

Recognized Rights as Devices of Public Reason

Gerald F. Gaus

1. A SOCIAL MORALITY OF RECOGNIZED JURISDICTIONAL RIGHTS

My concern in this essay is a family of liberal theories that I shall call “public reason liberalism,” which arose out of the social contract theories of Hobbes, Locke and Rousseau. These social contract accounts stressed that the justification of the state depended on showing that everyone would, in some way, consent to it. However, by relying on consent, social contract theory seemed to suppose a voluntarist conception of political obligation and authority: I am only bound by political authority if I choose to be bound.¹ Only in Kant, I think, does it become clear that consent is not fundamental to a social contract view: Kant insists that we have a duty to agree to act according to the idea of the “original contract.”² Rawls’s revival of the social contract tradition in *A Theory of Justice* also made no important appeal to consent, though the apparatus of an “original agreement” of sorts persisted. The aim of the original position, Rawls announced, is to settle “*the question of justification...by working out a problem of deliberation.*”³ As the question of public justification takes center stage (we might say as contractualist liberalism becomes justificatory liberalism), it becomes clear that posing the problem of justification in terms of a deliberative or a bargaining problem is simply a heuristic: the real issue is “the problem of justification”⁴ — what principles can be justified to all reasonable persons.

¹ On voluntarism, justice and the social contract, see John W. Chapman, “Political Theory: Logical Structures and Enduring Types” in *Idée de Philosophie Politique* (Paris: Presses Universitaires de France, 1965): 57-96; Patrick Riley, “A Possible Explanation of Rousseau’s General Will,” *American Political Science Review*, vol.64 (March 1970): 86-87.

² See Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, trans. (Indiana: Bobbs-Merrill, 1965), p. 71. [Akademie, 307].

³ John Rawls, *A Theory of Justice*, revised edn. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), p. 16 (p.17 of the original edition). Emphasis added.

⁴ Ibid.

Public reason liberalism is not to be equated with political liberalism. The latter is a specific version of public reason liberalism that seeks to restrict the set to be justified to a small number of principles of political right that are largely independent of moral principles. Rawls's earlier work — certainly his 1951 essay "Outline of a Decision Procedure in Ethics" and the famous essay on "Justice and Fairness" — understood the subject of justification more expansively, focusing on what we might call "social ethics," i.e., the moral resolution of competing claims of individuals.⁵ On this view liberalism is not simply a theory of the justice of the basic structure of society, but a public moral framework by which individuals can adjudicate their conflicting claims and demands on one another. Some may call this is a "comprehensive" liberalism, but we should be wary of such a simple description.⁶ Much of what we call "ethics" — including visions of the good life and conceptions of virtue and vice — lies outside social morality. As J. S. Mill saw it, the subject of "Civil" or "Social Liberty" — which is plausibly the subject of liberalism — involves the nature and limits of the moral authority of society over individuals to insist that they refrain from speaking, acting, and living as they wish.⁷ It is this broader understanding of liberalism that is my focus. Public reason liberalism, as I conceive it, claims that the principles of public morality that allow one individual to make demands on others to act or desist from acting must be justifiable to each and every reasonable moral person within that community.

In this essay I argue that under conditions of extensive reasonable disagreement about what is valuable in life, conceptions of the good, and so on, a publicly justified social morality must be (i) a morality that gives pride of place to jurisdictional rights that are (ii) socially recognized. (i) Given what I shall call "deep evaluative pluralism," I argue that a social morality that is publicly justified must be one in which most moral claims are based on individual moral rights. I shall argue that rights are often best understood in terms of a jurisdictional model. This jurisdictional conception has often been implicit in analyses of rights, but it has been

⁵ John Rawls, "Outline of a Decision Procedure for Ethics" and "Justice as Fairness" in *John Rawls: Collected Papers*, Samuel Freeman, ed. (Cambridge, MA: Harvard University Press, 1999): 1-19, 47-72.

⁶ As I have argued in "The Diversity of Comprehensive Liberalisms" in *The Handbook of Political Theory*, Gerald F. Gaus and Chandran Kukathas, eds. (London: Sage, 2004): 100-114.

