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OURS IS A SPECIESIST WORLD, REALLY

François Jaquet

IT IS A COMMON VIEW among animal ethicists that ours is a speciesist world.[1] The fact is that most people relentlessly treat nonhuman animals in various dreadful manners in which they would never dare treat members of their own species. This dominant view is critical insofar as it combines neatly with another common view in animal ethics—namely, that speciesism is immoral, in the same way and for the same reason that racism is immoral.[2] In conjunction, these two claims entail that there is something deeply wrong about the way most people treat animals. Considering the gigantic mass of speciesism's victims and the magnitude of their suffering, our treatment of nonhumans might well constitute the worst injustice that has ever existed.[3]

All interesting claims have their detractors. The above two are no exceptions, but not in anything like equal proportions. The speciesism debate has essentially focused on whether speciesism is unjustified, with a number of philosophers arguing that there is actually nothing wrong with it.[4] Once in a while, however, someone denies that most people are speciesists—call their view *speciesism antirealism*. In this contribution, I discuss three attempts to establish this view. One is due to Travis Timmerman, another to Shelly Kagan, and the third seems to follow from a view defended by Stijn Bruers, though Bruers would not endorse it. It will be my contention that all three attempts to establish

1 The first philosopher who defended this view was Peter Singer in his book *Animal Liberation*. Social psychologists who have started to investigate the issue empirically tend to agree with philosophers on that score. See, e.g., Amiot and Bastian, "Toward a Psychology of Human-Animal Relations"; Caviola, Everett, and Faber, "The Moral Standing of Animals"; Caviola et al., "Humans First"; Dhont et al., "The Psychology of Speciesism"; and Wilks et al., "Children Prioritize Humans over Animals Less Than Adults Do."

2 Singer, *Animal Liberation*; Rachels, *Created from Animals*; McMahan, "Our Fellow Creatures"; and Jaquet, "What's Wrong with Speciesism?" and "Indirect Defenses of Speciesism Make No Sense."

3 Rachels, "Vegetarianism"; Huemer, *Dialogues on Ethical Vegetarianism*; and Jaquet, *Le pire des maux*.

4 See, e.g., Wreen, "In Defense of Speciesism"; Cohen, "The Case for the Use of Animals in Biomedical Research"; Diamond, "The Importance of Being Human"; Chappell, "In Defence of Speciesism"; and Williams, "The Human Prejudice."

speciesism antirealism are misguided. Each of the three sections of the present paper deals with one of these attempts. But before getting to the heart of the matter, let me share a few thoughts on the social relevance of the question.

It has become a truism that words matter. As cognitive scientist Lera Boroditsky puts it,

> Things that are named are the ones most likely to be thought about and to be visible in our consciousness. Though in principle we can think about lots of things, our actual attentional span is very limited. As a result, the kinds of things we tend to think about are the ones that are named.[5]

No doubt this applies to the word 'speciesism' in particular. Having at our disposal a label to denote the form of discrimination that infuses our relationships with other animals is amazingly useful. This has created and structured a whole conceptual framework in which it is much easier for philosophers to address the ethics of our duties to nonhumans. While some authors maintain that there is nothing wrong with speciesism, many believe that the way we treat animals is morally unjustified *because* it is speciesist.

The point goes further. From its very first steps, animal ethics has been a source of inspiration for animal rights activists. The notion of speciesism is one of the very few instances of a philosophical concept that has leaked from the classroom to make its way into the world. In many countries, those who defend animals on the ground resort to it in their communication, claiming that many practices involving nonhumans are speciesist. The press has followed suit, and the notion is now present in the public space. A telling illustration of this trend is the holding every year on the last Saturday of August of the World Day for the End of Speciesism.[6] In 2023, for the ninth edition of this event, 145 actions were organized by a hundred groups in no less than twenty-eight countries. Besides such major animal rights organizations as the Humane League and People for the Ethical Treatment of Animals, the notion is also mobilized by effective altruists in their outreach activities.[7] In the branch of the Effective Altruism

5 Maron, "Why Words Matter."

6 See the World Day for the End of Speciesism (WODES) homepage, https://end-of-speciesism.org/en/ (accessed November 14, 2024).

7 See the websites of the Humane League (https://thehumaneleague.org) and People for the Ethical Treatment of Animals (https://www.peta.org). See also a November 8, 2020, forum post from Effective Altruism (https://forum.effectivealtruism.org/posts/XyZCnYMyxfEbtEKRq/the-case-against-speciesism-1).

movement that is dedicated to animal advocacy, many hold that a focus on speciesism is the most effective communication strategy available at this point.[8]

If the concept of speciesism has the potential to shape central debates in animal ethics and to raise public awareness about the ethical shortcomings of common attitudes toward nonhuman animals, then the stakes regarding the existence of speciesism are high. This topic is worth discussing.

1. The Argument from Unbelievable Speciesism

The first argument for speciesism antirealism that we will discuss is Travis Timmerman's. Timmerman holds that even self-described speciesists are not speciesists on the grounds that they are inclined to reject some clear implications of speciesism construed as a philosophical view.[9] Here is my reconstruction of his argument:

1. A speciesist is someone who believes that all humans have a moral status higher than that of all nonhumans.
2. Purported speciesists would reject the proposition that all humans have a moral status higher than that of all nonhumans upon finding out that one of its implications is inconsistent with some other proposition they believe.
3. Someone who would reject a proposition upon finding out that one of its implications is inconsistent with some other proposition they believe does not believe that proposition.
4. Therefore, purported speciesists are not speciesists.

In short: purported speciesists accept the claim that humans have a moral status higher than that of nonhumans only because they fail to appreciate some of its implications; hence, they do not believe this claim; hence, they do not qualify as speciesists. Let us see how Timmerman motivates his three premises.

Premise 1—a speciesist is someone who believes that all humans have a moral status higher than that of all nonhumans—flows directly from his account of speciesism. Timmerman distinguishes between two forms of speciesism, which he labels *genuine speciesism* and *coextensive speciesism*.[10] Humans count more than nonhumans: in virtue of their belonging to the human species, according to the former; in virtue of their instantiating some property that is coextensive with the human species, according to the latter. Both views are

8 See, e.g., Vinding, "Animal Advocates Should Focus on Anti-Speciesism, Not Veganism."

9 Timmerman, "You're Probably Not Really a Speciesist."

10 Timmerman, "You're Probably Not Really a Speciesist," 686.

variants of speciesism understood as the proposition that humans have a moral status higher than that of nonhumans. Speciesists are simply those who believe in this proposition.[11]

Premise 2—purported speciesists would reject the proposition that all humans have a moral status higher than that of all nonhumans upon finding out that one of its implications is inconsistent with some other proposition they believe—is supported by the following two thought experiments:

> *Anomaly and the Anomalous Case of Speciation*: Two human parents give birth to a baby named Anomaly, where a large random genetic mutation causes (genotypic) speciation to occur. Consequently, the DNA makeup of Anomaly is different to the extent that it is impossible for Anomaly to ever reproduce with a human. However, Anomaly is still fertile. So, on any genotypic conception of species, Anomaly is *not* a human. Now here is the catch. Surprisingly, Anomaly's mutated DNA has exactly the same phenotypic effects as normal human DNA with the notable exception that she will not develop a cognitive capacity higher than that of an average dog. As such, Anomaly looks identical to any other human baby and her mental life will mirror that of a set of cognitively disabled humans. The only way to tell that speciation has occurred is by sequencing Anomaly's DNA.[12]

> *Dr. Moreau and Innocent Irene*: Dr. Moreau has developed a chemical cocktail that allows him to control the phenotypic effects of any creature's DNA. A particularly loathsome individual, he conducts his experiments on Innocent Irene, a cognitively disabled human whose cognitive capacity is comparable to that of a normal dog. Now, Dr. Moreau gives Irene a cocktail that keeps her human DNA intact but changes some of the DNA's phenotypic effects so that she comes to look just like a dog. Although Irene's cognitive capacity and DNA are not altered, she is mentally and, to the naked eye, physically indistinguishable from a dog.[13]

Building on these scenarios, Timmerman reasons as follows. Accounts of the notion of species are divided into two broad types: genotypic and phenotypic

11 Earlier, Timmerman writes, "Speciesists are those who give disproportionate weight to the interests of one species over another and tend to do so on the basis of a creature's species membership" ("You're Probably Not Really a Speciesist," 686). I set this other characterization aside because it plays no role in his argument for speciesism antirealism. To reach this conclusion, Timmerman needs to define speciesism as he does later—that is, as a belief.

12 Timmerman, "You're Probably Not Really a Speciesist," 688.

13 Timmerman, "You're Probably Not Really a Speciesist," 691.

accounts. Whichever kind of account one adopts, either Anomaly or Irene will not be a human. On the one hand, because Anomaly does not have a human genotype, she is not human on any genotypic conception. On the other hand, because Irene does not have a human phenotype, she is not human on any phenotypic conception. Hence, speciesism entails that either Anomaly's or Irene's moral status is lower than that of humans, which is absurd. No matter how we analyze the notion of species, speciesism has ridiculous implications. And chances are that self-described speciesists will reject it upon considering these implications.[14]

Timmerman presents the following case in support of premise 3—someone who would reject a proposition upon finding out that one of its implications is inconsistent with some other proposition they believe does not believe that proposition:

> *Vegan Keegan and Apathetic Oysters*: Keegan is a vegan and believes that it is morally permissible to eat living things so long as they are not, and could not be, sentient (e.g., plants) but thinks it is wrong to eat any creature that is, or once was, sentient. Now, Keegan might assent to the proposition "It is morally wrong to eat any animal," not recognizing that this proposition entails that it is wrong to eat oysters. Oysters are not sentient. In an important sense, then, Keegan doesn't really believe that it's wrong to eat any animal. Were Keegan to recognize the inconsistency in his beliefs, he would reject the claim "It is morally wrong to eat any animal."[15]

Keegan would reject the proposition that it is morally wrong to eat any animal upon appreciating that this proposition entails that, contrary to his belief, some nonsentient living things are morally wrong to eat. Hence, he does not really believe that proposition.

I suspect there is something wrong with each premise of Timmerman's argument. The concern with premise 1 is that it rests on a questionable definition of speciesism. It is a mistake to define speciesism as the claim that humans have a higher moral status than nonhumans and to think of speciesists as those people who believe that claim. Here is why. A good definition of speciesism

14 Timmerman does not claim that all purported speciesists would reject the proposition that humans have a moral status higher than that of nonhumans upon considering some of its implications. His argument is meant to cover only those people who initially accept this proposition for *prima facie* plausible reasons. Premise 2 and conclusion 4 should therefore be read as being about "most, if not all" purported speciesists ("You're Probably Not Really a Speciesist," 684). This point does not affect my objection.

15 Timmerman, "You're Probably Not Really a Speciesist," 684.

will match a good definition of racism.[16] As its name suggests, speciesism is meant to be analogous to racism. Richard Ryder, who coined the term, is very explicit about that when he introduces it in his book *Victims of Science*: "I use the word 'speciesism' . . . to draw a parallel with racism."[17] Likewise, in *Animal Liberation*, Peter Singer talks about "the attitude that we may call 'speciesism', by analogy with racism."[18] Why should speciesism be analogous to racism? This requirement stems from the primary function of the concept, which is to denote a phenomenon resembling racism in certain respects and thereby to allow us to draw philosophical lessons from the ethics of racism to the ethics of that phenomenon.[19] Any account of speciesism that matches a bad account of racism and thus makes speciesism and racism disanalogous will prevent the concept of speciesism from fulfilling this important function and will therefore be unsatisfactory.

The worry is that the conception of racism that matches Timmerman's account—racism as the claim that white people have a moral status higher than that of nonwhite people—is flawed. It is flawed because it is too narrow. Consider the following case:

> *Racist Buck*: Buck, a white man, gives white people preferential treatment because he disrespects black people. Not the sharpest tool in the box, Buck has never given much thought to people's moral status. His respective attitudes toward white and black people are not the output of ethical deliberation. They certainly have causes, but the causal chain that leads to them does not involve any consideration of people's moral worth.

There is no question that Buck is a racist. Yet the account of racism that parallels Timmerman's definition of speciesism entails that he is not. Hence, this account is too narrow; it does not cover all cases of racism. Not only that. I presume that many racists are like Buck. They do not believe that white people have a higher moral status, either because the question never occurred to them—after all, few

16 Dunayer, *Speciesism*; Horta, "What Is Speciesism?" 246; Horta and Albersmeier, "Defining Speciesism," 5–6; and Jaquet, "How to Define Speciesism."

17 Ryder, *Victims of Science*, 16.

18 Singer, *Animal Liberation*, 6.

19 Singer's case against speciesism in *Animal Liberation* provides a nice illustration of the kind of lesson I am thinking about. In Singer's view, racism is wrong because it breaches the principle of equal consideration of interests, but speciesism also breaches the principle of equal consideration of interests, so speciesism is wrong too. Another illustration is provided by James Rachels in *Created from Animals*, where he argues that speciesism is unjustified because, just like racism, it involves treating differently cases that are relevantly alike.

people are even familiar with the notion of moral status—or because it did, and they rejected this proposition—those who understand the proposition should also understand that it is implausible. The difference between racists and the rest of us does not lie in a stance on moral status. As a rule, racism is much more insidious than that. If I am right, then, it is not only the case of Buck; the present account of racism fails to accommodate many cases of racism.[20] But then Timmerman's account of speciesism is also too narrow. It may well be that most people are speciesists even on the assumption that they do not believe that humans have a higher moral status.

Let us turn to premise 2. I would be surprised if those self-described speciesists who accept the proposition that humans have a higher moral status were to reject it after considering Timmerman's two scenarios. To be sure, few will contest his intuitive judgments—Anomaly and Irene certainly matter no less than anyone else. However, most will deny that their views on moral status imply otherwise. For they will resist the claim that either Anomaly or Irene is a nonhuman. In response, Timmerman will no doubt want to insist that both genotypic and phenotypic accounts support that claim. Purported speciesists will concede that much, but the odds are they will not draw the intended conclusion. They are much more likely to deny that one or the other account of species captures the concept of human they have in mind. Anomaly and Irene, they will say, are obvious instances of humans; too bad for genotypic and phenotypic conceptions of species if they cannot accommodate this datum! Though these conceptions may be useful tools for scientific inquiry, they do not capture the ordinary notion of species. Since both Anomaly and Irene are humans, speciesism ascribes them full moral status. At the end of the day, speciesists will remain speciesists, against the prediction expressed by premise 2.

One might object that this move is not available to purported speciesists. Timmerman himself writes, "Any defense of speciesism must be able [to] identify the concept of species that is supposed to be morally relevant."[21] What should we make of our purported speciesists' refusal to define species? We need to distinguish two claims. One is normative: faced with the cases of Anomaly and Irene, most purported speciesists *should* accept that either Anomaly or Irene is not human and conclude that being human does not matter after all. The other is predictive: faced with these cases, most purported speciesists *would* accept that either Anomaly or Irene is not human and conclude that being human does not matter after all. In the above quote, Timmerman appears to endorse the former

20 Some philosophers of race generalize this kind of criticism to all doxastic accounts of racism (e.g., Garcia, "The Heart of Racism"; and Todorov, "Race and Racism"), but the charge is especially powerful against doxastic accounts in terms of moral status.

21 Timmerman, "You're Probably Not Really a Speciesist," 684.

claim. Importantly, however, only the latter is relevant in the present context, for premise 2 is about what purported speciesists *would* do upon finding out that speciesist claims are inconsistent with some proposition they believe. And it is this claim that I contest. Whatever they should do, I guess most purported speciesists would insist that both Irene and Anomaly are human.[22]

Moving on to premise 3, is it so clear that someone who would reject a proposition upon finding out that one of its implications is inconsistent with some other proposition they believe does not really believe that proposition? Consider again the case of Keegan, and suppose he came to deny that it is morally wrong to eat any animal after discovering that some animals are not sentient. Timmerman's reading of this case is that from the outset, Keegan did not believe that it is wrong to eat any animal. He only *assented* to this proposition. This interpretation strikes me as far-fetched. It very much seems to me that Keegan changed his mind when he learned that oysters are not sentient. If this is a better description of what happened, however, we must conclude that Keegan did initially believe that it is wrong to eat any animal. To change one's mind involves substituting a belief for another—in this case, the belief that eating nonsentient animals is morally okay for the belief that all animals are wrong to eat. Keegan would not have changed his mind if he did not initially have the latter belief.

Maybe I am misreading this scenario, and Keegan actually knew from the outset that oysters are nonsentient animals—perhaps he just failed to connect the dots. This alternative interpretation is supported by Timmerman's assertion that Keegan's beliefs are *inconsistent*, which (strictly speaking) would be the case only if Keegan initially believed that only sentient creatures are wrong to eat, that all animals are wrong to eat, and that oysters are nonsentient animals. But wait, now, this assertion is incompatible with the view that Keegan merely *assented* to the proposition that all animals are wrong to eat; it entails that he *believed* this proposition. It can therefore not be used to establish that Keegan did not believe that all animals are wrong to eat.

Perhaps the idea is rather that, because Keegan was aware of the existence of nonsentient animals all along, he merely *thought* that all animals are wrong to eat—where the thought that *P* does not commit its author to the truth of *P*

22 I am not sure that the normative claim is true either. Suppose Jim believes that free will is morally relevant. Pam, who disagrees, lists all extant analyses of free will and, for each, presents a counterexample to the claim that the analysans is morally relevant. Jim agrees that all these analysans are morally irrelevant, but he sticks to the view that free will matters morally. It is just that none of the extant accounts manages to capture the concept, he says. Jim need not provide an analysis of free will of his own to be justified in doing that. Purported speciesists appear to be in a similar situation.

as the belief that *P* does. It is this thought that was inconsistent with Keegan's genuine beliefs. Fair enough. There is still a concern, though. On this new reading of the case, the analogy with speciesist beliefs breaks, for most speciesists are not aware of the possibility of Anomaly and Irene in the way Keegan is now assumed to be aware of the existence of nonsentient animals. So they do not believe that either Anomaly or Irene is a nonhuman who has full moral status in the way Keegan is now said to believe that oysters are animals that are not wrong to eat. Unlike Keegan, most people do not have inconsistent attitudes. Assuming that they ascribe humans a higher moral status, their situation is rather analogous to that of Keegan on the former interpretation, where he believed that all animals are wrong to eat until he changed his mind.

Since all its premises are dubious, I conclude that Timmerman's argument fails to establish that purported speciesists are actually not speciesists.

2. The Argument from Smart Aliens

Another philosopher who rejects the common view that most people are speciesists is Shelly Kagan.[23] His argument for speciesism antirealism goes something like this:

5. A speciesist is someone who believes that, other things being equal, the interests of humans count more than the like interests of all nonhumans.
6. Purported speciesists do not believe that, other things being equal, the interests of humans count more than the like interests of intelligent aliens.
7. Therefore, purported speciesists are not speciesists.

Like Timmerman's, Kagan's first premise rests on his own account of speciesism, in this case as the view that human interests matter more than corresponding nonhuman interests, other things being equal.[24] Speciesists are just those people who accept that view. As for premise 6, here is what Kagan has to say in its support:

> Imagine that Lex Luthor is trying to kill Superman with some Kryptonite. Superman is in great pain, and may soon die. Now remember: Superman isn't human. He isn't a member of our biological species. But is there anyone (other than Lex Luthor!) who thinks this makes a difference? Is there anyone who thinks: Superman isn't human, so his

23 Kagan, "What's Wrong with Speciesism?"

24 Kagan, "What's Wrong with Speciesism?" 2–3.

> interests should count less than they would if he were? I doubt it. At any rate, there surely aren't many. (Show of hands?) Examples like this could easily be multiplied. When ET, the extraterrestrial, is dying (in the movie of the same name) does anyone think, "Well, he isn't a Homo sapiens, so all of this matters less"? I doubt it.[25]

If we take ET and Superman to count just as much as the average human, then we do not believe that the interests of all nonhumans matter less than those of human beings. We are not speciesists.[26]

Assuming that this argument can establish that we are not speciesists, it does not yet tell us what we are. Why is it that we discount the interests of animals but not those of intelligent aliens? Kagan thinks he knows. We grant the interests of ET and Superman full consideration, in his opinion, because ET and Superman are modal persons—a modal person being a subject who either is or could have been rational and self-aware. Animals, by contrast, neither possess nor could have possessed these mental abilities. They are not modal persons, and this is why we treat them as inferiors and give their interests lesser consideration. Hence Kagan's diagnosis for our conduct and attitudes: we are modal personists rather than speciesists.

Kagan's argument appears no more compelling than Timmerman's. I believe it is unsound because both its premises are false. My concern with premise 5 is that it rests on a problematic account of speciesism. It is a mistake to define speciesism as the claim that, all else being equal, human interests matter more than the like interests of all nonhumans and to think of speciesists as those people who accept this claim. As we saw while dealing with Timmerman's argument, a good definition of speciesism will fit a good definition of racism. Any account that would match a bad account of racism would prevent the concept of speciesism from fulfilling its core function of allowing us to draw philosophical lessons from the ethics of racism to the ethics of speciesism. Unfortunately, the conception of racism that matches Kagan's account—racism as the claim that, everything else being equal, the interests of white people matter more than the like interests of all nonwhite people—is flawed. It is flawed because it is too narrow. To see why, consider the following case:

25 Kagan, "What's Wrong with Speciesism?" 9.

26 Kagan distinguishes two readings of his definition of speciesism ("What's Wrong with Speciesism?" 3). On the "relativized" interpretation, speciesism is the view that we should give the interests of humans more weight because humans belong to our species. On the "absolute" interpretation, by contrast, it is the view that anyone should give the interests of humans more weight because humans have a higher moral status. The argument from smart aliens is meant to show that we are speciesists in neither sense of the term ("What's Wrong with Speciesism?" 9).

> *Racist Barb*: Barb, a white woman, treats white people better than black people. When prompted for a justification, she replies that the interests of white people matter more than those of black people. Because of this, Barb gets sometimes called a racist. That happened the other day at the grocery store, when she was rude to the black cashier. Barb does not take these accusations too seriously, though. She has a ready answer: "I've got nothing against Asians and Latinos," she replies. "In my view, their interests matter just as much as white people's." Since she takes some nonwhites to count just as much as whites, she does not believe that all nonwhites count less than white people. Hence, she is not a racist.

There is no question that Barb *is* a racist, however. Her attempt to show the contrary rests on a flawed conception of racism, one that is obviously too narrow. Importantly for our purposes, this conception matches Kagan's account of speciesism. The latter fails to fit a good account of racism, so it is unsatisfactory. Speciesists need not believe that the interests of humans matter more than those of all nonhumans. Just as Barb is a racist even if she does not discriminate against Asians and Latinos, maybe we are speciesists even assuming that we would not discriminate against intelligent aliens.

Is this assumption warranted, anyway? This question brings us to premise 6. In the above quote, Kagan is fairly confident: most people believe that, all else being equal, we should give the interests of intelligent aliens every bit as much consideration as the corresponding interests of humans. As his claim is empirical, it would be nice if it were supported by empirical data. Unfortunately, the extant experimental evidence rather speaks against it. In a recent study, Lucius Caviola and his colleagues asked their participants to imagine the "Atlans," a species of aliens with human-like mental abilities.[27] The subjects were then invited to think about the following dilemma: two individuals, a human and an Atlan, will die if you do not come to their rescue, but you can help only one. Kagan's hypothesis predicts that participants would be indifferent to species in this case, that they would basically toss a coin. But this is not what transpired in the results. Only one-third of the participants said they would toss a coin; over half would save the human. In a variation on this scenario, the participants could save a human or a member of a newly discovered species of apes with similar mental abilities. One might have expected comparable results. One would have been wrong: 85 percent of the participants said they would favor the human. Overall, this experiment invalidates premise 6 of Kagan's argument.

It also goes against Kagan's diagnosis according to which we are modal personists rather than speciesists. And things get worse, as this hypothesis makes

27 Caviola et al., "Humans First," 8–10.

some pretty wild predictions of its own. Some of these concern human beings. Consider this case:

> *Actually Identical Grace and Jane*: Grace and Jane are mentally handicapped to such an extent that they are neither rational nor self-aware. However, their conditions trace to different origins: Grace's disability is the consequence of a malfunction that intervened at the embryonic stage, whereas Jane's has a genetic cause. This difference bears no effect on their actual faculties, but it does affect their modal abilities: unlike Jane, Grace could have been rational and self-aware; she would have been if her fetal development had proceeded according to plan.

Kagan's diagnosis—that we are modal personists rather than speciesists—plausibly predicts that we would take Grace to matter roughly as much as a paradigmatic human. While Grace is not rational and self-aware, she could have possessed these abilities, which makes her a modal person. Jane, by contrast, not only is not rational and self-aware but could not have possessed these abilities. She is therefore not a modal person.[28] Kagan's diagnosis predicts that we would believe that her interests count no more than those of pigs and cows—that is, much less than Grace's interests. This prediction seems absurd. Oddly enough, Kagan reports having the intuition that Jane's interests matter much less than Grace's, even though he "can certainly see that others may not agree."[29] Well, he is right about that. None of the people I have asked about this case share his intuitive reaction.

Other predictions of Kagan's diagnosis concern animals. Here is a case inspired by David DeGrazia and Jeff McMahan:

> *Modal Persons All over the Seas*: It is the year 2040. Advances in cognitive therapy now allow us to radically enhance the mental lives of our nonhuman cousins. Intended for humans who, like Jane, could previously not have possessed the mental capacities characteristic of their conspecifics, the procedure was first tested on animals, including fishes. Now that it

28 Or maybe Jane is a modal person. This might become possible if gene therapy can turn nonpersons into persons. In that case, however, Jane would be less of a modal person than Grace. This form of gene therapy does not exist yet in the actual world; it already exists in another possible world, but this other world is more distant than that in which everything went well in the pregnancy that led to Grace's existence. Kagan recognizes that modal personhood might actually be a matter of degree, in which case his view would be that the more you are a modal person, the higher your moral status ("What's Wrong with Speciesism?" 19). This view entails that Grace has a moral status much higher than that of Jane.

29 Kagan, "What's Wrong with Speciesism?" 18.

> has proven effective and risk-free, it is used only on humans. As a result, all fishes are in the same situation as Grace in Actually Identical Grace and Jane. While they are not rational and self-aware, they could have possessed these abilities; they would be rational and self-aware if this new form of gene therapy had been implemented on them.[30]

What would we say in such a situation? Kagan's hypothesis—according to which we are modal personists rather than speciesists—predicts that we would give the interests of fishes full consideration, or at least the same weight we currently give to Grace's interests. Indeed, just like her, fishes would be modal persons even though they would not be rational and self-aware. This prediction is unreasonable. Seeing as their mental capacities would remain unchanged, it seems obvious that we would go on giving the interests of fishes the same weight that we currently do.

Not only does Kagan's case for speciesism antirealism appear to fail. His positive take on our attitudes to animals is unlikely to be adequate.

3. The Argument from Species as a Proxy

One might finally be tempted to deny the existence of speciesism by appealing to the notion of heuristics.[31] Heuristics are conceptual tools that we use when we have trouble detecting an attribute that is relevant to our deliberation. They rely on a process of substitution: the *target attribute* that we struggle to detect is substituted by a *heuristic attribute*, both easier to perceive and statistically correlated with it. Such a mechanism is employed, for instance, by airline companies when they impose a strict age limit on their pilots for fear that their visual abilities might be impaired.[32] In and of itself, the age of the pilots is unimportant, but it is both correlated with and easier to assess than their visual abilities.

Building on this characterization, one might put forward the following argument:

8. Purported speciesists use species only as a proxy for personhood.
9. Someone who uses species only as a proxy for personhood is not a speciesist.
10. Therefore, purported speciesists are not speciesists.

30 DeGrazia, "Modal Personhood and Moral Status," 24–25; and McMahan, "On 'Modal Personism'," 29.

31 At some point, Kagan seems to rely on such a strategy to ground his denial that people are speciesists ("What's Wrong with Speciesism?" 15–16).

32 Schauer, *Profiles, Probabilities, and Stereotypes*, 108–30.

According to premise 8, when we treat fellow humans better than other animals, we are not interested in their species per se; what matters to us, really, is their rationality and self-awareness—their personhood, for short. It just so happens that whether a subject belongs to the human species is both correlated with whether that subject is a person and much easier to find out. One need not interact with an individual to check her mental capacities; a simple glance suffices to realize that she bears the phenotypic properties typical of humans. Membership in the human species then plays the role of a heuristic attribute, which we substitute for the target attribute of personhood in our deliberative episodes. This is why we end up treating humans so much better than nonhuman animals. Call this the *heuristic hypothesis*.

This hypothesis has been most thoroughly defended by Stijn Bruers, via an inference to the best explanation.[33] It is a trite observation that purported speciesists do not justify their conduct by appeal to species. When pushed to point at a morally significant difference between humans and other animals, one that could justify granting the former preferential treatment, they consistently cite the higher mental abilities of humans. On Bruers's view, this observation is best explained by the heuristic hypothesis: purported speciesists are not interested in species per se; they use species only as a proxy for higher mental abilities.

Why, then, accept premise 9 and think that someone who uses species only as a proxy for personhood is not a speciesist? Well, think about an analogous case:

> *Medical Proxy*: Two treatments are normally used to treat congestive heart disease: beta blockers and angiotensin-converting-enzyme (ACE) inhibitors. As shown in many studies and meta-analyses, while black and white people with this condition respond equally well to the former drug, the latter is most often ineffective with black patients. The correlation between race and responsiveness to ACE inhibitors is not perfect, but it is significant. Unfortunately, there is a shortage of beta blockers, and Dr. Smith is left with only ACE inhibitors, which are also in short supply. In order to maximize medical success, she decides to use race as a proxy for responsiveness to ACE inhibitors and, accordingly, gives the available drugs to her white patients.[34]

33 Bruers, "Speciesism as a Moral Heuristic." Notice that Bruers does not take the heuristic hypothesis to commit him to denying the existence of speciesism. On the contrary, he believes that this hypothesis tells us something about the psychology of speciesism. This is clear enough in the various ways he phrases it, such as when he writes that "speciesist thinking is based on a heuristic" (490) or "speciesism is a heuristic" (491).

34 For a thought-provoking discussion of such uses of race, see Root, "The Use of Race in Medicine as a Proxy for Genetic Differences."

Intuitively, Dr. Smith is not a racist; she is just a physician who values effectiveness. A good account of racism will accommodate the fact that someone who, like Dr. Smith, uses race only as a proxy for some other property is not a racist. But then parity requires that an account of speciesism should entail that someone who uses species only as a proxy for personhood is not a speciesist. Just as Dr. Smith is best described as an effectiveness-oriented physician, such a person will be best described as a personist. In sum, the heuristic hypothesis entails speciesism antirealism, in line with premise 9.

What should we make of this argument? My inclination is to reject its first premise. You will remember that Bruers supports the heuristic hypothesis with an abductive argument: the hypothesis is the best available explanation of the observation that purported speciesists invoke mental abilities to justify the preferential treatment they give to human beings. This is admittedly a possible explanation, but I doubt it is the best. Here is another. When pushed to justify the preferential treatment they give to members of their species, most people make up a justification that looks plausible on the face of it. Since species membership does not seem like the kind of feature that could ground a difference in moral status, they turn to other characteristics that are peculiar to humans. Cognitive abilities such as rationality and self-awareness immediately come to mind; they should do the trick. This process of post hoc rationalization at no point involves relying on species as a heuristic for personhood. Call this alternative suggestion the *rationalization hypothesis*. My contention is that it explains the data better than the heuristic hypothesis.

To decide between this pair of explanations, we need to compare the predictions that stem respectively from the rationalization hypothesis and from the heuristic hypothesis. And as we will see now, the latter generates some silly predictions. Consider this add-on to Medical Proxy:

> *Better Medical Proxy*: Race is correlated with responsiveness to ACE inhibitors in patients with congestive heart disease. As it turns out, however, genetic ancestry has more predictive power than race in this respect. While the correlation is still not perfect, it is significantly stronger than that between responsiveness and race. Dr. Smith learns about this finding and stops relying on race to assess people's likely responsiveness to ACE inhibitors; she starts using genetic ancestry instead.

This is exactly what should happen on the assumption that Dr. Smith is not a racist but a physician who, because she cares about effectiveness, has been using race as a proxy for responsiveness to ACE inhibitors.

Now, the way most people treat animals does not correspond at all to the way Dr. Smith treats her black and white patients. Consider this case:

> *Better Personist Proxy*: An engineer manages to design glasses that allow those who wear them to tell an entity's mental abilities. Through the glasses, persons shine with a bright aura, whereas nonpersons do not. Unsurprisingly, most humans have such an aura, contrary to most nonhumans, which confirms, if need be, that membership in the human species is correlated to personhood. Although highly reliable, the glasses do get it wrong on rare occasions. In exceptional cases, a nonperson will shine, or a person will not. The correlation is not perfect. Still, it is significantly stronger than that between species membership and personhood. The news of this technology is widely reported in the media.

Think about this. If it were true that most people use membership in the human species only as a proxy to distinguish persons from nonpersons, then they would react the way Dr. Smith did in Better Medical Proxy; they would stop relying on species to assess people's mental abilities, buy themselves a pair of glasses, and start using auras as their new proxy for personhood. Once this is done, they would begin treating all the subjects that lack an aura through the glasses as poorly as they currently treat animals. But this prediction seems incredible. It is much more likely that most people would treat humans without an aura more or less the same as they do now—that is, far better than animals.

Other predictions of the heuristic hypothesis concern nonhumans. Recall the study mentioned earlier in which Caviola and his colleagues asked participants to imagine the Atlans, an intelligent alien species, and to decide whether to save an Atlan or a human in case of an emergency. If the heuristic hypothesis were accurate and our treatment of nonhuman animals were caused by the mental abilities we attribute to them on the basis of their species, we would be willing to treat Atlans no worse than humans. Since membership in the Atlan species is as reliable an indicator of rationality and self-awareness as membership in the human species, we would use it as a proxy for detecting persons, we would ascribe Atlans the same mental capacities that we ascribe humans, and we would treat them as well as humans. Faced with the dilemma presented by Caviola and his colleagues, we would flip a coin. As we saw earlier, this is not at all what would happen. Most participants indicated that they would save the human over the Atlan, regardless of their respective mental abilities.[35]

In contrast, the predictions of the rationalization hypothesis for these cases appear reasonable. Regarding Better Personist Proxy, the hypothesis predicts

35 The heuristic hypothesis also predicts that we would toss a coin in the other scenario, in which we could save either a human or a member of a species of intelligent apes. This prediction is also false since, as we saw, roughly six out of every seven participants said they would save the human.

exactly what it should. Assuming that people appeal to mental abilities only to rationalize the unequal treatment they give to nonhumans, they would go on treating human nonpersons far better than nonhumans should an engineer invent glasses through which persons appear to have auras. Maybe they would make up a new justification. Or maybe not. After all, the appeal to personhood is already quite ridiculous if you think about it—who needs high-tech glasses to see that babies are not rational and self-aware agents? Yet few people are embarrassed to endorse it. It is unclear that anyone would feel the urge to make up a different pretext because a new device makes the obvious even more obvious.

The rationalization hypothesis also generates correct predictions about the intelligent aliens discussed by Caviola et al. Assuming that the appeal to higher mental abilities is only a post hoc rationalization of the disadvantageous consideration and treatment that people are disposed to grant nonhumans, one would expect them to grant intelligent aliens disadvantageous consideration and treatment. Only, they would then need to invoke a different excuse to justify their attitudes and conduct in this case. Finding such an excuse may prove more difficult, but probably not difficult enough to dissuade many from doing it.

Whether or not the rationalization hypothesis best explains the common observation that people appeal to animals' lower cognitive abilities to justify their own conduct, the explanation it supplies is better than that supplied by the heuristic hypothesis. This should be enough to refute Bruers's abductive argument in support of the latter. The heuristic hypothesis is not the best available explanation, so it is unclear why we should accept it. But more than that: the bizarre predictions that stem from this hypothesis give us sufficient reason to reject it, together with premise 8 in the above argument for speciesism antirealism.

Here is a possible rejoinder. Not all heuristics are as flexible as those I have used to illustrate the phenomenon. As a child, you wanted to know which animals were dangerous; dangerousness was your target attribute. But you had a hard time identifying dangerous animals. Membership in the suborder of snakes, by contrast, was much easier to detect and, as you soon became aware, correlated with dangerousness. So you started using it as a heuristic attribute. Suppose that, decades later, you were to find a better proxy for dangerousness. You would probably keep fearing all snakes nonetheless. This is an example of a "sticky heuristic." Now, we know that purported speciesists do not rely on a flexible heuristic—as we just saw, they would keep favoring humans as compared to nonhumans should they find a better proxy for personhood. For all that, maybe the unequal treatment that purported speciesists give to humans and nonhumans results from a sticky heuristic just like your fear of all snakes. This would vindicate premise 8 of the above argument for speciesism antirealism.

This *sticky heuristic hypothesis* certainly fares better than the simple heuristic hypothesis insofar as it delivers the right prediction for cases such as Better Personist Proxy. Having said that, I remain unpersuaded, for two reasons. To begin with, the sticky heuristic hypothesis makes little sense of the fact that we have at our disposal much more reliable heuristics for personhood. To mention just one example, rationality and self-awareness are presumably more strongly correlated with possession of language than they are with species membership. Under these circumstances, it is improbable that virtually everyone opted for membership in the human species after spending even a little time looking for a proxy for personhood.

What is more, the sticky heuristic hypothesis is unlikely to best explain the facts. It provides us with a distal explanation. The suggestion is that we developed a robust tendency to favor humans on the basis of species because long ago we were interested in personhood and became aware that the two are correlated. Of course, there is nothing wrong with distal explanations per se. It is just doubtful that the sticky heuristic hypothesis provides the best distal explanation available in this specific instance. Another distal explanation, one that is much more popular among psychologists, is the *tribalism hypothesis*, according to which the disadvantageous consideration and treatment we give to nonhuman animals are largely due to our general tendency to discriminate against out-group members, combined with our perception of nonhumans as an out-group.[36] This competing explanation sounds more plausible. Even if we focus on sticky heuristics, premise 8 rests on shaky empirical grounds.

But that is not all. Let us grant the sticky heuristic hypothesis and premise 8, for the sake of argument. The worry is that in the meantime, premise 9 has turned highly implausible. For if what we have now is a distal explanation of our robust tendency to discriminate on the basis of species, then our *explanandum* is speciesism—the proximal cause of the way we discriminate individuals is species. Remember Buck, the white man who treats white people better than black people without reflecting much about it? Whatever turns out to be the best distal cause of his robust tendency to discriminate against black people, Buck is a racist insofar as the proximal cause of his behavior is race. The same will be true, *mutatis mutandis*, of purported speciesists. Whatever turns out to be the best distal cause of their robust tendency to discriminate against animals, they will qualify as speciesists.

36 Amiot and Bastian, "Toward a Psychology of Human-Animal Relations," 30; Dhont et al., "The Psychology of Speciesism," 30–32; Jaquet, "Speciesism and Tribalism"; Kasperbauer, *Subhuman*; and Plous, "Psychological Mechanisms in the Human Use of Animals" and "The Psychology of Prejudice, Stereotyping, and Discrimination."

4. Conclusion

Do we live in a speciesist world? While most animal ethicists would readily answer this question in the affirmative, some do not. The latter philosophers bear the burden of proof. We have examined three attempts to shift that burden. I believe these attempts fail for various reasons, which I will not reiterate here. Instead, let me wrap up with some considerations regarding our social responsibility as philosophers.

In the introduction, I touched upon the significance of this whole issue. The concept of speciesism is a fantastic device both to morally assess the most widespread attitudes towards nonhuman animals and to raise public awareness about the ethical shortcomings of these attitudes—the kind of device we should handle with the utmost caution. And philosophers have a unique responsibility in this area.[37] Considering the great potential for social change that the concept of speciesism offers, we would be wise to avoid denying the existence of speciesism unless we have a very strong case to make to that effect, one that can resist objections such as those I have presented in this contribution.

Speciesism antirealism is innocuous, one might think, so long as it is expressed in an academic setting such as a philosophy journal. But this would be a mistake. What guarantee do we have that the content of our armchair discussions will not transcend the boundaries of academia to have unwanted effects on the outside world? By way of anecdote, I have seen people post a link to Kagan's article "What's Wrong with Speciesism?" under opinion pieces denouncing speciesism in the general press. It is not difficult to imagine the relieving effect this had on readers who might have found the initial pieces unsettling. In light of the impact that animal ethics has had on the public debate so far, we should be wary of writing papers that might have harmful consequences for animals and the animal rights movement.

This is not a plea for self-censure. It must of course be possible to question assumptions that are common in the philosophical community. I mean these concluding remarks only as a reminder, to myself included, to be extra careful when the stakes are high because the positions under evaluation play or might come to play a role in the public arena. Some philosophers are indifferent to the fate of animals and broadly satisfied with the status quo. They will not be interested in my two cents. The authors whose views I have discussed in this paper, however, are nothing like that. Despite our disagreements, I have not a shadow of a doubt that they care. It is indeed transparent in their work—including the articles that I have been discussing—that they are as concerned as anyone

37 Ebert et al., "Is Daniel a Monster?" 42.

by the mistreatments inflicted on animals in our societies. I trust they will be sensitive to these considerations.[38]

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THE MORAL HARMS OF HOMELESSNESS

Bradley Hillier-Smith

HOMELESSNESS afflicts thousands of our fellow citizens. In England and Wales, for example, over 350,000 households (individuals or families) experience *core homelessness*, defined as having no permanent address and instead sleeping on the streets, in sheds, garages, cars, hostels, or unsuitable temporary accommodation, or "sofa surfing."[1] Accurate census data is difficult to acquire (due to impermanent locations), yet UK government statistics record that around four thousand individuals sleep rough on the streets each night, with charity organizations estimating the figure as over ten thousand.[2] Homelessness has increased by 165 percent since 2010 and is projected to increase further due to rising housing costs and diminishing availability of affordable housing (relative to income levels) and as support measures in place during the COVID-19 pandemic (furlough schemes, enhanced housing support, emergency accommodation initiatives) have been withdrawn, with charities warning of a "substantial rise in core homelessness."[3]

The physical and psychological harms of homelessness are well documented and well established.[4] For rough sleepers, exposure to the elements, undernourishment, difficulties maintaining personal hygiene, lack of access to health care, high levels of stress, and higher incidences of of drug and alcohol dependency result in increased risk of respiratory disease, infection, malnutrition, dehydration, and cardiovascular and digestive diseases.[5] Homelessness further takes a severe toll on psychological well-being, with increased rates of acute and chronic depression compared to the general population, deterioration of preexisting psychiatric conditions, and far higher suicide rates compared to the

1 Crisis, "About Homelessness."

2 Department for Levelling Up, Housing, and Communities, "Rough Sleeping Snapshot in England"; Ministry of Housing, Communities, and Local Government, "Homelessness Statistics"; and Crisis, "About Homelessness."

3 Crisis, "The Homelessness Monitor."

4 See, for example, Public Health England, "Health Matters"; and Sanders and Albanese, "It's No Life at All."

5 Public Health England, "Health Matters."

general population.[6] In England and Wales, homeless persons are also seventeen times more likely to be victims of physical violence than the general population, and nearly one in four homeless women have been sexually assaulted while sleeping rough.[7] As a result of these and other difficulties, the average age of death for a homeless person in the United Kingdom is forty-four years old.[8]

In light of these harms, there is something unsettling about the phenomenon of homelessness in contemporary, affluent societies. The severe physical and psychological suffering outlined above provides more than sufficient moral reason to alleviate the urgent plight of the homeless. Yet there is a tacit acknowledgement of homelessness (at least in many contemporary, affluent liberal democracies) as an inevitable and acceptable feature of our social landscape. This tacit acknowledgement is evident *interactionally* through interpersonal, societal, and public neglect of the homeless: many of us (at least those of us in urban centers) are confronted with vivid examples of acute human suffering each day, yet few of us can claim that we have not ignored or failed to appropriately respond to the needs of those sleeping rough when it was in our means to do so. This tacit acknowledgement is also evident *institutionally* through political and public policy neglect: there are effective durable solutions readily available to address homelessness (as outlined in section 5), and affluent political societies have the capacity and resources to implement them, yet doing so is rarely a political priority. The severe suffering of homelessness is thus avoidable, yet it is accepted as a tolerable feature of our social landscapes. Call this *the unsettling phenomenon*: the tacit acceptance (and neglect) of the avoidable suffering of homelessness in affluent societies.

Further, with a few important exceptions, homelessness has received relatively little sustained philosophical analysis. This omission is surprising given that homeless persons are, or at least are among, *the* worst-off persons in contemporary liberal democracies and so would expectedly be central to applications of (Rawlsian) conceptions of justice and priority for the worst-off in political and moral theory.[9] The omission is also surprising given the centrality of hypothetical examples and ostensibly foundational principles within normative and applied ethics regarding aiding those in desperate need if one can

6 Public Health England, "Health Matters."

7 Crisis, "Rough Sleepers and Complex Needs," "New Research Reveals the Scale of Violence Against Rough Sleepers"; and Sanders and Albanese, "It's No Life at All."

8 Crisis, "About Homelessness."

9 See Rawls, *A Theory of Justice*; Parfit, "Equality and Priority"; and Crisp, "Equality, Priority, and Compassion."

do so at little cost.[10] Homeless persons are thus widely ignored not only in everyday interactions and public policy but also in (applied) moral and political philosophy.

This paper therefore aims to provide an account of the underacknowledged moral harms of homelessness, the recognition and alleviation of which would ground and motivate durable solutions to alleviate the plight of the homeless (and thereby address the unsettling phenomenon). The analysis focuses on involuntary homelessness, understood as the involuntary condition of lacking capabilities to obtain (property rights over) permanent housing.[11] And the well-established required durable solution is (supported) access to (property rights over) permanent housing.[12] The homeless need homes, and we need an account of the moral harms of homelessness that can ground and motivate obligations to provide them. The few existing accounts of the moral harms of homelessness—the freedom-based account, the privacy-based account, and the care-based account—reveal important insights but ultimately fail to ground obligations to provide durable solutions in the form of permanent housing. This paper therefore advances a novel *status-based account* that reveals a crucial but underacknowledged moral harm of homelessness, addresses the limitations of existing accounts, and is able to ground durable solutions. This account can then provide the normative framework for necessary and urgent reform and thereby help challenge the unsettling tacit acceptance of homelessness in contemporary, affluent societies.

The paper proceeds as follows. Section 1 clarifies the ethics and scope of the inquiry. The next sections critically analyze existing accounts of the moral harms of homelessness: section 2 discusses the freedom-based account, section 3 the privacy-based account, and section 4 the care-based account. Section 5 introduces and develops the novel status-based account. Section 6 then defends

10 See Singer, "Famine, Affluence, and Morality"; and Scanlon, *What We Owe to Each Other*, 224.

11 This paper focuses primarily on the harms endured by those facing "street homelessness": those sleeping rough on the street and also those having access to only temporary night shelters or unsuitable and precarious temporary accommodation. Yet the analysis also applies (to different degrees) to other forms of "core homelessness," including those sleeping in cars, "sofa surfing," or who have other forms of temporary accommodation but lack capabilities to obtain (property rights over) permanent housing.

12 Shelter England, "Solution out of Homelessness"; Crisis, "The Plan to End Homelessness"; and Homeless Link, "What Are the Solutions to Homelessness?" By 'homes' I specifically mean the capability to obtain (property rights over) permanent housing (whether provided by the state, rented, or owned) that meets an adequate standard (in providing living conditions sufficient for decent human life). See Wells, "The Right to Housing."

this account against potential objections and demonstrates how it grounds and motivates obligations to provide durable solutions to alleviate homelessness.

1. THE ETHICS AND SCOPE OF THE INQUIRY

There are important concerns about a (predominantly *a priori*) inquiry into the harms of homelessness from researchers (including myself) in positions of relative socioeconomic advantage who have not experienced homelessness. Such an inquiry may seem voyeuristic insofar as it treats the suffering of others as merely a subject of academic interest; it may proceed from assumptions and biases such that the analysis will be detached from the reality and lived experiences of those affected—and may be patronizing in this detachment; it may lead to a divisive and asymmetrical "us and them" relation; or it may contribute to a "savior complex" that risks othering and presuming a passive victimhood and lack of agency on the part of those affected, whose only means of betterment will be at the hands of their more privileged saviors.

