may use coercion to defend themselves or others from attack or to punish transgressors, and aggressors are permitted to use coercion to prevent counterattacks. Each person has a liberty-right to coerce in many cases, but no one has public authorization to engage in either action via a recognized system of moral rules. However, private parties can maintain legal codes to resolve their disputes in a private manner, say through systems of religious law like the Sharia.[318] But they cannot enforce those laws coercively; they may only enforce private law through ostracism, such as shunning or excommunication.

[318] Specifically, the status of the Sharia in non-Muslim countries, where Sharia is not a part of that country's legal system.

Call this social order a *legal state of nature*. In Lockean terms, we have established a social contract that creates *Society* by establishing a publicly justified set of moral rules.[319] But it lacks a social contract between society and public agents with the authoritative power to coerce. There is no system of public judgment that can back society's decrees with publicly authorized legal force. Thus, the social contract is incomplete because there is no political society.

The legal state of nature is a useful construct for identifying the purpose of legal systems. I grant that the legal state of nature has never existed, but it need not have existed to be useful. It is instead a thought experiment that enables us to distinguish between the social and political orders, specifically with respect to legal vs. merely moral rules.

Note that my state of nature construction avoids common complaints about state of nature constructs in general. I have made no especially "individualist" assumptions about human nature in constructing a legal state of nature. I have said nothing about people's individual natural rights. I have said nothing about personal identity and the extent to which it is socially constructed. I have even allowed that normal moral agents have many social obligations that they did not acquire by choice, since they may have social-moral obligations in virtue of the practical reasons they have, despite their lack of consent. Furthermore, I have not assumed that political order is "natural" or "artificial" since the alien force expressly prohibits *either* a natural or artificial formation of the state. I know many

[319] Locke [1690] 1988, p. 324.

people get off the boat (or perhaps never get in the boat) with social contract theories due to state of nature thought experiments, but by separating the social and political orders, I believe I have avoided the vices of such views.[320]

We should now envision how such a social order will function. Some may contend, as Hobbes did, that the moral order must collapse once a publicly recognized unitary state is abolished. Others may have more Lockean intuitions, where the legal state of nature has a high degree of social order but still fails to realize critical social goods. I imagine a moral order more in line with Locke than Hobbes, though I think it is hard to determine who is correct, given that context will heavily influence social stability. But we can agree that such a social order will face huge social costs, especially in supporting large-scale institutions that local moral rules cannot sustain. Moral rules will be able to sustain local orders where ostracism and blame are effective due to limited interactions with total strangers. So a legal state of nature will still have families, civic associations (churches, clubs, etc.,) and small commercial institutions.[321] People will still want goods and services and some people will still try to sell them those goods and services. They will still be religious and want to go to church. And, most obviously, the vast majority of people will do what was necessary to protect their families. Many of these social associations may band together to provide their own private security and internal court systems that lack public recognition (canon law courts, for instance). It is

[320] The criticisms arguably began with Hume 2008, but even Hume may have acknowledged the usefulness of the thought experiment in making sense of political authority. For a contractarian interpretation, see Gauthier 1979.
[321] I discuss all three generic institutional forms in Chapter 6.

even plausible to expect the formation of unenforceable tort law given the need for a reliable, predictable method of resolving property disputes and damages.

The work of a variety of social scientific researchers can substantiate these assumptions. I have in mind anthropological studies of social cooperation in societies without states and the formation of legal rules in the absence of state power.[322] I also draw on economic approaches to private law.[323] I further draw on the general observation that moral rules play the most important role in promoting social cooperation, given the limitations of political coercion.[324]

However, all but the most primitive societies have a legal system that nearly all regard as authoritative in its general aspects; and basically everyone sees the need for a legal system and that most people believe their legal system has some authority. So the legal state of nature should contain obvious defects that can be remedied by legal rules. In my view, the defect in the legal state of nature is that societies within it cannot successfully establish moral peace and associated social goods.

---

[322] Scott 1999, Scott 2009.

[323] Benson 2011, Leeson 2014, Stringham 2015.

[324] Ostrom 1990. For a review of Ostrom's methodology, see Aligica 2014. See the discussion of the law merchant in North 1990, pp. 125-129. Large-scale social order may collapse without publicly recognize law, rather than limping along inefficiently, but private coercion is still available. This may lead to war, however, a distinct possibility.

III. What is Missing?

The legal state of nature has three general problems: the order of moral rules will probably be *uncertain*, *static*, and *inefficient*.[325]

(1) A mere moral order leaves its members in crippling uncertainty. If people disagree about what moral rules require in certain cases, there are no formal, decisive means for resolving the disagreement. In a legal order, institutions and officials are expressly devoted to formalizing and harmonizing legal rules and generating authoritative, final judgments. These institutions can act relatively rationally and quickly. Further, the punishments imposed in the legal state of nature are haphazard and potentially numerous. Courts can impose regular punishments in an ascertainable fashion with a limited group responsible for imposing one or a few legal sanctions.

(2) A legal state of nature is also exceedingly *static* in that bad moral rules can be very hard to change. As Murphy notes, social rules "possess tremendous inertia."[326] In many cases, oppressive moral rules can last for centuries, such as rules that permit slavery and serfdom. It is true that influential social groups, large or small, can change moral rules. But the changes imposed are unreliable, since these groups can lose public favor in a variety of ways that courts ordinarily do not. When a popular group loses public favor, the rules they suppressed can return.

---

[325] Murphy 2006, p. 29.
[326] Murphy 2006, p. 28.

Stasis is explained by the fact that moral rules are generally social norms—sets of actions in a kind of equilibrium based on expectations. If a defeated or dominated rule is in equilibrium, then it will resist change; for few have an incentive to unilaterally deviate from it. For example, imagine a stateless society that imposes strict rules of racial superiority on the populace. Let us say that the Reds are the dominant race and the Blues are the subordinate race. The Reds are not able to legally repress the Blues but, due to the Reds' greater social power, they can ostracize, shun, and boycott Blues whenever they would like; further, suppose the Reds have done this for decades. The advantage of law is that it can use legal coercion to quickly move the Red-Blue society from their inegalitarian moral rules to publicly justified rules. As Gaus notes, it may be the case that "only the political order is apt to be an adequate engine of moral reform as it can move us to a new equilibrium much more quickly than informal social processes."[327] Coercion can stabilize norms that our non-coercive moral practices cannot, so a legal system should have the special power to create new legal rules and enforce them with coercion. This can help to move a society's moral rules into the optimal eligible set.

An excellent real-world illustration of the need for law in the case of an unjustified moral rule in equilibrium is the Jim Crow legal regime, prior to the Civil Rights Act.[328] In the American South (though not limited to that area), the

[327] Gaus 2011, p. 437.
[328] My example concerns legislation, which is not the subject of the chapter, but it can still serve as a useful illustration of the importance of a legal system.

groups that supported racial equality fought an overwhelmingly hostile culture whose members exercised their moral, social and physical power to ostracize and assault "uppity" blacks, effectively insisting that blacks acquiesce in their inferior social position. Moral rules requiring segregation were plainly unjustified, but these rules were deeply entrenched. Importantly, reform groups, such as those led by Martin Luther King, Jr., were changing social attitudes before the Civil Rights Act was passed. In fact, the Civil Rights Act could not have been passed unless a certain segment of the population had already changed their social attitudes (though perhaps not their social practices). But once the Civil Rights Act was passed, law enforced many of the social changes wrought by the civil rights movement. Most people no longer needed to take the same physical risks in changing their minds and flouting old, racist rules. The law brought about more equal political relations by extricating much of the South from a defeated moral rule with speed, uniformity, and finality that mere social change alone is typically unable to provide.

Consequently, while the Civil Rights Act was backed by coercion, it helped to extricate society from unjustified social rules that were, in effect, demands to subordinate black Americans. So the Civil Rights Act helped to realize moral peace between whites and blacks. Whites, despite their resentment, were less "at war" with blacks than before, since the law enabled social relations that can be publicly justified for all, or nearly all, members of the public. Whites, on even modest

reflection, could see that they would reject being treated as subordinated were they in the position of blacks. Public protest made this increasingly obvious.

I should say, however, that while the coercive power of law can move a society into the optimal eligible set, it can also stabilize rules outside of it. Governments can enforce Jim Crow just as easily as they can pass the Civil Rights Act. So while it is important to empower public legal systems to move a society from unjustified equilibriums to justified equilibriums, that power must be restrained. I defer discussion of the limitations to Chapters 6 and 9, where I develop an account of protecting recognized rights from violation, by private parties or governments.

I should also stress the flexibility of the moral order and the limited capacity of the legal order to change moral rules. First, we know that social norms can change quickly and can be undermined without law, such that a legal order will not always be necessary to undermine ineligible moral rules.[329] Second, we now how evidence that law is not that effective in undermining entrenched moral rules. Legal reform that violates social norms can often be ineffective. For instance, it is unlikely that the Civil Rights Act could have succeeded unless some racist social norms were already subject to challenge and were beginning to change.[330]

(3) Finally, a legal state of nature can be *inefficient* because its mode of enforcement is unreliable, clunky, and unclear. A legal system can respond faster

[329] Bicchieri 2016.
[330] "Self-defeating Crimes", and lunch counter integration in Bicchieri.

and with greater accuracy to violations of moral rules than the moral order can. When violations are detected, institutions are in place to quickly identify and enforce the law, given the existence of an expressly formalized system of legal sanctions. A benefit of this ability to act quickly and reliably is to stabilize empirical expectations about which rules apply to them and which do not.[331] Another attraction of general legal rules is that people can form short-term and long-term plans to realize their diverse ends because they can form reliable expectations about how social life will proceed in the future.[332] Consequently, uniform public legal systems can realize substantial social and economic benefits by propagating laws and enforcing them uniformly more effectively than mere moral rules.

I grant that there are forces that guide moral rules towards uniform application, even in a legal state of nature. This is due to the dynamic of increasing returns to moral requirements.[333] As persons converge on an eligible moral rule, the remaining persons have stronger and stronger reason to comply with it, as it is a social norm with the benefit of allowing the formation and continued existence of moral peace between persons. The *extant* eligible rule has the additional normative property of it being effective and in force. But even with increasing returns, moral rules alone still have the defects discussed.

---

[331] Peter Vanderschraaf's example of breakdowns in a thousand-piece orchestra is illuminating. See Vanderschraaf 2016, p. xx.
[332] Hayek stresses the importance of stable rules that allow for the formation of plans in both Hayek 2011, pp. 82-83, and in Hayek 1973, pp. 41-51, 55-58,
[333] Gaus 2011, pp. 398-400.

We reach a doctrine of the *rule of law*. Legal rules, following Lon Fuller, have defining characteristics, such as generality, publicity, exclusion of retroactive legislation, clarity, stability, exclusion of legislation requiring the impossible, and the congruence of official action and declared rule.[334] Legal rules must apply to the public generally. They must be publicly accessible; members of the public should be able to determine what the law is. *Ex post facto* laws cannot contribute to the rule of law. Laws must be clearly worded and be stable, enduring over time. They cannot demand the impossible and should be understood as applying to both citizens and political officials. Laws of this sort are capable of stabilizing public expectations in a way that can be publicly justified. We can see that the legal state of nature lacks key mechanisms for generating the rule of law, given that it cannot insist upon a uniform public, and publicly justified, legal system.[335]

So a legal state of nature is comprised of rules that, without a legal order to support them, exhibit undesirable degrees of uncertainty, stasis, and inefficiency. A legal system is required to remedy these defects. We can see that a legal system is required to perform four social functions:

---

[334] Fuller 1969, Chapter 2. Also see Rawls 1971, pp. 235-43 and Gaus 1996, pp. 195-214.

[335] To give equal weight to the badness of a publicly authorized system of law, we must remember that the rule of law also rules out certain *governmental* actions that undermine it. The only justification for coercing persons to comply with the rule of law is that the social-moral order cannot establish the rule of law on its own; so once the rule of law is established, we need moral *and* legal rules to prevent the government from violating the rule of law and disrupting public expectations.

(1) Discourage the violation of moral rules;

(2) Facilitate private arrangements;

(3) Settle unregulated disputes, and;

(4) Deliver goods and services.

Each of the primary functions of the law can be realized insofar as a legal system can be more certain, adaptive, and efficient than social institutions in the legal state of nature. A legal system can substantially improve a society's ability to secure moral peace between persons by providing certain, adaptive, and efficient tools discouraging the violation of moral rules. It can better facilitate private arrangements by avoiding vagueness and creating a system that can recognize certain complex legal arrangements, such as commercial contracts. Similarly, it can settle unregulated disputes by means of its formal court system, which can lay down rules for dispute resolution that are clear and simple. Finally, a legal system can deliver goods and services more effectively than a mere moral order because it will be more efficient, adaptive, and clear.

Having a legal system is especially important when it comes to the recognition, codification, and enforcement of rights claims, given that the legal state of nature contains many rights claims. I will justify a scheme of rights in chapter 5, but I want to be clear here that protecting rights requires a legal system, as evidenced in part by the fact that every society that recognizes rights has a legal

system to protect them, even if the protection is not enumerated in a constitution or written statutes.

One reason to have a legal system protect rights is that rights-claims are especially strong moral demands that can lead to severe social conflict if they go unrecognized by those who press the claims. Since moral rules by themselves can be vague and ineffective, a legal system can help answer rights claims through the relatively quick and efficient application or extension of law to address the rights claim in a decisive fashion.

Importantly, a publicly justified legal system will not recognize all demands for recognition. For instance, in Western societies, socialist parties have pressed the claim that workers have the right to own and operate capital for over a century, but the claim never achieved public recognition because socialists were unable to convince enough people that the right is justified for the public. This does not mean that moral reality contains no such right; the true moral theory may specify that the rights of workers to own the capital they use are natural or objective rights. Nonetheless, sectarian rights claims are not part of a publicly justified system of moral rules.

Moreover, sectarian rights claims may *undermine* the moral order when people begin to ostracize and interfere with others who have sufficient reason to reject the rights claim in question. Consider a small band of Marxists who ostracize local business owners for not handing their capital over to their employees. The Marxists might be correct that there *exists* an objective right for workers to own

and operate capital, but their right has no public status. As T.H. Green noted, such claims are equivalent to invoking the "name of a fallen dynasty exercising no control over men in their dealings with one another."[336] If I tell most American business owners to fork over their capital based on my Marxist reasoning, my position is normatively identical to insisting that American business owners fork over their capital because the Soviet Union has passed a law requiring capital redistribution. The rights claim has no rational uptake; the demands misfire. Since sectarian rights claims are not rationally validated, they will therefore tend to undermine, rather than support, moral peace.

In chapter 5, I will argue that evaluative pluralism leads sincere, informed people of good will to disagree about what rights we have and the extent to which these rights should have public status. Nonetheless, publicly justified polities will still raise some rights to public status if all have sufficient reason to endorse those rights. An example is a right against harm. Though societies understand harm differently, they agree on some core cases. A right not to have one's hand amputated by one's neighbors is almost always the subject of public recognition and should receive rational validation by all moderately idealized members of the public.[337] No one wants to be vulnerable to losing her hand for no reason. Protecting a right to not have one's hand amputated thereby realizes moral peace between persons. A moral order is limited in its ability to recognize and codify

[336] Green 1895, p. 105.
[337] We find strong defenses of bodily integrity rights in both Rawls and Gaus. See Rawls 1971, p. 53. Gaus 2011, pp. 357-8.

these rights, so another reason that a moral order needs a legal system is to determine with some efficiency, clarity, and short-term finality which rights are to be recognized. Codifying rights claims in public statements and defending them with violent, yet authoritative, means can stabilize the protection of rights and so answer those claims.

Public legal systems are subject to error. They frequently fail to extend publicly justified rights to those entitled to them and in still more cases violate the recognized rights of rights holders. So while we need a public legal system to protect, recognize and institutionalize rights, the power of the legal system must be limited, or it will recognize and enforce defeated claims. I will address the limits of the law further in chapters 5-9.

IV. Why Publicly Justify Coercion?

A morally peaceful social order must have a legal system if it is to solve the problems faced in the legal state of nature. The legal system must be authoritative.[338] Its practices and the laws it interprets and enforce impose *de facto* claim-rights on persons to comply with the law. However, unless those *de facto* claim-rights are publicly justified, forcing persons to comply with the law is morally equivalent to private coercion or coercive threats. The enforcement of a law that lacks justified authority, then, breaks the moral peace. Given the social

[338] For a similar claim that law must be authoritative, see Christiano 2010, pp. 231-259.

and relational value of moral peace, and the fact that moral peace specifies an ideal of respect for persons, law should only be imposed if publicly justified. This is, in brief, why law must be publicly justified.

But this brief explanation requires further analysis. I have only shown thus far that a moral order needs a legal system to perform important social functions. But that the moral order *needs* a legal system is not enough to show that the legal system has authority. Instead, we must explain how the need for a legal system helps us to publicly justify laws or legal rules, given that law, like moral rules, must meet a presumption against interference. One reason that law can meet the presumption is that all moderately idealized members of the public can see that law aids the moral order of which they are members. The public justification for the law, then, *is the fact* that the law is necessary to solve the problems faced in the social-moral state of nature. An implication of this justification is that, if moral rules alone can establish moral peace by performing the four functions discussed above, the law cannot be publicly justified, since it is unnecessary for the sort of social life that members of the public want to possess.

We can now see a critical difference between how we justify moral rules and how we justify law. If members of the public decide that a moral rule is superior to all alternatives and to no rule, then it is publicly justified. However, to have no law on some issue is *not* to say that there will be no *moral rule* governing the issue. To have no law regulating an issue is to leave the matter to social morality (save if the law is justified to prevent the formation of moral rules on the relevant matter). So,

in many cases, whether a law is publicly justified depends on whether members of the public think it better to use law rather than moral rules alone. If a law is publicly justified, then, it must be justifiably regarded at least as an *improvement on the legal state of nature*, and not on a state of nature with no moral rules at all (a truly fantastic scenario). And more strongly, the law must be justifiably regarded as an efficient improvement, where the costs of improvement are worth paying to receive the benefit the law provides.

The pre-political moral order, then, has a kind of *priority* over the law. If the moral order is effective enough then no law is needed and so no law is justified, given the presumption against coercion in social morality.[339] If we do not need legal coercion to supplement or alter the moral order, then the presumption against coercion is not met.[340] What can be done well in the legal state of nature should not be done by the political order. The priority of the moral order is not absolute, since sometimes the order of moral rules cannot perform the four functions described above. Instead, law can be justified when the moral order falls below a threshold of efficient functioning, a standard I elaborate in more detail below.

A critic will wonder why we need to show that a legal system needs authority, as we might be able to justify a legal system by showing that the legal system is morally permitted to impose law, even if the law lacks authority for its

[339] See Ch. 2, section 4 for a defense of the presumption in favor of moral liberty, and see Gaus 2011, pp. 456-460 for his version of the priority of social morality.
[340] Importantly, this does not mean that no private party can use coercion to defend his or herself, just that we cannot justify the imposition of coercive *law* without a public justification.

members. Traffic laws can stop wrecks even if people lack sufficient reason to internalize the traffic laws, since members of the public want to avoid police punishment. And government can impose effective regulations on industry to reduce carbon emissions, even if the owners of the firms in that sector have sufficient intelligible reason to reject the coercion, because carbon emissions are a threat to the environment.

I think this line of argument is doubly mistaken. (1) First, when laws are publicly justified, they can better accomplish their purposes, since people see no reason, on reflection, to disobey or break the law. Without public justification, there is no rational and enduring basis for social trust, which is critical for avoiding opportunism and shirking that can easily corrupt legal systems. Second, since nearly all law is coercive, then law undermines social trust if it is not publicly justified. This is because the imposition of unjustified law upsets our normative expectations that others follow the law on the grounds that some of those who break the law are not rationally culpable in doing so. We cannot sustain a practice of trust when we insist that others follow rules that we acknowledge they can see no reason to follow. Consequently, when laws are publicly justified, they can sustain our practice of trust, since violations warrant punishment. That means publicly justified law sustains moral peace by being a ground of sustaining a system of moral trust based on the practical rationality of members of the public. So, while a legal system can be beneficial without authority, it will better sustain

social trust and realize the goods associated with social trust, if it is publicly justified.

A critic could also argue that some laws are sufficiently necessary that they should be imposed without a public justification. Sometimes too much is at stake to hold legal coercion hostage to public justification and the importance of social trust. Perhaps, for instance, some group of persons promotes a sufficiently dangerous cause that we cannot afford to wait and see whether their actions are publicly justified in order to stop them. I acknowledge the point: yes, in some cases, deferring action based on public justification is not the most important consideration in deciding whether to interfere with the actions of others. But that is only the case because we lack sufficient reason to enter into a system of moral trust with other persons, since our reasons to enter into such a system are overridden.

Once we have entered into the participant perspective with others via extended social trust to them, however, respect for persons requires public justification. And given the great weight of respect for persons, other considerations cannot easily outweigh this important value. So once we judge the benefits of moral relations to be sufficiently great to enter into those relations, the requirement of respect for persons is generally overriding.

And it is not as though deferring action based on what is publicly justified means that we cannot act to protect certain basic goods. Important public purposes will usually be recognized as such by moderately idealized members of

the public. This recognition will typically demonstrate that using coercion to achieve that purpose is publicly justified. If climate change or nuclear war are clear threats to human welfare, then moderately idealized agents should be able to see this clearly, such that deferring to public justification is compatible with promoting morally important ends.

But even within a system of moral trust, there will be persons, like psychopaths, that appear to lack an interest in moral relations with others and so cannot see a motivating reason to care about others or not to hurt them. Even if most people acknowledge reason to enter into a system of moral trust, a few people might come to the opposition conclusion.[341] And yet, their failure to enter into a system of moral trust should not bar us from coercing them in some cases when a law cannot be publicly justified to them. I agree that psychopaths and others who lack an interest in moral relations with others can be coerced without a public justification. They have, as Locke thought, declared themselves the equivalent of wild beasts in virtue of their behavior.[342] However, we may only coerce them when they break moral or legal rules. Since they are engaged in acts that violate trustful relations and so break the moral peace, we realize the value of moral peace between persons by *stopping* them from violating the relevant rules.

Punishing non-psychopathic criminals might seem similar to coercing psychopaths, given that criminals have similarly placed themselves outside of the

[341] For a discussion of the moral psychology of psychopaths and its relation to understanding moral rules, see Shoemaker 2011.

[342] As Locke wrote, such persons refuse "to recognize that reason is the rule between men, and that man 'becomes liable to be destroyed by the injured person and the rest of mankind, as any other wild beast or noxious brute hat is destructive to their being." Locke [1690] 1988, p. 96.

law. But coercively punishing non-psychopathic criminals requires public justification, since non-psychopathic criminals typically break laws that are publicly justified for them, such as murdering or stealing from others.[343] In that case, in breaking the law, criminals impose punishment upon themselves such that the punishment to be authoritative for the criminal.

Punishment in public reason raises some difficult questions. First, which justification for punishment should we adopt?gaus[344] And second, how do we prevent under-punishment and over-punishment? The answer to the first question is hard. Different members of the public will have different views about what justifies punishment. Some will emphasize that justice requires punishment, whereas others will stress the importance of deterrence. I think the theory of punishment is an important new research avenue for public reason liberals, but I simply lack the space to answer the question here to any adequate degree of detail.[345]

(2) The second problem is more tractable. A publicly justified polity will avoid under-punishment and over-punishment through a variety of judicial and legislative requirements, but also by preventing many proposed judicial and legislative requirements from achieving public recognition. For instance, a number

[343] I set aside cases where someone breaks a defeated law.
[344] Gaus 2011.
[345] For a review a theories of punishment, see Bedau and Kelly 2010. I leave aside the complex question of how punishment is justified for the criminal, though given my other commitments in the book, my account will have affinities with Hegelian theories, where punishment is required as a way to realize and honor the rational will of the criminal. Hegel: "The injury which the criminal experiences is inherently just because it expresses his own inherent will, is a visible proof of his freedom and is his right. … This law he has recognized in his act, and has consented to be placed under it as under his right." Hegel 1991, Sec. 100.

of American laws are extremely punitive, making punishment last much too long, such as laws punishing non-violent drug offenders. We should also abolish laws for which punishment is always impermissible, such as legally punishing those who smoke marijuana. To protect against over-punishment, then, legislation should be used sparingly and modest penalties prescribed.

V. The Main Line of Argument Revisited

We have arrived at a critical juncture in the book, for I have completed my argument that the establishment of moral peace requires publicly justified, authoritative coercion. The foregoing provides a rich explanation of how we derive a public justification requirement from a foundational normative value.

We can now extend my argument from respect outlined in Chapter 2 by modifying the main line of argument to include two ideas—the idea of legal rules, which we have already explained, and the idea of a system of *legal trust*. A system of legal trust, like a system of moral trust, is social trust that persons will comply with the legal rules of their societies. That is:

> *Legal Trust:* a public exhibits legal trust to the extent that its members generally believe that others are necessary or helpful for achieving one another's goals and that (most or all) members of the public are generally

willing and able to do their part to achieve those goals, knowingly or unknowingly, by following publicly recognized *legal rules*.

Legal trust itself has great social and relational value. Since legal systems are required to help the moral order efficiently perform necessary and valuable social functions, the social and relational value of moral *and* legal trust is greater than the value of mere moral trust. So persons have greater reason to enter into a system of moral *and legal* trust. That means our reasons to establish a system of moral and legal trust, and so our reasons to enter into a participant perspective with others via trusting them, are even stronger than before.

Second, like a system of moral trust, a system of legal trust carries with it a practice of accountability. This is because systems of legal rules are thought to be authoritative and overriding. Generally speaking, persons are thought to be responsible for following the law and subject to the reactive attitudes when most laws are broken.

Our practice of accountability, applied to both moral and legal rules, presupposes standards that govern the appropriateness of the reactive attitudes and the ostracism and interference that flows from them. That means we are committed to confining our practice of accountability to the reasons of others regardless of whether we are focused on moral rules or legal rules. Consequently, respect for persons should require that we confine our practice of moral and legal accountability in accord with the reasons of others. That is why the law must be publicly justified in order to be compatible with respect for persons—because of

the analogy between moral and legal rules and the practice of accountability that sustains them both.

We can now modify our main line of argument from Chapter 2 connecting respect and public justification to include the legal order.

1. There is a response-independent moral requirement to respect persons.
2. Within a system of moral *and legal* trust, respecting persons requires confining our practice of accountability in accord with the reasons of others.
3. Within a system of moral *and legal* trust, there is a response-independent moral requirement to confine our practice of accountability in accord with the reasons of others.[346] (1, 2)
4. Confining our practice of accountability in accord with the reasons of others requires applying moral *and legal* rules to persons only when the rules are publicly justified.
5. Within a system of moral *and legal* trust, there is a response-independent moral requirement to apply moral *and legal* rules to persons only when the rules are publicly justified. (3, 4)

As we have seen, persons have sufficient reason to enter into a system of moral trust based on the social and relational value of trust. Once we enter into a system

[346] There's an implicit premise here that requires no real defense, namely that whatever a response-independent moral requirement requires is itself response-independently required.

of moral trust, we recognize that the practice of accountability that we associate with moral trust must be confined to the reasons of others. A practice of moral trust presupposes a practice of accountability where we create, sustain, and repair moral trust by treating others as sources of reasons, as co-laborers in a common moral practice, rather than as strategic agents to be managed, rather than addressed. This practice of accountability means taking others as sources of reasons for action. And once we've fleshed out the nature of that practice, we can see that our practice of accountability requires that the moral rules to which we are all subject be publicly justified. The legal order that sits atop the moral order connects respect for persons and the moral order to a requirement that law be publicly justified. We have therefore arrived at our conclusion that respect for persons requires the public justification of legal coercion.

Integral to a system of moral and legal trust are the ideas of social-moral and legal *obligations*. Obligations are required for us to distinguish between licit and illicit forms of moral and legal interference. When someone has a publicly justified obligation to comply with a moral or legal rule, our reactive attitudes and demands are appropriate; when the obligation is not publicly justified, it does not stand, and so the person who has sufficient reason to reject the proposed obligation cannot rationally be held accountable for violating the moral or legal rule. Obligations, then, are required to make sense of our practice of accountability and the conditions under which the practice can be appropriately applied to particular persons and cases.

I argue that legal obligations are grounded in publicly justified social-moral obligations. That is, we have legal obligations because we have more fundamental moral obligations, as complying with laws are necessary means towards discharging our moral obligations. By complying with a publicly justified legal system, however, members of the public can *more efficiently* fulfill their obligations. Complying with a law, then, is an *especially effective* means of fulfilling joint social-moral obligations. Accordingly, I will argue below that we have an obligation to comply with a publicly justified legal system because, in complying, persons have chosen feasible and efficient means for acting morally. In this way, legal obligation *piggybacks* on the social obligation. The social obligation is publicly justified and complying with the law is the best (and frequently the easiest) way of satisfying that obligation. So if persons have a general obligation to use effective means towards discharging their obligations, then their social-moral obligations generate legal obligations. I will explain my argument in more detail in the next section.

VI. Legal Obligation between the Moral and Political

A curious feature of contemporary political philosophy is that few theorists believe that persons are under a general obligation to obey the law.[347] One reason for this has to do with the nature of the duty to obey the law, which is typically thought to

[347] Edmundson 2004, p. 218.

have four features.[348] (1) The duty to obey the law is a *pro tanto* duty, implying that the duty holds under normal circumstances, but it can be overridden by serious moral considerations. (2) The duty to obey the law is said to be *comprehensively applicable* so that those under the law have an obligation to obey all laws; people cannot pick and choose the laws they wish to follow. (3) The duty applies to everyone within the jurisdiction of the law, such that it is *universally borne*. (4) Finally, the duty to obey the law is *content-independent* which means that the law must be obeyed because it is the law, and not because the relevant laws have a particular content. As Edmundson notes, "[a] content-independent duty effectively preempts the subject's individual assessment of the merits of the action required by law and is categorical in the sense that it is not contingent upon any motivating end or goal of the subject."[349] Given these features, it can be difficult to see how anyone could have a duty with these features, especially when the content of a law appears to conflict with one's other duties, however weak those other duties may be. It is unclear, for instance, how we could have a content-independent duty to obey the law rather than obeying it merely due to its content. There are many accounts of the duty to obey the law, but none of them seem able to explain all four of these features.[350]

---

[348] This review is based on Edmundson 2004, pp. 216-217 and Hasnas 2013, p. 451.
[349] Edmundson 2004, p. 216.
[350] Edmundson 2004, pp. 230-249 provides an overview of problems with three main types of accounts, natural duty accounts, volitional accounts, and associative accounts. Many of the theories simply haven't successfully answered the classic objections found in Simmons 1981, along with Wolff 1970. Michael Huemer's recent work continues that tradition. See Huemer 2013.

I believe that some concerns about the duty to obey the law derive from the fact that the duty to obey the law is typically run together with duties to obey political officials and the state's right to rule.[351] These notions of authority build upon the duty to obey the law, adding further duties that require their own justification. But as I have noted, we can distinguish the duty to obey particular laws from the duty to obey political officials or the dictates of a legislature. I contend that if we begin with an account of legal obligation, and then gradually build duties to comply with legislative dictates and political officials out of the account of legal obligation, that we can solve the problem of political obligation.

I also think that we can build an account of the general duty to obey "the law" understood as a society's legal system by explaining how individual laws acquire their normative authority. So the first step in my account of political obligation is to show how a person can have a duty to obey a particular law. I shall understand individual legal obligation, then, as *pro tanto*, universally borne, and content-independent. Since we are focused on the duty to obey individual laws, the condition of comprehensive applicability does not yet apply.

My argument begins with the observation that we have already explained the authority of moral rules. Therefore, if we can explain how the authority of moral rules gives rise to the authority of legal rules, then we should be able to explain the authority of legal rules.

[351] For a review of these different notions of authority, see Shapiro 2004.

In some respects, my account of legal obligations follows the strategy that Gaus pursues in Chapter 8 of *The Order of Public Reason*. There Gaus argues that, once we see that social morality stands between the individual and political order, such that individual political obligations are mediated by social-moral obligations, we can both see our way towards an account of political authority. So, Gaus derives the existence of political obligations from the authority of social morality.[352] The attraction of this approach is that the existence of social-moral obligations is much less controversial than the existence of political obligations, so if we recognize social-moral obligations, we may be able to give a less controversial justification of the authority of government.[353]

Gaus's strategy requires modification, however, for I have argued that legal rules stand between moral rules and political bodies. We therefore need to connect moral authority to political authority by means of a distinct stage of legal authority. We therefore need a *three layer* theory of political obligation, where we explain the authority of moral rule, then explain the authority of legal rules by means of the authority of moral rules, and then explain the authority of constitutional rules (and the authority of officials who occupy the roles established by constitutional rules) by means of the authority of legal rules. Chapters 1-3

[352] Gaus 2011, pp. 460-462.
[353] Though some, like David Enoch, deny that there are social-moral obligations distinct from our objective obligations. See Enoch 2013, pp. 145-150.

completed the first, moral layer of the account. This chapter completes the second, legal layer. Chapters 5, 6, and 9 take us from legal to political authority.[354]

VII. Deriving Legal Obligations from Social-Moral Obligations

We can now derive legal authority from moral authority. My *social obligation* approach to legal obligation, then, does not proceed directly from natural duties, the volition of individuals, or shared association, though it can appeal to elements of these views. Instead, it follows from *publicly justified moral rules*, which members of the public already have an obligation to follow. The social obligation account begins by assuming the existence of publicly justified moral rules, which prescribe social-moral obligations, and then derives legal obligation from those social obligations. In this way, I offer an "obligations in, obligations out" approach to legal obligation, rather than appealing directly to some good, personal act or duty, like our natural duties, volitions, or associations. We *begin* with social obligations.

The first step in defending the social obligation account is to recognize that law is publicly justified *only if* compliance with it helps to efficiently generate social and political goods that cannot be adequately produced in the legal state of nature. The second step is to recognize that persons have social-moral obligations

[354] I am ambivalent about whether my account of legal obligation can justify the sovereign powers claimed by modern democratic nation-states. I am much more confident that it can explain the legal authority of the common law and judicial and legislative rulings that effectively conforms the de facto legal order to a publicly justified legal order. These processes may or may not require a monopoly government.

that can be more effectively discharged by compliance with the dictates of a legal system, that is, by obeying the law. I have defended both steps above.

The third step in defending the social obligation account is to argue that when an agent, John, has an obligation to Φ, he has a sub-duty to choose necessary means towards discharging the obligation. John's sub-duty might not be a social-moral obligation itself, in that a failure to do his duty would give others standing to criticize him, but it must be a duty of some sort. This third step is not hard to defend, since it has the characteristics of a conceptual truth. For Reba to have an obligation to Φ implies a duty to choose necessary means to Φ, since she cannot otherwise discharge her obligation. As a corollary, she should choose effective means to Φ.

In this way, I follow Edmundson's characterization of one kind of argument for a duty to obey the law, which he describes as follows:

> (P1) Whatever is typically a necessary means to a morally compelling end is at least a *pro tanto* duty;
>
> (P2) Law-abidingness is typically a necessary means to a morally compelling end; therefore,
>
> (C) Law-abidingness is at least a *pro tanto* duty.[355]

[355] Edmundson 2004, p. 235.

On my view, the morally compelling end is complying with publicly justified moral rules that is, with our social-moral obligations. I have also argued that complying with certain legal rules is typically a necessary means to that morally compelling end. And since whatever is typically a necessary means to complying with our social-moral obligations is at least a *pro tanto* duty, then complying with the relevant legal rules is at least a *pro tanto* duty.

I would caution against conceiving of the idea of a "necessary means" too strictly. Consider two cases. In the first case, we might support one of two laws that, when complied with, enable one to discharge her social-moral obligations. Neither law is necessary in itself, but at least one of the laws is necessary. So if a decision procedure imposes one of the two laws, then one has a *pro tanto* duty to comply with it, since it is one of two necessary means towards discharging one's social-moral obligations. In the second case, there may be ways of discharging one's social-moral obligations in the legal state of nature by complying with a law is an enormous *improvement* in one's *presently weak capacity* to comply her obligations. In that case, the law imposed creates a legal obligation, given how much more effectively it enables one to discharge her duties. So we can qualify my account of legal obligation to hold that one is under a legal obligation when compliance with a law is one of several necessary means of discharging one's social-moral obligations, or an efficient means given one's presently weak capacity to discharge her social-moral obligations.

We must clear up an ambiguity in the notion of *efficient* means. I do not mean to imply merely *effective* means, means that improve upon our legal order but do not maximize benefits subject to the costs of the legal order. The reason for this is that it makes laws too easy to justify. If we appeal merely to effective means, then the moral costs of the law, such as the costs of coercion, would have no power to defeat the law, such that persons would have obligations to comply with laws that, in their view, are not worth the moral costs. Moreover, members of the public will be concerned with the economic costs of the law, say due to the fact that the law blocks opportunities for mutually beneficial exchange. For this reason, we want the law to provide efficient benefits, benefits to a person's evaluative standards that exceed the total moral and economic costs of the law.

Requiring that members of the public see the law as efficient in realizing her ends does not mean that she must identify the law as the best means chosen from a set of all available, feasible options. This would require that the public only have legal obligations when they are rationally capable of identifying and comparing all possible laws governing some issue. Instead, I want to claim that a law must be efficient in being the option that members of the public judge to be the most efficient given the set of feasible laws they can identify under conditions of moderate idealization. So the efficiency of the law is judged relative to the cognitive capacities of moderately idealized agents.

I also do not want to insist that a law be the very best means towards discharging a person's obligations. This is based on the intuition that a law can be

obligatory even if, in Reba's view, there are feasible laws that would yield superior results. Laws must, of course, be seen as efficient from the perspective of moderately idealized agents, but it need not be seen as the *very best* available means to discharge her obligations.

Laws can be efficient by either (i) *transitioning* members of the public from one practice to another or (ii) *stabilizing* a practice that would otherwise not be in equilibrium. Focusing on (i), a law might efficiently improve the moral order by moving members of the public from a defeated rule to a new, eligible social norm. The defeated rule permits or encourages persons to continue to sustain or enforce a social practice that cannot be publicly justified to all who are subject to the rule. In this way, by enforcing the social practice, people violate their social-moral obligations to others. By complying with a law that transitions the social group from the defeated rule to an undefeated norm, compliant agents better fulfill their social-moral obligations. So in case (i), the social obligation view implies that the coercion involved in establishing a new, eligible rule can be publicly justified. A simple case of transition is the use of the Civil Rights Act to undermine defeated Jim Crow laws and private acts of discrimination that maintained defeated rules that diminished the social status of Southern blacks.

Case (ii) is more complex. We presume that, prior to the ratification and enforcement of the law, a social group is stuck in a defeated practice. Since the practice is in equilibrium, no agent can deviate from it unilaterally without paying a significant cost. The practice can be in equilibrium either on its own, or solely

with the aid of legal coercion that stabilizes the practice. So the practice is either a social norm with or without legal punishment. But if we wish to escape that practice in the long-term, we may need law to continue to keep the relevant moral rule in place, as the rule might not be stable in the absence of legal coercion. For example, if the Civil Rights Act had been repealed two years after it was enacted, it seems likely that Jim Crow would have been restored in at least some states. Non-racist social practices take time to take hold, such that legal coercion might be required to keep the practice in place. The attractive feature of legal coercion is that it can turn otherwise unstable practices into equilibria. And in these cases, persons have an obligation to comply with the stabilizing coercion because it stabilizes an eligible rule.

Law can also improve upon the moral order by moving members of the public from a *dominated* but justified social practice to an undominated practice.[356] Perhaps a law moves a society from a safety-preserving traffic-governing law to a new law that engineers believe to be even safer. In this case, compliance with the new law is authoritative because it created an efficient way to help John discharge his social-moral obligations.

If two or more laws are equally, or nearly equally, efficient, then participants in this social group can change legal rules by appealing to a publicly justified decision procedure. In that case, if the decision procedure is publicly justified, then the decision it generates is authoritative so long as it only moves the

[356] Recall my Borda-Condorcet rule in Chapter 2, section 9c. I will discuss it further in Chapter 5.

social group from ineligible norms to eligible norms or from one eligible norm to another; if the procedure veers outside of the eligible set by enforcing a defeated law, then those for whom the law is defeated have no obligation to comply with it.

I will argue in Chapter 6 that members of the public will accept a Pareto criterion when ranking eligible, undefeated proposals for legal and moral rules. If so, they are already committed to complying with legal rules that all regard as improvements. Thus, from their own understanding of the ranking of moral requirements, they should generally comply with new legal rules that dominate the previous rule.

VIII. The Social Obligation Account Defined

In light of the foregoing, we can define the conditions for legal obligation:

> One has a legal obligation to comply with a law if and only if she is epistemically entitled to believe (i) that *general* compliance with the law will efficiently improve her moral order's capacity to perform one of its primary functions and (ii) that *her* compliance with the law with allow her to efficiently discharge her social-moral obligation(s).[357]

[357] Legal obligations involve the internalization of a law as the agent's own, but I omit discussion of internalization here.

Some comments are in order. First, recall the notion of epistemic entitlement from my definition of intelligible reasons from Chapter 3. Reba is epistemically entitled to believe p when she makes no rational error in believing p, not necessarily when her evidence uniquely favors p. So the epistemic pro-status required to have a legal obligation is weak. I also employ the idea of epistemic entitlement to account for the fact that the effects of laws are often hard to predict and may not do what we had reason to think they would do. For that reason, people can rationally respond to evidence by withholding belief; entitlement gives persons permission to believe but does not require belief.

The law has authority when an agent, *ex ante* (or even *ex post* where effects are hard to discern at the present moment), justifiably believes the law will have the relevant effect. But this authority can be overridden if the law does not turn out to perform its requisite function and the agent can recognize this fact.

Second, notice the key distinction between conditions (i) and (ii). Condition (i) requires that Reba believe that *general* compliance will realize some good, whereas condition (ii) requires that Reba believe that *her* compliance will realize some good *for her*. These conditions flow from the idea of public justification. If Reba does not believe that the law efficiently improves upon her order's ability to perform its primary functions, then the legal coercion cannot be publicly justified given the priority of the moral order. Legal coercion can only be publicly justified if it is efficiently improves upon moral rules in a legal state of nature.

Condition (ii) is equally important, since it secures the "obligation in, obligation out" foundation of legal obligations. If Reba does not believe that her compliance with a law will efficiently enable her to comply with her social obligations, such that she can effectively discharge her obligations without complying with the law, then she has no *obligation* to comply with the law, since part of the point of law is to either allow Reba to discharge obligations that she cannot discharge in the legal state of nature, or the law efficiently improve upon Reba's presently weak capacity to discharge her social-moral obligations. Law enables Reba to act in accord with, or much more in accord with, what she (rationally) takes her moral obligations to be. So a necessary condition for a legal obligation is the presence of a social-moral obligation combined with the rational belief that compliance with a law is an effective means towards discharging that obligation. Again, without this feature, we are stuck with traditional theories of political obligation that cannot generate legal obligations by appeal to natural duties, volitions, or associations.

My first-pass definition of a justified legal obligation, however, is not satisfactory. For it does not recognize the fact that a person's legal obligations depend upon what others are doing, particularly whether they are complying with the law or not. This raises the complex question of how to determine when a law is a social norm. If the law is not a social norm, it is not clear whether one can be obliged to follow it, or whether it is a law at all. It is at least a bit strange to hold that Reba has a duty to comply with a law that almost everyone else ignores. For

one thing, she owes obedience to *members of the public*, but by stipulation they are disobeying the law.[358] For another, the law is ignored, so it may not be a social norm in the first place. In that case, there is even less reason to follow it. In the case of widespread disobedience, then, I submit that the legal obligation in question is defeated.

A second problem is that Reba cannot be obligated to comply with a law that requires that she violate her other social-moral obligations, or at least those obligations that have greater or equal weight with respect to the obligations derived from the moral rules that apply to her.

In light of these considerations, I offer a second definition:

> One has a legal obligation to comply with a law if and only if she is epistemically entitled to believe (i) that *general* compliance with the law will efficiently improve her moral order's capacity to perform one of its primary functions and (ii) that *her* compliance with the law efficiently improves upon her presently weak ability to discharge, her social-moral obligation(s), so long as (iii) she rationally observes that sufficiently many other agents are complying with the law and that (iv) complying with the

[358] We do not here rule out, then, that A may have a private duty or a duty to God to comply with the law. Instead, the person lacks an obligation to comply with a law others are violating.

> law does not violate her other social-moral obligations of equal or greater weight.[359]

If we recognize that generally obeyed laws are legal rules, we can drop reference to general obedience to the law. We simplify further by omitting the conditions of epistemic entitlement. I will also assume that the relevant social-moral obligations are not overridden, undercut, or otherwise defeated by other obligations. Shortening:

> One has a moral obligation to obey a law if and only if she has sufficient intelligible reason to internalize the law and obeying the law efficiently improves upon her capacity to fulfill her social-moral obligation(s).

We can now specify a principle that covers the public justification of law. Recall our Public Justification Principle for moral rules:

> *Public Justification Principle*: a moral rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the rule.

[359] I omit a discussion of internalization here. I think that legal obligations involve the internalization of a law as the agent's own, but that condition is not required to explain legal obligation. [Keep this?]

The legal version of the principle is similar:

> *Legal Justification Principle*: a legal rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the law because each member rationally recognizes that compliance with the law efficiently improves upon her capacity to comply with a publicly justified moral rule(s).

Law is only publicly justified when citizens rationally see it as necessary to improve upon an order of mere moral rules. This does not require, of course, that citizens understand the idea of public justification; rather that, when asked, they express a belief that a given legal rule is necessary to perform an important social function that mere moral rules cannot, and that compliance with the law is the right thing to do. This means that legal rules cannot be publicly justified if they are not seen as required to modify or reinforce a moral rule. *A society's moral constitution has priority; the legal constitution is its handmaiden*.[360]

My account of the duty to obey the law embraces *quasi-independence*, where legal obligations are content-independent insofar as they obligate one to comply with a member of the eligible set of legal rules that one may find sub-

[360] In a later draft, I might grapple with the particularity problem. I think my account addresses it effectively since political obligations apply to persons who already have social-moral obligations to one another. Since social-moral obligations require mutual recognition, and such recognition occurs primarily among persons who interact with one another on a regular basis, such that rules can form governing their behavior, then political obligations will be particular to those interacting groups.

optimal. So if you prefer law A, but lack defeaters for laws B and C, then if a decision procedure selects B or C as the legal rule to be imposed upon you, you have an obligation to comply with B or C. So legal obligation is content-independent *with respect to the eligible set*, but not otherwise. If the law is not publicly justified for you, you are under no obligation to comply with it, as you lack sufficient intelligible reason to internalize the law, and so lack sufficient *moral* reason to comply with it.[361]

IX. Contrasted with Razian and Natural Duty Accounts

I would now like to bring out the distinctiveness of my account of political authority by contrasting it with two common theories in the literature—Razian and natural duty accounts. My view has affinities with both theories but also have crucial disagreements. Let's begin with Raz.

Raz's "service conception" theory of authority is a combination of two theses. First, the "dependence thesis" holds that a directive can only have real authority "if it is based upon (or at least reflect) reasons that already apply to the subject of the directive."[362] Practical authority can only arise when obeying the dictates of a political official help the person better act on reasons that already apply to her. In this way, political officials have authority in virtue of *serving*

[361] Unless you have some independent obligation to comply with the law, say if you promised a friend. But I set these cases aside, as they do not bear on my argument in any direct way.
[362] Ehrenberg 2011, p. 886. See Raz 1986, p. 47.

ordinary persons by helping them to do what they have reason to do. The second thesis is the "normal justification thesis" which holds that a directive typically derives its legitimacy from the fact "that its subjects do better at complying with the correct balance of reasons by obeying the directive than by determining on their own what the balance of reasons requires and acting according to that determination."[363] Any directive that does not serve its subjects by helping them comply with the right balance of reasons therefore lacks authority. A third thesis follows from the previous two—the "pre-emptive" thesis, which holds that "a subject should treat a legitimately authoritative directive as an action-guiding rule."[364] This involves treating the directive as a "motivating reason for action" and not the considerations that might undermine compliance. Finally, I want to stress Raz's conception of an authoritative reason. First, the reason is "exclusionary" by being a "second-order reason to exclude reasons one might have not to act in accord with the directive."[365] Second, the reason is a kind of external reason in that the reasons need not be "ones that the subject has knowledge of" such that a reason can apply to someone even if she does not realize it.[366]

Critically, Raz does not think that it provides a justification for the generic duty to obey the law with the four generic features outlined above. Instead, for Raz, legal authority is "piece-meal" such that directives might be legitimate for

[363] Ehrenberg 2011, p. 886. See Raz 1986, p. 53.
[364] Ehrenberg 2011, p. 887. See Raz 1986, p. 57.
[365] Ehrenberg 2011, p. 886. Raz 1990 (1975), p. 39.
[366] Ehrenberg 2011, p. 886. Raz 2009, pp. 147-8. However, Raz does think that the reason must be "knowable" which Steven Wall has argued may commit Raz to a conception of reasons closer to public reason liberalism. See Wall forthcoming.

some persons rather than others.[367] Further, real legal legitimacy involves a kind of respect for the law.[368]

My view is similar to Raz's in that it adopts versions of the dependence thesis and the normal justification thesis. Laws only have authority when they enable persons to efficiently comply with publicly justified moral rules—the moral rules which specify their genuine social-moral obligations. In complying with a publicly justified law, persons better comply with the balance of (intelligible) reasons that apply to them. I also agree with Raz that legal authority issues pre-emptive reasons, that legal authority is piecemeal, and that it lacks at least some of the general characteristics of the duty to obey the law.

However, my view also differs from Raz's in crucial respects. Most importantly, public reason views insist that justificatory reasons be internally, epistemically accessible. They are reasons that persons are epistemically entitled to affirm, where entitlement is understood in an internalist fashion, as based on accessible evidence and sound inference. In particular, my view holds that all *intelligible* reasons are justificatory, reasons that members of the public at the right level of idealization rationally believe that the person who offers the reason is entitled to affirm it. These reasons might be metaphysically external, but they are essentially epistemically internal. The set of justificatory reasons is restricted to those reasons (be they metaphysically external or no) that satisfy the intelligibility requirement.

---

[367] Raz 1986, pp. 74, 80.
[368] Raz 2009, pp. 250-262.

Justificatory reasons are therefore only pre-emptive in a certain sense. We may have external reasons to act, and the balance of *all* our reasons might speak in favor of some particular action as a result. But on a public reason view, legal authority is only grounded in the balance of *intelligible* reasons (yielding *sufficient* intelligible reasons), such that a law has authority when the balance of intelligible reasons favors compliance and internalization, even if the balance of *all* of one's reasons points in another direction, even if some of those reasons are epistemically inaccessible for us.[369] This means that the reasons of legal obligation are not necessary pre-emptive, though they are seen as such by moderately idealized members of the public.

A third critical difference between my view and Raz's view is that on my view legal authority is wholly derivative from moral authority, which is also understood in terms of a balance of intelligible reasons. So laws only have authority when they serve us in helping us comply with our social-moral obligations. In this way, as far as the moral peace foundation of public reason is concerned, interpersonal moral authority mediates all legal authority. There is no legal authority without moral authority.

Finally, Raz's discussion of legal and political authority focuses on the authority of the directives issued by legal and political agents. My theory establishes the authority of moral and legal *rules*, which should enable anyone with the appropriate standing to insist that people comply with the relevant rule.

[369] Interestingly, Raz thinks the reasons that apply to us must be knowable, his final view may not be so far from mine. Again see Wall forthcoming.

The authority that persons have to issue directives is derivative of the authority of the moral and legal rules.

I now turn to contrast my view with natural duty accounts. As Edmundson notes, natural duty views claim that the basis of legal and political authority are duties that apply to all persons in virtue of being persons.[370] A natural duty view "derives the duty to obey the law directly from the moral obligations we are clothed with as human beings."[371] John Finnis claims, for instance, "that a duty to obey the law is necessary to resolve the coordination problems that would otherwise prevent the attainment of some good," whereas David Lefkowitz claims that the duty to obey the law is required to recognize the basic human rights of persons, which in turn requires "the creation and maintenance of political institutions that publicly enact, apply, and enforce laws."[372]

John Hasnas has defended a version of a natural duty view that, on its face, appears quite similar to mine. Hasnas, for instance, only defends a natural duty position to establish a duty to obey some laws that are not the result of legislation. He also grounds the duty to obey the law in the fact that a duty to obey the law is "necessary to attain an instrumental value, social peace, that is itself necessary to the attainment of all fundamentally important moral ends" such that humans has a natural duty to promote social peace, and that the duty to obey the law is implied

---

[370] Edmundson 2004, p. 229. Natural duty views include Rawls 1971, pp. 293-301, Waldron 1993, Finnis 1984-5, Wellman 2005, Lefkowitz 2005. For a natural duty defense of a limited duty to comply with non-legislative law, see Hasnas 2013.
[371] Hasnas 2013, p. 453.
[372] Finnis 1984-5, p. 133 and Lefkowitz 2005, p. 590.

by that value.[373] Hasnas argues that social peace is a kind of "primary value" because "reducing the level of interpersonal violence within a community to facilitate cooperative behavior is instrumentally valuable" no matter what moral theory one affirms.[374]

As the reader well knows, my account of legal obligation is based in an account of moral obligation that is, in turn, based on the social and relational value of *moral* peace and its capacity to establish relations of respect between persons. My view also depends upon the claim that there exist distinctively social-moral obligations, ones held by way of living under a system of extant moral rules that are publicly justified for those subject to them. So legal obligations exist only insofar as social-moral obligations exist. Non-members who are not party to the relevant moral rules lack the attendant legal obligations.

