

Laws, Norms, and Public Justification: The Limits of Law as an Instrument of Reform

Jacob Barrett and Gerald Gaus

1 DOES PUBLIC JUSTIFICATION UNDERMINE LAW AS AN INSTRUMENT OF JUSTICE?

Jeremy Waldron famously declared that liberals “are committed to a conception of freedom and respect for the capacities and the agency of individual men and women,” commitments that “generate a requirement that all aspects of the social world should be acceptable to or capable of being made acceptable to every last individual.”¹ This commitment to the public justification of all aspects of our social world — and most obviously to the public justification of the law² — strikes many as an obstacle to improving the justice of the social order.³ Suppose an enlightened party secures control over a national legislature, such as the U.S. Congress. As thoughtful citizens, convinced that they possess the most reasonable view of justice, the majority seems poised to enact legislation that will enhance justice and better promote fair cooperation. Or suppose an enlightened supreme court orders a controversial interpretation of a law, seeking to promote greater justice. But, alas, a significant minority of citizens cannot see how this legislation or interpretation is justified — they reasonably reject it as unreasonable, as unjustified *to them*. It would seem that commitment to public justification imposes a heavy cost on our enlightened majority or court: they must abjure the use of the law that would effectively move their society

¹ Jeremy Waldron, “Theoretical Foundations of Liberalism” in his *Liberal Rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993): 35-62 at pp. 36-7.

² For the legislation to be within the ambit of public reason, Rawls would hold that it must concern matters of basic justice or constitutional essentials, or at least border on such areas, though he acknowledges that “it is usually highly desirable to settle political questions by invoking the value of public reason.” *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005), p. 215; see also pp. 134-40. Others, such as Gerald Gaus (*The Order of Public Reason* [Cambridge: Cambridge University Press, 2011], pp. 490-97) and Jonathan Quong [*Liberalism Without Perfection* (Oxford: Oxford University Press, 2011), chap. 9) extend the requirement of public justification to legislation in general. We are focusing on this more expansive requirement.

³ See, e.g., Steven Wall, “On Justificatory Liberalism,” *Politics, Philosophy & Economics*, vol. 9 (2010): 123-149, at pp. 136ff.

toward what they are convinced would be greater justice until the reasonable minority can endorse the law.

Public reason liberals sometimes respond by insisting that the requirement to treat others with respect simply outweighs these costs. As Charles Larmore puts it, “to respect another person as an end is to insist that coercive or political principles be just as justifiable to that person as they are to us. Equal respect involves treating all persons, to which such principles are to apply, in this way.”⁴ Perhaps.⁵ Yet many press the rejoinder: is respect of such supreme importance that it always outweighs the pursuit of greater justice (at least as the majority sees it)? The question seems to highlight the heavy “strains of commitment” of public justification: to endorse public justification seems entirely to preclude using the law to promote greater justice whenever it is not justifiable, say, to a reasonable minority.⁶ This raises what might be called the *public justification fetish worry*: surely if a law is very important, appealing to a normative standard that requires public justification for any law looks like placing overwhelming weight on one value. Perhaps it would be a good thing to show that everyone endorses a new law. But can this really be a *necessary* condition for the permissibility of using the law to pursue greater justice?⁷

Rather than directly confronting this question, here we pursue a different tack: we call into question the theory of law the question presumes. Underlying this worry is a view of the law as a largely autonomous tool for securing justice and fair cooperation: critical social change can be secured simply by enacting just legislation enforced by the state. Because it is supposed that a just society can be brought about through the enforcement of controversial laws, it is concluded that the public justification requirement, which poses barriers to such legislation, is an obstacle to achieving justice. Controversial laws, it is supposed, will be effective because the minority, who would otherwise act against justice, will be deterred by the threat of punishment,

⁴ Charles Larmore, “Political Liberalism,” *Political Theory*, vol. 18 (1990): 339-60 at p. 349.

⁵ For some doubts see Gerald Gaus, “Respect for Persons and Public Justification,” in *Respect for Persons*, edited by Richard Dean and Oliver Sensen (Oxford: Oxford University Press, forthcoming).

⁶ On the idea of the strains of commitment, see John Rawls, *A Theory of Justice*, rev. edn. (Cambridge, MA: Harvard University Press, 1999), pp. 153-4.

⁷ See further Gaus, “On Theorizing About Public Reason,” *European Journal of Analytic Philosophy*, vol. 9 (2013): 64-85.

producing what Kant called “external” just relations between people (though not necessarily moral motivations).⁸ We shall argue here that this theory of law, *legal centralism*, misconstrues the conditions for effective legal regulation and, so, the way in which law can be an instrument of greater justice. Once we take a more adequate view of legal regulation, we shall see that, so far from being an obstacle, public justification is an important tool of effective social reform.

Section 2 briefly describes two versions of legal centralism: punishment-focused and moral-focused. Section 3 commences our case against the former, sketching an alternative “normative perspective” according to which legal compliance depends more on social norms and personal moral convictions than on the threat of punishment.⁹ Section 4 turns to moral-focused legal centralism, a more nuanced view that acknowledges the relevance of moral convictions to legal compliance yet still ignores social norms. Against this position, we argue that laws effectively regulate behavior when they correspond to, or at least do not stray too far from, social norms, but are typically ineffective and sometimes counter-productive when they sharply conflict with them. We then (section 5) more carefully consider the role that people’s moral convictions play in explaining both the stability and change of social norms, arguing that stable norms and laws must approximate public justification: the overwhelming majority of the individuals governed by norms must endorse them from their own moral perspectives. Section 6 ties these threads together, showing how they bear on normative questions concerning public justification. Section 7 concludes by reconsidering the extent to which law can serve as an instrument of social reform and briefly surveying some of the other instruments in the social reformer’s toolbox.

⁸ External relations, not motivations, Kant insisted, are the proper purview of political philosophy. *The Metaphysical Elements of Justice*, translated by John Ladd, second edn. (Indianapolis: Hackett, 1999), p. 29.

⁹ Although we distinguish social norms from (personally held) moral convictions, we do not distinguish social norms from socially embedded moral norms. In other contexts, this latter distinction is important. See for example Geoffrey Brennan, Lina Eriksson, Robert E. Goodin and Nicholas Southwood, *Explaining Norms* (Oxford: Oxford University Press, 2013), pp. 57ff; Jean-Philippe Platteau, *Institutions, Social Norms and Economic Development* (Amsterdam: Harwood Academic Publishers, 2000), pp. 291ff. As Cristina Bicchieri observes, her notion of social norms is essentially what Hume means by “justice.” *The Grammar of Society: The Nature and Dynamics of Norms* (Cambridge: Cambridge University Press, 2006), p. 21. Cf. Gaus, *The Order of Public Reason*, pp. 2ff, 163ff.

2 TWO VARIETIES OF LEGAL CENTRALISM

2.1 Punishment-focused Centralism

According to what we shall call Punishment-focused Legal Centralism, a society's laws are its chief means of regulating social relations, and they influence behavior primarily through the threat of punishment.¹⁰ Laws are effective to the extent that those who would otherwise engage in unlawful behavior are deterred by coercive threats. If our goal is to prevent a certain form of harmful or unjust behavior, we ought therefore to criminalize it. If this behavior persists despite its criminalization, the explanation must be that violators do not sufficiently fear punishment. And if this is the problem, the solution is straightforward: we must either increase the severity of punishment or make enforcement more effective. The law is our primary tool for regulating social behavior, and, therefore, for promoting social change. It works by coercing those who would stand in its way.

