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Rethinking Political Justification

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1. Introduction

Laws are supposed to bind a person regardless of her personal estimation of what she ought to do. This is what makes them normative. But can we capture this feature without ascribing moral value to specific behaviors or states of affairs? Judgments regarding moral value are often controversial, especially in a society that is culturally diverse. Yet if the content of a law may not be defended by appeal to its moral rightness, there seems little to invoke apart from the pragmatic value of avoiding sanctions to justify the expectation that individuals conform. The essential question is what justifies this expectation when an individual's own judgment regarding what is called for diverges from that of legislators. Part of this problem regards compulsion. What justifies applying sanctions for failure to conform? However, prior to questions about the justifiability of sanctions are questions about normative force concerning what makes it wrong and not just inadvisable for a person to ignore the requirements of a law.

One popular strategy for answering these questions is to use the concept of political justification. A law is politically justifiable when citizens can defend it to each other in the political domain. Being defensible in the political domain is supposed to make laws emotionally compelling in virtue of their being justified for each member of the community, and intellectually compelling in virtue of their having emerged from a process that is subject to constraints of rationality such as consistency and coherence. However, being politically justifiable does not and cannot explain why it is reasonable to expect individuals to conform because it places too much emphasis on deference to the judgments of public actors. Ultimately the problem lies in the way the project of justifying laws has been framed. Laws are difficult to justify not because they include evaluative judgments, but because they purport to be normative. The problem is not moral disagreement, it is disagreement. The solution lies not in developing an account of political reasons but in developing an account of good reasons.

2. Political Justification

Political justification is a strategy for legal justification in which only political reasons are offered as grounds for accepting the requirements of a law as binding. It is supposed to be a good strategy for overcoming cultural and ideological differences in that it limits the extent to which arguments for and against a law may appeal to moral claims. This is an attractive feature because people often disagree on moral matters, and when they do it is not clear why it is reasonable to expect individuals to defer to legislators. In political justification, the problem of moral disagreement is solved by appealing to a distinctive form of reasoning in which only public principles may serve as justification. Insisting that laws be politically justified is supposed to make it reasonable to expect individuals to defer by ensuring that the content, topic, or circumstance of a decision is such that public actors may legitimately preempt the decision-making of individuals.[1]

Whether resorting to political justification actually solves the problem of moral disagreement hinges crucially on the claim that we can license imposing evaluative judgments by meeting a publicity condition. What is a publicity condition? On one understanding of it, judgments meet a publicity condition when there is openness in the methods used to persuade an audience of their rightness. Understood in this way, a publicity condition is a condition of general availability, in that it requires that the information, principles, and rules of combination on which the judgments are advocated be generally or easily available to others. Judgments fail to meet a publicity condition so construed when arguments for their rightness appeal to data that is not open to examination or verification by others, when proponents base their credibility on secret imperatives that they are not at liberty to reveal, or when the persuasiveness of the argument depends on connections between claims that cannot be demonstrated. Insisting that judgments must be public in the sense of being generally available makes permission to impose judgments conditional on legislators demonstrating proper respect for the reasoning abilities of the individuals upon whom their judgments are imposed. The assumption is that individuals to whom laws apply are as capable of recognizing the merits of information, argumentation, and valuation as are people who formulate legislation, and so they may be trusted to come to the same conclusions as their legislators once the relevant information and connections are pointed out. When everyone does not reach the same conclusion, it is assumed that someone has made a mistake, diagnosis of which is important in its own right as well as for purposes of legitimating the legislative outcome.[2]

To interpret publicity as general availability we must assume that what makes judgments correct or worthy of adherence is in some sense objective. If we do not assume this, there is no reason to expect everyone to recognize the same information as relevant, or to put information to the same uses in

generating conclusions. This seems to run into problems as a condition for imposing judgments that have an evaluative component, however, because the objectivity of standards of correctness for such judgments is philosophically controversial. Moreover, assuming that there are objective grounds on which we may determine the correctness of an evaluative claim seems only to push back a step the problem that motivated our adoption of publicity as a condition of legal justification in the first place, namely, that moral claims are widely contested. If individuals can be expected to disagree in their judgments of value, they can also be expected to disagree in their judgments of the kind of evidence that counts in favor of a value judgment.

For these reasons, many theorists have shied away from interpreting publicity as general availability. Instead, the dominant trend is to interpret publicity in terms of general acceptability.[3] On a general acceptability understanding of publicity, a claim is publicly justifiable insofar as it employs information, principles, and rules of combination that are generally accepted as adequate. This might involve limiting ourselves to data the reliability of which is generally acknowledged, refraining from offering reasons that presuppose a view of human nature or of citizenship that is widely contested, or appealing only to claims about relationships between premises that a typical interlocutor would accept. The advantage of interpreting publicity as general acceptability is that we need no longer be committed to the objectivity of value judgments. But there is a disadvantage. Divergence in views about what is valuable will inevitably lead to disagreement about what is generally acceptable, and about the concrete implications of what is generally accepted. For example, how we define moral personhood might be crucial to determining the reasons that we accept as compelling in discussions of animal husbandry or abortion, as well as influencing what we take to be implied by those reasons. For many issues the set of generally acceptable reasons, and so the set of reasons that meet a publicity condition interpreted in this way, is empty.