All the same, my view may appear to share many of the traditional problems with natural duty views, so let us quickly review four of them. The first problem is that it is not clear why "individual *as opposed to general* compliance with the law is required to achieve" the relevant good or satisfy the relevant duty.[375] A natural duty view, as well as my view, must show that an individual duty "really is necessary for human beings to attain a genuine morally compelling end." On my moral peace account, individual acts of compliance have the morally compelling end of discharging moral obligations, and so for that reason have value

[373] Hasnas 2013, p. 469.
[374] Hasnas 2013, ibid.
[375] Hasnas 2013, p. 455. Hasnas provides a nice overview of four problems with natural duty views, so I follow his characterization of the problems here.

and express respect for persons. I admit that if we relied entirely on the social and relational value of moral peace, it would be hard to see why individual duties are required to realize that value. But given my appeal to respect, I do not think the first problem for natural duty views affects my position.

Consequently, my view also solves the "problem of harmless disobedience," which holds that natural duty views cannot "explain why the underlying morally compelling end cannot be realized unless individuals have a duty to comply with *all* the laws of a jurisdiction, even those whose disobedience appears harmless."[376] My view, like Raz's, is piecemeal for persons. It only establishes legal obligations for persons who have the relevant moral obligations and who understand compliance with the law as enabling them to comply with their moral obligations. However, if the law is publicly justified, and so the subject of internalization, people should comply with them even when disobedience is harmless or hard to detect by others because, in complying, persons respect others. I don't think this establishes a duty to obey a stop sign in the middle of an unoccupied desert, since laws that impose pointless restrictions are hard to justify, but it does establish duties to obey laws where disobedience is otherwise harmless, since publicly justified laws are those that persons take themselves to have sufficient reason to obey and internalize.

A third problem with natural duty views is more well-known—the particularity problem. Natural duty views hold that all persons have a duty simply

[376] Hasnas 1995, p. 459.

because they are human beings, but it is not clear how to explain one's duty to obey the law of a particular legal system that governs one's community.[377] As A. John Simmons has famously put it, "natural moral duties will bind me as strongly with respect to persons or institutions that are not close to me (or my own) as they will with respect to those that are" and consequently, "it is difficult to see how a natural moral duty could ever bind citizens specifically to their own particular laws or domestic institutions."[378] My view does not face the particularity problem because it only establishes legal obligations for persons who have extant social-moral obligations. A person has a legal obligation only if she has social-moral obligations.

The critic of natural duty views could argue that my view has a particularity problem at the previous stage of social morality. I would reply that social-moral obligations also only hold when social norms are present. There may well be reasons to comply with moral requirements that are not social norms, and these reasons might ground the duty to obey the law, but my only claim is that people subject to publicly justified moral rules have legal obligations. Since a moral order carries particularity with it, obligations of this sort are particular to persons who are subject to the social norm.[379]

---

[377] Hasnas 2013, pp. 455-6.
[378] Simmons 2005, p. 166. Also see Lefkowitz 2005, p. 592 and Waldron 1993, p. 5.
[379] Though my view does raise a question I have not addressed, which is how to determine whether someone is subject to a rule. I think the core cases of persons who live in a community are sufficient to make my view plausible, but it does raise questions about people who only live in a community temporarily.

My response thereby also offers a simple response to a fourth problem with natural duty views, which is that one must do more than show legal institutions are morally justified to show that they have legitimate authority[380]; as Simmons notes, "the impersonal virtues of arrangements involving control simply do not entail personal legitimations of control."[381] But my account does not ground legal authority in impersonal virtues, but in the moral relations established by shared moral rules.

My view bears important similarities to Razian and natural duty views, but it differs in important respects, and avoids the trappings of natural duty views.

X. Rules, Moral and Legal

This chapter provides an account of legal obligation. Its intent is not to rule out other grounds for legal obligation. But given the great weight of respect for persons, moral peace establishes that we have legal obligations to one another. The point of legal obligation is to enable persons to live morally peaceful lives with others by facilitating the creation, maintenance, and reform of moral rules to sustain widespread rational moral trust.

Chapters 1-3 provide story about the constitution of society outside of the state, what we might call, following Rawls, our moral constitution.[382] Our moral

[380] Hasnas 2013, p. 457.
[381] Simmons 2005, p. 149. Also see Edmundson 2004, p. 223.
[382] Rawls 1980, p. 539.

constitution is the complex of publicly justified moral rules that largely cohere with one another in organizing social life between persons who are not fundamentally at odds, and who prefer to cooperate than conquer. This chapter has shown that a moral constitution, without a legal order, cannot fully realize moral peace and promote important social goods. To realize moral peace and promote these goods, we need a legal system of *authoritative* coercive laws. This insight provides a comprehensive explanation of why legal coercion requires public justification.

We must now outline the shape of a political constitution that realizes moral peace between persons. Specifically, we need an account of the highest-order rules of law *making*—a *political* constitution—and an explanation of how such a constitution is to be justified. Towards this end, Chapters 5 and 6 develop a three-stage model of constitutional choice based on the constraints outlined in Chapter 1-4. The first stage in justifying a constitution is to settle on a scheme of "primary rights" that citizens can agree to as constraints on public coercive power. Given deep evaluative pluralism, we cannot settle on much, but we can considerably constrain the set of constitutions that can be publicly justified. I then offer an account for how to publicly justify constitutional rules in terms of the degree to which they generate publicly justified law and allow for the reform or repeal of defeated law. Finally, I provide an account of constitutional stability, which involves both assuring conditionally cooperative agents that cooperation is

practically rational and that discourages defection by merely rational, rent-seeking agents. I develop the first stage in Chapter 5 and the second two in Chapter 6.

Chapter 5: Primary Rights

The ideas of moral peace, a social moral order, and public justification explain the need for a legal system with norm-applying institutions. A legal order must be added to a publicly justified social order of moral rules in order to correct for the defects of the legal state of nature by means of publicly recognized judicial systems and enforcement institutions. It corrects for the defects of the legal state of nature by discouraging the violation of moral rules, facilitating private arrangements, settling unregulated disputes, and delivering key goods and services. Legal rules, the components of the legal order, acquire moral authority when they efficiently improve upon the capacity of persons to comply with their social-moral obligations; I claimed in Chapter 4 that legal institutions efficiently improve upon this capacity by helping to realize these four social functions.

But my aim in this book is to show how *political* institutions can preserve moral peace between persons, and this involves justifying norm-altering institutions, bodies that can change the law. This means we need to explain how *constitutional rules* can be publicly justified. Constitutional rules are the highest-order rules of law-making and law-alteration. They allow persons to change the law. So our account of political authority has three layers—the moral, the legal, and the constitutional. The point of this chapter and the next is to provide a three-stage process for publicly justify constitutional rules as necessary complements to systems of moral and legal rules.

This chapter develops an account of the most fundamental constraints on the optimal eligible set of constitutional rules. These constraints are *primary rights*. A primary right is a right that anyone with a rational plan of life would want for herself to realize her conception of the good and justice and is willing to extend to others on reciprocal terms. A scheme of primary rights removes a vast array of constitutional rules from the optimal eligible set, for constitutional rules that allow for the systematic violation of primary rights cannot be publicly justified. Moderately idealized members of the public will insist upon rights to realize their conceptions of the good and justice and will not insist on special rights for themselves. Instead, they are prepared to extend their rights proposals reciprocally to all. Consequently, members of the public have reason to endorse primary rights and the constitutional rules that articulate and protect those rights. They have sufficient reason to reject constitutional rules that do not articulate or protect those rights.

In justifying rights, I am not trying to justify a scheme of objective rights that persons have, say, in virtue of their natures. My view does not require denying that such objective (natural or human) rights exist. The claim, instead, is that pressing claims based on objective rights *that lack public recognition* disturbs moral peace between persons. So while there may be objective rights, all I attempt here is to describe which rights must be part of a public *system of rights claims* recognized and protected by a publicly justified legal system.

I will not attempt an extensive derivation of any particular primary right in this chapter. I leave that for Chapters 7 and 8, which cover the rights of association and private property. My aim here is to outline the nature and justification of primary rights as such and to develop a case for certain classes of rights.

In many ways, my account of rights resembles Rawls's account of rights that protect and promote primary *goods*, but it differs in deriving primary rights partly based on the recognize that different moderately idealized persons will endorse different conceptions of justice, and will insist on the right to pursue their own conception of justice, as well as their conception of the good. As we saw in Chapter 1, I defend evaluative pluralism about the good *and justice*, which I call *justice pluralism.*[383] Later in his career, Rawls came to recognize that reasonable people disagree about justice, and that political institutions are authoritative and justified when they are reasonably just, as long as they institutionalize one member of a family of reasonable liberal political conceptions of justice.[384] But justice pluralism cannot be restricted in this way. A society treats persons that preserves moral peace between persons will not feature agreement on even a small set of such principles.

I assume justice pluralism because the Rawlsian and Hayekian burdens of judgment apply just as forcefully to conceptions of justice as they do to conceptions of the good. Unfortunately, I lack the space to defend that assumption

[383] I even allow, following Gaus 2016 and Muldoon 2017, in allowing for reasonable disagreement about social ontology
[384] Rawls 2005, p. xxxvi.

against Jonathan Quong's recent defense of treating disagreements about the good and justice *asymmetrically*.[385] His defense is based on two main lines of argument. First, Quong adopts an internal conception of political liberalism that expressly restricts the subjects of public justification to a highly idealized constituency of reasonable people who already affirm liberal values.[386] This assumption helps Quong defend his claim that reasonable disagreements about justice are necessarily based on thick common assumptions about what considerations are relevant to resolving such disputes. But, as I have argued elsewhere, the internal conception is in tension with the fundamental aims of political liberalism because it limits the number of persons to whom justification is owed to an extremely narrow group of people, probably the set of theorists who affirm political liberalism.[387] This makes Quong's political liberalism *objectionably sectarian*.

The second part of Quong's argument is that when we impose policies or principles on persons who reject those policies or principles despite affirming the thick common assumptions about value and the world that accompany reasonable disagreements about justice, we do not violate any plausible principle of legitimacy. This means that we can publicly justify coercing persons who disagree about justice without treating them disrespectfully or in an authoritative manner. I

[385] Quong 2011, p. 193.
[386] Quong 2011, p. 8. For a discussion justifying this restriction based on Quong's internal conception of political liberalism, see Quong 2011, pp. 137-160.
[387] Vallier 2016, forthcoming.

argue that imposing upon persons in this way is, contra Quong, disrespectful and authoritarian.[388]

My moral peace foundation for public reason also provides reason to reject Quong's approach. First, Quong's entire project involves a fundamentally different approach to idealization than the view I developed in Chapters 3. His goal is to try to show that political liberalism is internally coherent as Quong understands that project. In contrast, I am concerned to show that liberal institutions are justified because they can establish moral peace between real-world persons. And we establish moral peace by showing that persons has reason to embrace common moral, legal, and political rules that will gradually become the subject of rationally rational moral trust. For this reason, the internal conception is a non-starter given my foundation for public reason. Moderate idealization invariably leads to justice pluralism, and Quong's strategy for restricting justice pluralism must appeal to radical idealization built into the internal conception. So given the moral peace foundation of public reason, we can set the main competitor account of public reason liberalism aside for the remainder of the book.

Section I introduces the motivation for and basic definition of primary rights, while Section II explains the main features of primary rights. In Section III, I discuss how the selection of primary rights can avoid the trappings of a thick veil of ignorance while still identifying a relatively determinate set of rights. Sections IV-VIII develop five classes of primary rights: rights of agency, rights of

[388] Vallier 2017 (justice pluralism piece).

association, jurisdictional rights, procedural rights, and international rights. In Section IX, I address the question of the extent to which the idea of social justice has been eliminated from my account of public reason or just reinterpreted. To buttress the case for the latter, I introduce what I take to be a reasonable classical liberal conception of justice. I conclude in X by laying the groundwork for the transition to the public justification of constitutional rules.

I. Primary Rights

Justice pluralism implies that public reason liberals are not entitled to assume that moderately idealized persons will converge on a single set of principles of justice. Few principles of justice will be uncontroversial enough to serve as the uniquely justified, central normative role of organizing all of a society's major social, political, and economic institutions. I contend that once public reason liberals recognize justice pluralism, they must restrict their focus to determining which generic schemes of rights can be justified to persons who disagree about justice and the good.[389] Moderately idealized members of the public will be unable to agree on anything much more extensive than those schemes of rights and constitutional rules that articulate, protect, and stabilize those rights. In fact, the only additional thing they will be able to agree upon is to have part of the state's

[389] By initiating my model of constitutional choice with the selection of rights, I am on solid ground, as this first stage is extremely common among contractarian theorists, from egalitarians like Rawls, to libertarians like Jan Narveson and Loren Lomasky. Rawls 2001, p. 42. Lomasky 1987, pp. 56-83 and Narveson 2001, pp. 41-61.

duties include the provision of some public goods to which persons do not already have a primary right.

Members of the public will agree on what I call primary rights.[390] Like Rawls's notion of a primary good, a good anyone would want regardless of their rational plan of life, primary rights are rights that anyone would (a) want for themselves to pursue their conception of the good and exercise their sense of justice and (b) are willing to extend to everyone (and not just the reasonable) on the same terms.[391] Condition (a) specifies the extent of primary rights as including all rights necessary or helpful for enabling persons to pursue their conception of the good by giving them the social space and/or positive aid to form life plans and to live out those plans. For instance, a qualified right to private property is critical for forming life plans, and so is likely to be a primary right. Condition (a) also includes the rights necessary or helpful for enabling persons to pursue their conception of justice, so long as that conception is minimally moral and rational. For this reason, we can expect political rights to be primary rights, as persons live out their conceptions of justice by fighting to realize principles of justice in the political institutions they share with others. Condition (b) restricts the scope of primary rights by subjecting them to an equality condition. All primary rights are limited by the degree to which persons are prepared to extend those rights to others. If I propose that my society recognize a right of private property for myself,

[390] This approach owes much to Lomasky 1987, pp. 56-83.
[391] Rawls would later qualify his definition of primary goods to be the goods "persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life." Rawls 1971, p. xliii.

I must be prepared to accept the right of private property for others, and to accept moral limits on my ability to violate those rights. No one may insist on special privileges.

Primary rights must be *authoritative* for persons based on modest idealization, which means that the paradigmatic legal rights in a morally peaceful regime are *claim-rights*, not mere permissions to take certain actions, but rather permissions combined with a duty for others to allow rights-holders to take those actions. So publicly justified rights impose duties on others. This condition is critical for two reasons. First, only authoritative rights can preserve moral peace between persons, just as only authoritative demands and coercion can preserve moral peace. Second, if primary rights must be authoritative, this places limits on which rights can be publicly justified, as persons will only endorse rights that they believe rightly limit their liberty, since the protection of the rights of others limits our liberty in various ways.[392]

Some publicly justified rights go beyond claim rights. Many persons, especially those who validly hold a publicly justified legal office, have publicly justified power-rights—rights to create duties others must follow. But all power-rights must be justified as necessary to establish a functional legal system of norm-applying and norm-altering institutions. The quick case for publicly justified power rights is that a functional legal system requires that officials have the

[392] I grant exceptions, such as life-boat situations where persons are morally permitted to stop each other from pursuing a very scarce resource but neither is obliged to defer to the other.

authority to apply and change the law, which in turn can impose new duties on persons. Chapters 6 and 9 outline this case for legislative authority.

A system of publicly recognized rights must also be more or less *coherent*, in that there are publicly recognized mechanisms for resolving competing rights claims. This is not to say that all rights are *compossible* in the strong sense that there exist no contradictory, yet valid rights claims, but rather that the normal operation of a publicly justified legal order harmonizes rights-claims over time.[393] Social change, be it political, technological, cultural, etc., will frequently generate new rights conflicts, so systems of publicly justified rights will probably never reach full compossibility. But a publicly justified legal system will gradually render legal rights compossible were other forms of social change to grind to a halt. The process is analogous to a market price reaching equilibrium in the absence of constantly changing market conditions. So in an important sense, compossibility is a kind of *current* that draws legal rights into an increasingly coherent whole, even if the current can be thrown off by other factors.

A publicly justified scheme of rights must be *equal*. That is, if anyone has the right in a given circumstance, then everyone has the right in that circumstance. If, for instance, someone wants to claim a right to free speech for herself, she must be prepared to extend it to others on the same terms. She cannot insist on free speech for herself and not for others. Similarly, if a citizen takes a legal office, the rights and duties associated with that office should apply equally

[393] See Steiner 1977 for a classic account of the compossibility of rights, both as exposition and defense.

to anyone who holds that office. This equality constraint is not meant to commit a publicly justified polity to some form of distributive egalitarianism. Instead, it is a restriction on valid rights proposals: no unequal scheme of rights can be publicly justified, since some will always have a complaint that they should have as much protection and liberty as others.

Some primary rights and negative and others are positive. Negative rights are rights against certain kinds of interference or obstacles to action. To have a negative right to free speech, then, is to have a right against anyone interfering with the right-holder's speech.[394] Some publicly justified rights are negative rights because negative rights are required to realize rational plans of life of sufficient worth that most people expect to be able to pursue their own rational plan of life with others granting her deference to do so. This means that many proposed forms of interference will be defeated for many members of the public, and so for the public as a whole.

Further, all public justification must meet a presumption against coercion, and a presumption against coercion is an effective recognition of a negative right to not be interfered with in the absence of a public justification. This is to say that, within the domain of moral rules, there is a publicly justified rule that specifies that coercion stands in need of justification, whereas non-coercion does not.[395]

---

[394] Gaus 2000, p. 82. For the classic formulation of the negative-positive liberty distinction, see "Two Concepts of Liberty" in Berlin 1969.

[395] For discussion and defense of the claim that there is a publicly justified right against legal coercion, see Gaus 2011, pp. 479-487.

Turning to positive rights, primary rights can be positive in one of two senses—the right to freedom-as-self-rule sense and the welfare-rights sense.[396] The self-rule account construes rights as entitlement to social conditions that protect and promote one's capacity to rule herself, both against external interference *and* against internal blockages to self-rule, such as addiction or poor character. A person is positively free in this sense when she is ruled by reason rather than by others or by her own unruly passions. The welfare-account of a positive right is a right to the provision of certain goods and services, such as healthcare, clothing, shelter, and the like.

In one way, all publicly justified primary rights are positive in the self-rule sense, since a right is only publicly justified when it is rooted in the reasons that persons possess and their prima facie entitlement to act as those reasons direct. But in another sense, publicly justified rights typically are not positive in the self-rule sense because persons lack rights to force others to help them become better self-rulers. Others also lack the right to interfere with us in order to improve our capacity for self-rule, since anti-paternalist members of the public will have defeaters for those rights claims.

Welfare rights can sometimes be publicly justified, but not in the straightforward sense that John has a right that Reba provide him with healthcare such that he can violently force her to help him become healthy. Reba may often have defeater reasons for such acts of violence if she does not regard herself as

[396] Gaus 2000, pp. 82-84. For a proponent of the freedom-as-self-rule sense, see Green 2011.

morally obliged to help John, or if she does not regard herself as having reason to permit the coercive enforcement of that moral obligation. Instead, I understand welfare rights as rights that all persons have that their fellow citizens act to sustain institutions whose normal operation, be it deliberate or decentralized, provide the goods to which persons have a positive right. So if healthcare is best provided to persons via a market, and members of the public can agree upon this fact under conditions of moderate idealization, then the welfare right to healthcare is the right to participate in a functioning healthcare market.

Penultimately, all publicly justified rights must promote the achievement of *primary goods*, the goods which are required to realize nearly any rational plan of life. I do not endorse the entire Rawlsian account of primary goods, however. I will explain why by first reproducing Rawls's list:

(1) The basic rights and liberties;
(2) Freedom of movement, and free choice among a wide range of occupations;
(3) The powers of offices and positions of responsibility;
(4) Income and wealth;
(5) The social bases of self-respect: the recognition by social institutions that gives citizens a sense of self-worth and the confidence to carry out their plans.[397]

[397] Rawls 2001, pp. 58-59.

I term each class of goods a type indexed to their number; for instance, type-1 goods are the basic rights and liberties, and among type-2 goods is freedom of movement.

It is obvious enough that just about anyone with a rational plan of life will want certain basic rights and liberties to pursue the just and the good in a socially secure fashion. The list of type-1 goods arguably includes the standard litany of liberal rights recognized across most societies, especially liberal societies. There is widespread recognition, then, that some rights are ones that anyone, or nearly anyone, will find of vital use. I would add economic liberties to the list that Rawlsians reject, such as the ownership of private property, which I explore below and elaborate upon in detail in Chapter 8.

My approach to primary rights contains a lacuna: in defining primary rights as rights to primary goods, we run into the odd implication that type-1 goods—basic rights and liberties—are the ultimate object of primary rights. That is, there is a primary right to possess the *primary good of having a basic right*. However, the apparent redundancy dissolves once we recognize that the basic rights and liberties are *de facto* rights that persons enjoy as a matter of real moral and legal practice. So type-1 goods, basic rights and liberties, are not *de jure* rights, but real legal, institutionalized practices. So one has a *de jure* primary right to the good of *de facto* legal rights.

Now consider type-2, type-3, and type-4 goods. Freedom of movement is a primary good because anyone with a rational conception of the good wants to be

able to move around the world secure in their person and possessions. The same goes for freedom of occupation, since persons will want the ability to choose their occupation. I argue below that freedom of occupation includes the right to go into business for yourself, which in turn implies that owning and operating capital goods is a primary good, given that owning and operating capital *partly constitutes* working for yourself. Primary goods of type-3 include access to offices and positions of responsibility, especially those that affect the institutional rules persons live under, which includes both political office and influential positions of economic power. Obviously people will prefer to have access to those positions rather than being shut out of them; the ability to hold positions of influence is an important part of many forms of life. Goods of type-4—access to income and wealth—are the easiest to justify. Income and wealth are the keys to the acquisition of a wide array of goods and services. The right to own and operate private capital is also a type-4 primary good.

I have concerns about the social bases of self-respect—type-5 goods. I presume people do not have a primary right to self-respect, or to the respectful attitude of others, but rather to the resources that would be required for a person to respect herself. This is consistent with Rawls's claim that the social bases of self-respect are "those basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence."[398] Sam Freeman further explains that the social bases of self-

[398] Rawls 2001, p. 59.

respect are "features of institutions that are needed to *enable* people to have the confidence that they and their position in society are respected and that their conception of the good is worth pursuing and achievable."[399] So we look for institutional rules and goods that give people the ability to become confident in themselves. I would argue that goods of types 1-4 largely capture the social bases of self-respect.[400] For instance, if people are afraid to appear impoverished in public, the social bases of self-respect could include wealth. And if people feel diminished by their inability to achieve positions associated with high social status, then access to certain officials and offices could be part of the social-bases of self-respect. The main basis of self-respect that is not captured by other primary goods is the basis for resisting public stigma against, say, one's race, gender, or sexual orientation. Income, wealth, freedom of movement, and other basic rights and liberties may not be enough to allow oppressed persons to develop self-respect. Perhaps some form of affirmative action would be required to undermine, say, racial patterns of discrimination, and so to secure the bases of self-respect for the group discriminated against. But these cases aside, I will build the social bases of self-respect into the other four types of goods, particularly into type-1 goods, as de facto rights might include a right to compensation for being placed in disadvantaged social positions by historical circumstance and past oppression.

So I would modify the list of primary goods as follows:

[399] Freeman 2014. Emphasis mine.
[400] Even if they do not do so entirely.

(1) The basic rights and liberties, including economic and associational rights;

(2) Free movement and free choice of occupation, including self-employment;

(3) The powers of offices and positions of responsibility;

(4) Income, wealth, and capital.

These are the goods to which persons have primary rights, and primary rights are largely negative in character: they are rights not to be interfered with in the pursuit of these goods. Or, in the case of type-1 goods, they are rights to certain kinds of legal protection. However, when protection against non-interference is insufficient to secure an adequate level of these goods, government intervention can be justified so long as it can be shown with an adequate degree of justification that it can improve upon the circumstances typically produced by negative rights.

To further detail this list, recall that persons not only need the goods required to pursue their *good*, they also need the goods required to pursue their conception of *justice*. My account of public reason assumes substantial justice pluralism, as many people will have private conceptions of justice, much like they have private conceptions of the good. But if we treat the good and justice symmetrically, it follows that individuals will have a claim to order their social world in accord with what they believe justice requires. Critically, theories of justice conflict, and this implies that people have a claim to social resources to structure the justice system in ways that comport with their values. I think that, in practice, the only way to realize this right is to adopt strong rights to freedom of

association and federalism, including rights against the centralization of decision-making in the hands of the central state, which I discuss in Chapters 7 and 9 respectively. Pursuing a conception of justice is inevitably social and so requires association with others. Which helps to justify a strong right to freedom of association, such that I enumerate them as type-1 goods. I also argue that the right to pursue one's conception of justice, under conditions of pluralism, requires a considerable degree of institutional autonomy, and federal organization.

In sum, primary rights are a special kind of right. They are equal, publicly recognized claim-rights that legal systems attempt to define and harmonize over time. Primary rights must also secure for persons my revised list of primary goods, such that rights-holders can pursue their conceptions of the good *and justice* within an effective public system of rights.

II. A Veil with Normative Significance

Now we must determine how we can settle on a substantive scheme of rights that satisfies these conditions. Some may worry that *no* scheme of rights could satisfy all these conditions, but I think that is clearly incorrect. For remember the alternative—effectively living in a state of war with others, forgoing the social and relational value of moral peace between persons and the respect due others within a system of rational moral trust. There are at least *some* rights that survive this test, at least rights to bodily integrity and freedom of thought.

The traditional contractarian approach identifies a scheme of justified rights by constructing a choice situation where parties are denied certain information that would bias the rights or principles of justice they would choose. The choice situation is structured so as to ensure that the choice is not influenced by factors that are morally irrelevant, like race, gender, or religion. In this way, contractarians typically appeal to *veils of ignorance*. I find that the idea of a veil generates simple misunderstandings about the normative relevance of a contractarian bargain. They suggest, for instance, that the rules or principles chosen are morally binding *because* hypothetical persons (persons behind a veil) would accept them.

So let me be clear about what I'm after. The normative foundation of the book is moral peace. Primary rights are justified based on what moral relationships persons must bear to one another to preserve moral peace. So while I will appeal to a thin veil of ignorance to determine which primary rights can be publicly justified, I do so *purely as a heuristic* to economize on the search costs of locating a single scheme or small set of justifiable schemes of primary rights. The veil has *no normative significance other than as an economizing device*. Further, the *agents* in the veil have normative significance in the specific sense that their choices provide theorists with evidence about what practical reasons real-world persons have. We are not *treating* any real-world person based on what her idealized counterpart would accept. Instead, we are constructing a model to determine what real persons have most reason to do.

The veil I propose is thin. The choosers are moderately idealized members of the public, and they are not committed to choosing rights in order to preserve strong forms of social unity based on a shared conception of the good or justice. In virtue of their moderate idealization, parties know their own conceptions of the good and their conception of justice. Feminists may appeal to feminist conceptions of justice, just as Catholics may appeal to Catholic social thought. Persons may offer any of their reasons to accept or reject proposals in attempting to secure agreement. In practice, this means that a variety of rights schemes will be proposed and many will be rejected.

I allow for biased proposals, either because the proposal violates the formal conditions for having primary rights or because it is biased in content, say towards the political ideology of the proposer. However, biased *proposals* do not matter, since moderately idealized agents can detect the bias and reject proposals on that basis. Even if the input proposals are biased, the rights schemes that are the *output* of the contractarian procedure should not be problematically biased.

Members of the public will appeal to a *Pareto criterion*. They will prefer greater rights to fewer rights. If all members of the public prefer scheme S_1 to S_2, then the eligible set of rights-schemes only contains S_1. However, there are bound to be a great number of Pareto optimal schemes, as different schemes will secure different amounts of different primary goods. This means that the Pareto frontier will be defined by all the maximal, feasible bundles of primary rights schemes. To illustrate, imagine two rights schemes, one that secures many type-1 rights but not

much income and wealth, and another that secures income and wealth but fewer type-1 rights. From the perspective of members of the public as a whole, the two rights schemes might be equally choiceworthy, despite their differences. I assume, therefore, that all rights schemes on the Pareto frontier are indifferent from the social point of view. I also assume that these schemes can vary in content, though they must provide all persons with the same bundle of rights.[401]

Another question a choice model must answer is what the baseline of choice is. For Rawls, the baseline is equality, and departures from equality can only be justified if they maximize the position of the least advantaged.[402] For James Buchanan, the baseline is the holdings that persons secure following the state of war.[403] I reject both accounts. The scheme of primary rights is built from a baseline of the legal state of nature. Primary rights are legally enforced rights that help to complete the capacity of a society to establish moral peace between persons. The baseline is also understood in terms of the position of a representative person in the legal state of nature. If some have more rights than others in the legal state of nature, that fact does not play a role in setting the Paretian baseline, such that all rights schemes would have to increase the rights available to those who have special privileges in the legal state of nature.

---

[401] What about rights schemes that are unequal but maximize or increase the bundle of rights available to the least-advantaged in comparison to other schemes? If there are such schemes, schemes that are unequal but are nonetheless Pareto superior to all egalitarian rights bundles, then they might be able to be publicly justified despite the equality constraint, since disadvantaged persons will prefer more rights to less. But until one can show that an unequal bundle of rights is Pareto superior for the least-advantaged to all egalitarian rights schemes, I set this option aside.
[402] Rawls 1971, pp. 52-57.
[403] Buchanan 1975, p. 25.

Finally, moderately idealized members of the public choose a scheme of primary rights that *not only* secures a bundle of primary goods on the Pareto frontier but that maximizes the growth of the frontier *over time*. Even if parties prefer more primary goods to fewer goods at one time, they should prefer more primary goods to fewer goods *across* times. This implies that members of the public might choose a scheme of primary rights that entitles persons to fewer primary goods at present in order to secure a larger bundle of primary goods in the future. We should therefore expect the parties to engage in the *intertemporal* maximization of the bundles of primary goods.

Notice that this is not a principle of just "savings" as Rawls described it.[404] Instead, the parties adopt a *principle of sustainable improvements*. The authoritative scheme of rights is the one that promotes improvements for all over time, such that each person is entitled to sufficient primary goods that allow her to sustain herself and her family at present and to partake in social and economic growth. For instance, the principle of sustainable improvements almost certainly requires expanding the division of labor such that a national or global order has an ever-increasing number of plans to pursue as economic cooperation and production becomes more complex and sophisticated.

Improvement must be *sustainable* in that the forms of growth and civilizational development are ones that our best natural and social science suggest can be maintained over time. I grant that there is widespread disagreement about

[404] Rawls 1971, pp. 251-258.

which forms of economic development are sustainable, and that the term "sustainable" is often used by people who are pessimistic about our capacity for development. But I use the term capaciously to refer to what our best social science suggests we're capable of. I personally think that, as a matter of course, human ingenuity proves more powerful than we typically expect, given the long history of erroneous predictions that modern industrial production will fully deplete many natural resources.[405] I think we should err on the side of pushing progress too far rather than too little. But that aside, my central point here is that parties choose rights schemes according to a generic principle of sustainable improvements; I do not offer an account of which improvements are sustainable.

I want to stress how much the principle of sustainable improvements alters the landscape of publicly justified public policies. Public reason liberals have almost universally ignored the moral benefits of economic growth, seemingly preferring to follow Rawls, J.M. Keynes, and J.S. Mill in decrying excessive focus on economic growth.[406] But if we care about maximizing each person's bundle of primary goods, then, again, we should care about maximizing the bundle over time, and this requires that governments promote the sustainable growth of the bundles of primary goods. This suggests that policies that stymie economic growth

[405] Here I follow the reasoning that lead economist Julian Simon to win his bet with biologist Paul Ehrlich about the future prices and availability of various economic goods, which involved the assumption that human ingenuity would resolve industrial limitations in ways that could not be foreseen at the time. For analysis and discussion of the bet and its implications, see Sabin 2014.
[406] For a discussion of the continuity between their views, see Tomasi 2012, pp. 32-37. I disagree somewhat with Tomasi's characterization of Mill, but the difference is not relevant for my purposes in this chapter.

are *prima facie* suspect, as an increase in income and wealth involves an increase in the bundle of primary goods.[407]

So moderately idealized members of the public can propose schemes of primary rights based on their diverse reasons drawn from their conceptions of the good and of justice.[408] They will eliminate from consideration any schemes that do not meet the formal conditions of primary rights (like an unequal proposal), and some members of the public will have defeaters for a number of rights schemes, restricting the eligible set of such schemes. Among the undefeated schemes are those that maximize the each person's secure possession of a bundle of primary goods (as I have understood primary goods). The bundle will be maximized not over time. The baseline for choice is the position of the representative person in the legal state of nature.

Given these limitations, we can establish the existence of various primary rights by arguing that members of the public will converge on *a non-empty, non-singleton set of schemes of primary rights*.[409] First, members will prefer a scheme of primary rights to none given their varied and diverse ends, for rights protect the social space for each person to live her own life according to her own evaluative commitments. Second, parties will recognize more than one scheme as eligible;

---

[407] Though, of course, economic growth alone does not guarantee that the bundle of rights available to the poor will grow, or grow at a morally adequate rate. For some social democratic proposals for ensuring that growth promotes progress for the poor, see Kenworthy 2013.

[408] Note that the parties are not self-consciously committed to establishing moral peace. The choosers model a choice of rights that will preserve moral peace; they do not themselves choose on the basis of moral peace. I think Julian Mueller for pressing me to clarify this point. [move into body?]

[409] Gaus 2011, p. 43.

since members of the public are moderately idealized and diverse, they will not agree to jointly rank a single scheme of primary rights above all other undefeated options. In short, given the cost of not recognizing any primary rights, some rights will be acknowledged, but there will be only modest consensus on which scheme of primary rights is best.

I now turn to identify which *types* of rights will be chosen. I identify five types: rights of agency, associational rights, jurisdictional rights, procedural rights, and international rights.

III. Rights of Agency

I begin with the fundamental *rights of agency*, or rights that permit the formation of coherent agent psychologies and provide for and protect the minimal capacity of persons to exercise their agency. Since agency is required to pursue any conception of the good or justice, everyone will want some substantive, weighty rights of agency.[410] And given how important that agency is, they will sacrifice their potential authority to control others so as to secure authoritative protection for themselves. These agency rights involve extending authoritative protection to all, so agency rights also require acknowledging that others have the justified moral authority to insist that you not violate their rights, and vice versa.

[410] Gaus 2011, pp. 337-357 discusses rights of agency, as I understand them here.

Rights of agency come in two varieties—negative and positive. The most fundamental right of agency is the negative right against coercive interference with one's pursuit of justice and the good. This fundamental right is primary because it is the right of each person to authoritatively pursue her good and justice without control or interference. The negative right of agency generates justified prohibitions on coercion and interference to protect one's agency from control or by private parties or the state. The negative right of agency also includes rights against *harm*. Harm is a terribly complicated moral concept, and I cannot say much about it here, but I follow Joel Feinberg's classic understanding of harm as a substantive setback to her welfare interests and ulterior interests.[411] We can also follow Joel Feinberg in distinguishing between welfare interests, like the protection of one's health and bodily integrity, one's emotional stability, financial security, and so on, and ulterior interests, like a person's ability to pursue her fundamental goals and aspirations.[412] Harm is a setback to either sort of interest. However, my normative foundation for public reason involves justification to each person on her own terms. This means that we should understand harm intersubjectively, so I modify Feinberg's conception of a harm to understand it as an substantive setback of what a *moderately idealized member of the public regards* as her welfare interests and ulterior interests. Persons lack a primary right (though they may have a natural right) to not suffer objective harms, harms that *in reality* setback one's

[411] Feinberg 1987 contains the classic, great discussion. For a discussion of welfare interests, see p. 112. For discussion and analysis of Feinberg's view, among others, see Gaus 1999, pp. 136-159.
[412] Feinberg 1987, p. 37.

interests. Instead, they have a primary right against what members of the public regard as a setback to her interests.[413] This formulation is sufficiently specific for our purposes.

It follows from the adoption of equal authoritative rights of agency that persons have a long list of primary rights, including the right to life and bodily integrity, freedom of thought, freedom of speech, the formation of intimate relations with others, say through marriage or other contractual arrangements. They also have a primary right to own personal property, including photo albums, family heirlooms, clothes, and the right to own a home. Persons possess the primary right to freedom of occupation, such that the state may not forcibly determine what her job will be. This much should not be controversial. I know of no contractualist or contractarian theory that rejects these rights claims.

However, I do think that these primary rights, taken together, imply further primary rights that political liberals do not recognize. The combination of the right of freedom of occupation and the right to own personal property imply a right to *self-employment*. Freedom of occupation is insufficiently robust if persons only have the right to work for someone else and not for themselves. Further, the right to own personal property extends to one's home, and so arguably the right to use one's home for commercial purposes of some varieties. But if persons have a right to self-employment and the right to use their homes for commercial

[413] I leave aside here whether all members of the public must recognize the harm as a harm in general, or just whether they must recognize that the person putatively harmed is harmed in her own eyes. The latter formulation, however, fits better with my intelligibility requirement.

purposes, we have the foundations for a right to own private capital, since capital is just a good that produces other goods that can be sold for consumption or investment. If persons have a right to own and operate their home, and they have a right to self-employment, then they at least have the right to use their home as capital. And if this is so, then I think that there is a strong case to be made that persons have the right to acquire private capital outside of the home.

I do not mean to imply that the fundamental negative rights of agency require capitalism understood as complete private property in the means of production and voluntary exchange. I will argue in chapter 8 that government may abrogate the property rights claims characteristic of libertarianism. But it does imply that full socialism, understood as the planned economy and the public ownership of the means of production, violates the fundamental rights of agency, since socialism fails to protect a fundamental right of self-employment and the right to own and operate private capital. While some philosophers and communists may find this right controversial, it is not controversial in any extant liberal democratic order.

The *positive* right of agency is a right to resources or welfare, or at least to have access to goods and services required for an agent to freely develop and exercise her agency. Welfare includes uncontroversial needs, such as food, healthcare, housing, clothing, education, and non-discrimination. So persons have a primary welfare right to possess and consume these goods. Notice, though, that these welfare rights are emphatically *not* rights to state provision of these goods.

Instead, they are rights to have social institutions organized such that these rights are available and adequately protected. This means that, if free market orders are as productive as their proponents believe, these orders could respect these welfare rights through cheap, abundant products, and voluntary charity, perhaps with a basic social minimum guaranteed by the state.

In fact, given the negative rights of agency, there are *strong* reasons to favor non-coercive, voluntary means of respecting welfare rights. It is best to kill two birds with one stone—the protection of negative and positive rights of agency. This means that using market mechanisms and voluntary donations to respect positive rights is morally superior to the use of government coercion, all else equal. Therefore, in seeking to secure the positive rights of agents, we should first remove any coercive restrictions preventing them from securing resources and exercise their agency. For instance, suppose we have a choice between lowering the cost of healthcare through a single-payer system, which creates a health insurance monopsony and associated queuing, or allowing health insurance competition via health insurance exchanges subsidized by government. In that comparison, public reason liberals have strong reason to favor with the latter system of provision, given that it involves much less coercion: more companies can enter the market for health insurance provision, and people have more choices. In that way, a positive right to healthcare is respected, along with a negative right to choose one's own health insurance or to go into business offering healthcare insurance.

Importantly, primary rights to assistance, while publicly justified, can be seriously qualified by the presence of citizens who believe that rights to assistance are desert-sensitive. Many people believe, and may believe even if moderately idealized, that the poor are, by and large, responsible for their poverty. If so, then the poor persons do not automatically merit coercively imposed assistance from those who rationally believe that many persons are poor due to their own poor decisions. For instance, if middle-class John gives all his money to his church to live a life of poverty, many will believe that he does not have a right to assistance since he freely donated his income and wealth. The same would be true of people who freely engage in various forms of gambling or who become poor through indolence that is freely chosen. So there are *reasonable conservative* objections to extensive social insurance schemes that do not distinguish between the deserving and the undeserving poor.[414]

IV. Associational Rights

We now branch out from personal rights to analyze the rights of associations, such as families, churches, service organizations, and unions. Given how many conceptions of the good and fights for justice require membership in social

[414] This is one hurtle towards the public justification of a policy I favor—an unconditional basic income. Some will reasonably reject having their wealth redistributed to provide everyone with money no matter what choices they make. In response, I would argue that the efficiency of the basic income is sufficient to trump concerns about the undeserving poor, and that most moderately idealized members of the public would be open to the policy after recognizing this fact, which I think can be demonstrated via the standards of policy epistemology, as I discuss in Chapter 7.

organizations, the rights of freedom of association are bound to be strong. Most people, and I suspect all moderately idealized persons, will so value their right to form associations like families and churches that they would happily extend the same right to others. Even the most authoritarian religious and political organizations prefer a state of affairs where they and others are free to exercise their faith than a state of affairs where neither has that right. And the equality constraint on primary rights rules out special privileges that dominant faiths or political groups may seek for themselves. Associations are critical exercises of agency, and in many ways are preconditions for the formation of agency at all. This is especially true of families, but is also true of civic organizations and churches.

Another basis for freedom of association that is critical but less obvious is that associations, like individuals, are normatively prior to the legislative order. That is, they are not the mere creatures the modern legislative state, but rather can function in the absence of a modern nation-state. Families, churches, service organizations, and unions would exist in the absence of modern democratic states given that they serve critical needs. Further, we know that such organizations in fact existed prior to nation-states, as evidenced by the medieval period in Europe, where few political organizations had the powers of the modern state but associations proliferated. This means that, while these institutions are comprised of social rules, the priority of moral rules and non-state legal rules gives strong protection for the autonomy of these associations against the powers of the state. This is the theme of Chapter 7.

Given these two foundations for the right of freedom of association, we can conclude that a legal system that abrogates and controls organizations cannot realize moral peace because it destroys and undermines publicly justified moral rules that constitute these associations. I will say much more about the rights of associations in Chapter 7. But given the priority of social morality and the centrality of pre-political organizations like the family, religious institutions, labor unions, and universities, a public legal system cannot be publicly justified in violating the freedom of persons to form associations, to choose their own rules of operation, or to discipline or remove people from their organization.

Before transitioning to jurisdictional rights, I should add a controversial point, which is that many for-profit institutions are associations on a par with non-profit institutions. This means that some commercial enterprises will enjoy the same extensive protections afforded to non-profit organizations like service organizations or churches. But given that this claim is controversial, I will explore it further in Chapters 7 and 8.

V. Jurisdictional Rights

To secure agency rights and the rights of associations, members of the public must have rights over *jurisdictions.* Jurisdictions are spheres of social control where an

individual or group has the sole authority to authoritatively determine what occurs within that social space.[415]

Jurisdictional rights are not the same as agency rights for two reasons: (a) they involve protections that are not strictly speaking required for one to exercise her agency and (b) they have a unique grounding in the fact that evaluative pluralism prevents persons from making publicly justified collective decisions on a variety of matters. Regarding (a), jurisdictional rights might include the right to private property in a commercial enterprise, but if the state restricted this right, few people would endure a significant setback to their interests or regard their agency as plainly frustrated or violated. Rights of agency are especially critical to one's fundamental coherence as a doer and planner and to safety of one's person and conscience, jurisdictional rights less so. Regarding (b), and following Gaus, jurisdictional rights are partly grounded in the fact that they are devices for resolving unresolvable conflicts among diverse members of the public. As we will see in Chapter 8, one problem for liberal socialism—the combination of liberal rights and democratic decision procedures with the planned economy—is that people will not be able to agree on a central plan. A market order avoids this disagreement by allowing different people to develop and live out their own economic plans. Jurisdictional rights operate similarly: they protect social space for persons to make decisions for themselves that cannot be settled collectively.

[415] Mack 2000, Gaus 2011, pp. 370-374.

To illustrate, consider the ownership of land. Owning land is no mere liberty-right. The landowner also has a *de facto* claim-right against private parties or government from trespassing on her land without a strong justification (like the right of someone to serve a subpoena to the landowner). Strictly speaking, landownership is not *required* for a person to exercise her agency, at least outside of owning or safely renting land on which her house is built. But given that diverse persons will have trouble agreeing on how to use common property, private property in land can solve evaluative pluralism about land use by giving each individual a parcel to make her own choices.

Gaus has argued that the two fundamental jurisdictional rights are the right to privacy and the right to private property.[416] The case for the right to privacy is relatively straightforward and uncontroversial. Persons, Gaus argues, have immunity against certain forms of monitoring, searches, and seizures. Not only must private parties refrain from engaging in some forms of monitoring, searching, and seizing, but governments lack the normative authority to permissibly allow government officials to engage in the same activities.[417] The right to privacy is grounded not only in the protection of agency but in the fact that members of the public cannot collectively decide questions about what one may do in the privacy of her own home, such as whether the use of pornography is morally appropriate.

The case for the right to private property is similar. The right to private property not only allows us to protect our fundamental agency and to extend it

[416] Gaus 2011, pp. 374-386.
[417] Gaus 2011, pp. 382-4.

into the world via complex life plans. It also allows people to individually or locally resolve disputes that cannot be resolved collectively. In this case, there is more than a mere analogy with liberal socialism. Private property solves the insuperable collective decision problem posed by extensive government operation of the economy, as markets allow people to live their own lives according to their own evaluative standards.

In contrast to the right to privacy, the right to private property generates vast, intense disagreement. The extent of the right to private property animated the global contest between capitalism and socialism in the 20th century. Fortunately, I think we can avoid trying to settle this question by dividing the right to private property into components. For instance, the right to private property in one's home and yard is nowhere near as controversial as the right to the productive use of property. A right to own property to be used for non-profit purposes is also relatively uncontroversial. Few reasonable socialists would grant a federal legislative body the right to bulldoze a church against the will of its members, at least not without sufficient compensation. Further, good Rawlsian property-owning democrats probably don't want to give the government the power to take over or directly regulate their places of employment—colleges and universities. Congress lacks the primary right to shut down Harvard. The same goes for historical sites, cemeteries, and the like.

The core point of disagreement in most liberal democracies is the extent to which the jurisdictional right of private property[418] includes the use of property for commercial purposes. The heart of controversy concerns the *primary right to acquire and control private capital for profit*.[419]

To begin assessing whether persons have a jurisdictional right to own and operate private capital, let us note that every developed liberal democracy protects extensive private property rights in capital.[420] While controversial among philosophers, the right is not controversial in any developed, free society. The justification for this arrangement is that it is hard to draw any principled distinction between uncontroversial liberal rights on the one hand and rights to own and operate productive property on the other. We can surely own our homes, and it seems natural to think that we should be permitted to use our homes to run a small business, say for piano lessons, counseling, massage, dog breeding, etc. I fully grant that the right to one's home is limited. Property is widely regarded as legitimately subject to taxation and zoning regulations, such that the government can prohibit building a place of residence in a particular area (though excessively strict zoning laws may be sufficiently intrusive to be defeated in many social orders). Further, homeowners can be prevented from imposing negative externalities on their neighbors. So running a rock concert in one's backyard at

[418] We have seen that they already have a limited *agency* right to own some private capital, but that right is sharply limited to owning capital required to exercise one's agency. A jurisdictional right promises to be more extensive.
[419] Few dispute that governments are permitted to establish the constitutional or legal right to own and acquire private capital. The question is whether the right is primary, limiting government interference.
[420] Gaus 2011, pp. 511-521.

night can be limited because it imposes significant aural disruption on others. That said, despite these limitations, the right to operate a massage parlor, or host piano lessons, or baby-sit are uses of productive capital on the same order as one's right to safety and protection in one's personal possessions, one's home, and one's church. Government should keep its hands off church bake-sales, making wine for sale in monasteries, running lemonade stands, and mowing the neighbor's lawn.

The question before us, then, is even more specific; it is whether there is a primary right to own and operate productive capital *beyond one's home*. But we have already seen reason to think that moderately idealized members of the public will embrace this primary right—the considerations that justify the primary right to own and use a home apply to public commercial enterprises. All liberal orders agree that, by and large, people must have the freedom to choose one's occupation, at least between employers. They also agree that people must have the freedom to go into business for themselves. For persons on the left who worry about the treatment of workers under capitalism, the idea that the government can wholly abrogate the right to start one's own business is an absurdity. Owning capital is critical for starting worker-owned businesses and for many of the rights that Rawlsians would give to unions. Without this primary right, governments could legitimately prohibit the formation of syndicates. If Reba's home is not suitable for business, or if she wants to work outside of her home because she is more productive that way, she should have the primary right to contract with others to rent a space or to buy a building where they can run their business.

In this way, we can identify a weakness in the egalitarian liberal commitment to "economic exceptionalism," where economic liberties are treated differently than other liberal rights.[421] I have argued that the basic right to own and operate productive resources is on all fours with rights that liberals find much less controversial. Egalitarian liberals push back primarily when a business becomes large enough to have major economic effects on large groups of people. These effects include the ability to hire and fire a large number of wage-laborers, to impact the direction of markets, to impose large negative externalities on society, and to influence the political process. Based on this observation, it seems to me the specific issue that animates the indignation of people on the left is not even the right to own productive property, but rather *the right of persons to form large private firms that can control the livelihood and freedoms of their workers*. We have narrowed the leftist concern even further.

Due to the reasonable controversy, I think we should reject a strong primary right to own and operate large commercial enterprises with the same latitude that one might have in a freelance operation, running a small business, or operating a business out of one's home. True, being able to create and run a large, successful firm can be part of someone's conception of the good. It can even be part of living out one's conception of justice, such as creating an environmentally conscious manufacturing company. But if the right to own and operate large commercial enterprises involves enormous latitude in the treatment of workers, a

[421] Tomasi 2012, p. 42.

strong primary right to operate a firm could be used to restrict the right of workers to press for better working conditions. But workers probably have a strong right of freedom of association, such that large commercial enterprises do not have a primary right to prohibit this behavior. The primary right to unionize will generate conflicts between capital and labor, and an extensive right to own productive capital would tip the balance of reasonable objections in favor of capital and against labor in a way that many people have sufficient reason to reject. Large commercial enterprises may therefore be permissibly regulated to protect primary rights, including the primary rights of workers to form a union, as permitted by their right to freedom of association.

All that said, legitimate owners of large commercial enterprises have a primary right from *expropriation by governments*, despite having limited rights to control and determine the behavior of their employees. Governmental expropriation generally involves a massive amount of redistribution and control, which seriously curtails the ability of persons to live out their life plans. I would also argue that *workers* have a right against government expropriation. If Congress nationalized Google, it would violate the primary rights of Google's shareholders *and* Google's employees who freely agreed to work there. Further, note that unions are pre-political associations in the sense that they would exist in the legal state of nature. Consequently, they set limits on government law and legislation much like families and churches. As a result, if unions justifiably oppose nationalization, that will figure into a defeater for nationalization.

I also think we should be careful to craft economic liberties so that the interests of capital and labor are better aligned. Classical Marxists see this conflict as ineliminable short of socialist revolution, but their concerns have always struck me as exaggerated. If workers have the primary right to unionize, if governments can regulate business activity on behalf of the common good (when the regulations promote the common good *as understood by* a diverse public), and encourage competition within those industries, it has quite a bit of power to protect its citizens from dangerous corporate activity. No government needs the right to seize the means of production to protect the primary rights of its citizens, but every government will violate the primary rights of citizens if it expropriates industries. Classical state socialism, therefore, is the enemy of moral peace.

There are many other questions about the status of economic rights and liberties, particularly with respect to freedom of contract and the right to keep a portion of one's wealth and income. We must also address questions about how a morally peaceful order regulates economic inequalities. I will address these issues in Chapter 8 in more detail.

VI. Procedural Rights

We now turn to the procedural rights of citizens, both with respect to *legal* procedures and with respect to *political decision-making*. Legal procedural rights include the right to a fair trial, the right to a public defender, the right against self-

incrimination, and so on. Political procedural rights include the right to vote, the right to financially contribute to campaigns, the right to run for office, and the right to engage in public deliberation. While aspects of these rights are controversial, especially the right to financially contribute to campaigns, they are deeply entrenched in every free society, and with good reason. Anyone with a conception of the good and a conception of justice will want to be treated fairly by a legal system that could destroy their lives, and in some cases, kill them. Just about any suitably idealized person would want this right sufficiently badly that they would gladly extend the same right to others on reciprocal terms.

Political rights can be justified on similar grounds, as each reasonable person will want the right to influence the political process, and to be able to have a genuine effect inasmuch as this is possible. In the vast majority of cases, citizens are not able to impact the political process because there are simply too many citizens for any one person to have a major impact. But, collectively, the right to vote has a critical role in preventing governments from engaging in disastrous policies.[422] Democracies have *many* bad policies. But they are typically *dramatically* superior to policies in non-democracies, such as authoritarian regimes like China, and other dictatorships. So even if no one person can significantly impact an election through the right to vote, nearly all suitably idealized persons will recognize the easily accessible information on the record of democratic states in

[422] For instance, democracies are thought to fight few wars against other democracies, and to avoid famines. On the former, see Köchler 2001 and Hensel, et al. 2000. On the latter, see Sen 1981 and Rubin 2011.

reducing violence, fighting relatively fewer wars, and preventing mass starvation. As Mill noted, the right to vote is the right to control others, and so the right to vote should be limited to the right to vote over issues that do not violate primary rights.[423] But moderately idealized citizens will know that giving the people political input makes for better governance than the alternatives.