The doctrine of Punishment-focused Legal Centralism is in some ways reassuring, yet in other respects rather alarming. Changing social norms and moral convictions is typically a long and difficult process, but changing laws (at least for those with political power) is quick and easy: “[w]hile formal institutions can be changed by fiat, informal institutions evolve in ways that are still far from completely understood and therefore are not typically amenable to deliberate human manipulation.”¹¹ Thus, if Punishment-focused Legal Centralism held, behavior could be changed fairly easily through a centralized, top-down, process. We could legislate the requirements of justice without having to worry much about moral convictions or social norms. Our only limitation would be the enforcement power of the state.

Probably no one accepts Punishment-focused Legal Centralism when stated quite so baldly, either as an empirical thesis about effective social regulation or as an attractive picture of social life. Yet it informs a wide range of legal theory, going back

¹⁰ The term “legal centralism” is used in various ways: ours is closest to that employed by Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1994) and Gerry Mackie, “Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience” in *Cultural Agents Reloaded: The Legacy of Antanas Mockus*, edited by Carlo Tognato (Cambridge, MA: The Cultural Agents Initiative at Harvard University Press, 2018).

¹¹ Douglass C. North, *Understanding the Process of Economic Change* (Princeton: Princeton University Press, 2005), p. 50. For a recent analysis of the effectiveness of norm change strategies see Cristina Bicchieri, *Norms in the Wild* (Oxford: Oxford University Press, 2017), esp. chaps 3-5.

at least to Hobbes, Bentham and Austin.¹² At the heart of legal centralism is the conviction that legal coercion affects behavior far more than other factors such as social norms and moral convictions, and therefore that increasing fear of punishment is generally the most effective way of modifying behavior — an implication that Bentham appears to accept when he claims that attaching more severe and certain punishments to more “mischievous” crimes will “induce a man to choose always the least mischievous of two offenses.”¹³ In addition to the severity and certainty of punishment, Bentham does acknowledge that “[t]here may be a few other... considerations which may influence, *in some small degree*, the demand for punishment.”¹⁴ That punishment is “particularly well calculated to answer the purpose of a moral lesson” is one, though even then, this can only justify an increase in punishment that “stretch[es] a little beyond that quantity which, on other accounts, would be strictly necessary.”¹⁵ This is one of Bentham’s thirteen rules to pertaining to legal punishment, and the only one that makes any reference to moral convictions or social norms.¹⁶ Tellingly, Bentham includes it in the class of rules for which “it may be doubted whether they be worth putting on a level with the others.”¹⁷

The law and economics approach provides a contemporary example. On Gary Becker’s analysis, “a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.”¹⁸ In itself, this is innocuous: an argument in a utility function could be moral, or reflect

¹² Hobbes insisted that the bonds of obligation “have the strength, not from their own nature, but from fear of some evil consequence upon rupture.” *Leviathan*, edited by Edwin Curley (Indianapolis: Hackett, 1994), p. 81. In Austin’s Hobbesian theory of law as command of the sovereign, “command,” “duty” and “sanction” are different expressions of the same idea. *The Providence of Jurisprudence Determined*, Introduction by H. L. A. Hart (London: Weidenfeld and Nicholson, 1954), pp. 17-18.

¹³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Mineola, New York: Dover [1823]), p. 181.

¹⁴ *Ibid.*, p. 184. Emphasis added.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, chap. 14.

¹⁷ *Ibid.*, p 184.

¹⁸ Gary S. Becker, “Crime and Punishment: An Economic Approach,” *Journal of Political Economy*, vol. 76 (1968): 169-217, at p. 176. Norm change is seldom a part of economically-informed analysis of regulating social behavior. See David Colander and Roland Kupers, *Complexity and the Art of Public Policy: Solving Society’s Problems from the Bottom Up* (Princeton University Press, 2014), pp. 8, 188ff.

sensitivity to social norms.¹⁹ Yet while Becker acknowledges that his “approach implies that there is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities... and his willingness to commit an illegal act,”²⁰ the role of a non-punishment or income-related willingness to violate a law in the model is negligible. Individuals are assumed to be narrowly self-interested — people follow the law when it is in their narrow self-interest to do so. To prevent a behavior, we must ensure that its tangible, material benefits are outweighed by the material costs attached to performing it. We must ensure that “‘crime does not pay’ — in the sense that the marginal income of criminals would be less than that available to them in less risky legal activities.”²¹

Robert C. Ellickson provides further examples of the view that legal coercion is the chief means of regulating behavior.²² He too traces the view back to Hobbes, who “apparently saw no possibility that some nonlegal system of social control — such as the decentralized enforcement of norms—might bring about at least a modicum of order.”²³ This is no mere academic dispute. Gerry Mackie laments that “[i]nternational human rights scorecards count enactment of a criminal prohibition as an achievement... [u]sing criminalization as the metric of success” even in cases where criminalization fails to affect behavior.²⁴ Tom R. Tyler points out a similarly worrying tendency in the domestic case. “When policymakers think about how to obtain compliance, they often adopt implicitly an instrumental perspective” according to which “people are viewed as shaping their behavior to respond to changes in the tangible, immediate incentives and penalties associated with following the law.”²⁵ They therefore wrongly assume, like Bentham, that “increasing the severity and

¹⁹ See Cristina Bicchieri, *Norms in the Wild* (Oxford: Oxford University Press, 2016), pp. 165-7.

²⁰ Becker, “Crime and Punishment,” p. 177.

²¹ *Ibid.*, p. 203.

²² Robert C. Ellickson, *Order Without Law*, pp. 138-40.

²³ *Ibid.*, p. 138.

²⁴ Gerry Mackie, “Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience”.

²⁵ Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990), p. 3.

certainty of punishment for committing a crime... [is] an effective way of reducing the rate at which the crime is committed.”²⁶

2.2 Moral-focused Legal Centralism

To be sure, legal centralism is rarely explicitly endorsed in the rather flat-footed form of Punishment-focused Legal Centralism, though its core thesis that social regulation and reform are secured chiefly through legal coercion is alive and well. Contemporary political philosophers tend to better appreciate the role of moral convictions in influencing behavior, endorsing what we call Moral-focused Legal Centralism. This more nuanced doctrine recognizes that individuals are often motivated by moral commitments, and so whether people view a rule as justified or legitimate affects its efficacy and stability. As Rawls stressed, to secure stability “[a] just system must generate its own support” — “it must be arranged so as to bring about in its members the corresponding sense of justice, an effective desire to act in accordance with its rules for reasons of justice.”²⁷ A society enjoys “stability for the right reasons” only when this is “secured by a firm allegiance to [the] society’s political (moral) ideals and values;” otherwise, once the balance of power shifts, stability will be disrupted.²⁸

Nevertheless, contemporary political philosophers generally continue to embrace the legal centralist’s strong presumption that unjust behavior ought be criminalized, as well as their deeper supposition: questions about which social rules should be institutionalized are exclusively questions about the justification or legitimacy of coercive *law* (which includes how legal institutions such as the courts ought to operate). On Moral-focused Legal Centralism, although the efficacy and stability of law depends on individuals’ moral views, (i) the law is the focus of social and political philosophy, being accorded a unique regulative role in social life and (ii) the coercive nature of this unique regulator — its nature as a punisher — is its distinctive feature. “Political power is always the coercive power backed by the government’s use of sanctions, for government alone has the authority to use force upholding its laws.”²⁹

²⁶ Ibid.

²⁷ John Rawls, *A Theory of Justice*, revised edn. (Cambridge: Belknap Press of Harvard University Press, 1990), p. 230.

²⁸ Rawls, *Political Liberalism*, p. 459.

²⁹ Ibid., p. 136.

Though an improvement over the instrumentalism of Punishment-focused Legal Centralism, this Moral-focused variant continues to ignore the importance of informal social norms in affecting legal compliance and in directly regulating individuals' behavior. This too, as we shall see (§4), is a mistake.