These concerns ought to be taken seriously and will thus guide the following proposed constraints on the ethics of the inquiry. It is permissible to engage in an inquiry into the condition of homelessness if and only if (a) the purpose of that inquiry is not merely academic interest but to identify morally salient harmful features of the condition that ought to be alleviated (as a basis for individual, societal, and public policy responses); and (b) the inquiry takes seriously, includes, and broadly corresponds to the perspectives and expressed needs of those affected. These two conditions—of *teleological appropriateness* and *phenomenological correspondence*, respectively—can mitigate the concerns. The teleological condition entails the inquiry is not mere voyeuristic academic interest but aimed at motivating responses and durable solutions to alleviate the plight of those affected. The phenomenological condition entails the inquiry takes seriously, includes, and corresponds to the expressed experience of those affected in order to correct for biases, assumptions, and resultant detachment, to respect and affirm the agency and moral and epistemic status of those affected, and to correct for "us and them" distinctions. This inquiry will thus proceed under these conditions.

The scope of the inquiry is limited to an analysis of the *condition* of homelessness, not the *moral responsibility* for homelessness. That is, this inquiry is not concerned with identifying and assigning blame for the causes of homelessness, whether those are public policies, structural factors, or individual responsibility on the part of the homeless themselves (excepting, of course, that considering causal factors may be practically relevant for reform). The inquiry is in this sense forward-looking rather than backward-looking, insofar as it is seeking

to better understand the harms of homelessness and how to respond through reform rather than seeking to assign blame for how it came about.[13]

That said, one popular assumption about the moral responsibility of the homeless themselves ought to be challenged. It may be argued (or at least asserted in public discourse) that persons are homeless through their own fault as a result of (a series of) imprudent life choices. Since the homeless are morally responsible for their plight, there is less or no moral obligation on the part of others to alleviate their plight. Some philosophers defend the principle that if an agent is morally responsible for their coming to harm, there is a weaker (or no) obligation on the part of others to alleviate that harm compared to an obligation to alleviate an equal harm that is endured by an agent through no fault of her own.[14] Regardless of whether this principle is sound or not, it is not obviously applicable to homelessness. There are diverse and overlapping causes of homelessness, including but not limited to: structural factors (the supply of and access to affordable and social housing, rates of employment, rates of inflation, rates of wage growth (or stagnation or decline), the extent and provision of and access to social security); interpersonal triggers (evictions (including wrongful ones), the breakdown of familial or personal relationships, domestic violence or abuse, familial or relational ostracization of LGBT+ persons); and person-specific circumstances (being a care or prison leaver, mental health issues, substance and alcohol addiction, or destitution faced by unsupported refugees, asylum seekers, or undocumented migrants).[15] Only a limited number of these diverse and overlapping causes (if any) may plausibly be said to be the fault of the individual.

Moreover, crucially, we need not settle the empirical question. We can suppose it is true that *all* homeless persons are indeed *fully* morally responsible for their homelessness due to imprudent life choices. Even if this were true, we might wonder whether the harms of homelessness, including the immense physical and psychological suffering until early death outlined in the introduction, are a proportionate and deserved outcome or "punishment" for such life

13 I borrow the distinction between forward and backward looking from Young, *Responsibility for Justice*.

14 For example, David Miller argues that personal responsibility for coming to harm can modify and weaken the duty to rescue that victim. See Miller, "Responsibility and the Duty of Rescue." Luck egalitarianism similarly holds that persons who are responsible for their relative disadvantage are not owed redistribution as a matter of justice, while those who are disadvantaged through no fault of their own as result of brute luck are. See Dworkin, "What Is Equality?" And for critique, see Anderson, "What Is the Point of Equality?"

15 See Anderson and Christian, "Causes of Homelessness in the UK"; Shelter England, "What Causes Homelessness?"; and Ministry of Housing, Communities, and Local Government and Department for Work and Pensions, "Homelessness."

choices. After all, it is widely accepted that even those who have committed and are then convicted of the most serious crimes are nonetheless entitled to shelter, health care, mental health support, three meals a day, and basic subsistence during their incarceration. The homeless are plausibly worse-off (at least in many crucial respects) than imprisoned criminals. Indeed, it is well documented that some homeless persons commit minor offenses, especially in winter months, in order to be arrested, locked up, and thereby have a bed and a warm meal.[16] If deprivation of subsistence and an early death would be a disproportionate outcome relative to the most severe crimes, then deprivation of subsistence and an early death must *a fortiori* be a disproportionate outcome relative to the purported imprudent life choices of those who have ended up homeless. Thus, even if the homeless are responsible for their homelessness, the severity of that plight far outstrips the harm they are liable to incur on account of that responsibility. Therefore, there will remain duties to alleviate the underserved harms of homelessness. The claim that the homeless are morally responsible for their situation therefore is almost certainly false and, even if true, would not negate moral obligations to alleviate their plight. Hence, we can dismiss this claim going forward.

The final clarification of this inquiry is that it seeks to identify the moral harms of homelessness, which are understood as setbacks to morally salient interests and capacities (which are components of human well-being) that intuitively generate moral reasons in nonrelated agents to alleviate such setbacks. Physical suffering and psychological suffering constitute moral harms. Yet persons have other morally significant interests, needs, and capacities beyond physical and mental health that constitute elements of their well-being. Proposed candidate components of well-being include autonomy, liberty, personal security, important knowledge, achievement in life projects, friendship or deep personal relationships, and a dignified existence, among others.[17] These pluralistic conceptions of the components of well-being theoretically support the independently plausible view that human beings have certain morally important capacities and interests beyond physical and psychological well-being, and thus setbacks to these capacities and interests as components of well-being will be harmful to them. Hence, persons can be harmed in ways beyond setbacks to physical and psychological health. However, not all such harms will necessarily be moral harms (in generating moral reasons in nonrelated others to alleviate such setbacks). For example, if a head injury caused me to lose some knowl-

16 Ramesh, "A Fifth of All Homeless People Have Committed a Crime to Get off the Streets."

17 See Hooker, "The Elements of Well-Being"; and Martha Nussbaum's central capabilities in *Frontiers of Justice*.

edge about the life and music of my favorite musician, this would plausibly be a harm to me, but not a moral harm since, intuitively, strangers would not have sufficient moral reason to care about it and seek to restore my knowledge.[18] By contrast, if I (or anyone) were subjected to cruel and degrading treatment, this would also be a harm to me as (at least) a setback to an interest in a dignified existence, and this would be a moral harm since, intuitively, others would have reason to care that I suffered this harm and reason to alleviate it.

Thomas Nagel's discussion of the distinction between *subjective* (agent-relative) values and *impersonal* (agent-neutral) values can clarify this idea of moral harms.[19] Something has subjective value to the extent that any particular agent values it. Something has impersonal value to the extent that all agents have reason to value it. My knowledge about my favorite musician has subjective value to the extent that I myself care about it, but not impersonal value since not every other person has reason to value it. In contrast, my avoiding cruel and degrading treatment *does* have impersonal value, since avoiding cruel and degrading treatment is something that all persons have reason to value, and thus enduring cruel and degrading treatment is something that is apt to generate reasons in others to care about alleviating such a harm. Nagel argues that only things with such impersonal value provide "the raw material for ethics—the basis of our claims to the concern of others."[20] Drawing from Nagel, a moral harm is thus a setback to an element of well-being that has *impersonal disvalue* (everyone has a reason to avoid such a setback) and thus generates reasons for any and all nonrelated others to care about and alleviate it. It is these moral harms we are seeking to identify within the condition of homelessness in order to ground and motivate durable responses. Let us now assess existing accounts and their limitations.

2. THE FREEDOM-BASED ACCOUNT

Jeremy Waldron's freedom-based account highlights how (negative) freedom to ϕ (without interference) requires a spatial component.[21] In order to be free to ϕ, one must have a location in which to ϕ. If one is not free to be in a certain place (at least not without interference), then one is not free to perform any action in that place, and if one is not free to be in any place (at least not without

18 The following would be a good place to start: MacDonald, *Revolution in the Head*.

19 Nagel, *The View from Nowhere*.

20 Nagel, *The View from Nowhere*, 167.

21 Waldron, "Homelessness and the Issue of Freedom."

interference), then one is not free to do anything, and one is thus "comprehensively unfree."[22]

A homeless person is not free to enter any individual private property (individuals' private houses, gardens, apartments, lands, and so on), at least not without permission, and is liable to forcible removal (by the state) if they try. Homeless persons also face restrictions on freedoms to enter and perform actions in private commercial properties (cafes, restaurants, shops, offices, and so on) and are liable to interreference or removal. Homeless persons may lack the material means to be customers, and most of us do not fully appreciate the exclusionary significance of signs that read "toilets for customers only." The homeless of course lack their own private property in which they are free to be and to perform any action they wish. The only remaining spaces are collective public spaces (parks, public squares, pavements, streets, underground subways, stairwells, and so forth). Yet even here, restrictions apply. Parks, squares, stairwells, and walkways can close, and the range of permitted actions is restricted. One is not free to sleep, wash, or relieve oneself in these spaces, for instance, and one is liable to removal or interference if one tries. And these last remaining spaces are progressively further restricted by regulations. Waldron notes regulations preventing the homeless from sleeping in New York subway stations, and we can note similar restrictions in the United Kingdom.[23] Public benches have dividers or are curved to prevent sleeping, and gates close off shop doorways or public walkways after certain times. "Anti-homeless spikes" (metal spikes placed on pavements), deliberate noise pollution, and "wetting down" practices (spraying spaces with water) aim to prevent the homeless from resting in certain spaces.[24] And the phenomenon of "pseudo-public spaces" adds further restrictions: local authorities sell public spaces to private developers, resulting in ostensibly public spaces such as squares and walkways being owned by private institutions that enforce their own regulations with private security guards, removing persons for unsanctioned behavior such as loitering, sleeping, or "looking scruffy."[25]

Such hostile architecture, practices, and regulations corrode the freedom of homeless persons even further, such that, as Waldron emphasizes, "for anyone who values choice and freedom, it ought to be a matter of concern that the choices left open to a person are progressively closed off one by one so that he is

22 Waldron, "Homelessness and the Issue of Freedom," 33.

23 Waldron, "Homelessness and the Issue of Freedom," 41.

24 Crisis, "Crisis Uncovers Dehumanising Effects of Defensive Architecture."

25 Shenker, "Revealed."

nearing a situation where there is literally nowhere he can turn."[26] And for Waldron, a particularly severe manifestation of the condition of unfreedom is that restrictions on sleeping, washing, and relieving oneself in public places effectively preclude homeless persons from being free to perform these fundamental human functions essential for physical well-being (without interference).[27]

Waldron's insightful freedom-based account thus reveals a serious and underacknowledged moral harm of homelessness. Deprivations of basic freedoms endured by our fellow citizens ought to be considered a pressing normative concern. However, this account faces certain limitations insofar as it is unable to ground sufficiently substantive or adequate responses to the plight of the homeless. Note that it does not follow from the freedom-based account that durable solutions in the form of permanent housing ought to be provided to alleviate the condition of unfreedom. Rather, all that is required is that some place be provided in order for the homeless to freely perform certain actions for example: sleep, wash, or relieve oneself. This may require nothing more than the provision of some temporary night shelters, public toilets, and washing facilities, or even simply fewer restrictions on sleeping, washing, and relieving oneself in public spaces.[28] In the nearest possible world in which there were fewer such restrictions, Waldron's arguments would no longer apply, as the homeless would be as free as anyone else to perform these actions. This may be an improvement, but not a sufficiently substantive response: this would not be a world where the homeless were much better-off, or their plight adequately addressed.

It may be objected that the salient freedom that the freedom-based account illuminates is the freedom that comes with having a home—a place to be free to do whatever one wishes (relax, eat, sleep, wash, and simply be) without risk of interference from the state (or anyone else). However, the freedom-based account does not by itself entail that a home per se is necessary for such freedom, only that *some place* be provided for the homeless to be free to perform these actions without interference. For instance, consider the following case.

> *Liberty Spaces*: The UK government, compelled by the deprivation of freedom of homeless persons, provides "liberty spaces": specified areas of rural land where the homeless are free to perform whatever (noncriminal) actions they wish without interference by the state. No one is forced to enter such liberty spaces, but they are available for the homeless if they wish. The UK government now rests content that homeless persons possess the freedom to do whatever they wish, whenever they wish.

26 Waldron, "Homelessness and the Issue of Freedom," 45.

27 Waldron, "Homelessness and the Issue of Freedom," 43.

28 Bart van Leeuwen raises a similar concern ("To the Edge of the Urban Landscape," 591).

Such a proposal would be clearly unacceptable, inadequate, and an abject failure to take seriously or appropriately respond to the needs and plight of the homeless. However, the freedom-based account risks the implication that such "liberty spaces" represent an adequate response and improvement, and it cannot explain why such a proposal would be inadequate or unacceptable, since those liberty spaces sufficiently address the freedom deprivations to which the account objects. Therefore, though the freedom-based account identifies a crucial moral harm, it is unable to ground an obligation to provide substantive or adequate responses to homelessness, including durable solutions in the form of (property rights over) permanent housing. This account therefore ought to be supplemented (as will be discussed in section 6).

3. THE PRIVACY-BASED ACCOUNT

Shyli Karin-Frank's privacy-based account draws upon a distinction between being *on stage* and being *off stage*.[29] On stage describes the public dimension of our lives: the performance of behaviors, speech acts, self-presentations, and social roles in keeping with social norms, judgements, and expectations. Off stage describes the private dimension, where one can withdraw from social expectations and pressures, engage in behaviors, speech acts, and self-presentations in stronger accordance with one's own will and curate one's own individuality. The home is "the most permanent and well-defined off stage," as a physical and socially accepted means of seclusion from society. One can close the door, shut out the world, "take off one's social dress," and be free from the public's gaze, expectations, and judgements. Such privacy is essential for psychological well-being (in making emotional relief from exhausting moral and social life possible), for autonomy (as a sphere to live one's life more in accordance with one's own will and to choose "when and how to appear in public"), and for individuality (as a sphere to define and develop one's self).[30]

For the homeless, there is no off stage. They are instead constantly on stage in the public gaze, subject to the expectations and judgements of society, with no space to withdraw. Such constant exposure is exhausting and damaging to psychological well-being. It is also damaging to autonomy and individuality, as homeless persons are deprived of a secluded sphere to control how and when to appear in public, to live and present their lives according to their own will, and to develop their individualities. Hence, for Karin-Frank, homelessness is a

29 Karin-Frank, "Homelessness, the Right to Privacy, and the Obligation to Provide a Home." The distinction is taken from social psychologist Erving Goffman.

30 Karin-Frank, "Homelessness, the Right to Privacy, and the Obligation to Provide a Home," 259, 260–63.

condition of privacy deprivation, which is devastating to psychological well-being, autonomy, and individuality.

This privacy-based account reveals a crucial, underacknowledged moral harm of homelessness. Deprivations to privacy as well as to psychological well-being, autonomy, and individuality are plausibly serious harms endured by those facing homelessness. However, there are again limitations to this account. The account does not by itself ground or motivate an obligation to provide adequate durable solutions; rather, only *some means* of privacy are required, which does not seem sufficient for psychological well-being, autonomy, or individuality. Consider that if privacy from public expectations and judgements will enable psychological well-being, autonomy, and individuality, then it is not the case that a home is necessary for such privacy. Rather, the privacy-based account implies that, for example, providing portable curtains to homeless persons to be free from the public gaze and be off stage would be an improvement to their plight insofar as this would address their privacy deprivations (and thereby further enable psychological well-being, autonomy, and individuality). Yet this would manifestly be an inadequate response. Indeed, pressing this worry, consider the following case.

> *Invisibility:* The UK government, concerned with the privacy deprivation of the homeless, mandates that everyone wear a type of contact lenses that obscure the homeless from their vision, and each homeless person is made aware that no one can see them. The homeless therefore have maximum privacy and are free from the public's gaze and social judgements.

The privacy-based account risks the implication that such invisibility would be an improvement for the homeless. However, clearly, invisibility would not alleviate the harms that homeless persons face nor enhance their psychological well-being, autonomy, or individuality. Invisibility would not enable opportunities for homeless persons to live their lives as they would wish nor to develop their individualities. Rather, it would remain the case that their opportunity sets were severely constrained by a lack of material goods and adverse circumstances, such that their actions and lives were governed by meeting survival needs rather than their own will, and they thereby also lacked the opportunities to develop their individualities. This reveals that it may not necessarily be *privacy* deprivation that explains the diminishment of autonomy or individuality but more plausibly *material* deprivation.

Thus, addressing privacy deprivation alone will not necessarily enhance autonomy, individuality, or well-being nor provide a sufficiently substantive improvement. There is also a concern that enhanced privacy (i.e., in the form of

invisibility) may even exacerbate the harms of homelessness in certain respects. As will be discussed in more detail in section 5, one serious harm that homeless persons face is that they are already in one sense "invisible" insofar as they are ignored, dismissed, walked past without sufficient response to or recognition of their needs or even existence. More seclusion or privacy could thus exacerbate their social isolation and societal and political neglect.

It may be objected that the privacy-based account can indeed ground an obligation to provide permanent housing, since a home allows agents control over being on and off stage and provides the security and seclusion from the pressures of society necessary for psychological well-being, autonomy, and individuality. It is thus the *privacy of the home* rather than privacy itself that is fundamental and must be provided.

In response, it is contestable whether it is the *privacy* of the home or simply the *home* itself that is operative here. Having a home, understood as (property rights over) permanent housing, would indeed improve psychological well-being in providing safety and emotional relief from the pressures and dangers of the outside world, autonomy in the form of increased control over one's life and environment, and enhanced space and capabilities to live one's life according to one's will and cultivate one's individuality. But if it is the home itself that enables these goods, it is not clear what important role privacy plays. Privacy will not itself (as shown above) improve psychological well-being, autonomy, or individuality; a home would—but this is not something that the privacy-based account as it stands gives sufficient grounds to provide.

Hence, the privacy-based account does reveal important moral harms of homelessness: privacy deprivation, as well as diminished capacity for psychological well-being, autonomy, and individuality. However, this account cannot, as it stands, ground an obligation to provide adequate durable solutions and must therefore also be supplemented (as will be discussed in section 6).

4. THE CARE-BASED ACCOUNT

The care-based account, as defended by Nel Noddings and Bart van Leeuwen, takes care ethics as its foundation and focuses on the expressed and implicit unmet basic needs of homeless persons and on establishing supportive social relations.[31] As Noddings outlines, the acute basic needs of homeless persons—including shelter, safety, subsistence, and physical and mental health

31 Noddings, *Starting at Home* and "Caring, Social Policy, and Homelessness"; and Van Leeuwen, "To the Edge of the Urban Landscape."

care—ought to be of primary moral concern.[32] Addressing the full range of such needs requires providing a home: "The homeless need homes, not halfway measures that actually contribute to their continued homelessness."[33] A home provides for physical needs (shelter, a place to eat, sleep, and wash), practical needs (an address to register to vote, register a bank account, and apply for social security), and a sense of identity and self-respect, all at once. Since providing a home addresses a wide range of such needs, it ought to be considered a fundamental need itself and thereby a moral right that the state has an obligation to fulfil. Therefore, the "first priority" on a care-based account ought to be "securing homes for the homeless."[34]

Van Leeuwen further endorses this account (over freedom-based and privacy-based accounts) because of three advantages.[35] First, it identifies the appropriate locus of moral concern: basic unmet needs as opposed to abstract ideals of freedom or privacy. Second, the focus on individual needs allows for adaptable, individualized responses. Third, the emphasis on relationships foregrounds one important need and route out of homelessness: the maintenance of supportive social networks.

This care-based account is therefore vital and indeed promising in focusing on plausibly the most urgent moral harm of homelessness: the deprivation of basic needs. However, unfortunately, this account does face at least three limitations. First, *contra* Noddings, the care-based account does not in fact ground an obligation to provide *a home* per se. Rather, this account, in theory and practice, justifies placing the homeless in *any* form of accommodation deemed by others as appropriate for them, so long as that accommodation meets their basic needs. This concern is revealed in one of Noddings' proposals: "We might suggest, for example, that abandoned military camps be used to house and re-train the homeless." Noddings expands:

> If we agree that privacy, control over one's own movements, a certain unity of life afforded by home-like settings, and access to growth-inducing encounters are essential, that these are basic needs, then we can organize any available facilities with these needs in mind. It is wasteful to allow military structures to sit idle; they can be converted to civilian use.[36]

32 Noddings, "Caring, Social Policy, and Homelessness."

33 Noddings, "Caring, Social Policy, and Homelessness," 445.

34 Noddings, "Caring, Social Policy, and Homelessness," 444–48.

35 Van Leeuwen, "To the Edge of the Urban Landscape," 596–97.

36 Noddings, "Caring, Social Policy, and Homelessness," 488.

This proposal risks disrespecting the equal moral worth of homeless persons by treating them as defective social elements to be marginalized from society, retrained, and housed in facilities deemed suitable for them by others. And such a proposal exemplifies how the care-based account does *not* ground an obligation to provide a home per se but rather grounds an obligation to provide any form of accommodation deemed suitable by others, so long as it provides for basic needs.

This concern is compounded by the care-based account's second limitation: the justification of coercion. Noddings holds that the homeless should be coerced into using accommodation facilities and coerced into working to pay their way for the facilities. To be sure, Noddings holds that concerns raised by the homeless ought to be taken seriously and that a caring relationship is one of negotiation—yet "questions of coercion arise at every level," and this coercion is oftentimes justified.[37] This justification of coercion and of overriding the will of homeless persons disrespects their agency and autonomy, and this ought to be concerning to anyone who agrees that homeless persons (equally as anyone else) are entitled to decide for themselves how to live their lives.

The justification of coercion results from a deeper theoretical problem. The care-based account explicitly draws analogies with parent-child care relations. A parent ought to care for and respond to the expressed needs of the child but also ought not to indulge *every* expressed need, instead responding to the *inferred* needs of the child—and coercion is often justified. Noddings cites the example of not indulging every wish of a child to avoid homework, instead inferring her actual need to study and therefore permissibly coercing her to study.[38]

This application of parent-child ethics to homelessness raises problems. First, it risks being insulting and patronizing. Homeless persons are not passive victims merely to be pitied and nurtured, nor children to be coerced and disciplined, but autonomous agents entitled to respect as moral equals. Second, it risks instantiating a conceptual division between "us" and "them" or the carer and the cared-for. "Us" are those in a (parental) position who know best and may coerce "them" in their best (inferred) interests. This division places "us" or the carers in an objectionable asymmetrical power relation over "them" or the cared-for, who are cast as inferior subjects of dependence and domination, apt to be coerced against their will by more enlightened saviors. Both these problems—infantilizing the homeless and othering them as inferior subjects

37 Noddings, "Caring, Social Policy, and Homelessness," 447.

38 Noddings, "Caring, Social Policy, and Homelessness," 443.

of care—are instances of failing to respect the equal humanity and moral worth of the homeless.

The two limitations outlined above give rise to the third limitation: the care-based account risks justifying objectionable coercive accommodation policies. Since on this account it is required only that (inferred) basic needs are addressed, and coercion is justified, there can be no principled objection to coercing homeless persons into certain institutions. For instance, consider the following case.

> *Workhouses*: In Britain, under the 1834 Poor Law (Amendment) Act (and similar "poor laws"), the poor were coerced into a network of workhouses: support from the state for the poor was conditional on their residence and labor in workhouses, with further instances of involuntarily apprehension and incarceration. The workhouses provided accommodation, food, and clothing, and inhabitants were coerced to engage in manual labor. The workhouses aimed to take "beggars" off the street, reduce state expenditure on social support, and instill a work ethic in the "idle poor."[39]

Such "poor laws" and workhouses are now rightly regarded as unconscionable acts of impermissible coercion and cruelty against the most disadvantaged members of society. Yet the care-based account risks providing no principled objection against coercing the homeless into such workhouses so long as those workhouses do in fact provide for basic needs.

The care-based account may be argued to avoid this objection and the limitations outlined above. For instance, anticipating concerns regarding disrespect, autonomy, and coercion, Van Leeuwen suggests that "care for needs and respect for autonomy are not mutually exclusive principles," and "the care offered should always remain dialogic and open to negotiation, instead of becoming a self-righteous construal of the homeless as passive objects of care."[40] However, Van Leeuwen does not provide sufficient further support for these claims. Indeed, Van Leeuwen acknowledges that on the care-based account, "tensions between [respect for autonomy and caring for needs] arise, for instance, when someone's own vision of her good is overruled in the name of care for what other people think are her 'real needs.'"[41] And this tension, Van Leeuwen further acknowledges, entails a risk of abusive coercion. For example, Noddings outlines three sites of permissible coercion of the homeless: (1) coercing the

39 Davis, *A History of Britain*, 4; and McCord and Purdue, *British History*, 71–72, 191–93.

40 Van Leeuwen, "To the Edge of the Urban Landscape," 599, 603.

41 Van Leeuwen, "To the Edge of the Urban Landscape," 599.

homeless into accommodation; (2) coercing inhabitants of accommodation to work and contribute; and (3) medically intervening with homeless psychiatric patients.[42] Van Leeuwen is sensitive to the risk of abuse of coercive power at each of these sites.[43] To address these risks, Van Leeuwen first suggests that review systems be instituted to hold politicians accountable and to prevent coercing the homeless "in the name of care" through forcible relocation and/or institutionalization. Second, accountable and transparent review systems ought to determine if coercion, in the form of incentives to contribute to or move on from supported accommodation, is necessary and justified. And third, Van Leeuwen outright rejects forced medical treatment unless there is an acute risk of harm to self or others. Overall, the "general answer" to these risks of abusive coercion is for review systems to "cover the care takers and their practices in order to avoid power misuse."[44]

Hence, Van Leeuwen does not provide a principled objection to coercion itself, only proposals to mitigate the worst "abuses" of coercion. Yet these proposals themselves appear somewhat ad hoc. Coercion *is* justified on the care-based account, and Van Leeuwen does not object to coercing homeless persons into institutions or accommodation or coercing them to work or move on. Therefore, there is no principled reason to propose regulations to prevent authorities from coercing the homeless in these ways. Moreover, Van Leeuwen's proposals to mitigate the abuses of coercion do not address the central flaw of the care-based account—that coercion itself is justified, which generates this risk of abuse in the first instance. Thus, if a government were to coercively relocate and institutionalize the homeless into workhouses that met basic needs, there are no sufficient safeguards in the care-based account that could justify regulations to prevent this.

Instead, I suggest we (and defenders of the care-based account) retain the crucial insight that care for basic needs is of paramount moral importance but reject the justification of coercion. A prohibition on coercion and, in its place, a respect for autonomy would more adequately guard against the potential for abusive coercion, avoid the workhouse objection, and result in treating homeless persons with the respect they are entitled to as agents rather than infantilize them as subrational beings that require our coercive care.

The care-based account does successfully identify and emphasize the moral harm of acute yet neglected basic needs and foregrounds the moral importance of responding to such needs. However, as it stands, it does not ground an

42 Noddings, "Caring, Social Policy, and Homelessness," 447, 450.

43 Van Leeuwen, 599–602.

44 Van Leeuwen, 602.

obligation to provide a home, and it justifies coercion and unacceptable public policy proposals. For these reasons, the care-based account also ought to be supplemented (as will be discussed in section 6).

5. THE STATUS-BASED ACCOUNT

I now turn to outline my proposed status-based account. This account is at basis drawn from three analyses of poverty and/or homelessness from Naomi Zack, Jiwei Ci, and Jonathan Wolff that, despite their nuanced differences, broadly share an underlying theme, which we will call *social status harm*.

Zack suggests that certain authoritative social norms and expectations permeate contemporary affluent, liberal societies, including conceptions of the conditions necessary for a person to be deemed to be a valuable member of society.[45] There are expectations that one participates in employment and political and civic life and has a domain of privacy (typically one's home) to perform actions deemed private; and there are norms of what Zack calls *symbolic value materialism*.[46] Symbolic value materialism is the evaluative practice whereby commodities are valued more for their nonmaterial properties than for their needs-satisfying material properties. Instead of valuing food, clothing, and housing in strict accordance with their needs-satisfying properties, we attach additional value to gourmet food, designer clothes, luxury housing, and so forth. Participants in a society with norms of symbolic value materialism are then liable to view the acquisition and consumption of the inflated value items as markers of higher social status and their nonacquisition and nonconsumption as markers of lower social status. And Zack further suggests that having a home is itself a paradigm marker of social standing: "The strong normativity of having a relation-place—'Thou shalt have a home'—is a kind of absolute."[47]

We can draw from Zack's analysis that homeless persons may be less or unable able to attain such markers of social status or standing; and as a result, are liable to being perceived and treated by others as having less or no social status, or, in other words, as being less (or non) valuable members of society.

Ci's analysis of poverty outlines a similar concern. Ci introduces *status poverty* as "a special kind of lack of status that is characteristic of a society in which money is an all-important marker of social standing."[48] For Ci, those who endure material poverty will, as a result, also endure status poverty, whereby

45 Zack, *Homelessness, Philosophy, and Public Policy*.

46 Zack, *Homelessness, Philosophy, and Public Policy*, 184–85.

47 Zack, *Homelessness, Philosophy, and Public Policy*, 185.

48 Ci, "Agency and Other Stakes of Poverty," 126.

they are deemed to have inferior social status. Ci explains that "status poverty is found in societies in which social status is closely linked to things that only money allows one to do, so that the lower one's economic position, the fewer such things one is able to do, and the greater one's social exclusion will be."[49]

We can draw from Ci's analysis that if homeless persons lack certain resources and opportunities to participate in activities and acquire goods that carry meanings of social status, this nonparticipation and nonacquisition will carry with them negative social meaning, social exclusion, and a perception of lower status. Thus, the homeless will endure status poverty.[50]

Last, Jonathan's Wolff's influential analysis of poverty emphasizes *social needs*: needs to participate in social activities and relations that are customary in the society in which one lives.[51]

> In addition to wanting to meet physiological animal needs of physical efficiency, many people put a high priority on what is necessary to achieve a normal human life in the circumstances in which they live. Such needs will come in at least two forms: first, those that help secure a reasonable social and family life; and second, those that meet local social norms of a respectable existence.[52]

On Wolff's analysis, social participation (or "fitting in") is an essential need as a source of affirmation of one's equal humanity, which can be devastating to a sense of self-worth if deprived.

We can draw from Wolff's analysis that homeless persons may lack resources and opportunities to meet such social needs. Not only is this inability a harm to a sense of self-worth, but nonparticipation in customary social activities and nonattainment of social norms for a respectable existence also contribute to the perception and treatment of homeless persons by others as being lesser members or nonmembers of society. This is something Wolff is sensitive to: "Lack of resources can lead to [social] exclusion, which is one of the asymmetrical

49 Ci, "Agency and Other Stakes of Poverty," 126.

50 Ci in fact mostly focuses on *agency poverty*: the condition of lacking resources and opportunities to have power over and affect one's environment and life direction. This, in Ci's view, is "the real sting" of poverty.

51 Wolff, "Social Equality, Relative Poverty and Marginalised Groups," "Poverty," and "Beyond Poverty." Wolff's analysis is itself inspired by Adam Smith's famous contention in *The Wealth of Nations* that persons require means in order to appear in public and participate in social activities without shame or humiliation (869–72).

52 Wolff, "Poverty," 3.

or alienating (possibly both in this case) social relations to which social egalitarians object."[53]

The proposed status-based account draws these insights together to hold that those who face homelessness may lack the resources and opportunities to obtain markers of social standing (Zack), to avoid status poverty (Ci), and to meet social needs (Wolff)—and will thereby endure being perceived and treated as socially inferior and the resultant social exclusion and marginalization. Call this common diagnosis *social status harm*, which obtains if and when one's lack of resources and opportunities leads to perception and treatment of one by others as having inferior or no social status or as being a less valuable or nonvaluable member of society.

Social status harm is itself a significant harm for the homeless. Homeless persons are excluded, marginalized, and alienated from society, unable to participate as society (literally) walks past without them. Such social isolation is a well-documented challenge, with many homeless persons reporting feelings of being excluded from and "invisible" to society.[54] Further, homeless persons are often viewed and treated not as social equals but as subcitizens ("drains on society," "public nuisances," "social parasites," "scroungers," "tramps," and so forth), as those who are homeless often report. As a homeless man named Dan reported to researchers in 2016, "The kind of treatment you get off the public sometimes, you know, calling you a tramp or a smack head and things like that and they don't know you at all, you know? But yeah, you know, you very much feel on your own."[55] To be viewed and treated as socially inferior in these ways is manifestly a harm to homeless persons.

Yet the status-based account expands further beyond this to hold that this social status harm leads to an even worse and underacknowledged harm. I suggest that homeless persons are viewed and treated as sufficiently socially inferior to the extent that their status as homeless is one that carries *stigmatization*. Following Elizabeth Anderson, persons are stigmatized if and when they "are subject to publicly authoritative stereotypes that represent them as proper objects of dishonor, contempt, disgust, fear or hatred on the basis of their group identities and hence properly subject to ridicule, shaming, shunning, segregation, discrimination, persecution and even violence."[56] Though Anderson does not apply this concept to homelessness (instead framing her analysis against

53 Wolff, "Social Equality, Relative Poverty and Marginalised Groups."

54 Sanders and Brown, "I Was All on My Own"; and Sutton-Hamilton and Sanders, "I Always Kept One Eye Open."

55 Sanders and Albanese, "It's No Life At All," 12.

56 Anderson, "Equality," 43.

racist, sexist, homophobic, ableist, and other stigmatizing social relations), this diagnosis straightforwardly applies. As we have seen and is well documented, homeless persons are treated as objects of dishonor, contempt, disgust, and oftentimes fear and hatred on the basis of their identities as homeless, and subsequently subjected to ridicule, shunning, shaming, segregation (recall the hostile architecture and regulations of public spaces), as well as discrimination, persecution, and violence (as will be discussed in more detail below). Homeless persons are therefore treated as socially inferior to the extent that they are *stigmatized* on the basis of their social identity as homeless.

I suggest that it is at this site of stigmatization that the perception and treatment of homeless persons as having inferior *social* status becomes a perception and treatment of homeless persons as having inferior *moral* status. This is because stigmatization is a *dehumanizing* process. Stigmatization involves the identification of a trait or characteristic as undesirable or as a defect (for instance, being homeless); subsequently, the stigmatized person's perceived identity is narrowed to that trait or characteristic, such that "if the marked trait is the primary focus of an individual's social interactions, this prevents him or her from being seen as a human being with a complex social identity and interests."[57] As Martha Nussbaum's analysis of stigmatization suggests, the reduction of a person's identity to the marked trait results in a "loss of uniqueness" and the subject becoming "a member of a degraded class," which denies "both the humanity we share with the person and the person's individuality."[58] And in Erving Goffman's words, "the subject is reduced in our minds from a whole and usual person to a tainted, discounted one. . . . We believe the person with a stigma is not quite human."[59] Hence, stigmatization dehumanizes the subject such that they are no longer viewed or treated as a human being and (thereby) as having equal moral worth but rather viewed or treated as something less. Homeless persons are stigmatized in virtue of their homelessness and endure this process of dehumanization, and are thus viewed and treated not as equal human beings with equal moral worth but as something less—"defective," a "nuisance," "tramps," "parasites," or "pests"—with less moral worth.[60] Therefore,

57 Chen and Courtwright, "Stigmatization."

58 Nussbaum, *Hiding from Humanity*, 221.

59 Goffman, *Stigma*, quoted in Nussbaum, *Hiding from Humanity,* 221.

60 George Orwell reaches a similar conclusion. His diagnosis of the harmful condition of homelessness, which leads to further harms, is that homeless persons endure "prejudice" against them as "tramps" and "blackguards." They are stereotyped based on an "ideal [that] exists in our minds of tramps as repulsive and dangerous creatures." This ideal is a false stereotype but is entrenched and obscures the complexities of the individuals and "the real questions of vagrancy." See Orwell, *Down and Out in Paris and London*, ch. 36.

homeless persons endure social status harm to such an extent that they are stigmatized, and as result of their stigmatized status, are treated as not only socially inferior but *morally inferior*. Call this *moral status harm*, which obtains if and when one is viewed and treated by others not as a human being with equal moral worth but as having inferior moral worth.

Though any plausible theory in normative ethics holds that each person has equal moral worth or status, the Kantian formulation is arguably the most influential: all persons have an equal absolute and intrinsic moral value or moral worth as ends in themselves, and accordingly, all persons ought to be treated with due respect.[61] But it does not require a commitment to Kantianism to recognize the independently plausible view that all persons are moral equals, that we each have a fundamental interest in being viewed, respected and treated by our fellow human beings *as a human being with equal moral worth*, and that this is a component of our well-being. To be viewed and treated as morally inferior, then, is a harm as a setback to this interest and component of well-being. It is to be treated as if, morally, one does not count or counts for less compared to others, and one's interests and needs do not matter morally, or matter less compared to those of others. This is a crucial underacknowledged moral harm of homelessness.

This harm of being viewed and treated as morally inferior is one that homeless persons endure and are all too aware of. Homeless people report being ignored, dismissed, treated with contempt, and/or disrespected by members of the public. John Sparkes, chief of the UK organization Crisis, notes, "Many people we work with tell us that not being acknowledged or treated as a fellow human being can be just as painful as the physical hardships."[62] Two thirds of those surveyed by Crisis said that after becoming homeless, they were treated differently by others, with testimonies that others "look at you like you're a piece of dirt" or "like I'm a piece of shit on your shoe."[63] As one rough sleeper, Fiona, testified to Crisis researchers, "I don't think people look on homelessness as serious and sort of think to themselves they're a waste of time—they sort of don't consider that they've had a life and what has brought them to this point."[64]

Moreover, many of us, as comparatively affluent members of the public, regularly ignore or walk past the homeless (often with spare change in our pockets) without doing any small thing to help, donating to relevant aid agencies,

61 Kant, *Groundwork for the Metaphysics of Morals*, 434–35.

62 BBC, "How to Help If You See a Sick Homeless Person."

63 Sutton-Hamilton and Sanders, "I Always Kept One Eye Open," 50, 35.

64 Sanders and Brown, "I Was All on My Own," 11.

or even acknowledging their existence (often even when they explicitly and directly ask us for some form of assistance). This neglect too is an example of treating homeless persons as having inferior moral worth. To borrow a phrase from Derek Parfit writing in a different context, this neglect is to view and treat the homeless "as a mere thing, something that has no moral importance, like a stone or heap of rags lying by the side of the road."[65] And this neglect can have tragic consequences. In 2019, for example, Mark Mummary died in Grimsby, and his body lay on the street for hours before anyone appeared to notice or take action.[66]

Being viewed and treated as morally inferior also underpins and is manifested in further serious harms of abuse and violence. As we saw, in England and Wales, those sleeping rough are seventeen times more likely to experience violence, and nine in ten will be subjected to abuse and/or physical violence.[67] Homeless people face verbal abuse, harassment, threats and intimidation, having their belongings vandalized, damaged or stolen, and their collected change stolen.[68] They are spat on, urinated on, physically (and in certain cases, sexually) assaulted, and, in some cases, are set on fire while asleep.[69] It almost goes without saying that such treatment is incompatible with respecting the equal moral worth and humanity of the homeless.

Further, this moral status harm is manifested in public policy. It is widely accepted that to recognize and respond to the moral equality of citizens, the state is required to treat those citizens with "equal concern and respect," to use Ronald Dworkin's famous formulation.[70] A state, through its policies, practices, and institutional arrangements, can *fail* to do so and instead treat certain citizens as inferior, with disregard and disrespect in various ways.[71] Elizabeth Anderson and Richard Pildes outline how, in failing to treat certain citizens with equal concern and respect, state policies, practices, and institutional arrangements

65 Parfit, *On What Matters*, 1:227.

66 BBC, "How to Help If You See a Sick Homeless Person."

67 Crisis, "New Research Reveals the Scale of Violence Against Rough Sleepers"; and Sutton-Hamilton and Sanders, "I Always Kept One Eye Open," 5.

68 Sutton-Hamilton and Sanders, "I Always Kept One Eye Open."

69 Crisis, "New Research Reveals the Scale of Violence against Rough Sleepers"; Marsh and Greenfield, "A Lot of the Attacks Are Alcohol-Related, and the Homeless Are Easy Prey"; and ITV, "It Was a Lucky Escape."

70 Dworkin, *Taking Rights Seriously*, 180. See also Anderson and Pildes, "Expressive Theories of Law"; and Voigt, "Relational Equality and the Expressive Dimension of State Action."

71 Voigt, "Relational Equality and the Expressive Dimension of State Action," 640–41.

express, embody, and manifest certain attitudes towards those citizens.[72] States treat certain citizens as morally inferior, and express, embody and manifest attitudes that those citizens are morally inferior if and when the state's policies, practices, and/or institutional arrangements are incompatible with a principle that those citizens are viewed and treated with respect as moral equals.[73] For instance, legislation denying Black citizens the vote, in being incompatible with a principle that those citizens are political and moral equals, patently treats them as political and moral inferiors, and expresses, embodies, and manifests that attitude towards them.[74] Similarly, a policy of anti-Black racial segregation, in being inconsistent with a principle that the segregated racial group are equals worthy of inclusion, treats and expresses members of that group as inferior and "send[s] the message that blacks are untouchable, a kind of social pollutant from which pure whites must be protected."[75] And institutional neglect too treats and expresses citizens as inferior. For instance, avoidably failing to provide disabled access to public buildings, in being inconsistent with a principle that disabled persons are equals, worthy of inclusion, and have interests that matter, treats disabled citizens as inferior, expressing, embodying, and manifesting that inferiorizing attitude towards them.[76]

Accordingly, numerous state policies, practices, and institutional arrangements are incompatible with a principle that homeless persons are viewed and treated with respect as human beings with equal moral worth, but instead treat the homeless as inferior and thereby express, embody, and manifest such attitudes towards them. For instance, certain policies and practices treat and express homeless persons as inferior with *hostility*, as if their very existence or presence is undesirable and ought to be excised from public spaces. The use of anti-homeless spikes and other hostile architecture, as well as informal practices such as "wetting down" and others mentioned above, treat the homeless as if they were a "social pollutant" (in Anderson and Pildes' words) that must be prevented from settling in public spaces and affronting the public, and these policies and practices thereby express, embody, and manifest these inferiorizing attitudes. It is similarly the case with exclusionary regulations such as officially sanctioned "moving on" practices, dispersals, and destruction of possessions and tents. In the United Kingdom, the police use "enforcement measures" to

72 Anderson and Pildes, "Expressive Theories of Law," 1520. See also Schemmel, "Distributive and Relational Equality."

73 Anderson and Pildes, "Expressive Theories of Law," 1508.

74 Anderson and Pildes, "Expressive Theories of Law," 1508.

75 Anderson and Pildes, "Expressive Theories of Law," 1528.

76 This example is taken from Etinson, "What's So Special About Human Dignity?"

forcibly exclude homeless persons from certain urban locations (under threat of arrest or effectively unpayable fines), and in certain cases, their belongings and tents are destroyed by police and local authorities.[77] And in the United States, this phenomenon is pervasive: across many cities, anti-camping laws authorize the police to clear encampments by destroying camping materials and forcing homeless persons to move on (even if they have no alternative shelter).[78] These practices are commonly referred to as "sweeps," which itself betrays a dehumanizing norm, as those affected report: "The word 'sweep' that they use kind of [feels] like being swept like trash. I mean we're not trash, we're people."[79]

Homeless persons are also treated and expressed as inferior with *contempt*, as if they were a nuisance or pests. As Waldron notes, in the United States, many cities have laws that prohibit begging, sleeping, and camping in public places.[80] In New York, for example, people are arrested for being "outstretched" on public transport.[81] The United Kingdom also enacts local legal prohibitions on such activities.[82] In particular, the Criminal Justice Bill, which is progressing through Parliament at the time of writing, contains clauses criminalizing "nuisance begging" and "nuisance rough sleeping," which will give police and local authorities greater powers to move on, fine, or otherwise arrest and imprison those who ask for assistance or sleep rough in public places if and when those activities are deemed a "nuisance," which includes causing "excessive noise, smells, litter or deposits of waste."[83] Rather than address the needs of homeless persons, these practices and legislation instead *penalize* them for activities that are symptomatic of the very condition of homelessness (for instance, having to sleep rough and ask for assistance). This discounts the fundamental interests and needs of homeless persons (for instance, to sleep) to be outweighed by the

77 Sanders and Albanese, "An Examination of the Scale and Impact of Enforcement Interventions on Street Homeless People in England and Wales"; Liberty, "Met Police Issues Apology and Admits Officers Acted Unlawfully After Homeless People's Tents Removed and Destroyed"; and Warren, "Camden Council Admits Role in Removal of Homeless Tents."

78 See Trotta "Homeless Crackdown Gains Momentum in California as US Supreme Court Test Looms"; and Rush, Har, and Casey, "Cities Crack Down on Homeless Encampments."

79 David Sjoberg, Denver encampment resident, quoted in Rush, Har, and Casey, "Cities Crack Down on Homeless Encampments."

80 Waldron, "Homelessness and the Issue of Freedom," 41.

81 Oladipo, "Alarm as US States Pass 'Very Concerning' Anti-Homeless Laws."

82 Sanders and Albanese, "An Examination of the Scale and Impact of Enforcement Interventions on Street Homeless People."

83 Criminal Justice Bill, originated in the House of Commons, Session 2023–24, https://bills.parliament.uk/bills/3511/. At the time of writing, there is debate about whether the clause relating to "smells" will be included in the final bill.

more trivial interests of the public not to be troubled by the sight of homeless persons sleeping rough or by uncomfortable interactions with them. This is incompatible with treating homeless persons with respect as moral equals and with regarding their interests and needs as having (equal) moral significance. Moreover, these activities and the homeless persons themselves who perform them are then officially labelled *by the state* as "nuisances," and this demeaning judgement is subsequently expressed and enforced as a matter of public law.

Homeless persons are also treated and expressed as inferior with *neglect*. If a state avoidably fails to adopt policies to address the urgent needs of certain citizens and instead tolerates their avoidable suffering, this institutional neglect shows disregard for them and discounts their urgent needs in a way that is incompatible with respecting their moral worth. For instance, avoidably failing to provide access to treatment for a disease that disproportionately affects a certain minority, and instead allowing those citizens to avoidably suffer and die from that disease treats and expresses those citizens and their urgent needs as having little to no moral importance.[84]

There are effective public policy responses available to alleviate homelessness. In the United Kingdom, increased housing allowance, widening access and recourse to public funds, and increased funds to local authorities to provide supported temporary and permanent accommodation would do much to prevent and mitigate street homelessness. Longer-term increases in the affordable and social housing supply and supported accommodation drastically decrease the number of persons sleeping rough.[85] Plus, the present "staircase model" used in the United Kingdom, where permanent housing is conditional on a homeless person progressively engaging with certain services in order to demonstrate that they are "ready for housing," can be replaced with a "housing first model." This latter model of providing unconditional housing with social support demonstrably increases stability and housing retention, improves physical and mental well-being, strengthens social networks, increases employment and engagement with treatments for mental ill health and substance misuse, and reduces engagement with the criminal justice system.[86] Such a model has eradicated homelessness in some European cities.[87]

84 For example, the historical unresponsiveness of governments to address the outbreak of AIDS among gay and bisexual men is widely seen to have been the result of indifference if not outright prejudice towards such minorities. See La Ganga, "The First Lady Who Looked Away."