Further, many citizens see political rights as their only effective means of pursuing justice. Political organizing, for instance, gives meaning to the lives of millions of people across the world's democratic states, and even in non-democratic states with groups attempting to create a democratic order. So the reasons persons have to pursue justice only strengthen democratic rights (though, again, democratic rights can be used to control others, and so set back their capacity to pursue justice, so this rationale only goes so far).

I can really only think of one serious and significant exception to this rule: libertarians. Many libertarians would gladly give up their right to vote in exchange for financial compensation or for more economic liberties, given that libertarians are those least enthused about the power and goodness of the democratic process. But libertarians, with rare exception, prefer democratic regimes to real-world authoritarian alternatives. And since progressive and conservative members of the public arguably have sufficient reasons to defeat libertarian regimes, a system with the limited right to vote is the best regime libertarians can *insist* upon.

[423] Here Mill speaks of the right that a Member of Parliament has over others, but that there can be no right to power over others. Mill 1963, Volume XIX, p. 326.

However, all is not lost for libertarians. In Chapter 9, I will argue that rights of *exit* can be serve moral peace as much as rights of *voice*. And in some cases, the right of exit will be more important, since it can substantially improve the life prospects of rightsholders in comparison to the right to vote and engage in democratic deliberation. From this, I think, primary rights to federalist regimes, a limited right of secession, and rights of emigration will become an important part of a morally peaceful institutional order.

VII. International Rights

Finally, we turn toward international rights, or rights to engage with other political orders and members of those orders. I set aside questions of war and international peace entirely, as they raise complications beyond the scope of the book. Instead, I will focus on international freedom of movement and freedom of trade. I think persons have primary rights to freedom of movement because Reba's ability to exercise her conception of the good and justice depends upon the availability of opportunities to escape institutions that significantly undermine one's welfare and violate her other primary rights.[424] Immigration restrictions impose incredible harms on immigrants, especially those who wish to move from very poor countries to rich countries, and so it is hard to see how they don't have defeaters for those

[424] In this way, the primary rights to immigration and trade are on all fours with other primary rights. They have the same justificatory basis. For a powerful, recent argument that rights to immigrate have the same ground as other liberal rights, see Hildalgo and Freiman 2016.

restrictions.[425] I grant that citizens may have the right to deny immigrants citizenship and some non-essential social services, but they do not have the right to exclude immigrants from entering the country unless they present a clear and present danger to the stability of efficacy of political and economic institutions. I would make the same argument for a primary right to trade with persons internationally. The right to free exchange is vital for the livelihood of many people, and so limitations on trade will be defeated.

The main counterargument to primary rights of immigration and trade is that many people will be made worse off by free immigration and free trade, in particular those who will lose their jobs to immigrant workers and workers who live in other countries. But economists agree more on the economic benefits of free trade and immigration than almost any other issue.[426] This strongly suggests that the evidence supporting the economic benefits of free trade and free immigration will meet the standards of policy epistemology, an idea I explain in Chapter 8. Moderately idealized persons will understand and accept these benefits and so support primary rights to free trade and free immigration, as it stands to benefit them all. In response to concerns about displaced workers, moderately idealized persons are much more likely to pursue ways of mitigating these losses other than restricting trade and immigration. Consequently, persons displaced

[425] Gaus 2011, pp. 478-9.
[426] On immigration, see Kerr and Kerr 2011. On free trade, the consensus is even greater. See http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_odfr9yjnDcLh17m. Regarding the statement that "Freer trade improves productive efficiency and offers consumers better choices, and in the long run these gains are much larger than any effects on employment" 29% of over 100 top economists strongly agreed, 56% agreed, and 5% were uncertain. 0% disagreed, 0% strongly disagreed, and 0% had no opinion.

from their jobs by free immigration and free trade may have a primary right to a job-retraining program, financed by taxpayers if necessary.

VIII. Whither Social Justice?

So far I have used a thin veil of ignorance to show that certain rights are so valuable to persons who wish to pursue justice and the good that they will extend them to others on reciprocal terms. The set of rights I have justified are presently stable among highly educated citizens of democratic societies, and social elites in those orders make an effort to protect them, save for international rights. Together, both moderate idealization and present recognition of these rights suggest that these primary rights are publicly justified and so supply persons with defeaters for laws violating primary rights.

Many economic liberties, however, are extremely controversial even across the developed world. There are deep disagreements about the extent to which economic liberties limit permissible taxes, both their degree and progressivity. There is also extensive disagreement about whether governments have the right to compress income and wealth distributions merely because of the intrinsic value of equality. Since I cannot resolve these issues here, I leave them largely to Chapter 8.

At this point, readers may detect a mild resemblance to Rawls's view, even though my list of primary rights is more extensive than the liberties covered in Rawls's first principle. But, unlike Rawls, I have no other principle to add. This is

because I think many reasonable members of the public will reject additional principles. Instead, members of the public will insist that states remove obstacles to their pursuit of the good and of justice. I suspect that in a diverse society, justice is realized differently across different social contexts, such that different values specify what justice requires depending on the circumstance. David Schmidtz divides the elements of justice governing different social circumstances into desert, equality, reciprocity, and need.[427] This contextual approach to more extensive principles of justice suggest that there will be no single, unified explanation of the justice of distributions in terms of overarching distributive principles.

To stress a point I made early in the chapter, Rawlsians who insist that their conceptions of justice should be *the* organizing political ideas of a free order ignore justice pluralism and so are prepared, unwittingly or no, to break the moral peace in their society in order to impose their conception of justice on others. Rawls's second principles, Fair Equality of Opportunity and the Difference Principle, are both highly contestable by reasonable people. Rawls himself admitted as much for the difference principle, but it's clear even with fair equality of opportunity.[428] A reasonable person could deny that society is a race to garner positional goods, such that the fact that Reba has more opportunities than John requires no justification. The opportunities Reba has could easily improve John's opportunities and he has

[427] In this way, my approach to theorizing about justice resembles that in Schmidtz 2006, though my account is located within a theory of public reason and Schmidtz's is not. See esp. pp. 17-21.
[428] Rawls 2005, p. xlvii.

no natural entitlement to have as many opportunities as Reba.[429] I do think a principle of *sufficient* opportunity is plausible, but a right to these opportunities flow from the list of primary rights I've outlined above. For instance, I think a desert-sensitive sufficientarian principle is quite hard to reject, but we have already established a primary right to welfare, which can arguably satisfy that principle.[430] So we do not need to articulate an additional principle of justice.

If we understand Rawls's two principles as offering a theory of *social* justice, a notion of justice that regulates society's main institutions and that is concerned with the distribution of primary goods, then we can understand my theory of primary rights as a theory of social justice. So, on my view, social justice requires the systematic recognition and protection of equal primary rights. Importantly, I do not thereby reject the critique of social justice offered by Hayek[431], since the conception of social justice I adopt does not involve judging the justice of particular economic distributions, but rather concerning principles governing the basic structure of the moral and political order. Hayek had no problem with this understanding of social justice.[432] However, unlike Rawls, I place my theory of social justice within an account of the justification of moral rules and the value of

[429] Schmidtz 2006, pp. 109-114.
[430] For a discussion of sufficientarianism, see Arneson 2013, esp http://plato.stanford.edu/entries/egalitarianism/#Suf.
[431] Hayek 1978.
[432] See Hayek 1978, p. 100. For discussion of the sense in which the Rawlsian project does not conflict with Hayek's hostility to social justice, see Tomasi 2012, pp. 142-150.

moral peace. This means that the conception of justice developed here is bound by a prior set of moral rules; it is public reason within moral rules.[433]

IX. Onward to Constitutional Choice

Legal systems establish moral peace between persons only if they establish, recognize, and protect primary rights. But primary rights are invariably vague and so require legal codification, modification, interpretation, application, and harmonization. For that, we cannot rely on the rights themselves, nor can we rely entirely on moral and legal rules to settle these complex issues in an effective fashion. This means we need constitutional rules that can alter moral and legal rules. I therefore turn to develop an account of constitutional choice.

[433] In this way, I follow the much neglected, Buchanan and Brennan 1985.

Chapter 6: Constitutional Choice

The conclusion of Part I of this book is that publicly justified moral rules can establish moral peace between persons. However, they cannot do so by themselves. I argued in Chapter 4 that a system of moral rules requires a legal system to enforce, protect, harmonize, and alter many of the moral rules in that order if the moral order is to be both coherent and publicly justified. But even the legal order needs help in realizing its social functions because we sometimes need to change the law. Towards this end, I introduce a three-stage model for how to choose constitutional rules to govern the adoption, alteration, and repeal of laws. Constitutional rules are publicly justified under three conditions. First, constitutional rules must identify, codify, protect, and elaborate a system of primary rights. Second, constitutional rules must minimize errors in the imposition of law, minimizing both the passage of unjustified law and the failure to pass publicly justified law.[434] Third, constitutional rules must be self-stabilizing in the sense that they can maintain themselves in existence against both external shocks and the provision of assurance among those who comply with constitutional rules because they are publicly justified.

Chapter 4 outlined the first stage of constitutional choice. Chapter 5 is devoted to the second and third stages. The first aim of the chapter, then, is to determine how to publicly justify law-altering institutions, specifically legislatures,

[434] This second stage draws partly on Gaus 2008, part of the argument of which Gaus notes in correspondence he has abandoned.

or law-making bodies. I understand a constitutional rule as a highest order rule of law-making that governs the recognition, alteration, creation, and repeal of laws and policies. We know that constitutional rules must recognize and protect primary rights, which involve, among other things, institutionalizing social systems whose normal operation provides an adequate amount of social and economic goods. But we know little else about how to choose constitutional rules that preserve moral peace between persons.

I follow James Buchanan in distinguishing two stages of constitutional choice: protective and productive.[435] First, a political constitution specifies the protective function of the state, which is to protect, elaborate, develop, systematize, etc. the range of primary rights in that society. Second, a political constitution specifies the productive function of the state, which is to produce goods and services that cannot be produced in adequate supply via the moral order alone and that are not themselves required for the protection of primary rights.

To execute its protective and productive functions, an order of constitutional rules must minimize two types of errors in the production of law: the passage of unjustified law (a type-1 error) and the failure to pass justified law (a type-2 error). Members of the public will have different priorities in selecting constitutional rules. Progressive members of the public will be more concerned that much-needed legislation will not be passed, and so will worry more about

[435] Buchanan 1975, p. 68.

type-2 errors than type-1 errors. In contrast, libertarian and conservative members of the public will be more concerned that bad law will be passed. To treat all parties as free equals, then, we must find a method of taking their variable weightings into account. I argue that the best method involves aggregating the personal error weighting of each member of the public. I then suggest a candidate aggregation rule, one that chooses a social error weighting by means of both the Borda Count and the Condorcet Rule.

In explaining constitutional choice, I proceed in five parts. I first introduce the idea of constitutional rules and the general approach I advance to determine which rules are publicly justified. I advocate drawing on the constitutional political economy advanced by public choice economists, in particular the approach to constitutional choice championed by Buchanan and Gordon Tullock. In section II, I explain the promise of this approach. In the third section, I outline how constitutional decision rules can be chosen within public reason. I then face up to the powerful challenge that evaluative pluralism will prevent the selection of constitutional rules because members of the public cannot agree on which sorts of errors constitutional rules should more effectively avoid. So in section IV, I argue that we must appeal to social choice theory to generate an aggregate judgment. I then introduce, in section V, my preferred decision procedure, the Borda-Condorcet Rule, which combines the Borda count and the Condorcet voting rule in order to remedy the defects of both.

I next introduce the conceptions of stability required to explain how constitutional rules that respect primary rights can self-stabilize in the face of internal dynamics and external shocks. In Section VI, I connect constitutional choice to political stability. Section VII outlines two distinct notions of stability—durability and immunity. Constitutional stability is achieved when a constitution is both durable and immune for the right reasons.

I. Constitutional Rules

Primary rights are general and vague. Constitutions must therefore do more than protect them; they must also identify institutions practices that codify these rights, extend them to new situations, and harmonize them in cases of conflict. Further, constitutions must govern the choice of laws that execute the productive functions of the state, which appeals to primary rights even less to fix their content. Consequently, we need additional sources of information about how to choose among constitutional rules that remain eligible once we protect primary rights. I propose that this information be drawn from the empirical and normative evaluation of particular acts of law and legislation. As I argued in Chapter 3.1, public reason liberals should individuate the objects of public justification at the level of specific moral and legal rules. Laws are the proper unit of justification.[436]

[436] Jonathan Quong, *Liberalism without Perfection* (New York: Oxford University Press, 2011)., ch.10 and Gaus, *The Order of Public Reason*., Chapter V, section 15 and Chapter VIII, section 23.2 for arguments for fine-grained individuation of proposals.

My claim is that we can publicly justify the remaining eligible constitutional rules by how effectively they generate publicly justified law and how effectively they block, reform, or repeal unacceptable laws. We can use the specific information we have to evaluate particular laws to make these more generic judgments.

My approach may seem backward—many may prefer to justify laws by first justifying constitutional rules, whereas I propose that we justify the constitutional rules that survive the winnowing of primary rights by appealing to the laws we expect the rules to produce under normal conditions. So I would like to give some further arguments for individuating the objects of coercion at the level of laws, as this can justify my approach to constitutional rules by ensuring that laws are justified first and constitutional rules second.

First, moderately idealized agents cannot rationally evaluate the justifiability of constitutional rules and principles of justice in the abstract because of difficulties in determining the effects of institutionalizing rules that general. We cannot say with much specificity how those institutions will function.[437] For example, we cannot reasonably evaluate judicial review without evaluating the laws and policies that the courts have historically affected. If we review the historical impact of judicial review by looking at particular cases, we can come to a richer and better informed, though far from definitive, judgment. If we evaluate institutional structures in terms of the laws they produce, then we can hopefully develop a cumulative case for a particular constitutional rule by looking at its

[437] Buchanan and Brennan 1985, p. 30. This is Buchanan's "veil of uncertainty."

history. We can also appeal to detailed social scientific models in order to organize and interpret that history.

Second, coarse-grained objects of justification allow too many regimes and laws to be publicly justified. If we justify at the level of constitutions, any regime type or constitution that members of the public regard as (a) better than no constitution and that (b) is not Pareto-dominated by another alternative will be eligible for public justification.[438] Given the importance of having *some* constitutional order, members may be prepared to endorse illiberal constitutions. Fine-grained individuation helps us to restrict the set of potentially justified laws to options that better fit with our sense of the genuinely eligible options for public justification in a free society.

Third, we focus on the public justification of moral rules is that they're the forms of social practice that can be *internalized* by most moral agents. Moral life is not based on generic moral principles like the categorical imperative, but on local rules governing local behavior. Based on an analogy between moral and legal rules, we should stick to legal rules as the right level of evaluation simply because of our limitations in internalizing principles rather than specific rules.

A fourth argument for individuating objects of coercion at the level of laws is that there is too much disagreement at the level of principles to get traction on what is or is not justified. As we saw in chapter 5, justice pluralism ensures that we cannot agree to implement substantive principles of justice. Instead, we need to

[438] Gaus 2011, section 23.2. Recall Julian's worry.

look towards moral and legal rules concrete and specific enough to be evaluated, ranked, and approved, or rejected.

If we individuate coercion at the level of specific legal rules, then working out the second stage of constitutional choice becomes clear. In the second stage of constitutional choice, public reason liberals should judge constitutional rules by the *relative frequencies* with which they generate publicly justified law and allow for the reform or repeal of defeated law. A type-1 error is produced by the passage of a defeated law or the failure to reform or repeal that law—a false positive. A type-2 error is the failure to pass publicly justified law—a false negative. The second stage of constitutional choice is to minimize the *weighted sum* of type-1 and type-2 errors it produces over the course of its normal operation.

I argue that we can follow Buchanan and Tullock in choosing political decision rules.[17] Buchanan and Tullock's famous classic k-rule analysis can be modified and updated to include not merely the internal costs of decision-making within a legislative body, but the external costs of enduring *both* publicly defeated law and failing to enjoy a regime comprised of publicly justified law.[18] We can aggregate these three cost curves and select the number of persons required to pass a law at the minima of the three curves.

Importantly, constitutional rules involve much more than settling on a number of decision-makers, so the k-rule analysis is only one piece of the puzzle. A fuller picture of the relevant components will be required in order to fully elaborate the public justification of a constitutional rule. But we must begin the

justification of my approach somewhere, so I focus on the constitutional rules specifying the proportion of voters or officials required to pass a law.

II. The Promise of Public Choice

I believe that by appealing to *public choice* approaches to constitutional choice, we can make considerable progress in specifying the institutions of a just society, far beyond what can be established in Rawls's model. In this book, I shall understand public choice primarily as a *normative framework* that aids in selecting normatively binding institutional rules and norms, and not merely as a positive research program. Like Rawls's work, the public choice framework lies squarely within the social contract tradition. However, the project as articulated by James Buchanan has three unique features that commend themselves to the public reason liberal. Buchanan's contract (i) does not depend on agreement on principles of justice, (ii) provides a much more detailed account of the parts of constitutional choice, and (iii) due to its greater realism, offers a much broader source of information for determining which constitutional rules can be publicly justified.[439]

Starting with (i), Buchanan's contract never attempted to use principles of justice to substantially limit constitutional choice.[440] Instead, his contract *begins* with the selection of constitutional rules via a unanimity or consensus standard,

[439] A fourth feature of Buchanan's theory of constitutional choice is that it does not assume full compliance with principles of justice. Further, Buchanan has a dramatically more developed theory about how compliance breaks down and how to handle it. I hope to adapt Buchanan's tools for reducing non-compliance to a public reason framework in future work.

[440] As the paper's epigraph illustrates.

where everyone must agree to a set of constitutional rules to make them legitimate. Buchanan's contract is thereby insulated from the threat of pluralism about justice.

Regarding (ii), Buchanan's model of constitutional and legislative choice offers much more detail than the Rawlsian model. First, while Rawls distinguishes between the constitutional stage and legislative stage, Buchanan postulates a more complex and subtle relationship between constitutional and "post-constitutional" choice.[441] Buchananite constitutional choice proceeds via the integration of two cost curves, one that tracks the external cost of a decision-making rule and one that tracks the internal cost of a decision-making rule. The external cost is understood as the cost an individual pays due to a single rule imposed by other voters.[442] The internal cost is understood as the cost of decision-making itself.[443] The aggregate cost curve gives us a method of selecting voting rules based on an assessment of their net external and internal costs.

Second, Buchanan distinguishes sharply between the protective and productive functions of the state.[444] Rawls recognizes that the state should protect rights and produce public goods, of course. In fact, Rawls's two principles reflect the distinction, as the first principle protects a set of basic liberties and the second organizes the production and distribution of wealth.[445] But Buchanan's distinction emphasizes that there are two types of rational justification at the constitutional

[441] Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*., p. 33.
[442] Buchanan and Tullock, *The Calculus of Consent*., pp. 63-8.
[443] Ibid., pp. 68-9.
[444] Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan*., pp. 68-70.
[445] Rawls, *A Theory of Justice*., pp. 52-6.

stage of political choice. By adopting his distinction, we can identify two types of public justification at each stage. I will explain the protective-productive distinction further below.

Finally, concerning (iii), Buchanan's contract allows us to select constitutional rules by appealing to information concerning patterns of non-compliance among officials and citizens.[446] Buchanan thereby provides two types of information to the public reason liberal—information about how to design a constitution to produce generally just and effective laws and information on the functioning of non-compliant institutional actors.[447]

Rawls and Buchanan sharply disagree about which information is relevant to constitutional choice. Rawlsians object to including information on non-compliance in *ideal* theory, rather than nonideal theory. For Rawls extends his assumption of compliance to constitutional choice, the second stage in his four-stage sequence. He even claims that constitutional choice is purely a part of "moral theory" and criticizes Buchanan and Tullock for making the process of constitutional choice too realistic.[448]

Contra Rawls, I believe that problems of non-compliance are relevant to ideal theory, even as Rawls understands it, because ideal theory only assumes

[446] One could try to pack this information into the knowledge of social science that Rawls gives the parties to the original position. But Rawls was never very specific about what he meant and clearly means for a lot of the information public choice economists appeal to be excluded from the process of political justification in the second stage. See ibid., p. 119.
[447] Ibid., pp. 171-6 details the structure of the four-stage sequence.
[448] Rawls, *Collected Papers*, p. 74, n.1. Also see *A Theory of Justice,* p. 173, n. 2.

conditional compliance with the principles of justice.[449] Non-compliance also enters Rawlsian ideal theory in Rawls's discussion of the strains of commitment.[450] These problems are even more acute in *Political Liberalism*, for stability for the right reasons depends on persons with reasonable comprehensive doctrines regarding themselves, arguably contingently, as having reason to comply with a constitution, the essentials of which are specified by a political conception of justice. Justice pluralism only exacerbates the problem, as people may find reason not to comply with their institutions when it fails to embody an adequately just political conception.

Further, while I think it makes sense to choose *principles of justice* assuming strict compliance, it is far less plausible to choose *constitutional essentials* with this strong and unrealistic assumption. It is one thing to say that *justice* should not be tainted by real-world failures on the part of citizens and officials. It is entirely another to say that a *constitution* should not be structured around accounting for the weaknesses of real-world individuals. So I believe that constitutional choice within Rawlsian political theory should relax the assumption of strict compliance.[451]

But even if the reader is unconvinced that Rawlsians should take on the revisions I propose, surely *my* approach to constitutional choice is enriched and improved by appealing to the formal and empirical work in the public choice

[449] Rawls, *A Theory of Justice*, sec. 86 discusses cases where defection is rational.
[450] Ibid., sec. 29.
[451] Insofar as the distinction between strict compliance and partial compliance remains theoretically useful, and I'm not sure that it will.

research program. Public choice promises public reason liberals a systematic method of identifying publicly justified constitutional rules.

Public choice contractarianism requires a number of modifications before we can use it.[452] For now, it is enough to point out that public reason liberalism replaces the idea of consent in public choice contractarianism with the intelligible reasons standard and replaces Buchanan's conception of costs with the idea of a balance of reasons.

III. Constitutional Decision Rules in Public Reason

Buchanan provides us with a method for selecting constitutional rules based on the minimization of external and internal costs. I argue in the supplement that we must translate Buchanan's preference-cost framework into the public reason framework of sufficient reasons. Thus, the Buchananite attempt to minimize the internal and external cost of decision-making should be understood as an attempt to identify rules that citizens have *most reason* to endorse given their values and commitments *along with* the internal and external preference-cost of various decision-making rules (since the costs one faces bear on the reasons one has). I have argued above that the public reason liberal should judge constitutional rules by the relative frequencies with which they generate publicly justified law and allow for the reform or repeal of defeated law. We shall therefore understand the

[452] I discuss these alterations in detail in Vallier 2017 (E7).

external cost of a decision-rule as the *weighted sum* of type-1 and type-2 errors it produces over the course of its normal operation for a given period.[453] The rules with the lowest external costs are those that produce the lowest weighted sum of type-1 and type-2 errors, and other rules can be ranked in accordance with the sum of errors they produce.

Importantly, preference costs still play a role in choosing between decision-rules, but these costs only matter insofar as they affect the balance of reasons each person has to accept or reject a decision-rule. Preference-costs are relevant to determining our reasons to act, but public reason liberalism denies that preference-costs are the *only* factor relevant to fixing what we have reason to do.

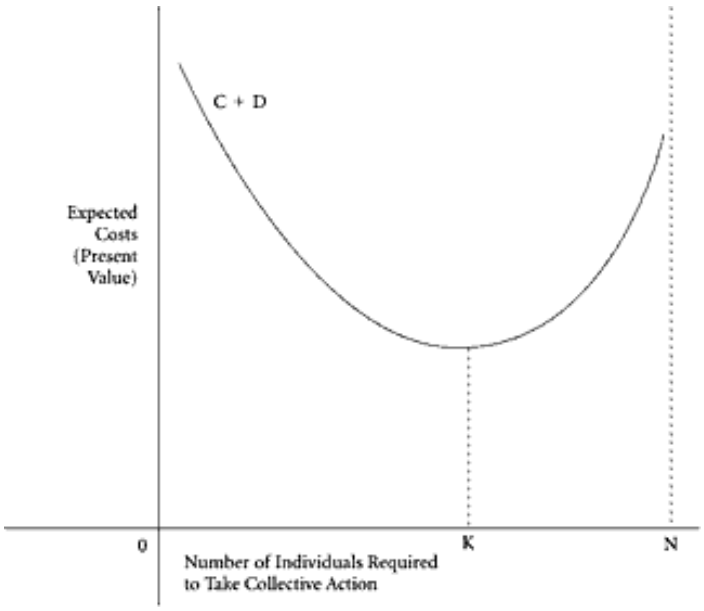
Obviously the balance of type-1 and type-2 errors is not a simple quantity. To come up with a balance, we need some trade-off rate between the two. Further, we need to distinguish between better and worse errors of *each* type. Some type-1 errors are bound to be much worse than others; if a constitutional rule typically produces laws that place enormous costs on a particularly vulnerable sub-group within a society, then this type-1 error (a false positive, a law treated as justified that is in fact defeated) is much worse than the consistent generation of laws that prove to be mildly annoying to the same sub-group. So total external costs must be understood as a complex function of different sorts of type-1 and type-2 errors. I will address problems determining the shape of the function below.

[453] The idea of a "weighted sum" contains considerable complexity that I focus on in the next section.

Let us assume for the remainder of the section that we can identify a total error *function* that expresses some adequately accurate weighted sum of type-1 and type-2 errors, and can thereby rank constitutional rules in terms of their external costs. If so, we should be able to use public choice theory to select decision-rules as a rational bargain between parties. I suggest that we employ the k-rule analysis that Buchanan and Tullock popularized.[454] Let's briefly review Buchanan's generic approach, as understood in *The Calculus of Consent*.

In the original model, the *internal costs* are the rising costs of deliberating and forming coalitions as we increase the proportion of the population that must support the policy, approaching the limit case of unanimity.[455] The *external cost* curve is understood in terms of the costs imposed on an individual for legislation passed by other coalitions. These costs fall as we approach unanimity, as the only collective actions that will be taken are ones that all regard as better than nothing. The more people required to pass a bill, the lower the external costs.[456] Buchanan and Tullock then combine the two cost curves like so:

[454] Buchanan and Tullock, *The Calculus of Consent*., p. 76.
[455] Buchanan and Tullock 1962, pp. 65-67.
[456] Ibid., pp. 60-65 covers an argument that external costs are not negative.



Display 6-1: Buchanan and Tullock's k-rule Analysis

In the standard analysis, represented in Display 6-1, D represents internal costs, which increase from 0 to N at a low but increasing rate. C represents the external costs, which decrease as we move from 0 to N. The C + D line aggregates the two cost curves into one, and point K is where aggregate costs are minimized. The k-rule prescribes the decision-rule at K. When applied to voting rules, some economists think K is a simple majority rule, others supermajoritarian.

We can now introduce the modifications proposed above. The external costs are the reliability with which voting rules will output publicly justified legislation and block, revise, or repeal publicly unjustified legislation, the degree to which they minimize the balance of type-1 and type-2 errors. That is, the external costs are described by an *error function*. The internal costs resemble the standard public choice model, as I assume there should be some monotonic relation between preferences and reasons with respect to assessing the costs of organizing

coalitions.[457] But the external cost curve needs to be split[458] in order to represent an individual member of the public's two broad priorities: blocking unjustified legislation (avoiding type-1 errors) and passing justified legislation (avoiding type-2 errors).[459] To simplify, let's assume that each voter's reasons include only those focused on her personal projects and moral principles, not external views about others.

Given these two priorities, I draw two curves, one for publicly justified legislation and the other for publicly unjustified legislation. Here I assume an extremely simple error function: an equal weighting of type-1 and type 2 errors, with no quality weights. Further, I leave aside the effect voting rules have on the ability of voting bodies to alter false positives and false negatives after some law has been passed.

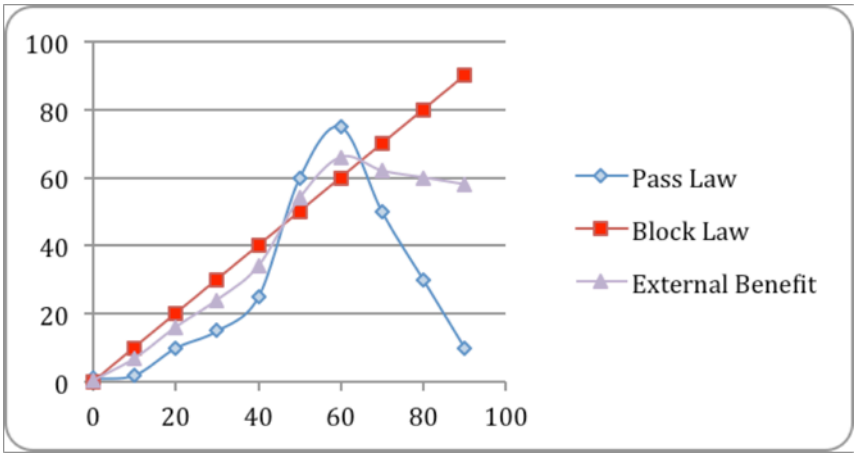
In Display 6-2, the x-axis represents the number of voters required to pass or repeal a law, understood as the percentage of members of the public that have a say in the legislative process (or that have a representative that has a say). At 1%, only 1% of members of the public are required to pass a law, whereas at 100%, 100% of members of the public are required to pass law. The y-axis represents *benefits* to

[457] I'm simplifying, of course, but it seems reasonable to hold that the primary considerations involved with internal costs are strategic challenges that people prefer to avoid when they can. Moral reasons that conflict with self-interest seem less important here.

[458] Buchanan and Tullock's cost curves already include the interest in getting "justified" legislation passed, but I split up the representation of this interest into one's interest in avoiding false positives and one's interest in avoiding false negatives.

[459] Publicly justified legislation is *not* costless. There is still a cost to being coerced, but with publicly justified legislation, the individual holds that the law has net benefits. So, even the rule for passing publicly justified legislation must include the costs of coercion, which will interfere further with the capacity of a decision rule to generate coercive law. I set this complication aside, as it needlessly complicates the model. But see Gaus 2011, pp. 500-501.

the evaluative standards of members of the public, the degree to which members of the public get laws that advance their values and commitments. Increases along the y-axis thus represent social states of affairs where members of the public are more able to realize their ideals within their social lives. I represent these *external benefit* curves as red and blue lines.[460]

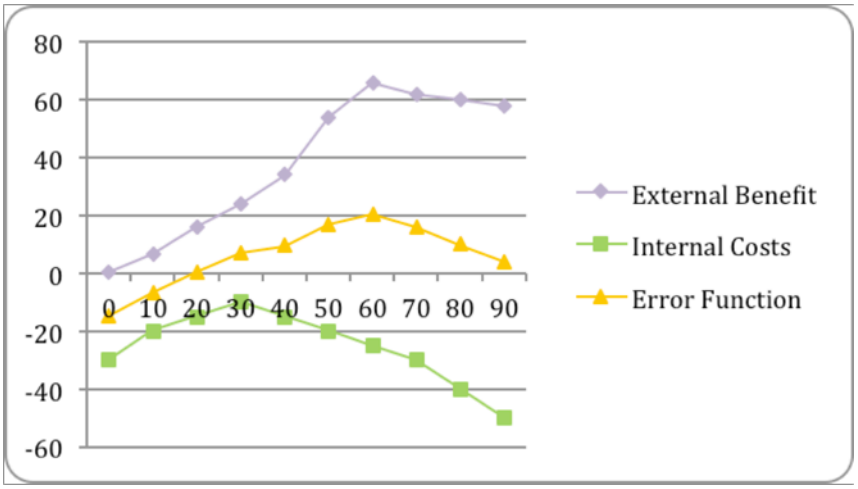


Display 6-2: External Benefit Curves

In Display 6-2, the blue line represents the reliability with which a voting rule outputs publicly justified legislation—how well it enables and facilitates the passage of laws that are publicly justified to all suitably idealized members of the public. I assume that the benefits to the evaluative standards of members of the public are low when a small minority of individuals can pass a law because a plurality rule of this sort allows for many contradictory legal changes. A plurality can pass a law, and another plurality can pass an opposing law, and then we need

[460] Representing the minimization of type-1 and type-2 errors as maximizing benefits allows for clearer representation than representing the minimization as the minimization of costs.

another plurality still to resolve the conflict. We run into other problems as we approach unanimity, since requiring that all agree to a law ensures that holdouts can defeat any law they like, making it next to impossible to pass publicly justified legislation. I assume that the benefits increase at some point in between plurality and unanimity. The second line in red represents the reliability with which a voting rule blocks publicly unjustified legislation. The red curve differs because unanimity will guarantee that no publicly unjustified law will be passed, which will be of great benefit to the evaluative standards of members of the public. But when any individual can pass a law, we'll end up with enormous amounts of defeated legislation. So the line increases in value as the number of required voters increases.[461] The lavender line combines the two functions into the error function, much as Buchanan and Tullock do in their k-rule analysis. In Display 6-3, we can aggregate the external curves with the internal cost curve.



Display 6-3: Error Function

[461] Now, there is a case to be made that members of the public get benefits from unjustified legislation, not the benefits from the law, but the benefits from getting a law that is less unjustified than another. I will leave these costs aside to keep the model simple.

Here I introduce the internal cost curve in green. The internal costs of decision-making are the costs of collectively organizing a clear vote in a decision-making body. These costs are understood in terms of setbacks to the evaluative standards of members of produced by the organizational costs of voting. The costs are high far below majority rule because, again, voters can pass and repeal legislation with extremely small minorities, so organizing to produce good law is difficult. The same is true at unanimity, when any holdout can spoil the vote. In this graph, again for purposes of illustration, I assume that the curve rises as we approach a large plurality, organization will be relatively easy and the possibility of contradictory coalitions is reduced.[462] The curve then falls at an increasing rate as we approach majority rule and then unanimity, due to the costs of convincing holdouts. I next introduce the external benefit curve from Display 6-2 (again in lavender). The total utility line, the error function, is in yellow.[463] The analysis tells us to select the decision rule that maximizes the benefits to the evaluative standards of members of the public, which in this case lies at 60 votes. I do not mean to commit myself to supermajority rules here. Instead, these numbers serve merely to illustrate my model.

Allow me to introduce another of Buchanan's distinctions to refine the model. As mentioned, Buchanan distinguishes between the protective and productive functions of the state. The protective function protects primary rights,

[462] One famous result of Buchanan and Tullock's work, however, is that contradictory coalitions can form even with majority rule.
[463] In aggregation, I weighted the internal and external costs equally, but this too is a simplifying assumption, as was the weighting choice in Display 5-2.

whereas the productive functions promote the production of public goods. In my view, we should carve up the selection of voting rules by indexing them to the protective and productive functions of the state. The reason for this is relatively straightforward: it is much more important for government to protect primary rights than to produce public goods. If government fails to protect primary rights, it is deeply unjust and illegitimate. If government fails to produce collective goods, but still protects rights, it is merely derelict and incompetent. Consequently, if we must choose between selecting the strong protective rule and a strong productive rule, we will want to select the protective rule.[464]

Based on the foregoing, then, we can distinguish between constitutional rules that execute the protective and productive functions of the state and the external and internal cost curves generated by constitutional rules that can govern one function or the other. We can now distinguish between two eligible sets of constitutional rules governing these two functions, where the members of each set are ranked in accord with their respective error functions, again after we have ruled out rules that unacceptably violate primary rights.

I must now address a serious problem that plagues the formulation of the weightings of type-1 and type-2 errors that the functions appeal to. This problem is a version of the familiar problem of generating a social welfare function. Given that constitutional choice is sensitive to evaluative pluralism, it must allow different

[464] This weighting should *not* be a *general* matter of controversy among members of the public, given that the scheme of primary rights is justified prior to the constitutional stage that we're examining in this paper.

members of the public to endorse different balances of type-1 and type-2 errors in formulating their individual rankings of constitutional rules. Some persons may be most concerned about unjustified coercion, whereas other persons may be more concerned about the failure to pass certain publicly justified laws. This means that different members of the public will have different *error functions* that specify the costliness of a rule in terms of that person's balance of type-1 and type-2 errors. If we wish to construct a social ranking of constitutional rules, a ranking that applies to society as a whole, however, we may need a *social error function* that is generated by aggregating individual error functions.

However, the only reason to think that we must aggregate is if we think failing to aggregate invariably privileges one person's error function over the functions affirmed by other citizens. One might argue that such privileging fails to treat persons as equals and will undermine moral peace between persons. While I think there is something to this worry, it need not delay us, because it is a mistake to think that a commitment to equality requires aggregating each person's error function. This is because a commitment to respecting others as free and equal requires public justification, but it does not require that the ranking of undefeated constitutional rules be socially ranked *at all*. In other words, once we are faced with a series of constitutional rules that do not violate primary rights, such that having any constitutional rule left over in the set is better than none, any of these constitutional rules should be capable of adequately conforming the legal and moral orders to what is publicly justified for each person. For this reason, we do

not need to add a ranking of constitutional rules within the optimal eligible set of constitutional rules that adequately protect primary rights.[465]

What we want, then, is to select a constitutional rule that economizes on type-1 and type-2 errors. We do not need an economizing function, but if a constitutional rule is an especially effective error economizer, then members of the public do well to select it to govern their legal and moral order.

IV. Stability

The last step in selecting constitutional rules involves determining whether otherwise eligible constitutional rules can be *stable for the right reasons*—whether they can be self-stabilizing for moral reasons, rather than by compliance with non-moral practical reasons alone. We have already discussed this form of stability in developing the idea of a moral rule in Chapter 1. Moral rules are internalized moral norms backed by the threat of characteristically moral punishment. The stability of moral rules derives in part from the motivation of the person's moral emotions that result from internalization and the fear of moral ostracism if the norm were publicly disobeyed. But in this chapter we are concerned with the stability of constitutional rules in relation to how they preserve publicly justified moral and legal rules. I will call this the *moral stability* of constitutional rules. Sometimes I will simply use the term "stability."

[465] I think that there is a helpful way of ranking constitutional rules via a social error function, but there is no need to lengthen the book to demonstrate this.

The moral stability of constitutional rules has two parts. First, constitutional rules must be stable because *officials* comply with them directly. If a constitutional rule specifies that Congress may make no law abridging free speech, then that constitutional rule is stable insofar as legislators do not attempt or ultimately fail to pass laws abridging free speech. If officials do not comply with constitutional rules, then since constitutional rules are themselves social norms, the norms will collapse and the constitution, or at least the ignored part of the constitution, will become, at best, sentences on a sheet of paper.

Second, constitutional rules must be stable because *citizens* comply with the laws produced or permitted by those rules. Constitutional rules are stabilized by citizens who take themselves to have reason to comply with the laws it produces. Since the constitutional rule is a rule governing the imposition, revision, and repeal of laws, the constitutional rule can only count as effectively stable when its outputs are obeyed.

Since my model evaluates constitutional rules under normal conditions, we must also consider the threat noncompliant agents pose to stability, persons who lack an effective motivation to act morally and respond to cooperation with cooperation. My conception of stability, then, includes stabilization under conditions of non-compliance, an assumption found in the contractarian theory common among public choice economists like Buchanan, but absent among public reason liberals like Rawls.[9] I claim that an appropriate model of constitutional choice should treat non-compliance as an endogenous variable: some

constitutional rules will encourage more compliance than others. If so, we should model constitutional choice by assuming that some real-world agents (not the contracting parties) are prepared to defect under a variety of conditions. So an important kind of stability obtains when compliant agents can successfully repel non-compliant agents, preventing non-compliant agents from getting a foothold in controlling the constitutional rules for their own ends.

Some have criticized public reason accounts of stability, especially Rawls's, as redundant.[466] A constitutional regime will be stable for the right reasons just because it is publicly justified, since citizens will comply with the regime in virtue of being reasonable. So once we've identified a publicly justified regime, then it will be stable for the right reasons—morally stable—by definition. If so, the third stage of my model of constitutional choice might be redundant as well. But consider two replies to this complaint. First, stability is determined in part based on whether citizens believe that other citizens will cooperate. Even with proper moral motivation, if citizens are convinced that others are not properly motivated, they will lack sufficient practical reason to comply, given that public justification does not require persons to make themselves vulnerable to negative political outcomes that result when they cooperate and others defect. If justice is connected to reciprocity, cooperative people are not morally required to cooperate with the uncooperative. So stability is not redundant because even eligible constitutional rules might fail the stability test if a society lacks social mechanisms that provide

[466] Habermas 1995, Barry 1995, pp. 901-2, Quong 2011, pp. 166-170.

assurance to cooperatively disposed persons. We will see below that providing assurance is complicated given potential social dynamics that can undermine stability in unexpected circumstances and in unanticipated ways. So the achievement of stability is even more of a non-redundant question than it may seem even for orthodox Rawlsians.

A second reason that stability is not redundant is that we want a society of reciprocal cooperators to be immune from various kinds of external shocks, shocks not due to dynamics present among reciprocally cooperative agents alone. A collapse in assurance due to "cheap talk" can be understood as an internal shock or dynamic, as the agents could generate it without the entry of new agent strategies or a substantial change in the social parameters governing that society.[467] An external shock is a significant change in social conditions due to changes other than what transpires among reciprocal cooperators, such as a collapse in their environment's carrying capacity, perhaps due to famine or war, or invasion by uncooperative agents who pursue their own gain at the expense of others whenever they can get away with it. So we cannot assume that stability is guaranteed by public justification because external system shocks can undermine stability, even if its constitutional rules are publicly justified.

[467] Farrell and Rabin 1996.

V. Constitutional Stability Defined and Disaggregated

Groundwork laid, I will now define the conditions for the moral stability of a constitutional rule. A constitutional rule is morally stable if and only if:

(i) Officials acquire and fulfill their roles as specified by the constitution.

(ii) Regular operation of the rule produces publicly justified laws;

(iii) Citizens generally comply with the laws produced by the rule;[468]

(iv) Violations of the rule and the laws it produces are discouraged by moral and/or legal pressure.

Constitutional rules do not typically issue direct commands to citizens *qua citizens*; rather, they specify the roles of officials, including requirements, prohibitions, and permissions, along with their normative powers, and rights of enforcement. The third amendment to the US constitution forbids Congress from forcibly quartering troops in the homes of citizens. So the rule does not directly apply coercion to everyone. It forbids legislative and executive powers from passing laws that permit or require troop quartering. A constitutional provision for collecting government revenue is similar. It does not directly impose upon citizens, but it gives Congress the power to do so.

[468] At least the *publicly justified* rules. Stability might involve *disobeying* unjustified laws. But this case raises complications that would take us too far afield, so I set it aside.

Let us now expand upon the four conditions of stability. First, and most importantly, officials must acquire and fulfill their roles regarding a constitutional rule in accordance with the rule or other constitutional rules. Officials have to acquire and fulfill their rule-specified role. Second, the constitutional rule should typically produce publicly justified legal rules. If it tends to produce defeated rules, people will lack sufficient reason to comply with those rules and so many will defect. And by disobeying the laws generated by the constitutional rule, the rule is destabilized since it consists in a procedure that attempts to successfully impose laws on citizens (or prohibit laws from being imposed). Third, while morally stable constitutional rules can withstand some defection, they cannot survive if violations are considerable and regular. So a constitutional rule can only be stable if citizens comply with its legal outputs.

Fourth, moral and legal pressure must be used to enforce the constitutional rule in many cases. Sometimes a constitutional rule is so obviously good and moral that few officials or citizens will violate it. Few people, for instance, are itching for the chance to violate the third amendment. But citizens and officials will be tempted to disobey constitutional rules that impose costs upon them. And if too many people are allowed to disobey a constitutional rule and the laws it produces, the rule will destabilize. So we need punishment to enforce many constitutional rules. Punishment need not be legal in nature; it might be merely moral. But there must be some pressure applied to violators for the constitutional rule to be fully stable.

Destabilization can occur due to two types of factors—*internal* dynamics and *external* shocks. An *internal dynamic* is a factor that arises from within a system of conditionally cooperative agents complying with publicly justified rules. The primary internal dynamic that can lead to instability is a collapse in assurance between agents.[469] This can easily happen in large N-person systems, given how frequently we misinterpret speech or behavior, and so acquire doubts about how committed other agents are to cooperating with some rule (a constitutional rule, or more likely, a law produced by the rule). Assurance failures could result in violations of any of the four conditions for stability. If officials become suspicious of the motives of other officials, they might violate constitutional rules; a prime illustration of this might be the contemporary use of the filibuster in the Senate, which makes it much more difficult to pass laws that even a significant majority of legislators (not to mention citizens) would like and probably regard as justified. Failures of assurance could affect the error rate of the constitutional rule, given that it could be commandeered by less cooperative agents. And in many cases, failures of assurance will lead to defection even from publicly justified laws. In that case, moral and legal pressure might be insufficient to keep the constitutional rule stable, given that mass violations are hard to police and deter. To establish stability in the face of internal dynamics, we need to identify assurance mechanisms. This is not easy. John Thrasher and I have argued that the use of

[469] Another internal dynamic could be an overly demanding system of norms that would lead persons to defect due to the strains of commitment.

public reasons to assure others that one is committed to their shared political institutions is subject to instabilities even among reasonable agents.[470]

Second, a constitutional rule can be destabilized if it can be easily disrupted by *external* shocks. External shocks include, among other things, invasion by uncooperative and purely self-interested agents. The kind of external shock to a constitutional rule most relevant for our public choice-inspired approach to constitutional choice is the agglomeration of rent-seeking agents, agents that manipulate constitutional rules to benefit themselves at the expense of others.[471] We can focus on constitutional rules governing taxation and the distribution of revenue as the most obvious sites for rent-seeking.[472] In those cases, legislators frequently abuse their roles by misappropriating funds, violating stability condition (i). Second, rules can be used to produce publicly unjustified legislation, violating condition (ii). Third, there may be considerable defection by legislators, special interest groups, lobbyists, and the like, violating condition (iii). Sufficient corruption can also increase citizen defection since people observe some people escaping punishment or detection due to their rent-seeking activities, which violates condition (iii). Finally, since these people escape punishment, adequate moral or legal pressure is not applied to them, violating condition (iv).

[470] Thrasher and Vallier 2015.
[471] For several articles on the nature of rent-seeking, see Tullock 2005. For the thesis of agglomeration of rent-seeking groups, see Olson 1984.
[472] Mueller 2003, pp. 333-335 reviews the concept of rent-seeking.

VI. Durability, Immunity, and Balance

I term the ability to resist internal dynamics *durability*, and the ability to resist external dynamics *immunity*. These are *first-order* forms of stability, as they are concerned with the capacity of a system to maintain a high level of cooperation and social trust in the face of threats. But there is a third factor that determines whether a constitutional rule is stable—the level of *variance* in the system in response to internal dynamics and external shocks. I understand variance in an internal dynamic in terms of the level of variation in a system's level of social trust, whereas variance in an external shock relates to how predictably and regularly a system copes with an external shock. We can understand this form of stability, which I call *balance*, as *second-order stability* or the stability of measures of stability.

These three types of stability—durability, immunity, and balance—are new to the public reason literature, but I believe they will prove helpful in developing an attractive account of stability for public reason liberalism. For example, my conception of durability ties stability to the idea of social trust, which I used to ground public reason in Chapters 1 and 2. Durability will be understood as the capacity of a polity, and constitutional rules, to preserve a high degree of social trust among persons. Second, immunity refers to the ability of a system to survive invasion by merely self-interested agents like rent-seekers, and so to maintain

social trust among cooperative agents. Balance just refers to a society's variance in social trust levels.

In general, given the importance of assurance and the idea of social trust discussed below, I understand cooperative behavior as *trusting* behavior, where persons comply with expectations set by social rules within that society. This means that they will not only forgo pursuing gains from defection not merely because they act in public, but because they are independently motivated to cooperate. In the bribe-taking case, most officials refuse to take bribes not merely because they trust that others will not corrupt the system but because they are independently motivated not to take bribes.

We can understand defection, following David Rose, as a kind of *opportunism*.[473] Rose defines opportunism as "acting to promote one's welfare by taking advantage of a trust extended by an individual, group, or society as a whole."[474] This trust is based on the expectation that everyone complies with the publicly justified constitutional rules present in that society. A critical feature of opportunism is that it does not always cause perceptible harm, or even any harm at all. If a society is sufficiently large, small acts of opportunism are not in themselves sources of harm. Returning to the case of taking bribes, taking any particular bribe may do not perceptible harm, but it is opportunistic. With sufficient opportunism, some parties will be harmed, say when the legal system becomes less fair because judges can be convinced to rule in the favor of the

[473] Rose 2014.
[474] Rose 2014, p. 21.

bribing party. Officials who take bribes may gradually reduce the will of less corrupt political officials, leading to a breakdown in the moral rule that forbids bribe-taking. We can understand bribe-taking and similar kinds of defection as *first-degree opportunism,* which involves taking advantage of the imperfect enforceability of contracts by reneging on contracts.[475] In our example, taking a bribe or offering one is a case of first-order opportunism.

Opportunism provides an attractive method of specifying what rational moral trust, and so moral peace, consists in. When moral and legal rules are publicly justified, persons lack significant incentive to engage in opportunistic behavior, since the moral rules they break are ones that they've internalized, such that violations of the rule generate guilt. Guilt alone cannot prevent all cases of opportunism, but it can discourage violations to a significant enough degree to sustain compliance with moral rules in private, and so to sustain moral trust generally.

In other work, I have created a computational model of agents interacting and maintaining social trust that measures and relates all three forms of stability.[476] My main finding is that durability, balance, and immunity are functionally distinct even though they interact. The model's key input values result in distinctive dynamics, the first having to do with the average level of social trust (durability), the second with the variance in social trust (balance), and the last with the capacity of cooperative agents to survive invasion by non-cooperative

[475] Rose 2014 p. 30. [Duplicate text?]
[476] Vallier 2017 (E7).

agents (immunity). I find no strong interaction between durability and balance, but I hypothesize that in a more complex model, a relatively unbalanced order will prove less durable than a balanced order. I also find that low levels of immunity quickly undermine a system's durability, such that high immunity becomes a critically necessary precondition to maintain high level of social trust, to have a durable order with low opportunism. What these results suggest is that an order that is stable for the right reasons must be durable, balanced, and immune for the right reasons.

The model has a number of other implications. First, even setting immunity aside, distinguishing durability and balance reveals that we may not be able to establish stability via a single social mechanism. Consequently, the arguments made on behalf of various assurance mechanisms in a well-ordered society are threatened. For example, some political liberals have argued that complying with the requirements of public reason can help citizens of a well-ordered society assure one another that they are committed to one or a small set of political conceptions of justice. The point of assurance is to generate a political order that is stable for the right reasons. But if the ideal of political stability is deeply ambiguous, it is no longer clear what assurance accomplishes.

Second, the model identifies two new lines of research within the public reason project: (i) identifying different assurance mechanisms for different types of stability and (ii) figuring out how socially sensitive reasonable persons must be, or the extent to which we should allow their social sensitivity to vary.

VII. Constitutional Durability and Immunity

We've seen that a constitutional rule should be durable, balanced, and immune for the right reasons. However, given our definition of constitutional stability, we can go further and index the different forms of stability to different necessary and sufficient conditions for constitutional stability.

The first condition, which requires that officials comply with their constitutionally-specified roles, is most naturally the subject of *immunity*. We want to prevent those disposed to defect from constitutional rules from benefitting themselves or their constituents at the expense of the public as a whole. There will be assurance problems among officials, but typically legislative bodies are small enough that the assurance problems that arise in mass society, such as trusting complete strangers, is of lesser importance. Balance, since it is a measure of the variance of durability, is similarly of limited importance.

The second condition requires that the laws produced by the constitutional rule be publicly justified, on the whole. This also implies that a constitutional rule should consistently undermine defeated proposals. If a constitutional rule has high immunity, it will be more effective at producing publicly justified laws. This is because non-compliant officials will tend to pass laws that cannot be publicly justified more often than officials that comply with their constitutional duties. A common example is when legislators abuse budgetary rules by passing rent-seeking legislation, since those hurt by rent-seeking will typically have defeaters

for the legislation. The second condition need not be especially concerned with durability or balance. Persistently corrupt or rent-seeking officials destabilize the rule, as well as ideologues who seek to impose defeated legislation on citizens.

Given that most citizens comply with most laws, and that most people are conditional cooperators in most social contexts, immunity becomes less important with respect to the stability of rules amongst the citizenry. So the third condition, which requires that citizens regularly comply with publicly justified laws, should be more focused on assurance than in preventing defection by generally non-compliant or exploitative citizens. Most citizens will only defect from laws when they find that others aren't obeying them; the conditions for rational reciprocity break down. So durability is relevant here. Citizens exhibit durability when they tend to comply with the laws imposed by a constitutional rule. Without assurance, citizens will defect from the laws, and as defection accumulates, the constitutional rule, while still on the books, may destabilize and dissolve from social practice and recognition, ending up not unlike the rights contained in the Soviet constitution. Balance is also important, since we want socially trusting agents to be able to maintain a *predictably* high level of social trust, and to avoid substantial variation in compliance with a rule.

The fourth condition involves the enforcement of both constitutional rules and the laws they produce. Violations must be punished by formal and informal pressure. When officials violate constitutional rules, they should be subject to punishment, and when citizens violate the law, they should be subject to the same.