3 THE NORMATIVE PERSPECTIVE

Let us commence with Punishment-focused Legal Centralism, and its commitment to the instrumentalist view of compliance—espoused by Bentham, Becker, and others—according to which compliance occurs primarily due to the threat of punishment. Though no one would deny that such threats play some role in shaping behavior, proponents of the competing “normative perspective” argue that legal compliance depends more significantly “on what people regard as just and moral as opposed to what is in their self-interest.”³⁰ Paul H. Robinson explicates this perspective well:

More than because of the threat of legal punishment, people obey the law because they fear the disapproval of their social group if they violate the law, and because they generally see themselves as moral beings who want to do the right thing as they perceive it. The normative pressures coming from other people, generally experienced as an external force by the actor, function like the more formal deterrence mechanisms were thought to operate. People obey the social norms of their groups because those groups have rewards to give for doing so, and sanctions for failing to do so.... People's own moral rules and action proscriptions are generally experienced as internal forces; people recognize that they come from the moral rules that they have adopted. Phenomenologically, we all have experienced this sense of obligation to act in a certain way, to avoid harm to another, or to fulfill some commitment we have made.³¹

Although later (§§5-6), we will see that social norms and moral commitment cannot be quite so neatly separated, the fundamental point of proponents of the normative perspective is that legal obedience depends on social norms and moral convictions more than on the threat of punishment. This is manifestly inconsistent with the claim

³⁰ Tyler, *Why People Obey the Law*, p. 3.

³¹ Paul H. Robinson, “Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive versus Normative Crime Control,” *Virginia Law Review*, Symposium: The Legal Construction of Norms, vol. 86 (2000): 1839-1869 at pp. 1861-2.

that that law is the chief regulator of behavior, since it makes the law's ability to regulate behavior derivative of these other factors.

Evidence for the normative perspective on legal compliance is therefore equally evidence against Punishment-focused Legal Centralism. And the evidence is overwhelming. As Tyler points out, “[c]itizens have been found to obey the law when the probability of punishment for noncompliance is almost nil and to break laws in cases involving substantial risks. Neither form of behavior makes sense from a strictly instrumental perspective.”³² For example, people pay their taxes at significantly higher rates than the instrumental perspective would predict, and anti-drunk driving campaigns decrease drunk driving without affecting individuals' probabilities of being caught.³³ Although Tyler recognizes the role of social norms — a phenomenon he refers to as “group influence”³⁴ — he focuses on individuals' moral convictions, distinguishing two sorts that are relevant to legal compliance. (i) Individuals may follow the law because it coheres with their own views on personal morality — with their own view about which sorts of actions are right or wrong. (ii) They may view the law as legitimate and therefore “comply with the law because they view the legal authority they are dealing with as having a legitimate right to dictate their behavior.”³⁵ The first provides a motivation to obey (or at least conform to) the law because of its content, the second a motivation to obey independent of its content. Thus, “people who respond to the moral appropriateness of different laws may (for example) use drugs or engage in illegal sexual practices, feeling that these crimes are not immoral, but at the same time will refrain from stealing,” whereas “if they regard legal authorities as more legitimate, they are less likely to break *any* laws.”³⁶ Tyler cites a number of previous studies that show a “moderately strong” link between both sorts of moral conviction and legal compliance³⁷ and provides evidence from his now classic Chicago study.

³² Tyler, *Why People Obey the Law*, p. 22.

³³ *Ibid.*, pp. 22-3.

³⁴ *Ibid.*, p. 24.

³⁵ *Ibid.*, p. 25.

³⁶ *Ibid.*, p. 4. Emphasis added.

³⁷ *Ibid.*, pp. 32-37, esp. tables 3.3 and 3.7.

The Chicago study measured individuals' (self-reported) law-abidingness with respect to a range of relatively mundane crimes — speeding, parking illegally, violating noise ordinances, littering, driving under the influence, and petty shoplifting — as well as their (self-reported) attitudes relating to the competing mechanisms of legal compliance posited by the instrumentalist and normative perspectives. In particular, the investigators measured individuals' beliefs about how likely they were to be punished for breaking particular laws (fear of punishment), the extent to which they thought peers would disapprove of them for breaking those laws (social norms), whether they believed the behaviors those laws prohibited were wrong (personal morality convictions), and whether they believed they had a general obligation to obey the law (legitimacy convictions).³⁸ The study involved 1,575 residents of Chicago in the first wave, and 804 respondents (randomly selected from the first group) in the second; the purpose of the first wave was to measure the extent to which these different attitudinal variables explained differences in legal compliance between individuals, the purpose of the second to measure the extent to which changes in attitudes explain changes in law-abidingness.³⁹ On the basis of both waves of data, Tyler concludes that fear of punishment, social norms, and moral convictions all explain some variance in legal compliance, with moral convictions best explaining such variance, peer disapproval (or social norms) coming second, and fear of punishment last.⁴⁰ Within the category of moral convictions, both attitudes towards the wrongness of particular actions and to the legitimacy of law in general appear to influence behavior, with the former playing a larger role.⁴¹

The Chicago study is only one of a group of studies that have come to essentially the same conclusions. Robinson helpfully summarizes:

What is the evidence concerning crime prevention due to fear of social sanction or fulfillment of moral obligation? Harold Grasmick and his associates have done the most sustained work documenting the role of the informal determinants of obedience to the law. Their research consistently finds that both fear of social disapproval and moral commitment to the law inhibit

³⁸ *Ibid.*, chap. 4.

³⁹ *Ibid.*, p. 8.

⁴⁰ *Ibid.*, p. 45.

⁴¹ *Ibid.*, chap. 5.

the commission of illegal activity. They comment that their “findings highlight the importance of internal control in producing conformity to the law.” Other researchers reach similar conclusions. Raymond Paternoster and LeeAnn Jovanni conclude that “the greatest effects on delinquent involvement are those from sources of social control.” Robert Meier and Weldon Johnson conclude that “despite contemporary predisposition toward the importance of legal sanctions, our findings are... consistent with the accumulated literature concerning the primacy of interpersonal influence” over legal sanction.⁴²

Although fear of legal punishment does play some role in explaining legal compliance, and although there is evidence suggesting that a small subset of the population may obey the law primarily due to this fear,⁴³ an overwhelming body of evidence indicates that most people follow the law because of their own moral attitudes towards particular laws and towards the legitimacy of laws in general, as well as because of social norms. As William J. Stuntz puts it, “[t]he mass of the population avoids seriously bad behavior not because they know it can be found in [legal] codes, but because they know the behavior is thought to be seriously bad (and only secondarily because seriously bad behavior can often get you thrown in jail).”⁴⁴

4 DISENTANGLING THE NORMATIVE PERSPECTIVE

4.1 *Personal Moral Convictions and Social Norms*

According to the normative perspective as thus far explicated, the two factors that best explain legal obedience are moral convictions and social norms. Although Robinson notes that these two factors “are analytically and often experientially separable” he suggests that “in the longer term they converge.”⁴⁵ Sometimes, however, social norms and moral convictions diverge. Examining such cases will help us better understand the respective role of each.

⁴² Robinson, “Why Does the Criminal Law Care What the Layperson Thinks Is Just?” pp. 1862-3, references omitted.

⁴³ See Clemens Kronenburg, Isolde Heintze, and Guido Mehlkop, “The Interplay of Moral Norms and Instrumental Incentives in Crime Causation,” *Criminology*, vol. 48 (2010): 259-294.

⁴⁴ William J. Stuntz, “Self-Defeating Crimes,” *Virginia Law Review*, Symposium: The Legal Construction of Norms, vol. 86 (2000): 1871-1899.

⁴⁵ Robinson, “Why Does the Criminal Law Care What the Layperson Thinks Is Just?” p. 1862.

