

ON JUSTIFYING THE MORAL RIGHTS OF THE MODERNS: A CASE OF OLD WINE IN NEW BOTTLES*

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I. SOMETHING OLD, SOMETHING NEW

We are familiar with one divide between “old” and “new” liberalism—that between classical liberalism and social justice liberalism.¹ Although this divide between the old and the new is multifaceted, the crux is a debate about the place of the market, private property, and democracy in a liberal polity.² According to common wisdom, classical liberals insist on rights of the person against others and against a limited government, freedom of association, freedom of conscience, and a free market within a framework of laws against fraud and violence, laws enforcing contracts, and strong rights of private property, including robust rights of investment, exchange, and inheritance. Limited democracy is endorsed as a way to control government, but not as a source of fundamental norms. Social justice liberals, while endorsing traditional civil rights—for example, the freedoms of speech, press, and religion, rights against search and seizure, the right to a fair trial, privacy rights, equal protection of the laws, and, generally, liberties of the person—argue that justice fundamentally concerns the distribution of resources or that one’s basic claims of justice are to resources that one needs or deserves. Thus, such liberals lay great stress on policies to alter the distribution of property, or to enforce social rights to assistance. Moreover, such liberals emphasize the role of

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¹ “Social justice liberalism” is more appropriate than either “welfare state liberalism” or “egalitarian liberalism.” “Welfare state liberalism” is a misnomer since obvious members of this group—such as John Rawls—believe that the welfare state is inadequate. “Egalitarian liberalism” is inappropriate since “new liberals” such as L. T. Hobhouse were not egalitarians. All “new liberals,” however, have been concerned with the idea of social justice. Hobhouse’s *Elements of Social Justice* (London: Allen and Unwin, 1922) was one of the first books on the subject. On the division between the old and the new liberalism, see Michael Freedon, *The New Liberalism: An Ideology of Social Reform* (Oxford: Clarendon Press, 1978), and Freedon, *Liberalism Divided: A Study in British Political Thought, 1914–1939* (Oxford: Oxford University Press, 1986).

² See my essay “Liberalism at the End of the Century,” *Journal of Political Ideologies* 5 (2000): 179–99.

democratic institutions in a liberal polity. Indeed, in recent years, social justice liberals such as John Rawls and his followers have declared themselves to be “deliberative democrats,” who value political participation rights equally with civil liberties.³ While of course inadequate, this familiar stylized contrast between classical liberalism and social justice liberalism captures a good deal of the truth.⁴

Michael Freeden, a contemporary political theorist, has drawn our attention to another interesting contrast between old and new conceptions of liberalism.⁵ Freeden plausibly argues that liberal thinking—especially in the United States—has become increasingly the domain of abstract and technical philosophy since, say, the publication of Rawls’s *A Theory of Justice* in 1971. Freeden unfavorably compares this new philosophical liberalism to older conceptions of liberalism that were widely accessible and firmly grounded in actual political practice. An upshot of the shift to the terrain of abstract philosophy is, I think, that many theories explicate the requirements of liberalism in an increasingly idealized, indeed often utopian, way. Liberalism is said to require implementation of a fully egalitarian society, or a society with the highest possible minimum income for all, or perhaps some version of market socialism. Although most of the interesting work in this new, highly philosophic approach to liberalism has been by advocates of social justice liberalism,⁶ the approach has also been employed by classical liberals and libertarians, offering highly philosophical and abstract arguments based on intuitions about Lockean property rights, unlimited rights of self-ownership, and hypothetical histories.⁷ This new variety of liberal theory can be contrasted to the older and more accessible accounts of liberalism presented by public intellectuals such as Herbert Spencer, Liberal Party intellectuals such as L. T. Hobhouse (in his famous little book *Liberalism*, published in 1911), or even philosophers

³ See John Rawls, *Political Liberalism*, paperback ed. (New York: Columbia University Press, 1996), 413. This is often put in terms of the contrast between the “liberty of the ancients and of the moderns”: I consider this contrast further in Section VII.D. Originally, Rawls insisted that civil rights were more important than political participation rights, but he came to revise his views. On Rawls’s changing views, see note 105 below. Rawls declares himself to be a “deliberative democrat” in Rawls, “The Idea of Public Reason Revisited,” *University of Chicago Law Review* 64 (Summer 1997): 764–807, at 772; reprinted in John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), and in Samuel Freeman, ed., *John Rawls: Collected Papers* (Cambridge, MA: Harvard University Press, 1999), chap. 26.

⁴ I have considered the differences between the old and the new liberalism in a more nuanced way in my essay “Public and Private Interests in Liberal Political Economy, Old and New,” in S. I. Benn and G. F. Gaus, eds., *Public and Private in Social Life* (New York: St. Martin’s Press, 1983), 183–222.

⁵ See Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Clarendon Press, 1996), chap. 6.

⁶ See, for example, Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000); and Philippe Van Parijs, *Real Freedom for All* (Oxford: Oxford University Press, 1995).

⁷ I have in mind, of course, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

such as John Stuart Mill (in *On Liberty*, 1859). All of these were British, but even earlier Americans such as John Dewey in his *Liberalism and Social Action* (1935) presented fairly simple and concise statements of liberal principles that were accessible to most educated members of the public.⁸ In the hands of these political theorists, liberalism still looked to be a practical political program rather than a technical and highly idealized philosophic construction.

I believe that there is something right and enlightening about Freeden's version of the "old" and "new" divide, although of course it must be highly qualified. Liberalism has traditionally been a radical doctrine; criticizing the current order and presenting idealized proposals is part and parcel of the liberal tradition. Liberals are often radicals. And, of course, liberal theories were sometimes abstract and technical long before Rawls and the rise of academic liberalism in the United States. The nineteenth-century British philosopher T. H. Green, whose liberalism inspired Hobhouse and others, based his political theory on a version of absolute idealism drawn from G. W. F. Hegel, as abstruse a philosophical doctrine as one is apt to encounter.⁹ Still, Freeden has an important insight. If one reads Hobhouse's *Liberalism*, or Dewey's *Liberalism and Social Action* (or, I should add, Isaiah Berlin's "Two Concepts of Liberty"),¹⁰ one encounters a very different genre of liberal theorizing from that found in current philosophy journals and books. While there have always been both genres, I think it is fair to say that today liberalism's center of gravity is in the academy and, especially, in philosophy departments.

The movement from the older, more practical and accessible approach, to the newer, more academic and philosophical approach to liberal theorizing has been a mixed good. In my view, a clear deficit is the plethora of opposed moral blueprints for social institutions, each insisting that departures from its ideal scheme render existing institutions unjust and illegitimate. We now have before us libertarian theories based on self-ownership and rights to initial acquisition (telling us that nearly any redistribution of market outcomes is illegitimate);¹¹ left-libertarian theo-

⁸ See Herbert Spencer, "From Freedom to Bondage," in Spencer, *The Man Versus the State, with Six Essays on Government, Society, and Freedom* (Indianapolis: Liberty Fund, 1982), 487–518; L. T. Hobhouse, *Liberalism* (London: Oxford University Press, 1911); J. S. Mill, *On Liberty* (1859), in John Gray, ed., *On Liberty and Other Essays* (New York: Oxford University Press, 1991); and John Dewey, *Liberalism and Social Action* (1935; New York: G. P. Putnam's Sons, 1980).

⁹ I should note that, in the hands of British philosophers such as Green, this theory was certainly more intelligible than in its original German version.

¹⁰ Isaiah Berlin, "Two Concepts of Liberty" (1958), in Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969).

¹¹ See, for example, Nozick, *Anarchy, State, and Utopia*; and Eric Mack, "Self-Ownership and the Right of Property," *The Monist* 73 (October 1990): 519–43. For an overview, see Eric Mack and Gerald F. Gaus, "Classical Liberalism and Libertarianism," in Gerald F. Gaus and Chandran Kukathas, eds., *Handbook of Political Theory* (London: Sage, 2004): 115–30.

ries also supportive of a conception of self-ownership but often upholding intuitions about the common ownership of the earth (telling us that extensive redistribution of market outcomes is mandatory for justice);¹² desert-based theories of various types (some insisting on the necessity of strong private ownership rights, and others upholding strongly redistributive policies);¹³ neo-Kantian theories (some supporting welfare-state rights to well-being, others leaning toward libertarianism);¹⁴ theories upholding an equal distribution of resources (or welfare, or basic capabilities) which challenge strong ownership rights while embracing some version of the market;¹⁵ and neo-Hobbesian accounts (some defending robust private property rights, others upholding a right to welfare).¹⁶ As a rule, these theories worry very little about connecting up with actual social practices except insofar as the author supposes that his moral intuitions are widespread. It is a caricature—but not an entirely unfair one—to depict all this as the activity of philosophers, ensconced in their ivory towers, instructing everyone as to the system of morality and politics that is clearly demanded by rational reflection, yet talking in a babble of conflicting voices. Yet the movement to rigorous philosophical analysis has had great payoffs. A contemporary reader cannot help but be struck by the vagueness and, one can only say, sloppiness of the analyses of Hobbhouse's *Liberalism*, Dewey's *Liberalism and Social Action*, or the works of Spencer. Even John Locke's *Second Treatise of Government* does not fare well by the standards of current argument. Our understandings of liberty, justice, equality, and the nature of public reasoning in a diverse society have improved immensely.

As I said, it is tempting to lay both the praise and the blame—if blame is appropriate—for the development of this more philosophical brand of liberal theorizing at Rawls's feet. Rawls's thinking, though, is always more complex than it first appears, and almost always more subtle than those whom he inspired. Rawls, we must remember, developed his philosophical liberalism into a political one where the overriding concern was meshing philosophical analysis with social facts. According to Rawls:

[E]ven if by some convincing philosophical argument—at least convincing to us and a few like-minded others—we could trace the right

¹² See Hillel Steiner and Peter Vallentyne, eds., *Left-Libertarianism and Its Critics* (Basingstoke: Palgrave, 2000).

¹³ For the former, see my *Social Philosophy* (Armonk, NY: M. E. Sharpe, 1999), chap. 9; for the latter, see Julian Lamont, "Incentive Income, Deserved Income, and Economic Rents," *Journal of Political Philosophy* 5 (1997): 26–46.

¹⁴ For the former, see Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1981); for the latter, see Marcus Verhaegh, "Kant and Property Rights," *Journal of Libertarian Studies* 18 (Summer 2004): 11–32.

¹⁵ See esp. Dworkin, *Sovereign Virtue*, but there are a host of others who take this view.