Proponents of general acceptability such as John Rawls and Ronald Dworkin acknowledge that in many issue areas there will not be reasons that count unambiguously as public ones. However, they argue that this need not be true in all cases. Moreover, where individuals disagree over what ought to count as public reasons, the underlying motivation for a publicity requirement is supposed to make it reasonable for disagreeing parties to construct a compromise position. In constructing a compromise each citizen slightly alters her reasoning standards in order to make possible at least some congruence with others. Joseph Raz describes this as a form of epistemic abstinence, in which each citizen refrains from ascribing the status of knowledge to beliefs whose truth is in dispute.[4] Such abstinence cannot require an individual "to abandon his sense of equal worth," and so construction of the compromise may be no easy task.[5] However, if such a compromise position can be

constructed, citizens will be able to use it to ensure that the laws they impose may reasonably be treated as binding for all of them.

Joshua Cohen describes this compromise position as a pluralistic consensus.[6] If we accept that coherence with a pluralistic consensus is what makes a reason public, then divergence in moral views will be fatal to the goal of justifying laws if all value judgments depend on a robust moral view. However, proponents of general acceptability deny that all value judgments are so dependent. Instead, some of the reasons that produce value judgments are argued to occupy a common ground between otherwise divergent moral views so that their truth or usefulness as premises can be asserted independently of the particular moral theory an individual accepts. Depending on the theorist, the common ground may be found by seeking an overlapping consensus, adverting to a higher or more abstract level of principle, or restricting ourselves to particular analogies and cases, the proper treatment of which is generally agreed upon.[7] The key is that we gain the ability to include value judgments in our justifications of laws by constraining, both intellectually and rhetorically, resort to private or personal reasons.

Such intellectual and rhetorical constraint ensures that when we invoke values in the course of defending a law, we appeal only to considerations that are, if not actively shared, then at least demonstrably consistent with value judgments that everyone accepts. In effect, we place judgments about the values that arguments for a law presuppose at an arm's length from judgments about the merits of complete moral views. This allows us to continue to ground our justifications of laws, in part, on claims about the rightness of the value judgments they contain, but that rightness is of a restricted and peculiar form from the perspective of the individuals to whom those laws apply. Laws are binding for individuals in virtue of their being justified to those parts of them that reason using public morality. In effect laws carry normative force for individuals *qua* participants in public life. This restricted normativity is what is meant in speaking of the judgment about what to do that is contained in a law as politically justified in contrast to being justified *simpliciter*.[8] The restricted form of justification is supposed to solve the problem of legal normativity by solving the problem of moral disagreement. In fact, however, it does no such thing.

3. Restricted Normativity and Personal Justification

To make sense of the notion of political justification, we must distinguish circumstances in which public reasons are relevant from circumstances in which they are not. To do this, we must identify spheres or types of decision-making that may or must be given over to public reasons. The first step in this is determining what kinds of activity it is appropriate to treat using public deliberation, understood as applying generally acceptable reasons. Immediately,

however, we face a problem. To argue for drawing the boundaries for public reasons at a particular point, or for even recognizing that there are such boundaries, we must presuppose a robust moral view. For example, to decide whether we may or must use public reasons to deliberate about the images of female sexuality that individuals may propagate and consume, we must take a stand on the role of sexual relations in a good life, and on whether images of female sexuality are relevant to sexual relations fulfilling this role. In cases such as these, setting the terms of public deliberation will be just as morally loaded as deciding what kinds of reasons to accept once public deliberation is under way.

The problem here is that drawing the boundaries of public reasoning requires us to explain why an individual should accept the judgments of her fellows that some of the reasons that she believes are relevant to deciding which activities should be on the public agenda may be excluded from consideration. It is a problem because within an individual's personal justification the candidates for public reasons that everyone accepts are often linked to candidates for public reasons that not everyone accepts. Even if everyone in a society includes certain activities on their list of activities that should be subject to public reasoning, some people may not be able to agree that public reasoning should be limited to only those activities, or should apply to those activities if it does not also apply to some of the activities about which people disagree. When this is the case, some individuals face the prospect of having to accept arguments as persuasive in their role as a participant in public life that do not persuade them outside of this role. Resorting to political justification ensures that we may not treat a conclusion as normative for a fellow citizen if the argument for it includes reasons for accepting a value judgment that are not generally accepted. However, this does not rule out treating a conclusion as normative when the argument includes reasons for accepting a value judgment that are generally accepted, but for different reasons across individuals. Because of this, it is possible for an individual to be confronted with a conclusion that is publicly justified because it is supported by reasons that everyone accepts as candidates for a public reason, but privately unjustified because it is not supported by the reasons in a way that is persuasive in the individual's personal reasoning.

This is the case in the images of female sexuality example given above. If the salience of images of female sexuality to sexual relations playing a good role in a person's life is generally accepted, public arguments that appeal to it may be treated as normative for us even though many of the reasons that drive our personal acceptance of its salience are not included in the arguments. This makes sense only if we assume that moral beliefs can be separated out without changing their content. For example, we must assume that if a person accepts that images of female sexuality are salient to individuals being assured that sexual relations positively contribute to their lives, then

she will accept any conclusion that uses this as a premise regardless of her personal reasons for believing it, as long as it is combined with other premises that she accepts according to rules of combination that she accepts. However, this assumption is problematic. Moral beliefs often form a web and cannot be deployed in arguments separately without undermining an individual's willingness to accept them.