85 See *The Economist*, "How to Cut Homelessness in the World's Priciest Cities."

86 Mackie, Johnsen, and Wood, "Ending Rough Sleeping"; and Homeless Link, "About Housing First."

87 Trewern, "The City with No Homeless on Its Streets."

Homelessness is thus avoidable. For an affluent state in its institutional arrangements to avoidably fail to adopt such available durable solutions to address homelessness is to allow fellow citizens to be and remain homeless and suffer needlessly, which is incompatible with viewing and treating such persons with respect as having equal moral worth. Rather, institutional arrangements that allow citizens to avoidably remain homeless and thereby suffer and, in certain cases, die on the streets treat those affected as if they do not count morally or count for very little, since they disregard homeless persons and their urgent interests and needs as having too little moral importance to be worth (spending sufficient recourses on) responding to. And this treatment is something the homeless are all too aware of and are at risk of internalizing—with tragic consequences. As one homeless person in the United Kingdom, Dan, has reported, "I know people who have committed suicide and overdosed, you know, because they can't be dealing with it anymore. . . . I've almost done it myself. But yeah, I do find a lot of people think they're, you know, being ignored or forgotten about and that—that is the way it feels, you know?"[88]

Hence, moral status harm underpins and is manifested in public policy: a wide range of policies, practices, and institutional arrangements that have substantial and pervasive impacts on homeless persons' lives, experiences, and interactions with the state fail to treat them with concern and respect as moral equals, instead treating them as inferior, with hostility, contempt, and/or neglect and expressing, embodying, and manifesting those inferiorizing attitudes towards them.[89]

Moreover, public policy can then reinforce inferiorizing norms among citizens.[90] For instance, a policy of racial segregation signals that the segregated racial group lacks equal status, and the policy thereby reinforces and legitimizes such attitudes among the public with official approval. Hence, if and when the state adopts policies that demonstrably treat and express the homeless as inferior with hostility, contempt, and/or neglect, this reinforces and legitimizes such attitudes among citizens insofar as it enacts a *permissibility fact*—namely, that it is indeed permissible to treat the homeless as morally inferior with hostility, contempt, and/or neglect.[91] This not only risks increasing the extent and

88 Sanders and Albanese, "It's No Life at All," 17.

89 I borrow the terms 'hostility', 'contempt', and 'neglect' as applied to the expressive function of state action from Schemmel, "Distributive and Relational Equality."

90 Etinson highlights how "laws can threaten one's standing in the eyes of others" ("What's So Special About Human Dignity?" 370–71) and trigger disrespectful attitudes and expressions thereof towards those targeted. See also Voigt, "Relational Equality and the Expressive Dimension of State Action," 447.

91 The concept of a permissibility fact is borrowed from McGowan, *Just Words*, 110–11.

severity of instances of inferiorizing interactional treatment of the homeless but also a self-reinforcing loop of exacerbating marginalization whereby public policies harden already inferiorizing attitudes among certain citizens, who then pressure (or have those preferences enacted by) state authorities to introduce further and harsher public policies regarding the homeless, which in turn further harden attitudes, and so forth—such that the homeless are increasingly further and further marginalized by public policy and society in general.

More broadly then, the harm of being viewed and treated as morally inferior, I believe, helps explain (in part) the unsettling phenomenon of the tacit acceptance of avoidable homelessness. The fact that the homeless are viewed as morally inferior *ipso facto* underpins their political and societal neglect and explains why society accepts their suffering as insufficiently morally important to respond to. Their interests and needs as human beings are given insufficient moral weight, and the homeless themselves are not viewed as sufficiently morally important to be worth caring about, and hence they can be permissibly ignored and their avoidable suffering tolerated. If instead, the moral worth of the homeless and their needs and interests as human beings were sufficiently recognized, then their avoidable plight would be viewed as unacceptable and responded to with increased urgency interactionally and institutionally. At least part of the solution to the unsettling phenomenon then is the renewed acknowledgement and affirmation of the equal humanity and moral worth of our fellow citizens facing homelessness (as will be discussed further in section 6).

In sum, the status-based account reveals a crucial yet underacknowledged moral harm: homeless persons endure *social status harm* to such an extent that they are stigmatized in virtue of their homelessness, which in turn results in *moral status harm*. This is an egregious harm itself; which also underpins further serious harms of abuse and violence; underpins and is manifested in public policy that treats and expresses homeless persons as inferior, with hostility, contempt, and/or neglect; and underpins the political and societal neglect of their avoidable suffering more broadly. This is a harm that has been overlooked and one that generates compelling moral reasons to address it: anyone who objects to human beings being treated as morally inferior should find the plight of homelessness one of acute normative concern.

6. Objections and Further Development

It may be objected that the implication of the status-based account is merely that homeless persons ought to be viewed and treated with respect as human beings with equal moral worth. But this implication is *trivially true* and unambitious or limited in scope. Most concerningly, objectors may argue that the

status-based account does not appear to ground an obligation to provide a home. Indeed, to press this worry, the status-based account may be vulnerable to the following case-based objection that is structurally similar to those raised against the freedom-, privacy-, and care-based accounts.

> *Public Relations:* The UK government, troubled by the status harm endured by the homeless, initiates a comprehensive public relations campaign to adjust public attitudes and social norms towards viewing and treating homeless persons with respect as moral equals. The government then rests content, having addressed the status harm.[92]

Such a PR campaign clearly fails to respond to the urgent needs of the homeless or to provide an adequate durable solution. But the status-based account cannot explain why or rule out such a proposal as unacceptable, and it therefore appears limited and unable to ground substantive, durable solutions. Hence, we might favor the freedom-, privacy- and/or care-based accounts as identifying the more morally salient harms of homelessness, the alleviation of which would represent more substantive improvements.

In response, the status-based account has more substantive implications than may initially be apparent. As a preliminary point, it is true that on the status-based account, individuals ought to treat homeless persons with respect as moral equals. But if interpersonal public abuse, violence, and neglect stem from the homeless being viewed as morally inferior and from the resulting assumptions that it is permissible to abuse, assault, or otherwise neglect them, then even the acceptance of norms that the homeless must be treated with respect as moral equals and hence that such inferiorizing treatment is unacceptable would do much to reduce the prevalence of interpersonal abuse and violence and to improve interpersonal responsiveness. Hence, even this change would not be an insubstantial improvement to the plight of many homeless persons. Yet most fundamentally, the status-based account yields wider and more substantive implications beyond this.

First, though it is true that the harm of being viewed and treated as having inferior moral worth is contingent on persons' attitudes towards and treatment of the homeless, the status-based account is alive to the fact that these attitudes and treatment are themselves contingent on distributions of and access to certain goods and opportunities. Recall that it is the lack of (access to) certain material goods, opportunities, and markers of social standing that causes social status harm, stigmatization, and, in turn, moral status harm. It is precisely *because* homeless persons are less or unable to attain certain social

92 I thank an anonymous reviewer for this objection.

and material goods with attached meanings of social status that they are viewed and treated as socially inferior, stigmatized, and thereby viewed and treated as morally inferior. Alleviating such harms therefore requires substantive practical reform to improve the material conditions, opportunities, and distributions of and access to certain goods in order to block the inferiorizing perception of the homeless and to secure the material conditions necessary for homeless persons to be able to participate in society and relate to others as (perceived) equals.

Indeed, for relational egalitarians, the aim is to secure the material conditions necessary for egalitarian social relations. For Anderson, material distributions matter as causes, consequences, and constituents of social relations, and all persons are entitled "to whatever capabilities are necessary to enable them to avoid or escape entanglement in oppressive social relationships" and "the capabilities necessary for functioning as an equal citizen in a democratic state."[93] This involves securing what Anderson elsewhere (drawing from Rawls) terms the *social bases for equal standing*: primary goods such as basic liberties, rights, wealth, income, and opportunities as well as other material goods.[94] Thus, it is the *securing of requisite material conditions, goods, and capabilities* that is the proper focus for tackling unequal social relations rather than individuals' perceptions themselves. Therefore, alleviating moral status harm requires structural reform in order to secure the material conditions, goods, and capabilities necessary for homeless persons to function, participate, and be regarded as equal members of society and thereby block inferiorizing perceptions and treatment. Crucially, it is the nonpossession of a home that precludes social standing and results in stigmatization and inferiorizing perception and treatment of the homeless. It is precisely because persons are home*less* that they are viewed as socially inferior, stigmatized, and thereby viewed and treated as morally inferior. Therefore, capabilities to obtain permanent housing are *required* to address this harm and to instantiate more egalitarian social relations. Therefore, the status-based account can and does indeed ground an obligation to provide homes.

Further, this analysis helps explain why the status-based account is not vulnerable to the Public Relations objection. Since social norms are tied to distributions of and access to certain material conditions, goods, and capabilities, they are entrenched, are resistant to change, and, even if changed (for a short period), have the propensity to replicate.[95] In our context, root norms—for

93 Anderson, "What Is the Point of Equality?" and "Equality."

94 Anderson, "Justifying the Capabilities Approach to Justice." See also Anderson, "Equality"; and Schemmel, "Why Relational Egalitarians Should Care About Distributions."

95 See Schemmel, "Why Relational Egalitarians Should Care About Distributions," for an in-depth analysis of how the distribution of certain goods is tied to social norm formation and endurance.

instance, that having a home and a decent standard of living are (socially) valuable—may not in themselves necessarily be problematic in merely reflecting what persons value (for themselves). Nonetheless, as shown in section 5, these norms metastasize into more harmful norms of viewing and treating persons who lack certain valued markers as socially inferior, of stigmatizing them, and thus of viewing and treating them as morally inferior. Hence, any public relations campaign alone would be insufficient in addressing status harm, since the inferiorizing norms, tied as they are to distributions, will be entrenched, resistant, and self-replicating. Instead, to address status harm, persons must be *securely* viewed and treated as moral equals, which in turn requires reform of institutional arrangements to secure access to certain conditions, goods, and capabilities. For instance, if a minority group lacked access to education and members were therefore unable to read or write and were resultantly stigmatized and treated as inferior by others, the proper response to securely block this status harm would require adjusting institutional arrangements to provide access to education. Accordingly, if homeless persons are stigmatized and treated as inferior in virtue of their being homeless, the proper response to securely block this status harm requires adjusting institutional arrangements to provide access to material conditions, goods, and capabilities—in this case, securing access to permanent housing as an institutional protection against inferiorization. Therefore, the status-based account does have substantive implications and is able to ground an obligation to provide durable solutions.

Second, the status-based account further has substantive implications since addressing status harm requires reform of the policies, practices, and institutional arrangements that *themselves* treat homeless persons as morally inferior and express, embody, and manifest such attitudes towards them. Accordingly, the hostile architecture and practices, exclusionary regulations, enforcement measures, and "sweeps" that treat homeless persons as inferior with hostility, as well as the ordinances and legislation that penalize homeless persons as "nuisances," thereby treating them as inferior with contempt, require reform (if not outright prohibition). Crucially, as demonstrated in section 5, institutional arrangements that allow citizens to avoidably remain homeless and as a result to suffer and, in some cases, die on the streets, when there are effective durable solutions to address homelessness available, are *themselves* incompatible with a principle of respecting the moral worth of those citizens. Recall that, by allowing avoidable homelessness, such institutional arrangements treat and express those affected as inferior with disregard and neglect since they treat homeless persons and their urgent needs and interests in avoiding homelessness and associated harms as having insufficient moral value to be worth (spending sufficient resources on) responding to. Thus, viewing and treating the homeless

as moral equals would entail that these policies, practices, and institutional arrangements would be unacceptable and subject to reform.

Hence, a key feature of the status-based account is that it entails that addressing status harm *requires* alternative policies, practices, and arrangements that are in fact compatible with respecting homeless persons as moral equals and thereby treat and express them as such moral equals. Public policy can treat and express previously inferiorized citizens as respected moral equals and include them as equal members of society, thereby redressing status harm. For instance, enacting equal marriage legislation expresses civil, social, and moral equality for LGBT+ citizens, whereas avoidable failure to do so would treat and express those citizens as inferior; and policy securing the effective right to vote for previously disenfranchised minorities signals their equal political, social, and moral status, whereas avoidable failure to do so would treat and express them as inferior. Accordingly, addressing the status harm endured by homeless persons requires the implementation of policies, practices, and institutional arrangements whereby durable solutions to alleviate (the harms of) homelessness are indeed adopted to provide secure access to permanent housing. Such implementation is necessary in order for policies, practices, and arrangements to be compatible with the principle that homeless persons are respected as moral equals, since avoidable failure to do so and leaving those persons to avoidably suffer homelessness and the associated harms would treat and express them as inferior. The implementation of polices, practices, and arrangements to secure durable solutions instead respects, recognizes, and publicly affirms the moral worth and equality of homeless persons and their needs and interests as human beings.

For instance, sustained investment in and provision of durable solutions to secure capabilities to obtain permanent housing—including increased funding for supported temporary and permanent accommodation, widened access to public funds and housing allowance, enhanced supply of affordable and social housing, and implementation of housing-first initiatives—would represent a visible commitment to the equal status of homeless persons and would publicly affirm that their avoidable suffering is unacceptable, that their interests and needs matter morally and are worth investing in, and hence that homeless persons themselves matter morally and are worthy of inclusion as social and moral equals.

Relatedly, if the broader political and societal neglect that underpins the unsettling phenomenon is caused and explained by a lack of recognition of the moral worth of homeless persons and a disregard for the moral weight of their needs and interests, then the due presence of such recognition would necessitate political and societal responsiveness towards addressing their plight. The interests, needs, and worth of homeless persons as human beings are given

insufficient moral weight in the deliberations of policymakers and members of society more broadly. If, instead, the equal moral worth of homeless persons as human beings and the moral weight of their needs and interests were recognized as is due, then their avoidable suffering would become unacceptable. This would necessitate enhanced substantive political and societal responsiveness to their needs and interests and would provide the impetus for reform to alleviate their plight and thus to establish the alternative arrangements that secure durable solutions to redress avoidable homelessness.

Hence, the status-based account grounds obligations to provide durable solutions since addressing status harm requires substantial reform of a wide range of specific policies, practices, and institutional arrangements that treat and express homeless persons as inferior, including the institutional arrangements and political and societal neglect that allow our fellow citizens to avoidably suffer homelessness. In their place, alternative policies, practices, and arrangements that treat and express homeless persons as equals are required, including policies, practices, and arrangements that secure their capabilities to obtain permanent housing.[96]

Last, we ought not reject the status-based account in favor of other accounts since the status-based account is a complimentary and necessary supplement. Each of the freedom-, privacy-, and care-based accounts reveals important insights, and they are not necessarily opposed to each other. It is plausible that homelessness does indeed involve the deprivation of freedom, privacy, psychological well-being, autonomy, and individuality, as well as the deprivation of basic needs—all of which ought to be addressed. The status-based account adds to this understanding by demonstrating the harm of being treated as morally inferior—which must also be alleviated. Each account thus contributes to a more complete understanding and demonstrates an additional moral reason to be concerned with the plight of homeless persons, thereby strengthening moral reasons to alleviate homelessness.

The status-based account is also *necessary* as a supplement to address the limitations of existing accounts insofar as it rules out their potential problematic public policy responses. The freedom-based account risked grounding

96 This provides an additional reason why the status-based account is not vulnerable to the Public Relations objection. Implementing a public relations campaign—as opposed to addressing urgent needs and providing durable solutions—and hence leaving the avoidable suffering of homelessness intact would fail to treat homeless persons with respect as moral equals, since it would neglect their urgent needs and allow their avoidable suffering and thereby express that homeless persons are not sufficiently morally important and so may be allowed to continue to suffer. Therefore, such a policy would be ruled out by the status-based account.

obligations only to provide more freedom to sleep, wash, or relieve oneself in public or only to provide "liberty spaces." The privacy-based account risked grounding obligations only to provide privacy in the form of curtained-off areas or invisibility. And the care-based account risked the implication that homeless persons could be coerced into workhouses. None of these proposals are morally acceptable, and the status-based account explains why: these proposals fail to treat homeless persons with respect as human beings with equal moral worth because they fail to respond appropriately to the moral weight of their needs and/or to respect their autonomy. Therefore, the existing accounts require the supplementary status-based account with its central prescription to treat homeless persons with respect as moral equals to avoid their respective unacceptable conclusions. Moreover, this supplement now yields the more complete view that the physical and psychological suffering, freedom deprivations, privacy deprivations, needs deprivations, and status deprivations ought to be addressed *in a way that treats and respects homeless persons as having equal moral worth*.[97]

Only with this supplement can the accounts ground an obligation to provide homes. Each account on its own, or even together, fails to ground such an obligation, since these accounts, in not including the condition to treat and respect homeless persons as moral equals, risk justifying problematic sub-home proposals that fail to respond appropriately to the moral weight of the urgent needs of homeless persons and/or to respect their autonomy. The complete view with the status-based account supplement, however, *does* ground an obligation to provide homes, since providing a home (capabilities to obtain permanent housing) is the only means of addressing these various deprivations that treats and respects homeless as human beings with equal moral worth: it gives appropriate weight and responds to the moral importance of the urgent needs of homeless persons, respects them as autonomous agents, and treats them as worthy of due moral consideration and inclusion within society as equals.

The status-based account therefore does have substantial implications and is able to ground obligations to provide homes in at least three ways. First, the account requires reform of material conditions, goods, and capabilities to secure access to permanent housing as a necessary means to block inferiorizing perception and treatment. Second, the account requires substantial reform of policies, practices, and institutional arrangements that treat and express homeless persons as inferior (including political and societal neglect and institutional arrangements that allow avoidable homelessness), in favor of policies,

97 This again sustains why the status-based account is not vulnerable to the Public Relations objection. Implementing a public relations campaign alone while allowing continued suffering would fail to treat homeless persons with respect as moral equals. See note 96 above.

practices, and arrangements that treat and express homeless persons as moral equals (including institutional arrangements that secure capabilities to obtain permanent housing). And third, the account acts as an essential supplement to existing accounts, which only with this inclusion can ground an obligation to provide homes as the means to address liberty, privacy, and needs deprivations in a way that respects the moral worth of homeless persons. Therefore, the status-based account reveals a crucial and underacknowledged moral harm, the recognition and alleviation of which does indeed ground and motivate substantive and durable responses.

7. CONCLUSION

This paper aimed to provide an account of the underacknowledged moral harms of homelessness that could ground and motivate durable responses, with a broader view to challenge the unsettling phenomenon of the tacit acceptance of avoidable homelessness in affluent societies. I have argued that the status-based account is able to do this. This account reveals that a crucial harm that homeless persons face is that they are viewed and treated as having inferior social status, are stigmatized, and as a result are viewed and treated as having inferior moral worth. This underacknowledged harm must be alleviated. Addressing this harm through the due recognition of the moral worth of the needs, interests, and humanity of homeless persons provides the grounds and impetus necessary for enhanced responsiveness, substantive practical reform of policies, practices, and institutional arrangements, and the implementation of adequate durable solutions such that the avoidable suffering of our fellow citizens facing homelessness is no longer an accepted feature of our social landscapes.[98]

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LEGALITY AND COMMITMENT

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Does law impose moral obligations?[1] Many thinkers—including political and legal philosophers—doubt that legal norms generate a general, content-independent, sanction-independent duty to obey them.[2] Yet there is a long tradition of attempts to ground duties of obedience in ideas like consent, fairness, natural duties of justice, and associative obligation.[3]

Might we be able to respond to skeptics about the duty to obey the law without giving up entirely on their claims? To my mind, those claims are at least plausible. Doubts about a general, content-independent, noninstrumental duty to obey the law seem at least warranted—particularly in the nonideal and unjust societies we inhabit.[4] Others might disagree and think that some version of consent, fairness, natural duty, or associative obligation is compelling. But what I wish to explore is whether, assuming the skeptics are right, we must conclude that the citizens and officials who believe that law does by itself change what they have reason to do are affected by a form of false consciousness.[5] As I understand it, these agents' belief is that law's prescriptions make a real difference—not contingent on content or prudential considerations—regarding what they should do. Throughout this paper, I will refer to this idea as law "making a practical difference."[6]

1 In this paper, I use the terms 'obligation' and 'duty' interchangeably.

2 In political philosophy, see Simmons, "The Duty to Obey and Our Natural Moral Duties"; and Wolff, *In Defense of Anarchism*. In legal philosophy, see Green, "Law and Obligations"; Murphy, *What Makes Law*, 109–43; and Raz, *The Authority of Law*.

3 For consent, see Locke, *Second Treatise of Government*. For fairness, see Hart, "Are There Any Natural Rights?" 175. For natural duties of justice, see Rawls, "Legal Obligation and the Duty of Fair Play"; and Waldron, "Special Ties and Natural Duties." For associative obligation, see Dworkin, *Law's Empire*, 195–216; and Scheffler, "Membership and Political Obligation."

4 Green, "Law and Obligations," 539; and Murphy, *What Makes Law*, 133.

5 Although I am lumping citizens and officials together here, I will return below to at least some potentially relevant differences between them.

6 Making a practical difference is compatible with that difference not being sufficient for determining the outcome of deliberation or what the agent has all things considered reason to do.

In other words, these citizens and officials believe in the truth of what we could call the *real practical difference thesis* (RPDT). According to the RPDT, the fact that law mandates (or prohibits) a behavior makes, in and of itself, a significant difference regarding what the agent should do.[7] For those who believe that the RPDT is true, the prescriptions of the legal system to which the RPDT applies make an important difference in their practical deliberation, simply because they are the prescriptions of the legal system. The RPDT thus posits that the mere mark of legality (or illegality) makes an independent practical difference in favor of (or against) the regulated behavior, independently of the substantive content of the law and prudential considerations.

The question is whether the individuals who believe the RPDT is true could be right even if skepticism about a general duty to obey the law is warranted.[8] My answer will be a qualified yes. As I will argue, individual agents can have genuine reasons to conform to legal prohibitions or prescriptions because of their commitment to law.[9] More specifically, an agent's commitment to law can generate a reason in favor of their doing what the law requires, with a certain independence from law's content and the sanctions threatened in cases of noncompliance. Thus, whether law makes a content-independent, sanction-independent normative difference depends, at least in part, on whether individuals have adopted a commitment to law.[10] While this commitment might be

7 The RPDT is based on the practical difference thesis—namely, "the claim that, in order to be law, authoritative pronouncements must in principle be capable of making a practical difference: a difference, that is, in the structure or content of deliberation and action." Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," 383.

8 A recent similar attempt (published after this paper was submitted for review) to find a middle ground between these two positions, also relying on the notion of commitment, can be found in Valentini, *Morality and Socially Constructed Norms*. I engage with Valentini's suggestive argument in section 2.5 below.

9 The question about how law can generate reasons for action has been the focus of recent legal and political philosophy. The question, for those who have addressed this issue, is whether—and under which conditions—the law can generate reasons for action directly, rather than merely manipulate the circumstances to trigger preexisting reasons. My focus here is not, however, law's ability to generate reasons on its own (I assume it does not) but rather its practical impact given the existence of agents' commitments. See Enoch, "Reason-Giving and the Law"; and Monti, "Against Triggering Accounts of Robust Reason-Giving."

10 An important caveat: on some views, our desires, inclinations, and attitudes never (or rarely) generate genuine reasons for action in and of themselves. See, e.g., Scanlon, *What We Owe to Each Other*, ch. 1. For anyone who adopts this starting point, my argument will initially seem unpersuasive because it rests precisely on the idea that our attitudes can indeed have such normative impact. All I can ask of readers who would adopt such a starting point is to entertain my argument with an open mind for now. I doubt the argument will lead readers who are deeply committed to this starting point to revise their

explained by a variety of considerations, as I will argue, compliance with the rule of law is an important reason (particularly in societies characterized by substantive moral disagreement) why individuals have reason to, or at least might, make such commitment.[11] Thus, belief in the RPDT need not rest on a mistake.[12]

One important caveat. The RPDT is somewhat less committal than the proposition that there is a duty to obey the law. It invites us to ask a simpler question: whether the law can make a significant practical difference, independently of its content and of the sanctions threatened for its violation. This question is, in principle, compatible with seeing that impact in terms of ordinary reasons; of particularly weighty reasons that might not be conclusive; or even (in certain cases) of obligations, understood as exclusionary or protected reasons. I will have more to say about how commitments relate to these different forms of practical impact below. But the central concern of the paper is how commitments allow law to make a practical difference—not the specific form of that difference, which, as I will explain, might vary from individual to individual.

Here is a road map. Section 1 introduces the value of legality (or the rule of law) as the specific virtue of law and explains why it is insufficient to ground, by itself, law's practical impact. Section 2 argues that agents who believe in the truth of the RPDT are still not necessarily mistaken. Their belief in the RPDT might be vindicated given the existence of a (permissible) commitment to law. Moreover, the value of legality is a central reason why agents ought to adopt such a commitment. Section 3 addresses three potential objections. Section 4 offers some concluding remarks.

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entire conception of practical reason. But revising their deeply held views about practical reason is in fact not necessary because the practical impact of commitments can itself be grounded in general, agent-neutral reasons, as I will explain below. In the meantime, these readers can approach this paper in the spirit of conditional exploration: if it were the case that our attitudes can impact our reasons for action, our commitments to law could ground reasons to act in accordance with law. For my argument as to why commitments can indeed have this impact even if one does not believe that attitudes and desires generate reasons in and of themselves, see section 2.2.1 below.

11 Compliance with the rule of law is not binary but a matter of degree. In this respect, I follow Raz, "The Rule of Law and Its Virtue," 211, 215.

12 I articulated a version of this idea in embryonic form in Jiménez, "Law, Morality, and the One-System View." As we will see below, the notion of a commitment is similar in spirit and orientation to multiple ideas that are present in the literature about law's practical impact. These ideas include arguments based on consent, respect, and dispositions. I aim to bring out what to my mind is the common insight underlying these different views, without the drawbacks that—as I will explain—affect them.

1. LEGALITY

1.1. The Value of Legality

Legality is the particular virtue that characterizes legal systems that are virtuous *as* legal systems. The virtue of legality, as I understand it, is realized through compliance with the formal idea of the rule of law and the main desiderata comprised by that idea, such as publicity, nonretroactivity, consistency, congruence, and stability.[13] As the rule of law tradition argues, governance by law is morally better—both in its instrumental efficacy and in its respect for human autonomy—when it complies with the formal requirements of the rule of law, independently of the substantive content of the particular norms of the legal system.

This is a formal conception of the value of legality. The formal conception understands the rule of law as a purely formal virtue, characterized by the constraints mentioned above, and compatible with different substantive contents. In contrast, a substantive conception of the rule of law includes substantive elements (such as the protection of private property, democracy, economic justice, or human rights) as part of the idea of the rule of law.[14] I think (although I do not argue for this claim here) we are better off separating the rule of law from other political ideals, and hence take the rule of law to be a purely formal virtue. This formal conception is undoubtedly a contested view about the value of the rule of law. There is much that could be said about the issue, and about why this relatively thin and formal conception of the rule of law is attractive even though it is compatible with some forms of substantive injustice.[15] A full defense of this view would require a separate paper (and more).[16] So instead of offering a full argument for it, I will take the correctness of the formal view for granted. This assumption avoids a too easy and direct vindication of the RPDT

13 See Fuller, *The Morality of Law*; Raz, "The Rule of Law and Its Virtue"; Waldron, "Does Law Promise Justice?" and "The Concept and the Rule of Law," 6.

14 See Waldron, *The Rule of Law and the Measure of Property*, 1–75.

15 On formal and substantive conceptions of the rule of law, see note 11 above.

16 There are many grounds on which one could articulate why this formal conception is preferable to a more demanding and substantive one. In my view, one clear advantage of the formal conception is conceptual clarity: the rule of law is, as Jeremy Waldron puts it, only one star in our constellation of political values. The formal conception clearly separates the value of the rule of law from the values of democracy, human rights, efficiency, and the protection of private property. See Waldron, *The Rule of Law and the Measure of Property*. But there are other criteria in virtue of which one could articulate the advantages of the formal conception. For example, continuity between our treatment of law and our treatment of other kinds subject to internal standards of evaluation might count in favor of the formal conception. For recent discussion of the rule of law in terms of the continuity between law and other goodness-fixing kinds, see Atiq, "Law, the Rule of Law, and Goodness-Fixing Kinds."

via the value of a richer, substantive, and more ambitious conception—as we will see in the next subsection. But it also allows us to explore whether we can vindicate the RPDT in relatively well-ordered legal systems (namely, those that comply with the formal conception of the rule of law) that are still somewhat deficient from the perspective of other values, such as democracy, human rights, or distributive justice. This, I take it, is a relatively common situation in many contemporary liberal and broadly democratic legal systems. A vindication of the RPDT for this type of situation seems more practically significant than a similar vindication for ideally just legal systems.

The rule of law (understood formally—a qualification I drop henceforth) is thus different from other moral norms to which legal systems should ordinarily conform. It refers to a set of standards that most (or perhaps all) functional legal systems realize to some degree and—all else being equal—ought to realize as much as feasible, *because* they are legal systems.[17] Given that legality is just one value, it is consistent with law being defective along other morally significant dimensions.[18] Precisely because of its compatibility with moral deficiency, it is worth asking why we should think that the rule of law is morally valuable. The rule of law does not guarantee justice or a flourishing society. It does not guarantee equality. It is compatible with certain forms of oppression.

An important part of the value of the rule of law, however, is its distinctive contribution to the achievement of justice and equality, the flourishing of society, and the avoidance of oppression. That contribution is not (or at least not directly) substantive. It is instead adverbial.[19] The value of the rule of law is not about what we do through law but the way in which we do it. The rule of law allows the complex political communities we inhabit, where people disagree about political morality, to be bound by predictable standards that allow for social coordination. This allows, in democratic systems, political communities to speak—as much as the circumstances of politics allow—with one voice, even if that voice is not quite the voice of (any specific conception of) justice.[20] It also allows individuals, even in nondemocratic systems, the space to plan their affairs and to know what is coming their way, even when what is coming their way is not the application of a rule they agree with.[21]

In response to this line of thought, particularly when it comes to nondemocratic systems, one might argue that compliance with the minimal formal

17 Gardner, "The Legality of Law," 192.

18 Raz, "The Rule of Law and Its Virtue."

19 See Gardner, "The Supposed Formality of the Rule of Law," 211.

20 See generally Waldron, *Law and Disagreement*.

21 See Raz, "The Rule of Law and Its Virtue."

requirements of the rule of law are purely instrumental: they are necessary for law to function *as law*, no matter how benign or evil the content of the law and the motivations of legal officials.[22] Perhaps so. It is certainly possible (and, in fact, a recurrent reality in regimes of autocratic legalism) for compliance with the rule of law to exist alongside injustice and oppression. Even in these cases, though, a regime that complies with the rule of law secures a minimal degree of respect for dignity (no matter how unintended and antithetical to the other features of the legal regime). That respect is evinced in how legal requirements are publicly presented, in how their procedures allow for argument, in how they present people with choices and opportunities for self-application, and so on.[23] The idea is that even morally deficient laws can be presented, implemented, and enforced in more or less morally decent ways, and the rule of law is concerned with the latter rather than the former set of moral concerns.

This is all familiar, given the long tradition of thought about the rule of law as a political ideal.[24] As that tradition emphasizes, a legal system that complies with the rule of law has something (morally) going for it, because of the moral value of compliance with these procedural and formal requirements. That compliance is necessary, even if not sufficient, for exercises of legal authority to be consistent with a minimal degree of respect for human agency.[25] A legal system that complies with the rule of law, thus, satisfies at least one moral standard that can be used to evaluate law—in fact, the basic moral standard to which law is subject as a specific mode of governance, and one on which people with good faith disagreements about substantive moral and political values can nevertheless agree. The question is whether this formal virtue is sufficient to directly vindicate the RPDT.

1.2. From Legality to Obedience?

One possibility in this regard would be to claim that the rule of law directly grounds the RPDT. In his reconstruction of Hobbes and Bentham, Dyzenhaus writes: "In Hobbes and Bentham it is the legitimating theory of legal order that transmits . . . normative force to the determinate content of positive law."[26] We could be tempted to vindicate the RPDT through an analogous argument. Under this argument, a legal system that complies with the demands of the rule

22 For an argument along these lines, see Kramer, *Objectivity and the Rule of Law*, 102–3.

23 See Waldron, "How Law Protects Dignity."

24 See Burgess, "Neglecting the History of the Rule of Law."

25 Raz, "The Rule of Law and Its Virtue," 221. See also Rawls, *A Theory of Justice*, 241.

26 Dyzenhaus, "The Genealogy of Legal Positivism," 57–58. For a similar reconstruction of Hobbes with some connections to the account offered here, see Horacio Spector, "Legal Reasons and Upgrading Reasons."

of law, and therefore has value, transmits this value to its specific prescriptions, making them genuinely normative.[27]

There is something attractive about the simplicity of this potential argument. But it moves too quickly from the value of the formal features of a legal regime to a substantive conclusion about individuals' reasons for action. Compliance with the rule of law does not entail that the law's prescriptions ought to be obeyed, full stop.[28] It also does not entail the weaker proposition—in which we are interested here—that law gives us content-independent reasons for action. In simple terms, it seems implausible that we could have a reason to commit moral wrongs simply because the legal system (which, we are assuming, complies with the rule of law) makes such wrongs legally obligatory. We should resist this overvaluation of the legal status of a norm, even when the legal system complies with legality.[29]

An obvious response here might be the following. One could say that the law's compliance with legality merely generates *pro tanto* reasons. If the substantive content of what the law requires is plainly morally wrong, the *pro tanto* reason provided by compliance with legality will be outweighed by the substantive wrongness of the required behavior.

There are three problems with this reply. The first is that, arguably but plausibly, reasons retain their force even when they are outweighed.[30] While acting against an outweighed reason is rational, it is still acting against how one should have acted from the perspective of that reason. It seems to me there is something odd about the idea that, merely because law complies with the demands of the rule of law, we could have reasons to commit moral wrongs that are merely outweighed.[31] It seems much more plausible to deny that law can have that impact on what we have reason to do merely because it complies with the formal demands of the rule of law. The concern is not that a given reason might or might not be outweighed but that there is no such reason in the first place.

Here is one way to think about why there might not even be a reason to be outweighed in the first place. If the reason generated by law's compliance with the rule of law has at least some weight, in some cases it will not be outweighed even though compliance with the law seems ridiculous and simply uncalled for. For instance, imagine a law that states that "every morning, after waking up,

27 For an exploration of an argument along these lines, see Walton, "Lon L. Fuller on Political Obligation."

28 See Waldron, "The Concept and the Rule of Law," 42.

29 See Hart, "Positivism and the Separation of Law and Morals," 618.

30 Gardner and Macklem, "Reasons," 464.

31 For an explanation, see Gur and Jackson, "Procedure–Content Interaction in Attitudes to Law and in the Value of the Rule of Law," 129–33.

each person over the age of eighteen shall touch their nose three times." If the response were right, those governed by this law would have reason to touch their nose three times every morning, independently of any prospect of sanctions.

An additional problem is that a derivation of the RPDT from the value of the rule of law is too undifferentiated: it applies in the same way, generally and across the board, to everyone subject to the legal regime. Yet not everyone is equally situated vis-à-vis the legal system. There are differences between ordinary citizens and legal officials, as well as within these categories—differences that are directly connected to the goods produced by compliance with the rule of law—that a general connection between legality and the RPDT that aimed to vindicate the RPDT as a general matter would simply ignore. The goods produced by the rule of law—such as certainty and predictability—are not equally distributed between, for instance, well-off investors and poor migrant workers.[32] This is not to say that the goods produced by the rule of law are irrelevant to the latter. The claim is simply that a general connection between compliance with the rule of law and the RPDT would posit such a connection for all individuals without considering the impact of these important differences on the force and scope of that connection for each specific agent. Thus, we should reject the idea that mere compliance with the rule of law makes a general, content-independent, sanction-independent difference regarding what *all* agents should do.

Perhaps a different possibility would be that the *pro tanto* reason provided by compliance with the rule of law, in these cases, is not outweighed but rather undercut, silenced, or some such.[33] The claim would not be that the injustice of a particular law might outweigh the reason to act according to law; rather, when it obtains, injustice makes it the case that what would otherwise be a reason is not a reason after all.[34] In these cases, the reason does not retain its rational force, and we would not have (even an outweighed) reason to commit a wrong. This modified claim, however, gives up the argument: through the idea of undercutting, the argument accepts that the rule of law cannot generate a general reason to act consistently with the law, precisely because in specific cases the reason will simply not exist as a reason.

Still, this argument might be too fast. I might have a general reason to spend my salary on records, the relevance of which *as a reason* in any given occasion is determined upstream by some other reason—say, my reason to be a good

32 See section 3.1 below.

33 There might be differences between reasons being undercut or silenced. For my purposes, though, what matters is the idea that reasons are not being outweighed by conflicting considerations but rather that, at a previous level, injustice makes it the case that the *pro tanto* reason does not even count as a reason.

34 See Schroeder, "Holism, Weight, and Undercutting," 334.

parent and provide for my child's basic necessities.[35] Being a good parent, on this view, makes it the case that my general preference for vinyl records ceases to have any role as a normative reason in certain cases. By analogy, perhaps the injustice of a rule makes it the case that the legal system's compliance with the rule of law fails to generate any reason in such cases, even though it might play a role more generally.

So stated, a general connection between compliance with the rule of law and a general, *pro tanto* reason that can be silenced in cases of injustice might exist. In other words, while I have certain doubts, this weaker connection is certainly possible. But, stated in this way, the connection is not of the right kind. The reason for this is that this weak connection between compliance with the rule of law and *pro tanto* reasons that can be silenced in cases of injustice does not amount to vindicating the RPDT. Recall here that the RPDT amounts to the idea that legal prescriptions make a significant difference regarding what the agent should do, and the mere legal status of a certain behavior makes an independent practical difference in favor of (or against) the regulated behavior, independently of the substantive content of the law and of prudential considerations. The weak connection we are discussing does not vindicate the idea that legal prescriptions make a *significant* difference *independently of the content of the law*. On the contrary, it states that the difference that law makes and its practical significance (its very operation as a reason for action) disappear or are silenced in cases of injustice. In this way, this argument would make law's practical difference contingent on questions of content.

This leaves us with two general ideas. First, law is valuable when it complies with the rule of law. Second, law cannot *by itself* make a genuine practical difference merely because it complies with the rule of law. The issue is that at least some—and perhaps many—people (and not just lawyers), even in moderately unjust societies, believe that law does make a practical difference. The concern is not simply that individuals routinely state the content of the law by making formally normative statements, but that at least some of them, in fact, seem to see the *oughts* of the legal system as genuine and binding *oughts*, particularly when the relevant system complies with the rule of law.[36]

35 See Scanlon, *What We Owe to Each Other*, 52–53.

36 This is a falsifiable empirical claim, of course. But it strikes me as a plausible hypothesis and, as such, one we are warranted to take as true unless (and until) there is significant and reliable empirical evidence to the contrary. For the observation that people routinely state the content of the law by making formally normative statements, see Hart, *Essays on Bentham*, 144–45. As Raz notes, it is possible to make statements about legal obligation and prohibition in a detached way, without endorsing the law's claims. Raz, *The Authority of Law*, 303–12. See also Gardner, "Nearly Natural Law," 160.

It is true, as legal positivists claim, that one can account for these attitudes while remaining agnostic about the question of whether law is genuinely binding. While legal statements traffic in the language of 'duty', 'obligation', 'wrong', 'right', 'and 'ought', these normative statements are not necessarily genuine *oughts*.[37] It is certainly true that in any functional legal system many individuals will adopt what Hart called the internal point of view and treat these legal *oughts* as reasons for action.[38] But under this framework, whether the legal regime generates genuine reasons for action is always an open moral question.

The question for us is not just whether people treat law as providing them genuine reasons—both Hart's internal point of view and the fact of people's belief in something like the RPDT tell us as much. Rather, the question is whether this attitude is something we can rationally vindicate, at least under certain conditions. From this perspective, the mere observation that some (or many) citizens and legal officials adopt the internal point of view is insufficient. The adoption of an internal point of view—or to put it in more theoretically neutral terms, the treatment of legal norms as reasons for action—is compatible with those who adopt it being simply mistaken.

Perhaps a possibility here would be to attempt to vindicate the semantics of legal propositions and the attitudes of those who adopt the internal point of view *directly*, by arguing that, as recent nonpositivist theorists like Hershovitz and Greenberg would argue, legal obligations are just moral obligations, or the moral obligations generated by the actions of legal institutions.[39] That path is perhaps plausible, particularly for those already committed to a nonpositivist view about the nature of law. But it is not without difficulties. For starters, the nonpositivist view might simply not be the right view about the nature of law. Note too that, just like statements of legal obligation could be detached and avoid any expression of acceptance or commitment to the norms of the legal system, so too for statements of moral obligation: they need not reflect an acceptance of, or commitment to, any particular conception of morality or set of moral norms. Claims of legal obligation could be (as a nonpositivist would have it) claims of moral obligation, but these claims might be detached. They might be *assuming* or *simulating* acceptance of a set of moral norms.[40] Because of these considerations, here I want to pursue a different and more

37 Murphy, *What Makes Law*, 111–12.

38 Hart, *The Concept of Law*, 56–57, 88–90.

39 Greenberg, "The Moral Impact Theory of Law"; and Hershovitz, "The End of Jurisprudence."

40 See Raz, *Practical Reason and Norms*, 172–73; and Toh, "Legal Judgments as Plural Acceptance of Norms," 110–11.

ecumenical route that does not turn on any contested views about the nature and the grounds of law.

1.3. A Different Strategy

My strategy to vindicate the RPDT will attempt to preserve the idea that there might be a connection between the value of legality and the normative effect of legal norms. But it will do so in a way that avoids the implication that all citizens and officials might have reason to commit moral wrongs merely because of the law's compliance with the rule of law. According to the view I will articulate, the connection between the value of legality and law's practical difference is mediated by agents' commitments. While the value of legality is not sufficient to directly generate reasons for complying with law, it can give agents a reason to adopt commitments that ground law's practical difference.[41] I start to explore the notion of commitment to law in the next section, and then move on to explain why the value of the rule of law might be a reason in favor of adopting such a commitment.

The approach I will follow is more charitable towards the ordinary individuals and legal officials who believe in something like the RPDT than an error theory. At the same time, my strategy avoids the implausible implications of a direct inference from the rule of law to the RPDT.[42]

41 Nothing I say here excludes the possibility that other facts and values (such as democratic authority, the value of cooperation, or the value of special relationships) might also constitute reasons for adopting a commitment to law.

42 I am not the first to suggest that law's practical impact might be mediated by agents. Noam Gur has made a similar argument from the perspective of agents' dispositions (*Legal Directives and Practical Reasons*). However, there are a few important differences between Gur's account and the view I will articulate. First, Gur focuses on dispositions rather than commitments. Second, on Gur's account, these dispositions are partly explained by their ability to operate as a protection against biases in decision-making. Third, Gur's model rejects the possibility of law having an exclusionary dimension. Fourth, on Gur's account, agents have a reason to adopt certain attitudes of law-abidingness only when society is reasonably just and well ordered. Finally, while for Gur, agents' dispositions follow from normative reasons, whether they generate not just motivational reasons but also normative reasons for action is an open question. In contrast, the focus of my account is the idea of a commitment to law. The role of such a commitment is not explained, unlike Gur's account of dispositions to obey the law, by the need to overcome defects or biases in practical reasoning. Under my view, as I will explain below, the effect of a commitment can be exclusionary. Moreover, commitments can be based on multiple reasons, and while agents ought to make them when the law complies with legality, they are always compatible with society being unjust. Finally, on my account, commitments can generate genuine normative reasons for action. While different in content and structure, the two approaches are different ways to flesh out similar intuitions. The argument offered here attempts to preserve the attractive features of Gur's argument while going beyond its limitations. For

2. COMMITMENTS TO LAW

There are different degrees to which a legal system might fail to comply with the moral demands that bear upon it. Perhaps there is no way to get from the law of a systematically unjust legal system that routinely violates the rule of law to something like the RPDT.[43] But a legal system might be merely somewhat unjust. For example, a legal system's tax system might not fully realize the demands of distributive justice. It might give certain people more than their fair share and unjustly deprive others of what they are entitled to. But this system might still get us closer to justice than at least some of the other existing feasible alternatives, or it might not make things worse than leaving the results of market interaction untouched. Or, to think about a different case, a legal system's regime of criminal punishment might generally sanction genuine wrongs in a proportionate manner, through appropriate and fair procedures, but might nevertheless contain some norms that criminalize conduct that is not wrongful or might condone certain minor forms of police violence that should not be allowed.

These are precisely the situations we have been considering: cases of a legal regime that complies with the rule of law in general, even though some of its norms are unjust and the legal system is therefore somewhat deficient from the perspective of justice. In these circumstances, perhaps it would be at least permissible for individuals to adopt certain attitudes towards the law that give legal mandates a practical impact. Joseph Raz offered an early version of this idea: "Respect is itself a reason for action. Those who respect the law have reasons which others have not. These are expressive reasons. They express their respect for the law in obeying it, in respecting institutions and symbols connected with it, and in avoiding questioning it on every occasion."[44]

a recent critique of Gur's view, see Vassiliou, "The Normativity of Law." Mark Murphy has also offered an argument from a natural law theory perspective, with a similar structure to the one offered here ("Natural Law, Consent, and Political Obligation"). Under Murphy's argument, the law specifies the requirements of the common good, and any citizen could reasonably treat those specifications as authoritative, accepting them as his or her own views about what the common good requires for the sake of practical reasoning. This would thus allow for a role for what Murphy characterizes as *consent* that is in line with the natural law tradition's emphasis on the nonvoluntaristic aspects of the duty to obey the law. Here, the differences are even more obvious than with Gur's account. First, Murphy's argument is based on a substantive evaluation of the content of the law, in connection to its realization of the common good. My argument is more content neutral. Second, he characterizes the citizen's attitude as one of consent, which I think makes the argument liable to some of the issues I identify in section 3.3 below as problems for consent views—problems that the notion of commitment avoids.

43 See Valentini, *Morality and Socially Constructed Norms*, 169.

44 Raz, *The Authority of Law*, 259.

Respect, then, might potentially vindicate the RPDT. The idea of respect is attractive on several additional levels. First, it sees individuals as the source of law's practical difference, without artificially stretching the idea of consent.[45] Second, because it does not focus on consent, the idea of respect can also explain how the relevant attitudes do not require identifying specific communicative acts at specific times. Third, respect preserves the ideas that underlie and perhaps explain the attraction of consent—particularly, the notion that we as individuals can be the authors of part of our moral world.[46]

Still, I am not sure the notion of respect is quite right. Respect might change agents' deliberation and their reasons. But an attitude of respect is compatible with a very limited practical impact and with a relatively indifferent and detached stance. Respect is merely an attitude of regard and deference. For instance, I can respect your religion (say, by not mocking it) even though I believe it is false, and I can respect any religious authority (say, by addressing a Catholic priest as "Father") even though I think the belief system that supports that alleged authority and its claims is false, and that the dictates of the alleged authority fail to give me any reasons for action. Similarly, it seems plausible to think that I can respect legal officials or even a legal system, even though I think the law is unjust and lacks any moral authority. But if that is the case, respect seems to generate a limited practical impact. Moreover, it seems to me that the notion of respect does not quite fit the attitudes of the law-abiding citizens and officials I have in mind—which seems to reflect a more active attitude, with stronger implications. Because of this, I will resort to a different notion, which nevertheless has certain resemblances to Raz's notion of respect and, more importantly, shares its underlying motivation: the idea of commitment.

2.1. Commitment

A commitment is an individual determination meant to govern the agent's future behavior.[47] Through the adoption of a commitment, agents give themselves reasons to act in certain ways in the future.[48] Our commitments thus change what we have reason to do. What this means is somewhat ambiguous, and I will disambiguate it below.

45 Raz, *The Morality of Freedom*, 97.

46 Raz, *The Morality of Freedom*, 98.

47 Rubenfeld, *Freedom and Time*, 92. See also Shpall, "Moral and Rational Commitment," 154. There are several possible conceptions about the structure and normative force of commitments. The account I offer here is just one possible (yet hopefully plausible and ecumenical) conception that attempts to capture a familiar set of normative phenomena.