¹⁶ For the former, see David Gauthier, *Morals by Agreement* (Oxford: Clarendon, 1986); for the latter, see Gregory Kavka, *Hobbesian Moral and Political Theory* (Princeton, NJ: Princeton University Press, 1986).

to private or social property back to first principles or to basic rights, there is a good reason for working out a conception of justice which does not do this. For . . . the aim of justice as fairness as a political conception is to resolve the impasse in the democratic tradition as to the way in which social institutions are to be arranged if they are to conform to the freedom and equality of citizens as moral persons. Philosophical argument alone is most unlikely to convince either side that the other is correct on a question like that of private or social property in the means of production. It is more fruitful to look for bases of agreement implicit in the public culture of a democratic society and therefore in its underlying conceptions of the person and of social cooperation.¹⁷

Rawls presents us with a paradox. His work was a major impetus to developing abstract theories of distributive justice, and he himself insists that his own rather abstract philosophical theory demonstrates that both laissez-faire and welfare-state capitalism are unjustifiable.¹⁸ However, he insists that “convincing philosophical argument” grounding a justification of capitalism on basic rights is not the right way to go about developing a conception of justice. If we accept this latter idea, much recent liberal political philosophy—whether endorsing classical or social justice liberalism—rests on a mistake: even if its abstract arguments are sound, they cannot achieve their ends.

In this essay, I sketch a philosophical conception of liberal morality that stays true to Rawls’s complex insight: although abstract philosophical argument alone cannot resolve our moral differences, careful philosophical reasoning is necessary to see our way to a resolution. Thus, I shall argue, we can develop a “new” (qua philosophical) liberalism that takes existing social facts and mores seriously while, at the same time, retaining the critical edge characteristic of the liberal tradition. However, *pace* Rawls, I shall argue that once we develop such an account, we are led toward a vindication of “old” (qua classical) liberal morality. Hence the old (vintage) wine in the new, more Rawlsian bottles.

Section II begins by sketching the basis for the claim that liberal principles must be “publicly justified”—justified to everyone. Section III argues that our deep disagreements about the proper standards of evaluation pose a challenge to all attempts at public justification. Sections IV through VI analyze methods for publicly justifying a morality under these conditions of disagreement on evaluative standards. Section VII then argues that the morality that is justified under these conditions is not the social justice/deliberative democratic liberalism of

¹⁷ Rawls, *Political Liberalism*, 338–39.

¹⁸ John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Belknap Press of Harvard University Press, 2001), 136ff.

Rawls, but closer to what Benjamin Constant called the “liberty of the moderns.”¹⁹

II. PUBLIC JUSTIFICATION AMONG FREE AND EQUAL MORAL PERSONS

A. Free and equal moral persons

I take as my starting point the supposition that we conceive of ourselves and others as (1) moral persons who are (2) free and equal. Although these features are assumed in this essay, we should not suppose that these assumptions cannot themselves be defended. Rawls rightly argues that this general conception of moral persons is implicit in our public culture.²⁰ In much the same vein, I have argued that our commitment to the public justification of our moral demands on each other follows from our conception of ourselves and others as such persons.²¹ Let me briefly explain each of these fundamental ideas: (i) moral personality, (ii) free moral persons, and (iii) equal moral persons.

(i) A *moral person* is one who makes, and can act upon, moral demands. Moral persons thus conceive of themselves as advancing moral claims on others and being subject to such claims. Alternatively, we can say that moral persons understand themselves as owed, and owing, certain restraints and acts.²² Not all humans—not even all functioning adult humans—are moral persons: psychopaths do not appear to understand themselves as pressing moral claims on others that demand respect, nor do they see others as moral persons.²³ As well as advancing moral claims, moral persons have the capability to act on justified moral claims made on them. In this sense, moral persons are not solely devoted to their own ends; they have a capacity to put aside their personal ends and goals to act on justified moral claims. Moral persons, then, are not simply instrumentally rational agents;²⁴ they possess a capacity for moral autonomy. Insofar as moral autonomy presupposes the ability to distinguish one’s

¹⁹ See Benjamin Constant, “The Liberty of the Ancients Compared with That of the Moderns,” in Constant, *Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 308–28.

²⁰ See John Rawls, “Kantian Constructivism in Moral Theory,” in Freeman, ed., *John Rawls: Collected Papers*, 303–58, esp. 305ff. This is not to say that Rawls and I advance precisely the same conception of free and equal moral persons, as will become clear in what follows.

²¹ See my *Value and Justification* (Cambridge: Cambridge University Press, 1990), 278ff.

²² See J. R. Lucas, *On Justice* (Oxford: Clarendon Press, 1980), 7. For a development of this conception of morality, see Thomas Scanlon, *What We Owe Each Other* (Cambridge, MA: Belknap Press of Harvard University Press, 1998), esp. 177ff. On this view, interpersonal claims are the crux of morality, though, of course, such claims need not be explicitly advanced: a moral person “makes claims on herself” in the sense that she accepts as reasons for actions the rights of others, and she acts on these reasons without prompting.

²³ I argue this in *Value and Justification*, 281ff.

²⁴ See Rawls, *Political Liberalism*, 51.

own ends from the moral claims of others, the idea of a moral person presupposes some cognitive skills.²⁵

(ii) In the *Second Treatise*, Locke held that “[t]he natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule.”²⁶ To conceive of oneself as *morally free* is to understand oneself as free from any natural moral authority that would accord others status to dictate one’s moral obligations. *This is not at all to say that one sees oneself as unbound by any external morality.* Locke thought we have the law of nature as our rule. Although we are by no means committed to a natural-law conception of morality, the crucial point, again one in the spirit of Locke, is that free moral persons call on their own reason when determining the dictates of moral law. A free person employs her own standards of evaluation when presented with claims about her moral liberties and obligations. A free person, we can say, has an interest in living in ways that accord with her own standards of value and goodness. At a minimum, to conceive of oneself as a morally free person is to see oneself as bound only by moral requirements that can be validated from one’s own point of view; it is not necessarily to view morality as one’s creation or the result of one’s will or choice.²⁷

(iii) To say that moral persons are equal is to claim, first, that qua moral persons they possess the minimum requisite moral personality so that they are equal participants in the moral enterprise and, second, that each is *equally* morally free insofar as no one is subjected to the moral authority of others. The equality of moral persons is their equality qua free moral persons: it is not a substantive principle of moral equality but a presupposition of the practice of moral justification insofar as it defines the status of the participants in moral justification. While this is a modest conception of moral equality, it rules out some conceptions of moral justification. Rawls not only conceives of moral persons as advancing claims against each other, but stresses that they view themselves as “self-authenticating sources of valid claims.”²⁸ It would seem, and apparently Rawls agrees, that those who understand themselves as authenticating their own claims would not see themselves as bound to justify their claims against others to those others—they would not suppose that only

²⁵ I argue for this claim in “The Place of Autonomy in Liberalism,” in John Christman and Joel Rogers, eds., *Autonomy and the Challenges to Liberalism* (Cambridge: Cambridge University Press, 2005), 272–306.

²⁶ John Locke, *Second Treatise of Government*, in Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), sec. 21.

²⁷ It also provides the basis for understanding morality as self-legislated. I develop this idea further in “The Place of Autonomy in Liberalism.”

²⁸ Rawls, *Justice as Fairness*, 23. The importance of the idea of self-authentication is easily overlooked in Rawls’s thinking. It first appeared in his 1951 paper “Outline of a Decision Procedure for Ethics,” which conceived of ethics as adjudicating the claims of individuals, which he clearly saw as self-authenticating. See section 5 of that paper, in Freeman, ed., *John Rawls: Collected Papers*, chap. 1.

claims justified to others are valid.²⁹ To advance a self-authenticating claim against others, however, is not to respect their moral freedom, for others are bound only by moral claims that they can validate through their own reason. The supposition of equal moral freedom thus requires that one's moral claims be validated by those to whom they are addressed.

Many have advanced stronger conceptions of moral equality. Some have claimed, for example, that the very practice of morality presupposes an "equal right of each to be treated only with justification."³⁰ In a similar vein, S. I. Benn and R. S. Peters, in their classic political theory text, defended the principle that "[t]he onus of justification rests on whoever would make distinctions. . . . Presume equality until there is a reason to presume otherwise."³¹ Benn and Peter's principle does not simply require us to justify our moral claims to others: it requires us to justify all our actions that disadvantage some others. Leaving aside whether some such presumptive egalitarian principle could be morally justified,³² this conception of moral equality is not presupposed by the very idea of a justified morality among free and equal moral persons. If I accept this principle, I claim that others act wrongly if they disadvantage me without good justification. But unless this nondiscriminatory principle itself can be validated by others, I disrespect their moral freedom, as I am making a moral claim on them to non-discriminatory action that is not validated by their own reason.

Validation from the rational and reflective perspective of another, however, is not the same as her actual consent. To treat another as a free and equal moral person is to accept that moral claims must be validated from her perspective when she rationally reflects upon them. Now, although, as Mill noted, there is a strong presumption that each knows her own perspective best, this is not necessarily so.³³ Just as others can make sound judgments about a person's beliefs and principles, and can be correct even when the person disagrees, so can others be correct, and the moral agent wrong, about what is validated from her perspective. Knowledge of oneself is generally superior to others' knowledge of one, but it is not indefeasible. People may withhold assent

²⁹ Hence, because of this, parties to Rawls's original position are not required to advance justifications for their claims. Rawls argues this in "Kantian Constructivism," 334.

³⁰ Hadley Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (Princeton, NJ: Princeton University Press, 1986), 70; italics omitted. Compare Ted Honderich: "To have a liberty in the relevant sense, whatever else it comes to be, is to act in a way that has recommendation or justification. You have to have a right." On this view, one may only act if one has a justified claim on others to allow one to act. Ted Honderich, *After the Terror* (Edinburgh: Edinburgh University Press, 2002), 45.

³¹ S. I. Benn and R. S. Peters, *Social Principles and the Democratic State* (London: George Allen and Unwin, 1959), 110.

³² I argue that it cannot in *Justificatory Liberalism* (New York: Oxford University Press, 1996), 162ff.

³³ Mill, *On Liberty*, 84–85 (chap. IV, para. 4). Mill also was aware that this assumption does not always hold true. See his *Principles of Political Economy*, in J. M. Robson, ed., *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1963), vols. II and III, 947 (bk. V, chap. xi, sec. 9).

for a variety of reasons, including strategic objectives, pigheadedness, confusion, manifestly false beliefs, neurosis, and so on. Nevertheless, respect for the equal moral freedom of another requires that the presumption in favor of self-knowledge only be overridden given strong reasons supporting the conclusion that she has misunderstood what is validated from her own point of view. Suppose that Alf and Betty reasonably disagree about whether some moral principle *P* is validated from Betty's rational perspective. Say that Alf has good reasons to conclude that Betty has misunderstood what is validated from her point of view: *P*, he says, really is validated from her point of view. Betty, we suppose, has reason to insist it isn't. For Alf to insist that his merely reasonable view of Betty's commitments overrides her own reasonable understanding of her moral perspective constitutes a violation of her moral freedom, since Alf is claiming authority to override Betty's own reasonable understanding of her moral commitments with his merely reasonable view.³⁴ Of course, just where to draw the line between a person's reasonable and unreasonable understandings of her commitments is difficult (I have spent more than a few pages trying to do so).³⁵ The core idea though, is not obscure. As Jeffrey Reiman argues in his account of justice, when one person's judgment prevails over another's, there is always the suspicion of "subjugation," which Reiman defines as "any case in which the judgment of one person prevails over the contrary judgment of another simply because it can and thus without adequate justification." To "dispel" this suspicion, we must be able to show that our judgment is valid "beyond reasonable doubt."³⁶

B. The principle of public justification

Given the requirements for treating others as free and equal moral persons, the task of publicly justifying a moral principle *P* requires that *P* be validated from the perspective of each (sufficiently) reasonable free and equal moral person. To publicly justify a moral principle is to justify it to all reasonable free and equal moral persons within some public, who confront each other as strangers.³⁷ I shall assume that the relevant public here is something like a society; we could also define the public in terms of all persons (a universalistic cosmopolitan morality) or a smaller community. As our main concern is with morality insofar as it relates to political justice, focusing on the notion of a society's morality is appro-

³⁴ I deal with this complex question more formally in *Justificatory Liberalism*, parts I and II.