Because of this, many moral theorists question whether there is a coherent distinction between public and private reasons in relation to value judgments. For example, reasons that have traditionally been classified as public do not seem sufficiently different from personal reasons, either in their relationship to other reasons or in their subject matter to warrant treating them as offering a distinctive type of justification.[9] Moreover, because distinctions between public and private reasons have historically been used to sort activities according to the type of person most often involved in them rather than by the way in which they justify, they have typically been not so much distinctions between reasons as between reasoners.[10] Finally, even if we can make sense of public reasons in relation to judgments of value, there is a gap between establishing such reasons as binding for persons *qua* participants in public life, and establishing them as binding for persons in their everyday lives. The question here is why a person should take the reasons that come under a pluralistic consensus to be more authoritative than her personal reasons in some but only some instances. For political justification to work, it must be possible to identify a set of decisions for which it is reasonable for people to substitute public judgments for personal judgments, regardless of what else they believe and regardless of disagreements about the set of reasons that should inform public deliberation. We need a set of decisions such that whatever a person's moral theory, and so whatever a person's account of when, to whom and to avoid what costs she must defer to public judgments, the decisions will be decisions that she agrees may be pre-empted.

One strategy for constructing such a set is to look for activities that have a logic of action or a role in social coordination such that they are likely to be more effectively executed when directed by public judgments rather than by personal judgments. In this strategy, deference to public judgment is justified by the instrumental value of reaching conclusions on the basis of public rather than personal reasons. If we can show that there are activities that everyone in a community wants or needs to be able to pursue, and that are much more effectively or efficiently pursued when everyone defers to public reasons, then we will have shown that political justification is possible. In effect, we ensure that a law is binding for all individuals subject to it by establishing that it is one of a set of decisions that are instrumentally better when governed by judgments arrived at through public reasoning. Individuals are bound to permit public judgments to pre-empt personal judgments when they have grounds to believe that the decisions that govern their actions will

better serve their purposes when arrived at through public reasons rather than personal reasons.

In this strategy, the reasonableness of our expectation of conformity is generated out of the instrumental superiority of public judgments. Individuals are shown to have a pressing interest in deferring to public judgments in virtue of such deference being either the best or only way for them to achieve an important end. The gap between the bindingness of such judgments for public individuals and the bindingness for actual individuals is closed by the desirability or necessity of authorizing public actors to replace personal judgments with public ones. For this to work, we must establish that there is something about the situation that makes public judgment better than personal judgment, and that some public actor is such that it is reasonable for individuals to allow public judgments to replace their own in the situation. Unfortunately for this strategy, the nature of public actors is such that it is very difficult to establish the second condition. Public actors such as states are not sufficiently unified for it to make sense to think of them as authoring public judgments. Moreover, even if it did make sense to think of them as authoring public judgments, the range of circumstances under which it is reasonable to expect individuals to allow a public actor to preempt their decision-making is very small.

For individuals to authorize a public actor to preempt their judgments on the grounds that the public actor's judgments are superior to their personal judgments it must be reasonable for them to assume that the public actor in question is able to make public judgments, and that in the particular case it is better for them to let the public actor's public judgments take precedence over public judgments of private individuals. The reasonableness of individuals treating laws as binding depends on the laws reflecting a judgment based in public reasons of an actor whose qualities are such as to permit or command deference in a particular decision-making domain. This treats public actors as unified entities to whom decisions can be attributed and of whom accounts can be demanded. In effect, public actors are treated as individuals writ large. But there is a difference between a judgment issuing from a public actor and a judgment being issued in a public actor's name. In fact, public actors do not have sufficient coherence or consistency in their operations for it to make sense to talk of them as sources of judgments. Moreover, it is very difficult to establish that the public judgments of public actors are more trustworthy than the judgments of individual persons. To see this, it is instructive to consider the primary candidate for a public actor, the state.

In most polities the collection of public institutions that make up the state can be usefully differentiated along a number of different lines depending on the explanatory objective. For example, public institutions may be differentiated by functional type, by organizational culture, by institutional setting, or by logic of appropriateness.[11] This makes it difficult to identify a single actor or form of activity as the voice of the state. States comprise a number of

different institutions, some of which may fit the needs of a pluralistic consensus model well, others of which may not, and all of which are best understood as producing their decisions in conversation with and through the judgments of individuals who work within them.

In addition to the variety of organizations and organizational forms that comprise a state, public institutions serve a variety of functions. The diversity of function often produces disunity in the goals and reasoning of differently located actors and officials. Although it is true that in some cases the various institutions and organizations interact in a way that directs their decision-making toward a single purpose, such interaction is not a necessary feature of their being elements of single state, and it may not be assumed to obtain.[12] The degree to which disparate elements and organizational forms complement each other varies according to the field of action and the particular constellation of agencies and organizational forms in which they are embedded. It is possible for disparate elements within a state to work in tandem toward a coherent goal, but the absence of such coordination is not unusual or always bad.[13] Because of this, states do not exhibit the kind of unity that is presupposed in arguments that justify preemption by appealing to qualities of public actors that make them an especially good source of public judgments.