Punishment should take the form of both legal and moral punishment when the constitutional or legal rules are publicly justified, though in many cases, we might restrict punishment to legal mechanisms due to concerns about moral punishment being too informal, erratic, and unfair. All three notions of stability are at play in the fourth condition. Immunity is relevant to the punishment of officials, as a system that lacks immunity will experience a breakdown in appropriate punishment, given the presence of defectors and the limited ability to force them to comply. Durability and balance are relevant to citizen compliance, as they too require some forms of punishment if they are to remain at high levels. My model does not include punishment, but it is fair to assume that were punishment possible and reliable, we would find higher levels of durability and immunity.[477]

Given that different notions of stability are relevant to different components of a morally peaceful policy, I suggest that we generalize in the following way. *A constitutional rule is stable if and only if it is immune against abuse by political officials and durable and balanced among citizens subject to the rule and the laws it produces.*

I have said little in this chapter about the mechanisms that generate immunity, durability, and balance. The reason for this is that I think it takes a lot of work just to show that we can and should distinguish between different concepts of stability. And I think outlining the role of different conceptions of

[477] Punishment, we know, is a powerful mechanism for enforcing compliance; the problem is that it can stabilize almost any norm, justified or not. Boyd and Richerson 2005 discuss the power of punishment; Gaus 2011 draws on their work in employing punishment as a stability mechanism.

stability in the third part of my model of constitutional choice is a significant enough advance that details about assurance and compliance mechanisms can wait until future work.

Part II of the book is completed. We have a full model of political public reason that proceeds in three stages: the selection of primary rights, economization on legislative error, and determining whether constitutional rules exhibit the requisite degrees of immunity, durability, and balance.

We can now step back and look at the complete model of public justification. A morally peaceful polity, by establishing a publicly justified legal system, helps to complete the order of publicly justified moral rules, and so helps to realize moral peace between persons. And a publicly justified legal system is established by means of a constitution that is publicly justified according to my three-stage model. *Politics is not war when it proceeds in accord with such a constitution.*

Part III of this book uses the model of constitutional choice in order to defend certain institutional structures, specifically the primary rights of freedom of association and private property, and constitutional decision rules I call process democracy. We will see that my model of public justification can vindicate a liberal social order as capable of establishing moral peace between persons and showing that it is within the grasp of real human beings to have a politics that is something more than institutionalized aggression, a war between sects.

Chapter 7: Associations

Part III applies the justificatory framework developed in Chapters 4, 5, and 6 to identifying justifying primary rights and constitutional rules. Chapters 7 and 8 focus on identifying two kinds of primary rights—freedom of association and economic liberties. This chapter focuses on freedom of association. In Chapter 5, I briefly defended a right to freedom of association as a right that anyone with a rational plan of life or commitment to justice would want for herself and would be prepared to extend to others on reciprocal terms. But there is much more to say about freedom of association because it plays a special role in shaping both the moral and political orders. The argument from primary rights is merely that a legitimate constitutional order must protect the freedom of association of its members. In this chapter, I show that if we understand associations as organizations of moral rules, then we must acknowledge that (a) associations are fundamental sources of moral authority, (b) that they have pre-political authority that limits the authority of the state, and (c) that associations play a critical role in creating and sustaining social trust, including rational moral trust. Respect for freedom of association, then, is a precondition for the legitimacy of any public legal system because it sets the appropriate bounds of state power and establishes moral peace between persons.

Few public reason liberals have focused on publicly justifying freedom of association, as I will in this chapter. The closest attempt is Gaus's argument for the priority of moral rules in *The Order of Public Reason.* There Gaus makes a powerful

argument for the priority of moral rules, but he does not explore the connection between the priority of the moral order and the right of freedom of association. I think this is because Gaus regards moral rules as governing all members of the relevant public, such that violations of those rules are, in a sense, "everyone's business." But associations are characterized by rules that only apply to *members,* and so do not fit neatly into the Gausian framework. In response, I will argue that moral violations are *not* always everyone's business because some moral rules restrict the standing of persons to criticize the practices of civic associations to members of those associations. So moral rules whose violations *are* everyone's business establish and legitimize moral rules whose violations *are not* everyone's business.

Once we see that associations are constituted by authoritative moral rules, we can understand how associations are sources of moral and political authority that place limits on the state. Associations are sources of moral and political authority in virtue of their being publicly justified sets of moral rules. Associations place limits on the state in virtue of performing important social functions that the political order need not, and indeed often *should* not, duplicate. As I argued in Chapter 4, legal rules can only be publicly justified if moral rules cannot perform key social functions. But given that many associations can perform social functions often left to the political order, there is no way to justify the displacement of associations by the political order.

A critical part of my case for the centrality of associations in public reason is the legal state of nature, a state of nature with moral rules but no legal rules. The associations with the strongest priority are those that can exist in the legal state of nature. To make the case for freedom of association, then, I need to review types of associations and the varying degrees to which they merit protection. I focus on three such types—families, civic associations, and commercial organizations. Each of these institutional types will exist in the legal state of nature, and each therefore has a special claim to protection from state intervention and other threats to their associational liberty.

I will then argue that publicly justified associations play a critical role in creating and sustaining moral peace because they will be especially effective at sustaining social trust vis-à-vis associations whose moral rules cannot be publicly justified. Much of the freedom of association literature, in both philosophy and political science, has focused on arguing that associations have a critical role to play in establishing social trust, and so make liberal democratic institutions work well. This *civil society* argument holds that "a robust, strong, and vibrant civil society strengthens and enhances liberal democracy." [478] I contend that associations best strengthen the moral and political orders when their constituent moral rules are publicly justified.

I will also address three traditional liberal worries about robust freedom of association. First, I will argue that my account of freedom of association limits

[478] Chambers and Kopstein 2001, p. 837.

concerns about associations forming unacceptable private tyrannies that are beyond state control. This is because moral rules must be publicly justified and that there is some case for legal intervention into an association when its constituent moral rules cannot be publicly justified. Second, I will argue that my account of freedom of association does not allow for excessive or harmful discrimination. Third, I claim that my account of freedom of association should not produce many associations that will balkanize civil society into organizations that undermine the well-functioning political institutions. This is true both because moral rules must meet the test of public justification, but also because publicly justified constituent rules contribute to social trust.

A fourth challenge to my account of associational freedom derives from a common egalitarian liberal criticism of libertarians who claim that people have well-defined, pre-political private property rights that prohibit state interference. The criticism is that property rights are entirely conventional in that they are created and maintained by the state and that these rights could not exist without state-created and state-maintained conventions. A broader version of the objection can be run against the view I defend in this chapter, for associations are also conventional orders, and one might argue that they could not exist in the absence of the state-as-convention-maker. The previous chapters show just how weak this objection is, since we will see that the objection plainly runs legislative rules together with all legal rules and all legal rules with all moral rules. Once we distinguish between these three types of social rule, it becomes obvious that, even

though many associations would not and could not exist without norm-creating institutions, many *obviously* could exist because they *obviously did* exist without a nation-state. Families are the most obvious case. And larger groups like tribes, churches, firms, and guilds all preceded legislative bodies that fell short of states, not to mention that nation-states of the post-Westphalian period.

We will also see our way towards a reconciliation between two distinct strands in liberal political thought which Jacob Levy calls "rationalist" liberalism and "pluralist" liberalism:

> On one side of this divide lies a liberalism I will call "pluralist"; skeptical of the central state and friendly toward local, customary, voluntary, or intermediate bodies, communities, and associations. On the other we see a liberalism I will call "rationalist": committed to intellectual progress, universalism, and equality before a unified law, opposed to arbitrary and irrational distinctions and inequalities, and determined to disrupt local tyrannies in religious and ethnic groups, closed associations, families, plantations, and the feudal countryside, and so on.[479]

Social contract liberalisms, as Levy understands them, are rationalist liberalisms, and the critics of social contract theory are often pluralist liberals. Levy is right to characterize many of the great social contract theories as rationalist. But the place

[479] Levy 2015, p. 2.

of civic associations in my own account of public reason is so expansive that readers will likely criticize my position for being insufficiently responsive to rationalist concerns, despite my protestations to the contrary. So we will have what I believe is a theory that Levy does not countenance: *pluralist contractarianism*. Pluralist contractarianism accepts the liberal pluralist thesis that there are multiple, in many ways competing sources of political legitimacy beyond the state and that these institutions may be stuck in some respects in constant tension with one another, while nonetheless insisting that the authority of institutions is judged at the tribunal of the reason of each person.[480] It also insists that social and legal order "can emerge and survive pluralistically, whether as the internal norms of such groups or as norms that regulate relations among them" and judges those structures to be "normatively attractive."[481] I believe this is a genuinely new form of contractarianism.

I explain these ideas across ten sections. Section I explains why moral violations are not everyone's business and how some moral rules restrict the standing of persons to enforce moral rules. This insight opens the door to placing associations at the heart of public reason. Section II outlines the idea of a *moral association*, a complex of formal and informal moral rules aimed at uniting a group of persons around some project or common goal. Sections III-V identify three types of moral associations—families, civic associations like churches, and commercial organizations like firms and unions. Section VI explains the way in

[480] Muñiz-Fraticelli 2014, p. 183.
[481] Levy 2015, p. 39.

which the moral rules comprising these institutions are sources of legitimacy and how they restrain state power. Section VII explains how publicly justified moral associations add to social trust and so to moral peace. Sections VIII-X respond to the objections mentioned and outline pluralist contractarianism. Section XI transitions into the next chapter.

I. Moral Rules and Standing

Gaus has correctly argued that moral rules are backed by and enforced with (in part) the moral emotions of resentment and indignation. These go beyond anger, since "one who holds them insists that *others* take certain appropriate" actions.[482] If John resents Reba for harming him, he must also insist that she stop harming him and/or compensate him for the harm. Gaus is right that it would be "puzzling" for John to both resent Reba and not think that she should stop. For Gaus, the moral practice that is generated by resentment and indignation is one where we not only care about what others do, but "hold ourselves to have standing to insist on actions on their part."[483] Following Kurt Baier, Gaus argues that moral violations where reactive attitudes are relevant are ones where we think it is "[our] business" because we "have standing to insist on performance and standing to hold the violator responsible for what she has done."[484] Baier was a bit more modest,

[482] Gaus 2011, p. 190.
[483] Gaus 2011, pp. 190-191.
[484] Gaus 2011, p. 224.

since he argued that moral violations cannot be *entirely* the business of the person who engaged in the moral violation: "whether a person conforms to the mores and laws of the group is not entirely his own business."[485]

In general, the Baier-Gaus idea is that moral rules are public entities that are created, enforced, and maintained by the community, such that moral violations license indignation among those who observe an infraction of the rule, and resentment from those who were harmed or insulted by the infraction. But there are many thousands of moral rules that not everyone has standing to enforce. In the Catholic Church, for instance, only some people have standing to insist that a member confess her sins or obey the directives of the church hierarchy. If an atheist insists that her Catholic friend go to confession, even when the Catholic friend herself acknowledges that she should go to confession, the atheist still lacks standing to insist on compliance with the Catholic moral rule of confessing sin. In this case, the Catholic friend is liable to think that *the atheist* has violated a moral rule of minding her own business because she is not a member of the group.

To recognize the fact of restricted standing, we do not have to deny that all moral rules are subject to the scrutiny of public justification. Instead, we need only argue that some publicly justified moral rules deny standing to non-group members to hold members of the group to the norms and practices of that group. So there may be a publicly justified moral rule that deprives non-members of

[485] Baier 1958, pp. xviii-xix.

standing to influence or direct the decisions and practices of a group. Consequently, we feel appropriate resentment and indignation at the non-member who sticks her nose in our group's business. Within the group, members of the organization are governed by moral rules that function for them much as generic moral rules function for members of a given public. To put it another way, all moral rules are publicly justified or not with respect to some public, and some moral rules have more limited publics than others.

Moral rules can be relative to all sorts of groups, from generic groups like races and genders, to self-consciously organized religious organizations like the Latter-Day Saints or the AFLCIO. In this chapter, I am focused specifically on *associations*, groups that have an expressly recognized set of goals and rules for admitting, removing, and governing members. Once we grasp the nature of what I shall call *moral associations*, we can see how the priority of social morality commits the public reason liberal to respecting the integrity of those associations by prohibiting the law from interfering in their internal organization, save in cases where some rule defeated for association members can be better altered or reformed by legal institutions than the group can do for themselves.

II. Moral Associations

A moral association is a local unity of moral rules (and sometimes legal rules) organized to promote a common end or a *commitment* shared among its members;

in this I follow Lon Fuller's first principle of associations.[486] Of course, all associations are comprised of some non-moral rules, such as conventions governing etiquette, decorum, aesthetics, and the like. But an association's constitutive moral rules are those that mark it out as an association, since moral rules specify conditions of membership, decision-making rights, and so on that, if violated, generate the reactive attitudes in its members, and perhaps even among non-members who recognize that a member has violated a moral rule of the association that would be inappropriate or wrong in other, more public contexts.

The second feature of moral associations is the inclusion of a "legal principle," which "refers to the situation where an association is held together and enabled to function by formal rules of duty and entitlement."[487] Most moral associations have express, formal rules of operation, but others are simpler, like families, whose moral rules are more tacit and unarticulated. But generally, speaking, moral associations have mechanisms for their own preservation and these mechanisms typically involve the articulation and enforcement of internal rules.

Fuller contends that while all associations have both shared commitment and a legal principle, the two properties "stand in a relation of polarity—they fight and reinforce each other at the same time."[488] So associations have legal principles that facilitate its shared commitments, but in some cases its legal procedures may

[486] Fuller 1969, p. 6.
[487] Fuller 1969.
[488] Fuller 1969, p. 8.

frustrate its shared commitment. Similarly, the shared commitments of associations might undermine the proper functioning of its internal procedures, just as it might sustain those procedures in operation. Fuller contends that as associations grow larger, the legal principle tends to dominate; and as the associations shrink, the shared commitment tends to dominate.

Despite the tension created by shared commitment and legal principle, a third critical feature of moral associations is that the moral rules that comprise them be broadly coherent with one another. If an association's core moral rules contradict one another, at least in some obvious and direct fashion, then the association has structural weakness. It will be subject to deep conflict that could potentially lead to the dissolution of the association, or at least severely hamper its mission. So while moral rules need not always be consistent within an association, they should be generally consistent and the institution should employ procedures, explicit and deliberative, or implicit and evolutionary, for resolving those conflicts. The criterion for resolving these conflicts is the shared commitment that members pursue. Members typically expect constituent rules to be harmonized in ways that further the mission, goal, or the good of members of the institution. This does not mean that they will always be so harmonized, but rather that there is a built-in normative expectation that decision-makers will resolve these conflicts in ways that help rather than hinder the association.

To illustrate, consider a specific example—the functioning of a Lutheran church. The aim of a Lutheran church is a ministry of Word and Sacrament.

Members of the church, led by the pastor and associate pastors, share both the promise of God's saving grace through the teaching and preaching of Scripture and the promise of grace found in baptism, the Lord's supper, and other rites like confirmation and confession.[489] Those are the shared Lutheran commitments that sustain Lutheran churches as organizations.

Lutheran churches also have constitutional structures meant to realize these aims, which form their legal principles. Many of these rules specify the ordinary decision-making rules within the church that empower pastors and elders to manage the church's membership, services, finances, charities, and so on. Rules are constrained further by the national and regional leadership bodies. Some of these rules are merely procedural, but all have a thoroughly moral content. Rule violations are met with the reactive attitudes, though these are typically defused through repentance and forgiveness. The decision-making process is similarly moralized. While Lutherans preach the priesthood of the believer, we find it prudent to set pastors and bishops over us through a call from God and a congregation. We empower the pastor to make decisions for us, such that resisting the pastor's decisions is a source of reactive attitudes.

These moral rules are widely regarded as justified to all members, though we seldom miss an opportunity to disagree about them. We disagree about worships styles (traditional or contemporary?), adherence to Lutheran tradition

[489] Though Lutherans officially only use the word "sacrament" describe baptism and the Lord's Supper, they effectively affirm other sacraments as well, understood as material means of conferring God's grace.

(confessional or no?), and social issues surrounding the role of women in the church. So there are lively disputes about the rules, both their authority and their content. Nonetheless, through voluntarily membership and confirmation for new members, the decisions we make are publicly justified to members of the church.

Notice how the moral rules constituting Lutheran churches establish who has standing to enforce, revise, create, or abolish moral rules. Church leadership has the authority to alter the moral rules of the church, but church leadership is chosen through democratic voting by Lutheran parishioners. So members have standing to hold the leadership to account, and in some cases, only leaders have the authority to perform certain functions, like ordination. In contrast, non-members have no standing to hold violators of moral rules within the church to account. They are not even licensed to have the reactive attitudes about most violations. Violations simply are not their business. Lutherans would (rightly) express indignation against a non-Christian, or perhaps even a non-Lutheran, who tried to hold their fellow parishioners to account for these moral violations or who even thought it his or her business to care. Members of other organizations frequently feel similarly.

If we imagine that moral rules can combine into bundles, there is a certain sense in which the larger, structural, or architectonic rules, the rules that institutions share with one another, are everyone's business. If the church violated other moral rules, ones that we all must follow, then that would be everyone's business. If a Lutheran Church, for instance, spread rumors about the behavior of

other churches in the area, people in the area would have license to hold the reactive attitudes. But so long as the moral violations are violations of moral rules held primarily by members of the church, others lack standing to criticize and even to appropriately experience the moral emotions of resentment and indignation. And this is all to the good. We should not *want* moral violations to be everyone's business, as any member of the broader public would have license to impose the costs of moral rules upon us. Satisfying the public would be an enormous potential burden. By allowing that some moral rules are somewhat private, we protect the formation of these ever so useful and beneficial associations.

We know from Chapter 3 that moral rules, when publicly justified, establish moral peace between persons. We can now see that one of the primary methods of establishing moral peace is via membership in moral associations. Through voluntary agreement, persons take on and are prepared to internalize and comply with a wide variety of moral rules. And their ability to live out their lives within their own associations helps them to create a space to pursue ends that are not shared with others. Moral associations function as *jurisdictions* where decision-making is made in a decentralized rather than a collective fashion on matters where agreement cannot be secured.

Emphasizing the notion of local unities that bind persons together also better reflects the deeply social nature of the human person. We are partly constituted by the moral rules that suffuse our lives, and especially by the nests of

rules we known as moral associations. This point is critical in a chapter about associations, since contractarian views are often unfairly and forcibly wedded to excessively individualistic assumptions about how it understands the nature of the person. By placing moral associations at the heart of public reason, we can see the social nature of the person at work in the theory.

III. Varieties of Moral Associations – Families

I would now like to distinguish three generic types of moral associations: families, civic associations, and commercial organizations. Each of these types meet the definition of a moral association as a more or less coherent body of moral rules organized around a common end or purpose.

Families are the least formalized moral association, and so are much closer to the shared commitment pole of Fuller's distinction. "The family" does not have a constitution or bylaws, but is rather comprised of a host of informal norms that evolve without explicit specification or codification. The shared commitment of the family is the good of its members, intimacy between partners, and, in many cases, the rearing of children. People disagree about how to balance these different goals, but all agree that families are particularly well-suited to promote these enormous social goods. Families give people sources of intense love, belonging, and meaning. Bonds are formed between people that are so intimate that they shape our behavior throughout our lives.

The rules that comprise families vary, but they have some common threads. Spouses are supposed to be kind to one another and to be loving in at least some general sense. Spouses are expected to be loyal and not to abandon one another for other persons or when the spousal relationship, typically a marriage, comes under stress. Spouses are expected to care for children if the couple chooses to reproduce and to raise the children to be competent, healthy adults who embody the values of the culture of which that family is a part.

Beyond this, almost everything else is up for dispute.[490] Different cultures assign different roles to men and women. Sometimes the relations are egalitarian, though historically they have almost always been patriarchal. Children are to obey parents in general, but the extent fluctuates considerably. Sometimes children are not to speak unless spoken to and they are sometimes allowed to speak freely. Parents value children to different degrees. Some, if not most, are prepared to die to protect their children, but in some cases children can be sacrificed for important social goals, such as the preservation of the rest of the family. The terms of separation and divorce also vary dramatically. And over the last fifty years, norms restricting interracial and homosexual marriage have broken down across the developed world.

We also expect that these disputes have an answer that can be reached over time. This is because the constituent moral rules of families are supposed to facilitate the good of the family as a whole, which is sometimes understood as

[490] For a documentation of the variability of martial norms, see Abbott 2011.

including the individual good, but in other cases the individual good is wholly sublimated to the collective good. So while we disagree about the relationship between the individual good and the collective good, and we disagree about what is good for the family, the good of the family is the touchstone of resolving disputes about the moral rules governing the family. Nearly all debates about the moral rules governing families are disputes about whether certain kinds of practices and relationships preserve the happiness of the family or whether they are healthy or appropriate.

Importantly, however, families are bulwarks of privacy. Families expect a great degree of privacy with respect to their inner-workings. People outside of the family lack the standing to interfere save in the most dire and threatening circumstances. Sometimes this includes domestic violence, but often not, and sometimes this includes infidelity, but sometimes not. So while it is true that people consider the *generic* rules that govern the family to be everyone's business, this does not compromise the privacy of families.

Unlike many moral associations, everyone agrees that families are of critical importance and that some set of moral rules governing family life can be publicly justified. Many people think that society can do without religious institutions, and some even without profit-seeking institutions, but almost no one thinks that families should cease to exist. So the existence of the family is almost universally affirmed, as well as its general telos of promoting the good of its members.

A final point. It is obvious that families *as such* predate the state, so they will exist in a legal state of nature. Families are the oldest human organization by a hundred thousand years, so we cannot say that families are a special creation of the legislative power of the modern nation-state. The family is a conventional order, but it is a creation of moral rules and biological imperatives, not necessarily formal law, and certainly not the creation of modern legislation. Yes, legislation shapes the family today, sometimes for the better, but the institution of the family outlasts all others. In this way, the social organization of the family precedes and restricts the scope of all other systems of moral rules. Moral rules that threaten to undermine families and their social functions, or to replace them, cannot be publicly justified. The only formal interference into families that can be justified are ones required to help families realize their own ends or to protect some family members from others that cannot be protected without the law.

IV. Civic Associations

The second type of moral association is the civic association not based on familial bonds. These civic associations are extraordinarily diverse: religious organizations, sports teams, universities, and colleges, charitable organizations and service clubs, hospitals, media organizations, and neighborhood associations, or "any kind of

formalized, non-governmental, human interaction."[491] The great British pluralist G. D. H. Cole defines associations as,

> … any group of persons pursuing a common purpose or aggregation of purposes by a course of cooperative action extending beyond a single act, and, for this purpose, agreeing together upon certain methods and procedures and laying down, in however rudimentary a form, rules for common action.[492]

So, like Fuller, Cole finds in associations two principles of organization – shared commitment and a legal principle. But in the case of civic associations, the legal principle is much more developed than it is within the family. So civic associations typically have *explicit* shared commitments or aims. Christian churches aim to produce and disciple Christians, to provide the forgiveness of sins, and the path to eternal life. A university aspires to educate persons for professions and, in some cases, for citizenship.

Also unlike families, membership in civic associations is typically voluntary; even associations who assign membership by birth typically allow adult members to exit the group. This does not mean that members can always choose the rules of the association, though this too is sometimes the case.

---

[491] Tamir 1998, p. 216.
[492] Cole 1920, p. 37.

Civic associations are distinguished from commercial organizations because they are typically non-profit organizations. While civic associations seek economic resources and attempt to benefit their members economically, they seldom recognize as an explicit aim the sale of goods and services in order to make a profit. In fact, in many cases civic associations strongly prohibit all profit-seeking activity in its name or by its officials. Simony laws, the prohibition on the sale of ecclesiastical offices and privileges, are recognized and enforced by basically all religious institutions.

Like families, the rules that constitute civic associations are often considered matters of public dispute. However, unlike families, not everyone is part of a civic association. Accordingly, the standing to criticize these organizations for their generic operating principles is largely restricted to members. For example, not everyone has a stake in the internal behavior of the Catholic Church, so non-Catholics typically lack standing to criticize matters of internal church decision. We all have an opinion about how parents should treat their kids, and we all have standing to speak out about it, but most people lack that standing with respect to whether the Catholic church should ordain female priests or allow divorce in more circumstances than it does now.

While families long predate all other moral associations, most civic associations are new, historically speaking. While tribes are important moral associations, they share enough features with political institutions that they are not true civic associations. Furthermore, civic associations as an *idea* are much

newer than the institutions themselves. This is because associations are now typically thought of as institutions that constitute "civil society" or an arena "within which voluntary associative relations are dominant."[493] The idea of civil society arose gradually, starting in the 17th century, as a contrast to both the nation-state and the growing commercial order.[494] A literature has arisen within political theory that focuses on characterizing the relationship between civil society and the state, and a variety of relations have been described, such as the idea of civil society "apart from" the state, "against" the state, "in support of" the state, and "beyond" the state.[495] But for most of human history, social institutions could not be divided into these neat categories because the functions of government were spread across these institutions. Churches had coercively enforced legal systems, for instance, such that the medieval Catholic Church was no mere religious organization.

Despite our modern understanding of civil society and civic associations, there is still good reason to think that many civic associations would be formed and preserved in the legal state of nature. People would still form churches, schools, hospitals, and professional organizations. The institutions would be less stable and effective, and could not benefit from many of the legal rules protected and established by governments. But they still are fundamental to social order in a way that modern nation-states are not. In this way, civic associations also

[493] Warren 2001, p. 57.
[494] Levy 2015, p. 19.
[495] Chambers and Kopstein 2006, p. 364.

constrain the reach of state power. If civic associations and families can perform various important social functions adequately and in ways that can be publicly justified *to its members*, then the state should not interfere unless the organization imposes some harm or restriction on non-members.[496] It is for this reason that the state has no role in determining the curriculum of universities, but does have a role in regulating how universities handle cases of sexual assault. In the former, the state has no particular expertise over the university and the harms of poor curriculum are modest. But in handling cases of sexual assault, universities are poorly equipped vis-à-vis states and seek to preserve their interests more than states do in these specific sorts of cases. Further, the costs of getting incorrect judgments are enormous. So the latitude afforded to civic associations is by no means absolute, though it is hard to override.

V. Commercial Organizations

We turn now to the most controversial and contested of our three types of moral associations—for-profit institutions like the firm, and associations associated with ensuring a certain distribution of profit, like unions and professional bodies. Their common goal is typically to maximize the economic resources of their members, or at least some of their members. The shared moral rules of these institutions are regulated by the pursuit of profit, understood as financial gain. Seana Shiffrin

[496] Unless imposing these restrictions is the only way or far and away the best way for the state to ensure that those functions are performed for everyone, but I suspect this possibility is remote.

identifies two main distinctions between commercial associations from others: (1) commercial organizations are centrally concerned with "access to material resources and mechanisms of power," and commercial associations (2) "have a fairly focused singular purpose whose pursuit is largely guided by [the] aim of profitable operation."[497] James Nelson argues similarly that within what he calls "organizations" people "do not integrate collective goals and values with the core aspects of their identities, and they perform their tasks largely motivated by explicit or implicit threats of coercion or offers of inducements."[498] Civic associations resemble Nelson's description of "collective communities" which are "constructed out of a cluster of identification relationships" where "individual members view their affiliation with the collective as a central aspect of their identities." So *in general* commercial organizations are distinguished by their pursuit of material gain and the lack of collective community among their members. This is not always true, of course, as a small business owner might deeply identify with a cause her business promotes, or members of a union could value their membership to realize their political ideology. But the paradigm commercial organizations are importantly different from civic associations. In Fuller's terms, they manifest the legal principle but have weak shared commitments.

It is generally harder to make a case against coercive interference with commercial organizations than civic associations. But the reasons are complex.

[497] Shiffrin 2005, p. 877.
[498] Nelson 2013, pp. 1581-2. Also see Nelson 2015, p. 1617.

While some commercial organizations will exist in the legal state of nature, they will tend to be small businesses or sole proprietors like farmers, craftsmen, lawyers, and doctors. These professions and economic activities are sufficiently essential to human society that we can expect them to exist in the absence of a public legal system.[499] But large commercial organizations depend extensively on legal rules that would not exist without norm-creating institutions that go beyond custom and moral rules. For example, large commercial organizations depend on complex credit-based relations and financial instruments that depend entirely on legal rules for their existence. So commercial organizations are more dependent on legal rules than families and civic associations are. Social morality lacks priority here, then, because there will simply be no stable moral rules that would allow these firms to operate over long periods of time. For this reason, the moral barriers against legal interference are substantially reduced.

Another reason commercial organizations will have fewer protections is because progressive and egalitarian members of the public sharply distinguish between civic associations and commercial organizations due to how they conceive of the relationship between economic and political power. As Shiffrin notes, commercial organizations are especially connected to mechanisms of power and are generally not conducive to the "free, sincere, uninhibited, and undirected social interaction and consideration of ideas and ways of life" because they are

[499] Lawyers would therefore be concerned with resolving legal disputes among private parties according to associational, private law.

hierarchical and financially focused.[500] This attitude reflects a general sentiment on the left that economic organizations are sources of political power, much like governments. Warren has argued that we should avoid contrasting civil society with the state because it "ignores non-state power relations, ignores economic and social power effects, and ignores entanglement between state and association."[501] Many progressives and egalitarians claim that we make the same mistake by sharply contrasting the state and the market.

Nelson argues that the motives used by businesses involve threats and material incentives that make their activities subject to more rigorous scrutiny.[502] Since commercial organizations are typically led and controlled by bosses and recognize that workers depend upon jobs to survive and not just to enrich their identities (like churches), they can exercise more ostracism and control over their members Nelson also argues that civic associations can often be said to have a "conscience" in ways that businesses frequently do not, given their different aims.[503] "For-profit businesses are not generally bound up with deep ties of identity and attachment" whereas nonprofit organizations tend to be "more hospitable to individual identification" such that associational claims should be stronger in the latter case than the former.[504]

For all these reasons, then, public reason liberalism provides fewer protections for commercial organizations than civic associations. Social morality

[500] Shiffrin 2005, p. 877.
[501] Warren 2001, pp. 32-3.
[502] Nelson 2013, p. 1581.
[503] Nelson 2013, p. 1583.
[504] Nelson 2015, p. 511.

poses less of a barrier and the reasons to support interference are generally stronger. But that does not mean that the legal order may do what it wants. Closely-held firms and many small business whose practices and aims are much closer to civic associations and families.[505] These businesses, then, are entitled to more protection because their operation is more tightly tied to the conscience and life projects of their owners and operators. I make the same claim on behalf of many trade unions. The mere fact that a group pursues profit is not enough to undermine its protections against state predation and control. My argument, then, is that protection is weakest for *publicly traded* firms, since there is a weak case that such organizations have anything like a conscience, even if members exhibit some sense of social responsibility. This is because the leadership, operation, and ownership of the firm is open to the public for a price. Ownership can easily change hands, and different people can own the firm tomorrow than owned it today.

Unions and professional organizations are harder cases.[506] They are not exactly for-profit organizations, even though they attempt to increase the income of their members and engage in quality control. We are typically less friendly to interventions into these organizations, which I suspect is because these groups are seen as engaging in primarily *defensive* activities or have dominant non-financial motives. Unions are seen as protecting their members from the greater economic power of employers, whereas professional organizations like the American Medical

[505] Like John Tomasi's example of Amy's-Pup-in-the-Tub. Tomasi 2012, p. 66.
[506] For some plausible arguments in favor of liberal protections for trade unions, see White 1998.

Association are seen as motivated by concern for patients rather than their own bottom line.[507] This is not always true, however, and to the extent it is false, to that extent these institutions may be liable to legal interference.

Another reason for providing unions and professional organizations with strong protections is that many are extremely old and have survived in premodern conditions, such as doctors' organizations and masonic guilds. So unlike large, publicly traded commercial organizations, we can expect these commercial organizations to exist in the legal state of nature. That means that public reason probably supports broad protections for freedom of association for these groups. Focusing on unions, I argue that public reason liberalism implies protections for workers to unionize in whatever industry they like in whatever way they like so long as the contractual relations established do not impose direct, or predictable and indirect, harms on third parties. It is possible that some firms will prod workers into signing contracts where they give up their right to unionize. But state enforcement of these contracts might not be publicly justified, especially if the contracts are signed under duress. That said, unions have no right to use state power or their own social power to destroy competitor associations. If a group of doctors wants to start an alternative to the American Medical Association, their right to freedom of association protects them from legal retaliation by the state of the AMA. And unions have no right to coercive protections from competition by

[507] That said, this is not terribly plausible claim about the AMA, historically speaking. See Blevins 1995.

firms within the same nation, and only slightly more of a right to protection from firms outside of the nation in question.

I have ignored political organizations—groups dedicated to changing the behavior of government and the use of state coercion. This is because I am focused on institutions that could exist within the legal state of nature. In the legal state of nature, there is little reason to think these political organizations would exist, since there would be no point in having them. But the mere fact that the institutions would not exist in the legal state of nature does not mean they merit no protections.

VI. The Priority of Moral Associations

In *The Order of Public Reason*, Gaus argues that social morality has priority over political processes—law is *not* the preeminent response to moral disagreement.[508] In my terms, the law is not the only way in which we can solve problems that arise in the legal state of nature, since we can appeal to our capacity to create, sustain, and alter moral rules. Law has various advantages, as noted in Chapter 4, but if you believe that moral rules comprising your society are publicly justified, then political procedures should be limited, if for no other reason than that the coercion might force us outside of the eligible set of moral rules. If we are coordinating around a rule in the optimal eligible set, "we should be most

[508] Gaus 2011, p. 456.

reluctant to modify it through the political process."[509] I understand the priority of moral rules similarly. If our moral rules are publicly justified, then the presumption against coercion cannot be overridden by any but the few political procedures that could reliably improve upon the process of moral rule-formation. These procedures count as improvements, but they do so in different ways. For instance, a procedure might keep us within the optimal eligible set of moral rules or help us to reach an alternative rule within the set that the social error function identifies as superior. So when moral rules can solve the various social problems humans face under normal social conditions, political institutions are prohibited from using coercion to interfere with those conditions.

But my account of the priority of social morality is stronger than Gaus's because I am establishing the priority of *moral associations*. The legal state of nature contains many of these institutions, in particular families, civic associations, and some commercial organizations. If these institutions can perform, through their ongoing operation and internal procedures, necessary social functions, they must be granted autonomy to act as the state would in their place. If families can handle the discipline of children better than government, or even nearly as well, families should have the freedom to do so. If civic associations can better organize charitable activities for impoverished members of society, the state should not redistribute wealth that would crowd out their efforts. If markets

[509] Gaus 2011, p. 460.

succeed in generally producing adequate levels of food, the government should avoid interfering in ways that would undermine that capacity.

Moral associations often contain formal legal systems, especially larger organizations like universities and churches. This means that these institutions will have many of the same capacities as formal political institutions. Thus, they have legal authority over members that can promote the primary functions of the law as I understand them in Chapter 4. They can (1) discourage the violation of moral rules; (2) facilitate private arrangements; (3) settle unregulated disputes, and; (4) deliver goods and services. Religious organizations have frequently performed *all* of these functions. They place effective restraints on members, contain their own dispute resolution system, and so on. It is true that these organizations typically provide these services primarily for members, though religious institutions often serve needy and destitute non-members. So if their provision is inadequate, there is a role for political institutions in providing these goods and services on equitable terms to non-members. So *in general*, the state should defer to civil society since moral rules, and so moral associations, have priority over legal rules.[510] The coercion involved in imposing most laws on persons cannot be publicly justified if moral associations are already providing these services adequately.

So I agree with Gaus that moral rules have priority, but when we see that these moral rules can be organized into moral associations, the implications of the

[510] We do not here embrace a sharply "bipolar" model between civil society and the state, just that associations can perform functions that political orders can perform.

priority of social morality are more hostile to state intervention. This is part of the explanation of the "classical liberal" tilt of public reason that I will discuss in Chapter 8. Civil society has priority, such that groups have a strong right of freedom of association against the state.

In this way, my view somewhat resembles Paul Hirst's account of "associationalism" which holds that "the organization of social affairs should as far as possible be transferred from the state to voluntary and democratically self-governing associations," though the associations need not be democratic, just publicly justified to their members.[511] However, I resist Hirst's insistence "on recruiting associations as partners in governance," because, as Victor Muñiz-Fraticelli has argued, we miss the "distinct and perhaps oppositional nature" of associations.[512] Instead, the primary case for freedom of association is respect for personal conscience and the accommodation of diversity between persons in a free order of public reason. As Chandran Kukathas notes, freedom of association is grounded in the freedom of personal conscience and the toleration of associational difference.[513]

[511] Hirst 1997, p. 32.
[512] Muñiz-Fraticelli 2014, p. 92.
[513] Kukathas 2007, pp. 4, 15, 39.

VII. Moral Peace, Social Trust, and Moral Associations

Another consideration that counts in favor of freedom of association is that associations are widely thought to contribute to social trust in social institutions generally. Robert Putnam has famously argued that "an effective norm of generalized reciprocity is bolstered by dense networks of social exchange" like civic associations.[514] The back and forth of favors and service to one another help to "foster sturdy norms of generalized reciprocity and encourage the emergence of social trust."[515] Warren argues that associational life can produce trust, and that the forms of trust produced by reciprocity within associations can produce the sort of trust that helps sustain political institutions.[516] Nancy Rosenblum argues that "the chief and constant contribution of associations to moral development is cultivating the disposition to cooperate," even though these contributions are not guaranteed. [517] Pamela Paxton has found that "membership in connected associations" ones that do not isolate themselves from society but are open to membership in other groups, increases trust such that, "at the national level, having more connected voluntary associations increases trust."[518] A survey of over

[514] Putnam 2001, p. 136.
[515] Putnam 1995, p. 67.
[516] Warren 2001, p. 74.
[517] Rosenblum 1998, p. 59. For caution about how much these skills generalize, see p. 47.
[518] Paxton 2007, p. 47.

thirty countries found that "at the individual level, membership in any voluntary association is a strong predictor of generalized trust."[519]

In this way, a society that protects freedom of association can foster social trust by creating social situations in which people learn to engage in reciprocal interaction with others. While there is no guarantee that the skills acquired in the associational context will transfer to other social contexts, there is good evidence for the claim that social trust is increased by associational life. It is therefore likely that a society with a vibrant associational life protected from excessive state intervention will have more social trust than societies without those protections.

Associational life can improve *moral peace* between persons if the social trust it generates is moral and rational, and so publicly justified. And there is some reason to believe that this is the case, as voluntary membership of associations suggests that people have sufficient reason of their own to comply with the dictates and practices of the association. So we can expect compliance with the publicly justified moral rules that constitute the association. Further, if people learn to engage in reciprocal behavior, they are more likely to comply with moral rules than otherwise because they are prepared to regulate their behavior in accord with their sense of fairness, and not just their interests, which helps to maintain

[519] Paxton 2007, p. 65. Importantly, however, Uslaner sharply disagrees with these positions. See Uslaner 2002, pp. 145-6, 162. Associational experience can increase in-group identification and "particularized" trust, both of which can undermine social trust generally. However, on this Uslaner is in the minority. Moreover, Paxton thinks this evidence is not successful counterevidence once we distinguish between types of organizations. If organizations are ethnic in nature, then that can undermine social trust, but voluntary associations of the sort we're concerned with do appear to correlate with social trust as long as they're connected to other voluntary associations rather than self-isolating.

any moral rule in existence. So publicly justified moral associations not only increase social trust in virtue of their stable, continued existence, but train persons in the art of reciprocal behavior, which helps to sustain moral rules that persons regard as fair and appropriate. There is a worry that a strong sense of reciprocity would lead some to comply with moral rules that are not publicly justified, but I think we can expect that the establishment and maintenance of justified rules will outweigh these effects due to the motivational force of intelligible reasons.[520]

VIII. Private Tyranny, Discrimination, and Balkanization

We must now address three pressing objections to my account of freedom of association:

(1) The *Private Tyranny* objection: without more placing limits on freedom of association, associations will unjustifiably limit the liberties of their members.

(2) The *Discrimination* objection: without more placing limits on freedom of association, associations will promote discrimination against marginalized non-members.

[520] Argument isn't strong enough here.

(3) The *Balkanization* objection: without more placing limits on freedom of association, associations will undermine political institutions and social trust by producing inwardly-focused citizens.

I take all three objections very seriously, and ordinarily they would deserve a great deal of attention. Fortunately for the reader, earlier chapters provide the foundation for concisely answering these objections. Let's begin with the *Private Tyranny* objection, which holds that associations should be structured much like liberal democratic government in order to avoid the inegalitarian and oppressive results of life within a hierarchical organization. John Stuart Mill, despite writing over a century and a half ago, provides an excellent characterization of this concern on the grounds that state tyranny can in some respects be much less worrisome than local associations. Mill: "Obedience to a distant monarch is liberty itself compared with the dominion of the lord of the neighboring castle."[521] As Levy notes, Mill was especially concerned about "the enforcement of … soul-enslaving, individuality-stunting norms through the oppressive combination of public opinion and local personalized power."[522] Today, the tendency to worry about private tyranny manifests itself as an insistence that we democratize associations

[521] Mill 1963, vol xix, p. 416.
[522] Levy 2015, p. 218. I do not mean to imply that Mill ignored the value of local association, just that he clearly articulated the "rationalist" worry about private tyranny. Levy defends this position later in the chapter.

to prevent private tyranny; Rosenblum calls this the "congruence approach" to civil society.[523]

Chandran Kukathas has argued, in response to this concern, that freedom of exit from oppressive associations is sufficient to counteract their tyrannical effects.[524] Kukathas articulates the private tyranny objection as the claim that "freedom of association, underpinned by freedom of exit, does not make for a free society because, in itself, it says nothing about the cost of exit."[525] The concern is that a citizen is not free unless she can exit associations she belongs to at a relatively low cost. In reply, Kukathas insists that "the magnitude of the cost does not affect the freedom" involved, such that people are still free even if they can barely afford to exit the relevant, potentially oppressive, association.[526] This response, I think, is inadequate because we can easily imagine a society of associations with freedom of association that nonetheless has few freedoms, given that each person's life can be directed by strong, potentially corrupt hierarchies.

The account of public reason liberalism I articulate in this book has more resources to respond to the private tyranny objection than Kukathas's theory. Moral associations only have authority over their members when the moral rules imposed upon members are publicly justified. Presumably, then, when associations exercise untoward authority over their members, the relevant moral rules permitting (or requiring) this behavior cannot be publicly justified.

[523] Rosenblum 1998, p. 46.
[524] Kukathas 2007, pp. 93-103.
[525] Kukathas 2007, p. 107.
[526] Kukathas 2007, p. 109.

Consequently, there is ground for the member to disobey the oppressive rule, and if powerful members of the association excessively punish those who justifiably disobey, there may be a role for the state to interfere to protect the member. If a religious authority abuses a parishioner's child, and the authority seeks to discipline the parishioner for speaking out, the religious authority has violated the rights of the parishioner (and the child). If the parishioner is powerless to seek justice for her child, then the state is not only permitted to interfere, but also required to interfere to protect the basic primary rights of parishioner and child.

My account of public reason nonetheless faces hard cases. Families, civic associations, and commercial organizations are often organized as severe and strict hierarchies, and some liberals have been quite hostile to hierarchical social structures of any kind. In these cases, some liberals argue that the relevant hierarchies harm subordinates. If the information demonstrating that these inequalities are harmful is suitably accessible to moderately idealized members of the public, then the information can count towards a defeater of those social arrangements. But there will be cases where someone recognizes the hierarchy in an association but she nonetheless joins voluntarily. So long as membership is voluntary, respect for the person and the value of moral peace with that person requires respecting her choice. We should respect voluntary submission to hierarchy becaise voluntary agreement, while not a perfect proxy for public justification, provides powerful evidence that the agreed-upon arrangement is publicly justified for the person that makes the agreement.

Voluntary agreement can only justify so much, however. Government has no business enforcing contracts that secure extremely harmful relationships, like slave contracts. It plainly should not support or protect associations who attempt to control persons who have freely exited the organizations. And government should be concerned that some putatively voluntary agreements are not voluntary due to unequal bargaining power between the parties to the association.

The *Discrimination* objection holds that freedom of association unjustifiably allows groups to exclude members on morally unacceptable bases, such as race, gender, religion, and the like, or to decline to provide services to groups with particular characteristics. This concern has attracted recent attention due to the legalization of same-sex marriage and the Affordable Care Act's contraception mandate. As of this writing, a wide array of religious institutions do not recognize same-sex marriage as theologically permissible, and so would like the right not to serve homosexual couples in the ways they serve heterosexual couples. For instance, the Catholic Church insists upon the authority not to marry homosexual couples, and a handful of Christian bakeries want the right to not provide wedding cakes to same-sex weddings. With respect to church practices, there is widespread agreement that these institutions should have the legal right to decline to serve gays and lesbians. But it is extremely controversial as to whether, say, Christian for-profit wedding services should have the legal right to refuse to provide services to same-sex weddings. Regarding contraception, there is widespread agreement that the Catholic church need not finance contraceptive

services for its employees, but it is extremely controversial whether commercial organizations like Hobby Lobby have the right to decline to provide contraceptive services to their female employees. The Green family, who owns Hobby Lobby, believes that some contraceptive services can function as abortifacents, and so destroy human embryos. For that reasons, they petitioned the Supreme Court to allow them to refuse to finance four contraceptive medications—Ella, Plan B, and the copper and plastic IUDs—which the Green family believes have a non-trivial chance of killing fertilized embryos. The Supreme Court has recently granted them this exemption, but not without serious objections that Hobby Lobby is harming its female employees by denying them these specific services.

On my account of freedom of association, the only ground for forcing Hobby Lobby or the Roman Catholic church to pay for contraceptive services is if these services are sufficiently necessary as to warrant forced provision, say if they're out of financial reach for female employees of these institutions, and the services cannot be provided through less restrictive means. Otherwise, the priority of moral associations prevails because the conditions for justified legal intervention are not met. In my opinion, these conditions are not met in the specified cases. Contraceptive services can be easily provided through less restrictive means via direct government funding or alternative arrangements with insurance companies (not unlike the exemption the Obama Administration has provided, though complications remain). There is no reason that Roman Catholic hospitals or Hobby Lobby must be the ones to provide these contraceptive services

to their employees. The contraceptive medications at issue are mostly inexpensive, and when they are expensive, this is due to governmental restrictions that could be removed, which would put contraception within the price range of even the very poor. However, I recognize that my position is controversial on the matter.[527]

Doesn't my defense of freedom of association commit me to endorsing a right to discriminate? Before giving my answer, I note that discrimination frequently involves a preparedness either to use coercion or to insist that the police use coercion on the discriminator's behalf. Jim Crow laws were coercive, and their enforcement became extremely coercive, and the coercion was obviously defeated by the reasons of black Americans. So we must specify a case where someone wants the right to discriminate without seeking the right to impose discriminatory laws on an oppressive group. Imagine then, Reba, a small businesswoman, wants a right to discriminate. Notice that we think that Reba has the legal right use her *home* in a racist way. The police shouldn't force her to welcome black Americans into her home, no matter how irrational or nasty her hatred. We frequently think the same of civic associations. But few are willing to extend the same protections to commercial organizations.

I have explained above why the case for protecting commercial institutions is weaker than the case for protecting families and civic associations, so those reasons provide some fodder for responding to worries about racist commercial

[527] For an argument that we should distinguish the freedom of association of for-profit groups like Hobby Lobby from non-profit groups, see Nelson 2015. For concerns about the reasoning in *Hobby Lobby*, see Greenawalt 2016.

organizations. But we can say more, I think. First, if there are moral rules in place that disadvantage the oppressed group, and the practice of the commercial institution reinforces and benefits from that norm, then the institution is contributing to a moral rule that cannot be publicly justified to the marginalized group. If Reba lives in a racist society, or one with a strong legacy of racism, then if she wishes to deny blacks admittance into her barbershop, her right of freedom of association does not cover that case, given the legacy of racism in the United States. But if Reba wanted to prevent hipsters from entering her barbershop, then due to the lack of bigotry and the legacy of bigotry against hipsters, Reba has the right to discriminate.

Now, a commercial institution might be entitled to discriminate if her services are non-essential and if racial minorities have lots of alternative options. For instance, I think that small religious wedding-service providers have the freedom of association to decline to provide services for same-sex couples, so long as their choice is driven by honest, sincere theological conviction and not animus or bigotry. There is a difference between these two attitudes that should be obvious to anyone who is or knows conservative people of faith. In that case, the sincere, unbigoted discriminators probably have sufficient reason to reject any legal penalty imposed upon them for discrimination. If all wedding service providers in an area opposed serving gays and lesbians, then I can see a case for anti-discrimination law to undermine the stigma against people for engaging in a

legal activity, perhaps. But in the cases raised in recent years in the US, same-sex couples usually have literally dozens of alternative opportunities.

So, my defense of freedom of association requires me to acknowledge that some moral associations have the right to discriminate, even in the controversial cases of contraception provision and wedding services. But I see no disadvantage here. The real disadvantage would be if I had to accord rights to discriminate in cases where it was plainly unjustified, and I think public justification restrictions address this problem rather directly.

I now turn to the *Balkanization* objection, which holds that extensive freedom of association rights will be used to undermine social and political institutions. Rosenblum articulates this concern when she argues, "the critical dilemma for liberal democracy in the United States today is not exclusion from restricted membership groups but isolation."[528] If we give associations too many rights, and romanticize their role in preserving a free society against the state, then "freedom of association threatens to balkanize public life."[529] There are legitimate worries about isolated associations, especially groups that advocate hatred and bigotry.[530] And there is evidence that institutions that isolate themselves and their members undermine social trust.[531]

The question the public reason liberal must answer is whether the social-moral order apart from the legal order can solve the threats posted by isolated

[528] Rosenblum 1998, p. 102.
[529] Rosenblum 1998, p. 46.
[530] Chambers and Kopstein 2001, p. 839.
[531] As Paxton notes, "having more isolated associations decreases trust." Paxton 2007, p. 47.

associations. In many cases, the groups are sufficiently isolated that they will have little to no effect on a morally peaceful polity, in which case their rights to association should be left unrestricted. But in cases where associations garner enough power and influence to undermine social trust and the effective functioning of political and economic institutions, along with other associations, then we must appeal to the power of the moral and political orders. As I have argued, the moral order has priority, and so we should attempt to restrain the influence and power of isolated associations through ostracism and criticism. If those mechanisms are unsuccessful, then and only then may we appeal to the legal order to restrain these organizations, and even in that case, we must pursue the least coercive means available to restrict associational power, lest the government acquire effective power to repress other associations, or to undermine other social institutions. I cannot say in principle how often legal intervention will be justified, but I do think it is fair to say that, given that legal options are on the table, we need not worry about excessive balkanization created by isolated associations. When isolated associations start to undermine publicly justified moral rules, there are plenty of social mechanisms for preventing them from doing so.

IX. The Conventionalist Objection

I turn to the *Conventionalist* objection, which holds that associations cannot have strong rights against the state because their rights depend on their capacity to own

and operate property, and property rights are not pre-political constraints on the state because they are state creations. So I formulate the objection as follows:

> The *Conventionalist* objection: there are no pre-political property rights because private property rights have a strong conventionalist component; they are necessarily the creation of political institutions. Consequently, property claims cannot provide a pre-political restraint on the state, since they are not pre-political.

Importantly, the conventionalist challenge is aimed squarely at the right of private property as endorsed by natural rights libertarians. The philosophers who have defended this objection, Thomas Nagel, Liam Murphy, Cass Sunstein, Stephen Holmes, Thomas Scanlon, and Philip Pettit, have aimed it squarely at the idea that there are natural property rights, rights whose moral force is binding independent of human convention and decision and which are determinate outside of legal rules.[532] Since the legal system can only be maintained by taxes, such that without taxes there could be no protection or even definition of these property rights, the state cannot possibly be constrained by property rights from taxation, since taxation is required for property rights to meet their most basic preconditions. Obviously that is not the position I've defended in this book. But I expect people to reject my view about the rights of commercial organizations on the grounds that

[532] This is the general thrust of criticisms fond in Murphy and Nagel 2002, Sunstein and Holmes 1999, Scanlon 2011, and Pettit 2013.

these commercial institutions are the creation of a government-run legal system. Accordingly, moral associations, or at least commercial organizations, cannot use their property rights as a bulwark against state power because they are the necessary creations of a government-run legal system.

There are two simple, serious problems with this objection. First, if it is successful, it undermines all kinds of rights claims against the state, including many of the liberal rights (if not all the liberal rights) claimed by the liberal egalitarians listed above. For instance, how can we have a right to free speech against the government if the government (we assume) is required to define and protect the right? Or how can we have a right to bodily protection against government if the government is required to define and protect that right? Obviously few liberal egalitarians will bite the bullet here. So why are private property rights any different?

I do not think liberal egalitarians are totally out of line, however. In my view, property rights (including the property rights of associations) are *kind of* different from other liberal rights. Yes, the same reasons that speak in favor of other liberal rights speak in favor of property rights, as I explained in Chapter 5. But the reasons that speak against *extensive* property rights *do not* speak against other liberal rights. That is because political practices that protect highly articulated, extensive property rights in external objects *require more deference* from others than less controversial liberal rights. That is, property rights place relatively more restrictions on the actions of others in contrast to other rights.