⁷ See John Stuart Mill, *On Liberty* in *The Collected Works of John Stuart Mill*, J.M. Robson, ed. (Toronto: University of Toronto Press, 1977), vol. 18: chap. 1, para. 1.

overshadowed by focus on the way that rights involve choice or relate to interests. In his famous essay on “Are There Natural Rights?” — which is standardly interpreted as a defense of the choice theory — H.L.A. Hart pointed out that some rights grant the rightholder “authority or sovereignty in relation to some specific matter.”⁸ On this jurisdictional view moral rights are individualized spheres of moral authority or sovereignty, in which the rightholder’s judgment about what is to be done provides moral directions for others. Although this view has obvious affinities to the choice theory, it is distinct from it, as well as from interest and benefit theories.⁹ (ii) My second thesis is (even) more controversial: *bona fide* jurisdictional rights must be socially recognized.¹⁰

2. MORALITY, AUTHORITY, AND PUBLIC JUSTIFICATION

2.1 Morality, Authority and the Threat of Subjugation

As I have said, social morality can be understood as a set of principles that warrant individuals making moral demands on each other. As Mill recognized, when one appeals to social morality one makes a claim to be something like a moral authority over another: one is claiming that on this matter, the other is not to do as she thinks best, but as you require. Stephen Darwall has recently stressed the way in which

⁸ H. L. A. Hart, “Are there Natural Rights?” *Philosophical Review*, vol. 64 (April 1955): 175-191, p. 184.

⁹ For a detailed argument to this effect, see Eric Mack, “In Defense of the Jurisdiction Theory of Rights,” *Journal of Ethics* 4 (January-March 2000): 71-98. I do not present the jurisdictional analysis as a *theory* of rights at all, at least if by “theory” we mean an account that identifies necessary conditions for well-formed rights claims. The long-running debate between “choice” and “interest” theories of rights was (for the most part) predicated on the supposition that each identified a necessary condition for a sound claim that “Entity *X* has right *R*.” An advocate the will (or choice) theory would typically insist that *X* must be capable of choice, or exercising her will, and *R* must somehow be responsive to *X*’s choices. Thus Hart (“Are There Natural Rights?” p. 181) insisted that babies and animals did not have rights (though, of course they can be wrongly treated). In contrast, Mill (*On Liberty*, chap. IV, para. 3) and others have upheld an account of rights as necessarily protecting important interests. Given that babies and animals have interests, they can be rightholders: thus the common claim that a fetus has a right to life, though of course it cannot choose whether to exercise it. I shall put aside this search for “a theory” of rights. I very much doubt whether our concept of a moral right is sufficiently coherent to support interesting necessary conditions for well-formed rights claims. My concern is to analyze the crucial jurisdictional function of rights that has long been overlooked. I do not claim that all well-formed rights must be jurisdictional, or that justifications of specific rights cannot combine jurisdictional considerations with the importance of choice or protecting interests.

¹⁰ The argument I advance in this essay is by no means the only case for the thesis that *bona fide* rights require social recognition. I have presented additional arguments for this conclusion in “Green’s Rights Recognition Thesis and Moral Internalism,” *British Journal of Politics and International Relations*, vol. 7(2005): 5-17. A revised and greatly expanded version of that essay appears as “The Rights Recognition Thesis: Defending and Extending Green,” in *T.H. Green: Metaphysics, Ethics and Political Philosophy*, Maria Dimovia-Cookson and William Mander, eds. (Oxford: Oxford University Press, 2006), pp. 208-235.

interpersonal morality involves “authority relations that an addresser takes to hold between him and his addressee.”¹¹ To make a moral demand on another is for one to assume a practical authority over another to make demands and to demand compliance.¹² To make a moral demand is not simply to call attention to your claim and its merits, but to insist that the claim is backed up with an authoritative moral reason for the other to do as you demand.¹³ It is immediately clear, however, that the liberal tradition views such a claim with suspicion. Recall that for Locke, “The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule.”¹⁴ Locke does not deny that each is bound by morality, but insists that no one is naturally under the authority of another’s understanding of the requirements of morality. But when one makes a moral claim on another, as Darwall points out, one is not making a request or calling attention to your view of morality: one is demanding that the other complies with it. It looks as if you are claiming that she is subject to your authoritative demands. Thus, as Jeffrey Reiman has nicely put it, this assertion that one “has a higher authority” over how another should act raises the specter of “subjugation” — that “the very project of trying to get our fellows to act morally” may be “just pushing people around.”¹⁵