48 Lieberman, *Commitment, Value, and Moral Realism*, 5; and Rubenfeld, *Freedom and Time*, 125.

A commitment is a voluntary engagement.[49] But not all commitments are equally voluntary or choice dependent.[50] In fact, in certain cases it might not be possible to single out the specific moment when a commitment was adopted. Individuals might come to be committed in a slow and incremental manner, as a consequence of social influence, acculturation, critical reflection, and so on.[51] Thus, voluntariness plays a significant role in the explanation of how commitments come about and subsist—but voluntariness does not mean that all commitments arise as the consequence of specific, identifiable voluntary choices. Commitments might in fact be based on reasons that agents come to appreciate and endorse without being fully able to articulate them at the outset.[52] A commitment might be the upshot of an incremental volitional process that slowly changes our priorities and values rather than of a discrete decision.

A commitment is, in the first instance, a personal phenomenon. *I* am committed to certain things—like relationships, projects, and institutions.[53] Unlike promises, commitments are personal also in the sense that they can be unilateral.[54] Because of this, a commitment can be made exclusively *in foro interno*.[55] Thus, a commitment—unlike, arguably, a promise—does not require uptake from any agent. When the agent fails to act consistently with the reasons generated by their purely internal commitment, no third party is wronged *simply* because the agent failed to abide by the commitment.[56] Relatedly, given and to the extent that a commitment is brought about by the agent unilaterally, it is always subject to the possibility of unilateral revocation.[57] The revocation might of course be all things considered wrong. But it seems to me it is

49 Shklar, "Obligation, Loyalty, Exile," 183–84.

50 Valentini, *Morality and Socially Constructed Norms*, 26. On different degrees of choice dependence, see Owens, *Shaping the Normative Landscape*, 3–6.

51 Chang, "Commitments, Reasons, and the Will," 79; and Valentini, *Morality and Socially Constructed Norms*, 90.

52 Ebels-Duggan, "Beyond Words," 624. To be clear, in these cases the commitment still generates new reasons for action (just like any other commitment), even though it is generated by the recognition of preexisting reasons in favor of the commitment.

53 Chang, "Commitments, Reasons, and the Will," 77; Valentini, *Morality and Socially Constructed Norms*, 25; and Williams, "A Critique of Utilitarianism," 112.

54 See generally Molina, "Promises, Commitments, and the Nature of Obligation."

55 This is in contrast to promises. See Watson, "Promises, Reasons, and Normative Powers," 158. Note that because I treat commitments as unilateral and individual determinations, I do not see them as a genus that includes species like promises. For that type of view, see Calhoun, "What Good Is Commitment?"; Gilbert, "Commitment"; and Shpall, "Moral and Rational Commitment."

56 Chang, "Commitments, Reasons, and the Will," 77.

57 Gilbert, *Joint Commitment*, 31.

never the case that revocation is wrong simply because it undoes a unilateral commitment.

This does not suggest that revocation is easy. Some commitments are very central to the agent's conception of themselves. Consider, for example, John's commitment to be a good Christian, or the Neapolitan football fan's commitment to SSC Napoli that echoes generations of fandom in their family. And even when they are not so central to the agent's conception of themselves, commitments are robust.[58] They exert a normative pull, even when the courses of action they would lead to are not optimal from the perspective of the agent's other existing reasons and preferences.[59] As a consequence, revoking a commitment is a significant and potentially difficult decision—it is not something one can simply do whenever a conflict between commitment-dependent reasons and our other reasons arises. And it is something that becomes harder the closer the commitment is to the agent's conception of themselves and their life project.

Commitments can certainly be changed, revised, and adapted over time. But not all commitments are equally susceptible to change. Some commitments, by their very specific nature, might be stable in content. For example, my commitment to be a vegetarian cannot be revised to admit certain forms of animal meat without ceasing to be a commitment to be a vegetarian. By the same token, a general commitment to law cannot be revised to admit certain forms of lawbreaking without ceasing to be a general commitment to law.

This takes me to the question about the scope of the specific commitments I am interested in here. A commitment to law is not a retail, specific commitment to a particular norm of the legal system. It is a commitment to the entire legal regime as a system of governance, and therefore a commitment that extends, in principle, to all the norms of that legal system. Thus, the type of commitment to law we are focusing on is not a decision to treat specific laws as giving us reasons—it is a general attitude towards law as such, which gives practical significance to its specific norms.[60] A commitment to law is a commitment to treat its mandates as genuine reasons for action as they arise, as a general matter.[61] This type of commitment is, of course, compatible with these reasons being overridden in some situations. And to be clear, nothing prevents an

58 Calhoun, "What Good Is Commitment?"; and Valentini, *Morality and Socially Constructed Norms*, 25–26, 89.

59 Bratman, "Time, Rationality, and Self-Governance." For a similar point regarding dispositions to comply with the law, see Gur, *Legal Directives and Practical Reasons*, 136.

60 For an interpretation of Plato's *Crito* along similar lines, see Gowder, "What the Laws Demand of Socrates."

61 There is a suggestive analogy here between commitment to law and a commitment to acting as a moral agent. See Shiffrin, "Moral Overridingness and Moral Subjectivism," 787.

agent from adopting a *partial* commitment to certain areas of law, to the norms issued by specific legal officials, or even to specific norms. These types of partial commitments, while conceptually possible, are just not the phenomenon I am interested in here.

These cursory remarks give us the bare bones of the idea of a commitment to law. They tell us that commitments are individual, voluntary determinations that are unilaterally revocable yet robust. Finally, as we have also seen, the commitments to law we are interested in are not retail.[62] All of this leaves open the most important and pressing questions regarding commitments: why they give law a practical impact, what that practical impact entails, and the connection between commitments' practical impact and the reasons that might explain why we should, or at least might, commit to the law in the first place—including, particularly, the legal system's compliance with the rule of law.

But before I get to these issues, I should note a potential concern. By attempting to vindicate the RPDT by connecting it to agents' commitments, am I not simply delaying the puzzle?[63] The initial worry was that many agents seem to believe in the truth of something like the RPDT, but the standard arguments for a duty to obey the law do not seem to successfully vindicate that belief. And my strategy is to suggest that agents' commitments might be able to come in handy for that purpose instead. But then we seem to need to vindicate the beliefs that lead agents to make these commitments (and, plausibly, these beliefs are precisely beliefs about reasons to support the law). The original problem is replicated, but at a different level: now it is a problem of vindicating not agents' beliefs about their reasons for action but rather the beliefs that lead them to adopt the commitments that generate such reasons. We still need to vindicate a belief or attitude, and all I am doing is changing the content of the belief or attitude to be vindicated.

This objection, however, ignores that there is an asymmetry between nonvoluntarist reasons and reasons generated by commitments. As I will explain, as long as they are not impermissible, commitments generate reasons for action. Once we are above the threshold of permissibility, we do not need to evaluate the reasons in favor of a commitment to ascertain its normative impact. While claims about nonvoluntarist reasons—which is how the claims involved in the RPDT are standardly treated—can be vindicated only by showing that the reasons do in fact exist, claims about commitment-based reasons can be vindicated merely by pointing to the existence of a permissible commitment. Just

62 Whether any individual agent has adopted a commitment to law is a complex question—and reasonable people would disagree about the factual conditions under which a commitment has been adopted, when it no longer obtains, and so on.

63 I thank an anonymous reviewer for prompting me to address this concern.

like in the cases of analogous phenomena like promises and—arguably—plans, one can derive reasons from the existence of a commitment directly.[64] This means that, once an agent has made a permissible commitment to law, this directly vindicates the RPDT. We do not need any awareness of the reasons for the commitment itself, and we do not need to vindicate any such reasons (even if we can point to some reasons that count in favor of a commitment, including the legal system's compliance with the rule of law). The permissible commitment is sufficient. I turn to the explanation for the practical impact of commitments in the next section.

2.2. Commitments, Agency, and Practical Impact

2.2.1. Commitments as Normative Powers?

Commitments change the reasons we have. As Ruth Chang argues, a commitment generates reasons (to have certain attitudes and to engage in certain actions) that would not exist in its absence.[65] A commitment to law, thus, gives law a genuine practical impact—even if such impact is something the law would otherwise lack—making the RPDT true for those who are committed. While there might be many other reasons why law has a genuine normative effect, a commitment generates a content-independent, sanction-independent impact—which can be understood as a reason to act consistently with law simply because it is the law. This effect is compatible with, and can reinforce, reasons, considerations, and undertakings that are also effective at giving law a practical effect (consider, for instance, oaths by judicial and other public officials).[66]

Because of this, we can think of commitment as a type of *normative power*—an ability to "reflexively will that some consideration be a reason, where that willing is that in virtue of which the consideration is a reason."[67] Our own wills would, on this view, be a source of normativity.[68]

64 And if a commitment can be permissible even if a legal regime is moderately unjust, as I will argue below, when individuals have adopted such a commitment, one can vindicate the RPDT even in the case of moderately unjust legal regimes.

65 Chang, "Commitments, Reasons, and the Will," 74. While Chang accepts that some reasons can be created by agents' commitments, she limits this to cases where other reasons run out (104).

66 Here, I depart from Chang's analysis.

67 Chang, "Do We Have Normative Powers?" 292.

68 Chang, "Voluntarist Reasons and the Sources of Normativity," 244–45. Commitments play this normative role, according to Chang, only when our nonvoluntarist reasons for action have run out. Unlike Chang, I believe commitments to law can give law a normative impact even if nonvoluntarist reasons haven not run out.

Why would commitments have this normative impact? To my mind, the explanation is connected to the value of autonomous agency. The ability to adopt certain commitments that impact our reasons for action is central to that form of agency.[69] Our life as autonomous agents comprises the embrace of goals, projects, values, and commitments that give shape to our life, making that life our own because it is, at least in part, rationally dependent on our inclinations and attitudes.[70] As Raz puts it, a person is significantly autonomous when they can shape the trajectory of their life by, among other things, adopting certain commitments that allow them to be "part creators of their own moral world."[71] More specifically, the value of autonomy explains why agents can change their reasons for action through their own attitudes (including their commitments).[72] If we see human agents as autonomous agents, then we must also see them as being able to change their reasons for action in this way: to be able to create, throughout their life and through the adoption of commitments, new values and reasons they would otherwise lack.[73] Treating ourselves and others as autonomous beings, in this way, entails seeing ourselves and others as able to make commitments, because the making of these commitments and the shaping of our practical deliberation by them are particularly important ways in which we can lead autonomous lives. On this view, the idea of agential autonomy explains why commitments can generate reasons for action.

The notion that our commitments to projects, people, ideas, and institutions make a difference to what we have reason to do is central to the idea of ourselves as autonomous agents.[74] Consider the case of a commitment that is neither impermissible nor required: a merely permissible commitment, such as my commitment to build a treehouse for my son. After I made the commitment (even if I never communicated that commitment to my son), I have a commitment-based reason to build the treehouse, and to take the appropriate steps to do so. Third parties, if they knew of my commitment, would agree with the

69 I assume here, but do not argue, that autonomy is indeed valuable. I hope (and expect) this is not a too contentious assumption.

70 Raz, *The Morality of Freedom*, 387.

71 Raz, *The Morality of Freedom*, 154.

72 Raz, *The Morality of Freedom*, 386.

73 Raz, *The Morality of Freedom*, 387.

74 I do not think this is a particularly novel or original point. For similar claims, see Frankfurt, "Freedom of the Will and the Concept of a Person," 16–17; Nozick, *The Nature of Rationality*, 13; Taylor, "What Is Human Agency?" 25–27; and Williams, "A Critique of Utilitarianism." For a recent defense of this type of view (one, however, that takes the view to be more controversial than I do), see Chang, "What Is It to Be a Rational Agent?" 95–109. See also Valentini, *Morality and Socially Constructed Norms*, 90.

judgment that I have such reason. Note that the force of the example does not turn on the fact that it relates to another agent (my son). My commitment to pursue an academic career gives me reasons to do certain things that I would lack if I had adopted a commitment to become a corporate lawyer or a folk musician. Many of our permissible life projects, relationships, and personal activities have this type of structure.

This argument, importantly, does not require making any general contentious assumptions about the grounds of reasons for action or about the structure of practical reason. I am not claiming that all reasons for action are grounded in agents' dispositions, including their commitments. The idea that all reasons are explained by psychological states like desire is sometimes called the "Humean" view.[75] My argument so far requires no such view, and is perfectly compatible with the possibility of some reasons being independent from agents' attitudes, desires, and commitments, and applying to everyone irrespective of their specific attitudes, desires, and commitments.[76] All I am arguing is that at least *some* reasons are explained by one particular aspect of the motivational profile of agents (namely, their commitments), and might be specific to them.[77] And the underlying reason why that is the case is in fact impeccably agent neutral and nonpsychological (i.e., applicable to all agents irrespective of their attitudes, desires, and commitments, and based on the general value of autonomy).[78]

One final point is relevant here. There is a certain resemblance between this type of argument in favor of the normative impact of commitments and Seana Shiffrin's transcendental argument in favor of nonconventional promissory powers.[79] But while I think this type of argumentative strategy makes sense for vindicating the normative impact of unilateral undertakings for individual agents, I am more skeptical about its success for vindicating powers that generate correlative rights and obligations *between* agents, such as promise and consent.[80] In this latter type of case (although I do not aim to resolve this

75 See Schroeder, "The Humean Theory of Reasons."

76 See Schroeder, "The Humean Theory of Reasons," 204–5.

77 The idea that at least *some* reasons depend on features of persons' psychology and motivations is "largely uncontroversial" (Schroeder, *Slaves of the Passions*, 1).

78 In this sense, the explanation follows a similar structure to what Schroeder calls the "standard model" (which he rejects) for grounding reasons based on desires on general reasons that are independent from the motivations of agents. See Schroeder, "The Humean Theory of Reasons," 209–16, and *Slaves of the Passions*, 41–60.

79 See Shiffrin, "Promising, Intimate Relationships, and Conventionalism."

80 For an account of commitments as undertakings that generate directed obligations, see Molina, "Promises, Commitments, and the Nature of Obligation."

issue here), I believe it is at least plausible to think that such powers cannot exist in the absence of social practices and conventions that could make the relevant bilateral undertakings effective.[81] As we have seen, a commitment (in my sense) can be *in foro interno*, and does not require uptake, communication, or any interpersonal transaction or engagement—unlike promises and consent. It might be hard to see how a value like autonomy (or even all-things-considered value, as in Raz's argument) could explain the existence of powers whose efficacy at least arguably seems to turn on social practices and patterns of social recognition.[82] It is significantly easier, to my mind, to see how considerations about value might explain why we are able to voluntarily impact *our* reasons without any interaction with third parties.

With all of this, we can go back to the idea of commitments as normative powers. The idea of *normative powers* is itself ambiguous.[83] When by a *normative power* we simply mean to suggest the idea of a capacity to create reasons for action, then—again—commitments are indeed a normative power, explained, as we have seen, by the idea of agential autonomy. The idea of *normative powers* is a plausible model for thinking about the type of normative impact that the commitments of autonomous agents have on their own reasons for action.[84] But commitments are different, in important respects, from other normative phenomena that are usually included under the label of normative powers, such as promising and consent. By thinking of commitments as normative powers, we are not assuming that agents must have innate powers to generate directed obligations, and we do not need to take any position on questions about the grounds of promise and consent.

81 See Lewinsohn, "The 'Natural Unintelligibility' of Normative Powers"; and Murphy, "The Artificial Morality of Private Law." For further exploration of the conditions of social efficacy for normative powers, see Bruno, "Value-Based Accounts of Normative Powers and the Wishful Thinking Objection."

82 See Raz, "Is There a Reason to Keep Promises?" and "Normative Powers (Revised)."

83 See Raz, "Normative Powers (Revised)."

84 It is not in the nature of things that we *must* think of commitments or of other related phenomena in terms of the idea of normative powers—the category is not forced on us by the nature of normativity or practical deliberation. The use of the idea of normative powers for explaining moral phenomena, to my knowledge, started with Joseph Raz's reliance on the older idea of legal powers. See Raz, "Voluntary Obligations and Normative Powers." I am not the first to note this historical point. See, e.g., Lewinsohn, "The 'Natural Unintelligibility' of Normative Powers"; and Murphy, "The Artificial Morality of Private Law," 470.

2.2.2. The Practical Impact of Commitments

Still, presumably some commitments are not permissible. Of course, from a first-person perspective, the fact that I have adopted a commitment has a clear impact on the reasons I take myself to have. But from the perspective of the vindication of the RPDT, what should matter is not whether agents take themselves to have a reason to do as the law requires, but whether they *really* might have such reasons from a third-person perspective—or, framed differently, whether they *ought* to have such reasons.[85] The question concerns what philosophers sometimes call "normative reasons."[86]

Commitments can arise out of diverse reasons.[87] Some of them might be grounded in imperative reasons (i.e., commitments we ought to make), and they would, in my view, have a clear practical impact. They would generate genuine normative reasons and change what agents ought to do. The case of permissible commitments might seem a bit more dubious, but I do not think it is. Intuitively, if it is permissible for an agent to adopt certain attitudes, to engage in certain projects, and to assume certain commitments, then the agent's reasons can genuinely change because of them. For example, my permissible commitment to become a better drummer gives me reasons to do certain things that I would otherwise lack: to practice at least three times a week, to try to learn new techniques, and so on. It is of course possible that the genuine practical difference generated by permissible commitments is weaker than that generated by commitments explained by imperative reasons. Nothing I say here precludes that possibility.

The case of impermissible commitments is more difficult. It is certainly plausible to think that these impermissible commitments do not have a genuine impact on what agents ought to do. In this respect, impermissible commitments might be similar to evil promises: both might fail to generate any reasons.[88] Others might be tempted by a less stringent position, according to which, for instance, a mafioso who makes a commitment to the mafia would indeed have reasons to express respect to the head of the mafia, to engage in

85 These are two different ways of framing the same substantive point. The first adopts an externalist position about reasons; the second adopts internalism. On internalism and externalism, see Finlay, "The Reasons that Matter"; Manne, "Internalism About Reasons"; Markovits, "Why Be an Internalist About Reasons?"; and Williams, "Internal Reasons and the Obscurity of Blame" and "Internal and External Reasons."

86 Enoch, "Reason-Giving and the Law," 15; and Schroeder, *Slaves of the Passions*, 11–12.

87 Valentini, *Morality and Socially Constructed Norms*, 91.

88 Watson, "Promises, Reasons, and Normative Powers," 167.

certain rituals, as well as to do hideous things, such as killing and hurting others.[89] Other intermediate positions are plausible too.[90]

We can nevertheless leave these complex issues aside here, because impermissible commitments are a distraction from our core concern: the case of commitments grounded in the fact that the legal system, while moderately unjust, complies with the rule of law. These commitments seem to be permissible because while unjust, the legal system does realize at least one important value. (In fact, as I will argue in the next section, these commitments might be imperative.) Admittedly, at some point, the degree of injustice might be such that commitment is impermissible even though the legal system complies with the rule of law (although there is an important empirical question about how compatible radical injustice and the rule of law might be as a matter of fact).[91]

There are different plausible positions regarding the threshold questions of what makes a legal system so oppressive that a commitment to it is impermissible, and of what makes a legal system sufficiently conducive to justice (or, perhaps, sufficiently necessary to secure justice) that a commitment to it is mandatory. The edges are bound to be porous and vague. It is also quite difficult to give more concrete content to the idea of moderately unjust legal systems that comply with the rule of law without adopting a specific conception of justice. But to give the idea more concreteness, several (though certainly not all) of the countries that the World Bank today lists as "high-income economies"—such as Australia, Canada, the United States, France, the United Kingdom, Portugal, Spain, Italy, Germany, New Zealand, Chile, and Uruguay—are both broadly in compliance with the rule of law and not fully just (under at least some familiar and plausible conceptions of justice).[92] All of these legal

89 I take the example from Cohen, "Reason, Humanity, and the Moral Law," 183. See also Williams, "Internal and External Reasons." Of course, for those who would adopt this less stringent position, the existence of this commitment-based reason does not mean that the mafioso has an all-things-considered reason to kill or hurt the innocent. See Velleman, "Willing the Law."

90 For instance, Ruth Chang argues that there are limits on the role played by commitments in practical reasoning ("Voluntarist Reasons and the Sources of Normativity," 269). According to her, the claim that all practical reasons must be connected to the agents' commitments or will in some way does seem to lead to the claim that we have the ability to create reasons that justify doing what we are not justified in doing, as in the mafioso example. According to Chang, because of this—and as I noted above—there is a hierarchical priority of our nonvoluntarist or commitment-independent reasons.

91 See Fuller, "Positivism and Fidelity to Law," 650.

92 See the World Bank webpage "World Bank Country and Lending Groups," accessed November 15, 2024, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups.

systems have public, general, predictable, and relatively consistently enforced legal standards. At the same time, to a greater or lesser extent, in these countries, arguably morally arbitrary factors, such as individuals' genetic endowments, the socioeconomic class of their parents, sheer brute luck, and the effects of social and racial discrimination impact the distribution of goods and resources. Arguably, many of these countries impose unjustified restrictions on asylum and immigration more generally. These societies are thus not perfectly just, and many of them are in fact at least somewhat unjust from the perspective of at least some plausible conceptions of justice. Nevertheless, many of these countries have (imperfect) democratic arrangements like open elections, freedom of association, and freedom of speech, attempt to uphold basic human rights, do not adopt permanent policies of formal and deliberate racial or gender discrimination, and achieve some degree of economic redistribution. Thus, throughout the rest of the paper, I will focus on these moderately unjust legal systems that nevertheless are not radically unjust and comply with the rule of law. I take it that most wealthy liberal democracies are within this set. For such regimes, individual commitments to law are permissible even though they refer to legal regimes that are, to some degree, unjust.

2.3. Reasons for Commitment and the Rule of Law

As I argued above, the rule of law is morally valuable, given the particular mode in which it allows societies and those in charge of them to achieve their goals. At the same time, as we have seen, it is implausible to think that this value is sufficient to make law morally binding.

But compliance with the rule of law might still be normatively significant. It might give agents a normative reason for (a reason that objectively favors) adopting a commitment to law. The value of legality would then explain why agents ought to adopt a commitment to law and might be subject to legitimate criticism if they do not. Compliance with the rule of law gives agents these normative reasons because of the moral value of the rule of law, and particularly its connection with human dignity (as I argued in section 1.1). Respect for human dignity through the rule of law is not just one more source of value that might or might not lead individuals—depending on their own inclinations, desires, and attitudes—to adopt merely permissible commitments. It is instead a reason why they ought to be committed and that explains why commitments to law are not merely permissible. The value of the rule of law is such that it gives all agents a reason to adopt a commitment to law.

This possibility, however, raises an immediate question. If the rule of law cannot generate genuine reasons for action directly, how could it generate normative reasons for adopting a commitment? The answer must start with

an examination of the conditions under which the value of the rule of law can be realized. The rule of law, while valuable, is a fragile achievement—because law itself is fragile. The legal system is effective only when it is able to secure stable expectations over time.[93] More strongly, a legal system exists as a system of social governance only if it is efficacious.[94] If the legal system were to progressively "lose control over its subject set," as Adams puts it, at some point it would no longer be reasonable to say that its purported subjects live under a legal regime.[95] At the same time, if a legal regime that complies with the rule of law ceases to be efficacious, then the moral goods produced by the rule of law will no longer obtain. The value of legality can be realized only if the relevant legal regime itself has a minimal degree of efficacy.

In practice, efficacy requires either voluntary compliance or the imposition of sanctions against (at least a significant proportion of cases of) noncompliance.[96] The efficacy of law—secured through voluntary compliance or through the imposition of sanctions—matters because legal norms are expectation-generative devices.[97] This is particularly true for duty-imposing norms. When the law says that *A* is under a duty to ϕ, it is also purporting to generate and/or stabilize the expectation that *A* will ϕ. Now of course the fact that law generates a certain expectation does not entail that those expectations will be upheld by those whose behavior falls under the legal norm. For instance, the law might say that promisors ought to perform their enforceable contracts or that we all have a duty not to kill others. But some promisors might breach their contracts, and some people might kill others. In these latter cases of disappointed expectations, the legal system can continue to secure them (it can continue to say, as it were, "everyone can expect those in *A*'s position to ϕ") only by imposing, at least for a non-negligible proportion of cases, a sanction that stabilizes the expectation.[98] In situations of noncompliance, legal enforcement is thus a means for stabilizing and reaffirming the expectations that legal norms invite everyone who participates in the social world to form.[99] It is a way, in other words, of securing the efficacy of the legal system.[100]

93 Luhmann, *Law as a Social System*, 143.

94 Raz, *The Authority of Law*, 104. See also Adams, "The Efficacy Condition," 228.

95 Adams, "The Efficacy Condition," 229–30.

96 Kelsen, *Pure Theory of Law*, 11. For discussion, see Adams, "The Efficacy Condition," 234–37.

97 Luhmann, *Law as a Social System*, 146.

98 Luhmann, *Law as a Social System*, 149.

99 Luhmann, *Law as a Social System*, 148.

100 For a recent exploration of the social benefits of belief in political obligation, see Frye, "Is Belief in Political Obligation Ideological?"

The issue is that, at the wholesale level, enforcement without any voluntary conformity will not do the trick. The legal regime can rely on coercive enforcement only to a limited extent.[101] While a legal regime where there is no obedience but only coercive enforcement is conceptually possible, and highly punitive legal regimes that extensively rely on coercion exist, relying *exclusively* on coercive enforcement to secure compliance is not a pragmatically feasible strategy over the long run.[102] Coercive enforcement is costly.[103] Widespread voluntary compliance, by contrast, diminishes the need to resort to coercive enforcement mechanisms. In this way, widespread compliance contributes to sustain the rule of law.[104]

This is not enough to get us to the RPDT. The reason is straightforward: while widespread noncompliance might erode the efficacy of the legal regime, single instances of noncompliance, by themselves, do not.[105] Any specific breach of legal duty will typically be insufficient to undermine the law's authority.[106] The causal irrelevance of singular breaches, moreover, increases the larger the society is.[107] What threatens the legal regime is not a single breach but a situation of widespread noncompliance.[108] Thus, the desirability of a legal system that complies with the rule of law does not immediately entail that its prescriptions are genuinely binding.[109]

However, the value of the rule of law does give us a reason to adopt a commitment to law. The fact that things would go better if everyone voluntarily complied with legal norms does not mean that agents have a reason to comply with those norms. The claim cannot be that law makes a practical difference because it would be good if it made it. But the fact that it would be good if law

101 Some theorists would go further and claim that the (socially) normative character of legal practices can be threated by excessive reliance on coercion. See Thomas, "Coercion in Social Accounts of Law.

102 See Adams, "The Efficacy Condition," 238–39.

103 For a similar claim about property law, see Merrill and Smith, "The Morality of Property," 1853.

104 Gur, *Legal Directives and Practical Reasons*, 173–74.

105 See Kagan, "Do I Make a Difference?"; and Nefsky, "Fairness, Participation, and the Real Problem of Collective Harm."

106 See Raz, "The Obligation to Obey," 149.

107 Ullmann-Margalit, *The Emergence of Norms*, 28.

108 Adams, "The Efficacy Condition," 232. This is why, in my view, "Samaritan" or fairness arguments for the duty to obey tend to fail. There is no reason to think that, merely because political order is valuable and it requires voluntary collective obedience, each individual agent has a duty to obey its law. For an example of this type of argument, see Wellman, "Political Obligation and the Particularity Requirement."

109 Murphy, "The Artificial Morality of Private Law," 458n15, 475.

made a practical difference does suggest that agents should adopt a commitment to law: a commitment to law is precisely a way, as I have argued, in which the law can effectively make a practical difference and secure the voluntary compliance of an individual over a long term. A commitment ensures the law's practical difference until revoked. Absent revocation, a commitment alters an agent's practical engagement with the law in the long term, potentially for their whole lifetime. The impact of a commitment is, from the perspective of law's efficacy, significantly greater than the impact of a single act of compliance. Believing that "it would be good if *p*" makes *p* true is a form of wishful thinking (that is why the value of the rule of law cannot directly ground a general reason to act in conformity to law). But if the truth conditions for *p*, at least when it comes to *A*'s case, are within *A*'s control, then "it would be good if *p*" does give *A* a reason to ensure that *p*. And this is precisely what agents can do, regarding the RPDT, by adopting a commitment to law. While one cannot get from the benefits of widespread compliance to reasons to comply in particular instances, the step from the benefits of widespread compliance to reasons to commit to the law as a general matter—and therefore to treat its standards of conduct as reasons for action over the long run—is quite natural. By committing to law, I change my reasons for action in a way that persists over time and ensures the normative impact of legal standards over my practical deliberation in general.

Now another worry here is the following. I have argued that agents ought to adopt a commitment to law. But that seems to suggest they ought to commit to seeing law as giving them reasons for action in a way that I argued above would be implausible, when I argued that compliance with the rule of law cannot directly ground the RPDT. This leaves us with two options: either it is actually plausible that law gives us reasons for action (in which case, there seems to be no need for a commitment), or it is implausible (in which case, it would seem that agents ought to adopt an implausible belief in order to commit to law).[110]

The response to this objection is that the same fact can be efficacious for generating certain types of reasons but not others. More specifically, a fact can generate reasons for commitment even though it does not generate reasons for action. Consider again the case of our Neapolitan football fan. Let us call him Giovanni. The fact that Giovanni's father and grandfather were committed followers of SSC Napoli does not, without more, give Giovanni a reason to go to Stadio Diego Armando Maradona every time the team plays there. But the same fact might give Giovanni a reason to adopt a commitment to SSC Napoli—a commitment that would indeed generate new reasons for Giovanni to go the stadium when the team plays. Similarly for law: compliance with the rule

110 I thank an anonymous reviewer for raising this objection.

of law might not be able to generate reasons for action directly, even though it might generate reasons for commitment given that commitments can ground practical impact (and lead to voluntary compliance) over the long run for a specific agent.

So far, my concern has been with the rule of law as a *normative* reason. Now let us assume the argument fails—in other words, that there is no way to get from the value of the rule of law to a normative reason for adopting a commitment to law. Here, we can transition to a different role for compliance with the rule of law: acting as an *explanatory* reason for why agents might, as a matter of fact, adopt a commitment to law.[111] In this second role, even if the rule of law were not a normative reason why agents ought to adopt a commitment to law, it could provide the explanation for why many agents, as a matter of fact, might adopt such a commitment. It might act as a fact that *motivates* agents to adopt a commitment to law. The explanatory power of the rule of law will be significant particularly in circumstances (like ours) of substantive moral disagreement about the content of the law. This means that even if the rule of law were not—contrary to my argument—a reason in favor of agents adopting a commitment, it might still be an explanatory reason for why they in fact adopt such commitment.[112]

If I am right about this second idea, two upshots follow. First, whether law makes a genuine practical difference is partly a contingent question that depends, among other considerations, on the existence and nature of the commitments of each of the individuals in any given population. This, incidentally, opens the space for a central connection between empirical questions about descriptive, positive or sociological legitimacy, the rule of law, and normative questions about agents' reasons for action.[113] Second, the stability

111 Gowder, *The Rule of Law in the Real World*, 6.

112 One might object here that this would not fully vindicate agents' belief in the RPDT. I seem to be suggesting that agents may be motivated to adopt a commitment to law on the basis of a fact that would not actually be a normative reason in favor of a commitment. This would seem to suggest that the reason to comply with the law is grounded in a commitment that itself lacks a genuine normative reason supporting it. Here, however, we need to go back to the previous observation: permissible commitments are sufficient to generate reasons for action. Once we know that a permissible commitment exists (just like when we know that a permissible promise exists), the normative impact follows. We do not need to inquire into the grounds for a commitment (once we are above the threshold for permissibility) to recognize its normative impact.

113 There is a large social scientific literature that explores the connection between the disposition of individuals to comply with the law and myriad factors, including the perceived compliance of government authorities with the rule of law and procedural justice but also substantive alignment with individuals' moral judgments. See, e.g., Gur and Jackson, "Procedure–Content Interaction in Attitudes to Law and in the Value of the Rule of Law";

of governance through law requires enough people to adopt these commitments.[114] This means that—in conditions of political pluralism and moral disagreement—a stable and legitimate legal regime ought to comply with the rule of law, because this is a reason why agents who otherwise disagree about justice, fairness, and political morality should, or at least might, adopt commitments to law.[115] In this way, compliance with the rule of law can make a practical difference: it gives agents a reason why they should, or at least might, be committed to the law. But this difference translates into a change in agents' content-independent, sanction-independent reasons only as a consequence of their commitments.

2.4. Commitments, Joint Commitments, and Moral Reasons

The notion of a commitment to law that I have described so far involves a purely unilateral undertaking. At the same time, governance through law is not a unilateral activity—making, applying, interpreting, and following the law are all activities that are intelligible only in the context of, or against the backdrop of, a collective social practice. How does this very atomistic conception of a commitment as a unilateral, even purely internal, phenomenon fit with the collective dimension of law?

One possible answer would see unilateral commitments as the basic notion that figures in a more complete explanation of law's practical impact at a collective level. A successful and functional polity, from the perspective of its law's ability to make a difference to what citizens and officials ought to do, might be characterized by multiple individual commitments. It is plausible to think that a political community where the law is such that most, if not all citizens and officials, see the project of legal governance as one they are a part of and committed to, would be morally valuable. In these circumstances, these citizens could legitimately say that law truly counts as "our law," and that it makes a

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Jackson et al., "Why Do People Comply with the Law?"; Levi, Tyler, and Sacks, "The Reasons for Compliance with Law"; and Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law." My argument here does not directly address the questions explored by this literature, but it opens up, by way of theoretical conjecture, the possibility of new empirical questions about the connection between compliance with the rule of law, agent's attitudes and dispositions, and their behavior.

114 See Gowder, "What the Laws Demand of Socrates," 361, and *The Rule of Law in the Real World*, 5, 52, 144.

115 On the notion that commitments are based on a positive evaluation of the system, institution, or belief one commits to, see Trigg, *Reason and Commitment*, 44.

difference to what they ought to do, for the right reasons. Thus, in this imagined community, law would be such that agents are *jointly* committed to law.[116]

I am not sure whether this imagined society would be ideal. Some dissent and even apathy are part of a healthy democratic polity, too. In any case, the notion of commitment as a unilateral and individual phenomenon is, to my mind, the basic building block of the larger and more ambitious idea of joint commitments. Thus, in the rest of this paper, I will continue to focus on unilateral commitments.

But would these unilateral commitments generate *moral* reasons? The answer depends on one's conception of moral reasons. If we adopted—somewhat controversially—the substantive view that moral reasons are necessarily relational (in the sense that moral reasons necessarily involve schemes of relationships and accountability between agents), then a purely unilateral commitment, which by definition does not require uptake by third parties, would not be able to directly ground *moral* reasons under this conception.[117] This is certainly compatible with there being moral (i.e., relational) reasons that coexist with unilateral commitments. For instance, a judge might both be committed to the law and have made an oath or a promise to uphold it.[118] It is also possible that commitments might have downstream relational effects: a unilateral commitment might lead us to behave in ways that lead others to have certain justified expectations about our future behavior.[119] But from the perspective of this relational conception of moral reasons, only joint commitments would be able to generate genuine moral demands and reasons directly. From this perspective, only the parties who jointly commit might be accountable to each other, have the standing to demand conformity and perhaps even to react in certain ways to nonconformity, etc.[120]

But the relational conception of moral reasons is only one possible substantive view about them. Under a different view, not all moral reasons need to be relational. What we ought to do and how we ought to live would be moral

116 This picture, I think, is quite consistent with Toh's model of committed internal legal statements—particularly in cases of what Dworkin called "theoretical disagreements"—as suffused with the purpose of achieving joint acceptances of norms. See generally Toh, "Legal Judgments as Plural Acceptance of Norms."

117 See Chang, "Commitments, Reasons, and the Will," 77. For an example of a relational conception of moral reasons, see Darwall, *The Second Person Standpoint*.

118 In this situation, the coexistence of a commitment and an oath does not render either redundant. Internal commitments might have a value and weight that give oaths special significance and value, as argued by Chang, "Commitments, Reasons, and the Will," 78.

119 Chang, "Commitments, Reasons, and the Will," 77. See also 103.

120 Gilbert, "Commitment," 6.

questions, answered by moral considerations, even though the domain of such questions and answers is larger than the domain of relational demands. From this perspective, we could be morally required to do certain things without owing those actions to anyone. Within this different picture of morality, then, even a unilateral commitment could lead to things we morally ought to do.[121] Consider, for example, a view that characterizes the moral life by reference to the good life, and therefore sees moral reasons as reasons of personal virtue.[122] Under such a view, the virtuous agent might be required to make commitments to legal institutions that comply with the rule of law and abide by them, and the reasons generated by such unilateral commitments would be moral reasons.[123]

The central point here is that commitments have a genuine practical impact. Whether that impact is *moral* will depend on one's substantive understanding of morality and its foundations. I remain neutral in this paper about these issues. I also remain neutral about the importance of whether or not the label *moral* attaches to our genuine reasons for action.

2.5. Commitments, in the Opposite Direction

Before moving on, I should note a different possibility, recently suggested by Laura Valentini: perhaps other agents' commitments directly ground the RPDT. On this view, laws could be treated as a species of socially constructed norms that reflect a society's public commitments. Perhaps, under certain conditions, we ought to respect other agents' commitments because we ought to respect their agency. This is what Valentini calls the *agency respect view*.[124] The normative impact of laws would be grounded in our duties or reasons to respect people's agency and therefore their commitments (provided those commitments are genuine and morally permissible, and respect to them does not impose an excessive cost).[125]

In the particular case of law, "agency respect for those who are committed to the rule of law—i.e., for those who are committed to the bindingness of law—grounds an obligation to obey it."[126] As this suggests, there is a superficial similarity between my argument and Valentini's. But the arguments have a very

121 Gilbert, *Joint Commitment*, 391–94.

122 See Aristotle, *Nicomachean Ethics*; and Nagel, *The View from Nowhere*, 195.

123 Under this type of view, it seems to me, the distinction between moral and prudential reasons might end up collapsing. Whatever would be rational for the virtuous agent to do is also what would be morally right for them to do. See Annas, "Prudence and Morality in Ancient and Modern Ethics."

124 Valentini, *Morality and Socially Constructed Norms*, 10.

125 Valentini, *Morality and Socially Constructed Norms*, 82, 90, 168.

126 Valentini, *Morality and Socially Constructed Norms*, 150.

different structure: while my argument claims that the practical impact of law can be grounded in the commitments of law's addressees, her view is that the practical impact of law is generated by a duty to respect the commitments of those who are committed to law.[127] We have an obligation (within certain constraints), grounded in respect for agency, to obey the prescriptions of socially constructed norms—and legal norms are a specific type of those norms.[128] In other words, while on my view, commitments generate reasons for action for the committing agent, on Valentini's account, other agents' commitments trigger a duty to respect them.

I do not think Valentini's argument can vindicate a general duty to obey the law in our contemporary circumstances (a conclusion that she perhaps would be happy to accept), where most citizens are at worst alienated from the mechanisms of law production and at best happily (and perhaps rationally) uninterested in them (even if they might be committed to the law as a whole). My sense is that many legal norms simply do not reflect, in the robust sense that would be required for the agency respect view to kick in, the commitments of a majority of our fellow citizens.

My concern here is that in contemporary legal systems (even democratic ones), the number and complexity of laws is such that it is not plausible to say that each particular legal norm of any given legal system truly reflects the commitments of the population. Perhaps we should respect people's agency. But I do not see how we can credibly claim that the norms of most legal systems are apt, in their totality, to reflect the actual commitments of citizens. The worry is not that a commitment to particular norms is downstream from, or an effect of, a larger commitment to law.[129] The worry, rather, is that the sheer number of statutes, regulations, and precedents in contemporary legal systems makes it hard to see why respect for agents would generate duties to obey the norms contained in such materials.

Valentini is of course aware of the fact that, in contemporary legal systems, most citizens ignore of much of the content of the law.[130] In her view, plausibly,

127 Another important difference is that my account attempts to vindicate the RPDT as a relatively content-independent claim, whereas Valentini offers her argument to vindicate a duty to obey the law only when doing so "does not excessively burden one's agency" (such as where legal requirements contradict the agent's "deepest religious or ethical convictions"). Valentini, *Morality and Socially Constructed Norms*, 169. This does not make her argument "content dependent," she argues, but rather content sensitive. The explanation for the duty to obey is not determined by the law's content (170).

128 Valentini, *Morality and Socially Constructed Norms*, 151.

129 See Valentini, *Morality and Socially Constructed Norms*, 96.

130 Valentini, *Morality and Socially Constructed Norms*, 43–46.

a commitment might be indirect and therefore not rely on any concrete and specific knowledge about the content of the law. Such indirect commitment, instead, might simply be a commitment that "everything that qualifies as law" in a particular legal system "should function as a standard of behavior."[131]

This is a plausible idea. But while we might have reason to respect some agents' commitments, it is hard to see how this reason communicates to norms those agents are not aware of. I agree with Valentini that because of agents' commitments, the normative status of certain behaviors might depend on the content of socially constructed norms, including legal norms.[132] But to my mind, the commitments that generate this impact are those of the addressee of the norm rather than those of citizens in general. There is an important asymmetry between the normative impact of commitments for the agent and for third parties. While my commitment to the legal system might explain why I have a reason to act in conformity with its prescriptions, it is hard to see why the commitments of other agents to the legal system or the rule of law impose on me duties to act in conformity to norms *the very agents whose agency demands respect are unaware of and uninterested i*n. The asymmetry, then, is an asymmetry between what I can legitimately impose *on myself* through my commitments, and what my commitments can impose *on others*. In the first case, it is plausible that a commitment to the legal regime gives normative impact to its particular prescriptions for the committing agent, even if the agent is not committed to each of those prescriptions in particular (just like I can legitimately obligate myself to perform a contract of adhesion even though I have not read the fine print). But there is something strange about the notion that an agent's commitment to the legal regime, in similar conditions of lack of direct commitment to particular norms, could make those norms binding on third parties.

3. THREE OBJECTIONS

In this section, I address three potential objections to the argument so far.

3.1. No General Reason?

The first potential objection is that my argument cannot ground the RPDT as a general matter, even within a specific jurisdiction. Given that commitments are personal and voluntary, many individuals might simply not make them. Within any legal system, law—even if it complies with the rule of law—will not be able to generate reasons for action for every member of society.

131 Valentini, *Morality and Socially Constructed Norms*, 45.

132 Valentini, *Morality and Socially Constructed Norms*, 98.

The objection is in fact entirely correct. But I want to suggest that this is a strength of the account.[133] To explain why, let me—very roughly—divide the population into well-off citizens, government officials, and worse-off citizens. Assume, moreover, that the legal regime complies with the rule of law but is also moderately unjust, and that its injustice particularly affects the third group.[134]

The first two groups have a significant normative reason to adopt a commitment to the law (assuming the injustice of the regime is indeed moderate): the law's compliance with the virtue of legality. There are also additional explanatory reasons that might explain why members of these groups might adopt the relevant commitment. Well-off citizens in this society are benefited by law. It also seems likely that they will tend to perceive the law as just. In other words, compliance with the rule of law, self-interest, and a genuine perception about law's justice might all contribute to explain their commitments to the legal system. Government officials, particularly but not exclusively at the highest levels, are also benefited by legal institutions. The legally constructed government structure is a source of their income and a channel for their professional and political ambitions. For many officials—for instance, career politicians and judges—their jobs or positions might be sources of pride, meaning, identity, etc.[135] Thus, there are many potential explanations—compliance with the rule of law, self-interest, a sense of personal and professional identity, etc.—for why these officials might assume a commitment to the legal system.

Finally, and in contrast, citizens who are unjustly worse-off in our imagined society will perhaps experience the legal system as alien, threatening, or at least distant.[136] They might not benefit in any significant way from the legal protection of capital. They are, as I stipulated, the victims of injustice. For these citizens, the range of explanatory reasons for a commitment to the legal system is significantly smaller than for the two previous classes of agents. This seems to suggest that as an empirical fact, there will be less commitments to law within this segment of the population. The main normative reason these agents will have to adopt a commitment to law will be the legal regime's compliance with

133 In this respect, my account is compatible with work on pluralism about political obligation, and particularly with the work of those who think there can be different grounds for the practical impact of law, which might apply differently to different agents. See Simmons, *Moral Principles and Political Obligations*, 36–37; Vasanthakumar, "Pluralism in Political Obligation," 320; and Wolff, "Pluralistic Models of Political Obligation," 17–19.

134 Again, if the situation were such that the society is not moderately unjust but systemically and severely unjust, I would accept that there would be no reason to commit to the law. More strongly, perhaps in this situation the victims of systemic injustice would have reason to commit to change, resist, and perhaps break the law. See Sinha, "Virtuous Law-Breaking."

135 Culver, "Legal Obligation and Aesthetic Ideals," 205–6.

136 See Hertogh, *Nobody's Law*.

the thin demands of the rule of law. This reason might not be sufficient, as an empirical matter, to motivate them to make such a commitment.

The view of commitment as a ground of law's practical difference explains why there might be different degrees to which law makes such a difference across a large population. This observation should lead us to insist on at least one more reason to be concerned not just about the rule of law but also about law's justice: effective governance through law requires the commitments of the majority of the population to the legal system.[137] The observation can also lead us, as I noted above, to see the account of unilateral commitment I have provided as the first step towards a more ambitious ideal of joint (though perhaps not universal) commitment. Under that ideal, the law ought to be such that it could ground the commitment of most citizens. Compliance with the value of legality gives agents a reason to be committed to law—and if the value of legality is coupled with other legitimate motivations for large segments of the population to adopt such a commitment, then this can lead to joint commitments that make a stable legal regime possible and the source of genuine reasons.

3.2. The Peremptoriness Objection

A second potential problem with my argument is focused not on commitment but rather on my concern with law's practical difference—as expressed in the RPDT—instead of the more traditional concern with the duty to obey. According to this objection, law does not just aim to have an unspecified impact on agents' deliberation. The law aims to exclude or preempt deliberation on the merits of the behavior, and legal obligations contain a practical verdict: the mandated behavior ought to be performed (or the prohibited behavior avoided).[138] The law aims to "settle the matter."[139] The idea can be framed in Razian terms: a legal directive is a reason for not acting on the basis of (at least some) reasons that conflict with the directive.[140] Legal obligations have a built-in exclusionary force that protects them against conflicting reasons.[141]

If that is the case, the objection goes, a commitment as a ground for law's practical difference—but not necessarily as a ground for peremptory obligations—is inconsistent with the structure of legal obligation and the claims that law makes. What we need to explain is not whether law's prescriptions can have

137 Gowder, *The Rule of Law in the Real World*, 155.

138 Essert, "Legal Obligation and Reasons," 69–70.

139 Essert, "Legal Obligation and Reasons," 72.

140 Raz, "The Problem of Authority," 1022.

141 Gardner and Macklem, "Reasons," 466.

a practical impact independently of their content and the sanctions associated to their breach, but rather whether and when they generate genuine *obligations*.

My response to this objection is twofold. First, the view that law necessarily claims to preempt deliberation is not obviously true. Second, assuming *arguendo* that law does make this claim, my argument can explain how that claim might empirically succeed in certain cases and not in others, and yet in the latter it might still have a practical effect.

The first part of my response rests on the answer to a fairly basic question: What do legal authorities aim to do when they enact a duty-imposing legal norm? The most plausible and natural answer is that they attempt to tell the agents subject to the norm what to do.[142] From a legal point of view, it is strictly irrelevant whether the explanation of the agent's lawful behavior resides in self-interest, complacency, altruism, fear, compliance with moral norms that the law tracks, or a cooperative or public-minded spirit.[143] As long as the behavior externally coincides with what is legally mandated, that is sufficient. On this view, law's claim is a claim to direct and control behavior, not (or at least not necessarily) practical deliberation.[144] Law is interested in external conformity to its prescriptions. Whether the prescriptions are the explanatory reason for conforming behavior is legally irrelevant.[145]

This does not deny that law might sometimes (and perhaps usually) in fact preempt our deliberation. Agents' commitments might be such that the law ends up preempting deliberation. But when this happens it is not because of the nature of law's claims or the structure of legal obligation, but rather because of what the commitments of the relevant agents happen to be.