Whereas Tyler is concerned with why people obey the law when (and where) they do, Gerry Mackie's focus is on explaining cases (and places) where they don't. More specifically, Mackie's concern is the failure of attempts to alter harmful social practices via criminalization in the global development context. Practices such as female genital cutting, caste discrimination, and underage marriage have been widely criminalized, but this has had almost no impact on their prevalence.⁴⁶ This, Mackie claims, is because legal obedience requires more than just the existence of laws, and more than even the existence of legal penalties alongside convergent moral convictions. It requires the presence of social norms.

Mackie points to two mechanisms by which social norms may undermine or support the efficacy of laws: "Criminalization fails where there is no social norm of legal obedience, when a new legal norm is too far from a current social norm, or both."⁴⁷ In other words, just as Tyler argues that both moral attitudes towards the legitimacy of law in general and towards the moral appropriateness of the actions regulated by particular laws can influence legal obedience, so, too, does Mackie argue that obedience is influenced both by social norms pertaining to legal obedience in general and by those pertaining to the actions governed by particular laws.

4.2 *The Social Norm of Legal Obedience*

In cases where there is no social norm of legal obedience — either because there exists no norm relating to legal obedience or because a norm of legal *disobedience* is present — laws tend not to be followed, even in the presence of moral convictions that they ought to be. Any number of standard accounts of social norms point to the possibility of divergence. On the analysis we (and Mackie) favor, a social norm, say, that one ought to follow the law, does *not* depend on a sufficient number of individuals believing that one ought to follow the law: this simply would constitute a large number of people who share the same personal normative conviction. A social norm exists when a sufficient number of individuals have the "normative expectation" that *others believe* one ought to follow the law, and the "empirical expectation" that others

⁴⁶ Mackie, "Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience."

⁴⁷ *Ibid.*

do in fact follow the law.⁴⁸ Norms thus are constituted by reciprocal normative and empirical expectations among a group of people, and though these may align with individuals' moral views, they sometimes fail to. In these latter cases, social norms significantly influence behavior despite the fact that few who are governed by them personally endorse them. Cristina Bicchieri draws our attention to a UNICEF study on violence toward children, which reported both high rates of caregiver disapproval of punishment *and* of caregiver punishment.⁴⁹ Similar findings have been reported concerning prison guards.⁵⁰

To understand this phenomenon note that social norms tend to influence behavior for two reasons. (i) Individuals may be motivated to obtain approval or avoid disapproval, either because they intrinsically care what others think of them or because approval and disapproval are associated with a gain or loss of reputation or of valuable social relationships and opportunities. In this case, norms “function like the more formal deterrence mechanisms were thought to operate” by instrumentalists.⁵¹ (ii) However, individuals may also view others' normative expectations as “legitimate” in the sense that they view them as grounding an obligation to comply. In this case, they may be motivated to conform to a social norm regardless of such self-interested considerations.⁵² Importantly, an individual may accord legitimacy to the normative expectations of others to comply with the norm even when she does not endorse the content of the norm. While, as we shall argue, (§5), this tends to lessen her devotion to the norm, there is strong evidence that even in these cases social norms can remain effective at regulating behavior, and therefore at maintaining harmful practices even when its participants do not morally endorse the practice.

⁴⁸ See Mackie, “Social Norms of Coordination and Cooperation,” *Social Philosophy and Policy*, forthcoming; Bicchieri, *The Grammar of Society*, pp. 8-28. For a different accounts of social norms, see Brennan et al., *Explaining Norms*, Part I.

⁴⁹ Bicchieri, *Norms in the Wild*, chap. 1.

⁵⁰ Bicchieri, *The Grammar of Society*, p. 180.

⁵¹ Robinson, “Why Does the Criminal Law Care What the Layperson Thinks Is Just?” p. 1862.

⁵² Bicchieri, *Norms in the Wild*, pp. 21-5. This is why purely instrumentalist accounts of social norm compliance fail. See Gaus, “It Can't Be Rational Choice All the Way Down: Comprehensive Hobbesianism and the Origins of the Moral Order” in *Tensions in the Political Economy Project of James M. Buchanan*, edited by Peter J. Boettke, Virgil Henry Storr, and Solomon Stein (Arlington, VA: Mercatus Center, forthcoming).

Citing important work by Denis Galligan and Marina Kurkchiyan,⁵³ Mackie argues that this dynamic characterized norms of legal obedience in post-Soviet Europe. As Mackie explains, “[f]or the Soviet regimes ... law was purely instrumental, based only on threatened and actual punishment. Law was alien and external to the population; the state itself acted arbitrarily and was not constrained by law. Widespread social norms of getting around the law emerged in response, norms of bribery and corruption that would be pathological in better political circumstances.”⁵⁴ These political circumstances have since changed, but the reciprocal expectations that constitute these norms of “getting around the law” persist. Legal disobedience therefore remains rampant, even though “population surveys and systematic interviews [suggest] that ... post-Soviet citizens ... morally endorse the rule of law as much as do their Western European neighbors.... If they expected that enough others would comply with the law, they would abandon bribery and corruption.”⁵⁵ Individuals thus possess a moral conviction that they ought to obey the law, but nevertheless disobey due to the presence of strong social norms of legal disobedience: social norms appear to swamp moral convictions. Thus, Mackie argues that “what is needed to overcome a ‘culture’ of legal disobedience is probably not moral reform of the citizenry (and if such reform were needed and did succeed, it still would not be sufficient). What is needed is a shift from reciprocal expectations of disobedience in the community to reciprocal expectations of obedience to the law.”⁵⁶

4.3 Specific Norms

The case of post-Soviet states provides powerful evidence both against Punishment-focused and the more nuanced Moral-focused Legal Centralism. Further evidence of the importance of social norms is provided by cases where a general norm of legal obedience exists, but particular laws are not followed because they conflict too sharply

⁵³ Denis Galligan, “Legal Failure: Law and Social Norms in Eastern Europe” and Marina Kurkchiyan, “The Illegitimacy of Law in Post-Soviet Societies,” both of which are in *Law and Informal Practices: The Post-Communist Experience*, edited by Denis Galligan and Marina Kurkchiyan (Oxford: Oxford University Press, 2003).

⁵⁴ Mackie, “Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience.” See also Daniel Friedman, *Morals and Markets* (New York: Routledge, 2008), chap. 5.

⁵⁵ Mackie, “Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience.”

⁵⁶ *Ibid.*

with other social-moral norms. One reason for this is that such laws are rarely enforced; Mackie suggests that this may be the best explanation of why caste discrimination continues in India despite its criminalization.⁵⁷ Dan Kahan collects a number of other examples of this phenomenon that have occurred in the U.S. For example:

To change the behavior of men (and women) who have internalized the norm that “no sometimes means yes,” some states have modified their rape laws either to dispense with the common law element of force or to eliminate the “reasonable mistake of fact” defense. Empirical studies suggest, however, that such reforms have little effect on juries, which continue to treat verbal resistance as equivocal evidence of nonconsent, or on prosecutors, who remain reluctant to press charges unless the victim physically resisted the man’s advances.

The same story can be told about attempts to crack down on drunk driving and domestic violence. As states adopt more severe laws, police grow more reluctant to arrest, prosecutors to charge, juries to convict, and judges to punish. As a result, such reforms do nothing to reduce the incidence of these offenses...[and] may even increase the incidence of such crimes. For example, when a jury in a high profile case acquits a defendant charged with raping a woman who protested but who didn’t physically resist his advances, the verdict reaffirms the vitality of the norm that “no sometimes means yes,” and thus perpetuates behavior consistent with the norm.⁵⁸

When laws depart from social norms they are not generally enforced, and this public lack of enforcement may even reinforce the reciprocal expectations that constitute the norm. In such cases, criminalizing a behavior that is permitted (or required) by social norms is not only apt to be ineffective, but counter-productive. It strengthens the very norm it aims to undermine.