³⁵ See *ibid.* and *Value and Justification*, 399–404.

³⁶ Jeffrey Reiman, *Justice and Modern Moral Philosophy* (New Haven, CT: Yale University Press, 1990), 1–2.

³⁷ On the concept of the public, see S. I. Benn and G. F. Gaus, "The Liberal Conception of the Public and Private," in Benn and Gaus, eds., *Public and Private in Social Life*, 31–66.

priate. (Moreover, as we shall see, there is some reason to think that societies, broadly conceived, may possess justified moral codes in a way that mankind does not. Should it be the case, however, that cosmopolitan morality is similar to the morality I defend in the later sections of this essay, the restriction may not be significant.)

I have employed the unfamiliar idea of “validating” a principle. Validating is, I think, especially appropriate in this context. To validate a moral principle *P* is to exercise one’s authority to inspect *P* and confirm that it meets the relevant requirements (as when a visa is validated). Validation is not voluntaristic in the way that consent is, or “acceptance” or “rejection” might be taken to be. Validation first involves substantive requirements: to be valid, *P* must meet the test of respecting others’ rational natures—there must be a conclusive reason justifying *P*. (What else could respecting others’ rational natures require, other than providing them with reasons?) But validation is not simply a matter of *in fact* meeting the requirements—of there being a reason for *P*. It requires that this fact be confirmed by one who has the authority to do so. Surely, to respect the free moral and rational natures of others is to provide them with conclusive considerations for *P* that can be seen as such by them insofar as they are reasonable; given that we are free and equal, each of us alone has the moral authority to confirm principles binding him- or herself. If Alf appeals to *P*, and Betty, a free and equal rational moral person, cannot see how she has adequate reason to accept *P*, then Alf is not respecting her as a free and equal rational moral person if he nonetheless insists that she does have good reason to accept *P* and thus is morally required to abide by *P*. Alf’s understanding of the demands of reason cannot trump Betty’s reasonable understanding if he is to respect her as a free and equal rational moral person. To be more precise, let us work with the following understanding of public justification:

P is a bona fide moral principle only if each reasonable free and equal moral person would, upon presentation of *P*, validate it.

According to this understanding of public justification, to possess a bona fide moral claim does not require that everyone has already validated it, and this is the case for two reasons. (i) A bona fide moral claim only requires the validation of reasonable, not actual, moral persons. (ii) Public justification conceives of moral claims as carrying the guarantee that they can be justified to reasonable others, even if these justifications have not yet actually been presented. This, I think, points the way to a plausible version of what Rawls calls “the proviso.”³⁸ Principles that meet the test of public justification are publicly justified principles.

³⁸ John Rawls, “The Idea of Public Reason Revisited,” *University of Chicago Law Review* 64 (Summer 1997): 764–807, pp. 783–84.

III. THE PROBLEM OF EVALUATIVE DIVERSITY

An obvious point of departure in publicly justifying moral principles would be to identify some “conception of the good”—involving a systematic relation of the various goods—that is shared by each free and equal moral person in the relevant public.³⁹ However, it seems most unlikely that free and equal moral persons share any such “comprehensive” understandings of the good or of value.⁴⁰ Contemporary liberal theory has stressed the reasonable pluralism that obtains about such comprehensive understandings of value or of the good. Pluralism about the good poses obvious problems for public justification, such as when my comprehensive understanding of value leads me to endorse P on the grounds that P promotes V_1 , and you deny that V_1 is a value; V_2 , you say, is correct, and it does not validate P . This may not entirely preclude public justification, as we might still converge on P' because it promotes both V_1 and V_2 .⁴¹ Still, the difficulties in appealing to such comprehensive systems of value in the justification of moral claims is formidable in a society characterized by deep-seated reasonable differences about what makes life worth living. In any event, I shall put aside this well-discussed problem of clear value disagreement, and consider the problems raised by the case in which we all concur on the normative considerations that justify moral claims. This is not to say that I deny that sometimes our evaluative standards simply clash; however, I wish to stress that *even if we share evaluative standards, the problem of evaluative diversity remains*.

Suppose we disaggregate conceptions of the good, or systems of value, into their component goods, values, and other normative principles. Even though we do not share full-blown systems of values, we do share many specific values, such as the good of bodily integrity, the good of personal resources, and the good of health; we also share moral “intuitions,” such as the wrongness of inflicting gratuitous pain on others. Abstracting from the notions of goods, values, moral “intuitions,” and so on, let us provisionally say that Σ is an *evaluative standard* for moral person Alf if and only if holding Σ is relevant to the validation of a candidate moral principle given Alf’s rational point of view.⁴² Evaluative standards, then, are to be distinguished from publicly justified moral principles. Now assume that everyone in the relevant public holds Σ_1 and the relevant beliefs about the world such that P_1 is validated in the perspective of everyone.

³⁹ Henceforth, the clause “in the relevant public” will be assumed.

⁴⁰ I focus on this problem in *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (London: Sage, 2003). See also my *Social Philosophy*, chap. 3.

⁴¹ On convergence as a mode of justification, see Fred D’Agostino, *Free Public Reason: Making It Up As We Go* (New York: Oxford University Press, 1996), 30–31.

⁴² I leave aside here whether Σ is itself a belief about the world, as ethical naturalists would have it. It is important to stress that nothing in my account precludes moral realism as a metaethical or metaphysical thesis; the epistemic constraint on moral reasons is the crucial principle on which the analysis rests.

Thus, P_1 is publicly justified. Assume further that the same holds for Σ_2 and P_2 : everyone shares Σ_2 as a normative standard, and everyone shares the relevant beliefs that validate P_2 . It would seem that the project of public justification is well under way. However, as Fred D'Agostino, a philosopher of social sciences, recently has shown, so long as individuals order Σ_1 and Σ_2 differently, the real problems for public justification remain unresolved.⁴³ If Alf's ranking is $\Sigma_1 > \Sigma_2$ (read as " Σ_1 is ranked above Σ_2 "), while Betty maintains that $\Sigma_2 > \Sigma_1$, then if the degree of justification of the moral claims is monotonic with the ranking of normative standards,⁴⁴ Alf will hold $P_1 > P_2$, while Betty will maintain $P_2 > P_1$. Thus, in an N -person society in which everyone holds all the same normative standards and relevant beliefs, we can still get N rankings of moral principles.

Many believe that a morality requires priority rules.⁴⁵ If so, this problem of plurality of rankings is indeed an obstacle to the public justification of a morality. To some extent, perhaps, the necessity of priority rules has been exaggerated. As the great moral theorist W. D. Ross argued, our moral knowledge is about moral principles; the correct way to order the principles in cases where more than one is applicable is, for Ross, a matter of practical judgment about which people will often disagree.⁴⁶ Perhaps in many matters of private life it would be enough to agree on moral principles, accepting that priority judgments will vary from person to person. Even this, though, is a cause for some concern, as our account indicates not simply that we disagree about the proper weighting of the principles in specific cases, but that there simply is no publicly justified weighting.

Because so many issues of public morality require not only the justification of a set of moral claims, but some priority rules, we require some way to publicly commensurate individual evaluative standards to arrive at a public ordering of moral claims. The problem, then, is this: A public ranking of moral principle P_1 over P_2 is obviously justified only if the evaluative standards (and sound beliefs) of each rational and reflective moral person give her good reason to rank P_1 over P_2 .⁴⁷ Given reasonable

⁴³ See Fred D'Agostino, *Incommensurability and Commensuration: The Common Denominator* (Aldershot, Hampshire: Ashgate, 2003). I draw upon D'Agostino's insightful analysis throughout Sections III-V and in Section VII. I consider these issues in a different way in "Liberal Neutrality: A Radical and Compelling Principle," in Steven Wall and George Klosko, eds., *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, MD: Rowman and Littlefield, 2003), 136-165, 156ff.

⁴⁴ This is to say that the normative standard passes on a degree of justification commensurate with its ranking within a perspective.

⁴⁵ See Kurt Baier, "The Point of View of Morality," *Australasian Journal of Philosophy* 32 (1954): 104-35.

⁴⁶ W. D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930), 27ff.

⁴⁷ This is too simple. A consistent system of trade-off rates between P_1 and P_2 need not, and most plausibly will not, be a simple priority according to which the satisfaction of P_1 , in any circumstance, is ranked above the satisfaction of P_2 . I focus on this idea in "Why All Welfare States (Including Laissez-Faire Ones) Are Unreasonable," *Social Philosophy and Policy*

evaluative diversity, this, I conjecture, will seldom occur (which is not to say it will never occur; see Sections V and VI below). Indeed, empirical research indicates that the main source of value conflicts among Americans lies in their rankings. According to Milton Rokeach, a psychologist, Americans agree in affirming a set of thirty-six values; what they differ on is “the way they organize them to form value hierarchies or priorities.”⁴⁸ Our disputes are not generally about what is good, but what is better. And given that all action has opportunity costs—doing one thing means forgoing others—disputes about what is more important result in endemic disagreement about what to do.

The problem of disagreement about public morality arising out of an *agreement* in evaluative standards is even more daunting than I have depicted it. I assumed above that each claim is to be validated by a single evaluative standard (along with relevant beliefs). More realistically, we must allow that, in each individual’s perspective, a number of evaluative standards contribute to the validation of a moral principle. Thus, even if we all agree on the same set of evaluative standards and relevant beliefs, and all agree what standards are relevant to the validation of a specific moral claim, we may not all validate *any* specific moral claim. To see this, suppose that both Σ_1 and Σ_2 are relevant to the justification of *P*-type principles. If Alf’s ranking is $\Sigma_1 > \Sigma_2$, while Betty’s is $\Sigma_2 > \Sigma_1$, then Alf may validate *P'* while Betty validates *P''*. Thus, the initial problem in justifying priority rules becomes a problem of justifying any principle or claim when it is validated by multiple evaluative standards.

IV. TWO FLAWED RESPONSES TO EVALUATIVE DIVERSITY

Given the assumption of evaluative diversity, how might we endeavor to publicly justify some ranking of principles? Following Rawls, we might suppose a deliberative setting of rational and reflective moral persons evaluating proposed moral principles according their evaluative criteria; what such people would all accept shows what is publicly justified.⁴⁹ To fix ideas, suppose that three reasonable moral persons are deliberating about how to rank three moral principles (assume for now that the evaluative perspective of each person provides some reason to accept all three

15, no. 2 (1998): 1–33. However, the more complicated analysis would only reinforce the point of the text: different sets of rational evaluative criteria will endorse different trade-off rates.