Let me explain. Agents' commitments might differ *in intensity*. They might be such that they give law's mandates only a *pro tanto*, defeasible weight. They might also be stronger and treat those mandates as particularly weighty reasons for action. In both of these cases, the agent's commitment leads to legal norms generating reasons—but not to the exclusion of other reasons. Moreover, it seems plausible to believe that commitments to law, as a general matter, might be stronger than other commitments: as a class, commitments to law might, on average, generate reasons that are significantly weightier than those generated by other mandatory or permissible commitments.

142 Ehrenberg, "Law's Authority Is Not a Claim to Preemption," 51–52.

143 Schauer, *The Force of Law*, 51.

144 Ehrenberg, "Law's Authority Is Not a Claim to Preemption," 54.

145 In other words, the law might be interested in conformity rather than compliance. On this distinction, see Raz, Practical Reason and Norms, 178–79; and Sevel, "Obeying the Law," 197. See also Scott Hershovitz, "The Authority of Law," 67. For a similar view to the one I adopt here, see Valentini, *Morality and Socially Constructed Norms*, 153.

However, agents' commitments might also differ *in structure*. An agent's commitment might not just give law's mandates weight. It might also have a second-order dimension that treats those mandates as exclusionary reasons. Certain agents—to my mind, the most obvious example being some public officials—might assume this type of "second-order commitment" (as opposed to a first-order commitment that only generates first-order reasons) that effectively preempts deliberation about the legally prescribed courses of action.[146] Nothing in my argument precludes this possibility. In the case of second-order commitments, agents let the law *control* their deliberation. In cases of first-order commitment, agents merely let the law *influence* their deliberation.[147] This is sufficient for the RPDT.

This means that law can sometimes be exclusionary for specific agents. It can guide practical deliberation by manipulating and excluding reasons and by preempting further deliberation. But this need not be the only way in which law makes a practical difference. The distinction between first-order and second-order commitments shows that law can, in fact, make a practical difference without acting as an exclusionary reason. Which situation—merely first-order practical impact or also second-order practical impact—is more common becomes, then, an empirical question. And perhaps the defender of peremptoriness might at this point want to argue that the law works as a source of exclusionary reasons for most of the population. That is a possible claim to make, but whether it is right again turns on sociological facts. More importantly, such an argument is no longer a claim about the nature or structure of legal obligations across the board, and is compatible with the practical impact of legal sources being partly determined by individual commitments.

3.3. *A Different Name for Consent?*

According to consent theories, states act permissibly when their exercises of coercion can be connected to the consent of the individuals who are subject to them.[148] Publicly available laws are, on this picture, the subject matter of consent: when an individual has consented to state power, they have consented to the state acting in certain ways specified by law.

A potential critic might think that the account I have offered is a specific account of what it is to consent to state power: to consent to state power is to adopt a commitment to its law (which sets out how the state is to exercise

146 As Raz notes, "one may regard oneself bound to disregard conflicting reasons because one has committed oneself to do so." Raz, "Reasons for Action, Decisions and Norms," 141.

147 I take the distinction between control and influence from Bratman, *Intention, Plans, and Practical Reason*, 16.

148 See Dagger and Lefkowitz, "Political Obligation."

its power and in what circumstances). At best, my argument is only a subtle precisification of what counts as consent. At worst, it just gives consent a different name.[149]

In my view, this potential objection captures something important: commitment and consent have certain common characteristics. For example, one could believe that consent is something like a specific, individuated, and communicated commitment (recall here that a commitment need not have such traits, because it might come about incrementally and might be *in foro interno*). More importantly, both commitment and consent as grounds of law's normative impact are consistent with a broadly liberal commitment to individual agency. However, in principle, it seems plausible to think that consent requires communication or at least common knowledge.[150] Moreover, this communicative act—or this act by which common knowledge is generated, or even the act by which a person consents without communicating anything—needs to be a single act that we can identify, and from which the ensuing normative consequences follow. This, precisely, has been the traditional problem for consent theories of political obligation: it is extremely difficult to identify a single act that might communicate or make apparent a citizen's consent to the law of the state, even implicitly.[151]

Commitment is, in this regard, different from consent—so different that we can be committed to a state's law without having ever consented to its authority. A commitment does not necessarily derive from a single identifiable act. And a commitment need not be communicated or made apparent to be normatively effective. Again, as we have seen, a commitment can be the growing, evolving, and ongoing adoption of a personal attitude *in foro interno*. This idea can perhaps be associated metaphorically to the notions of consent, promise, and contract.[152] This should be unsurprising because there are, as I have noted, some resemblances and connections between these communicative acts and a commitment, and the latter is the basic building block of a joint commitment (which is structurally similar to—and perhaps part of the same family as—the notions of agreement, consent, and contract). These resemblances and connections should not, however, lead us to treat commitments as a spe-

149 The fact that some writers on political obligation sometimes connect the ideas of consent and commitment gives some additional plausibility to the concern. See Simmons, *Moral Principles and Political Obligations*, 58, 69, 77.

150 See Dougherty, "Yes Means Yes"; and Gerver, "Inferring Consent Without Communication," 30–32.

151 See Smith, "Is There a Prima Facie Obligation to Obey the Law?" 960–61.

152 See Dyzenhaus, *The Long Arc of Legality*, 183–84; Gough, *The Social Contract*, 248; and Simmons, "Associative Political Obligations," 255n25.

cies of consent—particularly given the multiple problems consent theories are subject to. Instead, they should lead us to embrace commitment as the notion that the ideas of consent and contract can capture only metaphorically. The more general category of commitment does the work that consent theorists of political obligation want it to do without requiring us to resolve problems of communication and individuation.

This leads me to a significant difference between consent and commitment. Such difference points to a very distinct view of legal authority, with potentially important implications both for jurisprudence and political philosophy—and hence I can only mention it, without fully elaborating the idea here. The notion of consent is closely tied to a picture under which exercises of legal authority are not complete, fully successful, or legitimate as exercises of legal authority without consent of the governed. The enactment of law, on this picture, is an exercise of a power that can be fully apt as a binding, legitimate exercise of authority only if there is consent.[153] On the somewhat deflationary picture offered here, instead, the exercise of legal authority is just the issuance of a behavioral prescription. A commitment is not, on this picture, a legitimacy or success condition on the exercise of normative power, but instead a determination that generates new, noninstrumental reasons for compliance with legal directives. On this view, commitment is an active volitional engagement, not just in the sense that it is an exercise of agency (in this regard, consent is similar). More importantly, it is an active engagement because it does not merely change the normative situation of actions performed by others—in our case, the state or its personnel—but instead directly changes what the committing agent has reason to do. Commitment is not merely a condition on the justification, permissibility, or legitimacy of someone else's action. It is a source of reasons for action for the committing agent.[154]

4. Conclusion

The argument I have offered in this paper accepts that skeptics might be right—and therefore that law might be, in and of itself, normatively inert. Still, the law's behavioral prescriptions can genuinely impact what agents ought to do, independently of the law's content and the associated sanctions, if agents adopt a commitment to law. When agents do in fact adopt such a commitment, they

153 See generally Waldron's thoughts about acquired political obligation in "Special Ties and Natural Duties."

154 In this way, commitments as the grounds for the RPDT can contribute to respond to concerns about how duties to obey the law might threaten the moral self. See Smith, "Political Obligation and the Self."

make RPDT true for themselves. As I have argued, the legal regime's compliance with the rule of law gives agents a reason why they ought to or at least might adopt the relevant commitments. And in the circumstances of politics, the rule of law is a central way in which legal systems can give agents who otherwise disagree about justice, morality, and fairness, reasons to make commitments to law.[155]

In this way, the argument of this paper has shown that (i) compliance with the rule of law is normatively significant because it gives agents a reason to assume a commitment to the relevant legal system; and (ii) whether law makes a genuine normative difference, independently of its content and the sanctions it threatens for noncompliance, can turn on whether the relevant agents have in fact assumed a commitment to the legal system.[156]

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155 On the circumstances of politics, see Waldron, *Law and Disagreement*, 102.

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"I THOUGHT WE WERE FRIENDS!"

FRIENDSHIP AND THE NORMATIVITY OF INFLUENCE

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THE NOTION that relationships affect the appropriateness of interpersonal influence is intuitive, almost to the point of banality. Consider, for example, friendship. We generally take it that friends are permitted (and often expected) to offer advice when a mere acquaintance may not, to support or encourage us in ways that might be unwelcome coming from a stranger, or to tell us hard truths that even a romantic partner may be reluctant to share. Friends are often permitted to blame us and offer criticism when others are not and may even be blameworthy themselves for not doing so. Though it may seem obvious that friendship shapes the normativity of interpersonal influence, it is far less obvious how it does so. Many theorists recognize that interpersonal relationships factor into the normativity of influence, yet extant treatments of the nature and role of the relevant relationship-based considerations remain somewhat gestural. Since it is important to us not to give (or be a) bad influence when it comes to our friends, we have a stake in understanding how this relationship shapes the normativity of interpersonal influence.

Focusing on examples of rational influence (that is, influence via the provision of good reasons) and drawing on social psychological research and philosophical treatments of special relationships, I argue that attending to a triad of features partly constitutive of friendship can illuminate the normative considerations at stake in influencing friends. This paper consists of four sections. In section 1, I introduce and analyze a case using extant accounts of the normativity of (rational) influence to demonstrate the need for a more robust and comprehensive framework for assessing particular instances of influence.[1] In section 2, I identify and discuss three key features of friendship that can serve as the basis

1 Herein I use 'rational influence' and 'influence' to refer to influence via the provision of good reasons. My goal is not to argue what counts as a good or bad reason but to focus on a form of influence that is often treated as the paradigm of acceptable influence in the relevant philosophical literature. Although my analysis centers on rational influence, the proposed framework may also be applicable to nonrational forms of influence, e.g., certain kinds of manipulation and "nudges."

for such a framework. In section 3, I explain how those features bear on the normativity of influence. Finally, in section 4, I reassess the case discussed in section 1 in order to demonstrate what the proposed framework can reveal about how relationship-based considerations shape the normativity of influence.

1. Assessing the Normativity of Rational Influence

There is a longstanding presumption in the philosophical literature that among the methods of influence available to us, rational influence—influence via the provision of good reasons—is the paradigm of appropriate influence. As George Tsai observes, "There is, of course, something deeply right in the idea that rational persuasion is generally a respectful method of influence, that its use is compatible with acknowledging that the person on whom it is used ultimately has the right to decide for herself how to live."[2] But not all instances of such influence are on a moral par. As some authors have recently argued, sometimes even the provision of good reasons can be disrespectful, intrusive, or insulting.[3] For example, someone might offer good reasons in a way that is objectionably paternalistic or on a matter that is not their business.[4] Among the many factors that bear on the normativity of influence, the relationship between the influencer and influencee plays a substantial role. The expectations, obligations, permissions, and prohibitions bound up with these relationships help shape the normative space between influencer and influencee. However, it is not always clear what effects these elements have on the appropriateness of an instance of influence. Consider the following case of rational influence between friends.

> *Test*: Phelipé has been studying diligently for an important test tomorrow. In need of a break, he is considering attending a party with friends with whom he has in the past tended to stay out too late, at the expense of his academic performance. Phelipé has recently endorsed a new

2 Tsai, "Rational Persuasion as Paternalism," 79. I use the term 'influence' rather than 'persuasion' to minimize confusion, as the latter is sometimes used as a synonym for influence via the provision of reasons and thus would not admit of "nonrational" forms. Despite this terminological difference, I take it that Tsai and I are discussing the same phenomenon. Tsai, for example, characterizes "rational persuasion" as "the activity of offering reasons, evidence, or arguments to another person" and contrasts this form of influence with coercion, manipulation, rhetoric, and deceit (78). Thanks to an anonymous reviewer at *JESP* for prompting me to clarify this point.

3 See, for example, Cholbi, "Paternalism and Our Rational Powers"; Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation"; and Tsai, "Rational Persuasion as Paternalism."

4 See Herstein, "Justifying Standing to Give Reasons."

> commitment prioritizing his education and is eager for the opportunity to prove himself. Phelipé's friend Alex, however, believes Phelipé's optimism is unjustified. Citing relevant examples of Phelipé's past failures of judgment and self-control, Alex tries to dissuade Phelipé, explaining that the evidence suggests that if Phelipé attends the party, he will likely fail to follow through on his commitment and suffer significant consequences.

How ought we evaluate Alex's attempt to influence his friend? On a standard assessment, Alex has behaved appropriately, protecting his friend's welfare through the most respectful means of influence available. In offering Phelipé reasons rather than, say, attempting to manipulate or deceive him, Alex has shown respect for the authority of Phelipé's will and his capacities as a competent practical reasoner. Nevertheless, one might reasonably think that something in the situation has gone awry.

Those with such intuitions might avail themselves of another assessment currently on offer, according to which Alex's influence is objectionably paternalistic despite operating via the provision of good reasons. That is, it fails to properly respect some aspect of Phelipé's rational or practical agency. As Seana Shiffrin explains, "The essential motive behind a paternalist act evinces a failure to respect either the capacity of the agent to judge, the capacity of the agent to act, or the propriety of the agent's exerting control over a sphere that is legitimately her domain."[5] On this characterization, an instance of influence might be objectionable because it interferes with or preempts the operation of another's rational or deliberative faculties. Alternatively, the influence might be disrespectful or intrusive because it is not a matter of the influencer's concern. Finally, the intercession could be objectionably paternalistic because it is motivated by a belief that the influencee's judgment or deliberative capacities are inferior, and the influencer attempts to substitute his or her own judgment.[6] However, it is not obvious that any of these concerns account for the intuition that there is something suspect about Alex's influence.

First, Alex's influence does not appear to preempt or occlude a deliberative opportunity for Phelipé. Although Phelipé's deliberations may not yet be complete, he has had a chance to canvas and weigh what he takes to be the relevant considerations prior to Alex's influence. Second, as Phelipé's friend, this sort of thing does seem like Alex's business. The two friends share the kind of history that generates an implicit permission to exchange reasons, even on topics like this that might be considered too personal for others to permissibly

5 Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," 220.

6 See Cholbi, "Paternalism and Our Rational Powers," 126–27.

intercede.[7] Finally, although Alex does seem to think that Phelipé's judgment may be clouded by unfounded optimism, it is not clear why Alex's intervention would constitute an effort to substitute his own judgment for that of Phelipé's. Although Alex's influence does not appear to meet the criteria for objectionable paternalism, the literature suggests yet another factor that bears on the appropriateness of his influence.

Some authors who argue that the provision of reasons can sometimes be objectionably paternalistic have suggested that this can turn in part on the relationship between the influencer and influencee.[8] However, these treatments of the nature and role of the relevant relationship-based considerations remain largely suggestive and primarily focused on relationship participants as rational deliberators. Those who worry there is something normatively suspect about Alex's influence that is not, at least in the first place, reducible to respect for Phelipé *qua* rational agent require an alternative theoretical toolset. And even those who think Alex's influence appropriate can benefit from a more structured framework for explaining how the fact that one stands in a friend-relation to the influencee can bear on the normativity of one's influence. In what follows, I explore three key features of friendship that can provide the basis of such a framework.

2. THREE KEY FEATURES OF FRIENDSHIP

In this section, I highlight three central features of friendship that bear on the normative status of influence: care, vulnerability, and trust. While this list is not exhaustive of the relationship-based considerations that figure into the normativity of influence, they are key features of (arguably) all interpersonal relationships and help us understand the normative significance of other relationship factors.[9] As such, they are promising candidates for a preliminary framework for assessing how relationships affect the normative status of influence. In what follows, I examine each of these features in some depth to illuminate their

7 See Tsai, "Rational Persuasion as Paternalism."

8 See, for example, Cholbi, "Paternalism and Our Rational Powers"; and Tsai, "Rational Persuasion as Paternalism."

9 See LaFollette, *Personal Relationships*; and Guerrero, Andersen, and Afifi, *Close Encounters*. Other factors such as power dynamics, mutuality and reciprocity, and interdependence (of the goals and goods of the relationship) also affect the normative landscape. However, I argue that understanding the considerations resulting from care, vulnerability, and trust is central to understanding how these factors bear on the normativity of influence in different relationships.

function within friendship, shedding more light on how they might impact the normativity of influence.

2.1. Care

Friendship is marked by care for one another's well-being, as well as an expectation that each will act to support that well-being.[10] Caring about another involves being invested in them, having a stake in and taking an interest in their well-being.[11] When we care about someone, not only do we want them to flourish, but we stand to gain or lose from fluctuations in their well-being, and we are directly affected by how well or poorly they fare. We experience joy at their successes, concern over their perils, and sorrow at their setbacks. And we do so not merely from a perspective of self-interest but out of concern for the other for *their* sake. Friends take part in each other's fortunes and follies, rely on each other for support, confide in one another, and are disposed to do so from a certain kind of mutual concern and affection.[12] Genuine care of this kind also requires that we attend to the object of care, that we are vigilant about what happens (or might happen) to it.[13]

Friends also see each other as a source of import and, as such, see each other's needs and interests as sources of reasons and special duties.[14] In caring about another, we are disposed to attend to considerations pertaining to them and to respond to the reasons (real or apparent) that those considerations generate.[15] For example, that a dear friend is immensely fond of the symphony gives me a reason to accept his invitation to accompany him or provide good reasons for declining. Declining simply because the symphony is "not my thing" may not suffice since treating this reason as decisive may fail to prioritize my friend's interests as I should, given my care for him.

Importantly, the scope of care (the aspects of another's well-being to which the elements of our orientation of care are sensitive) varies by relationship.

10 Annis, "The Meaning, Value, and Duties of Friendship."

11 Jaworska, "Caring and Internality."

12 Scanlon, *Moral Dimensions*. Sometimes we use the term 'concern' to capture a thinner psychological orientation akin to the kind of general concern or goodwill we ought to have toward our fellow human beings. I take it that Scanlon's use of concern here is meant to capture a thicker kind of orientation, like the one described by Jaworska. Thanks to an anonymous reviewer at *JESP* for prompting me to clarify this.

13 Helm, *Love, Friendship, and the Self*.

14 See Annis, "The Meaning, Value, and Duties of Friendship"; Brink, "Impartiality and Associative Duties"; Jeske, "Friendship and Reasons of Intimacy"; and Nelkin, "Friendship, Freedom, and Special Obligations."

15 Seidman, "The Unity of Caring and the Rationality of Emotion."

For example, a tutor may care about her pupil, but the organizing focus of that care is the student's academic performance, and so her care may not include anything beyond that scope. Other aspects of the student's well-being, such as his self-esteem or sense of security, may be included but only *qua* the role they play in his academic well-being. Friendships, on the other hand, are marked by mutual care for a friend's overall well-being.[16] This includes things like self-esteem and security, as these affect our overall well-being, but it would include things like academic performance, for instance, only insofar as they contribute to the friend's overall well-being.

2.2. Vulnerability

Friendships also give rise to vulnerabilities beyond those associated with care. Importantly, we open ourselves up to disappointment and various harms by relying on friends to fulfill important needs and by affording their view of us considerable weight in our own deliberations, attitudes, and self-conception.

Among the marks of friendship is that it contributes to our well-being by fulfilling a variety of psychological needs like the needs for emotional attachment, to belong, to feel loved and appreciated, and to care for others.[17] We often view friends as sources of guidance, recognition of our own self-conception, trust, and autonomy support.[18] When we rely on others to fulfill these needs, we position them to promote or to diminish our well-being in significant ways. For instance, whether a friend responds to personal self-disclosures with criticism or support can affect one's self-esteem, sense of validation, personal identity, and overall well-being.[19]

16 Familial relationships, especially between adult siblings, also often involve care for overall well-being, though care does not play the constitutive role it does in friendships. While being someone's friend, spouse, or parent typically involves being subject to certain duties of care and trust, it is not clear that we are beholden to a particular set of norms simply in virtue of being someone's sibling. Due to their shared histories, intimate daily contact, and relatively egalitarian relations, siblings can become friends and therefore subject to friendship's norms and expectations. But this parallel relationship between siblings need not arise. For more on the similarities and differences between sibling relationships and friendships, see Cicirelli, *Sibling Relationships Across the Life Span*.

17 Guerrero, Anderson, and Affifi, *Close Encounters*.

18 Autonomy support involves responsiveness to the other, acknowledging the other's perspective, and encouraging self-initiation (Deci et al., "On the Benefits of Giving as Well as Receiving Autonomy Support"). Recent research has found that mutual autonomy support in relationships like friendships promotes participants' well-being, secure attachments, and relationship satisfaction, and these benefits accrue from both giving and receiving autonomy support. See Deci et al., "On the Benefits of Giving as well as Receiving Autonomy Support."

19 Vangelisti and Perlman, eds., *The Cambridge Handbook of Personal Relationships*, 218.

Failures to fulfill personal needs can be particularly damaging in cases where relationship partners also serve as attachment figures. In some adult friendships, for instance, relationship partners can function as a safe haven and serve as a secure base that helps engender in the other a kind of confidence that enables them to take risks and venture beyond their comfort zone.[20] Those who stand in these special relationships to us, whether in virtue of mutual caring or attachment relationships, are poised to support and empower us but also to undermine crucial aspects of our well-being. This is made even more apparent by the fact that we tend to give extra weight to the opinions of those with whom we share close relationships.

We often care most about the opinions of those with whom we stand in special relationships like friendship, and our interest in maintaining those relationships gives us reason to place more value on how our friends respond to our disclosures. We typically want those whom we like to like us in return, and when we reveal ourselves to them, it matters to us how they interpret us, whether they value our disclosures, and whether they accept or support the aspects of our identities that we disclose.[21] Further, it is expected we place some special value on our friends' perspectives on important matters in our lives. Given these needs and expectations, friends are well positioned to harm or help us in ways that others cannot and to impact us in sometimes profound ways.[22]

2.3. Trust

The last key feature that bears on the normative import of influence is trust. In friendships, trust promotes intimacy and self-disclosure, enables us to navigate and cope with the vulnerabilities that stem from friendship's complex expectations, and can serve as an empowering form of support and influence.

Although accounts of the nature of trust are rich and varied, there are a few generally accepted aspects of the phenomenon that ought to be noted. First, we can distinguish between the attitude of trust that we take toward others and a bond of trust that implies mutual acceptance and reciprocity of the attitude of trust. It is this *bond* of trust that has been identified as a particularly important aspect of friendship.[23] Second, trust is often taken to be a species of reliance that is distinct from *mere* reliance.[24] For example, I may merely rely on

20 Wonderly, "On Being Attached."

21 See Greene et al., *Privacy and Disclosure of HIV in Interpersonal Relationships*.

22 L'Abate and Baggett, *The Self in the Family*, 135.

23 See, for example, Annis, "The Meaning, Value, and Duties of Friendship"; Thomas, "Friendship"; and Vangelisti and Perlman, eds., *The Cambridge Handbook of Personal Relationships*.

24 See, for example, Baier, "Trust and Antitrust"; Faulkner, "The Problem of Trust"; and Goldberg, "Trust and Reliance." What distinguishes trust from mere reliance is disputed,

fellow drivers to follow the rules of the road yet not trust them to do so. Finally, trust makes us susceptible to certain negative reactive attitudes—namely, hurt feelings and betrayal.[25] As some argue, a readiness to feel betrayal rather than, say, anger or resentment helps distinguish trust from mere reliance.[26] Of the accounts of trust currently on offer, I favor a care-based account that is well suited to accommodate this set of features and fits well in the context of friendship and other close interpersonal relationships.[27]

On this care-based view of trust, when we trust, we invite the trusted to adopt a particular orientation of care toward us—to make what matters to us matter to them, for our sake.[28] When we trust those with whom we do not have a close personal relationship, the care sought by the truster is a penumbral form of the care seen in close relationships. But in friendships, the bond of trust calls on the deeper and more extensive care that is characteristic of the relationship. This bond involves a mutual understanding that one's trust is accepted and that the trusted will manifest appropriate care for the truster's interests in the relevant domain. Thus, the bond of trust encourages self-disclosure in two ways. First, it provides reassurance that the disclosure will be treated with the support and sensitivity characteristic of the friendship (not merely with confidentiality), and second, it generates normative pressure to reciprocate in kind.[29]

It is important to note that although trust is often sensitive to evidence of (un)trustworthiness, it is not typically subject to the same evidentiary constraints we ordinarily take belief to be. For instance, in relationships where the bond of trust is present, we may owe it to a friend to give them the benefit of the

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and some eschew the distinction altogether. See, for example, Hardin, *Trust and Trustworthiness*; and Hawley, "Trust, Distrust and Commitment."

25 See Baier, "Trust and Antitrust"; Holton, "Deciding to Trust, Coming to Believe"; Jones, "Trust and Terror," 17; McGeer, "Trust, Hope and Empowerment"; O'Neil, "Lying, Trust, and Gratitude"; Hawley, "Trust, Distrust and Commitment"; Hinchman, "On the Risks of Resting Assured"; and Kirton, "Matters of Trust as Matters of Attachment Security."

26 McLeod, "Our Attitude Towards the Motivation of Those We Trust," 474. It is also important to distinguish between the act of betrayal and the feeling of betrayal. Notably, susceptibility to the feeling of betrayal adds a kind of vulnerability distinct from (though not wholly unrelated to) the vulnerability associated with mere reliance. See Duncan, "The Normative Burdens of Trust."

27 See Duncan, "The Normative Burdens of Trust."

28 Duncan, "The Normative Burdens of Trust."

29 The bond of trust also helps distinguish intimate self-disclosure from mere openness. For example, despite their mutual professional trust, two therapists disclosing personal information to one another in confidentiality is not likely to generate intimacy of the kind characteristic of close friendships.

doubt on some matter even in the face of evidence to the contrary.[30] Notably, even in cases where a person is not initially up to fulfilling the expectations of the truster, trust can nevertheless empower the trusted to rise to the occasion, which can give us reason to extend it.[31] The potential scaffolding effect of trust, wherein the truster draws the trusted as someone capable of meeting the truster's expectations and expresses hopeful confidence in them, can make trust a powerful and important form of influence, as well as a source of autonomy support, especially among friends.

3. THE NORMATIVITY OF INFLUENCE

Care, vulnerability, and trust are not merely important features of interpersonal relationships—they are also strongly implicated in the basic norms governing interpersonal influence. In addition to the expectation that influence should be respectful of the influencee *qua* practical reasoner (e.g., avoiding objectionable paternalism), we can identify at least three further normative standards we generally take to govern interpersonal influence. First, the influencer should have *standing* to influence in the manner and domain in which they attempt to engage the influencee.[32] Second, the influencer should take steps to avoid or minimize reasonably foreseeable harm that could arise from the influence. Finally, the influence should be adequately conducive to uptake by the influencee.[33] In what follows, I illuminate some of the central ways in which care, vulnerability, and trust affect whether an instance of influence adheres to or violates these norms.

3.1. Care and Standing

Certain forms of influence manifest a kind of care that only certain people in our lives are positioned to manifest appropriately. For example, a helpful stranger might manifest appropriate care about your gustatory pleasure when

30 See Stroud, "Epistemic Partiality in Friendship."

31 McGeer, "Trust, Hope and Empowerment."

32 See Tsai, "Rational Persuasion as Paternalism"; Jonas, "Resentment of Advice and Norms of Advice"; and Herstein, "Justifying Standing to Give Reasons." The literature on standing, including standing to blame, is far too rich to canvass here. Although authors have identified several factors that can affect one's standing to influence in certain ways, I have in mind here only what is referred to as the business condition, which holds that the matter in which one intercedes ought to be one's business.

33 I take it that the norms of rational influence are not exclusively moral. A piece of influence ill positioned to achieve the aims internal to the activity does not obviously violate a moral norm (unlike influence that causes undue harm), but it nonetheless goes "wrong" or is "bad" *qua* form of influence.

she, unbidden, recommends that you try the steamed clams rather than deep-fried mussels because the restaurant is known for the former. On the other hand, she may express inappropriate care if she recommends the clams because the dish is better for your cholesterol level. You may rightly inquire of her, "What do you care about my cholesterol?" If, on the other hand, a close friend recommends the clams out of concern for your cholesterol level, she manifests care that is appropriate given your relationship. In fact, your friend may be remiss in not at least reminding you that cholesterol should factor into your decision.[34] Indeed, while her care for your health, warranted by your friendship, gives her standing to offer you reasons pertaining to it, that care also generates an expectation that she do so when appropriate.

Not only are friends permitted to care about us in ways that are inappropriate for others—they are also expected or required to intercede out of care for our well-being when others are not. It would be infelicitous at the very least to reply to your friend's reminder about your cholesterol intake with "What do you care about my cholesterol?" or "That's really not your business." It is their business in part because they care, and your friendship licenses that care.[35] A friend may bristle at nagging intercessions about their own health, but expectations of care bound up in friendships can give us reason to risk their irritation and resentment at attempts to manifest that care via certain forms of influence. Although attempts to influence sometimes risk resentment, especially those perceived as forceful or intrusive, such risks can be warranted by the opportunity to genuinely support those with whom we have special ties.[36] Indeed, when the stakes are high and we refrain from influencing when we are

34 Of course, there are limits to permissible influence, even for friends and other intimates, and even caring reminders can sometimes be inappropriate. First, respect for autonomy sometimes requires that we respect a friend's choices and cease our efforts to influence. Second, incessant or nagging attempts to influence can be disrespectful or objectionably paternalistic and so be impermissible on those grounds. Third, a pattern of nagging influence may take on the character of a demand, which a friend may not be permitted to issue in the matter—though another, like a spouse, perhaps might. The comparatively high degree of interdependence in spousal or romantic partnerships, wherein the lives of participants are so intertwined that achievement of the goods and goals of the relationship is inextricable from the behaviors of each party, can give those parties standing to make certain demands on one another regarding the relevant behaviors that others may not. Many thanks to an anonymous reviewer at *JESP* for prompting me to address these complexities in more detail.

35 The idea is not that an attitude of care is sufficient to make the matters of someone else's life your business but that care grounded in the relevant relationship with the influencee involves expectations that generate (defeasible) permissions and even obligations to intercede in certain matters.

36 See Jonas, "Resentment of Advice and Norms of Advice," 822.

in position to help a friend, they may reasonably protest, "Why didn't you say something? I thought we were friends!"[37]

While care and standing to influence do not necessarily give us decisive reason to heed a friend's influence, we do generally think that we have added reason to take their counsel seriously. After all, the protest "Why didn't you say something?" would lose some force if there were no expectation that the advice would be given some special weight in the influencee's deliberations. Moreover, the mutual care that is characteristic of friendship gives us reason to grant the influence of friends extra, even if not decisive, weight in our deliberations. Doing so conveys respect and trust but also acknowledges the care underlying the influence as something that deserves recognition.

The expectations of care bound up in the relationship between the influencer and influencee affect whether the influencer has standing to influence as she does, as well as the likelihood of the influence's success. But expectations of care also help shape the ways in which we are vulnerable to another's influence and so affect whether that influence adheres to the norm regarding harm.

3.2. *Vulnerability and Harm*

It seems fairly uncontroversial that, *ceteris paribus*, our influence should not harm others, at least not more than it helps them. But as we have seen, the manner and degree to which we are able to harm or benefit others varies depending on our relationship to them. The provision of reasons by a friend can be harmful if she fails to appreciate the special ways in which her friend is vulnerable to her influence.

This vulnerability can be construed in two ways. The first concerns susceptibility to being moved to heed the influence. For instance, we are more likely to give uptake to the influence of our friends than that of strangers. Other things being equal, then, a friend's influence is more likely to be successful in achieving its aims, whether good or ill. Vulnerability to influence can also be understood as the extent to which one is apt to be harmed or benefitted by the influence. Although friends are often well positioned to promote our well-being, they can also hurt us in ways that strangers typically cannot since interactions with friends are more likely to involve personally important matters. Further, negative interactions with intimates, such as those involving criticism and insensitive treatment, can indicate a lack of proper respect or valuation.[38] Though

37 See Annis, "The Meaning, Value, and Duties of Friendship," 352.

38 See L'Abate and Baggett, *The Self in the Family*; and Kowalski, *Behaving Badly*. This is certainly not to say that strangers cannot hurt us in meaningful ways. But it is important to acknowledge that disrespect, insensitivity, or indifference, for example, can cut more deeply coming from an intimate from whom you justifiably expect the opposite.

intimates can (and sometimes do) tell us hard truths that strangers should keep to themselves, critical or insensitive influence from a friend or intimate can be harmful and its impacts more lasting than even positive interactions.[39]

Moreover, our vulnerability to friends means that their influence can impact deep and important aspects of our practical identities in sometimes unintended ways.[40] It is characteristic of friendship that the parties remain open to being directed and drawn by one another, which means that our choices, interests, and self-conception are often shaped by our friends in distinctive ways.[41] Not only do our activities become oriented toward those of our friends, but we are also led by our friends' recognition and interpretation of our motives and character to recognize and interpret those aspects of ourselves in certain ways.[42] Friends are poised to understand better than many others how we experience the world and what it is we value, and they represent that understanding to us in ways that can influence and enrich our sense of self.[43] Approval or disapproval of certain traits or behaviors, for instance, can shape our self-evaluations and affect what we take to be (good) reasons for action, valuable ends, and so forth.[44]

It is important to note that the manner of influence by which approval and disapproval are expressed matters too. For example, while it may be permissible and expected for parents to express disapproval of their child's behaviors, traits, or dispositions directly via criticism, there is far less room for such expressions in friendships. Although parents have the authority to make demands (or influence in ways naturally construed as demands) of their children or exert strong (even coercive) influence over the formation of their character and behaviors, friends do not have such authority over one another.[45]

39 See Rook, Sorkin, and Zettel, "Stress in Social Relationships."

40 By 'practical identity' I mean to capture roughly Korsgaard's notion of "a description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking" (*The Sources of Normativity*, 101). According to Korsgaard, our practical identities, which are multifaceted and relational, give rise to reasons and obligations. For example, one whom identifies as a "trustworthy friend" has reason to do what a friend trusts them to do, as such, based in their practical identity.

41 Cocking and Kennett, "Friendship and the Self."

42 Cocking and Kennett, "Friendship and the Self," 504–5.

43 Cocking and Kennett, "Friendship and the Self," 509.

44 Of course, parents and siblings, especially during early childhood and adolescence, play a substantial role in shaping our identities. See Cicirelli, *Sibling Relationships Across the Life Span*. The dominance of this influence, however, wanes as friends become significant and sometimes primary sources of attachment, support, and influence.

45 There are limits to the demands a parent can reasonably make of a child, and a parent's ability to make authoritative demands diminishes as children grow into adulthood. It is also important to distinguish between what is appropriate and what is tolerated. I may

Notice that in virtue of an influencee being a friend, one's influence is more likely to satisfy one norm—i.e., conducing to uptake by the influencee—but is also at increased risk of flouting another—namely, avoiding or minimizing undue harm. That friends are more likely to heed our influence and more likely to be deeply impacted by it, then, gives us reason to refrain from interceding in some cases and reason to intercede, albeit with caution and sensitivity to certain factors, in others.

3.3. *Trust and Uptake*

Along with care and vulnerability, trust also plays an important role in the normativity of influence. The presence (or absence) of trust can directly affect the influencee's uptake of the reasons provided by the influencer, and trust can serve as a form of influence itself. As such, trust generates reasons to influence, or refrain from influencing, in specific ways.

Perhaps unsurprisingly, we are more likely to follow the advice of those we see as trustworthy, i.e., expert and well intentioned.[46] Some forms of influence do not depend much on trust, as is the case when, for instance, an influencer merely points out or makes salient reasons that we have to do a thing but that we are simply not attending to. But in other cases, like advising, trust in the advisor can itself supply a reason to do as advised. For example, when we solicit advice from a professional, their expertise gives us reason to follow the advice, even if we do not trust but instead merely rely on them. We also often receive unsolicited advice from friends, family, coworkers, and even strangers whom we do not consider experts. In these cases, our trust in them gives us reason to do as they advise.[47] It is not merely that we trust that the advisor knows what they are talking about; we also trust that their advice is grounded in care for our interests for *our* sake and that they have advised us to do what they surmise we have most reason to do. While trust can bolster the efficacy of the reasons offered by a trusted influencer, it can also serve as a form of influence in its own right.

There are two ways in which trust can influence. The first is by empowering the one trusted. As noted earlier, trust can involve a belief in the one trusted that

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tolerate my parent making inappropriate demands about my romantic life while giving them little to no uptake, though I likely would not tolerate such demands from a friend.

46 See Bonaccio and Dalal, "Advice-Taking and Decision-Making"; and Sniezek and Van Swol, "Trust, Confidence, and Expertise in a Judge-Advisor System." The relevant expertise need not be formal. I may, for example, consider a long, happily married friend sufficiently expert on marital issues, though not one who is thrice divorced.

47 As Laurence Thomas observes, accepting the advice of friends on trust rather than on the grounds that it seems the most sound can indicate intimate trust and the depth of regard we have for them. Thomas, "Friendship," 26.

can outstrip evidence of trustworthiness on the matter. On one influential view, this belief is underwritten by hope for what the trusted might achieve.[48] This investment of hope can empower the trusted as they come to see themselves and their own potential as the truster does.[49] In trusting, one can scaffold another's agency, empowering and inspiring them to fulfill the truster's expectations.

The second way in which trust can influence is through its own internal normative expectation—namely, the expectation that the trusted adopt a particular orientation of care toward the truster.[50] When we trust, we ask that the one trusted make what matters to us matter to them, for our sake. Trust, then, addresses an additional reason beyond what the trusted may already have to comply with the influence—namely, the trusted's care for the truster. For example, I may have my own set of reasons to keep to my low-cholesterol diet, but when my friend trusts me to do so, I gain an additional reason that is rooted in my care for her. Moreover, when we are trusted rather than merely relied upon, we risk betraying rather than merely disappointing the truster if we fail to fulfill her expectations.[51] When something becomes a matter of trust, so to speak, it can become an expression of the trusted's care for the truster, which accounts for the deeply personal hurt feelings or sense of rejection characteristic of betrayal. Given the added layer of normativity and risk of betrayal, then, influencers have reason to be particularly cautious about their efforts to influence when trust is involved.

Now that we have a clearer understanding of the import of these three key features of friendship and how they bear on the normativity of influence, I will reassess the case of Alex and Phelipé to demonstrate how their friendship shapes the relevant normative considerations at stake in Alex's influence.

4. REASSESSING *TEST*

Thus far I have shown that care, vulnerability, and trust interact in complex ways to shape the normativity of interpersonal influence. I have highlighted the contours of these elements in the context of friendship to show how they can serve as the basis of a preliminary framework for assessing whether an instance of influence satisfies or runs afoul of basic norms of influence. With this preliminary framework in hand, we can now reassess the case introduced in

48 McGeer, "Trust, Hope and Empowerment."

49 McGeer, "Trust, Hope and Empowerment," 252.

50 Duncan, "The Normative Burdens of Trust."

51 See Baier, "Trust and Antitrust"; Holton, "Deciding to Trust, Coming to Believe"; Jones, "Trust as an Affective Attitude"; and McGeer, "Trust, Hope and Empowerment."

section 1 to determine how Alex's influence fares. Recall that the relevant norms require (1) that Alex have standing to influence as he does, (2) that he avoid or minimize undue harm, and (3) that he exert influence that is sufficiently conducive to uptake by Phelipé. As I will argue, there is good reason to think that Alex's influence falls short along some of these dimensions. More importantly, though, examining Alex's influence through the lens of the framework provided here will help illustrate how his role as Phelipé's friend structures and animates the normative considerations at work in this example.

To determine whether Alex has standing to influence Phelipé as he does, we must answer two questions: (i) Does Alex have standing to influence Phelipé on this matter? And (ii) does he have standing to influence in the manner that he does, i.e., by offering Phelipé good reasons to refrain from his intended course of action? The answer to both, according to my suggested framework, is yes.[52] Considerations of care (licensed by the relationship) are central to whether one has the kind of stake to underwrite standing to influence another.[53] In this case, Alex's influence is rooted in the care that is constitutive of their friendship, which licenses certain types of intercessions aimed at protecting and promoting his friend's well-being in a broad range of matters, including those intertwined with Phelipé's values and commitments. Further, in offering evidence-based reasons for Phelipé to avoid the party rather than, say, issuing a demand, Alex has deployed a form of influence countenanced by their friendship. If Alex were instead to simply demand that Phelipé avoid the party, he would lack standing to influence in this way because their friendship does not permit of such demands.[54] If their relationship were different—say, if Alex and

52 It is worth noting here that although at least one of the views already discussed shares this affirmative conclusion, our explanations and their potential implications differ. For example, recall that Tsai's explanation hinges primarily on whether Alex and Phelipé have a history of exchanging reasons on this sort of topic. While I agree that such a history is relevant, it seems neither necessary nor sufficient for standing since we often seem to have the standing to influence others on novel topics, and even the right kind of history would be insufficient to ground Alex's standing to influence Phelipé if their friendship had already dissolved. On my view, relationships (and especially norms and expectations of care) play a key role in generating a stake in influencing in certain ways and on certain matters; this stake does not rest on historical exchanges and often dissolves if the relationship ceases.

53 The idea is not that caring itself is sufficient for standing to influence but that the aspects of relationships that license caring can also give someone the kind of stake we ought to have when influencing others. In other words, it is the relationship that makes another's behavior in a particular domain, in some sense, my business.

54 This is of course not to say that one cannot make demands within a friendship. I may, for example, demand that a friend refrain from causing me unnecessary harm or that they treat me with the basic respect and dignity I am owed as a member of the moral community. But standing to make such demands is not underwritten by our friendship. Further, it may be

Phelipé were romantic partners and some of Alex's own interests were meaningfully dependent on Phelipé's academic performance—then Alex might have standing to demand that Phelipé avoid the party given the nature of the stake Alex would have in the matter. Even so, considerations of vulnerability and trust might still speak against issuing such a demand in that case, particularly if other forms of influence were available to Alex. Let us turn to the second norm of influence wherein the issue of vulnerability comes to the fore.

Whether Alex's influence avoids or minimizes undue harm to Phelipé depends on whether it is sufficiently sensitive to Phelipé's vulnerabilities. A straightforward reading of the case might suggest that in acting to protect his friend from the risk of failure and its consequences, Alex's influence is indeed responsive to Phelipé's vulnerabilities. Alex has minimized not only the risk of harm to Phelipé's academic interests but also potential harm to Phelipé's fledgling commitment to prioritizing those interests. However, there is more at stake here than the consequences of Phelipé's failure.

Because of their friendship, Phelipé is likely to give extra weight to Alex's influence, more specifically to the way in which Alex has drawn Phelipé—as one who, on his own, is unable to follow through on his own commitment. Further, Phelipé is more likely to take to heart the message implicit in Alex's reasons for dissuading Phelipé: that Phelipé should not trust his optimism or sense of self-efficacy in pursuing the commitment he has endorsed.[55] The concern is not simply that Alex's construal of Phelipé differs from Phelipé's own self-conception but that Alex's construal fails to recognize and support the role of Phelipé's new commitment in Phelipé's evolving self-conception and is potentially damaging to Phelipé's self-esteem and self-trust. The reasons Alex draws on in his dissuasion suggest a lack of appreciation for (i) the degree to which Phelipé's commitment itself is a response to the flaws and failures Alex has cited, (ii) the motivating role Phelipé's commitment is poised to play in his practical identity and deliberations, and (iii) the importance of allowing Phelipé to test his new commitment in order to solidify its role in his psychological economy. One might reasonably object that testing our commitments

that many of the demands we can make in the context of friendship are akin to imperfect duties, which do not entail obligations to perform a particular action. For example, it may be that I lack standing to demand that a friend accompany me to a specific concert because they are my friend, though I may make a broader demand that they generally behave in ways characteristic of a friend.

55 If Alex were instead a colleague or perhaps even a parent, Phelipé might be less affected by his message, thinking to himself "Alex just doesn't know me that well; he doesn't really know what I'm capable of." But friends, especially close friends, are often in a privileged epistemic position with respect to our character, behaviors, strengths and weaknesses, and we have reasons to give genuine uptake to their advice and assessments of us.

(especially prematurely) can be risky, and perhaps Alex has simply acted with an abundance of caution to protect his friend. Although an important consideration, protective measures can sometimes be at cross purposes with duties and expectations to promote well-being. And when they are a matter of trust, disappointing those expectations carries further risks.

Recall that among the needs that we rely on (and often trust) friends to fulfill are the need for recognition of our self-conception and autonomy support. In dissuading Phelipé, Alex has sought to protect his friend from one kind of harm but has done so at the expense of providing another important form of support and promoting certain other aspects of Phelipé's well-being. Phelipé reasonably trusts Alex, as his friend, to offer autonomy support, a responsive recognition of Phelipé's perspective and self-conception that encourages the kind of self-initiation Phelipé is attempting. In neglecting to provide such support, Alex disappoints Phelipé's trust (in this specific regard). Such disappointments of trust can be harmful not only to the truster but also to the underlying relationship, necessitating some sort of reparative action, even if the disappointment of trust does not rise to the level of betrayal.

At this point, one might reasonably wonder "What is a friend to do?" Given their friendship and the stakes for Phelipé, it seems Alex should intercede *somehow*. But all forms of influence are not on a moral par, and dissuading his friend as he has, even on the basis of justified doubts, poses additional risks to Phelipé, their friendship, and the bond of trust they share. If dissuasion were the only mode of influence available to Alex, then the foregoing considerations may, all things considered, speak in favor of Alex's influence. However, the trust between the two friends affords Alex alternative and more ideal means of influence.

The norm that influence should avoid or minimize harm speaks against critical influence of the kind Alex has offered and in favor of some other form of influence that would improve Phelipé's chances of success. For instance, rather than talking Phelipé out of testing his new commitment, Alex could emphasize its import and fragility while offering informed guidance on following through when it comes time to leave the party. In doing so, he would provide the kind of secure base that can make a difference to Phelipé's success along with the support called for by their friendship. Importantly, this would be not just a matter of Alex being a good friend but a matter of him acknowledging that in virtue of their friendship, Phelipé justifiably relies on him for the relevant kind of support, and so denying it would risk subjecting Phelipé to a distinctive sort of harm.

The final consideration relevant to the normative status of Alex's influence is whether the influence is sensitive to the expectations stemming from the bond of trust in his friendship with Phelipé. The concern is not that their bond of trust precludes Alex from harboring or even expressing doubts about Phelipé's

capacities *qua* agent, as the literature on objectionably paternalistic influence might suggest. Doubting is compatible with trust, and although Alex may doubt his friend's ability to follow through on his commitment in this particular situation, that does not amount to disrespecting his agentive capacities in the manner suggested by some characterizations of objectionable paternalism. However, their bond gives Alex (some) reason to trust Phelipé when Phelipé genuinely expresses optimism that, in light of his new academic commitment, he will leave the party at a reasonable time. Since trust is not sensitive to evidence the way ordinary beliefs are, Alex's trust can be warranted even in the face of Phelipé's past failures, which provide evidence contrary to the belief that Phelipé will succeed in his efforts.

Moreover, given that their bond of trust makes Phelipé more likely to heed Alex's advice, it seems appropriate for Alex to trust Phelipé and contribute what he can in the way of influence to scaffold Phelipé's agency and improve his chances of success. As noted earlier, this would involve offering supportive advice but may also involve an explicit expression of trust in Phelipé. In expressing his trust in Phelipé to adhere to his commitment, Alex would give Phelipé an additional reason to act as he plans. When it comes time to act on his commitment, he would have his own reasons as well as reasons that are tied to Alex's trust, including that if he fails, he not only fails himself but also disappoints Alex's trust. Employing trust as a means of influence would, at least in this case, be more respectful of Phelipé's practical limitations and better manifest the care characteristic of their relationship.