None of this is to say that punishment is never effective in securing compliance: rather, the critical finding is that its effectiveness depends on how it aligns with social norms.⁵⁹ In a recent series of experiments on trust games, Cristina Bicchieri, Eugen

⁵⁷ Ibid.

⁵⁸ Dan M. Kahan, “Gentle Nudges vs. Hard Shoves: Solving the Sticky Norm Problem,” *The University of Chicago Law Review*, vol. 67 (2000): 607-645 at p. 607.

⁵⁹ For an excellent overview, see Platteau, *Institutions, Social Norms and Economic Development*, pp. 290ff. In recent experiments Klaus Abbink, Lata Gangadharan, Toby Handfield and John Thrasher

Dimant and Erte Xiao found that when the person being punished views the punishment as conforming to the normative expectations of others, it tends to significantly modify behavior. In the absence of this normative basis, punishment is unsuccessful, especially when conformity has higher costs.⁶⁰ This coheres with a large body of evidence gathered over the last twenty years that strongly indicates that when punishment fails to correspond to what people believe are legitimate normative expectations, punishment is either ineffective, or generates “anti-social” counter-punishment. As Samuel Bowles and Herbert Gintis stress, effective punishment depends on beliefs about its legitimacy: unless those to be punished and their friends and allies are convinced that the rule being enforced is legitimate, a punishing action taken as a means to protect social cooperation can lead to weakening it.⁶¹ Experimental evidence confirms that attempts to punish readily evoke counter-punishment when the offender does not experience guilt, which is associated with social-moral norm violation.⁶²

Even independently of legal enforcement, the existence of supportive social norms is generally recognized as a significant contributor to legal compliance. (i) In cases where there is no social norm prohibiting an action deemed illegal, an important motivation for following the law is absent: one does not expect others to disapprove of one (and to informally sanction one) for breaking the law. (ii) In cases where social norms conflict with the law, an important motivation for disobeying the law is present: one expects others to disapprove of one (and to informally sanction one) for

show that punishment can enforce group-destructive social norms. “Peer Punishment Promotes Enforcement of Bad Social Norms,” *Nature Communications*, DOI: 10.1038/s41467-017-00731-0.

⁶⁰ Cristina Bicchieri, Eugen Dimant and Erte Xiao, “Deviant or Wrong? The Effects of Norm Information on the Efficacy of Punishment,” Working Paper, Centre for Decision Research and Experimental Economics <<http://www.nottingham.ac.uk/cedex/news/papers/2017-14.aspx>>, accessed December 2, 2017.

⁶¹ Samuel Bowles and Herbert Gintis, *A Cooperative Species: Human Reciprocity and its Evolution* (Princeton: Princeton University Press, 2011), p. 26.

⁶² Astrid Hopfensitz and Ernesto Reuben, “The Importance of Emotions for the Effectiveness of Social Punishment,” *The Economic Journal*, vol. 119 (2009): 1534–1559

complying with the law. We consider each in turn — each further illustrates why even the Morality-focused version of legal centralism is fundamentally flawed.

(i) A clear example of the failure of regulation that was unsupported by social norms was the prohibition of alcohol in the early twentieth century — a historically unsuccessful legal prohibition of behavior that social norms permitted. As Stuntz explains, “[b]y 1919 a large majority of the population seems to have decided that alcohol consumption was wrong,” yet shortly after it passed a reaction to criminalization set in: the “legal prohibition undercut the norm it sought to enforce. Prohibition came to seem like intolerant meddling, and intolerant and meddling policies, like intolerant and meddling people, are unpopular.”⁶³ This raises a puzzle: if prohibition was popular before it was enacted, what made it so unpopular after? Stuntz suggests that the answer depends on “enforcement discretion.”⁶⁴ Since alcohol use remained widespread (and since individuals had empirical expectations that this was so, thus ruling out the existence of a social norm against it), police could not enforce the law against everyone, and so were compelled to make choices about the allocation of enforcement resources. In general, this resulted in targeting poorer neighborhoods, which happened to be populated by ethnic minorities. Though it may well have played a role, ethnic animus was by no means the whole story: “simple economics” shows that it was “cheaper for the police to attack the lower-class alcohol trade than to go after its upper-class counterpart.”⁶⁵ The rich could pay to drink in more discreet institutions, and were able to afford to purchase alcohol from more secure distribution networks; the rich tended to buy wine and liquor, the poor beer. The price of wine and liquor was driven above the budgets of the poor precisely by the fact that it was more difficult for police to monitor and disrupt their distribution and consumption than of the more easily monitored beer trade.⁶⁶ Thus,

⁶³ Stuntz, “Self-Defeating Crimes,” p. 1875.

⁶⁴ *Ibid.*, p. 1875.

⁶⁵ *Ibid.*, p. 1876.

⁶⁶ *Ibid.*

Prohibition was enforced disproportionately against distribution networks that served the urban poor, and the urban poor had an ethnic identity. This seems to have generated contempt for the law, which is also perfectly natural. No one likes hearing the message that a given kind of conduct is wrong and criminal for him but not for someone else... The ethnic divide tended to make this difference more salient.... This... affected the normative punch the law packed. Violating the liquor laws is not likely to be stigmatizing in a community that sees those laws as oppressive and discriminatory. As the 1920s proceeded and the us-and-them character of enforcement became ever clearer, Prohibition's ability to deter simply by virtue of its being the law diminished... And so prohibition unraveled.⁶⁷

As these factors became manifest, the initial widespread normative approval of Prohibition was undermined, greatly reducing compliance. Police could not target all, or even the great majority, of violators, so the efficient way for them to allocate resources was to target poor ethnic minorities who could not afford to pay premiums on alcohol that made them more difficult to catch. As Mackie notes, "the same counterdeterrent effects are reported today in poor urban neighborhoods in the U.S. exposed to differential enforcement of law, notably enforcement of drug laws in African-American communities"; this differential enforcement "can even result a new norm of pride and approval for having been imprisoned, and an outlaw culture regulated by strong social norms including one of more general defiance of the law."⁶⁸ Such differential enforcement is difficult to avoid in cases where the behavior we are attempting to prohibit is widespread, permitted by social norms, but some can afford to pay premiums to avoid detection. In these cases, passing a law is likely to do more harm than good.

(ii) When criminalization directly contradicts a social norm it is especially prone to fail. A clear example of the latter is, as already noted, the widespread prevalence of female genital cutting despite it being widely illegal. Though in some locales the practice is widely endorsed, in others it persists despite the fact that most individuals view it as wrong — for example, in 2006, the rate of female genital cutting was 72.5%, 93.1%, and 89.3% in Burkina Faso, Djibouti, and Sudan, even though only 11.1%,

⁶⁷ *Ibid.*, pp. 1877-8.

⁶⁸ Mackie, "Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience."

36.6% and 23.7% of each population respectively supported it.⁶⁹ The explanation offered by nearly all investigators is that the practice is strongly supported by reciprocal expectations — both (false) normative expectations that most others believe one ought to engage in the practice (which are maintained in part by other norms that prohibit talking about the practice), and (true) empirical expectations that most others engage in it — that constitute a social norm.⁷⁰ Importantly, in all three jurisdictions the practice has been illegal for some time. So it appears that individuals normatively disavow a practice, the law deems it illegal, but social norms support it — and so the practice persists. This is a critical case of a general phenomenon: when moral convictions and social norms diverge social norms tend to determine whether people obey the law. To reiterate and press a bit beyond Mackie’s claim, “[c]riminalization fails where there is no social norm of legal obedience, when a new legal norm is too far from a current social norm, or both”⁷¹ — even when individuals morally endorse a norm of legal obedience or morally denounce the criminalized behavior.