To vindicate my point, I appeal to some of Loren Lomasky's arguments against natural property rights theories, as he is one of my contractualist libertarian forbearers. Let me run through a few of his points, ones that I think should worry libertarians:

> It seems impossible to frame acceptable principles for the allocation of property rights by reference to a standard of noninterference. That is because what will count as interference is itself a function of rights to property and so cannot noncircularly be employed to establish those rights.[533]

Lomasky asks us to imagine the case of a king who legitimately owns all the property in his kingdom. If anyone uses any property at all, then that counts as interference with the king. In contrast, if the subjects own the property, then the king's attempts to exclude them count as interference. The analogous problem does not arise as acutely for bodily rights. We have a much clearer, less loaded, and universal understanding of who counts as interfering with my body when, say, someone tries to forcibly remove my kidneys.

In his next point, Lomasky anticipates an argument from analogy:

[533] Lomasky 1987, p. 113.

> For many of the familiar civil liberties it is the case that one person's enjoying the liberty does not exclude another person from enjoying the same liberty. For example, freedom of religion is a right that everyone can have, and have in the same degree. … One who acknowledges another's liberty thereby pledges not to interfere with that liberty, but he does not relinquish his own claim to that liberty.[534]

External property rights are different. If Reba person has a property right to the full enjoyment of item I, then no one else can have a similar right to I. If Reba may use, transform, sell, destroy, or bequeath I, then John may not. Liberties to treat I as Reba's property are fundamentally exclusionary in a way that other familiar liberties are not.

The obvious reply is that you can characterize other rights similarly, as your freedom of religion excludes me from controlling how you worship. But Lomasky objects that "property rights, whether taken as rights to particular items in the world or as general rights to acquire and us, exclude in a distinctive way the activities of others."[535] In the *short run*, property rights are zero-sum: "Whatever one player gets is lost (as a potential item of appropriate) to the others." But other liberal rights are positive sum even in the short run: "Speech, religious activity, and other such objects of civil liberties are positive sum. No matter how devoutly and frequently you worship, there is no resultant drain on my prospects for

[534] Lomasky 1987, p. 114.
[535] Lomasky 1987, p. 114.

religiosity."[536] Critically, property rights are not fixed in the long term or even the medium term, which is why distributing property is more like "distributing seed corn than like carving up a pie." But the fact that property rights are positive-sum in the long run does not undermine their exclusionary, short-run character.

Critically, all associational claims involve claims to external property. Families need homes to live in, and churches require land to build houses of worship. But liberal egalitarians seldom argue that the state can willy-nilly deprive families and churches of their property in the way that they can with respect to commercial organizations, even given that families and churches depend on property rules. And yet they refuse to extend the same protections to commercial organizations. But we have seen above that there are reasonable arguments that could justify the distinction.

In particular, commercial organizations are more dependent upon legal rules, and people have weaker reasons to insist upon the freedom to organize as publicly traded large firms. The best evidence for this distinction is historical. As we saw above, many civic associations predate the modern nation-state and formal public law, like universities, churches, guilds, and families.[537] But modern corporations only arise with the advent of modern legislative bodies. I think this is because large commercial organizations depend on norms that could not be stabilized by social morality or law-applying institutions alone.

[536] Lomasky 1987, p. 115.
[537] Levy 2015, p. 18, pp. 89-100.

In sum, the conventionalist challenge can only undermine my defense of freedom of association if we ignore the critical distinction between moral rules, legal rules, and constitutional rules. We must also ignore the distinction between commercial organizations that are especially dependent upon legislative rule and other associations. The conventionalist challenge does have force against these large, publicly traded firms, but proves much weaker against small commercial institutions and civic associations, not to mention families.

X. Pluralist Contractarianism

Now that we have placed associations at the heart of the social-moral order, I want to draw some general lessons about how to reconceive of the contractarian project in light of the centrality of associational life in determining what is publicly justified. I begin by returning to Levy's contrast between rationalist and pluralism liberalism. My account of association and public justification blurs the contrast and yields a pluralist contractarianism that has attractive features of both rationalist and pluralist liberalism.

Rationalist liberalism, within which Levy locates the social contract tradition, tends to be suspicious of associations because they are potential centers of private tyranny and threats to liberty.[538] According to Levy, rationalist liberals don't understand associations as anything but appendages to the contrast between

[538] Levy excludes commercial organizations from his understanding of associations.

the individual and government. Even Locke's conception of society "functions in his argument to choose a government, and, if needed, to reclaim the authority to do so. It is unitary and political. It is not pluralistic and extra-political, as we today think of civil society as being."[539] For the social contract liberal, associations are annoying barriers to answering important philosophical questions about the relationship between the individual and government. Pluralist liberalism, on the other hand, sees associations as sources of freedom, for on the pluralist view, associations function as "intermediate" institutions that usefully sit between the interaction between the individual and the state. Levy thinks that pluralist liberals have three general insights:

(1) Social orders can emerge and survive pluralistically, making effective use of localized knowledge to evolve local norms that are locally functional.[540]

(2) *Law* can emerge pluralistically, whether as the internal norms of such groups or as the norms that regulate relations among them.

(3) Such orders are normatively attractive: perhaps they are absolutely attractive, because they are the sites for our pursuits of ethical conceptions of the good and substantive life plans thicker than the formal rules of justice, perhaps they are attractive relative to the social or legal orders enacted by deliberate state planning.

[539] Levy 2015, p. 19.
[540] Levy 2015, p. 39.

One may be tempted, as Levy is, to think that the social contract tradition *cannot* take on these insights in any comfortable way. But I think my version of public reason liberalism can accommodate these insights within what otherwise might appear to be a rationalist liberal framework. I acknowledge that social orders can emerge and survive pluralistically by making use of local knowledge and social evolution. In this way, I draw on the evolutionary contractarianism of Hayek, Lomasky, and Gaus.[541] I allow that law can emerge not merely from the state and its legislature, but from common law institutions outside of the state; I argued for this in Chapter 4. And third, I have argued that these orders are normatively attractive in virtue of realizing moral peace between persons. Muñiz-Fraticelli emphasizes that pluralism acknowledges that groups have authority over their members that "imposes an external … limit to the authority of the state"; my view takes that on that insight as well.[542]

Levy claims that "there is no systematic way to combine all of the virtues and none of the vices of the two [rationalist and pluralist] mindsets, and no secure middle way that would allow us to know for sure which are virtues and which are vices."[543] And again, "a fully liberal theory of freedom cannot do without the insights of either rationalism or pluralism, and yet these are probably impossible to fully reconcile."[544] I do not claim that we can combine all the insights of rationalist and pluralism liberalisms in one theory, nor do I claim that we can

[541] Hayek 1978, pp. 15, 24, 28-29. See Sugden 1993 for an analysis of Hayek as an evolutionary contractarian. Lomasky 1987, pp. 79-83. Gaus 2011, pp. 409-446.
[542] Muñiz-Fraticelli 2014, p. 178.
[543] Levy 2015, p. 3.
[544] Levy 2015, p. 253.

always know when the pluralist or the rationalist is correct in criticizing overreach by states or by associations. But I do claim that we can go a long way towards integrating rationalist and pluralist insights into a public reason liberal view.

XI. Associations and Economies

Once we modify the Gaus-Baier view that all moral violations are everyone's business, we can see a range of new moral rules that lay the foundation for publicly justified moral associations, which include families, civic associations, and commercial enterprises. I have argued that this factor strengthens the right to freedom of association already present as a primary right. The presumption against coercion combined with the social recognition of the centrality of moral associations other than the state implies that these institutions place limits on the state when associations can perform their functions well. The state may only intervene where it is plainly and obviously needed, and not when voluntary associations and families can adequately perform the relevant social functions. This means that public reason liberals must reconceive of the place of the state within public reason liberalism. It is no longer the primary subject of public justification, but rather only a piece of the broader moral order. Further, once we recognize the non-legislative and non-statist sources of social order, we can see that state power is limited by the demands of public justification. So there is a robust primary right of association.

I then argued that my account of association can resolve four objections—tyranny, discrimination, balkanization, and conventionalism. Many problematic tyrannical and discriminatory norms are defeated for a diverse, moderately idealized public, and associational power can be limited when it undermines moral peace between persons. And when we recognize that social rules come in moral, legal, and legislative types, we acknowledge a role for social rules in limiting the right of association while insisting that these social orders are rarely merely legislative in nature.

Now I turn to focus on controversial questions that concern the status of economic liberties and the appropriate role of government on economic matters. These are hard issues because commercial property rights are more intrusive and controversial than other liberal rights, so we must grapple with a wide range of reasonable views on the matter.

Chapter 8: Property and Economy

We have seen in the previous chapter, and in Chapter 5, that citizens have pre-political property rights and the right to form commercial associations for the pursuit of profit. The legal state of nature will contain commercial institutions, such that the presence of the relevant moral rules crowds out the public justification of coercive laws that would interfere with at least some of the characteristic operations of various commercial enterprises. Further, families and civic associations have rather extensive property rights, given their inward focus, organizational integrity, and lack of direct effect on outsiders.

But questions about the proper extent of private property rights and the role of the government in the economy could use further discussion. In particular, I would like to address how to distinguish between licit and illicit interventions, which I pursue in this chapter. I shall argue that public reason liberalism is not egalitarian in that it does not embrace an extensive state devoted to equalizing holdings of property, income, and wealth, nor does it advocate an extensive regulatory apparatus. The more radically left-wing proposals advanced by Rawls and Rawlsians – property-owning democracy and liberal socialism – cannot be publicly justified to a diverse public. However, a fully libertarian regime that protects extensive private property rights cannot be publicly justified either. Reasonable non-libertarian members of the public will have defeaters for a fully libertarian regime. The question that remains is how to determine which, if any, property regime is eligible for all moderately idealized members of the public. On

my view, we land somewhere between what Rawls called the system of natural liberty and welfare-state capitalism.[545] I will argue that a principle of social insurance is publicly justified and so requires that we move away from pure capitalism. The additional institutions of heavy state regulation and redistributive taxation aimed at equalizing holdings cannot be publicly justified. However, we must still extend political power beyond the mere protection of a market order and a social minimum because many reasonable people fear that negative externalities and inequalities of wealth and income are sufficient risks to freedom and equality. Consequently, they have defeaters for extensive property rights in productive resources that would otherwise prohibit redistribution and regulation.

The argument of the chapter begins with a review of the idea of public justification and an explanation of how, in principle, it resolves disputes about economic policy and economic rights. I then explain why we must back away from political libertarianism, or a purely capitalistic regime. I next explain how the dramatic economic growth over the last 150 years in Western nations generates a presumption in favor of the market economy when combined with the principle of sustainable improvements. These matters are covered in Sections I-III. I then proceed through a series of assessments of government intervention into the economic institutions present in the social-moral order, from a principle of social insurance, to regulation and policy, redistribution in the name of democratic equality, and the further interventions involved in property-owning democracy

[545] Rawls 1971, p. 57.

and liberal socialism. These issues are discussed in sections IV-IX. I end the chapter with a characterization of my economic approach that I call *neoclassical liberal* public reason.

I. Public Reason and Economic Liberties

Recall that moral rules are merely the first of three stages of layered justifications of conventions, with the justification of legal rules and constitutional rules coming second and third. This led, in Chapter 4, to the development of a legal justification principle:

> *Legal Justification Principle:* a legal rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the law because each member rationally recognizes that compliance with the law efficiently improves upon her capacity to comply with a publicly justified moral rule(s).

So laws require public justification, and the justification proceeds partly in terms of the capacity of laws, when followed, to improve upon the ability of members of the public to comply with publicly justified moral rules. This means there is a presumption against legal rules: we must show that they are required to enable persons to better act on their moral obligations than they would be able to in the

legal state of nature. A principle of political obligation arises in the same way, as I will explain in detail in Chapter 9. I argue there that constitutional rules and associated political bodies are only publicly justified when compliance with their directives helps us to better comply with our legal obligations, and the moral obligations associated with those legal obligations. Part II of the book explained what this reliability consists in. Political bodies must respect primary rights, minimize legislative errors, and realize adequate degrees of durability and immunity.

Publicly justifying economic regimes is harder than the literature usually acknowledges because publicly justifying a legal regime is *not* the same as publicly justifying a series of laws. For we must publicly justify the constitutional rules that govern legislative bodies based on our expectation of the sorts of laws the legislative body will normally produce. Determining which laws are publicly justified is only *one step* towards that end. So even if we show that, say, property-owning democratic legislation can be publicly justified, *we have not yet shown that property-owning democracy per se* is publicly justified. That would require showing that the political bodies constitutive of property-owning democracy are publicly justified based on the standards established in Part II of the book.

Let's review the features of the political and legal justification principles that bear on the public justification of economic regimes. The first thing to remember is that primary rights morally limited government. These rights prohibit state coercion where property rights are primary rights, where intervention would

excessively abrogate freedom of association, or when it would merely replace or reduce the effectiveness of moral rules that sustain commercial institutions. Also remember the failure of the conventionalist challenge discussed in Chapter 7. I have not postulated *pre-conventional* economic rights generally. However, there are *pre-political* economic rights that constrain state power.[546]

These principles are hostile to coercion. To see why, recall that intelligible reasons are the currency of public justification. Publicly justified political bodies and laws must be justified by the diverse, dispersed reasons of citizens. This means public justification can be quite difficult, since moderately idealized normal moral agents will have diverse intelligible reasons, some of which will be sufficient to reject a vast panoply of laws. In previous work, I have addressed the concern that my view is too hostile to coercion, but there, and now here, I remind the reader that there is a distinction between finding a law or regime to be *sub-optimal* and regarding it as *defeated*.[547] Among the optimal eligible set of laws governing some issue, some laws will be defeated, or be outside of the set, but many laws might be seen as better than nothing. Given the great benefit of having at least some laws, we can expect the optimal eligible set to contain a number of laws, such that many can be publicly justified. Consequently, intelligible reasons are unlikely to lead to anarchy or, as we shall see, radical forms of libertarianism.

[546] Publicly justified rights contrast with mind-independently valid rights like natural rights, which could have a variety of contents different than those I postulate here.
[547] Vallier 2014, pp. 132-4.

Second, members of the public are moderately, rather than radically, idealized. They do not always reason perfectly, nor do they always have all relevant evidence. Moderately idealized agents are boundedly rational, reasoning well with respect to their cognitive restraints. As a result, idealization cannot fully normalize the parties to a political agreement, since the justificatory reasons of citizens will be relative to their distinct epistemic circumstances. Consequently, moderately idealized persons will have diverse defeaters for coercion.[548]

Third, we finely individuate moral and legal rules, meaning that we evaluate these issues on their own terms, independently from our evaluation of a wide range of other issues. So instead of attempting to publicly justify entire regime types, or whole constitutions, the unit of public justification is the moral and legal rule. I have already argued for this conclusion for moral rules in Chapters 1 and 3, and for legal rules in Chapter 4. The implication of fine-grained individuation is that less coercion can be publicly justified than on more coarse-grained approaches to individuation. Given the disaster of anarchy with respect to regime types, there will be many eligible but terrible regimes that can be publicly justified if we individuate according to regime types. For instance, we can justify a Hobbesian sovereign as eligible if anarchy is worse.[549] But if we individuate more finely, the no agreement point, the point just outside of the optimal eligible set, is merely having no law governing *that particular issue*, and anarchy with respect to almost any issue will be less worrisome than anarchy with respect to regime

[548] Though moderately idealized agents might also find more points of overlap.
[549] Gaus 2011, pp. 490-497.

types.[550] That is because we only risk being deprived of the benefit of particular laws, not entire legal regimes. So coercion is easier to defeat the more finely we individuate.[551] Finally, I want to stress the order of justification. We first publicly justify moral rules, then, when inadequacies are identified, we publicly justify legal rules. When we identify inadequacies with law and mere norm-applying institutions, then we can publicly justify political bodies and legislation. But these bodies are constitutionally bound to respect primary rights, to minimize legislative error, and to generate adequate degrees of stability. If we are to demonstrate that an economic regime is publicly justified, then, we must move through all of these steps. Otherwise, the political body that sustains the economic regime cannot be publicly justified.

So we can see that the idea of public justification is going to "tilt" in a classical liberal direction, as Gaus has argued.[552] But now we must demonstrate this with respect to different proposed interventions.

---

[550] Note here that the baseline is no law governing the issue, such that there is a legal state of nature on the matter (moral rules may apply, but not legal rules). We are not comparing an authoritative legal rule to a legal rule without authority.

[551] I agree with Gaus that there is no looming "libertarian dictator" issue here. The worry is that libertarians will have defeaters for any increases in coercion, such that their wills will carry the justificatory day over all other members of the public, making them effective social dictators. But libertarians advocate extensive coercion themselves, as we shall see below. Gaus 2011, pp. 501-506.

[552] Gaus 2011, p. 526.

II. Backing Away from Political Libertarianism

Many readers will accuse my account of public reason of being "libertarian" because of its hostility to the use of state coercion. This is wrong, but to explain why, I need to outline the conception of libertarianism at stake in the argument. I will understand libertarianism, for our purposes, not in terms of foundational commitments to, say, self-ownership and the free acquisition and transfer of resources, but rather as the defense of an extensive set of legal incidents over an extensive set of items.[553] We can understand the notion of having full private property rights over P as an agent, Reba, having the following scheme of rights:

(1) The right to use P as she wishes so long as this is not harmful to others or their property;
(2) The right to exclude others from using P;
(3) The right to manage: Reba may give permission to any others she wishes to use P, and determine how it may be used by them;
(4) The right to compensation: If someone damages or uses P without Reba's consent, Reba has a right to compensation for the loss of P's value from that person.
(5) The rights to destroy, waste or modify: Reba may destroy P, waste it or change it.

[553] Gaus 2009.

(6) The right to income: Reba has a right to the financial benefits of forgoing his own use of P and letting someone else use it.

(7) Immunity from expropriation: P (or any part of P) may not be made the property of another or the government without Reba's consent, with the exception of a few items such as taxation.

(8) Liability to execution: P may be taken away from Reba by authorized persons for repayment of a debt.

(9) Absence of term: Reba's rights over P are of indefinite duration. Rights to rent and sale (transfer rights): Reba may temporarily or permanently transfer all or some of his rights over P to anyone he chooses.[554]

A libertarian holds that persons have the moral ability to acquire all of these rights over property through the acquisition of resources in the state of nature or through the free, express, and voluntary exchange or gift between persons. She also advocates few, or no, restrictions on which items can be owned in this way, such that she believes in legalizing markets in just about everything, including sex, drugs, guns, assisted suicide, paying incredibly low wages, charging incredibly high prices, protecting vast inequalities of wealth, and prohibiting the redistribution of wealth to help the least-advantaged.[555] We can understand libertarianism, then, as the support of *capitalism*, defined as an economic system that allows persons to

[554] Honore 1961.
[555] For discussion of libertarian arguments for legalizing markets in an enormous range of goods and services, see Brennan and Jaworski 2016.

acquire the maximal set of legal incidents (listed above) over a maximal set of items.

Defined in this way, there isn't much coercion under capitalism. There is definitely less coercion than our present form of government. And yet it is *surely* a coercive system. Every one of the incidents listed are meant to be coercively enforced against violators by someone, be it the officers of the minimal state or the agents of private protection services. For instance, today Bill Gates has billions of dollars that the government coercively protects from expropriation by private persons and, in part, from the government. In a fully libertarian society, protection services would be expected to protect Gates against anyone who would take any amount his holdings without his consent.[556]

Since we individuate finely, we can ask whether the specific moral and legal rules that require the coercive protection of these rights can be publicly justified. I think it is quite clear that the coercion required to enforce maximally extensive private property rights *cannot* be publicly justified. To show this, let's imagine a progressive egalitarian, Reba, who affirms the justice of redistributive taxation and worries that capitalism will hurt the poor and produce unjust economic inequalities. Reba would surely prefer no law protecting all of Gates's holdings to a law that did so. So if Reba were to use the political process to redistribute wealth from Gates, Gates lacks the rightful authority to forcibly prevent Reba from doing

[556] Now, critically, a libertarian society might not, in practice, allow anyone to become rich in the way that Gates became rich, since Gates's wealth derives from government interventions like extensive intellectual property rights, which libertarians oppose. Any long-term attempt to amass wealth would attract competitors, who would bid down the large profit margins that the very rich use to become very rich.

so, or to prevent someone from doing so on her behalf. If Gates prevents the expropriation of his holdings in at least a handful of cases, it is *Gates* who uses coercion without a public justification.

The libertarian is bound to reply that the state will coercively prevent Gates from protecting his holdings from expropriation, and that this coercion cannot be publicly justified to Gates. But in this case, Gates could reasonably be seen as the *initiator* of coercion. Some would argue that the state would merely use coercion to stop Gates from interfering with their expropriation.

The libertarian could complicate matters by arguing that without a background assumption of the legitimacy of certain property rights, there is no way to determine who initiates coercion in this case. If Gates is the rightful owner of his property, then the expropriators initiate coercion against his property, and so the coercion must be publicly justified for Gates. But if Gates is not the rightful owner, then his acts of putative defense are not defensive. The question of who initiates coercion is parasitic on a theory of entitlement, and not the other way around, as a public reason view postulates. In response, I argue that while people have primary rights to property, they are socially vague, in that reasonable people disagree about how to flesh out the right. Few people would extend property rights to protect against every single form of state expropriation. So even if the libertarian is right that we need a theory of property to determine who initiates coercion, this reply cannot justify protecting Gates and others with large property holdings.

The challenge remains, though, that the public reason liberal cannot say that Gates is initiating coercion, and so whose actions purport to have authority over others. In this case, I think members of the public should reason as follows. Given that we face a potential violent conflict over holdings, where each party regards the other as initiating coercion, and given the undesirability of violent conflict, there may be property rules that can forestall these violent conflicts between state officials and the right that are eligible for both sides. If so, then acts of expropriation should follow the justified legal procedure that both sides deem appropriate to avoid violent conflict in cases where the rights conflict cannot be otherwise adjudicated between them. So even if we cannot agree on who initiates coercion, we can publicly justify legal procedures that violate libertarian proposals. So we must back off of libertarianism.

We can also back off of libertarianism because many on the left reasonably (if falsely) believe that a pure capitalist system would create a mass of extremely poor people who would be subject to considerable coercion. Many agree with Marx's remark:

> Capital further developed into a coercive relation, which compels the working class to do more work than the narrow round of its own life-wants prescribes.[557]

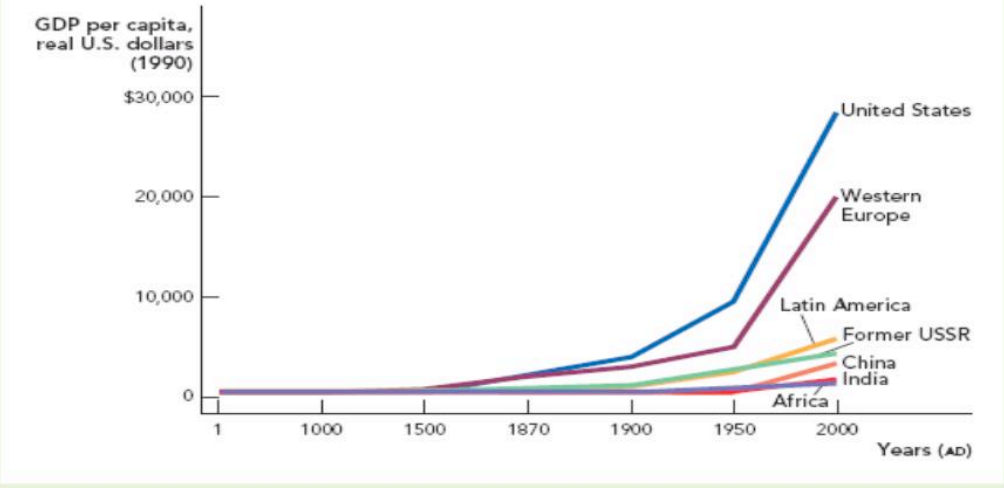
[557] Marx and Engels 2011, p. 338.

Marx argued, and many non-Marxists still agree, that pure capitalism is coercive because the working classes must work in order to survive and that this subjects them to enormous coercion by their employers or by a society that keeps them poor by depriving them of the social means to better their condition. Since sincere, informed people of good will can still continue to affirm Marx's complaint, if not his positive project (which cannot be publicly justified), particular rights allowing employers to coercively direct their workers and for society to deprive workers of sustenance, will be defeated by many members of the public. This is a further reason for the public reason liberal to back off of capitalism.

III. The Great Enrichment and Sustainable Improvements

While we must back off of pure capitalism, it is worth emphasizing the importance of the fact that nearly everyone recognizes today that capitalism is an enormously productive economic system. Capitalism has produced gigantic improvements in economic well-being, along with many other measures of well-being, such as quality and quantity of life. It is worth focusing on the stunning empirical fact that economist Deirdre McCloskey calls "The Great Enrichment."[558] Here is a representation of economic growth across the world over the last 2000 years:

[558] McCloskey 2016, p. x.



Economic Growth in Major World Regions

Source: Maddison, Angus. 2007. *Contours of the World Economy: 1-2030 AD.* Oxford University Press, Oxford.
Note: Timeline is not to scale.

Figure 7-1: The Great Enrichment

Few today would dispute that a competitive marketplace, where firms are free to experiment with new methods of production that are subjected to the withering scrutiny of millions of consumers, is a kind of golden goose. And it is a golden goose that we can kill; command economies nearly killed it. When we back off of capitalism, then, we must be mindful not to strangle the productive process. Even small costs to the growth rate have gigantic effects over time due to the compounding of growth rates over time. Without growth, we will lose enormous social goods, and not merely for the rich, but the middle classes and the least-advantaged.

It is remarkable how many liberal political philosophers have failed to grapple with one of the most incredible empirical facts available to social scientific researchers. Rawls speaks only of just savings, and not appropriate social

investment. The paucity of the importance of the Great Enrichment seems to have been irrelevant to determining which moral and legal conventions we should endorse. McCloskey argues that the Great Enrichment is the result of the collapse of moral conventions that discourage entrepreneurship and commercial activity.[559] But even if she is wrong about this, members of the public will judge moral and legal conventions by their effects of robust, energetic economic activity. Given that nearly everyone has an interest in greater economic well-being, that some moral and legal rules reduce economic growth is an enormous mark against them. Obviously economic wealth is not the same as human well-being, but it surely has something to do with it, given that economic wealth is a necessary conditions for all kinds of goods, including food, healthcare, shelter, clothing, leisure time, enjoyable work, and so on.

And note that we have already established the importance of economic improvement in Chapter 4 in my argument that members of the public will embrace a *Principle of Sustainable Improvements*. They will not only insist on moral and legal rules that work to their benefit, but that work to their benefit over time. Environmentalists of various stripes object, not unreasonably, that our present economic growth path is unsustainable. But the Principle of Sustainable Improvements only requires *sustainable* improvements. If the objections of environmentalists survive moderate idealization and the standards of what I call *policy epistemology* below, then growth can be restricted to ensure that it is

[559] That is the thesis of *Bourgeois Equality*.

sustainable over the long run. But restrictions on capitalism that undermine growth, especially those that restrict improvement of the economic well-being of the least-advantaged, will be incredibly hard to justify. Long-term economic restrictions, as well as short-term legal restrictions that stand the risk of sticking around long past their intended expiration date, also decreasing growth rates, are enormous problems. Again, members of the public will insist that we not kill the golden goose. Capitalism's productivity, in my view, is the single most important factor that speaks in its favor from the diverse perspectives of members of the public, and this factor serves to undermine various moral and legal rules and helps to publicly justify others.

A further reason to care about economic growth is based on evidence that societies are more liberal and tolerant under conditions of economic growth. As Benjamin Friedman has argued, growing societies have a large pie of resources to divide, and so conflict-generating scarcity is limited.[560] Given our aim of establishing moral peace between persons, if economic growth promotes social stability and positive fellow-feeling, that is strong reason to think that growth-promoting rules can be publicly justified.

[560] Friedman 2005. Along the same lines, Uslaner 2002 argues that social trust and peace are promoted by economic equality. So we might be in a difficult position if we need economic equality to generate social trust, and redistribution of wealth reduces the growth rate.

IV. The Principle of Social Insurance

Progressive and egalitarian defeaters do not undermine the public justification of a social system of private property. We individuate finely, and so any proposed defeat must proceed piecemeal. Further, progressive and egalitarian defeaters do not license state intervention to redistribute wealth *in general.* The redistribution of wealth, as a recurrent social process, is coercive in many respects, and so must itself be publicly justified as an ongoing, official governmental process.

This means that the redistribution of wealth must be publicly justified on the basis of the intelligible reasons of citizens. And few reasons will carry the day. For instance, some reasons for redistribution are sectarian, such as luck egalitarian reasons that will be rejected by many members of the public. Many thoughtful and sincere *philosophers* reject luck egalitarianism because it requires leveling down.[561] And few people think that the mere fact that one wins the natural lottery means that one should not benefit from the exercise of her talents.[562] The same is true for taxation meant to fund sectarian groups, like churches, in pursuing their reasonably rejectable mission and final ends.

Other reasons for redistribution are not sectarian, such as the widespread belief that government provides some essential services that cannot be adequately provided by the market process and civil society. The relevant goods, like roads,

[561] Nozick 1974, p. 229. Raz 1986, pp. 227, 235.

[562] I think theists have quite good reason to reject luck egalitarianism, since we tend to believe that God deliberately gives people their talents to be used to serve him. So there is nothing random about the distribution of natural talents (as opposed to natural deficits, which are not intended by God).

defense, and police services, are universally regarded as good and taxation for those purposes is widely regarded as publicly justified. The only people who disagree are anarchists and radical libertarians.[563] And their numbers are small enough that they can be accommodated in different ways.

The first controversy arises with respect to what I shall call the *principle of social insurance*. I understand social insurance as a type of public policy where government provides income and resources to people who, for one reason or another, have lost access to goods and services vital for them to remain normally functioning persons and citizens. Varieties of social insurance include government health insurance, unemployment insurance, disability insurance, old-age pensions, and food stamps. All of these policies are typically justified based on the widely recognized badness of not having access to food, healthcare, shelter, and other resources required to meet basic needs. Less common, but still popular, are arguments that social insurance is required to alleviate *injustice* against the poor and needy. Because the poor and needy have welfare rights, rights to goods and services required for basic physical, mental, and social functioning, social insurance is a means of protecting those rights.

(1) Critics of the principle of social insurance typically offer four objections to state provision. First, and most commonly, people complain that many recipients of social insurance are *undeserving*, either because their need is *their*

[563] I think that the radical libertarian is unreasonable if she insists that the only acceptable scheme of social institutions is the one she advocates, but she is reasonable if she insists on the right to secede or partially separate from her state in conjunction with other libertarians.

fault or because they are not in need in the first place.[564] An example of the former would be giving an alcoholic unemployment insurance when he is fired for being drunk on the job. An example of the latter would be extending giving food stamps to individuals making over $40,000/year. Importantly, however, this is not an objection to the principle of social insurance *itself*, but rather that it is hard to implement because cheaters are hard to detect. Worries about abuse are insufficient to justify ending social insurance programs in general. The government must simply be pushed to be more scrupulous and efficient, even if that is difficult. Some complain, along similar lines, that social insurance incentivizes sloth, which is considered an immoral use of taxpayer funds, but the same reply is appropriate here – the government should try to take steps to avoid incentivizing sloth. Those who genuinely need social insurance have morally urgent needs that can be easily met, such that taking away their social insurance cannot be justified based on the potential sloth of other recipients of government funds. We cannot deprive the genuinely needy to avoid rewarding the slothful, unless the slothful overwhelmingly dominate the deserving poor.

(2) The second objection is that social insurance is economically inefficient. Social insurance reduces the cost of making bad economic choices, such as not keeping one's job, or not saving enough money for retirement. By rewarding poor decisions, we can expect more poor decisions in the future.[565] Similarly, the relevant forms of social insurance are funded typically by taxing the rich, who

[564] Goodin and Schmidtz 1998, pp. 10-12 reviews the question of blame and its importance.
[565] Goodin and Schmidtz 1998, pp. 14-20.

typically work and produce significant economic value. By taxing the rich, they are discouraged from being economically productive—not entirely, but somewhat. Between hurting the productive and paying the unproductive, we can expect a slowdown in economic growth, which when growth rates are compounded, can lead to dramatically reduced levels of economic prosperity over time. This objection is more serious than complaints about deservingness for several reasons. First, it does not appeal to controversial moral ideas like desert, but rather makes a straightforward empirical claim about a country's economic well-being, something everyone has reason to care about. Second, the model of human behavior at work is relatively simple and easy for members of the public to grasp: people respond to incentives in the long run such that if you pay people for something, you get more of it (in this case, poverty) and that if you reduce the pay of people, you get less of it (in this case, economic production).

I think this objection has sufficient force to justify a number of limits on social insurance. It is trivially true that at *some* level of taxation, and some degree of social insurance, economic growth will slow, making many millions of people worse off in the long run. It is also trivially true that at some level of taxation and some degree of social insurance that over a generation or more the *recipients* of social insurance will be poorer than they would have been without it, given that their own income and the wealth available to them through social programs will be smaller than it would have been following a period of greater growth. Everyone should be able to agree that this greater level of taxation and redistribution is

defeated, and they should also be able to agree that forms of social insurance that reduce growth rates, reducing the economic well-being of millions of people, are likely also defeated. This is also an implication of the principle of sustainable improvements. Beyond this, however, it is a matter of reasonable dispute where the line should be drawn, and so should be left open to the moral and political orders to settle upon the appropriate levels of tax and the extensiveness of social insurance.

(3) Third, critics of the principle of social insurance argue that government provision of social services and the regulation of service provision *crowds out non-governmental groups* from providing those goods and services.[566] The groups include both civic associations and commercial institutions. When government gives money to the poor directly, it is sometimes argued that non-governmental charities are crowded out because the needs of the poor are being taken care of. For instance, the people who provide services to the poor are now relying on public funds rather than private funds. One could argue, for instance, that food stamps crowd out private food kitchens. Second, government provision sometimes crowds out private for-profit providers, such as private employers who would have otherwise offered jobs to the unemployment and private providers of medical insurance.[567] There is good reason to think that government welfare policies crowd out fraternal organizations and that government involvement in healthcare leads

[566] This is part of the argument in Beito 2000, which documents the robust fraternal order system that once alleviated poverty but that was gradually replaced by the welfare state.
[567] Abrams and Schmidtz 1984, Bolton and Elena 1998 find significant crowding out effects. For counterevidence, see Boberg-Fazlić and Sharp 2013.

to tight regulations of insurers, such that small insurers are not financially viable, meaning that many associations cannot provide themselves with adequate medical insurance.

The defenders of the principle of social insurance will counter that government provision is both more effective and just and that crowding out private institutions is not a problem so long as the needy are cared for. They may also dispute the claim that the degree of crowding out is morally significant. But the critics can argue, reasonably, that many forms of social insurance are inefficient, particularly in large, diverse social orders like the United States.[568] They can also argue that, empirically speaking, crowding out is a genuine problem, and that market-based solutions will be more efficient in the long run. But most significant for our purposes, critics of the principle of social insurance can and should argue that non-government groups have *moral priority* over the government, such that if institutions within the moral order can satisfy the demands of social morality (such as the demand that the poor be cared for) to an adequate degree, then the coercion involved in government provision cannot be publicly justified. This means there is a *presumption on behalf of civil society* regarding provision of social insurance that must be overridden. It must be overridden with solid empirical data demonstrating the greater effectiveness of

[568] See Tanner 1996 for a discussion of the now infamous program Aid to Families with Dependent Children (AFDC).

government-provided services.[569] Otherwise, the coercion involved in social insurance is defeated.

However, members of the public who happen to justifiably believe that that government services will be less effective than private organizations cannot defeat government-provided services based on these concerns alone. These individuals will presumably think that some government provision is better than none and that the coercion involved with government intervention, while unfortunate, is morally sub-optimal rather than unacceptable.[570] So if it is a matter of reasonable dispute among members of the public about whether government provision is a necessary supplement to civil society, given that some social insurance is eligible for even many conservative and libertarian members of the public, government provision can still be publicly justified. If civil society and the market can adequately provide resources to the needy through charity and cheap, competitive prices, then the moral order takes priority. But since that claim is reasonably contested, some social insurance cannot be defeated.

(4) The final objection to social insurance is that the taxation required to provide social insurance is unjust and excessively coercive. I take it as trivially true that taxation is very often coercive. In many cases, people don't care about paying taxes and so have no disposition to resist or even dissent government extraction of their income. In that case, since no coercion is needed there is an important sense

[569] In my view, there are works available that meet this standard of evidence. See Kenworthy 2013.
[570] Again, there will be some holdouts, like radical libertarians, but these groups are likely small in number and may be able to be accommodated in another way. See Appendix A.

in which there is no coercion, even though these people would be fined and ultimately imprisoned for refusing to pay their taxes should they change their minds. But in cases where people want to build their projects and plans around having access to a high level of income and wealth, government expropriation can prove quite coercive indeed.[571] Higher tax rates will tend to be more coercive because they will reduce the choice options of the taxed to use their own money in their own way. Many of these choices will be morally trivial, even from the perspective of those who value those choices. Bill Gates has no real complaint if his taxes increase from 0% to 1% of his yearly income and earnings. Such a small level of taxation does not set back Gates's projects and plans. But if all of Gates's income in excess of $100,000/year were taxed at 90%, this would be massively coercive. Such a high level of taxation would have prevented him from accumulating enough wealth to create the Bill and Melinda Gates Foundation, which is arguably helping save the lives and improve the living conditions of millions of people around the world. Now, Gates is an unusual case because he could not have acquired this much money in a free, publicly justified moral order because much of his wealth depends on the coercive enforcement of intellectual property laws that cannot be publicly justified. But people who acquire their wealth through publicly justified laws have a legitimate complaint against progressives and egalitarians that their policies would coercively reduce his ability to live his own life in his own way.

[571] Gaus 2011, p. 522.

Progressives and egalitarians are likely to respond that a world in which people would tolerate a 90% tax rate on the rich would increase the choice options of sufficiently many people that the tax rate could be justified. But plenty of sincere, informed people of good will not only reject this claim, but think it is obviously false. They will have sufficient reason to reject this economic forecast, such that the rich persons who reject the claim will experience the extraction of their income as coercive and alienating, and so probably not publicly justified. Progressives and egalitarians might also respond by emphasizing that, while the rich might be coercively taxed, the state "interacts with citizens" … "no less coercively" … than "when it uses the threat of legal punishment to protect private property."[572] This would be a mistake, however, as few people are coercively prevented from expropriating the rich, given that our background moral rules and many legal rules are sufficiently widely accepted that no coercion is required to prevent expropriation. One cannot plausibly respond that the revenue collected could be used to provide more options for recipients of the revenue, not merely because we might end up with less wealth and so fewer options overall, but because public reason is not in the business of maximizing or generating good options, but respecting persons and so insisting that the coercion applied to them can be publicly justified, even if other persons are coercively prevented from coercing them.[573]

---

[572] Bou-Habib 2015, p. 8.

[573] Bou-Habib is mistaken, therefore, to see all coercive enforcement of economic arrangements by the state as equally coercive. His view also has the absurd implication that all economic regimes are

My claim that taxation is coercive does not commit me to a natural rights approach to property rights or to pre-conventional property rights. Instead, I'm simply combining a basic primary right to private property, the presumption against coercion and in favor of the civil society, and the model of diverse public justification defended in previous chapters. The moral order will contain property conventions that will protect income and wealth from expropriation by any group, at least up to a certain level of economic holdings. Many members of the public will think that social insurance can be adequately provided without high levels of taxation and will think that the high levels of taxation are inefficient and excessively limit the choice options of some members of the public. Consequently, they will have sufficient reason to reject extensive social insurance.

Let's briefly consider a particular social insurance policy in order to illustrate how a public reason liberal should approach the complexities raised by social insurance proposals. My own personal view is that social insurance should take the form of a Basic Income Guarantee (BIG), where everyone below a certain income threshold would have access to a certain level of cash with no strings attached.[574] The BIG can be justified not merely on a left-wing basis, but even on a libertarian basis.[575] For instance, BIGs avoid many of the inefficiencies of standard forms of social insurance by bypassing government bureaucracy. Some will apply the worries about social insurance to the BIG, however. I also worry that a BIG

---

equally coercive, as thought Denmark's market economy were just as coercive as Soviet Russia's planned economy.

[574] For a survey discussion, see Van Parijs 2004.

[575] Murray 2006, Zwolinski 2014

cannot be justified because it will provoke an enormous amount of resentment among those who work for a living, since the BIG is unconditional. We cannot discount the objections of those who think that unconditional redistribution is unfair to the economically productive. This means that the only publicly justified means of providing social insurance might involve means-testing social insurance. But my suspicion is that the benefits of a BIG are sufficiently great as to render BIGs eligible even for those who think that BIGs are undeserved. Even people who resent welfare recipients think that some people are deserving, and they may think that, while a BIG is a morally sub-optimal way to provide social insurance, the BIG is better than nothing. If so, the principle of social insurance could render a BIG justified, depending on the diverse reasons of citizens.

In sum, the basic principle of social insurance can be publicly justified, though there are many reasonable restrictions that a free moral order can place on realizing and applying the principle.

V. Regulation and Policy

In this section, I discuss regulation and the public evaluation of public policy. So far, we have only backed off of political libertarianism by endorsing a principle of social insurance. Now we attempt to back off further still, by determining how extensive an administrative apparatus can be for a free people living in a publicly justified polity.

The biggest hurdle in determining the appropriate bounds on the administrative state is that different members of the public will disagree about whether some regulations are coercive impositions or reductions in coercion. Libertarian members of the public will have defeaters for a variety of regulations. But progressive and egalitarian members of the public will reject coercively enforced protection of private property as unjustified coercion. Fortunately, most regulations do not raise these complications – they're plainly coercive and some think the coercion is justified. So in this section I focus on regulations that different members of the public can agree are increases in coercion.[576]

The simplest public justification for a coercive regulation is that the regulation prevents a harm – a setback to the general interests of members of the public – given that moderately idealized members of the public recognize the wrong in harming others. For this reason, many regulations required to protect people from workplace harms, like health and safety regulations, should be publicly justified. Importantly, we must have reason to think that the regulation prevents the relevant harm without imposing a greater harm, but there are plenty of regulations that plausibly meet this requirement.

As I see it, there are three barriers to publicly justifying coercive regulations that prohibit harm.

[576] I set aside cases where the coercive regulation will indirectly bring about the reduction of coercion in some other part of the economic system, such as carbon taxes that reduce the rise of sea levels that would impinge upon the land of many property holders. These indirect effects can be built into the case for the public justification of the regulation.

(1) In many cases, the non-state legal system can address the various harms that regulations are meant to prohibit. They do so through the tort law, the law of damages, which long predates state intervention. The tortfeasor, the one who commits a tort, is frequently forced by the legal system to compensate the person whom she has harmed and that the law recognizes her as liable for the harm. These private legal conventions will appear within the legal state of nature, since they perform the absolutely vital function of resolving property disputes. No legislative apparatus is required for the existence and functioning of a tort law system. Since people with a financial interest at stake will often recognize, at least in vague terms, that they are liable to civil suit for harming others, this threat may prove enough to discourage them from creating the harm or damage in the first place. In this case, then, state regulation is not needed. And in many cases, torts are obviously superior ways to handle the threats of damages, as they're capable of being made responsive to particular cases than general regulations imposed by a central bureaucracy.

Of course, in other cases a regulatory solution may be superior, especially when it must be enforced by the state against a large economic power that has the ability to control or distort the tort law process. However, these large economic powers can distort the regulatory process as well. But if it can be demonstrated that the regulation is more likely to protect people from the relevant harms or damages, even given the threat of regulatory capture (where the regulated group

comes to control the regulatory body), then state regulations can be publicly justified.

(2) There must be some public method of demonstrating to members of the public that the regulation is worth the costs associated with the loss of a choice option, along with the cost imposed by the coercion itself, a secondary cost that matters given the badness of coercion. That means that public reason contains guidelines of inquiry governing *policy epistemology*. A policy epistemology is a set of standards that specify the *level of evidence* required to show that a coercive regulation or policy will have predicted results. Policy epistemology specifies the level of evidence that should convince any moderately idealized member of the public to assign a range of relatively high probabilities to the expected effect of a regulation of policy. For instance, policy epistemology might establish standards of evidence that would give progressive members of the public reason to adopt a probability of .8 that a proposed policy will produce a .2% increase in the growth rate, but that would give libertarian members reason to adopt a .55 probability that the proposed policy will produce a .2% increase in the growth rate.

Note here that I build in the expectation that policy epistemology will not require that evidence convince everyone to the same degree that some policy will have predicted results. That would set an impossibly high bar that no policy could pass. Also note that policy epistemology only specifies standards of evidence relevant for *predicting results* and not for publicly justifying a policy as a whole,

since factors other than the results of a policy are relevant to evaluating whether it is publicly justified.

As far as I can tell, policy epistemology is severely under-addressed by contemporary political philosophy, but it is critical for determining which regulations and public policies can be publicly justified. Remember that there is a presumption against coercion that must be met by sufficient intelligible reasons. Part of showing that persons have reason to submit to coercion is that the coercion in question can be reasonably demonstrated to be an improvement according to the evaluative standards of members of the public. This will require, at a minimum, some serious public method of counting the economic costs and benefits of various regulations and policies. Otherwise, only those who think that the policy realizes moral values that override economic well-being will lack defeaters for the proposed law or policy.[577]

I do not have the space to develop an account of the standards of policy epistemology. But I think what I've said is sufficiently intuitive that it can help us to evaluate the standards of evidence that American politicians and bureaucrats often have available. I have in mind organizations like the Congressional Budget Office and the Office of Management and Budget that try to determine the budgetary impact of various pieces of legislation. Importantly, these determinations are extremely difficult. The CBO, for instance, fully admits, "it is often difficult or impossible to determine, even in retrospect, the incremental

[577] And perhaps not even then, as whether a policy realizes certain moral values will have an empirical dimension.

impact on the budget of a particular piece of legislation."[578] Their admission is remarkable, so I reproduce its process in some detail:

> CBO regularly prepares cost estimates for legislation when bills are reported by committees of the House of Representatives or the Senate. In some cases, such legislation is changed before enactment. Although CBO often provides updated cost estimates (especially for direct spending provisions) prior to the enactment of legislation, proposals are sometimes amended after cost estimates are prepared. Moreover, in many cases the actual costs or savings resulting from enacting legislation cannot be identified; they may be a small part of a large budget account or revenue stream, and there may be no way to know for certain what would have happened if the legislation was not enacted. In fact, most of the cost estimates that CBO completes are for legislative proposals that are not enacted, so it is not possible to determine their accuracy.[579]

Anyone worried about the coerciveness of legislation ought to find this admission deeply troubling. The CBO is not able to demonstrate the cost-effectiveness of public policy by measuring its effects even after the legislation passes. In many cases, it is not merely difficult, but *impossible, in their own words*, to determine the impact of the legislation that they rate. There is no plausible account of policy

[578] CBO website (E7).
[579] CBO website 2013 (E7).

epistemology where this admission does not weaken the case for many bills being publicly justified.

However, sometimes legislation can be subject to monitoring. The CBO uses Medicare Part D as an example, which they originally estimated to cost $552 billion in 2003 but that has turned out to cost $358 billion. The original estimate was based on the assumption that the growth rates for drug spending would remain close to the long-term trend from 2003-2013, but growth rates did not follow the trend. So one of the CBO's best, self-selected, cases is one where they plainly overestimated initial cost. The CBO has recently touted its forecasting error for general economic trends as equivalent to administration and private sector consensus, where its largest errors are the same as the large errors of other forecasters. But its forecasts are only for general economic trends, and not for the costs and benefits of social programs. General forecasts are typically much less cognitively demanding than determining the specifics of the effects of policies. For determining overall economic numbers does not require specific knowledge of particular legal conditions, but overall aggregate measures.

What we see, then, that the CBO admits that it is exceedingly difficult to determine the costs and benefits of public policies in advance. This suggests that whatever standard of policy epistemology we might adopt, the actual practice of the CBO will fall far short of what would be required. It is not even clear that, when it comes to the set of actually imposed legislation, the CBO is generally

reliable, since the CBO cannot measure the effects of legislation that is altered after their scoring process.

This is bad news for defenders of an extensive administrative apparatus. Public reason liberalism requires a policy epistemology where the costs and benefits of major legislation can at least be generally assessed as economically efficient even in the rough and inadequate sense of the program being in the black—making more money than it loses. While the principle of social insurance can be publicly justified, this means that many forms of social insurance will not be, as groups like the CBO cannot demonstrate to members of the public that the actual legislation creating or revising some form of social insurance will be worthwhile. It is even more difficult to justify regulations and policies that go beyond the provision of social insurance, given that they must meet a higher justificatory bar.

Yet all is not lost for the policy wonk. Yes, determining whether policies are economically worthwhile is often difficult, if not impossible. But policy epistemology cannot be so demanding that no public policy or regulation is ever publicly justified. There will be at least some targeted regulations whose effects are specific enough that proper estimates can be made, or at least generally approximated. And some public policies will be such no-brainers that they can meet the bar of the appropriately demanding but feasible standard of policy epistemology. Further, we do not want to impose such strong epistemic standards that policy-makers are never publicly justified in engaging in policy experiments to

uncover just the sort of information that they need to justify the public policies they favor. In some cases, policies can be temporarily justified as attempts to learn what works and what doesn't, though we will want to take care that the coercion involved in imposing the policy can be publicly justified on that experimental basis.[580]

Two more considerations are relevant to determining the standards of policy epistemology. First, we must be clear about the potential costs of regulation to economic growth. Regulations generally restrict choice options, and so invariably reduce the ability of businesses to engage in economic experimentation. One comprehensive study of economic regulations imposed between 1977 and 2012 found that economic growth since 1980 has probably been reduced by about 0.8% per year. The authors claim that if regulation had been held to its 1980 level, "that the economy would have been nearly 25 percent larger by 2012 (i.e., regulatory growth since 1980 cost GDP $4 trillion in 2012, or about $13,000 per capita)."[581] The study is impressive, though defenders of a more extensive administrative state will surely quickly and reasonably criticize it. But if the reader looks at the study cited, she will find an honest and sophisticated attempt to add to an existing literature on the economic costs of regulation. Given that the costs of regulation are *so enormous*, if the authors are even merely likely to be correct, say at a probability of 0.51, then we have serious reason to worry about regulation as a severe economic

[580] Since, after all, Milton Friedman may have been right when he declared: "Nothing is so permanent as a temporary government program."
[581] Coffey, et al. 2016.

harm. The principle of sustainable improvements, then, will tell against bureaucracies that incentivize a glut of destructive economic regulations.

The second consideration, which is ultimately more important, is that recent work on the ability of experts to predict social outcomes across a wide range of fields has shown that their abilities are much more limited than we might have otherwise expected. Philip Tetlock has found that even the least ideological and open-minded experts, those with diverse and eclectic cognitive styles, are not much better than random predictors, and still fall behind basic statistical models.[582] And the "foxes" are in various respects better than the comprehensive thinkers, the "hedgehogs" who stick much more resolutely to one theoretical approach.[583] Expert political judgment isn't hopeless, but the best empirical study of expert ability is remarkably humbling. This means that even the most honest attempts to predict the outcomes of public policy are bound to find limited success. So meeting even adequate standards of policy epistemology is going to be a tall order.

I now want to use the admittedly rough standards of policy epistemology to examine the complicated case of countercyclical policy. Consider, for instance, estimates of the effects of stimulus packages in advance of their passage. Determining whether the Obama Administration's 2009 stimulus package was effective depends notoriously on counterfactual determinations that are *extremely* difficult to perform. Paul Krugman famously argued that our prolonged economic

[582] Tetlock 2006.
[583] Tetlock 2006, pp. 73-4.

difficulties in the United States are due in part to the fact that Obama's stimulus package was too small.[584] But many others think the package was just right, too large, or wholly ineffective.[585] While they do not represent anything near an academic consensus, 200+ academic economists agreed with the following statement:

> Notwithstanding reports that all economists are now Keynesians and that we all support a big increase in the burden of government, we the undersigned do not believe that more government spending is a way to improve economic performance. More government spending by Hoover and Roosevelt did not pull the United States economy out of the Great Depression in the 1930s. More government spending did not solve Japan's "lost decade" in the 1990s. As such, it is a triumph of hope over experience to believe that more government spending will help the U.S. today. To improve the economy, policymakers should focus on reforms that remove impediments to work, saving, investment and production. Lower tax rates and a reduction in the burden of government are the best ways of using fiscal policy to boost growth.[586]

---

[584] Krugman 2012, p. 118. Also see Krugman's explanation of his old-Keynesian approach: http://krugman.blogs.nytimes.com/2011/10/09/is-lmentary/

[585] For a range of opinion at the time, see the round-up in *The Wall Street Journal*: http://blogs.wsj.com/economics/2009/01/29/economists-debate-diverse-perspectives-on-stimulus/

[586] http://object.cato.org/sites/cato.org/files/pubs/pdf/cato_stimulus.pdf

Given reasonable dissensus among expert economists, it is exceedingly difficult to determine whether a stimulus package is worthwhile, and so whether the case for a stimulus package meets the standards of policy epistemology.