This worry that morality might just be a way of “pushing people around” is quintessentially liberal. Recall that Locke’s canonical liberal text, *The Second Treatise*, with its adamant denial of natural authority, was written as a response to Robert Filmer’s assertion that some were naturally the moral superiors of others. Filmer vigorously upheld this view against those who advocated the “dangerous opinion” of the “natural freedom of mankind.”¹⁶

¹¹ Stephen Darwall, *The Second-person Standpoint: Morality, Respect and Accountability* (Cambridge, MA: Harvard University Press, 2006), p. 4.

¹² *Ibid.*, pp. 10-11.

¹³ *Ibid.*, p. 76.

¹⁴ John Locke, *Second Treatise of Government in Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1960), sec. 21.

¹⁵ Jeffrey Reiman, *Justice and Modern Moral Philosophy* (New Haven, CT: Yale University Press, 1990), p. 1.

¹⁶ Robert Filmer, *Patriarcha in Patriarcha and Other Political Works*. Peter Laslett, ed. (Oxford: Blackwell, 1949), p. 53.

Every man that is born, so far from being born free, that by his very birth he becomes a subject to him that begets him: under which subjection he is always to live, unless by immediate appointment from God, or by grant or death of his Father, he became possessed of that power to which he was subject.¹⁷

If there is any sense in saying that men are born free, Filmer insisted, is it that men are not born subjugated as servants, but as sons.¹⁸ Filmer did not deny that fathers (and so monarchs) are bound by the laws of nature to act justly towards their subjects and to care for their welfare; however, he insisted that the authority to interpret this law resided in the father — the upshot is that the family is governed by the judgment of the father.¹⁹ Though Filmer was distinctive in deriving natural moral authority from patriarchal authority, he is by no means unique in upholding a claim that some people have intrinsic moral authority over others. Aristotle's account of the status of slaves as "living tools" incapable of friendship,²⁰ Mill's own acceptance of authoritarianism for "races" in their "nonage,"²¹ and even, I think, Sidgwick's principle that "enlightened Utilitarians" may advocate an "esoteric morality" that is the criterion of genuine moral requirements but is not revealed to *hoi polloi*²² — all seems to conform to the picture of morality as a tool that some people use to push others around.

2.2 Universal Self-legislation

Social morality presupposes that we claim authority over others, yet liberals insist that we are all free and equal moral persons, and so each has a moral freedom to interpret her moral obligations for herself. How can liberalism's commitment to moral freedom be reconciled with the authoritative nature of moral demands? Kant's ideal of the realm of ends provides the core insight: "A rational being belongs to the realm of ends as a member when he gives universal laws in it while also himself subject to these laws. He belongs to it as sovereign when he, as legislator, is

¹⁷ Filmer, "Directions for Obedience to Government in Dangerous or Doubtful Times," in *ibid.*, p. 231.

¹⁸ Filmer, *Patriarcha*, pp. 73-74.

¹⁹ *Ibid.*, p. 96.

²⁰ Aristotle, *Nicomachean Ethics*, Sir David Ross, trans. (Oxford: Oxford University Press, 1954), p. 212 [1161a30-b19].

²¹ Mill, *On Liberty*, chap. 1, para. 10.

²² Henry Sidgwick, *The Methods of Ethics*, 7th edn. (Chicago: University of Chicago Press, 1962), pp. 489ff.

subject to the will of no other.”²³ Kant insists that for morality to be consistent with “the dignity of a rational being,” a rational being must obey no law other than that which he gives himself. For morality to exist, the individual must be a subject; for it to be non-authoritarian, she must be the legislator.

Kant’s depiction of the self-legislative nature of a free morality stresses that each rational being has a will that is legislative for every other will, giving laws to all to which *qua* subject, are authoritative for her. Our moral freedom consists in being “a legislative member in the realm of ends,”²⁴ but we are also subject to such legislation. Now it is important that by “realm” Kant meant “the systematic union of different rational beings through *common laws*.”²⁵ So Kant does not think it is fine if you legislate in one way and I in another. Implicit in Kant’s analysis of morality, then, is a unanimity requirement: we legislate common laws. The same morality thus must be legislated by all rational beings, who are in turn subjects of their own demands.