5 NORMS AND PUBLIC JUSTIFICATION

5.1 *Unjustified Social Norms*

We have seen that when laws conflict or are merely unsupported by social norms they are apt to be ineffective and sometimes counterproductive. Yet we have also seen that in the case of norms such as female genital cutting, not just law, but personal normative convictions may be rendered ineffective by norms.⁷² Again, this is possible because a social norm requires (i) an empirical expectation that most people in one’s reference group follow the norms, and (ii) a normative expectation that most believe that *others* normatively expect them to comply. Because we can be wrong about what others believe we ought to do, features (i) and (ii) can obtain without (iii), anyone actually believing the norm is one that she, or indeed anyone else, ought to follow. So

⁶⁹ Bicchieri, *Norms in the Wild*, p. 47.

⁷⁰ Ibid. chap. 1. See Beniamino Cislighi, Diane Gillespie and Gerry Mackie, *Values Deliberation and Collective Action in Rural Senegal* (Wallace Global Fund and UNICEF Child Protection Section, 2014).

⁷¹ Mackie, “Effective Rule of Law Requires Construction of a Social Norm of Legal Obedience.”

⁷² It should be noted that on some analyses, it is part of the condition for a person following a social norm that he has a positive normative belief that it is worthy or has an attitude of endorsement toward it. See Brennan et al., *Explaining Norms*, pp. 1-14. This analysis, we think, obscures the critical problem that social norms can operate contrary to personal normative convictions.

we may well have cases in which most have the second-order belief that most others believe that the norm ought to be followed, but no one really has the first-order belief that it ought to be followed. A norm, then, may exist without being justified in the sense of being endorsed by its followers — it can be a *bona fide* social norm in a social network (group, community) even if no one in that network has a personal normative belief,⁷³ according to which people ought to act on the norm. In this case we can say that the norm is not even *minimally justified* to its followers: as they see it, the norm does not stand for, cohere with, or promote their personal normative convictions.⁷⁴

How, we might wonder, can it be the case that *most* of those in some group believe that others expect them to act on the norm yet *most* personally disapprove of the norm? It cannot simply be the power of conformity; that readily explains why a minority submits to a norm of which they disapprove, not why almost everyone does so. Of course it *could* be that each agent expects others to conform, disapproves of others for failing to, yet we all know that few if any personally approve of the resulting behavior. But that would be outlandish: it is as if we all declared “Let us all conform to norms that we personally do not approve of.” A far more plausible explanation is what Bicchieri and other researchers call “pluralistic ignorance”⁷⁵ — each member of the group, while personally disapproving of the behavior, believes that most others both approve of the behavior and expect others to conform. In cases of pluralistic ignorance each goes against her own personal normative convictions in order to satisfy what she wrongly believes are the normative expectations of others: each assumes others’ personal normative convictions *do* cohere with their normative expectations. Cases of pluralistic ignorance involve a sort ill-grounded normative conformity.

Bicchieri suggests that in cases of pluralistic ignorance abolishing a norm or changing behavior is relatively “easy.” “Interventions that disseminate information about what people really think would replace the perceived consensus with the

⁷³ Though our primary concern is with moral convictions, we here leave the idea of a “personal normative belief” open, so as to possibly include a concern for one’s own welfare, that of one’s family and associates, what one believes God requires, personal convictions about virtue, sacredness and seamliness, behavior required or approved by one’s moral convictions or ideal moral code, etc.

⁷⁴ For the contrast with more-than-minimal justification, see §5.3.

⁷⁵ Bicchieri, *Norms in the Wild*, pp. 42-7.

objective one, eliminating pluralistic ignorance.”⁷⁶ To be sure, Bicchieri is clear that making available better information about the normative beliefs of others is by no means sufficient to undermine a norm based on pluralistic ignorance: not only must the members of the network trust the information, but they also must know that others in their network have accepted the information and revised their expectations. This itself can be pose a significant problem. If (as already mentioned) there is a norm against talking about topics such as female genital cutting, then both the diffusion of information and the publicity of belief change may be difficult. And even when knowledge of belief change is public, there still remains an assurance problem: before departing from the requirements of the old norm, one needs to be assured that others are ready to depart, and so will not punish one’s deviance. This requires a level of coordination that is often difficult to obtain; norms against discussing such topics may, again, pose a significant obstacle. Still, changing unjustified social norms tends to be *relatively* easy, at least when compared to the other sort of norms we will consider, where normative beliefs must change too. The essential point for our purposes, then, is that even though unjustified norms may influence behavior—and even though they may do so in a way that appears to swamp the effect of laws and personal moral convictions—they are, in one important sense, unstable. Their very existence is dependent on people remaining ignorant about what other people actually believe.

5.2 *The Justification Effect*

In cases where pluralistic ignorance does not obtain, a majority in the norm network not only believe that the majority of others believe they ought to conform to the norm, but the majority actually *do* believe that others ought to conform to it. Here the majority’s personal normative beliefs cohere with the norm: the norm is minimally justified to them in the sense that, at least as they see it, it coheres with, or expresses, their personal normative beliefs, and this gives them reasons for holding that the norm is something people ought to follow. Thus the absence of pluralistic ignorance implies that the norm is minimally justified to at least most members of the community.

⁷⁶ *Ibid.*, ch. 3.

On Bicchieri's influential analysis, a person whose personal normative convictions support a social norm will be more *sensitive* to the norm's requirements: she will be willing to pay a greater personal cost in order to adhere to it, and so will be more likely to comply with it even in the absence of the threat of sanction or the presence of temptations to defect.⁷⁷ Bicchieri explains:

Sensitivity to a norm refers to how much a person adheres to what the norm stands for. Norm sensitivity embodies one's personal reasons for adhering to the norm. A highly sensitive individual could list several good, important, reasons why a particular norm should be enforced, whereas an individual with low sensitivity, who does not care much about what the norm stands for, may only list the fact that, since the norm is widespread, it makes sense for her to obey it (to avoid the sanctions that transgressions incur). Let us call a person's sensitivity to a particular norm, n , k_n . For example, a person who is not very convinced of the advisability of child marriage will have very low sensitivity to that norm (in other words a very low k_n), whereas a person who is convinced that that child marriage is the best way to protect a child's honor will be highly sensitive to the norm.⁷⁸

A person who is sensitive to a norm is one who believes there are many "good reasons" for adhering to and, presumably, enforcing the norm. A person who is highly sensitive to a norm — who is willing to follow it even at considerable cost to herself — is likely to be one for whom it is *justified in the sense that the norm "stands for" or promotes the things she cares about*.⁷⁹ Let us call this:

The Justification Effect: one's sensitivity (k) to a norm tends to rise as its justification increases, where justification depends on the coherence of the norm with one's own personal normative convictions.

As we have said, this is only a minimal type of justification: a norm is justified for a person if aligns her the personal normative convictions. At this point, we are not

⁷⁷ In Bicchieri's formal and empirical work, the sensitivity variable (k) measures a person's tendency to forego monetary gains in order to comply with a fairness norm. Bicchieri, *The Grammar of Society*, pp. 52-4.

⁷⁸ Bicchieri, *Norms in the Wild*, p. 165. Citation omitted.

⁷⁹ One can view these things a person cares about as "commitments." See, Amartya Sen "Rational Fools" in his *Choice, Welfare and Measurement* (Cambridge, MA.: Harvard University Press, 1982): 84-106.

interrogating the justification of those convictions — whether a person’s normative convictions are, say, themselves based on false beliefs.