Perhaps, though, state agencies are the wrong place to look for the distinctive virtues of public actors as sources of public judgment. Instead, a defender of political justification might direct our attention to the mechanisms or processes by which judgments are produced. If the mechanisms or processes rather than states themselves are what is relevant in identifying judgments as public, then disunity across agencies is not a barrier to treating laws as authored. This overcomes the problem of treating decisions that emerge from the disparate and competing agencies that make up a state as judgments based in reasons. However, there is a problem with treating the decisions that most public actors produce as public judgments. To count as public judgments, the decisions that emerge from a public actor must be produced by public reasons. But the mechanisms and processes that produce most laws do not count as based in public reasons if publicity is understood as general acceptability. For example, many laws are aimed at regularizing an existing practice, creating or structuring a field of action, elucidating the implications of past legislation, and facilitating relationships by offering the potential for arbitration. The reasons used to generate and adjudicate such laws tend not to be public in the sense of generally accepted, but public in the sense of generally available. Even when the reasons used are public in the sense of generally accepted, the set of persons whose general acceptance is salient tends to be experts and stakeholders in the law's application rather than the citizenry as a whole. In many cases, the judgments that emerge from states fail to count as public judgments and fail to exhibit the properties that are supposed to motivate deference.

The problem is that political justification relies upon an idealized conception of public actors. The idealization would be fine, if it were part of a descriptive theory designed to predict whether individuals will in fact accept pre-emption of their judgments. However, in political justification, we purport to explain why individuals ought to accept pre-emption of their judgments. To resort to an idealization in such a context is to explain what could be justified if public actors had properties different from the ones they actually have. Such an explanation is interesting, but it does not answer the question that led us to resort to political justification in the first place, which is why it is reasonable for individuals to accept pre-emption of their judgments by actual public actors.[14]

4. Political Justification and Public Actors

Even if states did have the properties of the idealized public actors assumed in political justification, there are further problems with justifying laws by showing that they fall within a range of decisions that it is better for individuals to leave to public actors. A public actor is better suited to make decisions than individuals when there is some deficiency or pathology in individuals, in their relationships to each other, or in the context in which they find themselves that makes it unwise for them to trust their own judgments about what they should do. The interposition of a public actor is supposed to remedy these defects by performing one or more of three services: acting on behalf of individuals as a delegate, mediating between priorities and actions that are in competition with each other, or organizing actions of individuals to make them cohere more effectively. However, there are two problems with this use of the inability of individuals to trust their own judgments. First, given the assumptions of political justification, it must be reasonable for individuals to believe not only that there exist activities and issues with respect to which their own decision-making cannot be trusted, but that the particular activities or issues in which they are asked to defer are such that their own decision-making cannot be trusted. Second, it must be reasonable for individuals to believe that in the particular case, the decision-making of the relevant public actor can be trusted, or at least, can be trusted to a greater degree than can their own decision-making. Each of these requirements poses a problem, because the same factors that establish that there are reasons for individual decision-making to give way in a particular case undermine the reasonability of individuals accepting that their decision-making should give way.

Let us consider cases where individuals require a delegate to act on their behalf. Here, the justification for deferring to the public actor's judgment is that individuals cannot trust their own judgments of how they as a group should act. Epistemic deference is supposed to overcome the inability of individuals to

trust their own judgments by transferring powers over the relevant decisions to the public actor. The problem is that these individuals who cannot trust their judgments about what they should do as a group are the same individuals who must choose whether to delegate such decisions to a public actor, which public actor to delegate them to, and how to evaluate whether the delegate is doing a good job. It is very unlikely that such individuals would be able to recognize their need for a delegate in the first place or, if they did recognize the need, that they would be able to trust the judgment. Subsequent judgments about whether to leave their powers in an existing delegate's hands, transfer their powers to another delegate, or take back their powers altogether face the same difficulty. If there are deficiencies in individuals, their relations to each other, or their circumstances that make it unwise for them to trust their own judgments, then individuals will be as unwise to trust their decisions about delegation as they are to trust their decisions about the questions that are to be delegated. Alternately, any mechanisms individuals develop to gain confidence in their judgments about delegation ought also to be available to them in the decisions that they are supposed to need the delegate to make.

If the explanation of why the public actor's judgments should preempt judgments lay in whether as a matter of fact it is reasonable to conclude that the public actor's decision will be better, then the inability of individuals to give themselves a reason to delegate decision-making would not be a problem. However, in political justification the explanation of why a public actor's judgment should preempt judgments lies in whether it is reasonable to conclude that preemption will lead to a better decision from the perspective of the individual. This difficulty is compounded by the second requirement, that individuals have grounds to believe that a public actor's decisions can be trusted to a greater degree than their own. After all, the decisions of public actors are produced by individuals. If preemption by a public actor is made necessary by some defect or pathology of decision-making of individuals outside the public actor, what is it about operating within the public actor that makes their judgments trustworthy?