2.3 *The Generic Public Justification Principle*

If we take seriously the unanimity requirement implicit in Kant, we are led to a view of moral justification along the lines of:

*The (Generic) Public Justification Principle: M is a (bona fide) moral requirement only if each and every member of the public P, deliberating under conditions C, have sufficient reason(s) R to accept M as a binding requirement on all.*²⁶

²³ Immanuel Kant, *Foundations of the Metaphysics of Morals*, Lewis White Beck (ed., trans.) (Indianapolis: Bobbs-Merrill, 1959), p. 52 [Akademie, 433-434].

²⁴ Ibid.

²⁵ Ibid.

²⁶ It might be argued that an egoist has reason to accept *M* as a binding requirement on all, but to ignore *M* in practice. We must recall that we are considering certain idealized persons (e.g. reasonable); in a fuller account we would also have to explicate what is involved in “accepting” a moral requirement, and whether the egoist we are considering can be said to genuinely have accepted *M*. I am indebted to Jim Sterba for pressing me on these points and pointing out to me the inadequacy on an earlier formulation.

The Public Justification Principle, as Rawls puts it, conceives of justified moral principles as mutually acknowledged “by free persons who have no authority over one another.”²⁷

Because I am concerned with a family of public reason liberalisms, I focus on a generic formulation of the principle. Because this is a generic principle, I initially leave open the really crucial problem of just how to specify *P* (whether the members must all be reasonable, fully rational, etc.), though in section 5 I shall argue for an important condition that members of *P* must meet. The (generic) Public Justification Principle supposes that there is some specification (and almost certainly some idealization) of the public such that if each member so described deliberated under some conditions (*C*), each would rationally endorse *M*. One Kantian specification of *P* is the set of rational beings; insofar as we act as members of *P* we act in accord with our status as rational moral beings.

For simplicity sake, in this essay I suppose that members of *P* under *C* are conceived of as deliberating about specific moral requirements. We can think of the members of *P* under *C* as confronting the question: “what should be the moral requirement, *M*, regulating matter Φ ?” This is closest to the Kantian-inspired view of the problem as legislating. It is more accurate, however, to suppose, as Rawls did in “Justice as Fairness,” that the object of deliberation is an entire moral practice: an interlocking set of moral requirements, permissions and prohibitions that distinguishes certain roles, and so on. Thus the members of the public should probably be thought of as considering entire moral practices such as, for example, ownership/distribution, personal privacy, protection of the person, and so on. Everything said here can be translated into the notion of a moral practice. What concerns members of *P* under *C* is whether they have reason to accept the same moral requirements or practices.

3. EVALUATIVE PLURALISM AND MORAL DISAGREEMENT

As stated, the majority of moral theories would endorse the (Generic) Public Justification Principle: if the parties are so specified that they all accept, say, a certain substantive moral theory, moral requirements justified by that moral theory

²⁷Rawls, “Justice as Fairness” in *John Rawls, Collected Papers*, p. 55.

would also be justified by the Public Justification Principle. The Public Justification Principle would do little or no work. The Public Justification Principle becomes a substantive test of a moral requirement if we accept Rawls's claim that a wide range of rational disagreement is the "normal result of the exercise of human reason."²⁸ Suppose, then, that we accept reasonable pluralism in the sense that our characterization of the members of *P* deliberating under conditions *C* includes that members of *P* reason on the basis of different values, ends, goals, etc. This does not prejudice whether values are "ultimately" plural, for perhaps fully rational, omniscient, beings would agree on what is valuable: the important point for public reason views is that the characterization of *P* under *C* allows for diversity in the basis of their reasoning about what moral requirements to endorse. Abstracting from the notions of goods, values, moral "intuitions" and so on, let us say that Σ is an evaluative standard for Alf if holding Σ , (along with various beliefs about the world) gives Alf a reason to endorse moral restraint M_1 over alternative M_2 .²⁹ Evaluative standards, then, are to be distinguished from justified moral requirements: as I have characterized them they need not meet the test of Public Justification, but are the reasons for members of *P* to accept (or reject) *M* in relation to some alternative.