⁴⁸ See Milton Rokeach, *The Nature of Human Values* (New York: The Free Press, 1973), 110; Milton Rokeach, “From Individual to Institutional Values,” in Rokeach, *Understanding Values* (London: Collier Macmillan, 1979), 208.

⁴⁹ “Understood in this way the question of justification is settled by working out a problem of deliberation: we have to ascertain which principles it would be rational to adopt given the contractual situation.” John Rawls, *A Theory of Justice*, revised ed. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 16.

TABLE 1. *Condorcet paradox rankings*

Alf	Betty	Charlie
P_1	P_2	P_3
P_2	P_3	P_1
P_3	P_1	P_2

principles). Their rankings are summarized in table 1. Can any social ranking be justified to all three individuals?

A. Aggregation

Let us first consider the familiar process of collective (aggregative) commensuration: Suppose that in our deliberative setting we seek to develop some aggregation procedure that takes, as inputs, each reasonable free and equal moral person's ranking of proposed moral principles (based on his or her own evaluative standards) and generates, as outputs, a publicly justified ordering of moral principles. Now, *ex hypothesi*, the procedure we develop must also pass the test of public justification; moreover, the problem of evaluative diversity resulting in different rankings of principles must not reproduce itself as a rational diversity in rankings of aggregation procedures. Given that all see themselves as *equal* moral persons, we might think that some aggregation procedure reflecting "one person, one vote" might be employed in our deliberative setting to decide on the publicly justified ordering of principles. The hitch, of course, is that the aggregation procedure itself must be justified, and our disputes about the rankings of principles will reproduce themselves as disputes about the rankings of procedures.⁵⁰ No candidate aggregation procedure would be ranked best by each. As we know from Arrow's theorem and related work on collective choice rules, reasonable objections can be brought against every procedure for ranking three or more options, or indeed every procedure for choosing from a set of three or more options. As Kenneth Arrow showed, given a social choice over three or more options (with two or more people choosing), there is no aggregation method that (1) is guaranteed to produce a complete and transitive social ordering and (2) meets a set of reasonable conditions.⁵¹ Although some proponents of

⁵⁰ As Robert Nozick reminds us: "When sincere and good persons differ, we are prone to think they must accept some procedure to decide their differences, some procedure they both agree to be reliable and fair. Here we see the possibility that this disagreement may extend all the way up the ladder of procedures." *Anarchy, State, and Utopia*, 98.

⁵¹ The conditions are these: (1) *Universal domain*: There is a social ordering for every possible set of individual preference profiles. (2) *Monotonicity*: An individual's changing her

collective decision-making seek to dismiss the relevance of Arrow's theorem,⁵² it clearly undermines any claim that there is an uncontroversial way to commensurate all diverse rankings by developing an aggregation method that rationally and fairly transforms individual rankings into a publicly justified social ranking. There are a number of such methods, but all are flawed, and there is no reason to suppose that rational and reflective people will converge on one. Moreover, equally reasonable, flawed procedures can produce different results, so the choice of aggregation procedure really does matter.⁵³ Table 1 depicts Condorcet's famous set of paradox orderings, in which pairwise majority choice between the options (options are considered in pairs, with majority vote deciding which of the pair is the social preference) results in an intransitive social ordering ($P_1 > P_2 > P_3 > P_1$). Thus, rational individual rankings yield an irrational social ranking: Arrow's theorem can be understood as a generalization of this result to all plausible aggregation procedures. More generally, the chaotic characteristics of aggregation procedures such as voting show that their outcomes can be highly unstable. As Donald G. Saari, a mathematician, observes: "Beware! Beware of aggregation procedures because, in an unexpected manner, they allow unanticipated behavior."⁵⁴

This is not to say that we are never warranted in relying on democratic procedures to resolve disputes. Given the background justification of moral and political principles, it may well be that at some point we have disagreements that we all have reason to believe must be resolved, and no procedure for resolving them is better than democracy. However, no aggregation procedure is intrinsically fair, stable, and reliable; whatever the merits of aggregation procedures, they are highly objectionable as ways to produce a justified, rational social choice of basic moral principles out of diverse individual orderings.

evaluation from { y is better than x } to { x is better than y } cannot itself make x socially less preferred than y . (3) *Nonimposition*: The social ordering is always a function of individual orderings. (4) *Pareto optimality*: If everyone prefers x over y , the social ordering ranks x over y . (5) *Independence of irrelevant alternatives*: The social preference between x and y must depend only on individuals' preferences between x and y , and cannot be affected by the presence or absence of some third alternative, z . (6) *Nondictatorship*: There is no person whose individual ordering over every pair of options is decisive for the social ordering. See William Riker, *Liberalism Against Populism* (Prospect Heights, IL: Waveland Press, 1988). I evaluate Riker's criticisms of democracy in my essay "Does Democracy Reveal the Will of the People? Four Takes on Rousseau," *Australasian Journal of Philosophy* 75 (June 1997): 141–62. For an analysis more nuanced than Riker's, see Dennis Mueller, *Public Choice III* (Cambridge: Cambridge University Press, 2003). For Arrow's own version, see Kenneth Arrow, *Social Choice and Individual Values*, 2d ed. (New Haven, CT: Yale University Press, 1963).

⁵² John Dryzek, for example, rejects most of Riker's analysis; see Dryzek, "Democratic Theory," in Gaus and Kukathas, eds., *The Handbook of Political Theory*, 143–54.

⁵³ This point is emphasized by Riker, *Liberalism Against Populism*, chap. 2. On the importance of this for democratic choice, see Gaus, "Does Democracy Reveal the Will of the People?"

⁵⁴ Donald G. Saari, *Chaotic Elections! A Mathematician Looks at Voting* (Providence, RI: American Mathematical Society, 2000), 152; emphasis in original.

B. *Elimination (or idealization)*

Arrow's theorem relies on the assumption that the aggregation procedure must successfully operate for all possible individual rankings: the procedure must work for every permutation of the options. One way to respond to Arrow's theorem is, to use D'Agostino's term, "elimination": we disallow some rankings so that the paradoxical social choice implied by table 1 does not occur.⁵⁵ Elimination of troublesome evaluative standards might be achieved by *idealizing* our deliberative moral persons so that they have "correct" evaluative systems, which thus limit the possible orderings of proposed moral principles. Thus, we might suppose that all rational and reflective moral persons have the sort of evaluative systems devoted to the cultivation of individuality endorsed by John Stuart Mill,⁵⁶ or that they all have the same rational insight into natural law or natural rights endorsed by Locke. Those who do not have such evaluations are then eliminated from the deliberative problem. But this is just to weaken our assumption of rational evaluative diversity; such proposals seek to constrain evaluative diversity within some acceptable range and, thereby, produce significant rational consensus. However, this move is question-begging: it assumes that, prior to public justification between rational moral persons, some substantive public evaluative conclusions have been reached about suitable individual standards of evaluation. That, though, looks as if it must mean that some persons assert that, while a certain restriction of evaluative standards could not be validated by all rational reflective moral persons, nonetheless it is warranted and those dissenting can be excluded from public justification. This is to lack respect for the moral freedom and equality of others.

V. JUSTIFYING PUBLIC MORALITY: ARGUMENTS FROM ABSTRACTION

A. *Abstract and full justification*

Is there some way to achieve public justification in the face of evaluative diversity? D'Agostino tells us that one of the great attractions of Rawls's original position is that it provides a device of "social commensuration":

Rawls's problem is, indeed, one of ranking options in a social setting. The members of some society have to decide, in a way that will be collectively binding, how they are to organize their relations with one another, at least in certain fundamental ways. In particular they have to decide how to rank proposals about the so-called "basic

⁵⁵ D'Agostino, *Incommensurability and Commensuration*, 91–95.

⁵⁶ For an explicit argument of this sort, see Jonathan Riley, *Liberal Utilitarianism: Social Choice and J. S. Mill's Philosophy* (Cambridge: Cambridge University Press, 1983).

structure of society." If each individual appeared in his own identity as a participant in discourse or negotiations about how to organize the "basic structure of society" in a collectively acceptable way, it is unlikely, in the extreme, that any agreement on substantive matters would be possible and, hence, the various options (each a specification of "the basic structure") would remain incommensurable with respect to one another. From a collective point of view we would not know how to order them in a satisfactory way.⁵⁷

The device of the original position aims to provide a public justification of a ranking of some moral claims (such as liberty versus equality) by abstracting from our actual, full evaluative positions, and so providing a shared core perspective that yields a determinate deliberative-justificatory outcome.⁵⁸ One function of the veil of ignorance is to locate this shared basis for evaluation. "One excludes the knowledge of those contingencies which set men apart. . . ."⁵⁹ Individuals are abstracted to the common status of agents devoted to their own evaluative criteria (values, comprehensive conceptions of the good, and so on), and because "everyone is equally rational and similarly situated, each is convinced by the same arguments."⁶⁰ Indeed, abstraction allows us to avoid the problem of interpersonal justification since the problem is reduced to the choice of one person.⁶¹ The success of an argument from abstraction depends on three key claims.

(1) Most obviously, it must be the case that there is a shared perspective that identifies a common basis of evaluation. The aim is to show that once we abstract to a certain shared perspective (and thus, for example, we exclude our desires to dominate or rule others), we do share some evaluative standards. Arguments for abstraction need not deploy a device such as the original position: Alan Gewirth, S. I. Benn, and others have maintained that the perspective of an abstract agent devoted to acting on his or her own evaluative criteria validates basic liberty claims, though they have not utilized a hypothetical choice situation.⁶²

(2) This shared perspective must identify especially important shared evaluative standards; it will be of little avail to identify a shared perspective that does not capture really important evaluative standards. We must, as Rawls says, "give very great and normally overriding weight" to the norms prescribed by the shared standpoint.⁶³

⁵⁷ D'Agostino, *Incommensurability and Commensuration*, 100.

⁵⁸ *Ibid.*, 100-101.

⁵⁹ Rawls, *A Theory of Justice*, 17.

⁶⁰ *Ibid.*, 120.

⁶¹ *Ibid.*, 120-21.

⁶² Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1980), chap. 2; S. I. Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), chaps. 6-7. See also my *Value and Justification*, sec. 24.2.

⁶³ Rawls, *Political Liberalism*, 241.