The answer to this last question is often thought to lie in the processes that a public actor imposes on reasoning, and the combination with other reasoners that participation in a public actor effects. However, these features make the fact that the judgment is produced by a public actor much less significant than the mode of reasoning that is used. This is not surprising given the observations of social epistemologists about the ways in which what makes for good reasoning at the collective level can be different from what makes for good reasoning at the level of individuals.[15] But it raises an important question. Why think that individuals have to practice epistemic deference to get the benefits of these modes of reasoning? Unless individuals outside the designated public actor are assumed to be epistemically less competent than individuals inside it, there is no reason for an individual to treat the public

actor's judgments as more trustworthy than judgments generated from outside, as long as they are produced by the same mode of reasoning. More to the point, in cases where individuals do accept a public actor's judgment as better than their own, epistemic deference depends on prior evaluation of the rightness of the judgment. Individuals do not seem to be suspending their own judgments in favor of the judgments of a source deemed more trustworthy, as much as they are deciding whether to accept another actor's conclusions. To accept a public actor's reasoning does not require deference but appreciation of a line of reasoning. To reject a public actor's reasoning is not refusal to defer; it is failure to be convinced.

In fact, attempting to resolve the problem of legal justification by appealing to the desirability of epistemic deference is inherently problematic. First, encouraging individuals to suspend personal judgments in favor of the judgments of a public actor such as a state can itself be a source of pathology or defect in reasoning. For example, the hyper-expansion of state mediation is often pointed to as one of the most pernicious effects of bureaucratic and authoritarian state structures.[16] Such harmful effects seem particularly likely in cases where the context and duration of the service is left open-ended, which is what establishing a public actor with a claim to deference of the sort envisaged in political justification pushes us to set up. This suggests that even if individuals are better served by deference to the judgments of public actors on particular issues in the short term, the long-term effects of such deference may be to perpetuate and aggravate pathologies rather than remedy them.[17]

Second, deference to public actors makes it easier for individuals to create and exploit moral loopholes, or situations in which the interposition of a third party permits individuals to pursue actions or protect interests that would otherwise be forbidden them.[18] For example, one of the reasons public actors are often better suited to instrumental reasoning than are private persons is that such actors are better able to represent the interests of individuals as a potential beneficiary of policies separately from the interests of individuals as a potential bearer of costs. This creates a potential for systematic distortions in the distribution of benefits and burdens that are invisible from the perspective of the public actor. If individuals are conceived of as deferring to public actors when they delegate powers, avail themselves of its mediation, or allow it to organize their activities, then their capacity and responsibility to interrogate such invisibilities is limited to the construction and operating rules of public actors. In their commitment to replace their personal judgments on the topic with the judgments of the public actor, individuals give up not only their ability but their responsibility to interrogate the acceptability of judgments falling within the public actor's sphere.

Moral loopholes are a problem not just with respect to the individuals on whose behalf public actors make decisions, but also for the individuals involved in generating a public actor's decisions. As mentioned above, the

decisions of public actors are produced by individuals. These individuals face the prospect of being permitted or even required not just to accept judgments of public actors that moral constraints on their reasoning would have made it impossible for them to accept as personal judgments, but to generate such judgments in the knowledge that they and others will have to defer. In their capacity as participant in or representative of the public actor, individuals may be required to undertake forms of reasoning that ordinarily would be forbidden them. In their capacity as citizens, they will then be required to defer to these judgments.

This situation arises because in political justification, we assume that there ought to be a difference in kind between the standards of justification that individuals apply to public directives and the standard they apply to directives that are internally generated. This sets up a situation in which a public directive's claim on individuals does not rely on the individuals being persuaded of its rightness, even if they are the individuals who helped to generate the directives in the first place. Instead of persuasiveness, the whole weight of the explanation for why individuals ought to experience themselves as required to conform to public directives is placed on such conformity serving ends of individuals. When public judgments are further placed at arm's length from personal judgment by locating it in a public actor this problem is exacerbated. Arguments for the reasonableness of treating public judgments as binding are made to hinge on empirical claims that channeling judgments through public actors is a good way for individuals to serve at least their shared ends. This is not very firm ground, given the arguments of rational choice theorists that in many circumstances, diluting the awareness of individuals of the costs associated with preference-satisfactions by channeling them through a public actor can in fact lead to pressure for an expansion of public services beyond a level which any of them wants.[19] If such theorists are right, there is a real possibility that although public actors are good at serving interests, they may not be good at serving interests that individuals care about or would want served if they were fully informed about the costs.

Moreover, even if we can show that there are ends public actors serve that fully informed individuals would want them to serve, we will still have failed to establish that individuals should think of themselves as bound to obey particular laws. The question of what justifies there being public actors is separate from the question of what justifies the demands that a particular public actor makes upon individuals via specific laws. That individuals can justify the construction and deployment of a public actor does not tell us whether there are good reasons for individuals to treat a particular directive or requirement of that actor as compelling. However, justifying particular directives and requirements is what the question of legal normativity is all about. Nor does establishing that there are reasons to establish and deploy a public actor reduce the role of controversial value judgments. On the contrary,

justifying particular directives against the background of a claim that we ought to establish and deploy a public actor is more likely to rely upon a robust moral view than would justification in the absence of such a claim. Introducing public actors introduces questions about the proper functions and limitations of such actors, and this is not possible without presupposing a substantive theory of the human good.[20] Even if the existence of public actors in the abstract may be justified within the limits of a pluralistic consensus, the actual content of particular laws may not. Resorting to political justification does not help us avoid the problem of moral disagreement.