We suppose, then, some plurality of evaluative standards for *P* under *C*. Under *radical* pluralism we would so characterize the deliberations of *P* under *C* as to allow for just about any evaluative standard that rational agents have endorsed — including, say, those that value the suffering of others and subjugating others. But it is unlikely that a plausible conception of parties who conceive of each other as free and equal moral persons would endorse such oppressive evaluative standards. In any event, the core problem of a liberal social morality under conditions of pluralism is not how we respond to, say, the Nazi (who certainly claims authority over others), but how those who conceive of each other (and themselves) as free and equal handle their disagreements and so find a way to live under a non-oppressive social morality. How to respond to people who pursue as valuable what we think of as evil is a real

²⁸ Rawls adds: "within the framework of free institutions of a constitutional regime." *Political Liberalism*, paperback edn. (New York: Columbia University Press, 1996), p. xviii.

²⁹ I leave aside here whether Σ is itself a belief about the world, or supervenes on one, as ethical naturalists would have it. Nothing in my account precludes moral realism as a metaethical or metaphysical thesis. The rationality-based constraint on justificatory reasons is the crucial principle on which the analysis rests.

problem, but the prior problem is how to deliberate with others who pursue what are recognizably values, but who endorse very different “conceptions” of the good — how values are to be arranged into a coherent scheme. Moreover, empirical research indicates that the main source of our disagreements is not about what is valuable, but about what is more valuable. According to Milton Rokeach, a psychologist, Americans agree in affirming a set of thirty-six values; what they differ on is “the way they organize them to form value hierarchies or priorities.”³⁰ This is a plausible take on Isaiah Berlin’s claim that the range of plausible pluralism is limited by the “common human horizon” — what humans agree on as ways of living that can be intelligibly valued.³¹

Consider, then, a less radical form of pluralism, according to which members of *P* under *C* all agree on a list of evaluative standards that are intelligible bases for the public justification of moral requirements. Now again we might consider more or less radical versions of such “intelligible value pluralism.” The most radical version of this pluralism supposes that, of this agreed upon list of intelligible values, members of *P* under *C* advance every possible ordering: every logically possible value hierarchy is represented in our deliberative setting. Assuming such unrestricted rankings, though, still seems too strong; public reason liberals may maintain that everyone, say, holds that not killing innocents is more important than securing personal pleasures, or (*a la* Rawls) liberals might suppose that all members of *P* under *C* hold that achieving fair terms of cooperation is an important *diseratum*. Even Berlin thinks that the “common human horizon” allows some common ranking of values: we sometimes agree that some rankings are more “humane” while others are “indecent.”³² We should not insist that liberals adopt a version of pluralism more extreme than Berlin’s. Although, then, we should not require liberal public reason views to suppose entirely unrestricted rankings, a compelling liberal account nevertheless must attribute great diversity to the

³⁰ See Milton Rokeach, *The Nature of Human Values* (New York: The Free Press, 1973), p. 110; Milton Rokeach, “From Individual to Institutional Values” in his *Understanding Values* (London: Collier Macmillan, 1979), p. 208.

³¹ See my *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (London: Sage, 2003), pp. 27-31.

³² See *ibid.*, pp. 43-46; see also Jonathan Riley, “Interpreting Berlin’s Liberalism,” *American Political Science Review*, vol. 95 (June 2001): 283-297.

evaluative standards that individuals endorse. So we must suppose that members of the public deliberating under C are characterized by great, if not entirely unrestricted, evaluative pluralism.

Now the problem for public justification appears manifest. Let us take up Rawls's fundamental insight of depicting the justificatory problems in terms of a deliberative problem, and suppose we understand the deliberative problem in terms of each member i of P under C proposing, on the basis of her intelligible evaluative standards $\{\Sigma_1 \dots \Sigma_n\}$, her preferred moral requirement, M_i . Suppose also that, on the basis of her own evaluative standards, each P under C ranks everyone's proposed requirements. If the parties employ their evaluative standards to evaluate different proposed moral requirements, so long as their disagreements in evaluative standards are great, these disagreements will seem to inevitably result in great disagreement in their rankings of candidates for moral requirements. If member of the public P_1 holds ranking $\Sigma_1 > \Sigma_2$ [read as " Σ_1 is ranked above Σ_2 "], while P_2 maintains that $\Sigma_2 > \Sigma_1$, then if the degree of justification of the moral requirements within a perspective is monotonic with the ranking of evaluative standards, P_1 will hold $M_1 > M_2$, while P_2 will rank the requirements $M_2 > M_1$. To be sure, the members of the public may display consensus on some basic moral requirements (as Berlin suggests, they may all see as wrong pushing pins into babies for fun), but given the depth of evaluative pluralism, and the importance of people's evaluative standards in their deliberations about what moral requirements they have most reason to accept, we would expect that great disagreement in evaluative rankings would result in great disagreements in the rankings of possible moral requirements. If our basis for judging moral requirements is diverse, so too will be our evaluations of moral requirements. Deep moral disagreement would seem the inevitable result of evaluative pluralism.