I have argued that while Alex's advice fares well with respect to some norms of influence, it falls short along certain dimensions, given his role as Phelipé's friend. Importantly, we need not conclude that in advising Phelipé as he does, Alex commits an egregious wrong against him. What I hope to have shown is that by applying the framework articulated in the preceding sections, we can discern a clear and significant tension between Alex's actions and some of the norms that govern the appropriateness of his influence *qua* Phelipé's friend. At the least, Alex's influence here is less than ideal and of a kind that Phelipé might find reasonably objectionable. Whether we should label the relevant normative deviation a moral violation or wrongdoing is a matter that I will not discuss here. I limit my assessment to the conclusion that there are good reasons, rooted in the normativity of influence (as shaped by his friendship with Phelipé), for Alex to refrain from dissuading as he does and to choose an alternate means of influence marked by trust and support.[56]

56 The idea is not that Alex has breached some deontic requirement but that given the nature of his relationship to Phelipé, the influencee, there remain commendatory reasons for

5. CONCLUSION

Whether one agrees with the judgment that Alex's influence is normatively suspect, I hope to have shown that (and how) a relationship-centered framework for assessing rational influence can helpfully illuminate the normative considerations at stake in a particular instance of influence. I have suggested that three factors common to personal relationships—care, vulnerability, and trust—are promising candidates for a preliminary framework to assess the normative status of rational influence. I have used this framework to illuminate how the provision of good reasons, even by a well-meaning friend, can run afoul of relationship-based considerations in subtle and complex ways. Although I have focused primarily on friendship, attending to these features in the context of other sorts of relationships could be equally fruitful, though its results will likely vary across different relationships. The features I have highlighted also interact with culturally based value systems. For example, extended family members might have more extensive standing to intercede in highly personal matters in some cultures, while there might be quite strong societal expectations of care amongst strangers in others. This sort of variation is to be expected and does not, in my estimation, undermine the proposed preliminary framework. My goal here has been not to offer a calculus for determining whether an instance of influence was morally good or bad but to highlight key features that necessarily contribute to its normative character. In doing so, I have also aimed to illuminate how our relationships interact with and shape the norms of influence more broadly.[57]

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influencing Phelipé differently. For more on the distinction between requiring and commendatory reasons, see Little and Macnamara, "Non-Requiring Reasons."

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REFINING THE ARGUMENT FROM DEMOCRACY

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THE FREEDOM of expression raises a philosophical problem. Speaking, writing, painting, publishing—these are ultimately just different kinds of conduct.[1] And like other kinds of conduct, they sometimes cause harm or impede the achievement of valuable social goals. Giving an incendiary speech to an agitated crowd can cause a riot or even an insurrection. Publishing military secrets in wartime might expose the identity of an intelligence source, hinder negotiations with an ally, or prolong hostilities. Now, as a general matter, when people cause social problems or seriously harm others, we often think the government should try to do something about it. What is puzzling is that when the relevant problems are caused by *speech*, in many cases we think that a principle of freedom of expression makes it impermissible for the government to intervene.[2] But why should that be? Why should we demand more justification for interferences with harmful speech than with other harmful conduct? What justifies the right to the freedom of expression?

According to one family of views, the freedom of expression is justified by its contribution to democratic self-government. The argument comes in different flavors. One version emphasizes that a democracy is a society where the power to decide political questions must ultimately belong to the people.

1 I am not concerned here with any *doctrinal* distinction between speech, on the one hand, and conduct, on the other. My point is just the obvious one that speaking, writing, and the rest are ways of *acting* on one's environment; they are things that one *does*, which can have different sorts of causal effects on the world. While people may sometimes lose sight of this point in free speech discussions, I take it that nobody actually wants to *deny* it, since this would be absurd. (For criticism of those who would assimilate expression to thought in the free speech context, see, e.g., Gelber and Brison, "Digital Dualism and the 'Speech as Thought' Paradox.") Thanks to an anonymous reviewer for alerting me to this potential misunderstanding.

2 Or perhaps it only makes it impermissible for the government to intervene in certain *ways*. The important point is just that if the free speech principle is doing any work at all, then it must make certain sorts of interventions in expressive conduct impermissible under circumstances in which, if the relevant bad effects were not caused by speech, those same sorts of interventions *would* be permissible.

In a democracy, the idea goes, we are supposed to decide important policy matters for ourselves. But to genuinely decide for ourselves, we need to know something about the alternatives and their likely effects, and we need to think through the issues together, which means that we need to talk about them. Another version focuses on our interest in being able to participate in policy debates as equals, suggesting that it would be unfair to impose a collective decision on dissenters who were denied the chance to make their case to the public. A third version points out that if the government is actually going to serve the public, we must be able to speak up when policies fail or officials abuse their power. For all their differences, however, the core claim of any argument from democracy is that the freedom of expression is justified because it is either a constitutive component of democracy or at least necessary for democracy to work well. Since we must live in a functioning democracy, we must have free speech.

There is surely *something* to these arguments. The value of democratic self-government is widely recognized, of course, and on any plausible interpretation of democracy, some form of freedom of expression really does seem indispensable. Modern-day Russia, where officials nominally stand for reelection but critics of the incumbent regime are routinely jailed or murdered, is hardly a democracy. Also, certain paradigm violations of the freedom of expression—like the criminalization of seditious libel—really do seem to undermine the proper functioning of democratic government, and this, more than any affront to a particular person's ability to express herself, intuitively lies at the core of what is so objectionable about them. Finally, the argument from democracy is well placed to explain our occasional ambivalence about the freedom of expression, since we are all familiar with the temptation to waffle even about democracy itself when the immediate results are sufficiently grim.

As a *general* account of the freedom of expression, however, the argument from democracy looks radically incomplete. The problem, according to what I will call the *Stravinsky objection*, is that lots of expression that intuitively deserves protection under a free speech principle has little to do with politics. Monet's water lilies, Gödel's incompleteness proofs, Shakespeare's sonnets—surely these should be protected. But if they should, then it is hard to see how the argument from democracy can be correct. Diehard democracy theorists have tried to salvage the view by dramatically expanding the category of political speech so that it turns out to include all the sonatas and sculptures that intuitively deserve protection. But it remains dubious that even a generous understanding of political speech can cover everything that intuitively deserves protection, and, in any case, it is implausible that the *reason* that abstract art and instrumental music ought to be protected is their contribution to democratic self-government.

This can leave the motivation for democratic accounts of the freedom of expression obscure. In any sensible discussion of free speech, it should be common ground that (1) political speech is important and that (2) political speech is not the only kind that matters. If the argument from democracy denies 2, then it is deeply implausible. But if it merely affirms 1, then it is banal, and its proponents flatter themselves when they claim to offer a distinctive *theory* of, or *approach* to, the freedom of expression. Given the variety of expression that intuitively deserves protection, the Stravinsky objection seems to leave us with just two plausible strategies for developing a satisfactory account of the freedom of expression. The first is to pursue a pluralist theory, appealing to different values to justify protections for different kinds of speech. The second is to search for a unifying value—more fundamental than the value of democratic self-government—that can offer a deeper justification for the protection of political speech and can justify proper protections for abstract art and instrumental music as well. While either approach might give the argument from democracy some modest role to play—perhaps as a sound but derivative argument for the protection of just one sort of expression among many—neither promises to single out democratic considerations or political speech as distinctively important to the freedom of expression.

As far as the moral right to the freedom of expression is concerned, this does strike me as the unmistakable lesson of the Stravinsky objection. But it is important to recognize that the moral right to the freedom of expression is not the only free speech right worth caring about. We might also want to consider, for example, whether there is a specifically *human* right to the freedom of expression, understanding a human right as a moral right whose contours are insensitive to institutional arrangements and historical circumstances.[3] Or we might want to know instead what *legal* free speech rights—or, more specifically, what *constitutional* free speech rights—we ought to have. These are interesting and practically significant questions, and it is far from evident that they are all settled straightaway by an adequate theory of the moral right to the freedom of expression. Nobody thinks that every moral right ought to be a legal right, after all, or that every legal right ought to be a constitutional one. And this raises an intriguing possibility: even if the argument from democracy is hopeless as a general theory of the moral right to the freedom of expression, could it be enlisted to give a plausible account of a free speech right of some other kind? Or would the Stravinsky objection sink the argument from democracy in these other forms as well?

3 See Alexander, *Is There a Right of Freedom of Expression?*

Although the argument from democracy draws on ideas old enough to be found in Hume and Kant, it really only came of age in the law reviews over the course of the twentieth century. In that context, it was developed primarily as an interpretive theory of the freedom of expression under the first amendment.[4] What theorists were looking for was a package of free speech principles that fit (most of) the relevant legal materials—constitutional text, case law, historical practice—and was normatively attractive in its own right. The suggestive point, for our purposes, is that part of what it meant for a candidate first amendment principle to be normatively attractive, in this context, was for it to be suited, in a broadly democratic society, for *judicial enforcement* under a system of strong-form judicial review.[5] Many first amendment theories—including many versions of the argument from democracy—were thus shaped not only by ideas about our interests in being free to express ourselves in different ways but also by (1) various features of the American free speech tradition and (2) ideas about the legitimate scope of judicial review in a democratic society. While 1 and 2 were supposed to support democratic theories of the first amendment, however, those considerations are obviously out of place in philosophical debates about the *moral* right to the freedom of expression. We should not be surprised, then, if the argument from democracy looks unmotivated in the context of those debates.

While democratic theories of the first amendment continue to be developed and debated by scholars of American constitutional law, I do not intend to contribute to those discussions here.[6] Nor do I intend to somehow salvage

4 See especially Meiklejohn, *Free Speech and Its Relation to Self-Government*, "What Does the First Amendment Mean?" and "The First Amendment Is an Absolute." See also, e.g., BeVier, "The First Amendment and Political Speech"; Blasi, "The Checking Value in First Amendment Theory"; Bork, "Neutral Principles and Some First Amendment Problems"; Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment"; and Sunstein, "Free Speech Now."

5 The distinction between weak- and strong-form judicial review is set out in section 2. Very roughly, however, the difference concerns who has the last word on the constitutionality of legislation. Under strong-form judicial review, if an apex court strikes down a law as unconstitutional, then barring a full-blown constitutional amendment, this is effectively the end of the matter. Under weak-form review, by contrast, the legislature has the opportunity to "overrule" the court and repass the law by a simple majority.

6 Democratic theories are defended in, e.g., Post, "Participatory Democracy and Free Speech"; Sunstein, *#Republic*; and Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine." Note that contemporary democratic theories of the first amendment do not generally attempt to ground all constitutional speech protections *exclusively* in the value of democratic self-government. Instead, they typically hold that the value of democratic self-government is at the core of the first amendment freedom of speech, and that speech bearing some favored relation to that value receives

the argument from democracy as an account of the moral right to the freedom of expression. Instead, I wish to construe the argument from democracy as an account, roughly, of the specifically constitutional free speech rights that we ought to have. This version of the argument—what I will call the *refined* argument from democracy—gives the democracy theorist an interesting reply to the Stravinsky objection. On the new strategy, the democracy theorist can accommodate the intuition that abstract art deserves protection by agreeing that we have a moral right, and probably ought to have an ordinary legal right, to produce and view abstract art. She must only insist that nonpolitical abstract art should not be protected by a specifically constitutional right administered by judicial review.[7] Not because abstract art does not *deserve* constitutional protection but because, on this view, whether a particular right ought to be enshrined in the constitution and administered by judicial review is not solely a matter of the importance of the right or the value of the interests it protects.

What we have in our sights, then, is an argument from democracy that avoids the Stravinsky objection and provides a plausible account of an important kind of free speech right. Earlier I called the prospect of such an account *intriguing*. For some readers, however, 'intriguing' may not be the first word that comes to mind. For you might think that the best response—indeed, the obvious response—to the Stravinsky objection is to simply abandon the project of grounding free speech rights exclusively in the value of democracy in favor of a broadly liberal approach that appeals to autonomy or dignity or some such. Under these circumstances, why is it not unreasonably *stubborn*, or even *perverse*, to insist on trying to develop a workable argument from democracy? Is there something wrong with the obvious response, or what?

This reaction is certainly understandable. In response, let me reiterate that as far as the moral right to the freedom of expression is concerned, I *agree* that the Stravinsky objection is an utterly decisive refutation of the argument from democracy. I agree, moreover, that it *would* be unreasonably stubborn to insist on trying to develop a workable democratic account of the moral right to free speech; such an effort seems bound to fail, and we have no good reason to hope that it might succeed. Fortunately, this is not the sort of view that I propose to develop. To repeat, the refined argument from democracy is directly concerned not with the moral right to free speech but with the constitutional free speech

(and ought to receive) the most stringent constitutional protection, while allowing that certain other kinds of speech might appropriately receive some lesser measure of constitutional protection.

7 Strictly speaking, she can allow that abstract art ought to be protected by a constitutional right administered by *weak-form* judicial review. She need only insist that this right is inapt for administration by *strong-form* judicial review.

rights that we ought to have.[8] Since the refined argument from democracy does not aim to provide an account of the moral right to the freedom of expression, its proponent is free to accept whatever account of the moral right turns out to be best, including a broadly liberal account along the lines suggested above.

Here, in broad strokes, is how I see the initial motivation for developing a refined argument from democracy. Contemporary moral and political philosophers tend to dismiss democratic free speech theories out of hand, largely due to the Stravinsky objection.[9] In fact, that objection looks so devastating that it is hard to see why anyone might have taken democratic theories seriously in the first place. As it happens, the argument from democracy has looked most plausible not as a philosophical theory of the moral right to free speech but as an interpretive theory of the first amendment.[10] Such theories are defended partly on the basis of general considerations of political morality—the same sorts of considerations that political and moral philosophers invoke in theories of the moral right to free speech—but they are also defended by appealing to claims about the appropriate role and extent of judicial review under the US Constitution. And this suggests an interesting possibility. Could the argument from democracy be developed in such a way as to give us neither a theory of the moral right to free speech nor an interpretive theory of the first amendment but a philosophical theory of the constitutional free speech rights that we ought to have? Given that many people have found democratic theories of the first amendment plausible, the fact that such theories are defended partly based on considerations about the proper role of judicial review suggests that a more general philosophical account of this kind might have some promise.

Of course, this initial motivation for pursuing a refined argument from democracy would be dampened considerably if we already had a fully

8 More specifically, it is concerned with the free speech rights that ought to be constitutionalized and administered by strong-form judicial review.

9 Of course, this is not the only objection that has been raised against democratic free speech theories. For additional objections, see, e.g., Alexander, *Is There a Right of Freedom of Expression?*; and Schauer, *Free Speech*.

10 As interpretations of the law of the first amendment, relatively narrow democratic theories—on which constitutional protections are limited, more or less, to a fairly strict conception of political speech—were at their most plausible in the period between World War I and roughly the 1970s. (Prior to World War I, of course, the Supreme Court had almost nothing to say about the free speech clause of the first amendment.) Since the 1970s, the Court has extended first amendment protections too far beyond explicitly political speech, in too many directions, for a narrowly democratic theory to offer a credible interpretation of our actual constitutional doctrine. Hence the tendency of contemporary democratic theories of the first amendment to endorse a tiered conception of some sort, reserving the strictest protections for political speech (or perhaps for contributions to "public discourse") while providing more modest protections for expression of other kinds.

convincing account of the strong-form constitutional rights to free speech that we ought to have.[11] In my view, however, we do *not* already have a fully convincing account on hand; in fact, we do not have much of an account at all. Moral and political philosophers tend to play pretty fast and loose with the distinction between our moral free speech rights and the constitutional free speech rights that we ought to have. Having argued for a certain kind of moral right to the freedom of expression, many philosophers seem happy to conclude straightaway that the courts ought to be in the business of enforcing a corresponding constitutional right, often without so much as acknowledging that an inference is being drawn. These philosophers may be vindicated in the end—it may turn out that the correct account of the constitutional free speech rights we ought to have falls out of the correct account of the moral right to the freedom of expression—but it would be nice to have an argument.[12]

I recognize that many philosophers—perhaps especially those raised in the United States—will find the conclusions of the refined argument from democracy unacceptable. Let me put my cards on the table, then, and acknowledge that I am not sure about them myself. The refined argument from democracy is worth exploring, I submit, not because it is necessarily sound but because it is *interesting*. To be sure, it is interesting in part because it is plausible; I do want to vouch for the argument at least to the extent of denying that it is *obviously* wrong. But it is interesting for reasons broached in the last paragraph as well. To get the refined argument from democracy off the ground, we must draw a clear conceptual distinction between our moral rights and the constitutional rights that we ought to have. We must at least allow for the possibility that these should come apart. In the philosophical literature on the freedom of expression, however, this distinction is rarely taken seriously and sometimes ignored altogether. For this reason, I take one of the contributions of the paper to be the way it calls attention to this distinction and opens up the possibility that the best account of the moral right to free speech and the best account of the

11 In this essay, I use 'strong-form constitutional rights' simply as a shorthand for the unwieldy 'constitutional rights administered by strong-form judicial review'. Likewise, *mutatis mutandis*, for 'weak-form constitutional rights'. On this usage, to say that a right is or ought to be a strong-form constitutional right is not to say anything about the strength of the right itself, either in terms of the sorts of actions it prohibits or requires or in terms of the strength of the countervailing considerations necessary to overcome it.

12 Arguably, then, the truly stubborn party is not the proponent of the refined argument from democracy but the liberal critic who refuses that argument a hearing without offering any alternative account of the strong-form constitutional free speech rights that we ought to have. Such a critic refuses without good reason to entertain the possibility that the best account of the moral right to free speech and the best account of the constitutional free speech rights that we ought to have might come apart.

strong-form constitutional free speech rights that we ought to have may come apart.[13] This contribution, it is worth noting, is not hostage to the ultimate success of the refined argument from democracy.

The paper proceeds as follows. The next section introduces the Stravinsky objection and explains why democracy theorists cannot meet it simply by endorsing a more expansive conception of political speech. Section 2 lays the groundwork for the refined argument from democracy by distinguishing some of the different aims that a theory of the freedom of expression might have. A given theory might reasonably aim to justify (1) a moral right, (2) an ordinary legal right, or (3) a specifically constitutional right. If it aims to justify a constitutional right, then it might aim to justify a constitutional right administered by either weak-form judicial review or strong-form judicial review. The refined argument from democracy aims to justify a specifically constitutional right enforced by strong-form judicial review. If this argument is going to survive the Stravinsky objection, then the democracy theorist needs to argue that the strong intuitions underlying that objection—intuitions that this or that bit of nonpolitical speech deserves protection under a free speech principle—are not best understood as intuitions about the strong-form constitutional rights that we ought to have. In section 3, I argue that these intuitions are best understood as intuitions about the *moral* right to the freedom of expression. If this is right, then the challenge to the argument from democracy is mitigated, since there is no inconsistency between the claim that we have a moral right to hear *The Rite of Spring* and the claim that this right should not be enforced by strong-form judicial review.

The democracy theorist has more work to do, however, since she still needs to explain why the moral right to political speech should be constitutionalized, while the moral right to Stravinsky should not. What she needs is an account of the proper scope of strong-form judicial review, one that recommends constitutionalizing rights to political speech but not the right to Stravinsky. We take up this task in section 5, first setting out Jeremy Waldron's influential argument against all strong-form judicial review and then developing a novel objection to Waldron's argument insofar as it concerns one particular set of rights—including rights to political speech—without undermining his conclusions about other rights. This objection points the democracy theorist toward a plausible account of the proper scope of strong-form judicial review that is fit for her purposes. Section 6 wraps things up.

13 Cf. Waldron, "A Right-Based Critique of Constitutional Rights."

1. THE TRADITIONAL DIALECTIC

The freedom of expression is supposed to protect certain kinds of speech from interference. If the justification for that freedom is that it is necessary to ensure democratic self-government, this presumably has some bearing on what kinds of speech are protected. In particular, while the argument from democracy suggests that *political* speech should be protected, it offers no straightforward justification for protecting *nonpolitical* speech.[14] What speech counts as political? Alexander Meiklejohn suggests that the freedom of expression protects speech that "bears, directly or indirectly, upon issues with which voters have to deal."[15] It covers, he says, speech on all "matters of public interest." Cass Sunstein holds that speech is political just when "it is both intended and received as a contribution to public deliberation about some issue."[16] While these dicta leave a lot unresolved, the basic idea is clear. On this view, the freedom of expression primarily protects policy arguments and political criticism. Other types of expression are protected, if at all, only insofar as they sufficiently resemble these paradigm cases or provide necessary inputs for them.

But democratic theories of the freedom of expression face a critical objection. The problem is that "people do not need novels or dramas or paintings or poems because they will be called upon to vote."[17] These forms of expression do not seem to qualify as political speech or even as politically relevant speech. Thus, the argument from democracy provides little protection for them. Yet many people firmly believe that they deserve protection. According to Seana Shiffrin, for example, any "decent regime of free speech" must provide robust

14 I do not mean to rule out from the start the possibility that the argument from democracy offers a *non*straightforward justification for protecting facially nonpolitical speech. The remainder of this section considers two closely related proposals along these lines, grouped together under the heading of the "standard response" to the Stravinsky objection. A third proposal in the literature goes something like this: "The speech that really must be protected, as a matter of principle, is core political speech. In practice, however, it is extremely difficult to distinguish political speech from nonpolitical speech. To ensure that core political speech is fully protected, then, it is best to draw the line much further out from core political speech than one might have thought appropriate purely as a matter of principle. The upshot is that a variety of nonpolitical speech ought properly to be protected." For this type of argument, see, e.g., BeVier, "The First Amendment and Political Speech." I do not address this view directly in what follows, but it faces many of the same objections as the standard response. I also think that these sorts of worries about line-drawing problems are overblown. Although I lack the space to defend this position here, see, e.g., Sunstein, "Free Speech Now."

15 Meiklejohn, *Free Speech and Its Relation to Self-Government*, 94.

16 Sunstein, "Free Speech Now," 304.

17 Kalven, "The Metaphysics of the Law of Obscenity," 16.

protections not only for political speech but also for fiction, art, music, and much else besides.[18] We can call this the

> *Stravinsky Objection:* The argument from democracy fails to justify protections for many kinds of nonpolitical speech that deserve protection.

Since the argument from democracy does not deliver these protections, the critics insist, the argument fails.[19]

Are theories of the freedom of expression really in the business of delivering protections for Stravinsky? Recall that the primary philosophical problem associated with the freedom of expression—the problem to which rival free speech theories are largely addressed—is to explain when and why speech ought to be protected *even when* it causes problems (by harming people, e.g.). We do not need a free speech theory to explain why the government should not target benign speech with censorship laws that make nobody better off. The government should not censor benign speech for the same reasons it should not stop you from going for a run or having a nap. Along with these and countless other activities, benign speech is already protected by a more general principle of liberty, something roughly along the lines of Mill's harm principle. What we need a free speech theory to do is to explain why speech that would be regulable under the general principle of liberty is nevertheless immune from regulation (except perhaps in extraordinary circumstances). But then we might wonder why it should be any objection to the argument from democracy that it does not justify protections for abstract art and instrumental music, since these are seldom harmful. Why can the democracy theorist not reply that protections for abstract art and the like are not part of the job description of a free speech theory?

Although this issue is largely ignored in the literature, the answer should probably go something like this. Even if harmless speech is already protected under a more general liberty principle, it seems reasonable to expect an adequate account of the freedom of expression to justify protections for at least some benign speech. Why? Because a theory of free speech will generally consist, at least in part, in an identification of the values served by leaving people free to express themselves in different ways, or in the identification of important interests that we have in this sort of freedom, and it would be strange indeed if those values or interests only *kicked in*, as it were, when speech starts to cause problems. So it seems reasonable to expect an adequate account of the freedom of expression—one that is not bizarrely disjointed or filled with arbitrary

18 Shiffrin, "A Thinker-Based Approach to Freedom of Speech," 285.

19 Variations on this perennial objection can be found in, e.g., Cohen, "Freedom of Expression"; Scanlon, "Freedom of Expression and Categories of Expression," 529–30; and Shiffrin, *Speech Matters*, 83–84.

thresholds—to justify protections for a lot of speech that is already protected under a general liberty principle. If this is true, then the Stravinsky objection cannot be met by claiming that because abstract art is harmless, an adequate free speech theory can disregard it.

It makes sense, then, that most democracy theorists concede, albeit implicitly, that the Stravinsky objection would be devastating if it could be made to stick. Accordingly, the standard response among such theorists is to argue that the objection is misplaced because, appearances notwithstanding, people actually *do* need novels and dramas and paintings and poems because they will be called upon to vote. In other words, democracy theorists have tried to expand the political speech category to include all the facially nonpolitical works of art, music, and science that intuitively deserve protection. This expansion is typically motivated in one of two ways. The first strategy is to look for subtle elements of social and political commentary in expression that does not announce itself in those terms. This is how Sunstein attempts to defend a broad conception of political speech, for example:

> The definition I have offered would encompass not simply political tracts, but all art and literature that has the characteristics of social commentary—which is to say, much art and literature. Much speech is a contribution to public deliberation despite initial appearances. . . . Both *Ulysses* and *Bleak House* are unquestionably political. . . . The same is true of Robert Mapplethorpe's work, which attempts to draw into question current sexual norms and practices, and which bears on such issues as the right of privacy and the antidiscrimination principle.[20]

The second strategy is to concede that much expression that intuitively deserves protection is not itself a contribution to political discourse but to argue that such speech is nevertheless crucial to the proper functioning of democracy because of its role in fostering the emotional and intellectual maturity required of democratic citizens. According to Meiklejohn,

> there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom.[21]

20 Sunstein, "Free Speech Now," 308.

21 Meiklejohn, "The First Amendment Is an Absolute," 256.

These forms of thought and expression include not just commentary on pressing public issues, he argues, but also philosophy, science, literature, and art. On either strategy, the point of the standard response is to argue that many, if not all, of the critics' apparent counterexamples are merely apparent.[22]

This response faces serious objections. First, even a liberal understanding of political speech may fail to encompass everything that intuitively merits protection.[23] Take Sunstein's suggestion that the category of political speech ought to include art and literature that functions as social commentary. This conception may be capacious enough to include Mapplethorpe's nudes, as Sunstein suggests, but what about Shakespeare's sonnets? What about David Lewis's metaphysics or Gödel's logic? It is unclear that Sunstein's conception of political speech, or any other, can reach all these sorts of expression. Since they intuitively deserve protection, this seems like a problem for the argument from democracy.

Many critics have expressed a second objection along the following lines: *even if* the democracy theorist rigs up a conception of political speech that manages to include Gödel, the argument from democracy still fails because the *reason* the first incompleteness theorem ought to be protected is not the contribution it makes, whether directly or indirectly, to democratic self-government.[24] Different critics have different positive ideas about what really does justify the protection of this or that bit of facially nonpolitical expression, of course. One might appeal to an idea of autonomy, another to self-fulfillment or moral development. But they all agree that whatever justifies the protection of these kinds of expression, it is *not* their connection to the value of democracy.

There is something intuitive about this second objection, but critics can be too casual about spelling out precisely what the problem is supposed to be.

22 A related strategy involves appealing to a more expansive conception of the value of democracy, or of democratic legitimation, to help justify free speech protections in the first place. The idea is for this expansive conception of democracy to yield a similarly expansive conception of the sorts of expression at the heart of the enterprise. This approach is developed in different ways in, e.g., Balkin, "Cultural Democracy and the First Amendment"; Post, "Participatory Democracy and Free Speech"; and Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine." I do not have the space to treat these particular views in any detail here, but insofar as they endorse protections for abstract art, instrumental music, and the like, the refined argument from democracy will eventually make the case that they are mistaken (see section 5 below), at least if they are construed not as interpretive theories of the first amendment but as noninterpretive accounts of the strong-form free speech rights that we ought to have.

23 See, e.g., Shiffrin, "Methodology in Free Speech Theory," 555n17.

24 See, e.g., Bollinger, "Free Speech and Intellectual Values," 444; Cohen, "Freedom of Expression," 227; Seana Shiffrin, "Methodology in Free Speech Theory"; and Steven Shiffrin, "Dissent, Democratic Participation, and First Amendment Methodology," 560–61.

Some seem to suggest that the argument from democracy would fail even if it managed to justify precisely the correct set of free speech principles, providing all and only the protections that really ought to be provided. But if democratic considerations really did *justify* the proper protections for Shakespeare's sonnets, how could it be, as the objection would have it, that the argument fails to identify the reasons those sonnets ought to be protected? To really justify the proper protections, would the argument not have to at least identify reasons that are *sufficient* to show that the sonnets ought to be protected? And if the argument really did manage to provide a sufficient justification for precisely the correct set of free speech principles, how defective could it be?

For some critics, the point may be about our national history or political culture. The argument from democracy, even if it justifies the proper protections in some abstract sense, fails to identify the reasons that *we* protect Shakespeare's sonnets. Alternatively, the problem may be with the modal profile of the democracy theorist's principles. This version of the objection suggests that while the argument from democracy might justify the proper protections for Shakespeare's sonnets in our actual empirical conditions—since, contingently, the sonnets happen to contribute to democratic decision-making in the right ways—those same protections would be justified even if our conditions were such that the sonnets did *not* contribute to democratic decision-making, and *this* is something that the argument from democracy fails to capture.

The most forceful version of the objection denies that the argument from democracy can justify the correct free speech regime in the first place. To understand this version, we need to distinguish a free speech regime's *coverage* from the strength of the *protections* it provides to particular kinds of expression.[25] A free speech regime operates in the context of a background standard of justification for the exercise of government power. The point of a free speech regime is to ensure that when the exercise of government power interferes with certain choices or activities involving expression, or when it is motivated by certain aims regarding expression, the government must meet a higher standard of justification. A regime's coverage refers to the range of activities, or the range of government motivations, that trigger the demand for extraordinary justification. But even where a free speech regime covers a particular kind of expression, the protection it receives need not be absolute. Depending on the regime, this protection may be stronger or weaker, and it may be stronger for some kinds of expression than others.

The original Stravinsky objection targets the coverage of the argument from democracy. Accordingly, the standard response tries to reconfigure the theory's

25 See Schauer, "Categories and the First Amendment" and *Free Speech*.

coverage to reach all the right kinds of expression. We previously considered follow-on objections maintaining that the argument from democracy would fail even if it managed to justify precisely the correct free speech regime. But now, having distinguished coverage and protection, we can articulate a different version of the objection. This version holds that even if the democracy theorist manages to ensure that *The Rite of Spring* counts as political speech, thus delivering a free speech regime with the proper coverage, the argument nevertheless fails. Why? The issue is supposed to lie in failing to identify the right reasons for protecting Stravinsky, which we can now understand as a worry about justifying the appropriate level of protection. If *The Rite of Spring* is protected only insofar as it contributes to democratic self-government, then presumably the level of protection it receives will reflect the modesty of its political contribution. The objection, on this construal, begins with the observation that we not only have powerful intuitions that *The Rite of Spring* ought to be covered, as the Stravinsky objection points out. We also think it deserves powerful protections. Because the only reason to protect these forms of expression that the argument from democracy acknowledges is their contribution to democratic self-government, it cannot respect these intuitions.[26]

None of this shows that democratic considerations do not *help* to justify the freedom of expression, of course. Everybody agrees they have a role to play. But the argument from democracy is supposed to do more than identify one reason, on a par with many others, for protecting one category of speech, itself on a par with many others. And the Stravinsky objection and its close relatives seem to show that the argument cannot accomplish anything more than this. For they remind us—if we needed reminding—of the tremendous range of expression that surely ought to remain free from interference or censorship, and also, if only indirectly, of the great diversity of vital interests at stake in regulating these different kinds of expression. Democratic accounts of free speech seem to miss all of this, obtusely focusing on politics at the expense of everything else.

26 Why not just say that all expression that makes even a minimal contribution to democratic self-government ought to receive maximally stringent protections? Because there is a huge variety of expression that just about everybody agrees ought to be regulated but that plausibly contributes at least as much to democratic self-government as *The Rite of Spring*. Just think, for example, of the myriad kinds of expression that are treated by antitrust law, food and drug regulations, copyright law, the common law of contract, and so on. If all that it takes for speech to receive maximally stringent protections is that it contribute at least as much to democratic self-government as *The Rite of Spring*, then it is very hard to see how these different areas of law could survive in anything like their current forms. Cf. Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine," 491–97.

This section has been devoted to giving the Stravinsky objection its due. In the rest of the paper, I want to sketch a version of the argument from democracy with the resources to say something reasonable in response.

2. DIFFERENT RIGHTS, DIFFERENT THEORIES

It will be instructive to consider a patently ridiculous objection of the same form as the Stravinsky objection. Let us suppose that someone objects to the argument from democracy because it fails to justify rights against torture. (If it helps, you might imagine that this person has accidentally wandered into the wrong Q&A session and *thinks* she is objecting to an entirely different theory.) How should the democracy theorist respond? Presumably by politely explaining that even granting that we all have rights against torture, this is no objection to the argument from democracy because that argument was never intended to deal with rights against physical violence in the first place. Because the argument from democracy is concerned only with rights of a particular kind, there can be no underinclusiveness objection to that theory based on the fact that it does not justify rights of some *other* kind. Despite the absurdity of the torture objection, I want to suggest that the democracy theorist might actually respond to the Stravinsky objection along similar lines.

The Stravinsky objection is motivated by intuitions that this or that bit of nonpolitical speech deserves protection under a free speech principle. According to the view that I will be developing, the standard response is right to try to accommodate these intuitions rather than debunk them, just as the democracy theorist is right to accommodate her misguided interlocutor's claim about rights against torture. The standard response errs, however, by assuming that the protection that abstract art intuitively deserves is the same kind of protection that the argument from democracy should be trying to justify. The purpose of this section is to clear the way for the refined argument from democracy by distinguishing some of the different aims that a "free speech theory" might have.

A theory of the freedom of expression can serve various purposes. One sort of theory attempts to justify or explain a particular body of existing law in a specific jurisdiction.[27] Such *interpretive* theories start with a collection of judicial decisions regarding the freedom of speech under a particular constitution or other legal provision—together with other facts about the legal and social history of the relevant jurisdiction—and try to develop a normatively attractive account that fits most of the data, including especially those decisions

27 See Moore, *Placing Blame*, ch. 1, for a general account of theories of areas of law in this sense. See also Dworkin, *Law's Empire*; and Raz, *Between Authority and Interpretation*, ch. 13.

and practices deemed most central to the tradition. Many theories of the freedom of expression, and many democratic theories in particular, are interpretive theories in this sense.[28] But not all free speech theories are like this. As Shiffrin makes clear in the following passage, her "thinker-based" account of free speech is not tethered to any existing body of legal doctrine:

> My paper aims to identify strong theoretical foundations for the protection of free speech but not to provide the best theoretical account of *our system* or *our current practices* of protecting (or failing to protect, as the case may be) free speech. Articulating a theory of free speech along the former, more ideal, lines provides us with a framework to assess whether our current practices are justified or not, as well as which ones are outliers. An ideal theoretical approach also supplies both a measure for reform and some structural components to form the framework to assess new sorts of cases.[29]

A theory of this second sort attempts to justify free speech protections without regard to the fit between the protections it justifies and those recognized by any existing tradition or practice. Accordingly, it is no objection to such a theory that it fails to vindicate some particular legal precedent, at least absent an independent moral argument supporting the relevant decision. In this paper, I will generally be concerned with theories of this second type, and I will construe the refined argument from democracy as such a theory.

But even once we have focused on this class of theories, it remains unclear what precisely they aim to accomplish. Following Shiffrin, one might develop such a theory to justify "strong theoretical foundations" for free speech protections from a more "ideal," critical point of view. But precisely what sort of protections does this kind of theory aim to justify? Consider how T. M. Scanlon describes the task at hand:

> Freedom of expression, as a philosophical problem, is an instance of a more general problem about the nature and status of rights. Rights purport to place limits on what individuals or the state may do, and the sacrifices they entail are in some cases significant. . . . The general

28 For democratic theories of the freedom of expression that are interpretive theories in this sense, see, e.g., BeVier, "The First Amendment and Political Speech"; Bork, "Neutral Principles and Some First Amendment Problems"; Meiklejohn, *Free Speech and Its Relation to Self-Government*; Post, "Participatory Democracy and Free Speech"; and Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine."

29 Shiffrin, "A Thinker-Based Approach to Freedom of Speech," 284.

> problem is, if rights place limits on what can be done even for good reasons, what is the justification for these limits?[30]

Scanlon says he wants to justify certain limits on what individuals or the state may do. But what *kind* of limits, in the particular case of the freedom of expression, are at issue? What kind of *right* are we trying to justify? As we will see, there are several relevant possibilities.

To begin, we may want to justify either a *moral* right or a *legal* right. These are different undertakings, since moral rights and legal rights are different things—not all moral rights are legal rights, and not all legal rights are moral rights.[31] But even if our notions of moral and legal rights are distinct, you might think they enjoy a close connection. You might think that to claim that I have a moral right is just to claim that I *ought* to have a corresponding legal right. This suggestion must be rejected, however, for it is simply not the case that every instance of

> *X* has a moral right to *Y*

entails, conceptually or otherwise, the corresponding instance of

> *X* ought to have a legal right to *Y*.[32]

Consider a simple promise between friends. If I promise you that I will go to your softball game to cheer you on, this gives you a moral right that I should turn up. But I doubt that you ought to have a *legal* right that I be there, so that you can take me to court if for some reason I miss the game. Or think of the division of domestic labor. While I have a moral right against my partner that she should do her fair share of chores around the house, it is dubious that I should have a corresponding legal right.

Moral rights and legal rights are different, then, and a given free speech theory might reasonably aim to justify either one or the other. But we also need to distinguish different kinds of legal rights. Specifically, we need to distinguish

30 Scanlon, "Freedom of Expression and Categories of Expression," 519.

31 Justifying a moral right differs from justifying a legal right in another way. When we succeed in justifying a legal right, we properly conclude that there *ought to be* such a legal right. When we succeed in justifying a moral right, by contrast, we properly conclude that *there is* such a moral right. Successful justifications of moral rights ground existence claims in a way that successful justifications of legal rights do not. Despite this difference between justifying a moral right and justifying a legal right, however, it plainly remains open to theorists of free speech to engage in the one task or the other.

32 Cf. Waldron, "A Right-Based Critique of Constitutional Rights," 24–25. Objections to this sort of view are canvassed in Feinberg, *Problems at the Roots of Law*, ch. 2; and Hart, *Essays on Bentham*, ch. 4.

constitutional rights from the rest. Constitutional rights are legal rights granted as a matter of constitutional law. For our purposes, constitutional law can be roughly distinguished by the following two features. Constitutional law, in a particular jurisdiction, is (1) *supreme* law that is (2) *entrenched*.[33] To say that constitutional law is supreme is to say, *inter alia*, that when a new statute conflicts with existing constitutional law—including an existing constitutional right—it is the statute that must give way. (When a fresh statute conflicts with an ordinary legal right already on the books, by contrast, the new law implicitly repeals the old right.)[34] To say that constitutional law is entrenched is to say that it is relatively resistant to change by regular democratic processes. Thus, while ordinary laws can be amended or repealed by legislative majorities, something more is needed to change the law of a constitution, usually a legislative or popular supermajority or some combination thereof. Finally, although this does not distinguish constitutional law from ordinary law, I will also assume that constitutional law is (3) *justiciable*, in the sense that the courts have some powers of judicial review.

But judicial review comes in different forms. In particular, we need to distinguish *weak*- and *strong*-form judicial review. The difference emerges when an apex court determines that a particular law violates the constitution. In a jurisdiction with strong-form judicial review, such as Germany or the United States, the court's decision and its interpretation of the relevant constitutional provision are effectively final.[35] The court invalidates the law, and the elected

33 'Constitution' and cognate terms are sometimes used in a thinner sense. In the thin sense, every legal system necessarily has a constitution, for a constitution consists in the rules or conventions that establish and regulate the powers and responsibilities of the main organs of government, and there must be some rules or conventions of this kind for a legal system to exist at all. This is a perfectly fine sense to give these expressions; it is just not how I will be using them in this paper. I take it that nothing substantive hangs on this terminological stipulation. On the distinction between thinner and thicker senses of 'constitution' and 'constitutional law', see, e.g., Marmor, *Law in the Age of Pluralism*, ch. 4; and Raz, *Between Authority and Interpretation*, ch. 13. The distinction is sometimes marked by referring either to a *small-c constitution* (thin) or a *capital-C Constitution* (thick). See, e.g., King, *The British Constitution*, ch. 1.

34 American courts recognize a presumption against implied repeal, so that, *ceteris paribus*, they will prefer a reasonable interpretation of the new statute that does not conflict with the existing right to one that does. But if the conflict is irreconcilable, then the statute repeals the right. See, e.g., *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936). For discussion, see Scalia and Garner, *Reading Law*, sec. 55.

35 Classic discussions of strong-form, American-style judicial review include, e.g., Bickel, *The Least Dangerous Branch*; Ely, *Democracy and Distrust*; Hand, *The Bill of Rights*; Thayer, "Origin and Scope of the American Doctrine of Constitutional Law"; and Wechsler, "Toward Neutral Principles of Constitutional Law."

branches have no power to use the ordinary channels of lawmaking to correct the court where they judge that it has gone wrong.[36] In a jurisdiction with weak-form review, such as Canada, the situation is different.[37] In a weak-form system, if the legislature believes that the court has made a mistake—that it has misconstrued either the law or the relevant constitutional right—then it can override the court's judgment and repass the law by a simple majority. For our purposes, the critical difference between weak- and strong-form judicial review is that the former gives the final say to the representative branches of government while the latter effectively gives it to the courts. On the face of it, a given free speech theory might wish to justify a constitutional right of either kind, one protected by weak-form judicial review or one protected by strong-form judicial review.

Let us take stock of what we have established in this section. We saw that our second type of free speech theory aims to justify free speech protections without regard to the fit between those protections and any going legal or social practices. But we noticed that this leaves open just what sort of free speech protection—just what sort of free speech *right*—a given theory of this type aims to justify. We then distinguished some possibilities. A particular theory of the freedom of expression might aim to justify a moral right, an ordinary legal right, or a specifically constitutional right. If it aims to justify a constitutional right, then it might aim to justify a constitutional right administered by either weak-form judicial review or strong-form judicial review.

If the argument from democracy is understood as a theory of the moral right to the freedom of expression, then I agree with the critics that it is hopeless, as there is simply no reason to think that this right should be grounded exclusively or even predominantly in our interests in effective democratic self-government. What I would like to consider, however, is a version of the argument that aims to justify a specifically constitutional right administered by strong-form judicial review. In that case, if the democracy theorist is going to respond to the Stravinsky objection the way she responded to the (admittedly fanciful) torture objection raised at the start of this section, then she will need to maintain that our strong intuition that we have a right to hear *The Rite of Spring* concerns something other than a specifically constitutional right protected by strong-form judicial review. We take up this issue in the following section.

36 A constitutional amendment may theoretically be possible, but the amendment process is liable to be too cumbersome for this to represent a realistic option in the usual case.

37 On weak-form judicial review, one might wish to consult Albert and Cameron, eds., *Canada in the World*; Dixon, "The Core Case for Weak-Form Judicial Review"; Gardbaum, *The New Commonwealth Model of Constitutionalism*; and Sigalet et al., eds., *Constitutional Dialogue*.

3. THE STRAVINSKY INTUITION

The Stravinsky objection is motivated by a variety of pretheoretical intuitions. Some of these concern particular cases, such as the intuition that the freedom of expression protects Jackson Pollock's right to display *Autumn Rhythm (Number 30)* or the intuition that it protects your right to view *Un Chien Andalou*. Others are more general, such as the intuition that the freedom of expression protects the right to produce and view abstract art or the intuition that it protects the right to express one's religious beliefs. This section concerns how these intuitions are best understood. Specifically, we want to see if the democracy theorist can plausibly argue that they are *not* best understood as intuitions about the strong-form constitutional rights that we ought to have.

To focus discussion, let us single out the

> *Stravinsky Intuition*: The freedom of expression protects our right to hear *The Rite of Spring*.

I think that the democracy theorist ought to follow the standard response in allowing something like the Stravinsky intuition to be correct. But she is now in a position to distinguish several claims that might be in play. These include:

1. We have a moral right to hear *The Rite of Spring*.
2. We ought to have an ordinary legal right to hear *The Rite of Spring*.
3. We ought to have a weak-form constitutional right to hear *The Rite of Spring*.
4. We ought to have a strong-form constitutional right to hear *The Rite of Spring*.

Which claims, if any, are embodied in the Stravinsky intuition?

I submit that, insofar as the Stravinsky intuition is supposed to be quite strong and widely shared, it is probably best understood as an intuition about the *moral* right to the freedom of expression. Although I have no knock-down argument to offer, I will briefly present a handful of considerations supporting this reading. Together, they make a strong case.

The first thing to notice is that, as a practical matter, 4 is a stronger claim than 1. Apart from the full-blown skeptic about moral rights, few people will want to endorse 4 who do not also endorse 1—and indeed, those who endorse 4 are likely to do so in part because they also endorse 1—and yet it may be perfectly sensible to endorse 1 without endorsing 4, since nobody thinks that every moral right ought to be a strong-form constitutional right. As an initial matter, then, regardless of precisely how confident we are in any of these propositions, we should probably have *more* confidence in 1 than we have in 4.

But while 1 and 2 are deeply intuitive judgments whose truth would be hard to deny, the same cannot be said of 4.[38] To see this, consider what exactly in the vicinity of the Stravinsky intuition strikes you as obviously correct. The clearest and most fundamental judgment here, it seems to me, is just that it would be quite wrong for the government to prevent us from hearing *The Rite of Spring*. We might also be confident that if the government were to do so, not only would it be acting wrongly, it would also be *wronging us* (perhaps among others). But if these judgments form the heart of the Stravinsky intuition, then 1 offers a perfectly reasonable summary expression of them. By contrast, it is unclear that 4 is in order, since there are many ways for the government to act wrongly, and even to wrong us, without violating a right that ought to be administered by strong-form judicial review.

The Stravinsky objection is not supposed to be based on a controversial conclusion from a philosophical or legal theory. The underlying intuition is supposed to be obvious, something that everybody recognizes—or at least *ought* to recognize—up front. It is worth noting, then, that many countries whose political systems are taken to be reasonably just—countries like Canada, England, and New Zealand, to name a few—reject strong-form judicial review *altogether*, across the board. *A fortiori*, they do not recognize a strong-form constitutional right to hear Stravinsky. It may turn out that despite their liberal bona fides, these countries are making a grave mistake. I do not mean to claim otherwise. I want only to suggest that if they *are* making a grave mistake, then this is probably something that should emerge in the course of theorizing. Simply assuming that they are mistaken in advance of any argument smacks of chauvinism.

Finally, I doubt that our judgments in the vicinity of the Stravinsky intuition—the firmest, most basic judgments in the neighborhood—are responsive to a key set of considerations that should be among the grounds of any verdict on judicial review that is worthy of respect—namely, considerations of *institutional competence*. We can approach this point by considering what is actually involved in constitutionalizing a particular right under a system of strong-form judicial review. Let us start, then, by imagining a country without strong-form judicial review but where citizens and legislators generally care about moral rights. Let us suppose more specifically that people generally recognize that we all have a moral right to the freedom of religion and that most people take this fact seriously. Legislators take themselves to have a moral duty to vote against legislation that violates this right, citizens recognize that they have a moral duty to support political candidates who respect it, and so on.

38 The same probably cannot be said of 3 either, but the nonobviousness of 4 is what really matters for present purposes.

Despite all this agreement on the existence of the right to free exercise, thorny questions about its contours remain. Does the right protect only the freedom of religious *belief*, or does it also protect religiously motivated *conduct*? If it protects some religiously motivated conduct, how far does this protection extend? Can polygamy be prohibited without violating the rights of Mormons? Can high school attendance be required without wronging Amish children or their parents? Must religious groups be allowed to worship together in large numbers during a deadly pandemic? Can the government require all businesses serving the public to do so on a nondiscriminatory basis, or must business owners with religious scruples about serving certain kinds of people be allowed to follow their conscience and turn those people away?