5. Normativity and Disagreement

The impetus to political justification is the assumption that moral disagreement poses a problem for legal normativity because of the possibility that individuals will be forced to act in accordance with value judgments with which they disagree. Resorting to political justification is supposed to solve this problem by ensuring that the directives and requirements that laws impose on individuals are grounded in values that everyone accepts. In fact, we have seen that merely constructing a pluralistic consensus is not sufficient to ensure that what laws impose is grounded in values that everyone accepts, and that even if it were sufficient, this would not give individuals a reason to substitute the judgment of public actors for their own. This failure of political justification as a strategy for explaining what makes laws normative for individuals who disagree with them reflects a basic misdiagnosis of what is at issue.

In political justification, the problem of legal normativity is conflated with the problem of political authority. The wrongness of an individual deviating from the requirements of a law is explained in terms of the wrongness of her refusing to substitute the public actor's decision-making in place of her own. But is this in fact what individuals do when they treat a law as binding? Do individuals in fact think of themselves as substituting the judgment of a public actor for their own? Careful attention to the way in which individuals experience laws suggests that the experience of a law as binding is not that of substituting the public actor's judgment, but of agreeing with it.

When individuals experience laws, they usually do so in a particular context. They experience laws as calling for or forbidding specific courses of action at a particular time. In the experiences there are two components, a judgment about what course of action the law implies, and an experience of that requirement as binding regardless of what else the individuals may be drawn to do. When we emphasize the properties of public actors and the types of decision for which such actors are suited, we assume that the experience of bindingness derives primarily from an experience of being bound to defer. But while it is

true that the size and structure of contemporary states encourage individuals to describe, and even experience, much of what public actors do as separate from their personal inclinations and activity, this does not imply that they experience the justification and application of most laws as separate from the justification and application of their personal norms and expectations. Even if it is true that individuals think of public actors as a third party interposed between themselves and their fellow citizens, this does not show that there is a gap between the course of action implied by the law and the course of action implied by their personal reasoning that they overcome with a principle of deference. Some laws may be experienced in this way, but many laws are not. Many laws are experienced as binding, not because individuals think there is a good reason to defer to the public actor's judgment, but because individuals think there is a good reason to believe that the public actor's judgment is correct. This is borne out by the fact that in cases where the course of action implied by law is experienced as distinct from that implied by personal reasoning, the bindingness of the law is often experienced as different and less compelling than that of other laws.

A good example of this can be found in traffic laws. In North America, drivers tend to display very different attitudes toward the laws that set speed limits and the laws that require motorists to yield for emergency vehicles. Decisions about conforming to speed limits tend to be based primarily on prudential considerations, such as the extent to which conformity is personally inconvenient and the likelihood of incurring a fine. Drivers also tend to be relatively indifferent to transgressions by others to the point of warning each other about upcoming speed traps by flashing their headlights. In contrast, yielding to emergency vehicles is treated as something a driver should do regardless of personal inconvenience or the likelihood that she will be fined. Drivers who fail to conform are likely to be the object of approbation in the form of dirty looks and honking horns. In this, North American drivers make a distinction between laws the motivation and content of which they accept as important in their own right, and laws that they accept for largely strategic reasons.

Against this background, the problem of legal normativity is the problem of what makes an individual right to experience a law as worth conforming to in its own right. Moral disagreement is a problem because it directs our attention to a potential gap between the conclusions of people who draft and apply laws regarding what an individual should treat as binding and the individual's own conclusions. This makes the salient question not why public actors may demand conformity to ethical judgments with which an individual disagrees, but why public actors may demand conformity to judgments that diverge from the individual's own.[21] The problem is establishing that an individual ought to accept a conclusion whose rightness she personally denies. It arises, not because laws have a moral component, but because laws purport to bind a person regardless of her own opinion about what she ought to do. Laws, like

the rules of formal logic, purport to be norms, not in the statistical sense of a standard from which there is not significant deviation by most individuals within a population, but in the normative sense of a standard from which there ought not be deviation. At the core of this non-statistical normativity is the notion of an inherently compelling claim, a claim that commands compliance simply in virtue of its content.[22] The claim to compel inheres in norms regardless of motivations or desires of individuals to comply, and the separation from motivation distinguishes statements that purport to be normative. In the words of Jean Hampton, normative statements are:

> prescriptive in their force, authoritative over us, whether we like it or not. Indeed, even instrumental reasons are "oughts," directing an agent regardless of whether she accepts them. . .direct[ing] us to engage in action of a certain type *regardless of whether we are motivated to do so*.[23]

Many statements other than moral statements have this feature. Many statements other than moral statements purport to compel regardless of motivations or desires to comply. Claims about effectiveness, healthiness, and desirability, all have a normative component, in that they purport to command a response from us simply in virtue of their being the claims they are. It is this aspect of them, and not their assumptions about moral values, that makes them peculiar and of special philosophical interest.

The peculiarity of normative claims arises because not all statements that claim to be inherently compelling actually turn out to be so. There is a puzzle when we are confronted by a claim that purports to be normative, but which does not immediately strike us as so. If it is true that what is compelling about genuinely normative claims is divorced from the desires and motivations of individuals, then our means of distinguishing claims that actually are compelling in themselves from claims that only purport to have this status seem inherently limited. At the same time, if what is compelling about a normative claim is determined by the desires and motivations of individuals, then normativity itself seems to disappear, replaced instead with a mere product of history, psychology, or brute relations of power. This is why disagreement is a problem for claims that purport to be normative, and why normativity, whether epistemic, moral, or legal is philosophically challenging.