This Justification Effect is not uniformly strong throughout the population. Those with greater “reflective autonomy,” Bicchieri predicts, will have a stronger tendency to decrease their sensitivity to a norm as they become aware of reasons against it, while more conformist members of the group will have higher sensitivity just because, say, the norm has been in place for a long time, and so will be less sensitive to reasons against it.⁸⁰ Still, greater minimal justification tends to bring along greater sensitivity with it. So we have here another way in which minimally justified norms tend to be more stable than unjustified ones: individuals are more likely to comply with them even in the absence of sanction or the presence of temptations to defect. When we add to this the fact that laws themselves are likely subject to a similar justification effect—recall that, in the Chicago study, moral convictions were moderately correlated with legal compliance—we find strong evidence for the stability-enhancing properties of public justification. In cases where social norms and moral convictions conflict, the existence of a corresponding social norm, justified or unjustified, may be our best predictor of legal compliance. But to determine how stable that norm is—and, therefore, how stable the corresponding law is—we need to look at whether it is minimally justified among those it governs.

5.3 *The Robust Justification of Norms*

The extent to which social norms are justified by personal normative beliefs turns out, somewhat surprisingly, to be central to Bicchieri’s analysis of social norms. Indeed, some notion of public reasoning is important to her analysis.⁸¹ As we have seen, norms characterized by pluralistic ignorance fail to be minimally justified by the personal normative beliefs of the large majority of the members of the relevant network; norms that people are liable to break (unless backed up by high sanctions) tend to be those that are not minimally justified to them. Commitment to norms, Bicchieri insists, is based on reasons. And compliance is typically based on commitment.

⁸⁰ Bicchieri, *Norms In the Wild*, pp. 166ff.

⁸¹ See Bicchieri and Hugo Mercier, “Self-serving Biases and Public Justifications in Trust Games,” *Synthese*, vol. 190 (2013): 909–922; Bicchieri and Mercier, “Norms and Beliefs: How Change Occurs,” *Iyyun: The Jerusalem Philosophical Quarterly*, vol. 63 (January): 60–82.

As we have described it, when freed of pluralistic ignorance, a community's norms are minimally justified. As Bicchieri points out, however, one can come to recognize that one's personal normative convictions are themselves not well-grounded, for example when we realize that our empirical beliefs and normative commitments do not cohere.⁸² Bicchieri and Hugo Mercier argue,

Inconsistencies are typically the occasion for belief change. When inconsistent beliefs are detected, the mind tries to determine which can be most easily rejected in order to reduce the inconsistency.... Arguments take a belief that the listener accepts — the premise — and show her that this belief is inconsistent with the rejection of the argument's conclusion. When a good argument is offered, it is more consistent for the listener to change her mind about the conclusion than to accept the premise while rejecting the conclusion.⁸³

While unreflectively one may conclude that one's personal normative beliefs endorse a norm, upon further argumentation and reflection on relevant data, one may come to see either that this is not so, or that one's moral convictions were flawed. This could lead to:

Robust Justification: a norm is robustly justified in a social group if (i) at least a majority in the group view their personal normative beliefs as giving reasons to hold that everyone in the group ought to act on the norm, (ii) this conclusion is stable in the light of the amount of reflection on their beliefs, discussion, and exposure to new information that it is reasonable to expect of typical members of the group.

Obviously clause (ii) is contextual, and rather vague.⁸⁴ The root idea, though, is that in any given case, a norm fails in robust justification if, in the light of the degree of critical reflection and discussion that is appropriate to the group, they conclude that their personal normative beliefs do not give them reason to endorse the norm.

⁸² Bicchieri, *Norms in the Wild*, pp. 129-30.

⁸³ Bicchieri and Mercier, "Self-serving Biases and Public Justifications in Trust Games," p. 69. See also Richmond Campbell and Victor Kumar, "Moral Reasoning on the Ground," *Ethics*, vol. 122, (2012): 273-312.

⁸⁴ For some philosophical cleaning up, see Gaus, *The Order of Public Reason*, pp. 254-8.

Robust Justification is no mere philosopher's will-o'-the-wisp: it is, essentially, the aim of the Tostan Community Empowerment Program.⁸⁵ The program, as conducted in rural Senegal (in villages ranging from 200-500),⁸⁶ centers on human rights and democracy education, stressing the exploration of, and deliberation about, the values recognized by the members of the community. Throughout the curriculum, the aim is to examine these ideas in light of the values of the community members. The participants in these classes reflect on human rights and equality (for example, concerning gender norms), often reaching considerable consensus within the group about these values and some of their implications, before going out to engage in further deliberation and discussion with the wider community.

There are many ways in which such deliberation can change norms and the personal normative beliefs on which they may be based. Some personal normative beliefs might change (for example, the belief that Islam requires female genital cutting might be rejected given information from Islamic religious leaders) or new personal normative beliefs may be adopted (say that the education of women is valuable to the family). Alternatively, individual's interpretations of their normative beliefs might change. As Bicchieri notes, the Saleema campaign in Sudan seeks to revise the interpretation of deep personal normative beliefs about purity and their link to the imperative to cut daughters, not by trying to undermine these traditional values, but instead by linking them to daughters remaining whole ("saleema") and natural.⁸⁷

As we move from an unjustified norm to a minimally justified one, and then on toward robust justification, not only is the autonomy of the norm follower respected, but the norm becomes stronger and more stable—in at least three ways. First, dissemination of new information is apt to confirm endorsement of the norm, rather than revealing a state of pluralistic ignorance. Second, since personal normative convictions are firmly aligned with the norm, individuals are typically more sensitive to it, and informal (and formal) punishment becomes less important as individuals become less tempted to defect. Third, critical reflection and discussion are likely to

⁸⁵ Cislighi, Gillespie and Mackie, *Values Deliberation and Collective Action in Rural Senegal*.

⁸⁶ However, some norms may characterize networks that link different villages, so those subject to a norm could be greater than 500.

⁸⁷ Bicchieri, *Norms in the Wild*, pp. 132ff, 159-69.

enhance rather than undermine individuals' normative convictions and therefore to have the same effect on individuals' sensitivity to the norm. So robustly justified norms are more stable in the face of the spread of information, temptations to defect, and critical reflection and discussion. Their efficacy and stability is not dependent on ignorance or coercion, but on the reflective normative convictions of those it governs.

To be sure, this not take us as far as Waldron's demand that the norm be justified to "every last individual" (§1) — when the ideal of public justification is transformed into the real world of moral agents, "every last" may often be best approximated as "the overwhelming majority." In the real world — not just Cambridge, but rural Senegal — this standard can be approached. The norms that approximate it simultaneously respect personal moral beliefs and provide a strong foundation for a stable social order.

6 LAW, NORMS AND THE PUBLIC'S REASONING

Public reason political philosophy — like most political philosophy — has been exclusively focused on the law and the coercive institutions of the state. Public reason, says Rawls, is concerned with deliberation in the political arena, and politics is about the coercive use of state power.⁸⁸ A political conception of justice defines the rationale and scope of the just or legitimate use of state power.⁸⁹ Thus understood the law is central to public reason and, famously, Rawls accords a supreme court a critical role: it is "the exemplar of public reason."⁹⁰ The judges of a supreme court are to "appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are the values that they believe in good faith ... that all citizens as reasonable and rational might reasonably be expected to endorse."⁹¹

⁸⁸ Rawls, *Political Liberalism*, pp. 136, 214-20.

⁸⁹ We set aside here the vexed issue of the relation of justice and legitimacy in political liberalism. For an insightful line of analysis, see Paul Weithman, "Legitimacy and the Project of Political Liberalism" in *Rawls's Political Liberalism*, edited by Thom Brooks and Martha C. Nussbaum (New York: Columbia University Press, 2015), pp. 73-112.

⁹⁰ Rawls, *Political Liberalism*, p. 236.