(3) Related to this point, it must be the case that the deliberative conclusions are not overturned as the process of abstraction is undone and individuals are again understood to be guided by their full set of evaluative standards. It is, I think, seldom appreciated just how important this point is to Rawls's later work. Rawls argues that the political conception can be justified as freestanding: it is based on an *abstract* conception of persons as reasonable and rational, free and equal—a conception that is said to be implicit in our democratic society, and thus, shared by all.⁶⁴ Justice as fairness thus expresses “shared reason.”⁶⁵ Rawls maintains that justice as fairness is a justified political conception because it articulates the requirements of the concepts of the person and society that all reasonable citizens in our democratic societies share. What Rawls calls “freestandingness” is a case of argument from abstraction. However, Rawls does not believe that this exhausts justification. Indeed, he says that this is simply a *pro tanto* (so far as it goes) justification.⁶⁶ In what he refers to as “full” justification, citizens draw on their full range of evaluative standards and find further reasons for endorsing the political conception. At this stage, Rawls tells us, the *pro tanto* abstract justification “may be overridden by citizen’s comprehensive doctrines once all values are tallied up.”⁶⁷ What was simply “freestanding” must, if it is to be fully justified, serve as a “module” that fits into each free and equal rational moral person’s set of evaluative criteria.⁶⁸

It is, I believe, a serious mistake to think that Rawls’s basic notion of justification changed from *A Theory of Justice* to *Political Liberalism*, replacing the focus on shared reasoning in the original position with justification qua “overlapping consensus”—that all reasonable evaluative systems overlap on the basic liberal principles. Rather, the core idea throughout his work is the argument from abstraction in the original position, but Rawls increasingly worried that as the abstraction is undone and people come to know their comprehensive conceptions of value, their devotion to the principles might be “overridden.” Full knowledge of evaluative standards may change what is validated from their perspectives. Hence Rawls’s claim that under “full” justification the normative importance of the *pro tanto* argument from abstraction is preserved (i.e., condition 3 is met). Let us, then, call this third requirement *the stability of abstract justi-*

⁶⁴ *Ibid.*, 10.

⁶⁵ *Ibid.*, 9.

⁶⁶ *Ibid.*, 386.

⁶⁷ *Ibid.*

⁶⁸ Most commentators on Rawls mistakenly identify these two ideas. Rawls employs the idea of a “module” when explaining “overlapping consensus” (*ibid.*, 12–13; 144–45), whereas “freestandingness” applies to the appeal to shared conceptions of the person, and lack of metaphysical and other commitments, of the abstract argument for the two principles (*ibid.*, 10, 40, 133, 144). The crucial passage that confuses many readers is on pp. 144–45 of *Political Liberalism*, where Rawls argues that because the political conception is freestanding it can serve as a module; many readers suppose that Rawls is simply equating the two ideas.

fication under full justification. This last requirement is immensely important: unless the conclusion of the argument from abstraction can be affirmed in light of a rational and reflective, free and equal moral person's full set of evaluative criteria, the abstract justification will be defeated by these other elements of her evaluative set. When Rawls tells us his main concern in developing political liberalism was to provide an account of the stability of a society based on his principles,⁶⁹ we should not think of this as mainly a sociological concern: the fundamental concern is the stability of the abstract justification in the light of the diversity of reasonable and conflicting "comprehensive conceptions of the good."

B. Rawls's two principles of justice

As is well known, Rawls maintains that two strictly ordered principles are justified via the argument from abstraction:

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all.⁷⁰

Rawls provides a compelling case that his argument from abstraction for the first principle and its priority over other social values satisfies our three conditions. (1) We do share the perspective of rational agents devoted to our ends. (2) What we are committed to when occupying this perspective is of great importance, since it is always relevant to action based on our evaluative standards. (3) The *pro tanto* case for an extensive and strong scheme of liberty seems stable under full justification. The compelling arguments in Rawls's *Political Liberalism* for overlapping consensus concern basic liberties. Much less compelling is the argument for the second principle. It was notoriously controversial whether the argument from the original position actually endorses the second principle. (Let us focus simply on principle 2(a), the so-called "difference principle.") Rawls's attempts to show that abstract agents would select basic institutions that must distribute universally required goods so as to maximize the share to the least-advantaged group has confronted an array of objections that this would simply not be a rational strategy for such agents. Objectors insist that the abstracted parties would do better to maximize the average pay-offs, or, alternatively, to avoid distributions that are disastrous to some,

⁶⁹ *Ibid.*, xix.

⁷⁰ *Ibid.*, 53. Compare the original edition of Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, 1971), 60.

but once those distributions are omitted choose the distribution that maximizes average payoff, and so on.⁷¹ However, let us leave these well-hoed fields behind. Even if the difference principle is justified by the argument from abstraction, it manifestly is not stable under full justification. Once free and equal reasonable individuals become aware of their evaluative standards (comprehensive conceptions of the good), many find the difference principle highly objectionable. Many people, for example, are strongly committed to notions of desert which clash with the difference principle.⁷² We need not, though, focus simply on Rawls's highly controversial difference principle. Consider the much more modest claim of Alan Gewirth that abstract agents would demand rights to welfare as well as freedom.⁷³ Suppose we grant that abstract agents would accept an unconditional right to welfare: because they value their agency, they would value those things that are necessary for continued agency. However, as our model deliberators become aware of the full range of their evaluative criteria (including notions of desert, responsibility, and prudence) some will rationally reject the results of the abstract justification, showing again that it is not stable under full justification. Consider two such objectors, Prudence and Sylvan.

Prudence is reasonably averse to risk, and spends a good deal of time planning for trouble and how to avoid it. Central to her evaluative criteria is that one is responsible for avoiding the pitfalls of life. Now she has good reason to value a cautious life in which she looks out for her own welfare rather than a life in which we look out for each other. For others may lead riskier lives, and thus put themselves in positions in which they are more likely to be imperiled. Prudence will see welfare-grounded claims to assistance as violating her "comprehensive conception of the good": those whom she considers irresponsible and who reject the value of prudence, or reject taking responsibility for their own lives, will have claims *on her* that are antithetical to her values. People get into very hot water because they seek excitement, or are careless, or are too cheap or lazy to take precautions, or simply would rather spend their time and money having a good time. Prudence's objection is sound. Although, say, health-care provision often has been enacted on the ground that everyone's basic welfare interests should be protected, experience has shown that the careless or reckless make inordinate demands on health-care systems. Because welfare provision is funded by all, Prudence and others like her end up paying a good deal for the recklessness of smokers and motorcyclists who

⁷¹ For evidence that ordinary reasoners tend toward this last option, and thus have non-Rawlsian strategies in original position-like situations, see Norman Frohlich and Joe A. Oppenheimer, *Choosing Justice: An Experimental Approach to Ethical Theory* (Berkeley: University of California Press, 1992).

⁷² For a review of the literature on people's beliefs about justice that brings out the importance of desert, see David Miller, "Distributive Justice: What People Think," *Ethics* 102 (April 1992): 555–93. See also my *Social Philosophy*, chap. 6.

⁷³ Gewirth, *Reason and Morality*, chap. 2.

ride without helmets; thus, Prudence and her like-minded fellows are forced to encourage what they see as vices.

The second objection comes from Sylvan, a nature lover. Sylvan's values are not centered on his own life or well-being, but on the wonders of nature. Although he does what he can to help and protect nature, Sylvan is under no delusion that his survival is necessary for the survival of nature. Because he so loves nature, however, he seeks to devote his life to worshipping it and understanding it; he has a religious awe when in the presence of nature. Now Sylvan may well resist incurring significant costs or transferring resources via taxation to help others; he does not cherish humans—he thinks they are not all that important in the scheme of things. Now, to *respect* and to *cherish* are not the same: Sylvan can respect others as moral persons without cherishing their flourishing. To Sylvan, devoting his resources to being near nature is tremendously more important than saving humans. Of course, Sylvan realizes that some day he may need help, and he is reasonable enough to admit that if he needs help, it would be nice to get it. But his environment-oriented philosophy indicates that it will be no great loss to the universe whether he dies in five, ten, twenty, or forty years. So Sylvan would resist the idea that significant costs should be put on him to assist others.

C. *The moral right to private property*

Political philosophers such as Rawls and Gewirth thus contend that, if we consider simply the abstract perspective of ourselves as agents, we appreciate not only the importance we place on agency freedom, but the importance we place on the maintenance of agency, and thus we all endorse strong claims against others to help us maintain our agency. Even if the latter "agency welfare rights" are justified from the abstract perspective, I have argued, they are not stable under full justification: once Prudence and Sylvan are aware of their complete set of evaluate standards, they will reject these claims on them.⁷⁴ However, Rawls and Gewirth are certainly right that the perspective of abstract agency does not simply endorse liberty rights. As Immanuel Kant argued, property rights are required for agency.⁷⁵ Think about a world without any moral rights to property. From a moral point of view, in such a world an agent can only *possess*: he can physically control objects and resources but never *own* them. And he must allow that there is nothing wrong with others' pos-

⁷⁴ See Loren Lomasky's argument concerning the "strains of commitment" that are induced by making us responsible for each other, and why this casts doubt on Rawls's claim that the difference principle would be selected in the original position. Lomasky, "Libertarianism at Twin Harvard," *Social Philosophy and Policy* 22, no. 1 (2005): 178–99.

⁷⁵ This, of course, supposes that property rights are not freedom rights. I argue for this view in my essay "Property, Rights, and Freedom," *Social Philosophy and Policy* 11, no. 2 (1994): 209–40.

sessing what he would like to have, for there are, we are supposing, no moral rights to property (and that includes no collective moral rights vested in the community). If one rejects the very idea of a moral right to private property by refusing to assert ownership, argued Kant, one must allow that it would be no moral injury to one should others arbitrarily take what one possesses and in so doing undermine one's activity and will. "In other words, it would reduce these objects to naught from a practical point of view and make them into *res nullius*, although . . . the will [is] involved in the use of these things. . . ." ⁷⁶ Recall that given the argument from abstract agency, we have, qua agents, a central concern with acting on our evaluative standards. By reducing the objects of his will and plans to "*res nullius*," one who rejects the very idea of private property rights undermines his own claim qua agent to act on his evaluative criteria: it is never a moral injury to him to "rob" his activities of those parts of the world with which they are intertwined. In sum, without true property rights defining a sphere of moral authority (see Section VII.A below), an agent has no moral claims on others to allow him to employ his evaluative standards over most of social life. Thus, Kant reminds us that claims to property are part of free agency itself: when one claims property over a thing, one claims "that any interference with my using it as I please would constitute an injury to me." ⁷⁷ This Kantian idea is reflected in the common law. When a thing that is simply possessed becomes integral to one's activity, the common law often supposes that claims are thereby generated. In common law, for example, possession is understood as an implicit act of communication of a claim that gives rise to rights, and often to title. Although possession qua control is understood as *physical* fact, it can give rise to *claims*. Even acts of possession such as killing and carrying away an unowned fox have been held to give title. ⁷⁸

Given that a free moral person has an interest in acting in accord with his own evaluative standards (see Section II above), it does not seem that he can reject moral rights to property, even under full justification. This, of course, by no means justifies anything like capitalistic property rights. It merely demonstrates the importance of private property as a moral category for agency. The contours of those rights must be filled in, but

⁷⁶ Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis, IN: Bobbs-Merrill, 1965), 53 (Private Law, sec. 2). *Res nullius* is a thing belonging to no one.

⁷⁷ *Ibid.*, 55 (Private Law, sec. 5).