In political justification, we mistakenly assume that our difficulties in explaining why even individuals who disagree with a law should nonetheless obey it arise because the justifications of laws often involve resort to moral claims. The problem of disagreement is thought to be specific to moral reasoning, and the solution is thought to lie in the way that moral reasons are integrated into legal justification. In fact, however, any judgment that applies a standard will face the same difficulties, including judgments made in scientific and economic reasoning.[24] Controversy in public justification cannot be avoided, not because resort to moral arguments cannot be avoided, although

this also may be true, but because all judgments are potential objects of disagreement.

The justifications offered for laws and policies may generate disagreement along at least three dimensions: their assumptions about the rightness of the ethical standard employed; their assumptions about the rightness of the standard of rationality employed; and their assumptions about the rightness of the standard of efficacy or efficiency employed. For example, we might offer an argument based in efficiency to an audience that denies that such considerations are a suitable basis for action in the domain we are treating. In such a case, the normativity of our conclusions will be controversial because they rest on a claim that evaluative statements based in efficiency can be compelling in such circumstances. Efficiency-based arguments for income support are a good illustration of this phenomenon. Most income support programs would be more effective in their delivery of services, and less expensive to administer, if anti-fraud measures such as home visits and personal interviews were eliminated. For most policy-makers and voters, however, the moral importance of catching and punishing people who abuse such programs justifies the decrease in efficient functioning and increase in cost.[25]

Arguments based in efficiency considerations might be controversial for different reasons, however. They might be controversial because although efficiency is accepted as an appropriate ground for judgment, the right understanding of efficiency is a subject of disagreement. Let us consider debates about the desirability of rent controls in urban centers. Such debates typically turn on disagreement not about the desirability of ensuring affordable housing, but over what counts as an efficient route to this goal. In political justification, it is assumed that the primary dimension of controversy in public justification is moral disagreement. However, judgments that are devoid of ethical content may be more hotly contested and more politically significant than judgments that are more deeply embedded in the comprehensive moral views of individuals.[26] For example, the question of whether automobile insurance should be administered by a public or private system turns almost entirely on calculations of the projected differences in cost and convenience for a typical driver. Yet this question is more likely to bring down a government in a place like British Columbia than is the question of gay marriage. This is not because there is more agreement about whether gay marriages should count as marriages, but because of the relative importance that is placed on the government's getting the question of automobile insurance right.

The possibility of contestation and concerns about what justifies a law's preempting personal judgments are thus not specific to preempting judgments about moral values. Puzzles about what justifies resolving disagreements about whether a requirement deserves to be law in favor of public actors rather than individuals are not specific to a law's moral component, nor especially problematic in that regard. Focusing on the plurality of moral values

in most contemporary societies obscures this fact and hinders us in trying to resolve the problem of legal normativity. Instead, the focus in debates about the political acceptability of particular laws and legal regimes should shift away from questions about the proper realm and content of the political and toward epistemological questions about what makes for a good reason.

6. Conclusion

Questions about what makes it right for public actors to compel conformity to their judgments are asked from an external perspective. Such questions are inherently moral and speak to the acceptability of directing another person's activities. Questions about normativity are asked from inside the actor. They are about the wrongness of deviation from a standard. The standards need not be moral, and questions about normativity are not always moral questions. But they are always questions that require us to grapple with the problem of disagreement, whether the disagreement is internal, between different parts of ourselves, or external, between ourselves and others. Arguments to the effect that public actors are right to compel conformity often rely upon assumptions about how questions about normativity should be answered. But questions about normativity and questions about rightful compulsion raise separate issues, and the problem of disagreement belongs to the realm of normativity.

Resolving the problem of disagreement requires us to give an account of why individuals should treat the judgments of people who draft and apply laws as more authoritative than their own in a particular case. In political justification, we offer an explanation of why public actors should be empowered to determine how individuals act in certain situations. This may answer the question of why it is not wrong to force individuals to conform to a public actor's directives. But it does not explain what makes it wrong for individuals to deviate from public judgments. As it turns out, then, political justification is not a very promising strategy for explaining why individuals should defer to the judgments of public actors, because in political justification we address the wrong set of questions. What is needed is not an account of why, generally, public actors are valuable, or even why, generally, their judgments may be trusted. What is needed are accounts of why, in particular cases, individuals should say that the public actor has gotten it right, or why, if she cannot be sure that the public actor has gotten it right, she has strategic reasons to conform.[27]

Notes

1. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. 212–255, Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996), Thomas Nagel, "Moral Conflict and Political Legitimacy,"

Philosophy and Public Affairs 16 (1987), Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), esp. ch. 8.