⁹¹ *Ibid.*

It is not, we think, unfair or misleading to describe this as a “top-down explication of an essentially bottom-up theory.” Public reason liberalism is, at its heart, a bottom-up theory: it is the reasoning of good-willed citizens that determines political justice. What is ultimately justificatory is what can be justified to the public. Yet, on the Rawlsian view, a body of nine legal experts at the apex of the judicial hierarchy is the exemplar of public reasoning, identifying what understandings of justice are publicly justified. This inversion of the justificatory focus, from the bottom to the top, should lead public reason liberals to hesitate,⁹² but it is at least coherent if the law is the unique source of social order, largely independent of social-moral norms. In that case the reasoning of the legal experts might well be taken as an exemplar of public reasoning. Because justice would be obtained through autonomous legal regulation, a publicly justified legal order would be, essentially, a publicly justified social order.

We have seen, though, the utter implausibility of this common picture. The law is, to be sure, a critical source of social order, but its efficacy depends on underlying social norms. When they approximate robust justification, the basic structure of the social order simultaneously respects the normative convictions of the citizens and provides a strong basis for publicly justified legal regulation. A law that meets a test of reasonable acceptance of citizens in say, the (normless) procedure of the original position, but *conflicts* with robustly justified norms will not be truly publicly justified: it conflicts with the fundamental normative order. It is not just politico-legal values, but the social norms of a society that need to be taken into account in any judgment of what is publicly justified. A law that meets a merely politico-legal test of public justification, but *fails to secure support* from an underlying social norm, will be ineffective. Moreover, the coercive public power exercised to enforce it is apt not only to be ineffective, but to induce contempt or disregard for the law, publicly justified or not.

Public justification of the social order is thus far more than a politico-legal justification. It is, in a critical respect, an informal social process. Legally mandated norm change is seldom efficacious as the main driver of change. Because norm change is, at its core, a bottom-up process that depends on the empirical and normative beliefs

⁹² See Gaus, *The Tyranny of the Ideal: Justice in a Diverse Society* (Princeton: Princeton University Press, 2016), pp. 240-50.

and convictions of normal citizens in their actual milieu, no body of experts is especially privileged in grasping the demands of public reason. To a large extent, it is driven by changes in people's personal normative convictions, which have been nothing short of astounding in the last one-hundred years.⁹³

7 PUBLIC JUSTIFICATION THE AND THE PURSUIT OF JUSTICE

We commenced with the worry that a commitment to public justification undermined the pursuit of justice: enlightened majorities are barred from pursuing justice as they see it because they must accommodate dissenting (but reasonable) minorities. A great cost of insisting on public justification seemed to be that it hamstringed the law in its pursuit of justice. We have argued that the law does not possess the autonomy and power this worry supposes. Effective legal regulation depends on a supporting framework of social-moral norms — which we might call the society's moral constitution. Unless our norms approximate robust justification they are apt to corrode in the face of information, reflection, and discussion: as people come to know the basis of the social order it is unmasked as founded on error about what others believe or about the grounds of their convictions.⁹⁴ And when norms do not cohere with personal normative convictions, they are more apt to be set aside when compliance is costly. Without such public justification justice is difficult to secure, and if secured is all-too-likely to be fragile.

To effectively bring about enhanced justice social-moral norms must be built upon, and sometimes changed. While the politico-legal order cannot mandate effective norm change, it is not without influence. Identifying successful influencing policies — which perhaps is truly fundamental to enhancing the justice of our societies — has only just begun. As Bicchieri stresses, we must begin by distinguishing norm abandonment from norm replacement: sometimes a norm can be undermined by better public information, sometimes simply by encouraging defection — norms wither when the associated empirical expectations are undermined.⁹⁵ Sometimes,

⁹³ For an enlightening overview of informal social change, see Thomas R. Rochon, *Culture Moves: Ideas, Activism and Changing Values* (Princeton: Princeton University Press, 1998) and, of course, Bicchieri's *Norms in the Wild*.

⁹⁴ See Rawls, *Political Liberalism*, pp. 66ff.; Gaus, *The Order of Public Reason*, pp. 296-8.

⁹⁵ Bicchieri, *Norms in the Wild*, Chap. 3.

however, norm abandonment requires norm replacement. Even bad norms may provide some social benefits: in such cases people might only be induced to abandon them when there is another to take its place. In seeking to establish a new norm, top-down legal directives are seldom effective.⁹⁶ Dan M. Kahan, though, argues that in some contexts a law giving a “gentle nudge” rather than a “hard shove” may be effective.⁹⁷ First, legislation is enacted that gives a “gentle nudge” beyond an existing social norm, stabilizing new reciprocal expectations that depart only mildly from the prior social norm, thereby modifying the norm. This allows for further legislation, producing more incremental changes in the norm, and so on. Gradually, over time, the social norm is pushed further and further, until the social norm corresponds to the ultimately desired legislation. Importantly, had we simply commenced with this final legislation it would have departed too far from existing social norms, and therefore would have been either ineffective or counter-productive. In the series of legislative changes each step went only slightly beyond existing social norms; the law, as it were, “dragged” the norms along with it. Presumably, however, we should expect such a legislative achievement to be stable only in cases where individual’s moral convictions come along for the ride, too.

Other tools abound — media campaigns, deliberation, economic incentives have all been examined.⁹⁸ In addition to these more top-down alternatives, Elizabeth Anderson has stressed the importance of forms of “mass public action” that may serve to “dislodge shared expectations, unsettle attitudes, and trigger practical deliberation.”⁹⁹ “Between pure argument and violence is a wide range of contentious activities that are more or less disruptive of habitual ways of life, from petitioning, publicity campaigns, theatrical performances, candlelight vigils, litigation, and political campaigns to street demonstrations, boycotts, teach-ins, sit-ins, picketing, strikes, and building occupations.”¹⁰⁰ Gaus, too, has suggested a more bottom-up

⁹⁶ *Ibid.*, p. 144.

⁹⁷ Dan M. Kahan, “Gentle Nudges vs. Hard Shoves,” pp. 625-31, 633-40. Kahan persuasively argues that his model explains the successful change in social rules pertaining to smoking, domestic violence, drunk driving, and sexual harassment in the U.S over the past few decades.

⁹⁸ For a survey see Bicchieri, *Norms in the Wild*, chap. 4.

⁹⁹ Elizabeth Anderson, “Social Movements, Experiments in Living, and Moral Progress: Case Studies from Britain’s Abolition of Slavery,” *Lindley Lecture*, University of Kansas (2014), p. 12.

¹⁰⁰ *Ibid.*, p. 9.

mechanism of norm change: because the precise requirements of norms are often ambiguous, individuals can exploit norm ambiguity to move norms in a better direction.¹⁰¹ Synthesizing these top-down and bottom-up approaches, David Colander and Roland Kupers have argued that governments should adopt a norm influence policy, providing conditions that induce individuals to develop of favorable social norms.¹⁰² But as Colander and Kupers and almost all investigators realize, while governments can provide conditions for norms to develop and flourish,¹⁰³ none are apt to be especially effective unless the policy aims to establish not only minimally justified norms, but something approaching robustly justified norms. Again, we are led back to public justification as a core desideratum of an effective set of social rules.

¹⁰¹ Gaus, *The Tyranny of the Ideal*, pp. 226-34.

¹⁰² Colander and Kupers, *Complexity and the Art of Public Policy*, chap. 11. See also Ryan Muldoon, "Understanding Norms and Changing Them," *Social Philosophy & Policy*, forthcoming.

¹⁰³ They are especially impressed by Hans Monderman's shared space traffic scheme, which structures the common space in such a way as to encourage the development of social norms. Colander and Kupers, *Complexity and the Art of Public Policy*, chap. 4.