Without strong-form review, it is up to the legislature to deliberate about these matters and to settle them, at least provisionally, as a matter of public policy. Under these circumstances, when the legislature passes a law—for instance, a law prohibiting all businesses, without exception, from discriminating based on sexual orientation—this presumably reflects its judgment that the law does not violate the right to free exercise, though of course this judgment may be mistaken in particular cases, and public debate on the issue may well continue. In such a society, what would be involved in constitutionalizing the right to freedom of religion under a system of strong-form judicial review? This would involve giving judges the power to invalidate laws when *they* determine, correctly or incorrectly, that those laws violate the right to free exercise. The effect of constitutionalizing this right under a system of strong-form judicial review, then, is not to subordinate legislation to the right to the freedom of religion but to subordinate legislation to the judiciary's understanding of that right.[39]

In light of this, my suggestion is that in order to be worthy of respect, a judgment about which rights ought to be constitutionalized must be sensitive to the relative *reliability* of legislatures and courts in dealing with rights. If someone judges that a particular right ought to be enforced by strong-form review without ever considering how well the legislature or the courts can be expected to perform in elaborating and specifying that right, then this judgment is not something that we need to take very seriously. Certainly it is not the sort of judgment that we ought to give a privileged position in constraining our theorizing in political philosophy. And my sense is that our superstrong judgments in the vicinity of the Stravinsky intuition are *not* responsive to these sorts of considerations. Instead, they are based almost entirely on ideas about the value of different kinds of expression or of having the ability to engage in them.

39 See Alexander, "Constitutions, Judicial Review, Moral Rights, and Democracy."

All of this suggests that while the Stravinsky intuition ought to be taken seriously, the claim we must be sure to accommodate is not 4 but 1. While this would certainly be a challenge for any version of the argument from democracy aiming to account for the moral right to the freedom of expression, once we construe the argument as aiming to justify a specifically strong-form constitutional right, the difficulty is mitigated, as there is simply no inconsistency between the claim that we have a moral right to hear *The Rite of Spring* and the claim that this right should not be administered by strong-form judicial review.

4. THE NAIVE PICTURE OF LEGAL AND CONSTITUTIONAL RIGHTS

When faced with the objection that the argument from democracy fails to justify rights against torture, the democracy theorist could simply dismiss the complaint as confused. Even if the critic is right about torture, this is no objection to the argument from democracy because that argument is not offered as a theory of rights against physical violence in the first place. If the arguments from the last section are on the right track, then the democracy theorist can now say something similar about the Stravinsky objection: even if the critics are right about what is protected by the moral right to the freedom of expression, this is still no objection to the (refined) argument from democracy because that argument is not being offered as a theory of that moral right. It is being offered as a theory of the strong-form constitutional rights to the freedom of expression that we ought to have.

Unfortunately, this response does not amount, all on its own, to a sufficient response to the Stravinsky objection. For even once we recognize that the core underlying intuition is directly concerned with our moral rights rather than with the strong-form constitutional rights that we ought to have, it might *still* seem relevant to the (refined) argument from democracy, as there is presumably some connection between our moral free speech rights and the constitutional free speech rights that we ought to have. Moreover, the right to political speech is itself a moral right, just like the rights highlighted by the Stravinsky intuition. So the democracy theorist needs to explain why the moral right to political speech should be constitutionalized, while the moral right to hear Stravinsky should not. What the democracy theorist needs, then, is an account of the proper scope of strong-form judicial review, one that recommends constitutionalizing rights to political speech but not the right to Stravinsky.

We have so far taken the core of the traditional argument from democracy to be a claim about the *importance* of political speech. That argument, recall, goes roughly like this: the right to political speech is a constitutive element of democracy; so, since it is important that we live in a democracy, it is important

that we have the right to political speech. Is there an account of the proper scope of strong-form judicial review anywhere to be found in this argument? Actually, if we see the argument as an attempt to justify a strong-form constitutional right, you might think that the account does presuppose a particular account of judicial review. For if the argument is to have any hope of achieving the aim we have given it, then it might seem that the question whether a particular right ought to be constitutionalized and administered by strong-form judicial review must be settled by the importance of the right and the interests that it protects.

This idea is part of what we might call the naive picture of legal and constitutional rights. The usual way to argue for the existence of a moral right is to identify certain interests—interests of the putative right holder but perhaps interests of others as well—and to try to show that those interests are sufficiently weighty to place others under a moral duty, either to promote the relevant interests or to avoid impeding them. Suppose that this sort of case has been made for a particular moral right. At this point, you might think that if the relevant interests are *really* weighty, then they will justify not only placing others under a moral duty but placing them under a *legal* duty as well, despite the costs of administering and enforcing such a duty. On this picture, in other words, the moral rights that ought to be legal rights are just the moral rights that are especially important. And continuing in the same vein, you might think that the rights that ought to be *constitutional* rights are just those that are more important still, with the protection of strong-form judicial review reserved for the most fundamental rights of all.[40] While seldom defended explicitly, this picture exercises a tremendous influence on popular and scholarly thought about constitutional rights.

In fact, this conception is hard at work in the background of many objections to the argument from democracy focused on the protection of facially nonpolitical expression. For many of the intuitions that drive these objections, it seems to me, are themselves animated by a sense of the value of the relevant kinds of expression. We can see this clearly in Zechariah Chafee's criticism of the classic argument from democracy defended by Alexander Meiklejohn:

> If [on Meiklejohn's account] private speech does include . . . art and literature, it is shocking to deprive these *vital matters* of the protection of the inspiring words of the First Amendment. . . . *Valuable as self-government is*, it is in itself only a small part of our lives.[41]

40 For an illuminating critical discussion of the naive picture, see Strauss, "The Role of a Bill of Rights."

41 Chafee, "Review," 900 (emphasis added).

Why is Chafee shocked that Meiklejohn might limit first amendment protections to political speech at the expense of art and literature? Plainly, it is because art and literature are such "vital matters." They are so vital, in fact, that our interests in producing and engaging with art and literature must be at least as strong as our interests in participating in democratic self-government (politics being "in itself only a small part of our lives"). The key point for our purposes is that Chafee implicitly treats the claim that political speech, but *not* (nonpolitical) art and literature, should receive specifically constitutional protection as entailing the claim that art and literature are less valuable than politics. We can find this same assumption in the work of other writers who press the Stravinsky objection against democratic theories of the freedom of expression, and I think that this partly explains some of the outrage—these critics are *indignant* on behalf of art, literature, and the rest.[42]

If the naive picture is correct—if the moral rights that ought to be constitutionalized are distinguished primarily by their value—then the democracy theorist is forced to argue that the right to political speech is more important than the right to Stravinsky. While this challenge may not be hopeless, I will not pursue it here. Instead, I want to consider a more conciliatory response to the Stravinsky objection, one that does not involve the suggestion that political rights are more valuable than others. To make this work, the democracy theorist will need at least a rough account of the proper scope of strong-form review on which those rights that are suited for strong-form review are distinguished by more than their relative value. For her purposes, however, there is no need to settle on a strict set of necessary and sufficient conditions for when an arbitrary right ought to be enforced by strong-form review. What she needs is a plausible argument that rights to political speech ought to be strong-form constitutional rights and a plausible argument that rights to nonpolitical speech ought *not* to be strong-form constitutional rights. The next section develops these arguments on her behalf.

5. THE PROPER SCOPE OF STRONG-FORM JUDICIAL REVIEW

I propose to begin the process of developing these arguments by reflecting on Jeremy Waldron's influential attack on all rights-based strong-form judicial

42 See, e.g., Shiffrin, *Speech Matters*, 93–94. Cf. Posner, "Free Speech and the Legacy of *Schenck*," 133 (suggesting that "the people who want to privilege political speech are often people who simply think that politics is the most important activity that people engage in").

review.[43] Before we dive into the substance of that attack, however, I want to give a quick preview of where we are headed. Waldron's argument plays a fairly subtle role in the remainder of the paper, and it will be worthwhile to forestall some possible misunderstandings at the outset.[44]

The refined argument from democracy is an argument about the strong-form constitutional rights that we ought to have. It aims to support the view that (1) rights to political speech ought to be strong-form constitutional rights, while (2) other kinds of free speech rights ought *not* to be strong-form constitutional rights. Waldron argues, roughly, that we should reject all strong-form judicial review based on constitutional rights. He argues, in other words, that *no* rights ought to be constitutionalized and enforced by strong-form judicial review. In one way, of course, this conclusion is congenial to the democracy theorist, since it entails that nonpolitical speech rights ought not to be strong-form constitutional rights. The problem is that if Waldron's argument succeeds, then it *also* follows that rights to *political* speech ought not to be strong-form constitutional rights. And this is something that our democracy theorist cannot accept.

The trick, for the democracy theorist, is to poke a hole in Waldron's argument that is wide enough for rights to political speech to escape but not so wide that rights to nonpolitical speech make it out as well. Accordingly, we will develop a targeted objection to show that Waldron's argument does *not* work for rights to political speech. Since the objection does not apply to other free speech rights, however, the democracy theorist can maintain that Waldron's original conclusion concerning *those* rights still stands. And, again, that conclusion is just that those rights should not be strong-form constitutional rights, i.e., they should not be constitutionalized and enforced by strong-form judicial review. This is the primary role I see for Waldron's argument in the paper. The refined argument from democracy enlists a modified form of that argument in order to show that rights to nonpolitical speech should not be enforced by strong-form judicial review.

Waldron's argument also indirectly helps the democracy theorist to defend her second key claim, which is that rights to political speech ought to be strong-form constitutional rights. Again, we will be objecting that Waldron's original argument against strong-form judicial review does *not* work for rights to political speech. In general, an objection refuting an argument *against* strong-form review of rights to political speech need not provide anything like a positive

43 Waldron develops this attack in a number of places, but see especially "A Right-Based Critique of Constitutional Rights," *Law and Disagreement*, and "The Core of the Case Against Judicial Review."

44 Thanks to an anonymous reviewer for encouraging me to spell this out more clearly.

argument *for* strong-form review of those rights. Fortunately, however, the particular objection that we develop will turn out to provide the democracy theorist with the materials to mount such a positive argument. The secondary role for Waldron's argument, then, is the heuristic one of engaging the democracy theorist in a critical exchange that suggests a plausible argument in favor of strong-form judicial review of rights to political speech.

One last prefatory point. Waldron's argument builds on some familiar doubts about the compatibility of judicial review and the democratic ideal of collective self-rule. This *countermajoritarian difficulty* has inspired an enormous amount of work by legal theorists and political philosophers, some of it seeking to discredit strong-form judicial review or to cabin its scope but the majority of it, at least in the United States, attempting to defend an active role for the courts.[45] Waldron aims to distill a core argument against strong-form judicial review that is not tied to the history or institutional details of any one jurisdiction. While the argument is supposed to generalize, however, it is not supposed to apply to every possible jurisdiction, regardless of social or political conditions. Accordingly, he begins the article "The Core of the Case Against Judicial Review" by stipulating four broad assumptions about the political institutions and culture of the societies to which the argument is to apply:

> We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.[46]

45 The term 'countermajoritarian difficulty' was coined by Bickel, *The Least Dangerous Branch*, 16. For criticism of giving judges broad powers of strong-form judicial review, in addition to Waldron's work, see, e.g., Bellamy, *Political Constitutionalism*; Hand, *The Bill of Rights*; Railton, "Judicial Review, Elites, and Liberal Democracy"; and Thayer, "Origin and Scope of the American Doctrine of Constitutional Law." Strong-form review is defended by, e.g., Bickel, *The Least Dangerous Branch*; Dworkin, *Taking Rights Seriously*; Fallon, "The Core of an Uneasy Case for Judicial Review"; Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review"; and Kavanagh, "Participation and Judicial Review."

46 Waldron, "The Core of the Case Against Judicial Review," 1360 (hereafter in this section cited parenthetically).

In a society that meets these conditions, Waldron argues, disagreements about rights ought to be settled in the legislature rather than the courts. Since the refined argument from democracy will eventually appeal to a revised version of Waldron's argument, it too is subject to these conditions. Having dealt with these preliminaries, we are now ready for the argument proper.

We have widespread disagreements about rights, yet a variety of issues concerning rights need to be settled for the community in some way, at least provisionally, for practical purposes. So we need a procedure for settling them. What kind of procedure should this be? In particular, should we let the courts decide, using a system of strong-form judicial review, or should we look to the legislature? Waldron suggests that two different sorts of reasons bear on the question: *outcome reasons* and *process reasons* (1372). Process reasons concern the propriety of a procedure without regard to the desirability of the policies it produces. Outcome reasons, by contrast, focus precisely on the desirability of those policies. With this distinction on the table, Waldron's argument has two steps. In the first, he argues that the outcome reasons are inconclusive. They fail to provide a strong case either for judicial review or against it. In the second, he argues that the process reasons overwhelmingly disfavor strong-form judicial review and support legislative decision-making. On balance, he concludes, we have good reason to reject strong-form judicial review.

Regarding the outcome reasons, many people have responded to the countermajoritarian difficulty by arguing that courts actually are more likely than legislatures to decide questions about rights correctly.[47] People often suggest, for example, that courts are epistemically superior because they specify rights in the context of concrete particular cases rather than in the abstract and because they are expected to explicitly give reasons for their decisions, in the form of detailed judicial opinions.

Waldron is unconvinced. As he points out, reasons are hardly the exclusive property of courts. Often enough, "legislators give reasons for their votes just as judges do" (1382). As for the judiciary's orientation to particular cases, Waldron argues that this is "mostly a myth" because appellate courts, the ones that actually make law, tend to approach and decide cases in fairly abstract terms (1379). But the point is moot anyway, on Waldron's view, because legislatures can consider individual cases too, for instance in hearings or debates.

Judicial decision-making also exhibits some distinctive epistemic vices. Waldron argues, for example, that judicial deliberations about rights tend to get sidetracked by narrow legalistic concerns about the details of precedent

47 See, e.g., Bickel, *The Least Dangerous Branch*, 24–27; Brest, "The Misconceived Quest for Original Understanding," 228; Dworkin, *Taking Rights Seriously*, ch. 5; and Wellington, "Common Law Rules and Constitutional Double Standards," 248–49.

decisions or the precise verbiage of canonical constitutional texts rather than focusing on the genuine moral issues at stake. These distractions, he suggests, are less likely to hinder the moral deliberations of legislators. All things considered, Waldron judges that the outcome reasons are simply inconclusive. They do not, as many have thought, make out anything like a convincing argument for strong-form judicial review.

Which means that the issue must be settled by the process reasons. For Waldron, this is a matter of political legitimacy:

> Political decision-procedures usually take the following form. Because there is disagreement about a given decision, the decision is to be made by a designated set of individuals $\{C_1, C_2, \ldots, C_m\}$ using some designated decision-procedure. The burden of legitimacy-theory is to explain why it is appropriate for these individuals, and not some others, to be privileged to participate in the decision-making. As C_n [a citizen who, not unreasonably, disagrees with the substance of a given policy affecting rights] might put it, "Why them? Why not me?" The theory of legitimacy will have to provide the basis of an answer to that question. (1387)

When C_n disagrees with a legislative decision about rights, Waldron argues, we have a good story to tell. In general, the response to a citizen who is disappointed with a legislative decision about rights and wants to know why the matter was decided in the way it was is that the matter was decided in a way that gave her as much of a say as possible while allowing every other citizen an equal say on the issue.

What about when C_n disagrees with a judicial decision on a vexed question of rights under a system of strong-form judicial review? Suppose we are dealing with a decision by the US Supreme Court. Why, C_n wants to know, should these nine men and women be able to impose their views on the rest of us? One answer that might carry some weight is that they are particularly likely to decide the issue correctly. But Waldron has already argued that this is not true. And once this response is set aside, Waldron suggests, the question is hard to answer. We might try pointing out that while the justices were not themselves elected by the people, they were at least appointed and approved by officials—the president and the members of the Senate, in the US case—who were. This is true enough, as far as it goes, but Waldron insists that since legitimacy is a *comparative* matter, "it is a staggeringly inadequate response" (1391). In sum, the process reasons weigh heavily in favor of legislative decision-making and against judicial review. Since the process reasons strongly disfavor judicial review, and the outcome reasons are inert, judicial review is illegitimate.

While the objection to Waldron's argument that I want to commend to the democracy theorist is straightforward, it has not, to my knowledge, been raised before in the literature.[48] Here is the problem. In evaluating the outcome reasons for and against strong-form judicial review, Waldron considers only whether legislatures or courts are better at answering questions about moral rights *in general*, across the board. But even if we accept Waldron's arguments on this score—even if we are prepared to agree that judges are no better than legislators at correctly answering questions of rights as a general matter—judges might still do better than legislators in certain *particular* domains. In that case, there would be good reasons—good outcome reasons, in Waldron's terminology—to support strong-form judicial review with an appropriately limited scope. My suggestion is that the democracy theorist can plausibly argue that judges are likely to outperform legislators regarding rights to political speech.

Since this part of the argument is familiar, I will not belabor the point. The idea is that elected officials, including legislators, are especially unreliable judges of the moral permissibility of restrictions on political speech because political speech is particularly liable to directly and conspicuously threaten their continued authority. Elected politicians want to be reelected, after all, and a politician's reelection hopes may be frustrated by a documentary highlighting the failure of her signature policies, a news story implicating her in an abuse of power, or a public protest calling for her resignation. Given the threat that these and other kinds of political speech represent to her deepest personal and professional ambitions, even a politician who genuinely cares about rights may convince herself in good faith that speech restrictions a more disinterested observer would condemn are consistent with the freedom of expression. Since judges with lifetime appointments are insulated from these pressures, however, we might reasonably expect them to do better.[49]

Where does all of this leave the democracy theorist? At the start of this section, she was in the market for plausible arguments that (1) rights to political speech ought to be strong-form constitutional rights, while (2) other free speech rights ought *not* to be strong-form constitutional rights. Schematically, at least, Waldron's core case against strong-form judicial review looks like this:

1. The process reasons heavily disfavor strong-form judicial review.

48 This is probably because Waldron's critics are typically interested in justifying strong-form review with a very wide scope, while this objection would open the door to only a more limited jurisdiction.

49 It is not strictly necessary that judges be given lifetime appointments, as they are in the US, so long as they are appointed for terms long enough to insulate them from the pressures of ordinary politics.

2. So we should have strong-form judicial review only if the outcome reasons significantly favor the practice.
3. But the outcome reasons do *not* significantly favor strong-form judicial review. In general, we have no good reason to think that courts will outperform legislatures in administering constitutional rights.
4. So we should not have strong-form judicial review.

If the democracy theorist were looking only for a plausible argument against strong-form constitutional rights to nonpolitical speech, then she could just grab Waldron's argument off the rack and call it a day. True, that argument is not directed *specifically* at rights to nonpolitical speech; it is directed at *all* rights. But if no rights should be enforced by strong-form judicial review, then obviously rights to nonpolitical speech in particular should not be enforced by strong-form judicial review. (Given the prominence and influence of Waldron's core case, I will simply assume that the argument is at least plausible.)

Unfortunately, it also follows from Waldron's core case that rights to *political* speech should not be enforced by strong-form judicial review, and this is something our democracy theorist is keen to reject. So the democracy theorist cannot simply accept Waldron's argument as it stands. This is where our objection comes in. It starts with a broadly logical point: while Waldron's core case considers only whether legislatures or courts are better at answering questions about moral rights in general, there is no reason to rule out *a priori* the possibility that they are better at answering questions about certain particular rights. This suggests that a defensible version of Waldron's core case would need to defend his position that the outcome reasons fail to support strong-form review on a *right-by-right* basis. Instead of 2 and 3, for example, the argument would need to defend

2*. For every candidate right *r*, we should have strong-form judicial review with respect to *r* only if the outcome reasons provide some significant support for the practice.

and

3*. But for every *r*, the outcome reasons do *not* provide significant support for strong-form judicial review with respect to *r*.

At this point, however, the democracy theorist claims that we should reject 3*. Even if courts are no better than legislatures at dealing with rights in general, she argues, because of the perverse incentives that the power to regulate political speech would give elected officials, we have good reason to believe that courts will outperform legislatures in this particular area. So we should

reject Waldron's core case against all strong-form judicial review even in this modified form.

At the same time, though, the objection concerning rights to political speech does nothing to cast doubt on Waldron's conclusions about many other rights. True, the right to political speech is probably not *unique* in giving elected officials perverse incentives to unjustifiably restrict rights in order to safeguard their own status and power. It seems plausible that roughly similar problems arise in the case of voting rights, for example. For most rights, however, the parallel objection is simply not credible. And this is what the democracy theorist claims about rights to nonpolitical speech. Consider, for example, the right to engage in commercial advertising, and suppose that a new bill up for consideration would prohibit outdoor advertising of cigarettes or vaping products near primary or secondary schools.[50] In deliberating about this bill, would a legislator's desire for reelection give her a perverse incentive, akin to the incentive to forestall public criticism and embarrassment, to shortchange whatever genuine moral rights we have to engage in commercial speech? The answer, surely, is no. Or consider a town ordinance that would prevent a local jazz club from putting on live music past midnight. Whatever else one might think about such an ordinance, it plainly does not invite the sort of legislative self-dealing associated with restrictions on political speech. And so it goes, the democracy theorist claims, for rights to nonpolitical speech more generally: the perverse incentives that incumbent officials have to restrict political speech simply do not arise for nonpolitical speech.

This suggests that the democracy theorist can still appeal to a modified version of Waldron's argument that is confined to rights to nonpolitical speech. Before stating that version, however, it will help to draw a distinction between two kinds of outcome reasons bearing on the permissibility of strong-form judicial review of constitutional rights: general outcome reasons and domain-specific outcome reasons. General outcome reasons are the kinds of reasons that Waldron considers in his original core case; they point to general institutional features of legislatures or courts that bear on their likely competence or reliability as administrators of important constitutional rights. Domain-specific outcome reasons are the kinds of reasons that the democracy theorist adduces in her objection to Waldron's core case insofar as it concerns rights to political speech; these point to some combination of general institutional features of legislatures or courts and the contents of specific rights that bear on competence or reliability with respect to those particular rights.

50 See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating such a restriction).

With this rough-and-ready distinction on the table, the refined argument from democracy is ready to incorporate the following modified version of Waldron's argument, directed specifically at rights to nonpolitical speech:

1. For every candidate moral right *r*, the process reasons heavily disfavor strong-form judicial review with respect to *r*.
2. So we should have strong-form judicial review with respect to *r* only if the outcome reasons significantly favor it.
3. The general outcome reasons do not significantly favor strong-form judicial review with respect to *r*.
4. So we should have strong-form judicial review with respect to *r* only if the relevant domain-specific outcome reasons significantly favor strong-form judicial review with respect to *r*.
5. In the case of rights to nonpolitical speech, domain-specific outcome reasons do not significantly favor strong-form judicial review.
6. So we should not have strong-form judicial review with respect to rights to nonpolitical speech.

Again, this conclusion is entailed by Waldron's original core case against all strong-form judicial review. As we have just seen, the democracy theorist has been led to modify the form of that argument and confine it to rights to nonpolitical speech.[51] The result, I submit, is a plausible argument that rights to nonpolitical speech ought not to be strong-form constitutional rights.[52]

This leaves rights to political speech. Since Waldron's core case is an argument *against* strong-form judicial review with respect to constitutional rights, the democracy theorist cannot enlist that argument to *support* strong-form rights to political speech. The core of the limited objection that we raised to Waldron's argument, recall, is the claim that courts actually *are* likely to be better stewards when it comes to rights to political speech. Even if this is correct, however, it

51 The democracy theorist can also accept that Waldron's case applies to many other rights besides rights to nonpolitical speech, of course. It is just that those other rights are not her concern.

52 Note that the distinction between general outcome reasons and domain-specific outcome reasons is playing a heuristic role in this argument and is not strictly necessary. All that the democracy theorist ultimately needs to claim is that the (undifferentiated) outcome reasons do not significantly favor strong-form judicial review with respect to rights to nonpolitical speech. By making the rough distinction between general reasons and domain-specific reasons, I mean only to highlight that once one accepts Waldron's argument that courts are not generally better than legislatures at dealing with rights, one can maintain that a particular right *r* ought to be subject to strong-form review only by arguing that *r* is special in some way that suggests that courts actually *are* better than legislatures at dealing with *r*.

does not strictly follow that rights to political speech ought to be strong-form constitutional rights. Waldron defends the claim that judicial review should not exist if the outcome reasons do not support it; he offers no argument for the inverse claim that review *should* exist if the outcome reasons *do* support it.

Waldron does seem to find the latter claim plausible, though. While strong-form judicial review trenches on the rights of citizens to participate as equals in the process of government, he says, the practice might *still* be "tolerable" if there were "a convincing outcome-based case for judicial decision-making" (1393).[53] Evidently, Waldron is not prepared to deny that strong-form review *would* be appropriate, or at least permissible, *if* the courts were more likely than the legislature to decide these issues correctly.[54] As one might expect, this conditional claim is widely endorsed—indeed, relied upon—by judicial review's many defenders, as well.[55] (Unlike Waldron, of course, they go on to insist that courts *are* generally better at deciding these issues.) Now consider one particular instance of the general conditional claim:

> If the balance of outcome reasons significantly favors strong-form judicial review for rights to political speech, then rights to political speech ought to be strong-form constitutional rights.

While the truth of this conditional is not quite common ground in debates about strong-form review, since critics like Waldron tend not to definitively endorse claims of this kind, its considerable plausibility is accepted on all sides, and this is good enough for present purposes.

At the start of this section, the democracy theorist was in the market for plausible arguments that (1) rights to political speech ought to be strong-form constitutional rights, while (2) other kinds of free speech rights ought *not* to be strong-form constitutional rights. We saw earlier how the refined argument from democracy defends 2. Here, finally, is her argument for 1:

1. If the balance of outcome reasons significantly favors strong-form judicial review for rights to political speech, then rights to political speech ought to be strong-form constitutional rights.[56]

53 See also Waldron, "A Right-Based Critique of Constitutional Rights," 49.

54 Peter Railton is another critic of strong-form judicial review who acknowledges that the practice might be justified if the outcome reasons supported it. See Railton, "Judicial Review, Elites, and Liberal Democracy."

55 E.g., Bickel, *The Least Dangerous Branch*, 24–27; Brest, "The Misconceived Quest for Original Understanding," 228; Dworkin, "What Is Equality?" 30; and Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review."

56 I do not mean to saddle the refined argument from democracy with the claim that superior judicial competence or reliability is sufficient, all on its own, to show that any given right

2. The balance of outcome reasons significantly favors strong-form judicial review for rights to political speech.
3. So rights to political speech ought to be strong-form constitutional rights.

The plausibility of the first premise is accepted on all sides of debates over strong-form judicial review. The second premise is justified by concerns about the incentives for self-dealing that the power to regulate political speech would give legislators. From these two premises, the conclusion logically follows.

This concludes the refined argument from democracy. I do not claim that the argument is sound, only that it is interesting and deserves consideration.[57] Whatever its ultimate fate, however, it cannot be dismissed straightaway merely by pointing out that political expression is not the only kind that matters.

6. CONCLUSION

The Stravinsky objection asserts that the argument from democracy fails to justify protections for lots of deserving nonpolitical speech. My suggestion is that the democracy theorist can essentially *agree* with this claim. We do have rights to nonpolitical speech, and the argument from democracy does not account for them. But we need to be careful about what rights are at issue. While the refined argument from democracy is specifically concerned with strong-form constitutional rights, the democracy theorist can maintain that our rights to

ought to be administered by strong-form judicial review. The point is just that whatever other conditions rights must meet in order to qualify for strong-form review are surely satisfied by rights to political speech. Incidentally, suppose that one of the other necessary conditions for *r* to be apt for strong-form review is that *r* must be sufficiently valuable or important. In that case, we might think of the traditional argument from democracy as aiming to show that rights to political speech are sufficiently valuable or important to be constitutionalized and administered by strong-form judicial review, while the refined argument from democracy aims to show that those rights also meet the condition regarding judicial competence or reliability. Concerning rights to nonpolitical speech, the democracy theorist can maintain that these rights satisfy the importance requirement but fail to satisfy the requirement of superior judicial reliability. Thus, she can maintain that rights to nonpolitical speech are inapt for strong-form judicial review not because they are unimportant but because we have no reason to think that courts will do better than legislatures at administering them. Thanks to an anonymous reviewer for encouraging me to clarify this point.

57 My reservations concern Waldron's underlying argument against all strong-form judicial review, which is incorporated, in a limited and modified form, in the refined argument from democracy. Some of these worries, at least, are roughly along the lines of Fallon, "The Core of an Uneasy Case for Judicial Review." Unfortunately, I do not have the space to discuss these issues here.

nonpolitical speech are ordinary moral rights against the government.[58] She remains free to agree that these moral rights ought to be legal rights as well, and possibly even constitutional rights protected by weak-form judicial review. Her argument simply does not commit her to any position on these matters.

Why think rights to nonpolitical speech should not be administered by strong-form judicial review? Earlier, in section 3, I suggested that the strong intuitions on which the Stravinsky objection is based are best understood as directed toward ordinary moral rights rather than strong-form constitutional rights. But suppose the critics continue to insist that the Stravinsky intuition is best understood as referring to a specifically strong-form constitutional right. In that case, it is important to remember that this sort of intuition can serve at most as a *provisional* fixed point in the construction of a free speech theory. If there are good theoretical reasons to reject this intuition (and others like it), then it must ultimately be discarded. In our initial sketch of the traditional argument from democracy, the democracy theorist did not provide good theoretical reasons to reject this intuition—she simply failed to give any good reasons to accept it. But the democracy theorist now has a theoretical argument, in the form of Waldron's core case against judicial review (as modified by our objection and limited to rights to nonpolitical speech), for the conclusion that, if the Stravinsky intuition concerns strong-form constitutional rights, then it ought to be rejected in the end.

The democracy theorist can also explain why people find the Stravinsky intuition so compelling and why they have (mistakenly, she claims) taken it to be so devastating to the argument from democracy. People find the intuition compelling because it is *true*—so long as it is understood as referring to the moral right to the freedom of expression rather than to a specifically strong-form constitutional right. And they have taken it to be devastating for at least two reasons. First, we are often a bit lax about distinguishing different kinds of rights and clarifying which are at issue in any given discussion, especially when we take ourselves to have overlapping moral, legal, and constitutional rights in some domain. This makes it easy to overgeneralize a strong intuition that is true with respect to one kind of free speech right but false (or at least nonobvious) with respect to another. Second, even when writers are relatively clear about the distinction between moral rights and strong-form constitutional rights, they often slide from claims about moral rights to claims about constitutional rights without ever making an explicit argument about the proper scope of strong-form judicial review. They simply assume that something like the naive picture of

58 And against others as well, presumably, but we have been focusing on rights against the government.

constitutional rights must be correct. In that case, even if one does not conflate moral rights with legal and constitutional rights, one may tend unthinkingly to infer a conclusion about strong-form constitutional rights from an intuition about moral rights. But the democracy theorist can argue that, because the naive picture is mistaken, these natural-seeming inferences are unjustified.

Finally, the democracy theorist can reassure her critics that the reason that rights to nonpolitical speech are unfit for strong-form judicial review, according to her refined account, has nothing to do with the value of the rights themselves or the underlying interests they protect. On her view, rights to nonpolitical expression are inapt for strong-form judicial review not because they are unimportant but because we have no reason to think that courts will outperform legislatures in administering them. Insofar as negative responses to traditional democratic free speech theories are driven partly by a perceived affront to these other rights, this should make the refined argument from democracy a bit more palatable.[59]

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POLITICAL OBLIGATION AND POLITICAL RECOGNITION

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IMAGINE that things were like this. You live in a liberal society governed by a substantially just legal system, whatever precisely you take that to mean. Each of your fellow citizens is like Justice Oliver Wendell Holmes's bad man: he views the law in a predictive fashion and complies solely to avoid sanction.[1] Further suppose that the state is an ideal enforcer—it enforces all and only substantially just directives against all and only violations of those directives—and each bad man knows about this and never breaks the law because of his prudential outlook. So you know that others will not interfere with your liberties, body, or property, at least not in ways proscribed by law. Now ask yourself: Is something important missing from this picture, something you have reason to care about as a person living amongst others in a political society? Obviously, it is better to live in this community than one in which people routinely harm you in unjust ways. But I hope you think that something important is missing in the society of bad men. My tentative suggestion, although I will return to this later, is that you care not just about whether people conform to just law but about whether they have a certain attitude towards it—namely, respect for the law itself. And given that the bad men never break the law, the value of that attitude does not depend solely on how it enables compliance.

The idea that respect for the law is noninstrumentally valuable will undoubtably be familiar to those who have delved into the philosophical literature on authority and obedience. But the novel thought I will develop is that this value, properly understood, grounds a general obligation to obey the law or, to use common terminology, political obligation. The *recognitional account* of political obligation defended here consists of the following claims:

1. Citizens of a liberal polity have obligations to recognize one another as free and equal members of their own political community and communicate this recognition.
2. Under certain conditions, having respect for the law of one's state is a crucially important way of affording and communicating such

1 Holmes, "The Path of Law."

recognition, and so we are obliged as citizens to have such respect under those conditions.

3. Being obligated to have respect for the law entails having a general obligation to obey it.

Taken jointly, these claims show how the following three concepts—political recognition, respect for law, and political obligation—are united in a normative nexus that yields a demanding but deeply attractive interpersonal ideal for political life.

The plan for the paper is as follows. In section 1, I provide a minimal conception of political obligation that draws on ordinary moral experience and incorporates the most important features from existing discussions of the concept. In sections 2–4, I develop the recognitional account of political obligation. Section 2 provides a preliminary characterization of political recognition and its values. Section 3 argues that an important function of just liberal law is to provide a vehicle through which citizens can afford and communicate recognition of one another as free and equal moral persons by having respect for the law. Section 4 argues for the obligatoriness of respect for the law and establishes its link with political obligation. Section 5 discusses some issues concerning the relation between law and justice on the proposed account, including the question of whether there are political obligations to obey unjust laws as well as laws that are consistent with but not required by independent considerations of justice. And finally in section 6, I discuss two kinds of "meta-skepticism" about political obligation that question the concept's importance for political philosophy. The first form denies that the existence of political obligations would make a significance practical difference for what individuals have reason to do, while the second form denies that political obligations are important for addressing potential objections to the state's activities. I argue that the recognitional account justifies a philosophical interest in political obligation even if both forms of skepticism are true.

1. WHAT IS THE GENERAL OBLIGATION TO OBEY THE LAW?

The literature on the obligation to obey the law is enormous, and many discussions raise reasonable worries about even its most plausible elements. Rather than delving into those intricacies, I will provide a minimal characterization that reflects some important parts of ordinary moral/political thought and that should be acceptable to most people working within this general tradition. First, the obligation is *content independent* in that those who have it ought to do what the law dictates *because* the law dictates it. Political obligation is

thereby importantly similar to promissory obligation: you ought to do what you promised *because* you promised to do so and not simply because of promissory-independent reasons.[2] But content independence should not be mistaken for *content insensitivity*.[3] Immoral promises do not bind, but that does not mean that one's reason to keep a promise is not the fact that you promised. Instead, it just means that the content of a promise must satisfy certain criteria in order for the promise to generate a content-independent reason. Similarly with political obligation. And in order for this obligation to be content independent, the fact that the relevant actions are required by law must play an essential role in the obligation's justification.

Second, the obligation is *general* in that it applies to all the law's subjects and to all those laws in all circumstances to which they apply.[4] Third, the obligation is *particular* in that it is owed specially to one's own political society (the state itself, the collective community, or its members individually) rather than to other societies/states that one interacts with.[5] This feature seemingly captures an element of ordinary political thought such that rejecting it would objectionably discount our shared moral experience.[6] Moreover, the particularity requirement ties the obligation to citizenship in an intuitively plausible way. As Robert Paul Wolff remarks, "[When I] return to the United States, I have a sense of reentering *my* country, and … I imagine myself to stand in a different and more intimate relation to American laws [than to others]. They have been promulgated by *my* government, and I therefore have a special obligation to obey them."[7]

Other features of political obligation are often proposed, in particular the purported *moral nature* of the obligation. For example, A. J. Simmons says that the problem of political obligation concerns "whether or not there's a *moral* duty to discharge our assigned legal duties" where a moral duty's "normative force derives from independent moral principles beyond any conventional or institutional 'force' … or widespread social expectations for conduct."[8] But what exactly is the point of the morality requirement? Simmons suggests that it is

2 See Hart, "Commands and Authoritative Reasons"; Raz, *The Morality of Freedom*; and Green, *The Authority of the State*.

3 Raz, "The Obligation to Obey the Law"; and Valentini, "The Content-Independence of Political Obligation."

4 Raz, "The Obligation to Obey the Law," 234. Not everyone accepts this feature, e.g. Simmons, *Moral Principles and Political Obligations*, 35–37.

5 Simmons, *Moral Principles and Political Obligations* and "The Particularity Problem."

6 Simmons, "Justification and Legitimacy," 67–68.

7 Wolff, *In Defense of Anarchism*, 18–19.

8 Simmons, "The Duty to Obey and Our Natural Moral Duties," 93–94.

needed to ensure that the problem of political obligation does not concern the simple issue of whether there is a legal duty (i.e., one internal to the law *qua* system of norms) to obey. But that point can be granted while avoiding some difficulties created by the morality requirement. First, there is a question of what 'moral' means in this context. Does morality concern the principles governing what we owe to one another simply as persons whose interests count equally? If not that, then what? Second, and building off that, some senses of 'moral' seem to automatically rule out intuitively plausible accounts. For example, an associative theory might ground political obligation in the nonmoral value of a certain kind of relationship. Why should such a view be dismissed at the outset? Alternatively, one might think that the morality requirement captures the thought that you cannot opt out of political obligation once you have it. Once morality gets a grip on you (perhaps just in virtue of the fact that you are a moral agent), it holds you for as long as you have the relevant properties; so too for political obligation. But whatever plausibility that thought has, it is hard to see how it is not captured by the generality requirement, which states that you have an obligation to do what the law dictates in all circumstances in which it applies to you. So if the law applies to you here and now, you cannot opt out by saying so. Furthermore, the fact that you cannot opt out of political obligation might just reflect the fact that the obligation serves your own interests independently of whether you in fact take an interest in it.[9] But that does not necessarily make political obligation moral in any interesting sense. So we can acknowledge that the problem of political obligation is not just about legal obligations without thereby accepting some version of the morality requirement. And without some clearer justification, it is unclear why it should be accepted.

One last worry is that, strictly speaking, there is no problem of political obligation since law does not have the form needed to make that problem intelligible. One might think that talking about a general duty to *obey* incorrectly assumes that some parts of the law contain commands. Instead, so the objector claims, the law specifies other kinds of norms. But that is not concerning so long as those norms can be associated with content-independent obligations.[10] And that is plausible even for laws that are not phrased with words like 'obligation' or 'duty' (e.g., anyone who does *x* is guilty of offense *o*). Alternatively, one might think laws are best understood as conditional announcements of what will happen (e.g., sanction) if you act in certain ways. But while states

9 I owe this point to Daniel Viehoff.

10 Many laws cannot be construed as obligation-imposing norms (Hart, *The Concept of Law*, ch. 3). Laws concerning contracts and marriage confer legal powers on people to alter rights and duties by specifying the qualifications and procedures for exercising them. I address the significance of such powers for our problem in section 3 below.

almost universally claim that they will punish lawbreakers, that does not preclude many laws from being commands or obligation-imposing norms. And it simply does not seem plausible to interpret even the criminal law as merely amounting to threats or conditional announcements.[11] Moreover, it is not conceptually necessary that the law provide for sanctions to count as law or have the normative features of interest here.[12]

It is important to stress that my characterization does not capture everything that might be meant in talking about political authority. It seemingly includes too little because it does not concern anything related to coercion or territorial rights. It also seemingly includes too much, as there are some theoretically interesting notions of authority that are not particularized and potentially also ones that do not entail that those subject to authority have a duty to obey.[13] But we should reject the idea that there is a single concept of political authority, as many different notions are normatively significant and worth distinguishing from one another.[14]

2. THE VALUES OF POLITICAL RECOGNITION

The first step in defending the recognitional account is to provide a preliminary characterization of political recognition's values. I will develop the central ideas of the account using a Rawlsian framework, but it is important to stress that this is a nonessential feature; it is simply a way of putting some illuminating flesh on a theoretical skeleton. One need not be a card-carrying Rawlsian or accept anything like the difference principle to endorse the recognitional account. All that one needs to accept (although this will not be fully clear until later) is that just law within a liberal society can play a certain normative role—namely, providing a crucially important vehicle for citizens to afford and communicate their recognition of one another as persons conceived of in whatever way matters fundamentally for thinking about liberal political life and the justification of our institutions. So the recognitional account could in principle be detethered from the Rawlsian ideas I employ without any real loss of theoretical substance.

11 Scheffler, "Membership and Political Obligation," 18.

12 Consider Raz's society of angels as well as a small commune in which nobody ever uses force but where questions of obedience might still intelligibly arise (*Practical Reason and Norms*, 159).

13 Johann Frick and Daniel Viehoff argue that a soldier's lacking a duty to obey their superior's orders does not establish that the superior has no practical authority over them ("Authority Without the Duty to Obey").

14 Christiano, *The Constitution of Equality*, 241.

So then why not articulate the recognitional account in more theoretically neutral terms? There are a couple reasons. First, many of the recognitional account's key elements, including, as I will discuss, its emphasis on political recognition's effect on individual self-respect, fit well within Rawlsian thought, and so the ideas are clearer when situated within that apparatus. Second, when it comes to political obligation, Rawls is typically interpreted as providing both natural duty and fair-play accounts, which come with their own suites of problems.[15] So it is theoretically worthwhile to consider whether Rawlsian theory has resources for defending an alternative account of political obligation, one that might even align better with Rawls's own central commitments.

A foundational element of Rawlsian justice is a particular political conception of personhood, namely, an ideal of free and equal moral persons. The specification of this ideal, as well as its justificatory role, partially gives Rawls's liberalism its distinctive flavor.[16] Free and equal moral persons are understood as possessing two moral powers: a capacity for reasonableness (i.e., having an ability and willingness to cooperate with others under fair terms) and a capacity for rationality (i.e., having an ability and interest in developing, pursuing, and revising one's own conception of what makes life valuable and which involves the exercise of one's developed skills). Personhood of this kind lies at the heart of Rawls's defense of the two principles. In choosing between competing conceptions of justice, the parties in the Original Position are motivated to secure the conditions needed to realize their higher-order interests in being reasonable and rational, which then translates into an interest in acquiring an adequate share of the primary goods. And the constraints imposed by the Veil of Ignorance ensure that the parties are considered solely as free and equal moral persons. Now, in ordinary life, our self-conceptions as individuals with particular histories and distinctive pursuits inform our reasons to live in various ways. But the Rawlsian conception of personhood specifies what matters fundamentally in assessing the principles governing the basic structure and that thereby make the effects of the structure justifiable to each person.

So a just basic structure will afford each of us an adequate share of the primary goods, reflecting our status as free and equal moral persons. But it is generally not enough that we simply receive this fair share. For several important reasons, recognition of our status as free and equal moral persons, as well as

15 Rawls, *A Theory of Justice*, secs. 51–52. For criticism, see Simmons, *Moral Principles and Political Obligations*, chs. 5–6.

16 Scheffler illuminatingly discusses the evolution of Rawls's thought on the conception of personhood ("Moral Independence Revisited").

the communication of that recognition, seems worth caring about.[17] First, such recognition is instrumentally valuable because it supports the kind of moral motivation necessary for people to act in ways that properly further everyone's interests as free and equal moral persons. It therefore plays an important role in promoting the stability of a cooperative society and might even support valuable solidaristic tendencies. Second, recognition of one's status as a free and equal moral person promotes individual self-respect, which involves both (1) a secure conviction that one's conception of the good is worth pursuing and (2) the confidence and desire to pursue that good on fair terms with others.[18] Without this kind of recognition, people may be more inclined to grow cynical and partly withdraw from social life, thereby making it less likely that they can fully endorse and pursue their own conceptions of the good.[19] Third, recognition of one's status as a free and equal moral person seems to be a finally valuable attitude that is constitutive of a valuable political relationship.[20] It is a familiar feature of ordinary life that we care about being recognized, even in the private mental lives of others, as having certain normative statuses rather than just acquiring the goods owed to us in virtue of them.[21] In some of the most quotidian cases (e.g., discrimination in employment contexts), we care that we have not been properly recognized as equals even when that does not deprive of us material goods. And the fact that we care about being so recognized does not reflect a psychological vulnerability that we would be happy to purge from our emotional repertoire; instead, it represents a justified and morally sensitive response to our circumstances and other people.[22]

17 The notion of citizenship invoked here is both broader and narrower than common forms of legal citizenship. Some legal citizens may not qualify (e.g., expatriates) while some legal noncitizens will (e.g., those who reside primarily in a foreign state). Compare Scheffler, "Membership and Political Obligation," 9.

18 Rawls, *A Theory of Justice*, 386, and *Political Liberalism*, 318. Stark claims that the confidence aspect of self-respect does little justificatory work in Rawls's own theory ("Rawlsian Self-Respect," 240). Even so, some form of political recognition could plausibly promote this dimension.

19 Consider the arguments for the difference principle given by Rawls, *A Theory of Justice*, 128–29.

20 It is plausible that being part of some finally valuable relationships (e.g., friendship) constitutively involves having certain attitudes towards one's relatives. See, e.g., Kolodny, "Love as Valuing a Relationship," 148; and Raz, "Respect for Law."

21 On caring about what others believe of us, see Basu, "Can Beliefs Wrong?" and "The Importance of Forgetting."

22 Shiffrin, *Democratic Law*, 167–68.

It is important to emphasize that some of political recognition's values are *communicative*, while others are not.[23] Take the instrumental values concerning moral motivation and individual self-respect. In order for recognition to promote those values, those who are afforded recognition must be able to reasonably believe that they are being afforded recognition, whatever precisely that involves. And one kind of communication occurs when, in a given context, an individual can reasonably form certain beliefs about the attitudes that informed or motivated another agent's action.[24] Suppose, to take a modified example from T. M. Scanlon, you do not invite me to the neighborhood block party because of your racial animus.[25] If I am the only minority in the neighborhood, you not inviting me communicates your prejudice insofar as I can form reasonable beliefs about what motivated your behavior. This is the sense in which the instrumental values of political recognition are communicative. But the third value concerning the final value of recognition is *noncommunicative* in that it can be realized without communicative uptake; we reasonably care about the simple fact that people have certain attitudes towards us. Given that, realizing all the values of political recognition requires that it be afforded in a suitably communicative way.

But what form of recognition could serve these values, and how could it be properly communicated? Even before getting clear on what recognition is, there seem to be several structural barriers both to having and to communicating it, at least within modern political communities.[26] First, much of our lives are organized around partial concerns. Granted, some may be able to afford others recognition simply by pursuing their own conception of the good (e.g., civil rights activists). But for those who live relatively private lives, their justifiable partiality makes it difficult to devote significant time and energy to affording others recognition. Second, our communicative means are fairly limited. In a state that is geographically very large, it is difficult (and perhaps impossible) to communicate recognition to some of our fellows given our limited interactions. And even though we live in the age of social media, the communicative reach of those mechanisms is still quite small. Furthermore—and here is the third

23 Thanks to an anonymous reviewer for highlighting the need for elaboration here.

24 Compare Scanlon on two different senses of "the meaning of an action" (*Moral Dimensions*, 53–54). Scanlon does not discuss communication exactly, but neither that nor the particular difference between the two senses he is interested in matters for present purposes.

25 Scanlon, *Moral Dimensions*, 52–53.

26 Shiffrin similarly argues both that there is a moral need to express our recognition/mutual respect *qua* citizens and that there are important structural barriers to achieving this (*Democratic Law*). My account incorporates some of her discussed barriers, but my solution is different from, although not incompatible with, hers.

problem—it is not clear that discursive affirmation of one's fellows as free and equal (e.g., via some daily Twitter posting) suffices for political recognition in the absence of some associated actions.[27] So there is a need to afford and communicate recognition within our political community as free and equal moral persons, but these barriers make achieving that difficult. And to emphasize, it is not enough to sit in your house and spend time thinking about how much you care about freedom and equality. The next claim to be defended is that the legal system can serve as a vehicle for affording and communicating recognition when people have respect for the law itself.

3. THE RAWLSIAN FUNCTIONS OF LAW AND RESPECT FOR LAW

Different things may be meant in speaking of the functions of law or a legal system.[28] On the one hand, there are its *conceptual functions*—namely, those things it must do to qualify, definitionally, as a legal system. But there is also a question about its *normative functions*—namely, those things that it ought to do and how it ought to do them. Now these two features are not entirely independent; the conceptual functions of a legal system set constraints on its intelligible normative functions. Thinking otherwise would be like saying that a carburetor ought to be used for writing.