Now one way to overcome apparent moral disagreement is to abstract the deliberations of P under C such that they focus on very general principles: regardless of the evaluative disagreements of P under C , it is plausible that all concur that some liberty principle is important, or that some property principle must be upheld. Such an abstraction strategy is by no means useless: it can help us identify some common ground in our moral outlooks. However, abstraction alone by no means puts to rest our moral disagreements (though it does draw some bounds to them). As Kent

Greenawalt observes, “Agreement on such abstract ideas may exist now in the United States, but this agreement has limited significance when many people have definite ideas on how to fill in the details, and these ideas powerfully conflict with one another.”³³ Our moral disagreements about which specific moral requirements are to be endorsed, which we avoided by abstracting to very general principles, reappear as disagreements about which interpretations of the principles are to be preferred and which are unacceptable.³⁴

4. The Two-Step Kantian Moral Legislation Procedure

The liberal is thus confronted with the specter of deep moral disagreement, yet he is committed to the public justification of morality. Liberals are committed to a common morality of universal self-legislation *and* great evaluative pluralism (of members of *P* under *C*). How can we get common judgments out of a disagreement about the bases for judgment? The liberal seems to have straightforwardly incompatible commitments. How did Kant, and later Rawls, seek to solve the problem?

Kant writes:

By “realm” I understand the systematic union of different rational beings through common laws. Because laws determine ends with regard to their universal validity, if we abstract from the personal differences of rational beings and thus from all content of their private ends, we can think of the whole of all ends in systematic connection, a whole of rational beings in themselves as well as of the particular ends which each man may set himself. This is a realm of ends....

A rational being belongs to the realm of ends as a member when he gives universal laws in it while also himself subject to these laws. He belongs to it as sovereign when he, as legislating, is subject to the will of no other.³⁵

Kant’s method for determining moral laws *qua* universal laws of freedom involves an individual decision procedure: each individual is to propound universal laws. Of course, as universal laws of morality regulating the realm of ends to which all free persons are subject, these laws are to be the same for all. How are different individuals, each acting as moral sovereign, to arrive at the same set of laws? Often Kant is seen simply as formalist, as if the mere universal form of the law guarantees

³³ Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), p.114.

³⁴ I have explored this problem in “On Justifying the Liberties of the Moderns: A Case of Old Wine in New Bottles,” *Social Philosophy & Policy*, vol. 25 (Winter 2007): 84–119.

³⁵ Kant, *Foundations of the Metaphysics of Morals*, pp. 51-52 [Akademie, 433-34].

convergence of legislation. There are well-rehearsed objections to any such purely formal account of moral legislation. As we see in the above passage Kant suggests a rather more subtle idea: when united by common laws we ignore our “particular” or “private ends,” and consider only universally valid ends. For this bracketing strategy to succeed, we must have good reasons to bracket the considerations that set us apart (our private ends), and having done this, we must still have available to us some common considerations that can serve as the basis of individual deliberations about what laws to legislate. As Rawls suggests (in his discussion of the universal law formulation of the categorical imperative), we might appeal to a notion of “true human needs” which are shared by all and so are not mere private ends.³⁶