⁷⁸ Thus the famous case of *Pierson v. Post* (Supreme Court of New York, 1805; 3 Cai. R. 175, 2 Am. Dec. 264). Post, the plaintiff, was pursuing a fox with his hounds while Pierson came in during the chase, shot the fox, and carried it off. Post sued (invoking something like the labor theory of value) on the grounds that he was pursuing the fox, and so had a claim to it. The court found in favor of Pierson, as he possessed the fox. See Jesse Dukeminier and James E. Krier, eds., *Property*, 5th ed. (New York: Aspen, 2002), 19–24. For a discussion, see Carol Rose, "Possession as the Origin of Property," *University of Chicago Law Review* 52 (Winter 1985): 72–96.

however they are filled in, the property rights must be robust enough to secure the interest in agency and in doing “as I please.” Moreover, it must be remembered that whatever principle of property is justified by considerations of abstract agency must be stable under full justification. To accept that there is an intrinsic tie between free agency and property rights, and thus that a system of property rights is morally necessary, also implies certain other conditions: just as only systems of basic liberties that widely distribute liberty can be justified among abstract agents, so too with property. Systems distinguishing “mine and thine” by making everything mine and nothing thine are manifestly unable to be endorsed under full justification. Adequate defenses of private property have always sought to show that, at a minimum, the benefits of property rights are universal: everyone is much better off under a system of private property than without one.⁷⁹ However, universal benefit from property may not be sufficient; an unimpaired opportunity to acquire property, or even something closer to a system that is conducive to universal property-holding, may be required.⁸⁰

VI. JUSTIFYING PUBLIC MORALITY: THE TESTING CONCEPTION

A. *Optimal eligible interpretations*

The argument from abstraction identifies, at a minimum, the importance of agency freedom and property rules; let us focus for now on agency freedom, the fundamental liberal concern. As I said, the abstract argument gives us abstract requirements; a wide range of interpretations present themselves about just what freedoms are morally required by agents such as ourselves. To see our way to more specific justifications, let us introduce the concept of a set $\{p_1 \dots p_n\}$ of *optimal eligible interpretations*

⁷⁹ The universal benefit of private property has been a fundamental liberal theme. Consider the following canonical liberal passages. First, Adam Smith: “[T]he accommodation of an European prince does not always so much exceed that of an industrious and frugal peasant, as the accommodation of the latter exceeds that of many an African King, the absolute master of the lives and liberties of the thousand naked savages.” Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell and A. S. Skinner (Indianapolis, IN: Liberty Press, 1981), vol. I, pp. 23–24. Now Locke: “There cannot be a clearer demonstration of any thing, than several Nations of the Americans are of this, who are rich in Land, and poor in all the Comforts of Life; whom Nature having furnished as liberally as any other people, with the materials of Plenty, i.e. a fruitful Soil, apt to produce in abundance, what might serve for food, rayment, and delight; yet for want of improving it by labour, have not one hundredth part of the Conveniences we enjoy: And a King of a large fruitful Territory there feeds, lodges, and is clad worse than a day Labourer in England.” Locke, *Second Treatise of Government*, 314–15 (sec. 41). In both cases, the claim is that private property is a Pareto improvement over a non-property regime.

⁸⁰ For a sensitive discussion, see Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), esp. chap. 11. Arguments for a Lockean “proviso” are also relevant here: i.e., the idea that a condition of a justified property right is that it does not interfere with others’ opportunities to acquire property.

of an abstract justified principle P . Our justificatory problem comes to this: We need to first identify what such a set might be, and then justify identifying one member of it as our public morality. Let us say that each interpretation p is put forward as a fully specified scheme of agency freedoms, including any priority rules. An interpretation p is *eligible* if and only if under full justification the interpretation of P qua p would be ranked by every reasonable moral person as better than no P interpretation at all. And let us restrict ourselves to only *optimal* eligible interpretations: if p_1 and p_2 are both eligible interpretations of P , and if under full justification everyone's evaluative standards rank $p_1 > p_2$, then p_2 is excluded from the set of optimal interpretations.

I shall suppose, for the moment, that the set of optimal eligible interpretations contains more than one member (but see below). If the set is null, then the abstract argument was not stable under full justification insofar as, for every possible interpretation, at least one reasonable moral person ranks it as worse than a morality without the principle. If the set has one member, then the justificatory task is completed. But the assumption that the set can be reduced to one—in other words, that abstract philosophical argument actually justifies a unique and determinate answer to what our morality requires—strikes me as implausible, and is indicative of disregard for current practices that Freedman (to say nothing of Hume, Hayek, and so many others) warns against. I assume, then, that we have a *nested disagreement*: a rational disagreement about the best choice nested within a rationally agreed upon set.⁸¹ We disagree about the best specification of moral claims, but this disagreement is nested in a rational agreement that moral regulation of this matter is publicly validated.

B. *The testing conception*

We seem to have landed back where we started: we have divergent rankings with no best option, though now we do rationally concur that some member of the set must be selected. Of course, we can continue on with abstract philosophical argument: we might, for instance, develop some sort of bargaining theory that would show that some member of the set is the rationally-to-be-selected option.⁸² But any proposal for a rationally best solution from the set of optimal eligible interpretations will itself be evaluated differently by various evaluative standards, leading us to a second-level disagreement about the rankings of different bargaining theories. A fresh start is needed. Abstract philosophical construction has done a lot of work; we have arrived at abstract principles and an under-

⁸¹ I have given a slightly different account of nested disagreement in *Justificatory Liberalism*, 156ff. For an enlightening discussion, see Micah Schwartzman, "The Completeness of Public Reason," *Politics, Philosophy, and Economics* 3 (June 2004): 191–220.

⁸² I sought to do this in *Value and Justification*, chap. 9.

standing of what range of interpretations is rationally admissible. But what is the next step in understanding a morality for free and equal rational agents?

An alternative conception of moral validation has been employed by philosophers such as Kurt Baier. Basic to Baier's analysis is that moralities are social facts. Anthropologists can identify a group's morality, and distinguish it from laws, taboos, and etiquette.⁸³ To be sure, members of a group may have sharp disagreements about some of the rules and interpretations of them, but an anthropologist could describe them in a fairly accurate way. On this conception, to validate a morality is to test the moral rules of one's group from the moral point of view: we ask whether each person's evaluative standards validate this rule. However, "validation" here does not imply "the best social moral code," "the best of all possible rules from one's perspective," or "the rules that would be arrived at in a perfectly fair bargaining situation." Because, ultimately, moralities are not philosophical creations—they are not at all the same thing as what philosophers call "moral theories"—philosophers cannot construct them by writing books, even quite long ones. They are social facts that confront us. The task of philosophical ethics is to sort out which of these social facts should be acknowledged as imposing obligations and which should be rejected as inconsistent with treating all as free and equal moral persons.⁸⁴

Our abstract construction has provided us with the requisite critical perspective; the task of moral reflection is to apply this perspective to our actual morality. Restricting ourselves now to agency freedom, our actual morality must be within the set of optimal eligible interpretations if all are to have good reason to accept our social morality. If our current interpretation of agency freedom is within the optimal eligible set, then we are confronted with actual moral freedom rights that satisfy the requirements of abstract moral reflection, and would not be rejected by any reasonable moral person under full awareness of her evaluative standards. This does not mean, however, that each person sees this as the best specification, or even one of the best, or even better-than-average. The existing practice may not be close to most people's ideal, but if it is part of the optimal eligible set, it qualifies as publicly justified. Moral obligation is not a tight function of moral perfection. Of course, people can provide arguments to move the current morality in their ideal directions. As Baier observes, "improvements in the society's morality can occur only by changes in the members' morality and these are best brought about by the members' own efforts at convincing one another by their discussions with others (and, of course, by their own critical reflections)."⁸⁵

⁸³ See Baier, "The Point of View of Morality."

⁸⁴ See Kurt Baier, *The Rational and the Moral Order* (Chicago: Open Court, 1995), 212.

⁸⁵ *Ibid.*, 217.

In contrast, the current interpretation may fail to be justified in two ways: (1) It could be that our current interpretation of liberty rights is part of the set of eligible interpretations, but not in the set of *optimal* eligible moralities. In that case, there is some alternative moral practice that everyone's evaluative criteria ranks as better than the current way of interpreting our agency rights. In that case, our current moral rights to agency freedom, though they represent an eligible option, are irrational because they are suboptimal: we all have reason to adopt the optimal alternative scheme. This raises complex issues. How far, for example, is the current interpretation of *P* from the relevant optimal interpretation? Certainly there is a case for moral reform here, but whether one has reason to follow the current understanding of our moral liberty rights depends on the details of the case. A reasonable proposal is that in personal interactions one should appeal to the optimal code, as one has the opportunity for showing that it is justified among free and equal moral persons. In relations with strangers, however, it may be morally presumptuous for one to ignore the accepted code.

(2) Secondly, it might be the case that our current moral practice is not within the set of eligible interpretations: it is not justified under some free and equal moral persons' full evaluative standards. In that case, the current interpretation is illegitimate: it does not specify moral rights to freedom. Of course, we might still have pragmatic reasons to pay attention to these positive rights, but they would not be justified elements of our public morality. However, we should not jump to the conclusion that the entire current moral practice involving agency freedom would be undermined. Even if the entire practice cannot be fully justified, some parts of it may survive the scrutiny of full justification and thus morally ground parts of our current agency freedoms. Insofar as we can partition our moral practices,⁸⁶ we can distinguish those parts that withstand critical reflection from those that do not. However, should large parts of our current practice fail to be within the set of eligible interpretations of abstractly justified principles, we would be faced with a sort of moral chaos: our current moral practice would then fail to treat each individual in a way required by his status as a free and equal moral person. We would then be faced with a deep moral problem: we are committed to some interpretation of a moral principle, but we cannot identify any publicly justified specific interpretation, so we are unable to arrive at a workable morality even though some moral principles are validated. It is tempting to suppose that democratic decision-making can offer a solution: the law might be understood as a way for us to coordinate on new practices within the eligible set.⁸⁷ However, we need to be careful: there

⁸⁶ This partitioning raises formal problems about the possible interconnectedness of justifications that I do not pursue here.

⁸⁷ See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999), 104ff.

is no good reason to suppose that majoritarian procedures will focus on practices that would be validated by all, rather than just the majority. If politics and legislation are to help us escape such moral anarchy, we would have to employ carefully constructed extramajoritarian methods to ensure that the outputs were reasonably likely to pass the test of public justification.⁸⁸

C. *Morality as recognized claims*

Some object to the testing conception of moral validation because it supposes a “bias” toward current moral practice. Why select the current morality from the set of eligible codes? What could justify this bias toward the actual?

A bias toward the actual is endorsed by a certain *publicity condition on morality*. This requires that a morality be a social fact. To be rationally justified is not sufficient to establish a bona fide moral rule: it must be accepted, taught, and relied upon. Baier sought to capture this publicity condition by requiring as a condition for being a moral rule that a rule “be taught to all children,” so that all would know what the rule is.⁸⁹ Rawls upheld a publicity condition as a formal constraint on the concept of right: our conception of what is right presupposes that justified moral principles are known to be such by everyone.⁹⁰ Some interpret the publicity condition in a weaker way, as simply mandating that the moral rules and principles *could* be made public, and thus their efficacy does not necessarily depend on being restricted to a few. The stronger condition endorsed here (and, I think, by Baier) is that moral principles *must* be public in the sense that they provide the basis of our settled expectations about each other’s duties and claims. Moral duty is not *simply* a matter of reason, it is necessarily a practical guarantee and source of mutual recognition of each other as possessing a certain status as free and equal moral persons—in the words of T. H. Green, “a society of men who recognise each other as *isoi kai homoioi* [equals].”⁹¹ If we accept the publicity condition, a necessary condition for *R* to be a moral right entailing obligations is that it is publicly recognized as part of morality. Only rules that are part of our current code can fulfill that condition.