I can also speak from personal experience about the details of assessing the case for stimulus. I tried to follow the discussion in the economics blogosphere on the stimulus at the time, and I found it rather dizzying. After reading economics blogs regularly from 2008 through 2012, I came to the following conclusions. First, my prior Austrian understanding of the business cycle was complicated by the fact that Austrians had predicted inflation on the grounds that the Fed response to the Great Recession was making money too easy, but the inflation never materialized. For this reason, I no longer consider myself an adherent of the Austrian theory of the business cycle.[587] I also realized that my conviction that Keynesian policies would be ineffective was much too strong. I have since become more convinced by market monetarist views, though my confidence level is relatively low.[588]

However, I also became more convinced that the certainty of pop-Keynesians like Krugman that their policies would be effective was much too great. In particular, Krugman loudly and repeatedly asserted that monetary policy could not be effective at the zero bound, such that fiscal policy was required to prevent the economic depression.[589] But whether monetary policy can be effective at the

[587] For classical formulations of the Austrian theory of the business cycle, see the writings of Ludwig von Mises, F.A. Hayek, and Murray Rothbard in Ebeling 1996.
[588] Market monetarism is a new school of monetary economics. For discussion, see Nunes and Cole 2013.
[589] In response to Nobel Laureate Gary Becker's concerns about Keynesian deficit spending, Krugman writes: "Urp. Gack. Glug. If even Nobel laureates misunderstand the issue this badly, what

zero bound is an extremely complicated and difficult question within monetary economics.[590] Krugman probably convinced hundreds of thousands of people to make a judgment about a matter that is beyond even most trained economists' ability to perform, and so to support fiscal stimulus in response. But the stimulus must eventually be paid for, even if it was worthwhile, and so requires tax increases in the future. For even Keynesians acknowledge that debts should be paid off by higher taxes during booms so that they can be afforded comfortably during busts. This coercive threat is plain, but the benefits of fiscal policy are not. In particular, if monetary policy is effective at the zero bound, there is little reason to support fiscal stimulus, as it is invariably a blunter tool (Congress is less careful, less intelligent, and more morally suspect than the economists at the Fed) and requires coercion in ways that monetary policy does not. What we saw in the economics blogosphere, continuing to this day, was deep, *reasonable* disagreement about the theory of money and credit most appropriate to combat the recession. But the disagreement was sufficiently deep, that it is hard to see how any policies that would increase coercion or stick us with the need for future coercion could be publicly justified. For that reason, it seems to me that what was publicly justified

---

hope is there for the general public? It's not about the size of the multiplier; it's about the zero lower bound.

In 1982, interest rates — elevated in part thanks to high expected inflation, in part because a tight-money policy was what *caused* the recession — were high. This meant that conventional monetary policy had plenty of room for action, and thus offered an adequate response to the slump."

http://krugman.blogs.nytimes.com/2009/01/19/getting-fiscal/

[590] Scott Sumner was probably the leading monetary theorist arguing, routinely, against Krugman, that monetary policy at the zero-bound can be effective if the central bank targets nominal GDP. http://econlog.econlib.org/archives/2014/01/the_parrot_is_s.html

was to allow the Fed to experiment with monetary offset, perhaps to an even greater extent than was actually pursued. But fiscal policy commits one to coercive taxation in the future, and tight money risks the collapse of the monetary base, which could lead to enormous governmental coercion as the economy collapses. The opposing risk—hyperinflation undermining the economy—now strikes me as sufficiently remote that erring on the side of excessive inflation was a reasonable, relatively non-coercive policy path for addressing the recession.

The policy epistemology involved in making countercyclical policy decisions involves standards that are hard to apply. Even economic specialists were accusing one another of making simple mistakes. Consequently, it is hard to see how any policy could be publicly justified, given the strong objections posed by opposing views. For that reason, we must stick with the non-coercive default, which I believe is the use of monetary policy, though in this case, determining the non-coercive default is fraught with difficulty. In light of Tetlock's work, I am more or less in the position of a skeptic. My degree of confidence in the market monetarist prediction that the business cycle is best managed through NGDP targeting is not much greater than half.

(3) The third barrier to justifying coercive regulations and public policy is the threat of rent-seeking. Remember from chapter 6 that the stability of a regime includes an ideal of *immunity*, where the legal system is not easily captured and manipulated by self-interested officials and lobbyists who seek to use the regulatory apparatus to benefit themselves at the expense of the public. As we saw

in chapter 6, there are serious concerns that rent-seeking agents have a strong incentive to engage in regulatory capture when an administrative state is particularly powerful, as those affected by the regulations can sometimes control which regulations are passed down.[591] And in many cases, those regulations hurt the rent-seeker's competitors and pass on costs to members of the public as a whole. So if a regulatory body decreases the immunity of the liberal constitutional order, then that counts against its public justification, since it is less immune than it would be if its powers were more limited in scope and reliably tracked what is publicly justified. Systems vulnerable to rent-seeking, then, are harder to publicly justify than systems that are less vulnerable.

Obviously regulations that are instances of rent-seeking will be vulnerable to defeat. But even good regulations can be defeated on the grounds that the regulatory body required to impose them is too vulnerable to rent-seeking, say through regulatory capture. If a regulation can only be sustained by a low-immunity bureaucracy, then the regulation cannot be publicly justified.

In sum, state regulations and public policies can be publicly justified under the following conditions: (i) the regulation or policy must not reduce economic efficiency too much, (ii) the empirical case for the regulation or policy must meet the standards of policy epistemology, and (iii) the regulation or policy must be adequately insulated from rent-seeking groups, inside and outside of the

[591] What's worse, rent-seeker produces regulations and rent-seeking groups can accumulate around a liberal state over time, dragging down the overall efficiency of the economy, and so violating the principle of sustainable improvements. For a classic account of the accumulation process, see Olson 1984.

government. These three conditions suggest that few regulations and public policies can be justified, but not, I submit, all of them. While I cannot make the case here, I think that carbon taxes may be sufficiently important to reduce the threat of climate change that the economic costs will be worth paying, that the scientific standards of evidence satisfy the standards of policy epistemology, and while carbon taxes will be subject to some rent-seeking, a tax policy could be designed that is transparent and simple enough that tampering will be easily detected by the public.

VI. Inequality and the Democratic Process

Economic inequality has become an increasingly important focus in US politics and in left-wing intellectual circles. For several decades, the left has focused primarily on defending and extending the welfare state, largely on what appear to be sufficiency grounds. The dispute with the political right has been whether the government should provide all persons with a basic standard of living and whether persons have a right to that support. But with the increasing divergence between income quintiles in the US, and with similar divergences in European nations[592], more people have argued that welfare programs are not enough to realize

[592] Piketty 2014 provides the most extensive empirical documentation of these claims, though his data has been the subject of considerable public controversy, such as the criticisms of Piketty's data by Chris Giles of the *Financial Times*. See: http://www.ft.com/cms/s/2/e1f343ca-e281-11e3-89fd-00144feabdc0.html and Piketty's response: http://piketty.pse.ens.fr/files/capital21c/en/Piketty2014TechnicalAppendixResponsetoFT.pdf

economic justice.[593] Instead, differences in income and wealth must be compressed. The reasons for income and wealth compression come in two forms – intrinsic and extrinsic. Income equality is said to be intrinsically valuable because it is required by principles of justice; that is, equal incomes and wealth are just. A number of conceptions of justice are rooted in this commitment, such as luck-egalitarianism.[594] I regard these views as too radical and sectarian, and so the reasons generated by these doctrines will be neutralized by reasonable disagreement about justice. The luck-egalitarian advocates coercive redistribution based on a doctrine that many, if not most people reasonably reject.[595]

A second concern about inequality must concern the public reason liberal, however, namely the *extrinsic* value of income and wealth inequality, particularly with respect to the effective functioning of democratic institutions. A number of people have argued that societies with greater income inequality have more poorly functioning democratic institutions, and that the greater inequality *causes* this greater level of dysfunction, rather than both being caused by some third factor, or by distinct factors.[596] I find these causal connection claims hard to assess, as they invariably involve oversimplified economic models. In particular, I am skeptical of views that super rich individuals and small groups are powerful enough to

[593] Piketty, for instance, advocates an annual, global tax on capital to constrain inequalities. See Piketty 2014, pp. 515-539. Rawlsians, of course, have long maintained that the welfare state is insufficiently attentive to reducing economic inequalities.
[594] For a discussion of luck egalitarianism, see Arneson 2013.
[595] For a variety of objections to various forms of egalitarianism from the left, see Frankfurt 2015.
[596] Bartels 2010.

systematically distort the democratic process.[597] Our best evidence, instead, is that the difference in the responsiveness of democratic institutions to economic classes is their greater responsiveness to the top income decile rather than the top .01%.[598] Say what you will about the Koch Brothers, George Soros, Warren Buffet, Sheldon Adelson, Bill Gates, Mark Zuckerburg, and other super rich Americans who attempt to influence elections and policy—they cannot undermine democratic institutions on their own. They simply have too little power with respect to other political forces, and their work and contributions are plagued both by principal-agent problems and by divergent political moves that often appear to cancel one another out. The *real* worry, as Martin Gilens has argued, is that democratic institutions in the United States are solely responsive to the top 10% of income earners.[599]

I take it that the primary empirical case that US democratic institutions are not responsive to the wishes of the populace is the recent major study by Gilens and Page on the correlation between the wishes of different economic groups and their policy outcomes, based on data that Gilens turned into a book.[600] Gilens and Page find that the top 10% of income earners and large corporate powers and interest groups have a huge effect on policy vis-à-vis everyone else. In fact, disturbingly, they find that when the top 10% wants X and the bottom 90% wants

---

[597] For instance, there is no significant correlation between levels of wealth inequality across the advanced democracies and how well their democratic institutions function. For discussion, see Gaus 2011, pp. 517-521.
[598] Gilens 2012, pp. 70-96.
[599] Gilens 2012.
[600] Gilens and Page 2014.

not-X, the top 10% always gets their way. Given that all members of the public that are of age have primary rights to vote and influence the political process, and that certain democratic institutions can be publicly justified (as I show in Chapter 9), if income inequality *causes* this lack of responsiveness, then we have little reason to think that democratic institutions have a tendency to track what is publicly justified for members of the public. Gilens acknowledges that the top 10% and bottom 90% often agree on policy, such that in many cases, the poor get what they want[601]; but in cases of disagreement, the top 10% win out, such that democratic processes under conditions of economic inequality will ignore what the bottom 90% believe is best or good for the country. This means that constitutional rules governing the policy process function poorly because their production of legislation is not responsive to the preferences of the poorest Americans. Consequently, legislation may not be publicly justified for the poor. Moreover, if Gilens is correct, poor Americans will have ineffective political rights, something about which they have a reasonable complaint.

Of course, it is *possible* that the top 10% have a better sense for what is publicly justified for *everyone*, such that their getting their way politically means a higher number of publicly justified policies and a lower number of defeated policies. But given the difficulties in determining what is publicly justified in a world of diverse and dispersed defeaters, we have reason to defer to the judgments

[601] Gilens 2012, p. 78.

that members of the public make concerning themselves, rather than consulting the judgments of elite members of society.

Gilens and Page's work has now come under significant scrutiny.[602] And we need more than an interpretation of a single, albeit impressive, data set to determine whether Gilens and Page's work meets the standards of policy epistemology if their work is to serve as the evidential base for policy that compresses income and wealth inequality. But let's assume for the moment that their interpretation is the only reasonable interpretation of the data, and that the data is sufficiently strong evidence to justify the belief that in the United States, over the last several decades, the preferences of the poor count for little or nothing in democratic outcomes, in contrast with the middle class, and especially with the rich. What policies can we publicly justify in response?

The argument from the left will be that our high levels of income and wealth inequality are generated by coercive property rules. Given that these property rules produce inequalities that undermine primary political rights and lead constitutional rules to not track what is publicly justified for the poor, the rules are defeated. If government imposes policies aimed at compressing these inequalities, the rich can have no successful objection given the relatively greater importance of having a rights-protecting and well-functioning democracy than having enough of their own money to live out their dreams.

---

[602] For a critique of Gilens's focus on "responsiveness" as the appropriate standard of democratic equality, see Sabl 2015. For reinterpretations with the Gilens-Page data, see Enns 2015 and Branham, et al. 2016, both of which purport to show that the middle class has far more influence than Gilens and Page acknowledge.

However, recall the presumption against coercion and in favor of solutions offered by voluntary, civic institutions. This means that we should look for *coercion-reducing* policies that can reduce income inequality. I think two coercion-reducing policies can go a long way towards reducing income inequality in the United States – abolishing many residential zoning laws and intellectual property protections. One of the controversies raised by Thomas Piketty's recent work on income inequality is that much of the inequality can be explained by the differing values of real estate held by the very rich and by everyone else.[603] If so, then reforming zoning laws to prevent them from creating artificial shortages of real estate should be an excellent way to reduce inequalities of wealth specifically.

The same is true of intellectual property laws that artificially inflate the wealth of the creators of intellectual property, especially with respect to software copyrights. It has also been estimated that extremely strict and long-term intellectual property rights have promoted the spectacular growth in the wealth of Silicon Valley billionaires and the many people who work at these firms, becoming ever richer and more powerful.[604] Many libertarians oppose *all* intellectual property rights, not to mention the extended protections that information technology firms insist upon for themselves, so a libertarian-egalitarian alliance on

[603] Rognlie 2015.
[604] See Joseph Stiglitz's discussion at: http://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality/

this issue could generate intelligible defeaters for the intense coercion involved in imposing severe intellectual property laws.[605]

The hard question is whether the reductions in inequality wrought by less restrictive zoning laws and intellectual property rights will make the democratic process sufficiently responsive to the people in order to ensure that primary political rights are respected and that our constitutional rules minimize legislative error. I find this extremely difficult to determine, given all the counterfactual judgments involved, the limitations of our empirical tools, and the other difficulties in ranking constitutional rules. My thought is that we should first pursue coercion-reducing methods of compressing income inequality rather than coercion-increasing methods, assuming that economic inequality causes democracy to function less well. We should also pursue the relatively modest coercive restrictions brought about through campaign finance reform before we attempt to substantially restructure the economy through taxes, regulations, and even the redistribution of capital holdings.[606]

My skepticism about coercively compressing inequality is driven by the concern that inequalities in wealth and income cannot by themselves cause democratic institutions to function poorly. Both factors could have some further cause, such as a constitution that allows for excessive rent-seeking that leads to the formation of inequality-increasing rules. If it is relatively easy for people to gain

---

[605] http://freenation.org/a/f31l1.html, https://mises.org/library/ideas-are-free-case-against-intellectual-property

[606] Gilens 2012 is long on diagnosis and extremely short on remedies; he focuses almost exclusively on campaign finance reform and gerrymandering. See pp. 247-252.

special government favors that others are denied, we can expect the politically well connected to benefit from these favors by becoming richer than others. And if it is relatively easy for people to gain special government favors that others are denied, then *of course* democracy is more responsive to their wishes than the wishes of everyone else. The concentrated benefits and dispersed costs of a rent-seeking society could explain both the failure of democracy to track the will of the people *and* increases in inequality between the rich and the poor.[607] Before we can justify the use of redistributive taxation, we would need to determine that we lack alternative feasible, less coercive methods of trying to protect the integrity of the democratic process.

There are other confounding factors with respect to the social traits of the politically influential classes. The rich, for instance, may secure greater influence through better education about the political process. So if we could increase the quality of civics education for most members of the public, then we might be able to increase the responsiveness of democratic institutions to the will of the people because the people as a whole will have become better players in the democratic game. Fixing educational inequality may not require extensive redistribution to compress inequalities of wealth and income.

It is also possible that the influence of the rich is due less to how much more *wealth* they hold vis-à-vis the poor rather than their higher *social rank*,

[607] Gilens 2012 and Gilens and Page 2014 find that interest groups have powerful effects on legislative outcomes, though they frequently lose when their policy preferences diverse from the top 10% of the income distribution.

which could persist even with lower levels of economic inequality. If influence is due to social status, and wealth is a function of social status as well, then even if we coercively compress income inequality, we will not make the democratic process more reliable with respect to the will of the people because the process will remain tied to persons with high social status. Let's combine this point with the old observation by Gordon Tullock that, given how high the stakes are in politics, it is peculiar that *more* isn't spent on campaigns.[608] Given how much influence the rich have, and how little they spend on purchasing politicians, this strongly suggests that they're affecting political outcomes in some other way, and I think status is a plausible alternative.[609]

The absence of a clear, decisive cause of economic inequality shows the importance of policy epistemology. The standards of evidence for determining causal connections between social variables might be relatively permissive with respect to what individuals are entitled to belief but the standards of evidence required to publicly justify coercion are invariably much higher. If you're going to tax someone making $1,000,000/year at 80% rather than 40%, you'd better be able to show with an adequate degree of certainty that reducing their income increases the protections of primary political rights. Otherwise, the coercion required to redistribute cannot be publicly justified to the person coerced.

Right now, in my estimation, coercively redistributing wealth acquired by justifiable fiscal policy cannot be publicly justified, and so such coercion

[608] Tullock 1972. For a much more detailed discussion, see Ansolabehere, et al. 2003.
[609] I thank Will Wilkinson for this important point.

undermines moral peace between persons. In the 2016 Democratic Primary, Vermont Senator Bernie Sanders spent his entire presidential campaign criticizing income inequality. On my view, he painted with too broad a brush, criticizing everyone who is rich rather than those who have become rich through rent-seeking. Sanders was absolutely right that many economically advantaged persons have been able to rig the political system in their favor, and these persons have no valid objection to having their wealth redistributed, or to changes in legal rules that would make it difficult for them to stay wealthy or increase their wealth. Yet blanket redistribution cannot be publicly justified until we have much better data demonstrating cause and effect with respect to inequality and undermining the democratic process. The Gilens and Page study is an important empirical breakthrough in connecting economic inequality to the responsiveness of democratic institutions, but to justify the coercive policies favored by the political left, they have yet to satisfy adequate standards of evidence.

I feel similarly about the work of Thomas Piketty, which attempts to explain increasing income and wealth inequality in industrialized nations by arguing that the natural rate of return to capital (r) exceeds the general rate of growth (g), as it did in the 19th century.[610] His large data sets are used to buttress his claim. However, Piketty does not spend much time in such an enormous work to explain why r exceeds g. He also ignores further problems, such as the inevitable diminishing marginal return to holding capital, such that at some r:g inequality,

[610] Piketty 2014, pp. 25-7.

the rates of return should equalize.[611] Here again we have a purported connection between relatively free economic conditions and dangerous levels of income and wealth inequality without a clear causal connection between the two. Without a causal connection demonstrable by means of the appropriate standards of policy epistemology, Piketty's work cannot by itself publicly justify the coercive redistribution of wealth.

For these reasons, I advocate a cautious, gradualist, experimentalist attempt to make democracy responsive to the poor, only advocating more coercive policy in response to failures of less coercive policies with the same aims.

VII. Property-Owning Democracy

Property-owning democracies combine the regulative and redistributive functions of the welfare state with the governmental aim of ensuring that wealth and capital are widely dispersed. Rawls, political philosophy's most famous property-owning democrat, argued that property-owning democracy was one of two regime types that best realized his principles of justice (the other being liberal socialism), though he was notoriously vague about how a property-owning democracy's institutions are meant to realize his principles. To compensate for this deficiency, a number of political philosophers have recently tried to add institutional and

[611] For an accessible version of the criticism that Piketty's model doesn't address diminishing returns to capital holdings, see http://larrysummers.com/2014/05/14/piketty-book-review-the-inequality-puzzle/.

policy content to the idea. I argue that, in comparison to a market-based order combined with social insurance, property-owning democracy cannot be publicly justified because in normal liberal democracies many members of the public will have defeaters for the additional coercion involved in establishing a property-owning democracy over and above the coercion required to establish a welfare state. Once we acknowledge justice pluralism, I think it is fairly obvious that property-owning democracy cannot be publicly justified. Elsewhere I have argued that the case for property-owning democracy fails on expressly Rawlsian terms, on the grounds that it is inefficient and unjust compared to the welfare state.[612] So I think one can make an even stronger case against POD, but I will not advance that specifically Rawlsian argument here.

Martin O'Neill and Thad Williamson have done more than anyone to develop a Rawlsian defense of POD by outlining both the theoretical justifications for property-owning democracy and its characteristic public policies.[613] I shall focus on their work here.[614] I criticize these property-owning democrats on two grounds. First, property-owning democracy faces serious economic challenges. It generates bad incentives and faces severe information problems in comparison to more market-friendly welfare states. Further, the motivations of political officials and citizens can be corrupted by perverse institutional conditions. People will have

[612] Vallier 2016b.
[613] I cite a variety of their papers throughout, but for many of their articles, see the edited volume, O'Neill and Williamson 2012. Through Rawls, political economic work on property-owning democracy began with economist James Meade. See Meade 1964. In this chapter, I focus on the Rawlsian interpretation of POD.
[614] Readers may also be interested in the symposium on property-owning democracy in *Analyse & Kritik* vol. 1 (2013). From my read, none of the pieces address the concerns I raise in this chapter.

defeated for POD, then, based on the principle of sustainable improvements and on the grounds that the case for POD does not meet the standards of policy epistemology. Second, property-owning democracy involves coercive restrictions on liberty that cannot be publicly justified, such that even if POD could meet its economic challenges, some members of the public will justifiably regard it as excessively restrictive of liberty.

The familiar idea of welfare-state capitalism combines private property rights in land, labor, and capital with an activist government that engages in extensive economic regulation, countercyclical policy and the provision of social insurance. While there is no one thing referred to by "the welfare state," we can understand it in terms of these broad institutional aims. While standard uses of the term "welfare state" can pick out regimes that merely provide social safety nets, I shall use the term more broadly here, to pick out policies characteristic of presently existing welfare states.

Property-owning democracy (hereafter POD) does more. Again, the key governmental aim that distinguishes POD from welfare-state capitalism is the attempt to broaden capital ownership "so that income returns from capital are broadly rather than narrowly distributed" thereby producing "a more equitable pre-tax distribution."[615] In other words, PODs engage in the "predistribution" of capital, setting pre-tax incomes at a more equal level from the economic start.

To be more specific, O'Neill and Williamson propose five institutional

[615] O'Neill and Williamson 2012a.

features of a POD: (i) a right to equal public education, (ii) a right to minimum income and/or the means for supporting oneself and one's family at a minimal level of social acceptability, (iii) a public system of campaign financing and explicit limitations on corporate political activity, (iv) a right of individuals to share a society's productive capital and/or wealth and (v) a collective right to sufficient productive capital to sustain viable democratic communities at the local level.[616] Since (iv) and (v) are the focus of this part of the chapter, I shall understand PODs as recognizing and enforcing individual capital rights and collective capital rights respectively.[617]

Implementing (i)–(iii) only requires welfare state capitalism, but institutionalizing individual and collective capital rights require something more. In contrast to the welfare state, POD reforms the heart of the economy, purportedly ensuring that those individuals that justice bars from having too much wealth or market power never have it in the first place.

In contrast to state socialists, who seek to abolish markets in productive capital entirely, Rawls, O'Neill, and Williamson stress that PODs have markets and a price system. But price signals are used primarily for "allocation" and not "distribution."[618] The extent of markets is also limited, as PODs have extensive public sectors to provide public goods that would otherwise be underprovided. Nonetheless, while the POD-state will heavily regulate and control the market,

[616] Ibid. It is unclear what "local" refers to.
[617] See Williamson 2013 for a discussion of how to guarantee these rights through constitutional amendments.
[618] Rawls 1971, p. 273.

PODs would still allow people to choose their careers and jobs, save for those whose existence relies on large concentrations of capital. Further, competitive markets will help to ensure that economic power is decentralized.

Rawls thought that POD requires enormous regulatory bodies, or additional "branches" of government.[619] Rawls defended a four-branch system of economic control, including "allocation," "stabilization," "transfer," and "distribution" branches. The function of the branches is as follows:

> (a) *The Allocation Branch* keeps prices competitive, prevents formation of "unreasonable" market power, identifies and corrects market inefficiencies through taxes, subsidies and the redefinition of property rights (p. 244).
>
> (b) *The Stabilization Branch* brings about full employment and protects free choice of occupation along with deploying financial resources to increase aggregate demand when necessary.
>
> (c) *The Transfer Branch* generates and distributes the social minimum by taking all needs into account and giving them the right weight with respect to other claims. A competitive price system gives no consideration to needs and "therefore it cannot be the sole device of distribution."
>
> (d) *The Distribution Branch* preserves approximate justice in distributive shares through taxes and redefining property titles. It imposes great inheritance and gift taxes, along with restricting rights of bequest. It taxes

[619] It is unclear whether O'Neill and Williamson would endorse these bodies, but they endorse the basic functions of the bodies in any case.

> to achieve a certain distribution of wealth and to raise the revenue required to impose justice.[620]

Rawls argues that the branches will routinely require that "social resources … be released to the government."[621]

Note that welfare states contain many of the same branches, but with more restrictive functions. In a welfare state, the allocation branch will not prevent the formation of "unreasonable" market power, but will correct for market inefficiencies, whereas the distribution and transfer branches will simply ensure that social safety nets are adequately funded through redistributive taxation. The function of the stabilization branch is similar under both regime types, though welfare state capitalism will tend to realize stabilization, transfer and distribution functions through less coercive means, perhaps by relying largely on redistributive taxation and Keynesian fiscal and monetary stimulus, while forgoing the deliberate transfer of capital stock.

Williamson furthers fleshes out the functions of a POD by distinguishing between three forms of capital that must be more widely distributed: residential capital, cash, and stock (together representing the scope of individual capital rights). To ensure the dispersion of residential or real-estate holdings, Williamson argues that the government should subsidize home mortgage lending and provide grants for down payments. To distribute cash, the government should ensure that

---

[620] Rawls 1971, p. 245.
[621] Rawls 1971, p. 278.

households at the bottom of the wealth distribution have at least $100,000 in wealth. The government should also provide people with savings, perhaps through a one-time lump sum derived from a fund of inheritance taxes. Of course, we can't guarantee that all persons have the same savings, as this would "immediately create perverse incentives as well as a fiscal sinkhole." Instead, the government could require people to see a government financial adviser before they could invest in short-term stocks or liquefy their holdings.[622]

To implement collective capital rights, that is, to help the economy better sustain local democratic bodies, both O'Neill and Williamson argue that the workplace should be largely democratic.[623] Workers will not only govern their own terms of employment but may be given part of the task of monitoring and enforcing workplace regulations and, perhaps, non-tradable coupons for fixed stock ownership. Or a government institution could hold the stock for them. We can see then that POD is democratic in two senses: it protects equal civil and political liberties via a representative democracy and it protects worker control of the workplace.

To sharpen the contrast with the welfare state, we should focus on the unique ways in which PODs intervene into the economy. Initially it seems obvious that imposing a POD on otherwise normal persons will require constant (if justified) interference with their lives. While Williamson is sensitive to this concern, he disagrees:

---

[622] Williamson 2009, p. 443.
[623] O'Neill 2009, pp. 33-42.

> Once the background institutions for allocating property are established, the system should operate of its own accord to produce a less concentrated, far wider distribution of property, with no "interference" in the everyday operations of the economy required beyond that present in the existing system of periodic taxation.[624]

To his credit, Williamson recognizes that the transition from welfare-state capitalism to POD "would require, probably in quite a substantial degree, redistribution of assets accumulated under the 'old' rules defining property rights and taxation."[625] So while the transition might (justifiably) require enormous amounts of coercion, the system once established would not. A POD will somehow reach a social equilibrium, preventing deviation towards welfare-state capitalism, laissez-faire, and command socialism. Otherwise, significant coercion would be required to keep POD institutions in place. It is not clear why POD is a social equilibrium, but O'Neill has argued that POD will stabilize through the promotion of democratic participation in the workplace, which will in turn give citizens are more democratic "character" that they can use to construct stable institutions. O'Neill admits that this is an empirical claim that would require substantial research to establish.[626] In lieu of such evidence, we cannot take for granted that POD will settle into a social equilibrium that would substantially reduce the need

[624] Williamson 2009, p. 449.
[625] Williamson 2009.
[626] O'Neill 2009, p. 47.

for constant interference. For our purposes, then, we should assume that POD states must interfere much more in the economy than traditional welfare states, since we have little reason to think otherwise. To accept O'Neill's conjecture is tantamount to assuming away a huge range of economic challenges in maintaining POD institutions.

VIII. Property-Owning Democracy Cannot be Publicly Justified

The point of this chapter is to illustrate how the value of moral peace between persons generates an account of the proper role of the state in regulating economic affairs. I have argued that, due to diverse and dispersed defeaters, making the case for coercive state intervention is difficult. The principle of social insurance may be publicly justified, but policy epistemology requires meeting demanding standards of evidence to show that regulation and public policy can be publicly justified. Further, concerns about economic inequality are better understood as concerns raised by some less sectarian commitment, like opposing excessive intellectual property laws. And these concerns are often too sectarian to serve as a basis for public justification, or do not satisfy the standards of policy epistemology. So we have seen that it is hard to make a case for going beyond a modest welfare state.

Getting to a property-owning democracy requires surmounting these hurdles and serious concerns about whether POD hampers economic growth and the economic well-being of a publicly justified polity. Elsewhere, I have given a

variety of arguments that POD cannot meet these barriers, given what little its proponents have argued on its behalf. To summarize my argument, because PODs distribute capital holdings so broadly as to prevent concentrations of capital from forming even in sectors where doing so is economic efficiency, PODs will create disincentives for the accumulation of capital, which will reduce economic growth. Further, PODs must have an extensive and expensive bureaucratic apparatus that will frequently and mistakenly overtax, overregulate, and all-too-often break-up efficient and otherwise helpful capital concentrations. They will not only reduce the *incentive* to produce capital, and so to generate growth, they will not have the *information* required to adequately perform their functions. Finally, we have reason to think that the great power of these bureaucratic organizations will attract rent-seekers, which will gradually capture the organizations and run them to their own benefit. These "public choice" problems could easily cripple POD economies vis-à-vis capitalist welfare-states.

Consequently, POD will be defeated because there are reasonable members of the public that will accept many of the arguments I have discussed. The arguments I have given may be wrong, but, again, they are *surely* reasonable, given that they are based on rudimentary economic concerns. We can conclude, then, that POD and public reason liberalism are incompatible given the present diversity of opinion in liberal democratic orders. Perhaps the POD people can convince those of us who disagree. But until then, POD is not a viable governance structure for a free society.

I worry about two potential counterarguments to my claim. First, defenders of POD can argue that unions are civic associations who have a primary right to organize to control their economic lives. If capitalists use coercion to prevent them from exercising their freedom of association, say by threatening to fire them, then the capitalist may be using publicly *defeated* coercive threats to get his way. In that case, the state might have a role in prohibiting the capitalist from engaging in these threats. On this basis, we can build various labor rights protections into the legal order of a publicly justified polity. So I think the defenders of property-owning democracy have a point. However, to make a case for a full-blown POD, its defenders will have to build on this legal structure, arguing that the freedom of association of workers and, arguably, their basic welfare rights, require that they be given considerable control over their workplace by in some cases redistributing capital goods from capitalists to workers. I think this will be a hard argument to make, given that labor law can go a long way towards protecting workers without worker ownership. Imagine a society in which all persons were free to unionize on whatever terms they liked and that few large firms have the right to coercively penalize them for doing so. Unionization rates would likely increase substantially, and the welfare of workers might be much better protected. Under such a regime, which could be publicly justified, workers in a free economy could do quite well. For the POD people to go further, then, would likely require the use of defeated coercion. But I am open to an argument from POD people to this effect.

The second, more serious, counterargument is that PODs are not more

coercive than welfare states. Paul Bou-Habib has provided several arguments to this effect that are worth careful discussion. Bou-Habib first argues that POD's higher tax rates are not necessarily more coercive than the lower tax rates required to have laissez-faire or a welfare state. He first argues that "the extent to which citizens will comply with tax laws depends on, among other things, their sense of justice—particularly whether they morally endorse the economic regime in question."[627] Bou-Habib backs up this conjecture by claiming that, in cross-cultural studies, the empirical literature on tax evasion is "decidedly mixed," and cites empirical evidence that tax compliance may not fall as tax rates increase, and that some empirical works suggests more compliance as tax rates rise in cross-cultural studies.[628] On the empirical evidence, my review of several tax evasion studies lead me to conclude that tax evasion rates are determined by a variety of factors, but that higher tax rates do correlate with more tax evasion. For instance, Gamze Oz Yalama and Erdal Gumus find that "increases in the tax rate and in tax burden increase tax evasion," confirming results in five other studies.[629] Bou-Habib cites Grant Richardson's work on the determinants of tax evasion, but Richardson focuses on factors other than high tax rates.[630] The main finding that Bou-Habib appeals to is that tax evasion is partly determined by "tax morale" which Erzo Luttmer and Monica Signhal define as "an umbrella term capturing nonpecuniary

[627] Bou-Habib 2015, p. 6.
[628] I cannot review this literature here, but Bou-Habib's claim that the tax evasion literature is "decidedly mixed" seems inaccurate. Tax evasion rates are determined by a variety of factors, but higher tax rates do correlate with more tax evasion.
[629] Oz Yalama and Gumus 2013, p. 21.
[630] Richardson 2006.

motivations for tax compliance as well as factors that fall outside the standard, expected utility framework" such as acting from feelings of "guilt or shame for failure to comply."[631] They note that tax morale can be raised when government attempts to "increase[e] voluntary compliance with tax laws" while "creating a social norm of compliance."[632] Attempts to raise tax morale include shaming tax evaders and instituting public campaigns to encourage tax compliance. I believe Bou-Habib's argumentative strategy is to argue that higher tax rates might not lead to more tax evasion on the grounds that those taxed might have a high tax morale, which would lead them to comply with higher tax rates, perhaps because they believe the higher tax rates are fairer. The problem with Bou-Habib's view is that the fact of evaluative pluralism suggests that moving to property-owning democracy will not raise tax morale across a diverse population. Some may be sufficiently inspired by POD institutions that they will happily pay higher taxes, but people who do not endorse POD, even if they think some POD policies are eligible, may nonetheless be strongly tempted to evade higher taxes, and so experience the higher tax burden as coercive. Unless POD institutions transform the populace in a direction towards higher tax morale, Bou-Habib's first argument fails to discharge the connection between coercion and tax level.

Bou-Habib also disputes the idea that higher tax rates are more coercive on the grounds that taxation is a cost on options. The only reason that higher tax rates appear to be a greater cost on options is because "we fail to appreciate that

[631] Luttmer and Singhal 2014, p. 150.
[632] Luttmer and Singhal 2014, p. 149.

the structure of social relations that make up a distribution of private property in our society is a revocable product of social choice."[633] Property rights are generally products of coercive enforcement such that the state interacts with citizens no less coercively when it protects private property than when it imposes high tax rates.

The problem with this argument is that it is subject to a simple *reductio ad absurdum*. I have already granted that the enforcement of property rights is coercive, but the enforcement of different schemes of property rights are not equally coercive. If they were, then the Soviet Union's enforcement of collective property rights would be no less coercive than the enforcement of property rights in present-day Denmark.

There must, therefore, be some way to distinguish more and less coercive regimes while simultaneously recognizing that property rights are coercively enforced. One way to do so is to compare the options available to citizens under different regimes, and this is partly a function of a society's level of economic prosperity, as greater riches are associated with more choices. If free-market orders are likely to be more efficient than property-owning democracies, as I have argued, then generally people should have more options under welfare-state capitalism than POD. Increases in taxes that move us towards POD should therefore prove more coercive over the long run in virtue of reducing economic growth.

But there is also a more immediate effect due to the fact that property rights are established against a background set by the legal state of nature, where

[633] Bou-Habib 2015, p. 7.

we can expect moral and private legal rules to form around the basic property holdings of citizens, such that legislatively-imposed taxation will increase coercion by disrupting the rules that would form in the legal statue of nature. While the state acts coercively to protect property rights, legislation and legislative bodies are not required to enforce them in general, such that state interference with these rights is an increase in coercion.

The property rights justified early in the order of justification are vague and so do not rule out redistributive taxation in principle. However, moral and legal rules that specify property rights in ways that are within the optimal eligible set must rule out some redistributive taxation, or they are hardly property rights at all. Consequently, we can expect redistributive taxation to become less optimal, and eventually less than eligible, as tax rates increase. Given the massive amount of taxation required to maintain a POD over and above a welfare state, since POD requires heavy levels of capital taxation, we have reason to think that POD levels of taxation, not to mention regulations, will violate property rights by being excessively coercive.[634] It is not hard to see, then, that PODs cannot "constitute the correct way in which to partition social space into individual spheres of authority."[635]

[634] In this way, I reject another of Bou-Habib's arguments. See Bou-Habib 2015, p. 9.
[635] Bou-Habib 2015, p. 11.

IX. Liberal Socialism[636]

I want to end the chapter with a criticism of liberal socialism, which I take to combine the standard list of liberal liberties with government ownership and operation of productive resources.[637] This regime is defeated for *many* reasons. The first and most obvious reason is that we have strong reason to believe that such an order will dramatically reduce the bundle of primary goods available to each person, given the inefficiencies in a planned economy due both to information problems and incentive problems. The same concerns that apply to the efficiency of property-owning democracies apply much more strongly to liberal socialism, given that it lacks a competitive pricing mechanism for capital.[638] A further problem can be drawn from Hayek's famous work, *The Road to Serfdom*.[639] I read *Road* not as a defense of laissez-faire, but rather as an argument that liberal socialism cannot be stable for the right reasons. Hayek's argument is that the liberal rule of law and individual freedoms are incompatible with a socialist economic order, and that a socialist economic order must invariably collapse into a totalitarian socialist order. The argument is remarkably proto-Rawlsian, as the "scales of value" of rational and moral persons "are inevitably different and often inconsistent with each other."[640] Given that everyone's fate is bound-up in the

[636] [Add Edmundson here in v3.]
[637] Rawls 2001, p. 138.
[638] Just as described in Hayek 1945, remarkably ignored by Rawls and other advocates of liberal socialism.
[639] Hayek 2007
[640] Hayek 2007, p. 102.

details of the central plan, disagreement about how to proceed collectively will be rampant, and we can expect little agreement among democratic leaders. But given how much is at stake, Hayek foresaw that interminable squabbling would make democratic leaders look weak and ineffectual, particularly during economic downturns when public social anxiety increases. This would leave the liberal socialist regime vulnerable to take-over by some group or sect that promises to end the debate and impose a single plan based on the sect leader's empathic connection with the people themselves. Under liberal socialism, people are not allowed to go their separate ways when it comes to decisions about economic production, freedoms that markets protect. This will lead to ferocious fights about how to plan the economy, and the fights will undermine the stability of democratic regimes, leading to totalitarian regimes.

Some have attacked Hayek for making a bad slippery slope argument, perhaps based on his *purported* claim that welfare states must lead to totalitarianism.[641] Critically, Hayek expressly embraces the principle of social insurance by supporting "the assurance of a certain minimum income for everyone."[642] Without getting into the weeds of Hayek exegesis, I will simply note that I have elsewhere weighed in on the debate about Hayek's concerns about the welfare state by distinguishing, as Hayek does implicitly, between the *welfare state*

[641] Farrant and McPhail 2010 both advance and discuss other versions of this criticism. They argue that Hayek thought the welfare state would lead to serfdom, in contrast to Hayek scholar Bruce Caldwell in Hayek 2007, pp. 29-31.

[642] Hayek 1979, p. 55. I discuss Hayek's endorsement of a minimum income as a necessary condition of legitimacy while simultaneously rejecting social just in http://bleedingheartlibertarians.com/2012/05/hayek-enemy-of-social-justice-and-friend-of-a-universal-basic-income/.

of law and the *welfare state of administration*.[643] The welfare state of administration is not the same as a social insurance or safety-net state, but rather a state based on a robust conception of distributive justice applied to its economic components, not the system as a whole. Hayek is concerned only about coercive redistributive institutions that permit constant *state tinkering*. Hayek affirms the welfare state law, where clear, public, general principles, rather than extensive administrative bodies, regulate social insurance and other state functions.

The problem with liberal socialism, then, is that it is a welfare state of administration on steroids. It does far more than engage in regulation and the equalization of incomes, but pursues distributive justice by owning and operating a society's major concentrations of capital according to a central plan. Such a regime will prove unstable for the reasons outlined, and this argument holds without even the hint of a commitment to the claim that a principle of social insurance leads to serfdom. If we understand Hayek in this way, we can see that the logic of evaluative pluralism applies to deciding what to produce. Deep disagreement will lead to the intense struggles that weaken democratic orders and their ability to resist totalitarianism. And understood in this way, I think Hayek was obviously right. We have never seen a liberal socialist regime, only liberal welfare states and authoritarian socialist regimes. While many liberal welfare states moved in a socialist direction following World War II, they did not approach the liberal socialist ideal. For instance, Attlee's Labour government in Britain

[643] http://bleedingheartlibertarians.com/2012/05/hayek-on-serfdom-and-welfare-states/.

socialized only 20% of society's productive resources.[644] Furthermore, after a few decades, all liberal socialist leaning parties retreated from their programs and started selling off state enterprises. The regimes that went for socialism *always* destroyed their democratic institutions; the regimes that were liberal backed off of socialism.

X. Neoclassical Liberal Public Reason

This chapter began by reviewing public reason liberalism's hostility to state coercion. Public justification begins with the moral order, then adds the legal order and protections of primary rights before political institutions can be publicly justified. But, as we saw, we are not left with political libertarianism. Instead, a principle of social insurance can be publicly justified. Further, we can justify regulations and additional public policies so long as they meet the standards set by the appropriate policy epistemology. We can justify redistribution in the name of preserving the integrity of the democratic process as well, though the present empirical evidence linking inequalities of wealth and democratic dysfunction is inconclusive. Further, public reason does rule out redistribution for the sake of egalitarian conceptions of distributive justice. And property-owning democracy and liberal socialism are much too inefficient and coercive to be publicly justified.

[644] Thorpe 2001, p. 124.

Public reason is therefore neither libertarian nor egalitarian, but rather tends to favor modest welfare-state capitalism—a market economy combined with a principle of social insurance, the strong right to unionize, relatively low taxes, demonstrably effective regulations and public policies, and strong protections for the integrity of the democratic process.[645] Such a regime is one that all members of the public can see as superior to the legal state of nature. Even socialists and libertarians will prefer such a regime to the state of nature. This does not mean that either libertarians or socialists must acquiesce in such a condition. They are free to agitate for their preferred regime types. But at present, neither the imposition of either a radically free market economy or an extensive state can be publicly justified to diverse members of the public.

I term this form of public reason liberalism a *neoclassical liberalism*, which Jason Brennan and John Tomasi understand as a combination of an extensive set of basic economic liberties with a commitment to a certain form of social or distributive justice.[646] The public justification of primary rights to economic liberty and the principle of social insurance both flesh out a doctrine of social justice, which concerns how social institutions should be organized to give others their due, and embraces a classical liberal conception of economic freedom.

Thus far, I have not discussed the form that government must take and the justification for liberal governmental structures. I turn to this task in the next

[645] Compare Gaus 2011, p. 526.
[646] Brennan and Tomasi 2011, p. 115.

chapter. Chapter 9 justifies an approach to democratic governance I call *process democracy* in contrast to agonistic, aggregative, and deliberative approaches.

Chapter 9: Process Democracy

The first two chapters of Part III applied my model of public justification to the derivation of primary rights, specifically the rights of freedom of association and property rights. I now apply the second two stages of the model of constitutional choice to questions about the structure of political institutions, specifically how to determine whether constitutional rules that specify *democratic* decision procedures can be publicly justified.

Allow me to begin by briefly reviewing my criteria for publicly justifying constitutional rules in general. The only eligible constitutional rules are those that adequately execute the protective and productive functions of law-altering institutions. In particular, they must provide an adequate degree of protection for primary rights, or else they are immediately defeated. The remaining eligible rules are then ranked by the spread of type-1 and type-2 errors that they can be expected to produce under normal circumstances. A type-1 error, recall, is a false positive, where a constitutional rule produces a law that is not publicly justified; a type-2 error is a failure to produce publicly justified laws that are, in some sense, necessary or important. Our goal is to identify constitutional rules that economize on these errors, even when, due to evaluative pluralism, different members of the public will be more worried about one kind of error than the other.

I also outlined the conceptions of moralized stability appropriate for selecting constitutional rules. A constitutional rule is morally stable if and only if:

(v) Officials acquire and fulfill their roles as specified by the constitution.

(vi) Regular operation of the rule produces publicly justified laws;

(vii) Citizens generally comply with the laws produced by the rule;[647]

(viii) Violations of the rule and the laws it produces are discouraged by moral and/or legal pressure.

In understanding the conditions of moralized stability, we must also identify the ways in which a constitutional rule can be destabilized. In Chapter 6, I postulated two kinds of stability: durability and immunity. A system is durable when it can remain in equilibrium despite countervailing forces that arise from within a system of reasonable, cooperative agents complying with publicly justified rules. A system has immunity when it remains in equilibrium despite shocks generated by factors outside of the cooperative system, such as the invasion of defectors.

In light of Chapter 6, we can say, then, that a constitutional rule is publicly justified when it adequately respects primary rights, economizes on legislative errors and possesses high degrees of immunity and durability.

We can now turn to applications. I have two aims goal in applying my model of constitutional choice to democratic decision-making. I first seek to develop a principle of political obligation understood as a duty to comply with *legislation*. I specified the conditions for social-moral obligation in Chapter 3 and the conditions for legal obligation in Chapter 4, but I have yet to outline the

[647] At least the *publicly justified* rules. Stability might involve *disobeying* unjustified laws. But this case raises complications that would take us too far afield, so I set it aside.

conditions for political obligation. But if we are to establish that political institutions are compatible with moral peace between persons, we must have an account of political obligation.

My second aim is to show that certain forms of democratic decision making are publicly justified. I want to show not merely that publicly justified constitutional rules can generate political obligations but that, to do so, those institutions should be democratic. My conception of democracy focuses not on a specific sort of democratic process, like *deliberative* or *aggregative* democracy, but rather on the careful selection of various and diverse democratic processes at different stages of the political process. Accordingly, this chapter develops a conception of *process democracy*.

Given my goals, I proceed in eight parts. In Section I, I outline a general principle for publicly justifying a constitutional rule and derive a principle of political obligation from that principle. Section II reviews James Fishkin's work on different conceptions of democratic procedures and Section III argues that Fishkin's different conceptions of democracy apply to different stages of the political process.[648] In short, different parts of the political process should exemplify different values and so call for different kinds of democratic procedure. Sections IV-VII divide up the political process into four stages, discuss the conception of democracy most appropriate for that stage, and address the possibility of democratic failure at that stage. Section IV covers the selection of

[648] Fishkin 2009.

political officials. Section V covers the choice of policies relevant to executing the state's protective functions, whereas Section VI covers the choice of policies relevant to executing the state's productive functions. Section VII covers the review process, where legislative errors can be corrected after a law goes into effect. Finally, Section VIII contrasts my process democratic approach to the familiar alternatives—deliberative democracy, aggregative democracy, and agonistic democracy.

I. A Formula for Constitutional Authority and Political Obligation

Public reason not only requires an account of legal obligation, but also the authority of law-selecting decision procedures—constitutional authority. Unless constitutions have authority, then no law-changing institutions can have authority, but we need that authority to complete the moral order and so establish moral peace between persons.[649]

Recall from Chapter 4 that my account of political authority has three layers—moral, legal, and political. The moral layer is focused on the public justification of moral rules; the legal layer is focused on the public justification of

[649] All real-world constitutions cover the actions of nation-states. I will not here attempt to justify a nation-state, understood as a monopolist on the use of force and adjudication (for further parts of the definition of the *modern* nation-state, see Morris 2002, pp. 45-6); rather, I will take it for granted to simplify my argument. But in granting that states can be publicly justified for purposes of discussion, I do not thereby commit myself to state legitimacy. In fact, I think it an open question as to whether states can be publicly justified if and when there are polycentric alternatives, alternatives I analyze in Chapter 10 in the supplementary material.

legal rules; and the political layer is focused on the public justification of constitutional rules *understood as law-creating and law-altering institutions*. The justification of the political layer depends upon the deeper legal layer. Specifically, the principle of constitutional justification builds on the Legal Justification Principle just as the Legal Justification Principle builds on the Public Justification Principle. To see this, recall both principles:

> *Public Justification Principle*: a moral rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the rule.

> *Legal Justification Principle*: a legal rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the law because each member rationally recognizes that compliance with the law efficiently improves upon her capacity to comply with a publicly justified moral rule(s).

Laws are justified insofar as each person has sufficient reason to internalize them because they recognize that compliance with laws improve upon their capacity to comply with the moral rules that apply to them. The Political Justification Principle is constructed likewise. Let's begin with the most formal and complex

statement of the Legal Justification Principle and build an analogous Political Justification Principle before simplifying the latter.

> One has a legal obligation to comply with a law if and only if she is epistemically entitled to believe (i) that *general* compliance with the law will efficiently improve her moral order's capacity to perform one of its primary functions and (ii) that *her* compliance with the law efficiently improves upon her presently weak ability to discharge, her social-moral obligation(s), so long as (iii) she rationally observes that sufficiently many other agents are complying with the law and that (iv) complying with the law does not violate her other social-moral obligations of equal or greater weight.

From here, can build a principle of political obligation, the *Political Justification Principle*:

> One has a political obligation to comply with constitutional rule if and only if she is epistemically entitled to believe (i) that *general* compliance with the constitutional rule will effectively improve her legal order's capacity to perform one of its primary functions and (ii) that *her* compliance with the constitutional rule efficiently improves upon her presently weak ability to discharge her legal obligation(s), so long as (iii) she rationally observes that

> sufficiently many other agents are complying with the constitutional rule and (iv) that complying with the constitutional rule does not violate her other legal obligations of equal or greater weight.

Again, constitutional rules are related to legal rules as legal rules are related to moral rules; and political obligations are related to legal obligations as legal obligations are related to social-moral obligations. The arguments that derive political obligation from legal obligations are isometric with the arguments that derive legal obligations from social-moral obligations. To review once more, Reba has an obligation to follow the law when it better enables her to comply with her social obligations than she could in its absence; similarly, John has an obligation to follow a constitutional rule when it better enables him to comply with his legal obligations than he could in its absence.

We can imagine a *political* state of nature that runs parallel to the legal state of nature; in such an order, there are only moral and legal rules, but no decision procedures. In Razian terms, in a political state of nature, only duty-imposing laws exist; there are no laws that govern the process of laying down laws or adjudicating disputes about them. In other words, there are no constitutional rules.[650] In the political state of nature, laws can secure moral peace by structuring moral rules, but they cannot structure other laws, since there are no decision procedures for resolving conflicts between laws. Without legislative bodies,

[650] Raz 1970, p. 147.

understood as self-conscious legal decision-making mechanisms, the law will be unable to perform its four primary functions.

Before proceeding, I should note that political decision procedures are imperfect and will often generate bad law. Further, constitutional rules might be unfair or corrupt in themselves. In these cases, persons lack moral obligations to comply with and internalize those rules. However, *constitutional* rules can continue to have authority even if they make legal mistakes. Reba will have no obligation to comply with laws that cannot be publicly justified for her; but if her constitutional decision procedures do a reasonably good job of providing publicly justified law, *she must not seek to overthrow or undermine her constitution*. This is how a constitution can be legitimate when it is not fully just, because we can be obliged not to undermine the constitution even if it is fallible. So constitutional rules can retain their authority even if they make mistakes, so long as they meet the other conditions of public justification. To do this, they must be limited in certain respects, and I will discuss those limits later in the chapter.

With this, I offer a simplified Political Justification Principle:

> *Political Justification Principle*: a constitutional rule is publicly justified only if each member of the public has sufficient intelligible reason to internalize the constitutional rule because each member rationally recognizes that

> compliance with the constitutional rule efficiently improves upon her capacity to comply with the relevant sub-set of laws.[651]

To determine whether a constitutional rule efficiently improves upon her capacity to comply with laws, we must introduce the framework developed in Part II of the book. A constitutional rule efficiently improves upon a citizens' capacity to comply with the relevant sub-set of laws produced or protected by the constitutional rule when the constitutional rule (a) protects and respects primary rights, including political rights like the right to vote, (b) minimizes legislative errors according to the social error function, and (c) proves durable in the face of internal instability and is largely immune to external shocks.[652]

Now we can determine which familiar forms of democratic decision-making can be publicly justified.

II. Fishkin's Taxonomy of Democratic Procedures

In *When the People Speak*, James Fishkin develops a useful taxonomy of democratic decision procedures based on the realization of certain attractive moral qualities that ultimately conflict with one another. These four principles are

[651] Notice here that my view diverges from Hasnas's social peace view, since he claims that the scoail pace view "cannot give rise to a duty to obey the law of a state-administered legal system" because legislative rules "are not necessarily peace-promoting rules." Hasnas 2013, p. 471. My view, in contrast, is that *insofar* as legislation improves upon our ability to comply with our legal obligations, that the moral peace view can ground the authority of legislation.

[652] I will set aside balance in this chapter, as I believe it will be achieved largely through appropriate punishments for deviation from publicly justified norms.

deliberation, political equality, mass participation, and non-tyranny.[653] I agree with Fishkin that these principles are attractive, so let's examine his definition of these principles:

(1) Deliberation. Fishkin understands deliberation as "the process by which individuals sincerely weigh the merits of competing arguments in discussions together."[654] Thus, deliberation looks to achieve a certain level of quality, such that good legislative and policy options can be identified and decided upon. The goal of deliberation is to realize five properties: information, substantive balance, diversity, conscientiousness, and equal consideration.[655] Information should be reasonably accurate, arguments should be offered by different perspectives to achieve balance, viewpoints should be diverse and so representative of diverse views among the public, and participants should conscientiously evaluate arguments; and each person's arguments should be given equal consideration.