So what are law's normative functions within a society governed by Rawls's principles? One function is to protect people's interests in the two moral powers of reasonableness and rationality in a way that is fitting given the law's conceptual functions.[29] And while Rawls's principles holistically regulate the whole basic structure, the legal system plays some distinctive roles in furthering the ideals underlying the principles. First, the legal system specifies private norms of individual conduct (e.g., criminal and tort law), which collectively provide a public basis for people to act in ways that fairly promote others' interests in being reasonable and rational. Even many mundane laws, such as traffic regulations for parking in major cities, play this role. Such laws help solve a coordination problem, which in turn enables people to pursue their adopted ends while making fair and efficient use of public and private spaces.[30]

Second, the law provides individuals with various legal powers (e.g., contract and marriage) that can be used to enter normative arrangements through

27 Shiffrin, *Democratic Law*, 153.

28 Raz, "The Functions of Law," 164–65.

29 I assume that most plausible ways of specifying a legal system's conceptual functions will allow it to fulfill the normative functions described below.

30 Shiffrin, *Democratic Law*, 167–68.

which people might better pursue their conceptions of the good. The justifiability of a private conduct norm or the provision of a legal power partially depends on whether general compliance with the norm (or the availability of the power) properly furthers the fundamental interests of all in a fair way. And this point is not threatened by the fact that different legal systems contain different private norms and provide different powers. Even keeping fixed the normative function of Rawlsian law under consideration here, particular cultural histories and sentiments make some legal powers perfectly intelligible and worthwhile in some communities, while they are odd and perhaps even pointless in others (e.g., a power to authorize your child's marriage).

Third, the legal system sets constraints on what the government may do (e.g., constitutional laws concerning freedom of speech), which, when observed, ensure that people are given fair opportunities to exercise fundamentally important liberties in the pursuit of their goods. Fourth, the legal system plays an important role in regulating other elements of the basic structure, including the political and economic systems. Given that part of the point of having those other institutions is also to, in their own distinctive ways, fairly protect our interests in freedom and equality, the legal system plays a quite expansive role in furthering the normative function of the entire basic structure. These considerations do not mean that the ideal of free and equal moral persons provides the only justification for or constraint on the content of a legal system. It may be acceptable to promulgate laws that do not implicate this status (e.g., prohibiting the destruction of protected forests because of their final value). The key point for present purposes is that one normative function of Rawlsian law is to fairly further the fundamental interests of all citizens in being reasonable and rational.

I suggest now that law within a just Rawlsian society has another normative function—namely, to provide a vehicle through which people can afford and communicate recognition of one another as free and equal moral persons. To see how this is possible, we must say something about what it is to have respect for the law. Respect for the law is a complex attitude, and its fullest form has three dimensions, which are logically separable though usually coexisting.[31] First, it has a cognitive dimension involving (1) certain beliefs about the moral value of the law as an institution that protects our status and interests as free and equal moral persons and (2) associated affective attitudes that are appropriate in virtue of those beliefs (e.g., pride that one's society is governed by such an institution). Second, it has a practical dimension involving a robust disposition

31 Raz discusses the first two elements ("Respect for Law," 251–53), although I differ from him slightly in articulating them in terms of free and equal personhood. Thanks to an anonymous reviewer whose objections necessitated a revised characterization of respect for the law.

to obey the law (i.e., to treat law as a source of political obligation) whereby the motivation for obedience is that the law is a fundamentally important institution that protects our status as free and equal moral persons.[32] Given this characterization, the bad man does not have respect for the law, as his obedience has a solely prudential motivation. The practical dimension may also involve associated affective responses such as guilt when one unjustifiably violates the law or approval of others who obey it out of respect. Third, respect for the law has another practical dimension, which involves a robust disposition to not abuse one's legal powers. Abusing a power, in one sense, involves attempting to exercise it while believing that it will not serve the values that justify its use/availability or being indifferent to that issue.[33] And legal powers can be abused in ways that express disrespect for the law. Think of corrupt judges who issue judgments in order to further their financial interests or businesspeople who knowingly attempt to contract in legally unconscionable ways. Behaviors like these do not involve disobeying the law for the simple fact that there are no laws with the form necessary to make the idea of disobedience intelligible. Nevertheless, insofar as a person seeks to exercise their legal powers, they should take due care in following specified norms and not abusing those powers. Otherwise, they express disrespect for the law.

Now we establish the link between respect for the law and political recognition. A just Rawlsian legal system—in virtue of its structure, content, and underlying justification—embodies the ideal of free and equal moral persons living together on fair terms and aims to protect those interests by serving as a regulating institution for an enormous amount of social behavior. One who has respect for the law itself will thereby, in virtue of all three of this attitude's dimensions, afford and communicate their recognition through their cognitive and practical activities. Take the second dimension. If you have the articulated disposition, then your will is sensitive to certain kinds of reasons, specifically ones related to what the law demands *qua* law. This kind of practical acknowledgment yields a practical recognition of your fellow citizens as free and equal given that the legal system foundationally reflects this status and that your disposition is sensitive to this fact. By having this attitude, acting on it when appropriate, and understanding the normative underpinnings of just Rawlsian law, one affords recognition to one's fellows in a way that they have reason to care about simply

32 An alternative characterization of the practical dimension might be as follows: respect for the law involves a disposition to obey the law whereby that disposition is explained in part by the cognitive dimension of an individual's respect for the law (i.e., their beliefs that the law has a special moral importance as an institution that protects our status and interests as free and equal persons).

33 On the arbitrary exercise of power, see Raz, "The Rule of Law and its Virtue," 219.

because that seems to be a finally valuable attitude. Because of this, respect for the law promotes the noncommunicative value of political recognition.

Moreover, affording others recognition via having respect for the law can secure the communicative values articulated earlier as long as a particular publicity condition is satisfied—namely, that there is a reasonable public basis and culture for people with ordinary cognitive facilities to know that the legal system is structured so as to fairly protect their interests as free and equal moral persons.[34] If this condition is not satisfied, people will not be well positioned to reasonably believe that others have a valuable attitude of respect for the law, which in turns means that the communicative values tied to moral motivation and individual self-respect will not be furthered. It is not really possible to precisely specify what is needed to satisfy this publicity condition, as that will depend on, to name just a couple things, cultural features and the community's level of technological advancement. It might be necessary to provide some kind of public education that enables people with ordinary cognitive faculties to understand, at some level, important political ideals that justify the content and structure of the legal system. This does not mean that *A Theory of Justice* must be included on all summer reading lists for third graders, but it is perhaps important that there be readily available secondary education classes that teach young persons about basic moral ideals and how the legal system should be designed in light of them. It might also be necessary for government officials to routinely and publicly express how the legal system's design and operation is consistent with the ideals embodied by the Rawlsian principles (e.g., a sitting president publicly supporting a Supreme Court decision concerning free speech). Much more could be said here by way of illustration, and it will likely be quite difficult to satisfy the publicity requirement in modern states. But the main point is that if we are reasonably well positioned to know why the law of a liberal society is important, then others having respect for the law can be a basis for us forming reasonable beliefs that we are being afforded recognition via their compliance with law, and that can serve the communicative values of recognition. Given all that, law is, in a sense, the medium that enables us to relate to each other in a distinctive way by affording and communicating recognition of all of our fellows as free and equal.

One might object that other people having respect for the law cannot promote the communicative values of political recognition since we are not

34 In articulating a different publicity principle, Christiano distinguishes between an implausibly demanding requirement that each person actually see that they are being treated justly and a more plausible requirement that each person be capable of seeing that they are being treated justly given a reasonable effort on their part to exercise ordinary cognitive faculties. See Christiano, "The Authority of Democracy," 270.

mind readers, and publicly observable compliance with law is consistent with a number of internal motivations. After all, for all we know, maybe each person conforming to the law is really just a bad man. In response, recall the sense of communication described above in articulating political recognition's values. An agent's action can communicate something in a context if others are well situated to form reasonable beliefs about that agent's motivating reasons for performing the action. When the publicity condition is satisfied, and people have respect for the law, others are well positioned to (1) reasonably believe that people have respect for the law and (2) interpret their behaviors as communicating a clear message about the importance of our status as coequal free persons. Even if we sometimes make mistakes about people's motivations for complying with the law, the obtaining of 1 and 2 means that we can have knowledge of people affording one another political recognition when they do so. So when people have respect for the law, the communicative values of political recognition can be secured even if some bad men still live amongst us. And it is worth emphasizing not just that we believe that we are being afforded recognition but that we *reasonably* believe that we are being afforded it and that others are actually affording it.

It is important to note that respect for the law does not just afford and communicate recognition to those who will be affected by your immediate actions. Granted, when I obey a traffic law because it is the law, I afford recognition to other drivers on the road who need to make fair, safe, and efficient use of roadways. But I also afford recognition to others who are not driving on the road now and perhaps even people in faraway parts of the state. This is because of the encompassing nature of law mentioned earlier, the generality of its application, and its regulative functions. To have respect for the law is in a way to say, "I recognize that this institution matters for *all* of us as free and equal moral persons engaging in public life, and so I recognize *all* of you in obeying when and because the law applies to me." But having respect for the law does not require blindly following it on all occasions. If you are driving at night, and the traffic light has remained red for an unusually long period of time, it is acceptable to look carefully in both directions and proceed with caution. Doing so does not involve any disrespect for the law, nor does it fail to afford your citizens proper recognition. But if you lack the standing disposition to obey speeding regulations during busy hours or if you knowingly attempt to exercise your legal powers in unconscionable ways, you express disrespect for the law and in turn for your fellow citizens.

Apart from the publicity condition, these remarks point to a need for something like a *totality* condition: in order for the law to serve as a vehicle for affording and communicating political recognition, the legal system must be substantially just in its totality. In the present context, this means that the legal system must have the content needed for it to play its proper role within a basic structure

governed by Rawls's two principles. One might object that the preceding traffic example cuts against the need for a totality condition.[35] Even if the law is substantially *unjust*, there might be traffic laws, for example, that properly protect our interests as free and equal moral persons by fairly playing their coordinative role. Would an individual not then afford recognition to their fellows by obeying a traffic law because it is the law? In response, I will say that the individual may afford recognition by doing what the traffic law dictates simply because they see why having such laws matters. But I do not think that having the *disposition to obey the law* in the way involved in having respect for the law properly affords/communicates recognition unless the legal system is just in its totality. Think of it this way. When I have respect for the law, my motivation of obedience, which psychologically grounds my disposition, is tied to my appreciation of the law as a fundamentally important institution that protects our status as free and equal moral persons. But if the law does not actually do that, I struggle to see how recognition of our status is afforded and communicated. What is important is not just that I do what a just law within an otherwise unjust legal regime dictates; what matters is that I obey the law because I am motivated by an appreciation of the fact that the legal system, *qua* institution, fulfills a certain normative role—namely, protecting our status as free and equal moral persons. So something like the totality condition seems needed for respect for the law to properly play its role in affording and communicating recognition.

4. Linking Respect for Law and Political Obligation

The discussion so far has aimed to show both (1) that it is valuable for members of a liberal political community to afford and communicate recognition as free and equal moral persons and (2) that having respect for the law is a crucially important way of affording and communicating such recognition given some structural features of modern social life. To complete the defense of the recognitional account, we must now establish both (3) that we have obligations to afford one another political recognition via respect for the law and (4) that the obligatoriness of respect for the law entails that there are political obligations.

One might doubt that respect for the law could be obligatory simply because it is an attitude. But respect for the law, in each of its dimensions, may be cultivated. As Raz remarks, "whether or not one respects the law is up to the individual. A person may decide that the law deserves to be respected and that he will respect it. . . . Such decisions do not create or terminate the attitude overnight, but they may signal the beginning of a process leading to its acquisition . . .

35 Thanks to an anonymous reviewer for raising this worry.

and they may demonstrate one's control over its existence."[36] If respect for the law can be cultivated, then common control-based worries often levied against the obligatoriness of belief do not apply.

But how can the obligatoriness of political recognition and, in turn, respect for the law be established? It is worth noting that many philosophers, especially those with deontological sensibilities, are quite willing to accept that some forms of recognition or respect are obligatory. For example, Seana Shiffrin says that there is a moral imperative of communication among citizens insofar as "the social bases of self-respect are not merely material in nature but communicative."[37] In a different vein, Stephen Darwall says that persons are entitled to recognition respect, which involves taking seriously and weighing appropriately the fact that other individuals are persons in one's practical deliberation.[38] So if political recognition is valuable in the ways described earlier, it is plausible that we are obliged to afford it to our fellows and are thereby obliged to have respect for law. But can more be said in favor of recognition being obligatory? There is a difficulty here, as there are many different philosophical views about the constitutive features of obligation and how to "build" one, so to speak. On my preferred way of thinking about what is sufficient for *x* being obligatory, we consider the benefits and burdens in *x*-ing that would accrue to those subject to the obligation and compare those against other relevant considerations, including in particular the benefits and burdens that would accrue to others through general compliance with the obligation. If the burdens on those subject to the obligation to *x* are insignificant compared to the benefits enjoyed by others, it is plausible that there is a genuine obligation to *x*. In the present case, all citizens enjoy significant benefits by being afforded political recognition in a suitably communicative way and are subject to not so significant burdens in cultivating an attitude of respect for the law. Moreover, it is good for everyone, as both subjects and objects of the obligation, to live on terms of mutual political recognition with their fellows. And my interests in being afforded political recognition (via respect for the law) and having that recognition be communicated give me reasons to form normative expectations that my fellows will cultivate respect for the law and blame them when they do not.[39]

Now for the final question of the main argument: Why does the obligatoriness of respect for the law establish political obligation? Raz argues that

36 Raz, "Respect for Law," 258.

37 Shiffrin, *Democratic Law*, 149–50.

38 Darwall, "Two Kinds of Respect," 38.

39 For discussion of how normative expectations are constitutively linked to obligations, see Scheffler, "Morality and Reasonable Partiality," 110.

respect for the law is a morally permissible but not required attitude, and one who has respect for the law has an "expressive" reason to do what the law dictates. Expressive reasons are "so called because the actions they require express the relationship or attitude involved."[40] For Raz, respect for the law expresses loyalty to and identification with one's society, which he presumably thinks is nonobligatory. But if respect for the law is an obligatory attitude in virtue of its connection to political recognition, then one is thereby obligated to perform those actions that are associated with the attitude. The argument form for this is as follows: (1) *A* is obligated to ϕ; (2) ϕ-ing entails ψ-ing; (3) therefore, *A* is, subsequent to ϕ-ing, obligated to ψ. Additionally, respect for the law involves a robust disposition to obey the law when it applies to you. It is not possible to have practical respect for the law and not comply with it, at least in a rather large variety of circumstances, for then one would not have the disposition to begin with. Furthermore, practical recognition of others realizes its fullest value when that recognition is associated with actions that have both communicative and noncommunicative significance. Full recognition comes in a package and involves doing what the law dictates because of one's respect for it. This means that the recognitional account establishes additional duties beyond those recognized by traditional answers to the problem of political obligation—namely, ones to cultivate a rich variety of cognitive and practical attitudes towards law, freedom, and equality and to obey the law because of those attitudes.[41] Only in doing so do we properly afford recognition to others and secure its values, ones that are partly tied to our reasonable beliefs that others think of us as free and equal moral persons and that they use that as a guiding ideal for their attitudes and actions.[42]

One might object that the obligatoriness of respect for the law presupposes political obligation, and so I have unacceptably reversed the explanatory order. To get a better grip on this worry, consider R. Jay Wallace's view of interpersonal recognition, which involves treating moral requirements as presumptive constraints on behavior.[43] Because Wallace thinks of moral requirements as constitutively connected to claims held by other individuals, interpersonal

40 Raz, "Respect for Law," 255, 259.

41 Thanks to an anonymous reviewer for help in clarifying how these additional duties should be specified.

42 There are some similarities with this line of thinking and Rawls's discussion of the duty of mutual aid: "A sufficient ground for adopting this duty is its pervasive effect on the quality of everyday life. . . . The primary value of the principle is not measured by the help we actually receive but rather by the sense of confidence and trust in other men's good intentions and the knowledge that they are there if we need them" (*A Theory of Justice*, 298).

43 Wallace, "Recognition and the Moral Nexus," 4.

recognition involves acknowledging other persons as sources of moral claims, which is itself finally valuable. But for Wallace, the value of recognition is explained fundamentally by the moral claims we have on one another. So he thinks it would be a mistake to reverse the order and explain the reason-giving force of moral requirements in terms of recognition. So too one might think that the value of political recognition, and in turn its obligatoriness, can be explained only if there is an independent ground for political obligations. But I do not think there is a real problem here. The articulated values of political recognition and its communication—(1) support for the development/maintenance of moral motivation, (2) support for individual self-respect, and (3) the final value of relating to one another via the attitude—do not presuppose that there are independent obligations to obey the law *because it is the law*. The defense of the recognitional account just relies on the claims that we have a certain status that is embodied in a just legal system and that respect for the law is an obligatory means of acknowledging that status. Given that respect for the law also entails obeying the law because it is law, political obligations are established.

In closing this section, I will explain how the recognitional account establishes our three hallmark features of political obligation: content independence, generality, and particularity. As for content independence, the obligatoriness of respect for the law depends essentially on the law as a regulative institution embodying the ideal of free and equal personhood. Without that, respect for the law will not afford people the recognition they are entitled to. Given that and the link between respect and political obligation, the fact that certain actions are required by law plays an essential role in the justification of political obligation. So the content independence requirement is satisfied.

As for particularity, political recognition is, in the first place, a valuable way of relating to one another as fellow citizens, understood in the broad sense mentioned earlier. The underlying ideal of free and equal moral personhood sets a standard for a common framework of life within a single state, through which we might all pursue our own conceptions of the good on fair terms with others. It may be important for noncitizens traveling within the country to have respect for the law and to obey because it is the law. But the value of that attitude is importantly derivative on the valuable form of life that we share as citizens of a particular state. So the particularity requirement is satisfied.

The generality requirement is slightly trickier. If it is interpreted to mean that one always has a political obligation to follow any law, then the recognitional account cannot establish that, given the earlier remarks about significantly unjust laws that are inconsistent with the ideal of free and equal personhood. But that seems an overly demanding and implausible interpretation of the generality requirement. It is enough that respect for the law is obligatory for

all citizens in virtue of the generality of the duty to afford recognition. One who has respect for the law will have a stable and robust disposition to obey the law in all circumstances in which it applies to them, but this allows for the possibility that they may sometimes legitimately conclude that a particular law is substantially unjust or perhaps not particularly relevant in the circumstances and that they have no obligation to obey it.

5. The Relationship between Law and Justice

It is important to now clarify the relationship between law and justice as it bears on political obligation. One question is whether there can be a political obligation to follow an unjust law. Some philosophers accept this possibility. For example, Thomas Christiano argues that democratic procedures have authority for citizens even when, within certain limits, they result in unjust decisions.[44] But if a particular law is significantly unjust insofar as it is inconsistent with the ideal of free and equal citizens, then the recognitional account cannot establish a political obligation to obey it, as the grounds of that obligation are inapplicable even if the remaining body of law is substantially just. If a law's content is such that conforming to it will deny someone something they are owed as a free and equal moral person, your obedience to that law does not afford them recognition; it might even be a way of denying them that recognition.

But what about a political obligation to obey a law that does not contradict what justice independently requires? To take one example, it is plausible that the Rawlsian ideal does not determine whether there should be a law prohibiting marijuana use in public spaces. If the rest of the law is substantively just, and the relevant publicity conditions are satisfied, is there a political obligation to obey this particular law? I think the answer is yes, and a comparison with requests within personal relationships can illuminate why this is the case. Suppose that your spouse falsely believes that one of the two driving routes you can take back home is more dangerous than the other. They request that you take the one they believe to be safer. You know that the two routes are equally safe, but you cannot convince them of this. So as far as your request-independent reasons are concerned, you have no reason to opt for one over the other, apart from your preferences. But if they ask you or perhaps if you promise to take your spouse's preferred route, you have a distinctive reason to take that route. And that is because, although the story needs to be developed, of the practical significance of their power to request certain things of you, even things you do not have independent reason to do, for the valuable relationship you share. In

44 Christiano, *The Constitution of Equality*.

assigning their request practical significance for your deliberation and acting on the basis of that consideration, you afford them recognition as your spouse, which is something they have reason to care about apart from whether you act in light of independent reasons, even ones that concern their interests. Similarly, even if justice does not settle the question of whether there must (or must not) be a law prohibiting marijuana use in public spaces, the fact that there is such a law can still provide a basis for affording and communicating recognition to one's fellows through respect for it, given that it is part of a body of law that properly acknowledges our status as free and equal moral persons. The fact that the marijuana law is part of a legal structure that plays the right kind of role in mediating the valuable relationship between fellow citizens is sufficient to give it normative significance for your deliberation insofar as respect for that law affords recognition. The content of a particular law does not settle whether there is an obligation to obey it, just like the content of a particular request (or promise) does not settle whether you have a reason to grant (or fulfill) it.

Another issue is whether law seems to drop out of the picture even if one accepts various elements of the recognitional account. To get a grip on the worry, return to the society of bad men that was described earlier. I conjectured that this story suggests that we reasonably care about whether our fellows take a certain attitude towards the law *qua* law. But a natural response is that this story shows only that we reasonably care whether our fellows are moved by considerations of *justice* rather than anything having to do with the law *qua* law. It is one thing, as Shiffrin notes, if someone begrudgingly complies with the law to avoid sanction, for that at best sends mixed messages about their commitment to coequal personhood.[45] But it is an additional step to assume that it is important that they respond to what law requires *qua* law rather than simply what justice requires. Put another way, the objection here is that respect for the law is not necessary for political recognition.[46] So the recognitional account faces a problem in that it cannot establish some special role for law and thereby cannot establish that there are political obligations.

In response, let me first acknowledge that some communities may be structured such that recognition can be afforded without any real need for the kind of law found in modern states. Imagine a small, isolated farming commune whose members have basically the same conception of what is important in life and possess common knowledge of a basic set of shared responsibilities. Given these two features, the values of political recognition may be secured simply by people conducting their daily lives in ordinary ways that are intelligible in their context.

45 Shiffrin, *Democratic Law*, 152.

46 Thanks to R. Jay Wallace and Daniel Viehoff for pressing this objection in different ways.

But I think that things are different, for several reasons, in the pluralistic liberal societies that we are most familiar with. First, as noted earlier, there are structural barriers to affording recognition that do not apply in the small commune, particularly issues of partiality and limited communicative means. In familiar modern societies, these circumstances generate a need for some unifying public institution to provide a vehicle for affording and communicating recognition of one another as free and equal moral persons. And I have argued that a legal system governed by the Rawlsian principles, in virtue of its content and expansive social role, is particularly if not uniquely well positioned to play this role.

Second, there is a deeper difference between familiar liberal societies and the small commune—namely, that the former contain citizens with wildly different political/moral worldviews and conceptions of the individual good. Given that such individuals cannot unite around a single such worldview or conception of the good, as the members of the small commune can, the need for political recognition in turn requires some unifying ideal and suitable public mechanism for affording that recognition. The Rawlsian conception of personhood supplies the ideal, and I confess that I cannot see how recognition of all persons can be adequately realized without something very much like a legal system to provide a public standard and mechanism for that acknowledgment. What other kind of public institutional structure or communicated doctrine could cover so much of social life?

Third, and relatedly, some of our interests as free and equal moral persons cannot be fully specified without a legal system. In order to adequately exercise the capacity to develop, revise, and pursue one's conception of the good on fair terms with others, some system of property rights, to take one example, needs to be respected. But potential property rights in a state of nature seemingly suffer from numerous problems that a legal system (and perhaps a scheme of coercive enforcement) is needed to rectify.[47] Without a legal system, how are we to determine what it takes to acquire a property right or what constitutes interference with one's property? So the gap between what justice demands and what the law dictates can be shrunk, at least concerning a reasonably broad set of important issues. And if the law plays this special role in specifying what is precisely needed to secure our status as free and equal moral persons, then respect for the law will be crucially important for political recognition.

47 This is an important element of Kant's legal philosophy. For helpful discussion, see Pallikkathayil, "Persons and Bodies," 36–39.

6. Skepticism about political obligation and the significance of the recognitional account

In this closing section, I discuss some varieties of skepticism about political obligation in order to highlight the recognitional account's philosophical significance for our practical and political lives. When it comes to the problem of political obligation, first-order skeptics deny that there are or could be such obligations. Within this camp, in-principle skeptics offer *a priori* arguments that such obligations are impossible. So, for example, Wolff argues that there cannot be any such obligation because it would conflict, in an irresolvable way, with the "primary obligation of man" to be autonomous.[48] Other "indirect" skeptics are suspicious about the possibility of such *a priori* arguments but do not rule them out. Instead, their arguments aim to provide strong grounds for thinking that such a duty does not exist. One common indirect argument is that most plausible extant accounts of political obligation fail somehow.[49] A second argument is that a proper understanding of the societal roles of good/just law suggests that there is no general obligation to obey it.[50] Just law can still do everything it "needs" to do without positing a general duty of obedience.

Apart from first-order skeptics, there are meta-skeptics who raise doubts about the philosophical significance of political obligation and thereby question the value of devoting attention to the problem. Such a view might seem implausible. Wouldn't far-reaching implications flow from the fact that there are no political obligations? Wouldn't that render all governments "bad" in some distinctive and important way? Tempting as these thoughts are, at least two plausible versions of meta-skepticism appear in the literature. First, there are *no-difference skeptics* who, informally put, think that the general obligation to obey makes no real practical difference to those within the law's scope.[51] More formally put: for any (or most) possible circumstances in which an individual has a reason, grounded in the general obligation to obey the law, to do what a given legal directive *D* dictates, that individual would have a reason (of similar

48 Wolff, *In Defense of Anarchism*, 18.

49 Simmons, *Moral Principles and Political Obligations* and "The Duty to Obey and Our Natural Moral Duties." See also Raz, "The Obligation to Obey the Law" and *The Morality of Freedom*.

50 Raz, "The Functions of Law" and "The Obligation to Obey the Law."

51 Buchanan, *Justice, Legitimacy, and Self-Determination*, 239–40. In earlier work, Simmons seems to accept no-difference skepticism (*Moral Principles and Political Obligations*, 29, 193). But in later work, he explicitly denies that "a duty to obey is simply unnecessary to reasonable concerns in political philosophy" as it must to invoked to explain, for example, why it is morally wrong to compete with our authorities ("The Duty to Obey and Our Natural Moral Duties," 98).

normative weight and significance) to conform to *D* even if they were not subject to a general obligation to obey. So, to use the simplest example, you have a strong moral reason to conform to laws prohibiting murder regardless of whether you have any general obligation to obey the law. Importantly, no-difference skepticism does not entail the implausible claim that political obligations are absolute in that one has conclusive reason to obey the law in every circumstance it applies to you. Political obligation is almost universally understood as *pro tanto*, and many considerations justify not complying with the law on particular occasions.

Second, there are *no-complaint skeptics* who claim that political obligations are either insufficient or unnecessary for assessing the state's legitimacy or for addressing independent complaints about its activities. Many philosophers reject no-complaint skepticism, often because they think that political obligations are relevant for the justifiability of state coercion. For example, Ronald Dworkin claims that "no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations."[52] And Simmons says that "[a] state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties, and to use coercion to enforce these duties," which suggests that the duty to obey and the permissibility of coercion stand or fall together, either logically or normatively.[53] And apart from the general question of whether coercion is in-principle permissible, one might think that political obligation is necessary for establishing the purported right of the state to be the sole enforcer of its laws.[54] And apart from any worries about coercion and force, one might think that there i's something objectionable about the state issuing threats (or simply nonthreatening directives) unless there are political obligations.[55] But while many of us dislike being told what to do by people who lack authority, this does not seem a significant enough worry to warrant much interest in political obligation.

There is much to be said both for and against these two forms of skepticism. But the important question for present purposes is: Must both be rejected to justify a philosophical interest in political obligation? Perhaps one thinks the question of whether there are such obligations would still be significant simply because we are interested in categorizing the normative truths of the world. But I doubt that mere categorization of this kind is a significant goal of political

52 Dworkin, *Law's Empire*, 191.

53 Simmons, "Justification and Legitimacy," 130. See also Huemer, *The Problem of Political Authority*.

54 See Senor, "What if There Are No Political Obligations?" 263–64.

55 Kolodny considers different versions of this worry in "Political Rule and Its Discontents" and *The Pecking Order*.

philosophy if it does not shed light on something normatively important for our social and political lives. As a concessive note, I am willing to grant that the truth of no-complaint skepticism means we should abandon the common thought that the problem of political obligation is the fundamental question of political philosophy. But I do not think that accepting both forms of skepticism means we should deny the philosophical importance of the problem. And that is because the recognitional account shows how political obligations serve a distinctive value within a liberal community that matters for realizing an ideal political relationship and relating to one's fellows on terms of mutual recognition as free and equal moral persons. That is what makes political obligation philosophically important and relevant for our lives. And it is no objection that the full significance of the question emerges only with a particular answer in hand; that is simply what happens often with philosophical problems.

So according to the recognitional account, we are not interested in political obligation, as the no-difference skeptic would have us think, simply because we wish to understand whether there are reasons to do what the law says. There might well be many such reasons, both moral and prudential, even if there were no general obligation to obey. Similarly, the importance of the recognitional account does not rest, as the no-complaint skeptic would have us think, on the claim that there is something objectionable about the state's activities or the way it relates to its citizens if there is no obligation to obey. Rather, the recognitional account shows both (1) that political obligation matters for properly relating to one another as free and equal citizens via a distinctive form of recognition and (2) that an important evaluative dimension of a legal system concerns its capacity to serve as a vehicle for recognition. So the guiding ideals of our institutional structures extend beyond familiar concepts like liberty, equality, and fairness.[56] Instead, we should make room within institutional morality for a concern with recognition and respect, as expressive attitudinal matters, amongst citizens. Political obligation is a key element of this concern and is thereby part of a demanding but deeply important interpersonal political ideal.[57]

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56 Compare Hussain's discussion in "Pitting People Against Each Other" of the value of community and the problem with institutional structures that "pit people against one another."

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THERE IS NO INSTITUTIONAL DUTY TO VOTE

Jason Brennan and Christopher Freiman

Most democratic citizens believe in a duty to vote.[1] Philosophers in turn have adduced dozens of arguments purporting to establish such a duty. However, many and perhaps most of the major arguments for such a duty fail to overcome what Brennan calls the *particularity problem*—a problem that seems fatal to such arguments:

> To show there is a duty to vote, it is not enough to state some general goal or reason to vote which voting satisfies. Instead, one must show why voting is the *only* way to meet that goal, or must show why it is special and obligatory if there are other ways to meet it. For instance, a duty to avoid complicity with injustice could be met by volunteering, fighting in a just war, political activism, among other ways. A duty to contribute to the common good could be met by charitable donations, scientific contributions, and so on.[2]

Kevin Elliott has recently published a novel argument defending a universal duty to vote that he claims overcomes the particularity problem.[3] This critical response shows that Elliott fails to do so. We also outline other serious problems with his argument.

1. SUMMARY OF ELLIOTT'S ARGUMENT

Elliott's argument, in brief, alleges that everyone ought to vote because "universal turnout patterns" are needed to create the incentives and communicate the information that democratic representatives need to govern effectively.[4] Elliott understands democratic citizenship as being a particular role that carries a particular role morality. In brief, representative democracies require fair representation to function well, and, he claims, all citizens must vote to enable

1 Mackie, "Why It's Rational to Vote."
2 Brennan, *The Ethics of Voting* and "The Ethics and Rationality of Voting."
3 Elliott, "An Institutional Duty to Vote."
4 Elliott, "An Institutional Duty to Vote," 918.

fair representation. Borrowing from Jane Mansbridge, Elliott first discusses *promissory representation*.[5] Representatives make promises to their constituents, and constituents must hold them to account in elections. Elliott argues that "the logic of promissory representation cannot function well if any group of citizens is systematically excluded from this process. Any group that does not participate in the making and evaluation of promises can expect to have their interests neglected or actively harmed, because their judgment about how well representatives kept their promises to their group will go unregistered and conduct unsanctioned (or unrewarded)."[6]

Next is *anticipatory representation*. Elliott writes, "In anticipatory representation, representatives seek to please future voters through anticipating voters' reactions at the next election to what they do in office."[7] However, representatives have little electoral incentive to advance the interests of a group that does not show up to the polls. As Elliott puts it, "When a group habitually neglects to vote in proportion to their numbers in society, anticipatory representatives come to understand that they can neglect the interests of this group—even sacrifice their interests or actively exploit them—without incurring electoral danger. This contradicts the institutional logic of anticipatory representation since some constituents' views are not being anticipated."[8]

Last up is *gyroscopic representation*. Gyroscopic representatives are those who act in the service of their constituents without caving to external influence or pressure. "Mansbridge posits that it has to be easy to remove gyroscopic representatives, presumably because they might otherwise abuse the wide discretion afforded them. This is what elections do at their best—provide an opportunity to confirm or reject gyroscopic representatives and replace them if necessary."[9] Elliott argues that universal turnout is required to enable gyroscopic representation—without it, representatives may not advance the genuine preferences of all of their constituents.

To summarize, "the excellent functioning of representative democracy normally requires universal turnout."[10] From here, Elliott argues that individuals in their role as democratic citizens have a duty to contribute to this universal turnout by voting.

5 Mansbridge, "Rethinking Representation."

6 Elliott, "An Institutional Duty to Vote," 907–8.

7 Elliott, "An Institutional Duty to Vote," 908.

8 Elliott, "An Institutional Duty to Vote," 908.

9 Elliott, "An Institutional Duty to Vote," 909.

10 Elliott, "An Institutional Duty to Vote," 910.

2. Elliott's Argument Fails to Solve the Particularity Problem

Elliott's main argument is that universal voting ensures that representative democracy functions properly. Yet this goal can be promoted or met through means other than voting. Rather than solving or overcoming the particularity problem, Elliott's argument is simply another instance of it.

Suppose Eleanor volunteers to register voters. Janice is an election integrity official. Michael drives voters to polls. Karl's activism ensures hourly workers have paid time off to vote. Sally, in a state without such legislation, gives her employees the day off. Tom tutors citizens to make them more informed and effective voters. Examples like this can be multiplied endlessly. But suppose none of these people vote. Nevertheless, each of them acts to increase turnout and thus contribute to the proper functioning of representative democracy, as Elliott describes it—despite not voting. Indeed, they have contributed *better* than they would have by voting. Suppose Hundley enables one hundred people to vote who otherwise would not by driving them to the polls in his limousine, but he does not vote himself. Wanda casts her one vote, but does not facilitate the votes of anyone else. By Elliott's own lights, Hundley outperforms Wanda in their roles as democratic citizens contributing to the proper functioning of representative democracy. Yet Hundley does not vote and Wanda does. Thus, Elliott fails to show that everyone must vote; the grounds for voting can be discharged through other means. This is the particularity problem, again.

Consider an analogy. Suppose there is a duty to contribute to feeding and clothing victims of disasters. Lindsey does not directly feed or clothe anyone; she instead drives thousands of volunteers to the disaster site in her limousine. Indeed, suppose that more of the victims of the disaster will be fed and clothed if she spends her time driving other volunteers than if she serves as a volunteer herself. It would be implausible and unfair to insist that Lindsey fails to contribute to the disaster relief efforts. By driving other volunteers, she helps *more* than other individual volunteers.

Elliott cannot deny that registering or driving voters, or the other activities we described, promote the goal that grounds his theory of the duty to vote. So he must give us some account of why these alternatives cannot substitute for voting. Indeed, since many of them are on their face more effective than casting a vote, we might instead demand to know why voting substitutes for them. Elliott already recognizes that he cannot respond with "Why not drive voters to the polls *and* vote?" because the answer could be "Why not spend more time driving voters instead of voting?"

Strictly speaking, this paper could end here. Elliott's central goal was to overcome the particularity problem, but he does not. The underlying goal that

grounds a purported duty to vote can be discharged without voting, so his argument does not succeed.

3. ELLIOTT'S ARGUMENT PROVES TOO MUCH

Elliott might grant that we have shown that he has not overcome the particularity problem but insist that this leaves open the possibility that voting remains morally special, such that everyone has an obligation to promote fair and equitable turnout, either directly by voting or indirectly via the means we discussed above. (Presumably, Elliott does not want to say that *very* indirect means—such as paying taxes or fighting in the military—count as helping. This trivializes his argument.) This section explains why Elliott has failed to defend even this weaker claim.

Many arguments for a duty to vote prove too much. To illustrate, consider the classic argument that if no one voted, this would be disastrous. Therefore, the argument goes, there is a duty to vote. Geoff Brennan and Loren Lomasky parody this by noting that if no one farmed, that would also be disastrous. But there is no general duty to farm.[11]

Even a weakened version of Elliott's argument faces this problem. According to his argument, voting (or promoting voter turnout in general) is obligatory because "it is a particular, institutionally specific need of electoral representative democracy," and democracy is an important and valuable institution:

> Why should I fulfill the expectations representative democracy places on me? Here, I pass the buck to justifications of representative democracy. I assume that there are strong arguments for representative democracy and that these provide us with reason to want it to persist. This in turn means we have reason to want to do our part to support it. The task of the present discussion has been to clarify how individual inputs of votes are linked to institutional functioning and so, by extension, to the ultimate justifications for representative democracy itself.[12]

So, we can ask, if performing some action is a particular, institutionally specific need of some valuable and important institution, does it follow that performing that action is a universal duty? Parallel cases show otherwise.

Volunteering as a firefighter is a particular, institutionally specific need of volunteer fire departments, which are valuable and important institutions. Teaching is a particular, institutionally specific need of schools, which are

11 Brennan and Lomasky, "Is There a Duty to Vote?"

12 Elliott, "An Institutional Duty to Vote," 918, 910.

valuable and important institutions. Attending law school is a particular, institutionally specific need of the judicial system, which is a valuable and important institution. And so on. But it does not follow that everyone is obligated to volunteer to be a firefighter, to teach, and to attend law school. We need only *enough* people *of the right sort* to take those actions. So, that *X* is a particular, institutionally specific need of a valuable institution, even an institution essential for justice, does not imply a universal duty for everyone to provide for *X*, even indirectly.

4. PERFECT DEMOCRACY IS NOT A REAL GOAL

Perhaps having enough people vote is not adequate; Elliott could insist that the *perfect* functioning of democratic institutions requires universal participation. We are skeptical of this move. First, it is implausible that universal participation minus one (or even many thousands) is functionally different *at all* from universal participation. Indeed, Elliott agrees; he explicitly states that his argument does not depend on implausible claims about the impact and efficacy of individual votes.

Suppose instead there *is* something special that makes universal participation necessary for the perfect functioning of representative democracy. Still, one must show that there is a duty to contribute to the perfect functioning of representative democracy but not to the perfect functioning of other valuable institutions. Maybe the town fire department will function "perfectly" only if everyone volunteers (for instance, the department will save the cat stuck in a tree one-tenth of a second sooner with universal participation), but it will function equivalently in all important respects (for instance, the same amount of damage, lives lost, injuries, and so on) if *enough* people volunteer at it, and others volunteer at the town hospital instead. It seems clear that we have no duty to volunteer at the fire department, at least in those circumstances where it does in fact have enough volunteers already.

But suppose that you deny this and insist that everyone has a duty to volunteer at the fire department to ensure its perfect functioning. This reply gives rise to another problem. Time spent volunteering at the fire department is time not spent volunteering at a hospital, a library, a food bank, and so on. If you spend your time volunteering at the fire department rather than at the hospital in order to ensure the department's perfect functioning, then you have violated your duty to contribute to the perfect functioning of the *hospital*. It is simply not feasible for each individual to contribute to every valuable and important institution.

There is a simple resolution to this problem: allow that people have some moral discretion about which valuable institutions to contribute to. Plausibly

you are obligated to contribute to *some* valuable institutions, but not all. However, this resolution defeats the argument for a universal duty to vote or otherwise promote turnout—just as you have the moral freedom to volunteer at the fire department rather than at the hospital, you have the moral freedom to volunteer at the hospital but not promote voter turnout.

One reply is that democratic governments are different from fire departments and schools in virtue of being significantly more impactful. But this is just Julia Maskivker's argument, from which Elliott intends his argument to be distinct.[13] So an initial worry about this potential response is that it would not yield a *novel* defense of a duty to vote.

In any event, it is worth exploring Maskivker's argument. Her view, in brief, is that there is a special obligation to contribute to good governance because governance is the most impactful collective activity to which one can contribute. As Maskivker puts it, "Governments are massively powerful giants whose policies can influence the economy, the geopolitics, and the general welfare of society in a way few other entities can."[14] She states, "*Because* governments are so influential, their justice *should* be seen as a central justification for voting."[15] She grants that in many cases an individual vote will not make a difference to whether or not good governance is provided, but she defends a duty to vote well nevertheless: "We do not assess the moral permissibility of individual actions according to their *difference-making* impact on a collective result. Rather, we assess individual actions according to the nature of the collective activity to which they contribute."[16]

A key objection to this argument is that the impact of one's contribution to a collective activity—and not simply the impact of the collective activity itself—is morally relevant.[17] Imagine that Habitat for Humanity is undertaking two housing projects. The first one will shelter a family of eight, and the second one will shelter a family of four. Let us simply stipulate that the positive impact of building the first house is greater than the impact of building the second house. But settling the impact of each house does not settle the question of where a volunteer ought to make their contribution. Suppose that there are more than enough volunteers working on the first house. Adding yourself as one more volunteer will not make a difference as to whether or not the house gets built. Suppose, though, that there are too few volunteers working on the

13 Maskivker, *The Duty to Vote*.

14 Maskivker, *The Duty to Vote*, 133.

15 Maskivker, *The Duty to Vote*, 133.

16 Maskivker, *The Duty to Vote*, 51.

17 See Freiman, *Why It's OK to Ignore Politics*, 96; and Brennan and Freiman, "Must Good Samaritans Vote?" 294.

second house. Your contribution will make or break the attempt to build the second house. Intuitively, you should contribute to the second house rather than the first because your contribution is far more impactful. This point stands even though the impact of the first house itself is greater.

Similarly, a national presidential administration is surely more impactful than a local fire department. But in most cases, contributing a single vote will not make a difference as to whether or not a given administration comes to power because there are already plenty of voters. By contrast, contributing to the common good in other ways will often make a difference as to whether, for instance, someone is rescued from a burning building because the fire department might otherwise have a shortage of volunteers. As in the housing case, the mere fact that good governance is more impactful than good firefighting does not imply that one ought to contribute to the former rather than the latter.

5. Rules and Role Morality

We could interpret Elliott as offering a broadly rule consequentialist argument along the following lines: representative democracy functions best if all (or most) democratic citizens comply with a rule instructing them to vote, and this fact generates a duty to vote that applies to all citizens.[18] This argument would explain why everyone has a duty to vote even though an individual vote on the margin makes no difference. By analogy, it is plausible that judges ought to decide every case fairly even if an unfair decision in a particular case actually produces a better outcome.[19] Intuitively, it seems wrong for a judge to decide a case unfairly even if an unfair outcome would lead to more fair or beneficial outcomes over time. (Maybe the decision involves allowing a guilty but fair judge to go free so that she can continue to decide cases fairly.) Just as the legal system functions best if all judges play their role and decide each case fairly, the system of representative democracy functions best if all citizens play their role and cast a vote. We believe this argument for a duty to vote runs afoul of three objections.

An initial worry here is similar to our initial worry about appealing to Maskivker's argument—resting Elliott's defense of a duty to vote on a rule consequentialist foundation would sap it of its originality. As we understand it, Elliott aims to produce an original defense of the duty, an aim he would not accomplish by an appeal to rule consequentialism (as opposed to role morality), given that rule consequentialist defenses of voting date back to at least the 1970s.[20]

18 We owe thanks to an anonymous editor for suggesting this possibility.

19 We owe thanks an anonymous editor for this case.

20 See, for example, Harsanyi, "Morality and the Theory of Rational Behavior," 649–50.

Let us now turn to the rule consequentialist argument itself. First, as critics of rule consequentialism have noted, if the justification for following a rule is to produce the best consequences, then it is hard to see why one would be justified in following the rule when breaking it has the best consequences.[21] For instance, if the point of following a rule against stealing is to maximize human welfare, then plausibly one should break that rule when doing so maximizes human welfare (for instance, by stealing a life preserver to save a drowning child). Those persuaded by this objection would simply bite the bullet and deny that one should follow a rule when breaking it produces the best consequences (or makes no difference, as in the case of an individual vote).

We note that the opportunity costs of voting are not always high.[22] However, in some cases the opportunity cost of voting will exceed the benefit, and these cases militate against Elliott's attempt to establish a *universal* duty to vote. Take a particularly dramatic example. The odds of a voter in Washington, DC, casting a decisive vote in the 2020 presidential election were one in two hundred forty trillion.[23] Suppose, then, that a high-wage worker in DC faces the choice between working an additional hour for one hundred dollars and donating that money to an effective charity or spending that hour registering to vote and casting a vote. Here the opportunity cost of voting exceeds the benefit, and so the worker plausibly should not vote. If this is correct, then the duty to vote is not universal. The cost of voting will exceed the benefits in less dramatic cases as well—namely, where voters reside outside of swing states and thus have extraordinarily small chances of changing the outcome of the election.

The second objection emphasizes that one's obligation to follow a rule is sensitive to whether others are following that rule. Consider a case from Richard Arneson.[24] The best consequences would result if all (or most) soldiers complied with a rule instructing them to stand by their post. But suppose most of your fellow soldiers do not in fact comply with this rule and retreat when attacked. Here it seems as though you should break the rule and retreat so that you can survive and continue fighting at a later date. Indeed, in line with the discussion above, breaking the rule does a better job of promoting the goal that justifies the rule (for instance, military victory) than following the rule.

Returning to the case of voting, we know that a large percentage of people will choose not to vote, even if it were their duty and they agreed it is. After all,

21 See, for instance, Smart, "Extreme and Restricted Utilitarianism."

22 We're grateful for an anonymous referee for emphasizing this point.

23 Gelman and Heidemanns, "Forecasting the US Elections."

24 Arneson, "Sophisticated Rule Consequentialism," 239.

many people who believe there is a duty to vote nevertheless do not vote.[25] Thus, if the goal is to work toward fair, equitable, and representative elections, then perversely, Elliott's argument implies that in the real world, with imperfect and uneven turnout, people from overrepresented groups have a duty not to vote. For instance, in the real world, high-income people vote at higher rates than low-income people, so a richer person would better satisfy Elliott's goal of promoting fair and equitable representation by abstaining than by voting.

Third, establishing that representative democracy functions best if everyone follows a rule instructing them to vote is not enough to overcome our objection from the previous section. Even if the town fire department functions best if everyone in town follows a rule instructing them to volunteer as a firefighter, it does not follow that everyone is obligated to volunteer as a firefighter rather than, say, as a hospital worker. As noted, it is infeasible for individuals to contribute to *every* valuable institution, so Elliott needs to argue that representative democracy is special such that there is a duty to contribute to it but not to other valuable institutions.

6. Conclusion

Elliott's paper is explicitly meant to solve the particularity problem. However, he does not show that democracy is special in a way that generates universal duties to contribute; moreover, the goals and reasons that underlie this purported duty to vote can be discharged through other means. Indeed, his argument implies many people would better support these goals by abstaining rather than by voting. So his argument is unsuccessful.[26]

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25 Elliott considers the objection "that universal turnout is unnecessary because turnout that is unbiased but not universal would work just as well. Yet this is an empty debater's point. The only practical way to approximate unbiased turnout is by making it universal" ("An Institutional Duty to Vote," 912). However, universal turnout is infeasible. For instance, Australia *mandates* voting and does not secure universal turnout. See Vinayaka, "Compulsion Emboldens Democracy." Thanks are due to an anonymous referee for making this point.

26 We owe thanks to an anonymous editor and two anonymous referees of this journal for their helpful feedback on earlier versions of the manuscript.

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