⁸⁸ See my *Justificatory Liberalism*, 237ff. See also my essay “The Legal Coordination Game,” *American Philosophical Association’s Newsletter on Philosophy and Law* 1 (Spring 2002): 122–28.

⁸⁹ Baier, “The Point of View of Morality.”

⁹⁰ Rawls, *A Theory of Justice*, 115. Rawls relates this condition to Kant’s justification of publicity in a note, 115n.

⁹¹ T. H. Green, *Lectures on the Principles of Political Obligation*, in Paul Harris and John Morrow, eds., *Lectures on the Principles of Political Obligation and Other Writings* (Cambridge: Cambridge University Press, 1986), sec. 116.

VII. THE RIGHTS OF THE MODERNS

A. *Rights as devices of devolution*

Our fundamental moral concern, then, must be whether our current morality is at least within the set of eligible interpretations. Do we have any reason to think it is?

D'Agostino's analysis is again helpful, providing grounds for concluding that our liberal morality does reasonably well at the crucial task of coping with evaluative diversity. Because liberal morality is a morality of rights, its main solution to the problem of divergent evaluative standards, and divergent interpretations of shared principles, is to devolve to individuals the moral authority to decide what evaluative standards to apply in specific situations. A system of rights is an efficient response to the problem of public justification given evaluative diversity. "Civil society, with its individual rights and rights of association, [and] the market, with its foundation of property rights and rights of contract," are, D'Agostino argues, devices of "commensuration" that devolve moral authority: they define spheres of authority that specify whose evaluative standards will be regulative in a social interaction.⁹² "In effect, we say that in a society with n individual members, there are n separate spheres in which an answer . . . may be sought, each of which is, in theory, inviolable and particular to the individual who occupies it."⁹³

Of course, because there are indefinitely many systems of rights, the devolution solution presupposes that successful arguments from abstraction have identified the eligible systems, and the testing conception confirms that our system is in the set. Granted that, however, we can see how devolution via a system of rights greatly lessens what we might call the burdens of justification. Deep evaluative diversity, we have seen, poses serious obstacles to the public justification of a common morality. The rights solution is to mitigate our evaluative disagreements by granting to each a limited sphere in which an individual's evaluative standards have public standing. This function of rights is almost always overlooked.⁹⁴ Liberals are apt to see rights as ways in which individuals are protected against others: they define morally protected zones surrounding each. While rights are certainly that, however, they are typically far more: a moral right gives a person moral authority to decide the social outcome on the basis of his own evaluative standards. If I exercise my moral right against you, my evaluative standards are given social moral standing: they become, on this issue, the voice of public morality.

⁹² D'Agostino, *Incommensurability and Commensuration*, 105.

⁹³ *Ibid.*

⁹⁴ For a notable exception, see Eric Mack, "In Defense of the Jurisdiction Theory of Rights," *Journal of Ethics* 4 (January–March 2000): 71–98.

B. *The impossibility of a Paretian liberal?*

At this point, the argument of Amartya Sen's essay "The Impossibility of a Paretian Liberal" is relevant, and seems to pose an objection to the devolution proposal.⁹⁵ Sen conceives of a person having a right R as having authority to decide the social preference over at least one pair of alternatives (x, y) such that if a person chooses $x > y$, that is the social preference; and if the person chooses $y > x$, then that is the social preference. This conception of a right has been disputed, but it perfectly captures the conception of rights as devolved ways to cope with evaluative diversity: instead of a collective choice over the pair (x, y) , the social choice is devolved to a single agent.⁹⁶ However, Sen shows that attributing such rights to two persons, and assuming all possible orderings of social states are permissible, the social outcome selected by the rights can conflict with the widely endorsed Pareto principle (that if for everyone $x > y$, then the social preference must be $x > y$). More formally, Sen shows how combining rights, the Pareto principle, and no restriction of preference orderings, can result in intransitive social preference. Sen nicely summarizes his argument:

There is a book (e.g. *Lady Chatterley's Lover*) which may be read by Mr. A ("the prude") or Mr. B ("the lascivious") or by neither. Given other things, these three alternatives define social states, a , b and o respectively. Consider now the following possibility. The prude A most prefers o (no one reading it), then a ("I'll take the hurt on myself"), and lastly b ("Imagine that lascivious lapping it up"). The lascivious [Mr. B] prefers most a ("it will give that lilywhite baby a nice shock), then b ("it will be fun"), and last o ("what a waste of a good book"). On grounds of individual freedom, since B wants to read the book rather than no one reading it, b is socially preferred to o ; note that in *either case* A does not read the book here. Similarly, since A does not want to read it, o is socially better than a . But a is Pareto superior to b , yielding a preference cycle.⁹⁷

Thus, we get $b > o$ (by Mr. B's right); $o > a$ (by Mr. A's right), and $a > b$ (by the Pareto principle, since in both Mr. A's and Mr. B's ordering, $a > b$); therefore, we get $b > o > a > b$ —a cycle.

Some see this as a case against individual rights: such rights can conflict with the Pareto principle, which many see as so intuitively obvious as to

⁹⁵ Amartya Sen, "The Impossibility of a Paretian Liberal," *The Journal of Political Economy* 78 (January–February 1970): 152–57. For an extended, and accessible, discussion, see Amartya Sen, "Liberty, Unanimity, and Rights," *Economica*, New Series 43 (August 1976): 217–45.

⁹⁶ Nozick, for one, criticized this conception in *Anarchy, State, and Utopia*, 165–66. Cf. Sen, "Liberty, Unanimity, and Rights," 229–31.

⁹⁷ Sen, "Liberty, Unanimity, and Rights," 218.

be beyond dispute. After all, if *everyone* in society prefers *a* to *b*, then certainly that ought to be the social ordering; but if we combine this principle with individual rights to decide the social preference over some options, we can get a social preference—or a public morality—that is intransitive, and thus irrational. However, Sen saw this not as a case against liberal rights, but as showing “the unacceptability of the Pareto principle as a universal rule.”⁹⁸ We have especially good reason to discount the Pareto principle *here*.⁹⁹ According to our argument from abstraction, morality is to ascribe central importance to agency freedom. Sen’s case is an example where people’s agency freedom conflicts with what they prefer others to do; preferences about what another does in her sphere of rights thus should be ignored by public morality.

C. Rights and social recognition

Appreciation of the importance of rights as devices of devolution leads to another consideration (in addition to the publicity condition; see Section VI.C above) supporting the testing conception’s “bias” toward actual morality. If a system of rights is to perform the function of devolving moral authority to individuals in society, it is crucial that these rights be socially recognized. In his *Lectures on the Principles of Political Obligation*, Green considers the distinction between de facto and de jure sovereignty.¹⁰⁰ Green resists the idea that de jure sovereignty is simply “rightful authority” that has no practical force, as when appeal is made simply to a “general will, or the mere name of a fallen dynasty exercising no control over men in their dealings with each other.”¹⁰¹ Instead, Green argues, the distinction “has natural meaning in the mouths of those who, in resisting some coercive power that claims their obedience, can point to another determinate authority to which they not only consider obedience due, but to which obedience in some measure is actually rendered. . . .”¹⁰² Green’s point—and he seems entirely right—is that a political authority that has no practical effect is no political authority at all, as it cannot perform its main task of sorting out disagreements and harmonizing rights. To be any

⁹⁸ *Ibid.*, 235.

⁹⁹ If the Pareto principle is unacceptable as a general constraint, then we must question Arrow’s theorem (see Section IV.A), which also relies on it (see note 51 above). Does this mean that justification via aggregation is a live option again? I think not, both for the reason I explore in the text, and because the formal problems identified by Arrow’s theorem are just the tip of the iceberg with aggregation procedures, which display a plethora of worrisome features such as path dependence.

¹⁰⁰ Green, *Lectures on the Principles of Political Obligation*, sec. 105. For defenses of “the rights recognition thesis,” see Rex Martin, *A System of Rights* (Oxford: Clarendon Press, 1993); Derrick Darby, “Two Conceptions of Rights Possession,” *Social Theory and Practice* 7 (July 2001): 387–417; and Gerald F. Gaus, “Green’s Rights Recognition Thesis and Moral Internalism,” *British Journal of Politics and International Relations* 7 (2005): 5–17.

¹⁰¹ Green, *Lectures on the Principles of Political Obligation*, sec. 105.

¹⁰² *Ibid.*

sort of authority at all, there must be some general recognition of it; only then can it perform its designated tasks. If it is not generally recognized as an authority, we might argue that it ought to be an authority, but we cannot claim that it now is. The job of authority is to regulate and coordinate interaction; if so, an authority that is not recognized simply is unable to perform the office of an authority, just as one who is not socially recognized as a leader is unable to fulfill the position of “group leader.” We can say that a person who is not recognized—either explicitly or implicitly—as a leader ought to be the leader, but not that he is the leader.

The application of Green’s analysis of sovereignty—understood in terms of the point of authority argument—to rights qua dispersed moral authority is manifest. To the extent that the function of moral rights is to localize moral authority, they cannot fulfill this function at all if they are not generally recognized. If there are no recognized moral rights, we are in a state akin to civil war, with each side seeking to construct its own preferred authority. As Green observes, however, in situations like this, there really is no sovereignty at all.¹⁰³ Rights as dispersed moral authority thus require social recognition. Without general recognition, no authority exists.

D. The rights of the moderns

Benjamin Constant’s famous lecture “The Liberty of the Ancients Compared with That of the Moderns” is interesting to us insofar as he set out to compare two interpretations of the freedom principle: the one that we “moderns” have developed and a more ancient one, which still has a pull on us. The liberty of the moderns, Constant tells us, consists in people’s freedom from arbitrary arrest and punishment, their freedom of association and religion, their right to exercise influence on government, their right of expression, *and* their right “to choose a profession and practice it, to dispose of property, and even to abuse it; to come and go without permission, and without having to account for their motives or undertakings.” Constant contrasts this to the liberty of the ancients, which consisted of “exercising collectively, but directly, several parts of the complete sovereignty.”¹⁰⁴ As I said at the outset in Section I, Rawls’s final position was that these two types of liberties are of equal status.¹⁰⁵ His

¹⁰³ Ibid.

¹⁰⁴ See Constant, “The Liberty of the Ancients Compared with That of the Moderns,” 310–11.