(2) Political Equality. Fishkin understands political equality as "the equal consideration of political preferences."[656] In other words, each person's preference or choice should be counted the same. The way that political equality has typically been realized is through a one person, one vote

[653] Fishkin 2009, p. 46, 60.
[654] Fishkin 2009, p. 33.
[655] Fishkin 2009, p. 34.
[656] Fishkin 2009, p. 43.

standard, where each member of the public is given a vote over the relevant issues. Fishkin stresses the indeterminacy of the idea of political equality because it is neutral between one man, one vote and "microcosmic experiments" where deliberative bodies are chosen through a random selection mechanism from the public, such that the public's views are represented in discussion by representative persons. He also notes that political equality is usually understood more broadly as including not just a vote, but an equal opportunity to affect the political process. But for our purposes, let's understand political equality as equal voting power in politically competitive conditions.[657] To generate more substantive notions of equality, we can appeal to earlier parts of my theory.

(3) Participation – Fishkin understands participation as *mass political participation* that engages "the bulk of the population in participation that is political" in nature.[658] Political participation can be understood more directly as "behavior on the part of members of the mass public directed at influencing, directly or indirectly, the formulation, adoption, or implementation of governmental or policy choices."[659] Participation includes all sorts of activities, from writing letters to one's

[657] Fishkin 2009, p. 44.
[658] Fishkin 2009, p. 45.
[659] Fishkin 2009, ibid.

> representative, to take part in demonstrations, to sign petitions, to publish editorials, and organize get-out-the-vote efforts.

Despite valuing all three principles, Fishkin acknowledges that in real political practice, we face a democratic *trilemma* because we can only adequately realize two of these principles if we partly sack the third. Fishkin's *mass democracy* realizes political equality and political participation because it gives everyone an opportunity to vote for politicians and participate in elections. But in large, mass elections, there is little incentive for citizens to deliberate in any responsible way since their deliberatively formed opinions have no impact on the political process. The costs of becoming informed are too high.[660]

Mobilized deliberation combines participation and deliberation by encouraging members of the mass public to participate in deliberative forums.[661] Deliberation is highly structured in order to realize the values of deliberation. However, Fishkin acknowledges that most will not participate because it is not generally possible to "reliably motivate millions to deliberate without either incentives or compulsion."[662] In this way, we partly give up on political equality because some citizens will have much more influence than others.

Third, Fishkin introduces *deliberative equality*, which combines deliberation and political equality. Under a system of deliberative equality, people are selected

---

[660] As famously argued in Downs 1957 For further discussion of Downs and related "rational ignorance" theories of voting, see Caplan 2007, pp. 94-113. Also see Gaus 2007, pp. 178-184.
[661] Fishkin 2009, p. 53.
[662] Fishkin 2009, p. 54.

at random for *microcosmic deliberation*, "a representative mini-public of participants" who "become informed as they weigh competing arguments on their merits."[663] Since people are placed within highly structured deliberative contexts, the value of deliberation can be realized, and since people are chosen at random, political equality endures. But due to random sampling the vast majority of people will not be full participants in the political process, since only a handful of people will be chosen as deliberators.

Matters become more complicated when we add Fishkin's fourth condition of non-tyranny.

(4) Non-Tyranny. Tyranny is "the choice of a policy that imposes severe deprivations of essential interests when an alternative policy could have been chosen that would not have imposed comparable severe deprivations on anyone."[664] Fishkin admits that people can do bad things, "even if they decide democratically."[665] I understand severe deprivations as severe violations of primary rights. If a democratic procedure reliably, severely violates primary rights, then that democratic procedure cannot be publicly justified. So non-tyranny places a sharp outer boundary on which democratic procedures can even be considered for public justification.

[663] Fishkin 2009, ibid.
[664] Fishkin 2009, p. 62.
[665] Fishkin 2009, p. 60.

I want to avoid running non-tyranny and the Political Justification Principle together. The values of non-tyranny, deliberation, participation, and political equality all come in degrees, on Fishkin's understanding, and different democratic procedures and practices will realize them to different degrees. Only with a general assessment of the extent to which a democratic procedure realizes all four values can we determine which procedures are publicly justified. So avoiding primary rights violations, that is non-tyranny, is only one factor that speaks to the public justification of a democratic procedure.

Ideally, we want a democratic procedure to realize political equality, to prompt high participation and quality deliberation, and to reliably avoid tyranny. But Fishkin recognizes that there is no democratic procedure that reliably realizes all four values, and that means we must choose among imperfect procedures. In particular, there is no conception of democracy that can even reliably guarantee *three* of these four values.

Fishkin introduces four democratic theories—competitive democracy, elite deliberation, participatory democracy, and deliberative democracy. He classifies their strengths and weaknesses according to the values they realize:

	Competitive Democracy	**Elite Deliberation**	**Participatory Democracy**	**Deliberative Democracy**
Political Equality	+	?	+	+
Participation	?	?	+	?
Deliberation	?	+	?	+
Non-Tyranny	+	+	?	?

Figure 9-1: Fishkin's Taxonomy

Competitive democracy "focuses on competitive elections and on the institutionalization of rights that might protect against tyranny of the majority."[666] Fishkin cites Joseph Schumpeter as an advocate of competitive democracy, since he defines the "democratic method" as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[667] William Riker is arguably another proponent of the view, as his "liberal" theory of the function of voting "is to control officials, *and no more*."[668] Competitive democrats, then, are less concerned with deliberation and participation because they hold that there is little reason to believe that feasible forms of deliberation and participation can generate meaningful reflections of a society's general will. For Riker, for instance, social choice "depends not simply on the wills of individuals, but also on the method used to summarize these wills"; democratic outcomes are "just as much a function of the method as it is of the underlying tastes."[669] The reason why we don't have to guarantee voting and participation is because phenomena like agenda control and strategic voting by officials will render popular input more or less pointless even if the input is coherent, due to the absence of cycles.

Elite deliberation, like competitive democracy, is not committed to mass participation but instead focuses on filtering mass public opinion to reach a more

[666] Fishkin 2009, p. 66.
[667] Schumpeter 1942, p. 269.
[668] Riker 1988, p. 9. Emphasis in original.
[669] Riker 1988, pp. 31, 36.

sensible, stable underlying set of attitudes about policy.[670] The goal of elite deliberation is to determine, through quality deliberation, what the public really wants, despite the fact that deliberation by the public is not a highly valued method of determining what the people want. Filtration in elite discussion provides an account of "what the people would want, on reflection."[671] Fishkin attributes this view to James Madison and John Stuart Mill, both of whom were prepared to restrict purer forms of mass democracy in order to yield more rational and considered outcomes. Madison focused on a republican, rather than democratic form of government, where the public will's expression was limited to certain branches of government, whereas Mill was open to plural voting schemes that awarded more educated persons more votes.[672]

Participatory democracy, in contrast, focuses on encouraging people to vote under equal conditions but does not attempt to increase the quality of deliberation in determining policy. Participatory democracy does not imply that the public has direct control over all functions of government, but the goal is "to shift the mix [from less democratic forms of government] so that direct consultation is frequent and consequential." [673] Direct consultation concerns both the choice of

[670] Fishkin 2009, p. 70.
[671] Fishkin 2009, p. 72.
[672] In particular, see Madison in Federalist 63, where representative government helps to identify the "cool and deliberate sense of the community" and Federalist 69 where Hamilton argues that "the reason, alone of the public … ought to regulate and control the government." Hamiton, et al. 2003. For the discussion of plural voting, see Mill 1963, p. 476 (E7). Also see Mill's discussion of a "Congress of Opinions," an arena where "not only the general opinion of the nation, but that of every section of it, and as far as possible of every eminent individual whom it contains, can produce itself in full light and challenge discussion…" Mill 1963 (volume XIX, p. 432.)
[673] Fishkin 2009, p. 76. Fishkin (p. 213) cites a number of advocates of participator democracy, including Barber 1984.

representatives and the choice of policy. The people should be "consulted about the substance of what is to be done" and implies that "public will formation is meaningful and worth consulting." [674] Participatory democrats defend their position on the grounds that actual participation serves as a "proxy for mass consent" which legitimizes government decisions. Further, participatory democrats hope that political participation will educate ordinary citizens as well as consult them. Fishkin attributes this view to various progressive movements in the United States who fought for more direct participation of the people in government through referenda and other political mechanisms.

The final democratic theory that Fishkin discusses is deliberative democracy, which combines deliberation with political equality. Deliberative democracy tries to realize political equality through representative deliberation rather than mass participation.[675] The problem with participatory democracy, for deliberative democrats, is that "the better-off and the more educated tend to participate more" and that the only way to equalize participation is to make voting compulsory, which "has an obvious cost in liberty."[676] To realize deliberation, it must take place "on a human scale, on the scale of face-to-face democracy." And that requires what Fishkin calls microcosmic deliberation. We represent persons by selecting deliberators at random from the populace in order to achieve of

[674] Fishkin 2009, p. 77.
[675] Obviously, deliberative democracy has many advocates. For what continues to be a nice range of views, see Bohman and Rehg 1998, especially the articles by Joshua Cohen, Rawls, and Habermas. Also see Gutmann and Thompson 2004 For a recent update on the state of deliberative democratic theory, see Parkinson and Mansbridge 2012
[676] Fishkin 2009, p. 80.

representative sample; then these individuals are given information and are asked to engage in structured deliberation designed to determine what the informed public will on some issue is. So political equality is realized "via random sampling in the choice of participants as well as the equal counting of their views once assembled."[677]

On *my* theory, political equality and non-tyranny are the most essential democratic values. Political equality is necessary because the realization of moral peace between persons implies a commitment to equality, perhaps most obviously in the construction and assignment of equal primary rights. Even when decision-making is filtered through the process of public justification, we will want to ensure that persons have equal decision-making power, even if that power is miniscule. This is because persons have a primary right to vote and that right to vote involves everyone having the same chance to input their preferences, regardless of how small the impact of that input is. Consequently, voter input should not be restricted by elite constraints when it comes to the choice of politicians.[678]

Non-tyranny is essential because the first duty of government is the protection of the primary rights of all persons under its direct control, usually understood as the set of citizens plus those not yet naturalized, as well as temporary residents. In a conflict between non-tyranny and participation, the participation of the public loses because a state that protects rights but fails to

[677] Fishkin 2009, p. 82.
[678] Add discussion of Brennan's *Against Democracy* here.

adequately consult the public is more legitimate than a state that fails to adequately protect primary rights but consults the public reliably and regularly. Deliberation is even less essential, for a state with inadequate deliberation but that protects primary rights is obviously more legitimate than a state that fails to adequately protect primary rights but has adequate deliberation. Getting informed inputs into the political process simply has less value from the perspective of public justification than protecting primary rights.

It may appear, then, that our choice is made. Competitive democracy focuses on the protection of rights and the preservation of political equality, so what else is there to say? Well, while a political system as a whole should realize political equality and non-tyranny, there is a subtler option for appealing to these kinds of democracy; for it is possible to apply these different democratic ideals to govern different parts of the political process.

III. Different Functions, Different Values

Let's divide up political decisions in accord with two distinctions. The first distinction is between the protective and productive functions of the state, which should be familiar to the reader by now. I think it is clear that non-tyranny is far more important for the protective function of the state than the productive function simply because non-tyranny is defined as serious violations of primary rights and the productive function of the state focuses on political decisions that

do not involve or threaten the violation of primary rights. So different approaches will probably be appropriate.

The second distinction is between the choice of political officials, the protection of rights, the choice of public policies, and the review of political decisions. The distinction between choosing officials and policies is clear enough. In most democracies, the people vote for officials, and then officials, who have more time to become expert on the relevant policies and represent their constituents accordingly, vote for policies. The review function should also be familiar, as we will want some sort of failsafe device to prevent laws and policies that cannot be justified (however justification is to be understood) from being enacted, given the flaws in decision-making by voters, flawed officials, and the flaws in the voting rules they use. In the United States, we rely heavily on judicial review, which can only decide whether policy and legislation are constitutional or not, but a review process could be broader. A publicly justified polity could have an additional legislative body that only has the power to repeal legislation. The people could also be used for review, say by means of form of legislative recall like the capacity of the people in some states to recall state officials.

In many cases, the choice of officials cannot separate the protective and productive functions of the state because we vote for officials to make decisions about both sets of concerns. It may be feasible to choose two different sets of officials, one to make policy about primary rights, and the other to make policy about, say, fiscal policy. But the typical way in which democracies govern these

issues is to protect primary rights via supermajority rules. In the United States, changing any primary right embodied in the constitution is *extremely* difficult, and some constitutions forbid amending themselves in ways that violate rights.[679] Based on the foregoing, then, I will analyze the choice of officials without distinguishing between the protective and productive functions of the state.

Now let's consider the review process, which is typically used to govern the protective functions of the state alone. The review process might include the practice of judicial review. The US Supreme Court almost exclusively concerns itself with the protection of what are arguably primary rights, like freedom of speech and religion. And even in some cases where they appear concerned with the productive functions of the state, a potential primary right is at issue, such as their judgment that the Affordable Care Act is constitutional. The Act was said to violate the Constitution's commerce clause, a clause that has, at times, been construed to protect certain economic liberties as basic constitutional rights.[68o] In general, review is used in cases of controversy about bills that purport to violate the rights protected in the constitution, all of which are arguably primary rights. Consequently, we can largely confine our account of review to the protective functions of the state.

We are left with four types of decision-making over which different democratic theories might have something to offer: the selection of officials,

[679] It is true that some countries lack written constitutions, but they functionally treat rights issues as requiring huge majorities to alter.
[68o] Sebelius cite.

protective policy, productive policy, and the review of protective policy. Let's consider each stage separately, asking which of Fishkin's principles are most essential in each, and so determine which democratic theory should govern that stage.

IV. The Selection of Officials

The ultimate focus of political public reason is the public justification of legislative outcomes. That process typically begins with the nomination and selection of political officials, such that the selection of officials is the political process with the *furthest causal distance* from legislative outcomes. All subsequent parts of the political process can neutralize or alter public input, such as the legislative process and the review process.

Since citizens are so causally distant from legal coercion, I contend that non-tyranny is a negotiable value in choosing officials in conflicts with other values. While we might worry that citizens could select corrupt officials that will violate rights, properly designed constitutional rules can severely limit the capacity of officials to systematically violate primary rights.

Political equality, in contrast, is critical for justifying the selection of political officials. This is true for two reasons, one normative and one empirical. The normative reason is that citizens have equal primary rights to vote and participate in the political process. The only way to respect these rights is to

ensure to allow for the democratic selection of officials. Otherwise, their rights are not respected since they have no input into the political process at all, since officials have relatively free reign once elected to act on their own judgment. The empirical reason is that law is probably more likely to be publicly justified for all citizens if all citizens have input into the political process. The responsiveness of political institutions will be far from perfect, but it will arguably perform better than they would if political officials could afford to ignore large swaths of the public.[681]

Because of the way in which political equality is protected in this part of the political process, we must pair political equality with participation as the two critical values to be realized by the selection of political officials. We care more about everyone having input into the selection process than generating informed, quality choices (even though we care about quality choices a great deal). The reason for this is the need to publicly legitimize the selection of officials. If citizens were not allowed to vote, but were represented by elite deliberators or some large subset of the public, officials would not be seen as politically legitimate. For this would be to effectively nullify the primary rights of citizens to exercise their political rights *even if someone else represents their views*. If we choose deliberation over participation at this stage, we could end up publicly justifying a four-stage political process that lacks direct, unmediated public input at any point. Citizens would feel as though they had no voice. I submit, then, that the *durability* of the

[681] Cite responsiveness literature in v3.

political order would be threatened, as citizens would see relatively little reason to abide by legislative conventions passed by these officials. Even citizens of good will have limited reason to comply with conventions imposed by officials she had no opportunity to choose. For this reason, the selection of officials in a publicly justified polity must be governed by the ideal of *participatory democracy*.

There are many potential challenges to this view, including concerns about (i) the moral relevance of unreconstructed, raw mass public opinion, (ii) the coherence of public opinion, and (iii) the choice of voting rule to reflect the will of the people. The first problem holds that people should not be coerced through a process that is based primarily on uninformed, irrational, and bigoted groups of people, like much of the voting populace.[682] This problem, I think, is the easiest to solve because the main reason to discount raw mass public opinion is that public opinion might lead to the election of an evil or tyrannical official. But with proper constraints later in the political process, the power of such officials can be sufficiently limited to make the problem manageable. So even if a bad official supports policy that cannot be publicly justified, further constraints on his power can prevent poor voting from getting out of hand.

Of course, one might reply that bad political officials can find some way around the constraints placed upon them by other branches of government or the constitution. This is true, though it is less of a problem in some democratic systems than others. In the United States, the primary culprit is arguably the office

[682] For a striking review of public political ignorance, see Brennan 2011, chapter 7, pp. 161-178.

of the presidency, which has accumulated incredible power over the course of the last 100 years, and so those powers are easily and frequently abused.[683] A parliamentary system with the executive chosen by the leading party or parliamentary coalition might be less vulnerable to this problem. But a better reply is that abuses of power can happen under any system where social trust and legitimacy breaks down to the point where the constraints in the constitution are no longer effective, including libertarian and anarchic constitutional orders. My contention is that social trust is better maintained when everyone feels that they have some causal input into the political process than by a system where representative persons make decisions for them, even if the decision-making quality of elite deliberators would be greater. A participatory system should be more durable, for its participants will find a system where they have causal input more amenable than otherwise.[684]

(ii) The potential incoherence of mass opinion is a much harder problem. A huge amount has been written on the subject, so I will limit myself to a sketch of some prominent positions. Riker and his followers have insisted that real-world social preferences contain cycles, where individuals have transitive preferences but society has intransitive preferences over some list of candidates or issues.[685] This means that group decision-making requires violating some fundamental condition of rational collective choice. But their attempts to demonstrate the existence of

[683] Healy 2009.
[684] Immunity is not an issue in this area, as merely rational agents have a hard time gaming a system with millions of actors, though immunity will become an issue in future parts of the political process.
[685] Riker 1988.

cycles in the real world have been forcefully challenged on empirical grounds. Gerry Mackie has done more than anyone to muddy the Rikerian waters, arguably demonstrating that Riker's examples of important cycles, such as the US election of 1860, are controversial at best, and distortions of the truth at worst.[686] After reading Mackie, my sense is that we cannot empirically vindicate the Rikerian claim that when "subjects are politically important enough to justify the energy and expense of contriving cycles, Arrow's result is of great practical significance. It suggests that, on the very most important subjects, cycles may render social outcomes meaningless."[687] Mackie claims, in contrast, "that the cycles that are alleged to make democracy meaningless are rare" where "the question is not one of logical possibility but rather one of empirical probability."[688] I believe that through his intense scrutiny of common claims of cycles, Mackie has shown that, while Riker could in principle turn out to be correct about the pervasiveness of cycles, there is no decisive, or even weighty, evidence in Riker's favor. For that reason, I set aside the question of whether mass public opinion is meaningless because it is plagued by cycles.

Mackie might be wrong about Riker, but even Riker thinks that consulting mass opinion is important, since mass opinion should be meaningful when it comes to controlling exceptionally bad officials. This consideration should allow

[686] Mackie 2003.
[687] Riker 1988, p. 128.
[688] Mackie 2003, p. 17.

public reason liberals tempted by Riker to nonetheless favor choosing officials in a participatory fashion.

To my mind, the most serious empirical concerns about the value of consulting mass opinion are that the public is systematically biased.[689] The case for systematic voter bias is based in part on the already-mentioned extensive empirical data demonstrating vast public ignorance on nearly all matters of political importance. There are a number of theories that purport to explain what explains voter psychology and whether voter psychology is *problematically* biased once we understand what voters are doing in the ballot box. One influential theory, advanced by Geoffrey Brennan and Loren Lomasky, is that "voting in large-scale elections is disconnected in a fundamental way from citizen preference over electoral outcomes," and that voters in fact vote *expressively*, that is, to express their affiliation with a value system or some group.[690] Importantly, since citizens vote expressively, they are much more likely to vote based on ethical considerations, for "expressive behavior will reflect various kinds of ethical and ideological principles that suppressed in the market setting"; this means that expressive political behavior "gives much freer range to ethical considerations."[691] Yes, voters are ignorant because they have little incentive to become informed, but this means that citizens might vote on factors that could nonetheless have moral

[689] As documented in Caplan 2007.
[690] Brennan and Lomasky 1993, p. 1.
[691] Brennan and Lomasky 1993, p. 16.

and ideological import, such as whether a candidate's expressed policy preferences and political principles match the voter's own preferences.

However, Bryan Caplan has forcefully argued that we can expect voters to express opinions that are subject to systematic bias that lacks moral import.[692] Caplan covers four biases in his work, identified by comparing the opinions held by the public to opinions held by economists.[693] Caplan postulates that voters are guilty of *rational irrationality,* where the biases of voters are not the result of getting tired of searching for truth, but rather because they "actively avoid the truth."[694] Contra expressive voting theorists, Caplan argues that citizens only vote expressively when they actively believe that their ordinary "feel-good politics are ineffective" so they instead decide, however implicitly, to vote expressively.[695] But Caplan thinks that voters lack an implicit belief in their causal inefficacy. Consequently, voters vote based on a false belief in their efficacy and based on systematic biases.

We must grant that voters have some systematic biases. For instance, Caplan is on strongest ground when he claims that voters are guilty of anti-foreign bias, where people underestimate the value of working with foreigners.[696] It is remarkable how much people in the United States completely discount the value of immigrants and immigrant labor, as illustrated by the popularity of President Donald Trump. The vast majority of economists agree that immigration is

[692] Caplan 2007, p. 10.
[693] Caplan 2007, Ch.2 and Ch.3.
[694] Caplan 2007, p. 123.
[695] Caplan 2007, p. 138.
[696] Caplan 2007, p. 10.

generally economically beneficial, and that the public vastly overestimates "the likelihood and magnitude of adverse labor market effects for natives from immigration."[697] So we can expect voters to vote for candidates that promise to restrict immigration; but given the severe economic and liberty costs of immigration restrictions, these restrictions cannot be generally publicly justified.[698] So in this way, consulting raw, unmodified public opinion will tend to yield publicly unjustified policies.

But the important question is whether Caplan's biases make mass participation in the choice of political officials worse than the democratic alternatives, and I don't think even Caplan would suggest as much. While voters will be problematically biased in some respects, they won't be in others, and at the least, if a candidate presides over a regime that causes the populace enormous harm, voters will likely punish the candidate. So in this way, consulting raw public opinion can be valuable in preventing the political order from becoming tyrannical or extremely harmful to the public. So I deny that voter bias is sufficient to show that a publicly justified polity should reject mass participation; in general, we can expect public opinion to at least loosely track the public's broad interests. And in fact, the literature on the responsiveness of policy to voter preferences is fairly strong.[699] As long as we have confidence that consulting mass public opinion to

---

[697] On the views of economists, see Kerr and Kerr 2011, p. 24.
[698] Gaus 2011, pp. 478-9.
[699] For a review, see http://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0103.xml. Also see Gilens 2012. As we saw in Chapter 8, while American democracy is not really responsive to the poor, it is quite responsive to the preferences of the middle class and the rich, or at least, it tends to track them.

choose political officials isn't too bad, then we can focus on correcting the malign influences of voters to later stages in the political process, while selecting candidates in ways that respect the principles of political equality and participation.

We should also ask if there are good ways to use deliberation to improve mass opinion. To answer the question, deliberation must be understood in real-world terms; we are not concerned with highly formalized models of deliberation but rather with data about how real-world deliberation functions in real democracies. This means that we need to look at evidence that real-world publics who deliberate choose systematically better policies (where "better" is understood in terms of public justification) than non-deliberating publics. Unfortunately, the only systematic data that we have on improving opinion through deliberation is from small, focused groups.[700] We have little data on how to improve mass opinion, and that is because carrying out a controlled experiment is practically impossible.

To compensate for this lack of data, we might appeal to *a priori* models of the potential benefits of deliberation, such as the model of deliberation found in Helene Landemore's work.[701] I worry that Landemore's model is also too far removed from contemporary circumstances to be useful in determining whether democratic procedures for official selection can be publicly justified. However, I

[700] See Fishkin 2009. Fishkin has arguably done more than anyone to try to determine whether, in the real world, the concerns raised by deliberation's critics and the benefits cited by deliberation's proponents actually materialize. He has a moderately favorable view of focused, small-group deliberation but acknowledges that this may be a poor proxy for public opinion. See pp. 194-6. (??)
[701] For the most recent development of an *a priori* model of good deliberation, see Landemore 2013

think it is helpful when trying to determine how Fishkin's deliberative democracy should proceed in the policy formation and ratification process, so I will discuss her model in more detail below.

Another option, common in the public reason literature, is to try to set out ethical principles to govern public deliberation, like Rawls's duty of civility.[702] These principles often require that citizens discuss important political issues in terms of shareable or accessible reasons. I have discussed problems with this approach elsewhere, but here it should suffice to say that there is little connection between what political theorists claim about how discourse *should* proceed and how we can reasonably *expect* it to proceed under normal conditions, given the costs and benefits of personal contribution to political life. Citizens have limited reason to engage in careful deliberation given that their causal impact on their political process is miniscule. It seems to me unreasonable to push citizens around to get what political theorists can only hope will produce a better outcome. I think it much more practical to develop an ethic for political officials, who each have a substantial causal impact on the political process.[703]

The second main question we must ask about the beginning of the policy process is which voting rules we should use to report mass participation. As Riker notes, "social choice depends not simply on the wills of individuals, but also on the

[702] Rawls 2005, p. 217. I cover some common principles of restraint in Vallier 2014, ch. 2.
[703] I provide much more detailed arguments for restricting restraint to political officials in my previous book, *Liberal Politics and Public Faith*, in Chapter 6.

method used to summarize these wills."[704] We also know, from social choice theory, that any voting rule that is remotely rational and fair has flaws and is potentially subject to manipulation. Even so, I think there are some good, if imperfect, options.

For real world voters choosing candidates, I propose that each voter be asked to rank candidates in accord with whatever motivations have driven them to vote. The voting mechanism can use this information to compute both the Borda Count and the Condorcet Rule. Each candidate would receive a sum total based on his or her ranking, in accord with the Borda Count, and each candidate would also be ranked by who wins a head-to-head vote, in accord with the Condorcet rule. If one candidate wins in both voting schemes, then she wins the election. This is a normatively attractive result, since each voting rule compensates for the flaws in the other; Borda allows for violations of independence of irrelevant alternatives, but Condorcet does not, whereas Condorcet allows for violations of transitivity, but Borda does not. The tough question is to determine what ought to happen when the Borda and Condorcet winners differ. In this case, we could simply follow an instant run-off rule between the two winners, which would take votes from the lowest ranked candidate and assign it to the remaining, higher ranked candidates.

We might also deploy a parliamentary voting system, where citizens vote for a party that they like, and the seats of parliament are divided up according to the percentage of votes the candidate or party receives. This might be an effective

[704] Riker 1988, p. 31.

alternative to the American system of voting for individual congressmen according to a first-past-the-post rule, as it would allow for the formation of robust third parties, increasing the diversity of representation among members of the public, and lending itself to a more coalition-based moral of government, which could encourage compromise over acrimony.

The advantage of the Borda-Condorcet selection rule and parliamentary voting is that they all for a more comprehensive representation of what citizens will. Instead of a binary choice, citizens can express complex preferences about the relative worth of candidates and parties, and governments can reflect more diverse views in virtue of having more outlets for third, fourth, and fifth choices. Both tools could decrease partisanship and hostility between political groups and their supporters. We would need to grapple with the potential problem of a large number of parties, which can lead to serious coordination problems such as those faced by the Italian government, but this not typically a serious problem in most parliamentary democracies, or in orders with ranked-choice voting, like Australia.

V. Protective Policy Choice

Protective policy choice concerns the articulation and protection of primary rights, following my Buchanan-inspired definition of the protective function of government in Chapter 6. Since we are focused on the protection of rights, non-tyranny is a critical component of protective policy choice. Since officials are

typically supposed to represent different parts of the electorate, they should be given equal power to influence the output of policy, and equal power among officials thereby expresses the value of political equality. To preserve political equality and non-tyranny, then, effective deliberation and participation can therefore be compromised; so with respect to protective policy choice, our democratic theory should be competitive democracy. Some are bound to challenge the competitive approach on the grounds that it is elitist. But remember that competitive democracy only governs one of four parts of the democratic process. The input into the process is participatory in nature. The people have chosen officials who operate the protective policy process. So elitism in protective policy choice is tempered by mass participation at the previous stage of choice.

Two factors control the proper form of protective policy—(i) that primary rights are typically broadly recognized and simply protected and (ii) that political officials have the capacity and even the tendency to violate some primary rights. Due to the fact that primary rights are broadly recognized and understood, and their protection is relatively straightforward in comparison to, say, the formation of productive policy, the protection of primary rights can generally be pursued without extensive legislation. Nor need we rely heavily on having the judiciary overrule laws that violate rights. Given the imperfections of officials, in terms of knowledge and character, we should therefore be more concerned about officials passing laws or issuing executive orders that violate rights rather than failing to produce legislation that articulates and protects rights. Both of these factors imply

that we should be more concerned with false positives (passing laws that cannot be justified) than false negatives (failing to pass laws that are justified).

Most democracies protect primary rights via supermajority voting rules, where a large majority is required in order to amend constitutional protections on basic rights. Once primary rights are properly protected at the constitutional level, there will of course be controversies about how to apply these rights to new, complex circumstances, and legislatures should have the authority to pass such laws. But a supermajority rule, by being biased against changes, protects against false positives at the expense of false negatives. And I have argued that this is the appropriate stance for protective policy choice. Members of the legislature and the public forgo the right to alter the protection of primary rights based on majority votes for fear that the majority will sometimes turn against primary rights. Some majoritarians are bound to challenge this risk assignment, but the balance of risks is best determined by the determinations of the great, functioning democracies over the course of their history. And there is nearly uniform agreement in political practice that rights are to be given strong, supermajoritarian protections against abolition or abrogation.

A common majoritarian complaint about supermajoritarian protections is that they are non-neutral in virtue of being biased in favor of the status quo.[705] This may threaten to make supermajority rules sectarian or reasonably rejectable. I disagree. The authority of democratic procedures with respect to protective policy

[705] For discussion, see Gaus 2011, pp. 487-490 and Ganghof 2013.

derives from the will of the people regarding the entire moral order of moral and legal conventions. The political order is only part of that general will, such that non-neutral procedures are only problematically non-neutral if they are non-neutral with respect to the protection of the moral order as a whole, rather than the political part of the general will specifically. But I have argued that the moral order requires completion by a legal system based in primary rights, which means that primary rights are a central part of the general will. That means the general will endorses the protection of rights and, potentially, non-neutral procedures for protecting them. Legislative-decision rules that less effectively protect primary rights, then, more poorly express the collective will of the people. In this way, we reject political neutrality based on our concern that the conventional order expresses the general will and so realizes moral peace between persons.

This means that public reason liberalism, as I understand it, rejects pure proceduralism about democratic politics, which holds that the outputs of a fair democratic process are necessarily legitimate, and that political rights are established as presuppositions of that process.[706] Instead, our focus is on the public justification of moral rules, and the endorsement of political primary rights as a necessary means towards the public justification of moral rules. This means that our democratic theory bears similarities with deliberative democratic forms of proceduralism, but differs substantially in the justification of political institutions

[706] For a brief but classic statement of pure proceduralism, with the rights of persons presupposed by the relevant democratic procedures, see Habermas 1997.

since political institutions are justified as extensions of the moral order rather than as the direct implication of the rational commitments of the people.

I would also argue that supermajority rules, in virtue of protecting primary rights, promote durability *and* immunity for the right reasons. The system of primary rights is durable because peoples regard themselves as having reason to reciprocally respect the rights of others, given that the scheme of primary rights are ones that each person can endorse as worthy of compliance and internalization. Compliance with and enforcement of primary rights helps to establish public assurance that the system of rights is effective and widely agreed upon. Supermajority protections also promote immunity, so as to discourage officials from attempting to game the system to distort the protection of primary rights in their favor. By requiring that large majorities ratify all amendments to rights, we make it harder for officials to game the system than under majority rules. Such a system will therefore be more stable than one in which a simple majority can undermine fundamental rights at any time.

VI. Productive Policy Choice

Now we turn to the voting procedures that should govern legislation regarding the state's productive function, understood as the provision of goods and services

where primary rights are not typically at stake.[707] Paradigm cases of the state's productive functions are the provision of infrastructure, social insurance, and countercyclical policy.

I argue that productive policy should be governed by Fishkin's notion of deliberative democracy—decision procedures that ensure both political equality and quality deliberation. So at the productive policy stage, we allow the compromise of non-tyranny and participation. The reason we do not need to worry as much about guaranteeing non-tyranny is because non-tyranny already applies to protective policy and the protection of basic rights. When it comes to policy governing the state's productive function, rights violations are less relevant because fewer rights are at stake. Participation is less essential because we are focused on deliberation among officials or citizens-experts appointed and educated as part of the legislative process. Further, given that we are focused on a small group of persons, and that each has strong incentive to voice their opinion and vote accordingly, there is no need to focus on guaranteeing participation; that matter should largely tend to itself. But before I can address the inputs specific to deliberation, we have to address several concerns about the functionality of the productive policy process in the United States and explore mechanisms that can improve the process.

[707] I grant that the line between productive and protective policy is not sharp and must be settled upon by the constitutional process, but I think it fair to assume for the sake of argument that such a line can be drawn.

At present, productive policy in the United States is plagued by the influence of lobbyists and special interest groups that constantly attempt to contort legislation in their favor. This is to be expected for the familiar reasons presented by public choice economists.[708] Officials tend to be self-interested, so they can easily be tempted by campaign contributions and the promise of social and economic benefits once they leave office. Furthermore, politicians who are not focused on their self-interest, and who wish to legislate based on other factors, can often be stopped and intimidated by politicians who are "bought and sold."

Rent-seeking can corrupt the legislative process in many ways, not merely through the purchase of legislative votes, but also through legislative tactics like agenda control.[709] While Mackie has made a convincing case that these tactics are not used as often as one might expect, there are still serious attempts to co-opt the legislative process for the benefit of the few at the expense of the many.[710] The logic of concentrated benefits, dispersed costs will lead to legislation that cannot be publicly justified because it imposes costs on the many to benefit the few, given that the few are more easily organized into coalitions that can apply pressure to legislated officials.

I advocate constitutional structures that restrict the power of rent-seeking, such as supermajority rules and bicameralism.[711] Both have the effect of blocking legislation, and so avoiding lots of type-1 errors. Rent-seeking tends to produce

[708] See the literature reviews on the topics of rent-seeking and the inefficiencies of bureaucracy in Mueller 2003, pp. 333-384.
[709] Mueller 2003, pp. 112-114.
[710] Mackie 2003, pp. 158-172.
[711] For a discussion of the effects of bicameralism, see Buchanan and Tullock 1962, p. 233-248.

type-1 errors rather than type-2 errors. Yes, special interest groups work to defeat legislation, but more often than not, they attempt to legislate benefits through coercion, rather than increase their power through the prevention of legislation. The best counterexamples are fights to oppose regulation, such as the regulation of carbon emissions. But, on balance, lobbying and rent-seeking increase the incidence of type-1 errors because fewer rent-seeking benefits are garnered by defeating rather than passing legislation.

Another mechanism worth exploring is shaping the power of the purse. Right now, the US House of Representatives passes general appropriation bills and then directs the funds they have (and funds they often do not have) to specific legislative purposes. But these funds are often directed towards rent-seekers. I suggest that we can constitutionally tie expenses to methods of payment, so as to reduce the problem of excessive and badly spent funds. For instance, we could follow the recommendation of James Buchanan and require that every bill contain provisions specifying how the bill is to be financed.[712] This would require scoring each bill to determine its costs and then specifying the taxes and forms of revenue collection that would cover those costs. Scoring need not be perfect, but tying funding and spending would help master those who would appropriate funds from a general pot that happened not to be earmarked for particular bills. Another advantage of this proposal is that it would ease the process of evaluating whether a

[712] Buchanan 1999, p. 141. For discussion of the role of Buchanan's propose in public reason, see Gaus 2011, pp. 496-7.

bill can be publicly justified, as we would at least have estimates of their costs and some idea of the burdens the bill would place on some portion of the public.

The main worries about this proposal are two. First, such a constitutional requirement would dramatically reduce the amount of legislation passed. Many people would be far more hesitant to support spending bills if they also included tax increases and policy epistemology will rule out excessively vague and sketchy cost-benefit analysis as insufficient to justify coercion. In response, I would argue that reducing the amount of legislation passed is all to the good, given that much legislation cannot be publicly justified to members of the public. And the bills that do pass will stand a fair chance of being publicly justified, which adds to their legitimacy and stability.

The second concern is that such a proposal would be biased against Keynesian members of the public. Keynesians support the appropriation of funds to engage in countercyclical policy, and so want to ensure that governments can run a deficit in order to have extra money to spend to counteract recessions. I would counter that if Keynesian policy can be demonstrated to be sound based on the norms of policy epistemology, then bills can be passed that permit temporary deficit spending so long as they specify that taxes will be raised to cover the deficit spending once the recession is over. If Keynesian members of the public cannot convince others to support these bills, then that is tough luck.

Another broad problem with productive policy is the presence of ideologies that lead politicians to support legislation that suits their particular sectarian

conception of the good or justice but that sets back the conceptions of the good or justice of others. As I have argued elsewhere, we must attend to the phenomenon of *ideological* rent-seeking, where officials pass bills that increase the satisfaction of their evaluative standards (their "rent") by decreasing the satisfaction of the evaluative standards of other members of the public (where these setbacks cannot be publicly justified). Fortunately, the mechanisms that can reduce the incidence of purely economic rent-seeking can also be used to reduce ideological rent-seeking, since much ideological rent-seeking involves redirecting public funds to sectarian causes. There will be cases when the protective process distributes ideological rents by protecting sectarian rights claims, but we already have protections in place to ameliorate that threat.

I cannot stress enough that productive policy must be protected from economic rent-seekers and ideologues, as they present pervasive problems in all advanced democracies. Mancur Olson has convincingly argued that rent-seeking groups tend to accumulate over time, gradually slowing the process of economic growth by gumming up the works with inefficient spending.[713] Since even small decreases in the growth rate significantly reduce economic well-being over time, we must be vigilant about small, negative short-term corruptions of the productive policy process. This is especially true in light of the principle of sustainable improvements from Chapter 5.

[713] Olson 1984.

Furthermore, checking extensive rent-seeking is critical for rendering the legislature relatively immune from invasion by rent-seeking politicians and lobbyists. Without protections, we can expect rent-seeking behavior to gradually crowd out efficient cooperation, as more rent-seekers enter the system and more people already present within the system are inclined to engage in rent-seeking since others are engaging in it. This means agents within the system may consistently distort the rules of the game within which they can operate.

I would now like to focus on an additional mechanism for checking rent-seeking and strengthening the immunity of the productive policy process—a version of Fishkin's microcosmic deliberation that we can call a *policy mini-public*. The policy mini-public is composed of citizens selected at random, and paid a salary over the course of a month or up to half a year to engage in policy review. Members of the public will become informed about a particular policy and its costs and benefits, deliberate about whether to recommend that policy to political officials, and then vote on their recommendation. They must also sign off on changes to the policy proposals made by officials after their recommendation is received, so they may be temporarily recalled. Selection is voluntary, so the salary should be high enough to enable economically disadvantaged persons to participate in the process. Ideally, we could establish a moral practice where citizens are expected to take part in the process, not unlike jury duty, but without legal compulsion. Citizens could also decide whether to put their names in a hat to become part of the process, though that may be seen to increase the power of

influential members of the public, so all voters might be included in the selection process, but once selected, they can decline to serve.

Importantly, new mini-publics would be selected for each piece of major policy legislation. A congressional committee could decide upon what counts as a "major" piece of legislation, though this would be subject to potentially corrupting effects. We will also want to avoid having a large number of committees, as the expense of the process could be enormous. For this reason, I envision twenty to thirty groups of fifty persons during each Congressional term evaluating significant legislative proposals. The small size of these groups is essential to their functionality. Face-to-face discussion has great benefits that anonymous discussion lacks, as persons have an incentive to behave in a calm, reasonable, and moral manner. If a group becomes too large, these dynamics are undermined and more unsavory dynamics take over.

Citizen deliberators have several powers. First, they have the ability to review the policy recommendations of legislators and make recommendations of their own. The recommendations would be public in almost all cases (save national security issues), so the public could determine whether politicians are following the recommendations of deliberators and hold them responsible if they ignore what the deliberators recommend. Then, when a bill is amended, citizens will have the right of review to see whether further review is required.[714] At no

[714] The big worry I have about this part of the process is that legislators will load bills with amendments in order to exhaust the citizen deliberators, but amendment could be limited to avoid this problem.

point could the mini-public put a stop on the legislative process, but their recommendations will have substantial effects, since they will be sampled directly from the public. Their recommendations will arguably come to be seen as a proxy for informed consent by the populace. The deliberators will not be career politicians; instead, they will represent the public, their terms would be limited, and their identities would be anonymous. So their recommendations should be regarded as having a high degree of democratic legitimacy. It is not unreasonable to hope that the public will generally expect politicians to hew to citizen recommendations. And the fact that publicly selected deliberators approved the law will arguably increase the stability of the relevant legislation. Citizens may feel relatively assured that they can follow the policy, since it has received approval based on their chosen candidates and citizen-deliberators who represent them.

Following Fishkin's work on microcosmic deliberation, we can hold out some hope that microcosmic deliberation among citizens selected at random can increase the quality of deliberation. Fishkin has found that citizens almost never have cyclical collective preferences because deliberation tends to produce single-peaked preferences, and that polarization effects only crop up from time to time.[715] So some worries about democratic failure appear to be addressed through careful construction of deliberative practices. However, Fishkin's experiments have one gigantic drawback – they tend to cover political issues of minor significance. In cases where a deliberative microcosm could make recommendations about

[715] Fishkin 2009, pp. 143-6.

important policies like healthcare policies, or stimulus bills, we can expect a dramatic increase in attempts to influence the process. Legislators will try to control the way in which citizen-deliberators are chosen, not unlike attorneys in the jury selection process, along with the way in which information is presented to them. Legislators and outside groups and may try to influence citizen deliberators in the deliberative process, say by using ideological cues or by sowing division and discord along racial, gender, class, religion, or cultural lines in order to distort the process in their favor or to delegitimize the deliberations of citizens. They could even promise these deliberators benefits following the process, like private sector jobs based on their policy experience.

Ideally many of the protections provided by the jury system could be used to resist these forms of tampering. The identities of the deliberators could be withheld from the public and from the majority of legislative officials. For instance, legislators could select moderators, and the moderators alone would know the identity of citizens. This would help to counteract the temptation to payoff deliberators, and so reduce the incidence of corruption. Further, deliberators would be selected at random to avoid biasing the deliberative group in favor of one ideological position or interest group. Finally, we could establish a system of influence where representatives of different ideologies and interest groups could speak to the deliberators with equal time.

Another worry is that deliberation on matters of great significance will lead to considerable polarization.[716] And polarization would be difficult to counteract once deliberators become aware of their ideologies and the ideological balance of the group. However, the fact that they will be encouraged to interact at a personal level and to discuss policy with one another face to face may exert pressure not to polarize. To avoid slacking off, there could be some sort of contractual obligation upon taking the position to engage in some level of participation. Otherwise citizens may simply vote based on the heuristics given by their ideologies and so ignore the effects of deliberators.

Some effects will be very hard to counteract, such as simple apathy. Some citizens may simply take their paycheck and refuse to participate. Further, deliberation might lead to the marginalization of shy and/or insecure speakers. Some of these problems are inevitable, just as they are with ordinary democracy. The hope is that by adding microcosmic deliberation, we can improve upon the process we have.

Another potential benefit of randomly selected deliberators is that we are likely to end up with a very diverse group of deliberators, as they will represent a diverse public through random sampling. As Hélène Landemore has argued, diverse groups can often contribute to good decision making better than a group of persons with high amounts of ability, so long as deliberation is appropriately

[716] For evidence to this effect, see Sunstein 2011. Fishkin finds little polarization, but that is probably an artifact of the low stakes involved in the deliberative bodies he put together.

structured.[717] Critically, diversity can trump ability, so elite deliberator diversity might compensate for their weak deliberative skills. The problem is that elite deliberative groups will be small, such that Landemore's *numbers*-trump-ability theorem may not apply.[718]

One might also worry that the information that deliberators appeal to can be limited or distorted by the political process. And even if politicians did not try to control the flow of information, the media and partisan bias would still corrupt the information citizen-deliberators are presented. An attractive remedy for this problem is to require deliberators to consult *prediction markets* for information about which policy proposals is likely to be effective. The structure of prediction markets is fairly straightforward. Participants in the market make bets on the effects of various policies in the future. Participants without good information will tend to have views that are randomly distributed across the relevant range of predictions, and so we can expect for their views to cancel one another out. But people with good information will tend to tilt the market in favor of their position and against others. So prediction markets serve as good information aggregators. They are surely imperfect, but they could dramatically improve the quality of information available to deliberators. As Robin Hanson argues, prediction markets are our most epistemically effective method of gathering information.[719] Further, prediction markets have the advantage of anonymity of recommendation, which

[717] Landemore 2013, pp. 102-4.
[718] Landemore 2013, p. 104.
[719] Hanson 2013.

means that citizen-deliberators can get information untainted by the celebrity and charisma of a popular cultural figure or even the leader of a superforecasting team. Landemore has complained that prediction markets are not themselves a political decision-making mechanism, but prediction markets are still a very useful supplement for citizen deliberation.[720] Philip Tetlock has argued that a small group of people are "superforecasters" who improve upon prediction markets, there is no reason that citizen-deliberators cannot listen to superforecasters as well.[721]

I fully grant that deliberation has flaws, both due to discourse failure within the group and due to attempts to influence the group from the outside. But the incentives of the group, combined with Fishkin's long experience with such small-group deliberation, gives us reason to hope that consulting elite deliberators could help to minimize the error function of the constitutional rules governing the productive policy process. We won't eliminate error, but we might arrive at a political process that can better enable persons to comply with their legitimate legal obligations. This would, in turn, enable persons to better comply with the moral obligations prescribed by their system of moral rules, and so better realize moral peace between persons.

Another potential problem is that legislators will ignore the policy mini-public if the policy mini-public goes against public opinion.[722] Since politicians generally seek reelection, and they often genuinely care about their constituents'

[720] Landemore 2013, pp. 173-184.
[721] Tetlock 2015.
[722] I thank David Estlund for encouraging me to address this concern.

untutored views, they may have a strong incentive to ignore the mini-public. They might even argue that the polls are more representative than the mini-public in cases where doing so is self-serving. Since the mini-public has no binding political power, they would have no way to successfully fight back. The only response that I can give is to hope that members of the public can recognize that, because the mini-public is randomly selected and knows more than they do, that they will remain open to regarding the mini-public as representing their considered views. The public often approaches their representatives in this way, only sometimes blaming them for voting differently than they would like on complex matters. The hope is that the mini-public will be seen as more like the public than one's representatives, and so will inherit some moral authority in that way. We also defer to the judgments of mini-publics in the form of citizen juries, though in certain high profile cases where the public pays close attention (rare enough), jurors are sometimes blamed and attacked for going against public opinion.

A second problem is that it's clear that the policy mini-public requires an ethos of responsible decision-making and they may lack the incentive to comply with that ethos. But I've rejected the deliberative democratic use of an ethos to increase deliberative quality above, so why is an ethos appropriate for members of the policy mini-public and not citizens as a whole? However, in that discussion I distinguished between applying principles of restraint to *citizens* and to *officials*. Citizens have little incentive to become informed because their effect on the policy process is negligible. But imposing certain kinds of restraint norms to small groups

who can affect outcomes is much more feasible. We hold members of juries to high deliberative standard and, in many cases, jurors try to abide by that standard; principles of restraint should be similarly feasible for members of the policy mini-public.

VII. Legislative Review

Review can be understood as a legal process by which legislation is reviewed and then either overruled or allowed to stand. Following Jeremy Waldron, we might call this process "strong review," where a political body can "decline to apply a statute in a particular case … or to modify the effect of a statute to make its application conform with individual rights" and that the review body possesses "the authority to establish as a matter of law that a given statute or legislative provision will not be applied."[723] Here Waldron is speaking of judicial review, but I am focused more broadly on cases of strong review by any political body. In the United States, review is largely realized through the Supreme Court and the federal court system. Laws can be found unconstitutional on various grounds, and if a law violates the constitution, it can be overridden. But the review process need not be restricted to a court at all.

Review processes tend to be carried out by court systems in large part because determining whether a law violates the constitution requires a high degree

[723] Waldron 2006, p. 1354.

of legal expertise. One must not only be familiar with the history of constitutional jurisprudence and all the steps of the legal process, but also aware of innumerable details of case after case. I will not argue that, due to this expertise, the US should retain its extremely powerful Supreme Court. The Supreme Court sometimes overrules legislation that can threaten its legitimacy and so create destabilization across the country.[724] This occurs whenever the Supreme Court makes a decision significantly at variance with the views of a large political group or the majority, regardless of whether that decision is right-leaning or left-leaning. Had the Supreme Court overruled the Affordable Care Act, this would probably not only have threatened the legitimacy of the court, but of the effective functioning of the government as a whole, which threatens both the durability and immunity of our legal order.

Given that a review process can be structured in different ways, it should not be vulnerable to the objection that review is anti-majoritarian, given that a review body could rule by majority vote among a large number of officials whose sole job is to engage in strong review. The only way to argue that the review body is anti-majoritarian is that the general effect of the review body is to overrule legislation supported by a majority of voters or legislators standing in for voters. However, remember that the point of the legislative process is *not* to represent the majority's views. It is instead to generate publicly justified law by means of publicly justified constitutional rules. A review process is publicly justified, then, when it

[724] This is one of Waldron's classic concerns about it. See Waldron 2006, p. 1391.

forms part of a broader constitutional process that respects primary rights, minimizes the social error function for constitutional rules, and generates the requisite degrees of durability and immunity. I think, in practice, these factors may tell in favor of having a review process, given the process of legislative error. In particular, if we think that the risk of type-1 legislative errors is sufficiently great even given proper structuring of the protective and productive legislative processes, then a review process may be essential for ensuring that legislation is as publicly justified as we can reasonably hope for.

While it is hard to say for sure, I think a review process is probably necessary over and above constraints already placed on the protective and productive policy processes. I take no stance on whether the review process must be led by a judiciary. For all we know, the most effective review body might be a kind of negative legislature, one whose officials are elected by the people, but that only have the right to repeal or reform laws. Alternatively, this review body might prevent type-1 errors at the expense of a vast number of type-2 errors, in which case the review body would frustrate rather than promote publicly justified law.

As general guidelines for formulating a publicly justified review process, I suggest that the review process should prize the principles of deliberation and non-tyranny. We can give up on assuring political equality because political equality is realized at all three previous stages of the political process, at the level of citizens and the level of legislative officials. And we can give up participation since we want a highly informed elite body to make complex determinations about

the constitutionality of laws that ordinary citizens simply cannot make. This is why we should prize deliberation, since it helps the review body make these complex determinations. Without an appropriately high degree of deliberation, the quality of these final decisions would arguably be worse. We shouldn't ignore the defects of officials in the review, but we should ensure that this stage of the political process appeals to quality decisions as much as we can. It should also be clear that the review process must respect non-tyranny, as the largest part of the review process is concerned with ensuring that coercive laws that violate primary rights are not imposed upon members of the public. So I suggest that the review process should guarantee deliberation and non-tyranny, generating what Fishkin calls *elite deliberation*.

I think we can see that, if public justification is our concern, review is potentially vital in preventing legislative error. Though the fact that review is less democratic than other processes can threaten legitimacy and stability, as Supreme Court decisions sometimes do.

VIII. Process Democracy Contrasted with Deliberative, Aggregative, and Agonistic Democracy

Following Fishkin, I have distinguished four values that a constitutional rule might embody—political equality, deliberation, participation, and non-tyranny. And I have distinguished, also following Fishkin, between regimes that guarantee the

realization of two of these values, potentially at the expense of the other two—competitive democracy, elite deliberation, participatory democracy, and deliberative democracy. I argue that we should distinguish between four areas of governance—official selection by citizens, protective policy, productive policy, and the review process. Citizen input takes the form of participatory democracy, embodying the values of political equality and participation. Protective policy takes the form of competitive democracy, embodying the values of political equality and non-tyranny. Productive policy takes the form of deliberative democracy, embodying the values of political equality and deliberation. And the review process takes the form of elite deliberation, embodying the values of deliberation and non-tyranny. In each stage the relevant constitutional rules realize two of the four democratic values, and political equality is preserved at three stages of the process.

I can now contrast my approach to democracy with the three most popular democratic theories—deliberative democracy (a theoretical tradition distinct from Fishkin's notion), aggregative democracy, and agonistic democracy. Deliberative democracy bears deep similarities to mainstream public reason views, holding that democratic decisions are legitimate when they are the outcome of certain structured, egalitarian forms of deliberation.[725] Aggregative democracy ascribes legitimacy to democratic decisions when the judgments of citizens are aggregated

[725] Classic works of deliberative democracy are many, but some of the main monographs and articles can be found in the following works: Habermas 1998, Bohman and Rehg 1998, Gutmann and Thompson 2004, and Freeman 2000, Bowman and Richardson 2009, Parkinson and Mansbridge 2012.

in accordance with rationally and morally attractive principles, like a Pareto principle specifying that when each member of the public prefers p to q that society prefers p to q.[726] Agonistic democracy rejects aggregation and is not optimistic about the prospects for consensus following deliberation.[727] Democratic decisions are, therefore, supposed to balance the differing, and invariably contradictory, interests of different social groups vying for power.