2. See Helen Longino, *Science as Social Knowledge: Values and Objectivity in Scientific Inquiry* (Princeton, N.J.: Princeton University Press, 1990), Alvin Goldman, *Knowledge in a Social World* (Oxford: Oxford University Press, 1999), pp. 139–144.
3. See John Rawls, *Justice as Fairness: A Restatement*, E. Kelly ed. (Cambridge, Mass.: Harvard University Press, 2001), esp. pp. 26–38, T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), esp. ch. 4, Jurgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, Mass.: M.I.T. Press, 1993), Joshua Cohen, "Moral Pluralism and Political Consensus" in *The Idea of Democracy*, D. Copp, J. Hampton and J. Roemer eds. (New York: Cambridge University Press, 1993).
4. Joseph Raz, "Facing Diversity: The Case of Epistemic Abstinence," *Philosophy and Public Affairs* 19(1) (1990).
5. Dworkin, op. cit., p. 205.
6. Cohen, op. cit., p. 270.
7. Rawls, *Political Liberalism*, pp. 144–150; Scanlon, op. cit., ch. 4; Sunstein, op. cit. ch. 2.
8. See Rawls, "The Domain of the Political and Overlapping Consensus," in *The Idea of Democracy*, op. cit., pp. 252–254 and *Political Liberalism*, pp. 125–129, Habermas, op. cit., pp. 56–68, Scanlon, op. cit., pp. 171–187, Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), ch. 14, Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), pp. 186–202.
9. See Bernard Williams, *Ethics and the Limits of Philosophy* (London: Fontana Press, 1985), Annette Baier, *Moral Prejudices* (Cambridge, Mass.: Harvard University Press, 1994), Joan Tronto, *Moral Boundaries: A Political Argument for the Ethic of Care* (New York: Routledge, 1993), esp. pp. 6–11 & 26–51.
10. See Frances Olsen "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96 (1983), Regina Austin, "Sapphire Bound!", *Wisconsin Law Review* (1989), Claudia Card, "Against Marriage and Motherhood" *Hypatia* 11 (1996), Patricia Hill Collins, *Black Feminist Thought* (New York: Routledge, 1992), pp 251–271, Patricia Williams, "On Being the Object of Property," in *Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass.: Harvard University Press, 1991), p. 13.
11. Bo Rothstein "Political Institutions: An Overview," in *A New Handbook of Political Science*, R. Goodin and H. Klingemann eds. (Oxford: Oxford University Press, 1996).
12. See Anne Schneider and Helen Ingram, *Policy Design for Democracy* (Lawrence, Kans.: University Press of Kansas, 1997), pp. 46–49.
13. Ibid.
14. See Onora O'Neill, *Towards Justice and Virtue* (Cambridge, England: Cambridge University Press, 1996), pp. 40–41, and Thomas Christiano, "The Incoherence of Hobbesian Justifications of the State," *American Philosophical Quarterly* 31(1) (1994).
15. See Lynn Hankinson Nelson, "Epistemological Communities," in *Feminist Epistemologies*, L. Alcoff and E. Potter eds. (New York: Routledge, 1993), Helen Longino, *The Fate of Knowledge* (Princeton, N.J.: Princeton University Press, 2002), esp. ch. 5–6, Philip Kitcher, *The Advancement of Science* (Oxford: Oxford University Press, 1993), esp. ch. 8 and "Veritistic Value and the Project of Social Epistemology," *Philosophy and Phenomenological Review* 64(1) (Jan 2002), Alvin Goldman, *Pathways to Knowledge* (Oxford: Oxford University Press, 2002), pp. 191–195.
16. See Claus Offe, *Contradictions of the Welfare State* (Cambridge, Mass: M.I.T. Press, 1984), Ronald Inglehart, *Cultural Shift in Advanced Industrial Society* (Princeton, NJ: Princeton University Press, 1990), Hannah Arendt, *On Revolution* (New York: Penguin, 1963),

J. L. Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, Mass.: M.I.T. Press, 1994).

17. See Offe, op. cit., R. Paehlke and Douglas Torgerson eds., *Managing Leviathan: Environmental Politics and the Administrative State* (Toronto: Broadview Press, 1990), and Sidney Milkis, "Remaking Government Institutions in the 1970's: Participatory Democracy and the Triumph of Administrative Politics," *Journal of Policy History* 10(1) (1998).
18. See Thomas Pogge, "Loopholes in Moralities," *Journal of Philosophy* 89 (2) (1992), Dennis Thompson, *Political Ethics and Public Office* (Cambridge, Mass.: Harvard University Press, 1987).
19. See James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), E. S. Savas, *Privatization: The Key to Better Government* (New York: Chatham House Publishers, 1987).
20. See Jean Hampton, "Should Political Philosophy Be Done Without Metaphysics?" *Ethics* 99 (1989), and "The Moral Commitments of Liberalism" in *The Idea of Democracy* op. cit, pp. 292–313.
21. See Jean Hampton, "Hobbes and Ethical Naturalism," Philosophical Perspectives 6 (1992), and *The Authority of Reason* (Cambridge, England: Cambridge University Press, 1998).
22. See Christine Korsgaard, *The Sources of Normativity* (Cambridge, England: Cambridge University Press, 1996), pp. 8–9.
23. Hampton, *The Authority of Reason*, p. 80.
24. Ibid., ch. 6–7.
25. See Francis Fox Piven and Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* (New York: Vintage Books, 1993), Joel Handler and Yeheskel Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (Newbury Park, Calif.: Sage Publications, 1991), Joel Handler and Ellen Hollingsworth, *The Deserving Poor: A Study of Welfare Administration* (Chicago: Markham Publishing, 1971).
26. See Joseph Raz, "Authority, Law and Morality" *The Monist* 68 (1985).
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