¹⁰⁵ Rawls appears to change his position from a priority of the liberty of the moderns over the ancients (in his senses) to one of equal status. Compare Rawls, *Justice as Fairness*, 143, and *Political Liberalism*, 106ff. Although *Justice as Fairness* was published after *Political Liberalism*, it expresses Rawls’s views from the 1980s. Constant himself held that “[i]ndividual liberty . . . is the true modern liberty. Political liberty is its guarantee, consequently political liberty is indispensable.” Constant concludes his essay, however, by insisting that the two sorts of liberty must be combined in free institutions. As Stephen Holmes points out, Constant wrote parts of his famous essay in the first years of the nineteenth century, with left-wing critics

influential interpretation of this distinction, which he attributed to Constant, is troubling in two ways.

First, as Rawls sees it, the liberties of the moderns are, centrally, “freedom of thought and liberty of conscience, and the civil liberties generally.”¹⁰⁶ Elsewhere, Rawls adds “certain basic rights of the person and property, and the rule of law.”¹⁰⁷ He consistently identifies political liberties with the liberties of the ancients,¹⁰⁸ though Constant was explicit that the liberty of the moderns includes “everyone’s right to exercise some influence on the administration of the government, either by electing all or particular officials, or through representations, petitions, demands to which the authorities are more or less compelled to pay heed.”¹⁰⁹ For Constant, the liberty of the ancients concerned not simply political rights, but a

collective exercise of sovereignty; in deliberating, in the public square, over war and peace; in forming alliances with foreign governments; in voting laws, in pronouncing judgments, in examining the accounts, the acts, the stewardship of the magistrates; in calling them to appear in front of the assembled people, in accusing, condemning or absolving them.¹¹⁰

Constant did not have in mind, then, simply the distinction between, on the one hand, freedom of conscience and expression, freedom of association, and basic rights of the person, and, on the other hand, political rights. Once we see that political representation is part of the liberty of the moderns, it is uncertain whether the liberty of the ancients holds any attraction whatsoever. The “collective exercise of sovereignty” resulting in a “social jurisdiction” over the commensuration of evaluative standards cannot loom large in modern life, for the familiar reasons I have canvassed. Given (as Arrow and others have shown) the impossibility of devising a way of aggregating preferences into an overall social preference ordering (or, indeed, into a simple social choice) that does not violate reasonable conditions, collective commensuration wilts under the burdens of justification (see Section IV.A above).

Second, Rawls’s gloss on the distinction just barely admits the right to private property as one of the “liberties” of the moderns. As I have said,

in his sights; much of this part of the essay is critical of the liberty of the ancients. By 1819, when he delivered his lecture, these left-wing critics had passed from the scene, and Constant, worried about overprivatization, added comments sympathetic to the liberty of the ancients. See Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* (New Haven, CT: Yale University Press, 1984), chap. 2.

¹⁰⁶ Rawls, *Political Liberalism*, 299.

¹⁰⁷ *Ibid.*, 5.

¹⁰⁸ See Rawls, *A Theory of Justice*, 176–77, 195; Rawls, *Justice as Fairness*, 143; and Rawls, *Political Liberalism*, 396ff.

¹⁰⁹ Constant, “The Liberty of the Ancients Compared with That of the Moderns,” 311.

¹¹⁰ *Ibid.*

in some places Rawls includes among the liberties of the moderns “basic” rights of property, while at other times no mention at all is made of property.¹¹¹ In any event, it is clear that Rawls does not think that a just scheme of agency freedom must include any property rights in productive resources.¹¹² Constant gave a far more important place to property rights in his account: modern “freedom” (broadly understood here to include a range of liberties, claims, powers, and liabilities) is based on devolution of moral jurisdiction to individuals over wide areas of social life, crucially including a system of robust property rights. To be able “to choose a profession and practice it, to dispose of property, and even to abuse it; to come and go without permission, and without having to account for their motives or undertakings” is fundamental to the morality of people living in complex, evaluatively diverse modern societies. One can act within a sphere without having to account to others because one has moral authority within it. Constant’s chief aim was to contrast the modern system of private jurisdictions over parts of social life to the unlimited “social jurisdiction” of the ancients.

Private property is perhaps the chief means by which the authority to employ controversial evaluative standards is devolved to individuals and associations. We thus arrive at a second fundamental argument for private property rights (in addition to the argument from agency; see Section V.C). In the absence of robust private property rights, the rights of freedom of expression and of conscience, freedom of association, and freedom of occupation ineffectively respond to the burdens of justification, as so many of our evaluative standards relate to the disposition of resources. Owners employ controversial standards with which others disagree, yet others recognize a bundle of moral duties and liabilities that give public moral standing to an owner’s standard-based activity. Rights in several property, by devolving moral jurisdiction, thus allow for moral claims in the face of evaluative disagreement and in the absence of collective commensuration.¹¹³ As Jeremy Waldron notes in his insightful book on the right to private property: “Ownership . . . expresses the abstract idea of an object being correlated with the name of some individual, *in relation to a rule which says that society will uphold that individual’s decision as final when there is any dispute about how the object should be used.*”¹¹⁴ Ownership, then, implies authority over decisions about the use of objects and parts of the world.¹¹⁵ A robust system of private ownership is endorsed

¹¹¹ Property is included in Rawls, *Political Liberalism*, 5, and *Justice as Fairness*, 2; it is omitted in Rawls, *A Theory of Justice*, 195; *Justice as Fairness*, 144; and *Political Liberalism*, 299.

¹¹² See Rawls, *Justice as Fairness*, 177.

¹¹³ On these points, see Mack, “In Defense of the Jurisdiction Theory of Rights”; and Randy Barnett, *The Structure of Liberty: Justice and the Rule of Law* (New York: Oxford University Press, 1998), 138ff.

¹¹⁴ Waldron, *The Right to Private Property*, 47; emphasis added.

¹¹⁵ The idea of ownership as a status against the whole world in relation to a thing remains important in property law. See, e.g., *Armory v. Delamirie* (Kings Bench, 1722, 1

by the very (Rawlsian) idea of public justification under conditions of far-reaching evaluative diversity. As the political theorist John Gray once observed:

The importance of several property for civil society is that it acts as an enabling device whereby rival and possibly incommensurable conceptions of the good may be implemented and realized without any recourse to any collective decision-procedure. . . . One may even say of civil society that it is a device for securing peace by reducing to a minimum the decisions on which recourse to collective choice—the political or public choice that is binding on all—is unavoidable.¹¹⁶

A regime of individual moral rights, including a regime of private or “several” property, is thus a form of public justification or, perhaps better understood, a way to settle the problem of public justification in such a way that in the future it is no longer a collective problem. This point is seldom appreciated. It is, of course, widely accepted that, as the prominent libertarian philosopher Eric Mack puts it, the “organizing idea” of the “private property system . . . [is] the idea of sanctioning expansion of personal spheres of authority so as to secure individuals’ inviolability in their respective life projects.”¹¹⁷ (Or, in the words of the left-leaning Charles Reich, “[p]roperty draws a circle around the activities of each private individual or organization. Within that circle, the individual has a greater degree of freedom than without.”)¹¹⁸ This is the abstract argument from agency (Section V), and it should by no means be belittled. What is less appreciated, though, is how this devolution of moral authority allows us to cope with evaluative diversity without ongoing collective commensuration.¹¹⁹

E. The fatal attraction of the liberty of the ancients

What Constant called the liberty of the moderns is, I believe, one of the great modern discoveries: it provides a framework for a common morality that reconciles deep differences in our evaluative standards by devolving moral authority to individuals, giving each a sphere in which her evaluative standards have authority. Yet, puzzlingly, contemporary political theory is enamored with the liberty of the ancients—collective commensuration to reach joint judgments about evaluative standards. The current fascination in contemporary political theory is “deliberative

Strange 505), in Dukeminier and Krier, eds., *Property*, 108-9. On the importance of property qua jurisdiction over resources, see Barnett, *The Structure of Liberty*, 64ff.

¹¹⁶ John Gray, *Post-Enlightenment Liberalism* (London: Routledge, 1993), 314.

¹¹⁷ Mack, “Self-Ownership and the Right of Property,” 536.

¹¹⁸ Charles Reich, “The New Property,” *Yale Law Journal* 73 (1964): 771.

¹¹⁹ See Barnett, *The Structure of Liberty*, 138ff.

democracy"—a diverse family of views favoring enlarging the scope of democratic decision-making based on widespread public deliberation aiming at consensus.¹²⁰ "[T]he aim of the regulative idea is agreement of conviction on the basis of public reasons uttered and assessed in public discourse. . . ." ¹²¹ Even Rawls came to embrace some version of this doctrine.¹²² Apparently, we are still held captive by the highly idealized picture in our mind's eye of the Athenian polis: Why can't we again be like that? (Was it ever like that?)

This attempt to emulate in practice a romantic image of the past can only lead to oppression. Deliberative democracy supposes that our differences in evaluative standards are, as it were, only on the surface. Once we reason together and talk things through, deliberative democrats hold that our value orderings will be transformed:¹²³ the range of disagreement will radically narrow so that the problems of social commensuration will become fairly insignificant, if not vanish altogether. Surely, though, this is a fantastic claim: in the end, deliberative democrats acknowledge, we must cut off discussion and take a vote, but then the majority is subjugating others to its judgment in the name of public reason—reason which is not shared by the dissenting minority. Moreover, we know that there is nothing uniquely correct about the outputs of any actual voting procedures. Once we accept that our disagreements are widespread and deep—that the range of possible value orderings is almost unlimited—democratic procedures simply are not up to the task of collective commensuration (again, we come back to Arrow-like problems; see Section IV.A).

VIII. CONCLUSION: OUR MORALITY OF RIGHTS

I have argued that our commitment to treating others as free and equal moral persons implies a commitment to the public justification of our moral claims. Given reasonable evaluative diversity, the public justification of a morality must, somehow, take these reasonably diverse standards and arrive at a common, justified morality. The burdens of justification are weighty. A regime of rights solves the commensuration problem by devolving moral authority. Thus, I have upheld the liberty of the moderns—understood as a system of individual rights—over the lib-

¹²⁰ The core work here has been done by Jürgen Habermas. See his "Popular Sovereignty as Procedure," trans. William Rehg, in James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997), 44. See generally the essays in that volume. See also Dryzek, "Democratic Theory."

¹²¹ Gerald J. Postema, "Public Practical Reason: Political Practice," in Ian Shapiro and Judith Wagner DeCew, eds., *Nomos XXXVII: Theory and Practice* (New York: New York University Press, 1995): 345–85, at 356.

¹²² See note 105 above.

¹²³ See Jon Elster, "The Market and the Forum," in Bohman and Rehg, eds., *Deliberative Democracy*, 10–11.

erty of the ancients, which stressed collective decision-making as the primary mode of public commensuration.

But how can we justify a regime of rights? Before we can devolve authority, we must justify a specific rights regime. Philosophical reflection and justification, I have argued, can give us abstract answers regarding which moralities are acceptable to free and equal moral persons, but they cannot create a morality, moral rights, or moral obligations. A morality is a social fact (though not only a social fact) that cannot be conjured up by even the most potent philosophical brews: it involves real norms, which structure actual social interaction. Once we abandon the thoroughly constructivist project, we see that the main aim of normative ethics is to reflect on the moral rights that are recognized in our society, and to determine which of them free and equal moral persons ought to embrace.

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