I believe that my approach to democratic theory combines the virtues of these approaches while avoiding their flaws. Process democracy differs from deliberative democracy by limiting the reliance on deliberation among citizens and not imposing an ideal or principle of restraint that is meant to structure the deliberation of citizens. It also rejects consensus as an ideal outcome of the political process. Instead, its standard is to require that democratic institutions, insofar as they can, track what is publicly justified for citizens in accord with their intelligible reasons. But process democracy does appeal to deliberation in the political process, especially with respect to productive policy and review. Deliberation is important for increasing the quality of political decisions and,

---

[726] Rather, aggregative democrats *appear* to ascribe legitimacy on this basis, though in reality, they tend to say little if anything about their normative assumptions. In fact, many people believed to be aggregative democrats are critics of more ambitious democratic theories on the grounds that aggregations are subject to problems. Theorists often associated with aggregative democracy include Schumpeter 1942, Downs 1957, Riker 1988, and Dahl 1989 Riker articulates some principles of "fairness" that include the Pareto principle and the universal admissibility of different preference orderings in Riker 1988, pp. 116-7. I thank David Estlund, Alex Guerrero, Enzo Rossi, and Joshua Miller for discussion about how exactly one comes to be called an aggregative democrat.

[727] Ernesto Laclau, Chantal Mouffe, and William Connolly are among the best known contemporary agonists. Laclau and Mouffe 2014 Connolly 2002, and Honig 1993. For the most recent articulation of the agonistic democracy, see Wenman 2013. For discussion of the distinctiveness of agonistic democratic theory and the ways in which it is distinct from deliberative democracy, see Gürsözlü 2009 I thank Alan Reynolds for helping me to understand contemporary agonistic democracy.

insofar as deliberation helps to realize public justification, it has great instrumental value. But we must not confuse public deliberation with public justification. Public deliberation is simply one process among many that may help to create and maintain a publicly justified policy; it should not be the central focus of a democratic order. Further, deliberation is subject to a variety of flaws even under relatively controlled conditions, so we must focus on other aspects of the design process to determine which laws we should have.

Turning to aggregative democracy, the input of citizens into the political process more or less corresponds to the approach of aggregative democrats. The idea here is to take raw mass opinion and then use good voting rules to choose candidates that can arguably be said to be the choice of the people. Deliberative democrats have often complained that aggregative democrats take citizen judgments as given, rather than as something shaped by the political process, and that this makes the aggregative approach inappropriate.[728] But notice that this criticism does not damage process democracy. I do not rule out deliberation, or take preferences as given. The formation of preferences is an open process that is shaped by the moral order and that, as a result, may prevent the imposition of principles of deliberative restraint on citizens meant to structure deliberation. So preferences will evolve and change, but the political part of the moral order may not be entitled to use coercion or moral ostracism to control that evolution.

[728] For an early version of the criticism, see Cohen 1991, though I think this misfires as a criticism of Dahl, who is not obviously an aggregative democrat. For an overview of the deliberative democratic narrative, see Bohman and Rehg 1998, pp. ix-xiii.

Further, I side with deliberative democrats when it comes to governing the productive policy of the state. The goal there is to use citizen input to affect the policy process and to allow for the structuring of citizen deliberation within these citizen juries. I use aggregative approaches to help convert mass opinion into the selection of candidates, given the real-world limitations on citizen deliberation. So while aggregation is quite useful, process democracy does not rely upon aggregation alone. Process democracy avoids the flaws of aggregative democracy.

Finally, let us consider agonistic democracy. In one way, this entire book is a repudiation of the philosophical foundations of agonism, given that agonism is focused on insisting that democratic politics is invariably a power struggle; as agonistic democrat Chantal Mouffe notes, the domain of the political has a critical and inevitable "dimension of antagonism."[729] On the agonistic view, political foes are understood not necessarily as enemies but "adversaries" which are defined as "persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way."[730] On this view "power is constitutive of social relations" because the values at the heart of liberal democracy are in ineradicable conflict; this means politics is invariably built on exclusion.[731] I obviously reject the agonistic approach. However, agonistic critiques of deliberative democracy have some force for the process democrat. Agonists emphasize that political groups are not going to come to

[729] Mouffe 2009, p. 11.
[730] Mouffe 2009, p. 13.
[731] Mouffe 2009, p. 98. Also see Ernesto Laclau and Mouffe's claim that "social objectivity is constituted through acts of power" and that "every order is ultimately political and based on some form of exclusion." Laclau and Mouffe 2014, pp. 99-100.

consensus on a regular basis, as deliberative democrats often hope. Agonistic democrats are also correct to emphasize that politics invariably involves disagreement and contestation and that our votes will reflect those divisions. And process democracy agrees that politics does involve contestation between diverse groups based on different values that are hard to reconcile with one another. However, against the agonistic democrat, I deny that this means we should conceive of politics as a power struggle. Instead, the real value of moral peace between persons demands that we place boundaries on political struggle so that the coercion employed by the state can be publicly justified for its members.

Given that I allow different democratic principles to govern different stages of the political process, and given that my view possesses the strengths of the three dominant democratic theories—deliberative, aggregative, and agonistic—I think the process democratic approach has much to commend it.

However, I have so far left unexplored key questions about a publicly justified polity that go beyond democratic decision procedures. In particular, I have not explored non-democratic mechanisms for realizing public justification, such as exit mechanisms like federalism and secession. It turns out that a publicly justified polity might need more than democracy to achieve moral peace between persons. Moral peace might require a political and moral order that distributes power across different levels of government and different social organizations. I now turn to explore this idea.

IX. Voice, Exit, and Federalism

I end this chapter by moving away from democratic procedures to other political procedures that focus less on emphasizing *voice* to resolve disputes and more on *exit*. In a diverse society, people will disagree greatly about how to structure social institutions. They can use voice to resolve their disputes by trying to convince others to collective repair or improve institutions. But citizens might also exit the institutions by withdrawing from it in one way or another.

Mainstream public reason liberals have focused exclusively on using voice to conform the legal order to what is publicly justified. One reason for this, I believe, is that they think exit from political order is not a live option. Another reason is that many public reason liberals are hostile to the market, the characteristic exit-based institution, and so they view rights of exit with some suspicion, as exit might threaten or undermine the power and pervasiveness of political rather than economic decision-making.

But on any plausible account of public reason, we must recognize the obvious fact that the democratic process has many limitations; we should also allow that institutions that permit exit could ameliorate some of these limitations. I grant that a social institution that allows for exit gives citizens a reduced incentive to exercise voice in trying to shape that institution, since the capacity to exit increases the opportunity cost of using voice. But I think the worries about voice raised in the previous chapter are sufficiently great that we must figure out

how to balance exit and voice in public reason. By allowing people to exit from their legal order in various ways, they can pressure their legal institutions to conform to what is publicly justified, and this pressure, one hopes, will reduce exit and produce legal orders that can satisfy those it governs.

In this section, I will focus on exit mechanisms in the national context. Once we move to the international level, public justification might require a dramatic reduction in immigration and emigration restrictions, and even allow for greater expatriation. But these are sufficiently complex issues that focusing on national issues can better illustrate my overall point. I will also focus on a single exit mechanism – federalism.

Federalism can be understood as the horizontal division of the powers of government between the federal, state, and local levels. In other words, federalism advocates "federal principles for divided powers between member units and common institutions" where "sovereignty in federal political orders is non-centralized, often constitutionally, between at least two levels so that units at each level have final authority and can be self-governing in some issue area."[732] To put it still another way, federal political orders are "the genus of political organization that is marked by the combination of shared rule and self-rule."[733]

There are several types of federalist organizations, such as federations, unions, confederations, leagues, and hybrids; to give one example, a *federation* involves a "*territorial* division of power between constituent units—sometimes

[732] Føllesdal 2014
[733] Watts 1998, p. 120.

called 'provinces', 'cantons', possibly 'cities', or confusingly 'states'—and a common government."[734] Constitutions typically specify the relevant arrangements and the authorities of both levels are standardly directly elected.[735] In contrast, *confederations* tend to have a weaker center, as they might allow member units to legally exit, only exercise authority delegated by member units, or the center might be subject to a wide range of vetoes.[736]

Here I will focus on federations and the reasons to have federations rather than central states (as opposed to separate states). From what I can tell, there are at least four general reasons members of the public might want a federal order. (1) Federal orders can provide better protections against the central state by protecting unpopular ethnic, regional, or political groups. (2) Federal arrangements can help to accommodate minority groups whose complaints against a centralized over would lead them to attempt to violently secede from the central state. (3) A federalist order may give different groups more economic options, as they can move between federal units depending on the package of fiscal policies in each state. This is sometimes called "fiscal federalism."[737] (4) Federalist orders can also allow groups with conflicting preferences and views to cluster around one another, by providing greater mobility.[738]

These reasons are all reasons for believing that federalism is a critical tool for conforming the legal order to the ideal of public justification. In many cases,

[734] Føllesdal 2014.
[735] Watts 1998, p. 121.
[736] Watts 1998, p. 121.
[737] Oates 1999.
[738] I draw on the list of reasons found in Føllesdal 2014, section 3.2.

there is simply too much diversity at the federal level to come to adequate solutions to political problems. For instance, all serious solutions to political problems might be defeated at the national level, but need a solution badly enough that it is best to devolve approval to lower political orders, allowing the solutions to vary by province, canton, etc. Social groups may find that they can arrive at publicly justified solutions at lower levels of government, where there is less diversity and disagreement. Often states and provinces have much more unified political cultures and so can be expected to come to consensus or at least an inconclusively justified outcome at times when the federal government cannot. So federalism is appropriate when a political decision is necessary but where no solution can be justified at the national level.

I think this is true of some states in the United States with respect to healthcare policy. Utah and Vermont are both relatively homogenous but have starkly opposed political cultures, and there is little reason to force them to solve the same problem in the same way at the same time. And most people in both states disagree about healthcare policy. I see no reason why they should not be allowed to experiment with very different methods of healthcare delivery. For instance, Vermont should be allowed to have a single payer healthcare system while Utah should be allowed to adopt a more market-based solution. When the federal government attempts to overlay a single healthcare system over both states, it will invariably impose a solution that cannot be publicly justified to members of those states. Perhaps the vast majority of the public would prefer a

single government solution that, like the Affordable Care Act, is a kind of hybrid of market-based and government-based proposals. But everyone, even those who have defeaters a piece of national healthcare legislation, is forced into this system regardless of his or her values and commitments. I think the large majority of people agree that government has an important role to play in healthcare, but they disagree sharply about what that role consists in. Consequently, there is little reason not to allow variable accounts of this role to play out in different areas.

The argument for resolving issues at to the national level is that you can solve a problem for everyone all at once and use the resources of the federal government, such as its almost limitless capacity to take on debt and so to finance policies that cannot be financed at the state level. I grant that this may sometimes be a reason to solve problems at the national level. But, in general, when there is sufficient diversity, devolving power to more homogenous sub-groups is the only path forward in achieving the goal of a publicly justified polity.

I think this much is clear in countries outside of the United States where emphasis on states and localities has no association with racism. In US history, the language of states' rights has often served to legitimize the mistreatment of black Americans, and so general federal solutions are viewed with skepticism. But we can solve this problem by disaggregating issues. There is no reason we cannot have a national race policy, due to worries about oppression at the state level, but dramatically more federalism than we have at present on, say, drug policy like the

use of marijuana, the definition of marriage, abortion, higher education policy, healthcare, pensions, and so on.

The best counterargument to favoring federalism is the minority-within-a-minority problem[739] Were the US federal government to hand decisions down to Texas, liberal cities like Austin would find policy less to their liking, and Illinois outside of Chicago might find that public policy is skewed further left than they find acceptable. We can protect minority groups like American blacks by keeping some governmental functions at the national level, but the federalist approach would involve dramatic decentralization, and this would lead to other minorities within minorities getting less of what they want. The ultimate question about the decentralization of government power, then, will be whether decentralization better conforms the legal order to what is publicly justified vis-à-vis centralization.

Another response to the minority-within-a-minority problem is further decentralization. One could, for instance, decentralize state functions in Texas down to the level of counties and cities, as one might in Illinois. This would arguably further conform the legal order to public justification, though again we may face problems that arise from not having uniform solutions to legal problems. I am less worried about this problem than many public reason liberals, however, as I see recent work on polycentric legal and social arrangements as demonstrating that decentralized social institutions can often produce efficient solutions to social

[739] For a discussion and several proposals for solutions to the problem of persistent minorities, similar though not identical to the minority-within-a-minority problem, see Christiano 2010, p. 288-99.

problems in ways that standard rational choice theory and the natural statism of many public reason liberals would not expect. Jane Jacobs' famous work on the structure of cities, along with Elinor and Vincent Ostrom's work on common pool resources and polycentric social solutions helps us to see that many efficient solutions to social problems can be handled at the local governmental level.[740] This work also suggests that in many cases, we should decentralize decisions all the way down to neighborhoods, families, and individuals, though we have already discussed decentralization in terms of associations in Chapter 7.

In sum, then, process democracy is an account of the public justification of constitutional decision procedures at a particular level of government. But some political issues will be so divided that any collective solution to a problem at that level will be defeated. However, if there are publicly justifiable solutions at lower levels of political organization, then public justification requires decentralization in the form of federal arrangements. So federalism is an important supplementary exit mechanism to the voice mechanisms present in process democracy. Yes, federalism has drawbacks, but it is plainly an important supplement to democracy in resolving collective disputes, and bears similarities to jurisdictional rights like the right to private property and freedom of association.

[740] Ostrom 1990, Jacobs 1992.

X. Closing Part III

Part III of this book applies the model of constitutional choice developed in part II of the book to defend three political arrangements: primary rights to freedom of association and private property, and a constitution whose rules are variously democratic and federal.

The ultimate defense of these arrangements is that they help a society to avoid politics as institutionalized agreement. With these rights and rules in place, politics need not be war. This is because a publicly justified constitution improves upon citizens' capacity to discharge their legal obligations, which in turn are publicly justified to improve upon citizens' capacity to discharge their social-moral obligations. These obligations are grounded in public justification, and public justification is grounded in the social and relational value of moral trust, and the form respect for persons takes within a system of moral trust. A constitution of this sort, then, establishes rational moral trust and so creates the conditions for the formation of a genuinely moral peace between persons.

Epilogue: Politics Need Not Be War

This book asks whether politics in the real world must be institutionalized aggression between opposing groups. I have answered that question by arguing that a liberal order of moral peace is not only coherent, but institutionally familiar. Establishing moral peace requires the public justification of the moral order and the legal and constitutional rules required to repair or complete the moral order. The last three chapters have applied my model to argue that moral peace requires a robust right of freedom of association and a variety of economic rights, and that the constitutional should be organized as a federal process democracy. In such a regime, politics would not be war, but rather a process of public negotiation that preserves moral relations between persons.

But now we must ask whether such an order is within our grasp. If real human beings cannot reasonably expect to achieve such an order, then perhaps politics *will* be war even if it doesn't *have* to be war. I think it does not take much to justify the hope that such a regime is within our grasp. I have made no heroic assumptions about human nature, neither especially individualistic or collectivist, religious or secular. I have not assumed that humans are basically good or that they will agree about what is good. I have not even assumed that people will agree upon the right conception of justice or social ontology. I have only moderately idealized persons and I account for morally corrupt and self-interested agents in my model of constitutional choice.

Also, the regimes I describe are not terribly different from our own. A publicly justified polity is likely to be liberal democratic market order with a rich and robustly protected associational life. So to insist that a morally peaceful polity is not within our grasp strikes me as unfounded complacency. I conclude that the war parties in philosophy and politics are wrong. Politics can preserve moral relations between persons.

Some readers will remain impressed by the depravity of humanity, our nasty history, and the relations of oppression that continue to generate injustice to this day; they have no hope that we can do more than to achieve a decent balance of power. But I ask those readers to simply observe the advanced liberal democratic market orders in the world today. Their very existence is a challenge to continuing skepticism about the capacity of human beings to establish and maintain decently moral and peaceful social orders.

The message of the book, then, is that we should step back from our determination to destroy each other on the political field of battle. If we care about being reconciled to one another, about trusting those who are different from us, then we need not despair. We can find peace by pursuing certain kinds of political and economic arrangements. There is no mythical force preventing us from forming more peaceful relations with one another, no source of inevitable struggle and conflict. Moral peace is within our grasp, if we want it. Whether we establish it is up to us.

Works Cited

Abbott, Elizabeth. 2011. *A History of Marriage*. New York: Seven Stories Press.

Abrams, B.A., and M.A. Schmidtz. 1984. The Crowding out Effect of Government Charitable Contributions: Cross Sectional Evidence. *National Tax Journal* 37, 563-568.

Aligica, Paul Dragos. 2014. *Institutional Diversity and Political Economy: The Ostroms and Beyond*. New York: Oxford University Press.

Altschul, Jon. 2014. Epistemic Entitlement. Internet Encyclopedia of Philosophy, http://www.iep.utm.edu/ep-en/.

Ansolabehere, Stephen, John Figueiredo, and James Snyder. 2003. Why Is There So Little Money in Money in U.S. Politics? *Journal of Economic Perspectives* 17, 105-130.

Aristotle. 2000. *The Nicomachean Ethics*. Translated by Terence Irwin. Boston: Hackett Company, Inc.

Arneson, Richard. 2013. Egalitarianism. Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/egalitarianism.

Badhwar, Neera, and Roderick Long. 2014. Ayn Rand. Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/ayn-rand/.

Baier, A. C. 1986. Trust and Antitrust. *Ethics* 96, 231-260.

Baier, Kurt. 1958. *The Moral Point of View: A Rational Basis of Ethics*. Ithaca: Cornell University Press.

———. 1954. The Point of View of Morality. *Australasian Journal of Philosophy* 32, 104-135.

Barber, Benjamin. 1984. *Strong Democracy: Participatory Politics for a New Age*. Berkeley, CA: University of California Press.

Barry, Brian. 1995. John Rawls and the Search for Stability. *Ethics* 105, 874-915.

Bartels, Larry. 2010. *Unequal Democracy: The Political Economy of the New Gilded Age*. Princeton: Princeton University Press.

Bedau, Hugo Adam, and Erin Kelly. 2010. Punishment. http://plato.stanford.edu/archives/spr2010/entries/punishment/.

Beito, David. 2000. *From Mutual Aid to the Welfare State: Fraternal Societies and Social Service, 1890-1967*. Chapel Hill: University of North Carolina Press.

Benn, Stanley. 1988. *A Theory of Freedom*. New York: Cambridge University Press.

Benson, Bruce. 2011. *The Enterprise of Law: Justice without the State*. Oakland: The Independent Institute.

Berlin, Isaiah. 1969. *Four Essays on Liberty*. Oxford: Oxford University Press.

Bicchieri, Cristina. 2006. *The Grammar of Society*. New York: Cambridge University Press.

———. 2016. *Norms in the Wild: How to Diagnose, Measure, and Change Social Norms*. New York: Oxford University Press.

Bicchieri, Cristina, and Ryan Muldoon. 2011. Social Norms. http://plato.stanford.edu/entries/social-norms/.

Bjørnskov, Christian. 2006. Determinants of Generalized Trust: A Cross-Country Comparison. *Public Choice* 130, 1-21.

Blevins, Sue. 1995. The Medical Monopoly: Protecting Consumers or Limiting Competition? *Policy Analysis* 246, 1-36.

Boberg-Fazlić, Nina, and Paul Sharp. 2013. Does Welfare Spending Crowd out Charitable Activity? Evidence from Historical England under the Poor Laws. *EHES Working Paper* 49, 1-33.

Bohman, James, and William Rehg, eds. 1998. *Deliberative Democracy: Essays on Reason and Politics*. New York: MIT Press.

Bolton, Gary, and Katok Elena. 1998. An Experimental Text of the Crowding out Hypothesis: The Nature of Beneficent Behavior. *Journal of Economic Behavior and Organization* 37, 315-331.

Bou-Habib, Paul. 2015. Gaus on Coercion and Welfare-State Capitalism: A Critique. *Political Studies*, 1-13.

Bowman, James, and Henry Richardson. 2009. Deliberative Democracy, Liberalism, and Reasons That All Can Accept. *Journal of Political Philosophy* 17, 1-22.

Boyd, Robert, and Peter Richerson. 2005. *The Origin and Evolution of Cultures*. New York: Oxford University Press.

Branham, J. Alexander, Stuart Soroka, and Christopher Wlezien. 2016. When Do the Rich Win? , 1-31.

Brennan, Geoffrey, and Loren Lomasky. 1993. *Democracy and Decision: The Pure Theory of Electoral Preference*. Cambridge: Cambridge University Press.

Brennan, Jason. 2011. *The Ethics of Voting*. Princeton: Princeton University Press.

Brennan, Jason, and Peter Jaworski. 2016. *Markets without Limits: Moral Virtues and Commercial Interests*. New York: Routledge.

Brennan, Jason, and John Tomasi. 2011. Classical Liberalism. In *The Oxford Handbook of Political Philosophy*, edited by David Estlund, 115-132. New York: Oxford University Press.

Buchanan, James. 1975. *The Limits of Liberty: Between Anarchy and Leviathan*. Chicago: University of Chicago Press.

———. 1999. Taxation in Fiscal Exchange. In *The Collected Works of James M. Buchanan, Volume I: The Logical Foundations of Constitutional Liberty*, 133-149. Indianapolis, IN: Liberty Fund.

Buchanan, James, and Geoffrey Brennan. 1985. *The Reason of Rules: Constitutional Political Economy*. New York: Cambridge University Press.

Buchanan, James, and Gordon Tullock. 1962. *The Calculus of Consent*. Ann Arbor, MI: University of Michigan Press.

Campbell, James. 2016. *Polarized: Making Sense of a Divided America*. Princeton: Princeton University Press.

Caplan, Bryan. 2007. *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. Princeton: Princeton University Press.

Castelfranchi, Christiano, and Rino Falcone. 2010. *Trust Theory: A Socio-Cognitive and Computational Model*. West Sussex: Wiley.

Chambers, Simone, and Jeffrey Kopstein. 2001. Bad Civil Society. *Political Theory* 29, 837-865.

———. 2006. Civil Society and the State. In *The Oxford Handbook of Political Theory*, edited by John Dryzek, Bonnie Honig and Anne Phillips, 363-381. New York: Oxford University Press.

Christiano, Thomas. 2010. *The Constitution of Equality: Democratic Authority and Its Limits*. New York: Oxford University Press.

Cocking, Dean, and Jeanette Kennett. 2000. Friendship and Moral Danger. *Journal of Philosophy* 97, 278-296.

Coffey, Bentley, Patrick McLaughlin, and Pietro Peretto. 2016. The Cumulative Cost of Regulations. *Mercatus Working Paper*, 1-72.

Cohen, G.A. 2008. *Rescuing Justice and Equality*. New York: Harvard University Press.

Cohen, Joshua. 1991. Review of Robert Dahl's Democracy and Its Critics. *Journal of Politics* 53, 221-225.

Cohen, Marc. 2015. Alternative Conceptions of Generalized Trust (and the Foundations of the Social Order). *Journal of Social Philosophy* 46, 463-478.

Cole, G.D.H. 1920. *Social Theory*. New York: Frederick A. Stokes.

Connolly, William. 2002. *Identity/Difference: Democratic Negotiations of Political Paradox, Expanded Edition*. Minneapolis: University of Minnesota Press.

Cooper, John, ed. 1997. *Plato: Complete Works*. Indianapolis: Hackett.

D'Agostino, Fred. 1996. *Free Public Reason: Making It up as We Go*. New York: Oxford University Press.

Dahl, Robert. 1989. *Democracy and Its Critics*. New Haven: Yale University Press.

Darwall, Stephen. 2006. *The Second-Person Standpoint: Morality, Respect, and Accountability*. New York: Harvard University Press.

Dasgupta, Partha, and Ismail Serageldin, eds. 2000. *Social Capital: A Multifaceted Perspective*. Washington, D.C.: The World Bank.

Downs, Anthony. 1957. *An Economic Theory of Democracy*. New York: Harper.

Easterlin, Richard. 1974. Does Economic Growth Improve the Human Lot? Some Empirical Evidence. In *Nations and Households in Economic Growth: Essays in Honor of Moses Abramovitz*, edited by Paul A. David and Melvin W. Reder, 89-124. New York: Academic Press.

Ebeling, Richard, ed. 1996. *The Austrian Theory of the Trade Cycle and Other Essays*. Auburn, AL: Ludwig von Mises Institute.

Ebels-Duggan, Kyla. 2008. Against Beneficence: A Normative Account of Love. *Ethics* 119, 142-170.

———. 2010. The Beginning of Community: Politics in the Face of Disagreement. *The Philosophical Quarterly* 60, 50-71.

Eberle, Christopher. 2002. *Religious Conviction in Liberal Politics*. New York: Cambridge University Press.

———. 2005. What Does Respect Require? In *Religion in the Liberal Polity*, edited by Terence Cuneo, 173-194. Notre Dame: University of Notre Dame Press.

Edmundson, William. 2004. State of the Art: The Duty to Obey the Law. *Legal Theory* 10, 215-259.

Ehrenberg, Kenneth. 2011. Joseph Raz's Theory of Authority. *Philosophy Compass* 6, 884-894.

Enns, Peter. 2015. Relative Policy Support and Coincidental Representation. *Perspectives on Politics* 13, 1053-1064.

Enoch, David. 2013. The Disorder of Public Reason. *Ethics* 124, 141-176.

Fahmy, Melissa Seymour. 2010. Kantian Practical Love. *Pacific Philosophical Quarterly* 91, 313-331.

Farrant, Andrew, and Edward McPhail. 2010. Does F.A. Hayek's Road to Serfdom Deserve to Make a Comebac? *Challenge* 53, 96-120.

Farrell, Joseph, and Matthew Rabin. 1996. Cheap Talk. *The Journal of Economic Perspectives* 10, 103-118.

Feinberg, Joel. 1987. *Harm to Others: The Moral Limits of the Criminal Law*. Vol. 1. New York: Oxford University Press.

Finnis, John. 1984-5. The Authority of Law in the Predicament of Contemporary Social Theory. *Notre Dame Journal of Law, Ethics, and Public Policy* 1, 115-137.

Fishkin, James. 2009. *When the People Speak: Deliberative Democracy and Public Consultation*. Oxford: Oxford University Press.

Føllesdal, Andreas. 2014. Federalism. Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/federalism.

Francis. 2015. Laudato Si' [Encyclical Letter on Our Common Home]. http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

Frankfurt, Harry. 2015. *On Inequality*. Princeton: Princeton University Press.

Freeman, Samuel. 2000. Deliberative Democracy: A Sympathetic Comment. *Philosophy and Public Affairs* 29, 371-418.

———. 2014. Original Position. http://plato.stanford.edu/archives/fall2014/entries/original-position/.

Friedman, Benjamin. 2005. *The Moral Consequences of Economic Growth*. New York: Knopf.

Fukuyama, Francis. 1999. *The Great Disruption: Human Nature and the Reconstitution of Social Order*. London: Profile.

———. 1995. *Trust: The Social Virtues and the Creation of Prosperity*. New York: Free Press.

Fuller, Lon. 1969. *The Morality of Law: Revised Edition*. New Haven: Yale University Press.

———. 1969. Two Principles of Association. In *Nomos Xi: Voluntary Associations*, edited by John Chapman and J. Roland Pennock, 3-23. New York: Atherton Press.

Ganghof, Steffen. 2013. Does Public Reason Require Supermajoritarian Democracy? Liberty, Equality, and History in the Justification of Political Institutions. *Politics, Philosophy and Economics* 12, 179-196.

Gaus, Gerald. 2009. The Idea and Ideal of Capitalism. In *The Oxford Handbook of Business Ethics*, edited by George Brenkert and Tom Beauchamp, 73-99. Oxford: Oxford University Press.

———. 1996. *Justificatory Liberalism: An Essay on Epistemology and Political Theory*. New York: Oxford University Press.

———. 2007. *On Philosophy, Politics, and Economics*. Belmont, CA: Wadsworth.

———. 2011. *The Order of Public Reason*. New York: Cambridge University Press.

———. 2000. *Political Concepts and Political Theories*. Boulder: Westview.

———. 2011. Retributive Justice and Social Cooperation. In *Retributivism: Essays on Theory and Practice*, edited by Mark White, 73-90. Oxford: Oxford University Press.

———. 2008. The (Severe) Limits of Deliberative Democracy as the Basis for Political Choice. *Theoria: A Journal of Social and Political Theory* 117, 26-53.

———. 1999. *Social Philosophy*. Armonk: M.E. Sharpe.

———. 2016. *The Tyranny of the Ideal*. Princeton: Princeton University Press.

———. 1990. *Value and Justification: The Foundations of Liberal Theory*, Cambridge Studies in Philosophy. Cambridge: Cambridge University Press.

Gauthier, David. 1979. David Hume, Contractarian. *The Philosophical Review* 88, 3-38.

———. 1986. *Morals by Agreement*. New York: Oxford University Press.

Gilens, Martin. 2012. *Affluence & Influence: Economic Inequality and Political Power in America*. Princeton: Princeton University Press.

Gilens, Martin, and Benjamin Page. 2014. Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens. *Perspectives on Politics* 12, 564-581.

Glaeser, Edward, David Laibson, and B. Sacerdote. 2002. The Economic Approach to Social Capital. *The Economic Journal* 112, 437-458.

Goldman, Alvin, and Thomas Blanchard. 2015. Social Epistemology. http://plato.stanford.edu/entries/epistemology-social/ - PeeDis.

Goodin, Robert, and David Schmidtz. 1998. *Social Welfare and Individual Responsibility*. New York: Cambridge University Press.

Green, T. H. 1895. *Lectures on the Principles of Political Obligation*. New York: Longman's Green and Co.

———. 2011. On the Different Senses of 'Freedom' as Applied to Will and to the Moral Progress of Man. In *Works of Thomas Hill Green, Volume 2, Philosophical Works*, edited by R.L. Nettleship, 307-333. Cambridge: Cambridge University Press.

Greenawalt, Kenneth. 2016. Hobby Lobby: Its Flawed Interpretive Techniques and Standards of Application. In *The Rise of Corporate Religious Liberty*, edited by Micah Schwartzman, Chad Flanders and Zoë Robinson, 125-148. New York: Oxford University Press.

Grootaert, Christiaan, Deepa Narayan, Veronica Nyhan Jones, and Michael Woolcock. 2004. Measuring Social Capital: An Integrated Questionnaire. *World Bank Working Papers*, 1-52.

Grootaert, Christiaan, and Thierry van Bastelaer. 2001. Understanding and Measuring Social Capital: A Synthesis of Findings and Recommendations from the Social Capital Initiative. *World Bank Working Papers*, 1-31.

Gur, Noam. 2007. Legal Directives in the Realm of Practical Reason: A Challenge to the Pre-Emption Thesis. *American Journal of Jurisprudence* 52, 159-228.

Gürsözlü, Fuat. 2009. Agonism and Deliberation--Recognizing the Difference. *Journal of Political Philosophy* 17, 356-368.

Gutmann, Amy, and Dennis Thompson. 2004. *Why Deliberative Democracy?* Princeton: Princeton University Press.

Habermas, Jurgen. 1998. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. New York: MIT Press.

———. 1999. *Moral Consciousness and Communicative Action*. Cambridge: MIT Press.

———. 1997. Popular Sovereignty as Procedure. In *Deliberative Democracy: Essays on Reasons and Politics*, edited by James Bohman and William Rehg. Cambridge: MIT Press.

———. 1995. Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism. *The Journal of Philosophy* 92, 109-131.

Hall, Robert, and Charles Jones. 1999. Why Do Some Countries Produce So Much More Output Per Worker Than Others? *The Quarterly Journal of Economics* 114, 83-116.

Hamiton, Alexander, James Madison, and John Jay. 2003. *The Federalist Papers*. New York: Signet.

Hanson, Robin. 2013. Shall We Vote on Values, but Bet on Beliefs? *Journal of Political Philosophy* 21, 151-178.

Hardin, Russell. 2004. *Trust and Trustworthiness*. New York: Russell Sage Foundation.

Hart, H. L. A. 1961. *The Concept of Law*. Oxford: Clarendon Press.

Hasnas, John. 2013. Is There a Moral Duty to Obey the Law? *Social Philosophy and Policy* 30, 450-479.

———. 1995. The Myth of the Rule of Law. *Wisconsin Law Review* 199, 199-233.

Hayek, F. A. 2011. *The Constitution of Liberty: The Definitive Edition*. Edited by Ronald Hamowy. Chicago: The University of Chicago Press.

———. 1979. *The Counter-Revolution of Science: Studies on the Abuse of Reason*. 2nd ed. Indianapolis: Liberty Fund, Inc.

———. 1973. *Law Legislation and Liberty, Volume 1: Rules and Order*. Chicago: University of Chicago Press.

———. 1978. *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice*. Chicago: University of Chicago Press.

———. 1979. *Law, Legislation and Liberty, Volume 3: The Political Order of a Free People*. Chicago: University of Chicago Press.

———. 2007. *The Road to Serfdom (the Definitive Edition)*. Edited by Bruce Caldwell. London: Routledge.

———. 1952. *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*. Chicago: University of Chicago Press.
———. 1945. The Use of Knowledge in Society. *American Economic Review* 35, 519-530.
Healy, Gene. 2009. *The Cult of the Presidency, Updated: America's Dangerous Devotion to Executive Power*. Washington, D.C.: Cato Institute.
Hegel, G.W.F. 1991. *Elements of the Philosophy of Right*. Edited by Allen Wood. New York: Cambridge University Press.
Hensel, Paul, Gary Goertz, and Paul Diehl. 2000. The Democratic Peace and Rivalries. *Journal of Politics* 62, 1173-1188.
Hildalgo, Javier, and Christopher Freiman. 2016. Liberalism or Immigration Restrictions, but Not Both. *Journal of Ethics and Social Philosophy* 10, 1-22.
Hirst, Paul. 1997. *From Statism to Pluralism*. London: UCL Press.
Hjerppe, Reino. 1998. Social Capital and Economic Growth. *Government Institute for Economic Research (VATT)*, 1-26.
Hobbes, Thomas. 1994. *Leviathan*. Edited by Edwin Curley. Indianapolis: Hackett.
Honig, Bonnie. 1993. *Political Theory and the Displacement of Politics*. Ithica: Cornell University Press.
Honore, A.M. 1961. Ownership. In *Oxford Essays in Jurisprudence*, edited by A.G. Guest, xx-xx. Oxford: Oxford University Press.
Hosmer, Larue. 1995. Trust: The Connecting Link between Organizational Theory and Philosophical Ethics. *The Academy of Management Review* 20, 379-403.
Huemer, Michael. 2013. *The Problem of Political Authority: An Examination of the Right to Coerce and the Duty to Obey*. New York: Palgrave Macmillan.
Hume, David. 2008. Of the Original Contract. In *David Hume, Selected Essays*, edited by Stephen Copley and Andrew Edgar, 274-291. New York: Oxford University Press.
Jacobs, Jane. 1992. *The Death and Life of Great American Cities*. New York: Random House.
Jankauskas, Vidmantas, and Janina Seputiene. 2007. The Relationship between Social Capital, Governance and Economic Performance in Europe. *Business: Theory and Practice* 8, 131-138.
Johnston, Mark. 1991. Explanation, Response-Dependence and Judgment-Dependence. In *Response-Dependent Concepts*, edited by P. Menzies, 122-183: Working Papers in Philosopy: Philosophy Program (RSSS): Australian National University.
Joyce, Richard. 2015. Moral Anti-Realism. http://plato.stanford.edu/archives/sum2015/entries/moral-anti-realism/.
Kahneman, Daniel. 2011. *Thinking: Fast and Slow*. New York: Farrar, Straus and Giroux.
Kant, Immanuel. [1797] 2009. *The Metaphysics of Morals*. Translated by Mary Gregor. Edited by Mary Gregor. New York: Cambridge University Press.
Kenworthy, Lane. 2013. *Progress for the Poor*. New York: Oxford University Press.

Kerr, Sari Pekkala, and Wiliam R. Kerr. 2011. Economic Impacts of Immigration: A Survey. *National Bureau of Economic Research*, 1-48.
Köchler, Hans. 2001. *Democracy and the International Rule of Law: Propositions for an Alternative World Order*: Springer.
Kolodny, Niko. 2003. Love as Valuing a Relationship. *The Philosophical Review* 112, 135-189.
Korsgaard, Christine. 1983. Two Distinctions in Goodness. *The Philosophical Review* 92, 169-195.
Krugman, Paul. 2012. *End This Depression Now*. New York: W. W. Norton & Co.
Kukathas, Chandran. 2007. *The Liberal Archipelago*. New York: Oxford University Press.
Laclau, Ernesto, and Chantal Mouffe. 2014. *Hegemony and Socialist Strategy*. London: Verso.
Landemore, Hélène 2013. *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many*. Princeton: Princeton University Press.
Larmore, Charles. 2008. *The Autonomy of Morality*. New York: Cambridge University Press.
Leeson, Peter. 2014. *Anarchy Unbound: Why Self-Governance Works Better Than You Think*. New York: Cambridge University Press.
Lefkowitz, David. 2005. A Contractualist Defense of Democratic Authority. *Ratio Juris* 18, 346-364.
Levy, Jacob. 2015. *Rationalism, Pluralism, and Freedom*. New York: Oxford University Press.
Lewis, C. S. 1960. *The Four Loves*. Orlando: Harcourt Books.
Lister, Andrew. 2010. Public Justification and the Limits of State Action. *Politics, Philosophy and Economics* 9, 151-175.
———. 2013. *Public Reason and Political Community*: Bloomsbury Academic.
Locke, John. [1690] 1988. *Two Treatises of Government*. Cambridge: Cambridge University Press.
Lomasky, Loren. 1987. *Persons, Rights, and the Moral Community*. New York: Oxford University Press.
Luttmer, Erzo, and Monica Singhal. 2014. Tax Morale. *Journal of Economic Perspectives* 28, 149-168.
Mack, Eric. 2000. In Defense of the Jurisdiction Theory of Rights. *The Journal of Ethics* 4, 71-98.
Mackie, Gerry. 2003. *Democracy Defended*. Cambridge: Cambridge University Press.
Marx, Karl, and Friedrich Engels. 2011. *Capital: A Critique of Political Economy, Volume One*. Translated by Samuel Moore and Edward Aveling. Mineola, NY: Dover Publications.
McCabe, David. 2010. *Modus Vivendi Liberalism: Theory and Practice*. New York: Cambridge University Press.
McCloskey, Deirdre. 2016. *Bourgeois Equality: How Ideas, Not Capital, or Institutions, Enriched the World*. Chicago: University of Chicago Press.

Meade, James. 1964. *Efficiency, Equality and the Ownership of Property*. London: George Allen and Unwin.
Messick, David, and Roderick Kramer. 2001. Trust as a Form of Shallow Morality. In *Trust in Society*, edited by Karen Cook, 89-117. New York: Russell Sage Foundation.
Mill, John Stuart. 1963. *Collected Works of John Stuarl Mill*. Edited by J. M. Robson. Vol. 21. Toronto: University of Toronto Press.
Morris, Christopher. 2002. *An Essay on the Modern State*. New York: Cambridge University Press.
Mouffe, Chantal. 2009. *The Democratic Paradox*. London: Verso.
Mueller, Dennis. 2003. *Public Choice Iii*. New York: Cambridge University Press.
Muldoon, Ryan. 2017. *Diversity and the Social Contract*. New York: Routledge.
Muñiz-Fraticelli, Victor. 2014. *The Structure of Pluralism*. New York: Oxford University Press.
Murphy, Liam, and Thomas Nagel. 2002. *The Myth of Ownership: Taxes and Justice*. New York: Oxford University Press.
Murphy, Mark. 2006. *Philosophy of Law: The Fundamentals*. Oxford: Wiley-Blackwell.
Murray, Charles. 2006. *In Our Hands: A Plan to Replace the Welfare State*. Washington D.C.: American Enterprise Institute Press.
Narveson, Jan. 2001. *The Libertarian Idea*. Peterborough, Ontario: Broadview Press.
Nelson, James. 2013. Conscience, Incorporated. *Michigan State Law Review* 1565, 1565-1620.
———. 2015. The Freedom of Business Association. *Columbia Law Review* 115, 461-513.
North, Douglass. 1990. *Institutions, Institutional Change, and Economic Performance*. New York: Cambridge University Press.
Nozick, Robert. 1974. *Anarchy, State and Utopia*. New York: Basic Books.
Nunes, Marcus, and Benjamin Marcus Cole. 2013. *Market Monetarism: Roadmap to Economic Prosperity*: CreateSpace Independent Publishing Platform.
Nunner-Winkler, Gertrude, and Beate Sodian. 1988. Children's Understanding of Moral Emotions. *Child Development* 59, 1323-1338.
O'Neill, Martin. 2009. Three Rawlsian Routes Towards Economic Democracy. *Revue de philosophie economique* 17, 29-55.
O'Neill, Martin, and Thad Williamson. 2012. Free Market Fairness: Is There a Moral Case for Free Markets? *Boston Review*, http://www.bostonreview.net/BR37.6/martin_oneill_thad_williamson_john_tomasi_free_market_fairness_libertarianism.php.
———. 2012. *Property-Owning Democracy: Rawls and Beyond*. Hoboken: Wiley-Blackwell.
Oates, Wallace. 1999. An Essay on Fiscal Federalism. *Journal of Economic Literature* 37, 1120-1149.
Olson. 1984. *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities*. New Haven: Yale University Press.

Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.

Ostrom, Elinor, and James Walker, eds. 2003. *Trust & Reciprocity: Interdisciplinary Lessons from Experimental Research*. New York: Russell Sage Foundation.

Oz Yalama, Gamze, and Erdal Gumus. 2013. Determinants of Tax Evasion Behavior: Empirical Evidence from Survey Data. *International Business and Management* 6, 15-23.

Pappas, George. 2005. Internalist Vs. Externalist Conceptions of Epistemic Justification. http://plato.stanford.edu/entries/justep-intext/ - 3.

Parkinson, John, and Jane Mansbridge, eds. 2012. *Deliberative Systems: Deliberative Democracy at the Large Scale*. Cambridge: Cambridge University Press.

Paxton, Pamela. 2007. Association Memberships and Generalized Trust: A Multilevel Model across 31 Countries. *Social Forces* 86, 47-76.

Pettit, Philip. 2013. Taking Back the Economy: The Market as a Res Publica. Open Democracy, https://www.opendemocracy.net/print/70670.

Piketty, Thomas. 2014. *Capital in the 21st Century*. Cambridge: Belknap Press.

Pollock, John. 2006. *Thinking About Acting*. New York: Oxford University Press.

Putnam, Robert. 1995. Bowling Alone: Democracy in America at the End of the Twentieth Century. *Journal of Democracy* 6, 65-78.

———. 2001. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster.

———. 1994. *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton: Princeton University Press.

Quong, Jonathan. 2011. *Liberalism without Perfection*. New York: Oxford University Press.

Railton, Peter. 1984. Alienation, Consequentialism, and the Demands of Morality. *Philosophy and Public Affairs* 13, 134-171.

Rawls, John. 2001. *Justice as Fairness: A Restatement*. Edited by Erin Kelly. New Delhi: Universal Law Publishing Co. Pvt. Ltd.

———. 1980. Kantian Constructivism in Moral Theory. *The Journal of Philosophy* 77, 515-572.

———. 2002. *The Law of Peoples with "the Idea of Public Reason Revisited"*. Cambridge: Harvard University Press.

———. 2005. *Political Liberalism*. 2nd ed. New York: Columbia University Press.

———. 1999. *A Theory of Justice*. Revised ed. Cambridge: Belknap Press.

———. 1971. *A Theory of Justice*. New York: Oxford University Press.

Raz, Joseph. 2009. *The Authority of Law: Essays on Law and Morality*. New York: Oxford University Press.

———. 1970. *The Concept of a Legal System*. New York: Oxford University Press.

———. 1990. Facing Diversity: The Case of Epistemic Abstinence. *Philosophy and Public Affairs* 19, 3-46.

———. 1986. *The Morality of Freedom*. Oxford: Oxford University Press.

———. 1990 (1975). *Practical Reason and Norms*. Princeton: Princeton University Press.

Rescorla, Michael. 2015. Convention. http://plato.stanford.edu/entries/convention/.

Richardson, Grant. 2006. Determinants of Tax Evasion: A Cross-Country Investigation. *Journal of International Accounting, Auditing, and Taxation* 15, 150-169.

Riker, William. 1988. *Liberalism against Populism: A Confrontation between the Theory of Democracy and the Theory of Social Choice*. Long Grove: Waveland Press.

Rognlie, Matthew. 2015. Deciphering the Fall and Rise in the Net Capital Share. *Brookings Papers on Economic Activity*, 1-69.

Rose, David. 2014. *The Moral Foundation of Economic Behavior*. New York: Oxford University Press.

Rosenblum, Nancy. 1998. *Membership and Morals*. Princeton: Princeton University Press.

Rousseau, Jean-Jacques. 1997. *Rousseau: 'The Social Contract' and Other Later Political Writings*. Edited by Victor Gourevitch, Cambridge Texts in the History of Political Thought. New York: Cambridge University Press.

Rubin, Olivier. 2011. *Democracy and Famine*. London Routledge.

Sabatini, Fabio. 2007. The Role of Social Capital in Economic Development. 1-28: AICCON Cultura Cooperazione.

Sabin, Paul. 2014. *The Bet: Paul Ehrlich, Julian Simon, and Our Gamble over Earth's Future*. New Haven: Yale University Press.

Sabl, Andrew. 2015. The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide. *Perspectives on Politics* 13, 345-365.

Scanlon, Thomas. 2011. Libertarianism and Liberty: How Not to Argue for Limited Government and Lower Taxes. Boston Review, http://bostonreview.net/forum/libertarianism-and-liberty.

Schmidtz, David. 2006. *The Elements of Justice*. New York: Cambridge University Press.

Schumpeter, Joseph. 1942. *Capitalism, Socialism and Democracy*. 5th ed. New York: Harper and Brothers.

Scott, James C. 2009. *The Art of Not Being Governed*. New Haven: Yale University Press.

———. 1999. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press.

Sen, Amartya. 2009. *The Idea of Justice*. Cambridge: Harvard University Press.

———. 1981. *Poverty and Famines*. New York: Oxford University Press.

Shapiro, Scott. 2004. Authority. In *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules Coleman and Scott Shapiro, 382-439. New York: Oxford.

Shiffrin, Seana. 2005. What Is Really Wrong with Compelled Association? *Northwestern University Law Review* 99, 839-888.

Shoemaker, David. 2011. Psychopathy, Responsibility, and the Moral/Conventional Distinction. *Southern Journal of Philosophy* 49 (Special Supplemental), 99-124.

Simmons, A. John. 2005. The Duty to Obey and Our Natural Moral Duties. In *Is There a Duty to Obey the Law?*, edited by A. John Simmons and Christopher Wellman, 93-196. Cambridge: Cambridge University Press.

———. 1981. *Moral Principles and Political Obligations*. Princeton: Princeton University Press.

Smith, Adam. 1981. *An Inquiry into the Nature and Causes of the Wealth of Nations, Vol. I and Ii*. Edited by R.H. and A.S. Skinner Campbell, Vol. Ii of the Glasgow Edition of the Works and Correspondence of Adam Smith. Indianapolis: Liberty Fund.

Steiner, Hillel. 1977. The Structure of a Set of Compossible Rights. *Journal of Philosophy* 74, 767-775.

Stevenson, Betsey, and Justin Wolfers. 2008. Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox. *Brookings Papers on Economic Activity*, 1-102.

Strawson, P. F. 1974. *Freedom and Resentment and Other Essays*. New York: Routledge.

Stringham, Edward. 2015. *Private Governance: Creating Order in Economic and Social Life*. New York: Oxford University Press.

Stump, Eleanore. 2012. *Wandering in Darkness: Narrative and the Problem of Suffering*. New York: Oxford University Press.

Sugden, Robert. 1993. Normative Judgments and Spontaneous Order: The Contractarian Element in Hayek's Thought. *Constitutional Political Economy* 4, 393-424.

Sunstein, Cass. 2011. *Going to Extremes: How Like Minds Unite and Divide*. New York: Oxford University Press.

Sunstein, Cass, and Stephen Holmes. 1999. *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W.W. Norton & Co.

Tajfel, Henri, ed. 2010. *Social Identity and Intergroup Relations*. New York: Cambridge University Press.

Tamir, Yael. 1998. Revisiting the Civic Sphere. In *Freedom of Association*, edited by Amy Gutmann, 214-238. Princeton: Princeton University Press.

Tanner, Michael. 1996. *The End of Welfare: Fighting Poverty in the Civil Society*. Washington D.C.: Cato Institute.

Taylor, Gabriele. 1985. *Pride, Shame, and Guilt: Emotions of Self-Assessment*. Oxford: Clarendon Press.

Tetlock, Philip. 2006. *Expert Political Judgment: How Good Is It? How Can We Know?* Princeton: Princeton University Press.

———. 2015. *Superforecasting: The Art and Science of Prediction*. New York: Penguin.

Thorpe, Andrew. 2001. *A History of the British Labour Party*. New York: Palgrave MacMillan.

Thrasher, John, and Kevin Vallier. 2015. The Fragility of Consensus: Public Reason, Diversity, and Stability. *The European Journal of Philosophy* 23, 933-954.
Tomasi, John. 2012. *Free-Market Fairness*. Princeton: Princeton University Press.
Tullock, Gordon. 1972. The Purchase of Politicians. *Western Economic Journal* 10, 354-355.
———. 2005. *The Rent Seeking Society (the Selected Works of Gordon Tullock, V. 5)*. Indianapolis: Liberty Fund.
Uslaner, Eric. 2002. *The Moral Foundations of Trust*. New York: Cambridge University Press.
Vallier, Kevin. 2016. Gaus, Hayek, and the Place of Civil Religion in a Free Society. *Review of Austrian Economics*, 5-35.
———. 2016. In Defense of Intelligible Reasons in Public Justification. *Philosophical Quarterly* 66, 596-616.
———. 2014. *Liberal Politics and Public Faith: Beyond Separation*. New York: Routledge.
———. 2015. On Distinguishing Publicly Justified Polities from Modus Vivendi Regimes. *Social Theory and Practice* 41, 207-229.
———. 2016. On Jonathan Quong's Sectarian Political Liberalism. *Criminal Law and Philosophy*, 1-20.
Vallier, Kevin, and Fred D'Agostino. 2012. Public Justification. Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/justification-public/.
Van Parijs, Philippe. 2004. Basic Income: A Simple and Powerful Idea for the Twenty-First Century. *Politics and Society* 32, 7-39.
Van Schoelandt, Chad. 2015. Justification, Coercion, and the Place of Public Reason. *Philosophical Studies* 172, 1031-1050.
Vanderschraaf, Peter. 2016. *Strategic Justice*. New York: Oxford University Press.
Veenhoven, Ruut, and Michael Hagerty. 2006. Rising Happiness in Nations 1946-2004: A Reply to Eastern. *Social Indicators Research* 79, 421-436.
Velleman, David. 1999. Love as a Moral Emotion. *Ethics* 109, 338-374.
Waldron, Jeremy. 2006. The Core of the Case against Judicial Review. *The Yale Law Journal* 115, 1346-1406.
———. 1999. *Law and Disagreement*. New york: Oxford University Press.
———. 1993. Special Ties and Natural Duties. *Philosophy and Public Affairs* 22, 3-30.
Wall, Steven. 1998. *Liberalism, Perfectionism and Restraint*. New York: Cambridge University Press.
Warmke, Brandon. 2016. The Normative Significance of Forgiveness. *Australasian Journal of Philosophy* 94, 1-17.
Warren, Mark. 2001. *Democracy and Association*. Princeton: Princeton University Press.
Watts, Ronald. 1998. Federalism, Federal Political Systems, and Federations. *Annual Review of Political Science* 1, 117-137.

Wellman, Christopher. 2005. Samaritanism and the Duty to Obey the Law. In *Is There a Duty to Obey the Law?*, edited by A. John Simmons and Christopher Wellman, 3-89. Cambridge: Cambridge University Press.

Wenman, Mark. 2013. *Agonistic Democracy: Constituent Power in the Era of Globalization*. Cambridge: Cambridge University Press.

White, Stuart. 1998. Trade Unionism in a Liberal State. In *Freedom of Association*, edited by Amy Gutmann, 330-356. Princeton: Princeton University Press.

Whiteley, Paul. 2002. Economic Growth and Social Capital. *Political Studies* 48, 443-466.

Williamson, Thad. 2013. Constitutionalizing Property-Owning Democracy. *Analyse & Kritik* 1, 237-253.

———. 2009. Who Owns What? An Egalitarian Interpretation of John Rawls's Idea of a Property-Owning Democracy. *Journal of Social Philosophy* 40, 434-453.

Wolff, Robert Paul. 1970. *In Defense of Anarchism*. New York: Harper and Row.

Wolterstorff, Nicholas. 2010. *Practices of Belief: Volume 2, Selected Essays*. New York: Cambridge University Press.

———. 2012. *Understanding Liberal Democracy*. Oxford: Oxford University Press.

Zwolinski, Matt. 2014. The Pragmatic Libertarian Case for a Basic Income Guarantee. Cato Institute, http://www.cato-unbound.org/2014/08/04/matt-zwolinski/pragmatic-libertarian-case-basic-income-guarantee.