Rawls’s argument from the original position can be understood as a formalization of this two-step legislation procedure. First, (*via* the veil of ignorance) we abstract away “private ends” that would lead us to legislate different universal laws.³⁷ One excludes “knowledge of those contingencies which set men apart....”³⁸ Second, we attribute to the parties a concern with primary goods that provides a basis for their common deliberation. These primary goods can be understood as akin to “true human needs.” Insofar as we consider ourselves as agents devoted to some undefined ends, they are what we need. When we isolate the specific evaluative standards characteristic of our (common) status of agents devoted to their own (unknown) ranking of evaluative standards (values, comprehensive conceptions of the good and so on), because “everyone is equally rational and similarly situated, each is convinced by the same arguments.”³⁹ So although the original position begins by posing a problem of collective choice, the problem is reduced to the Kantian problem of public legislation by one person.⁴⁰ However, unlike Kant, who apparently sees “private ends” as irrelevant considerations that can be entirely bracketed in moral legislation, Rawls’s commitment to evaluative pluralism prevents him from simply dismissing different conceptions of the good as irrelevant to moral

³⁶ John Rawls, “Themes in Kant’s Moral Philosophy” in *John Rawls: Collected Papers*, pp. 497-528 at pp. 501ff.

³⁷ See Fred D’Agostino, *Incommensurability and Commensuration: The Common Denominator* (Aldershot, Hampshire: Ashgate, 2003), p. 100.

³⁸ Rawls, *A Theory of Justice*, p. 17.

³⁹ Rawls, *Political Liberalism*, p. 120.

⁴⁰ *Ibid*, pp. 120-121.

justification. Rawls contends that the argument from the original position is free-standing: it isolates the evaluative considerations that follow from our conception of persons as reasonable and rational, free and equal — a conception that is said to be implicit in our democratic society, and so shared by all.⁴¹ Justice as fairness thus expresses “shared reason.”⁴² Justice as fairness, Rawls says, is a justified political conception because it articulates the requirements of the concepts of the person and society that all reasonable citizens in our democratic societies share. However, he does not believe that this exhausts justification. Indeed, he says that this is simply a *pro tanto* (so far as it goes) justification.⁴³ In what Rawls refers to as “full” justification citizens draw on their full range of evaluative standards and find further reasons for endorsing the political conception. At this stage, Rawls tells us, the *pro tanto* (freestanding) justification “*may be overridden by citizen’s comprehensive doctrines once all values are tallied up.*”⁴⁴ What was simply “freestanding” or isolated must, if it is to be fully justified, serve as a “module” that fits into each free and equal reasonable moral person’s set of evaluative standards.⁴⁵

The Kantian legislation procedure is caught in a dilemma. If we follow Kant in entirely setting aside that which sets us apart as mere “private ends” irrelevant to moral legislation we may get a shared result, but only because we have ignored fundamental evaluative diversity. Evaluative pluralism is not about mere private conflicts that are irrelevant to what moral laws agents have reason to endorse: they are fundamental to what a person sees as rational laws to live by. Remember, our goal is for each to follow her own reason while seeing herself as a member of the realm of ends: by declaring irrelevant so much of what a person understands as basic to her evaluative outlook, she can only see these laws as rationally self-

⁴¹ Ibid., p. 10.

⁴² Ibid., p. 9.

⁴³ Ibid., p. 386.

⁴⁴ Ibid. Emphasis added.

⁴⁵ Most commentators on Rawls mistakenly identify these two ideas. Rawls employs the idea of a “module” when explaining “overlapping consensus” (ibid., pp. 12-13; 144-5) whereas “freestandingness” applies to the appeal to shared conceptions of the person and lack of metaphysical and other commitments of the argument for the two principles (ibid., pp. 10, 40, 133, 144). The crucial passage that confuses many readers is on pages 144-145 of *Political Liberalism* where Rawls argues that because the political conception is freestanding it can serve as a module; many readers suppose that Rawls is simply equating the two ideas.

legislated in an extremely attenuated sense. Rawls sees this, and so insists that the free-standing justification is only *pro tanto* — full justification must admit the full range of evaluative considerations, which might override the free-standing justification. But now it becomes doubtful that the free-standing argument is stable under full justification; it is not, for example, in Display 1.

		P1		P2		P3	
		Σ ranking	M ranking	Σ ranking	M ranking	Σ ranking	M ranking
<i>Freestanding Justification</i> (isolated perspective of Σx)		x	M_1 M_2 M_3	x	M_1 M_2 M_3	x	M_1 M_2 M_3
<i>Full Justification</i> (all Σ)	<i>Relevant</i> Σ	x	M_1 M_2 M_3	y x	M_2 M_1 M_3	x y	M_1 M_3 M_2
	<i>Irrelevant</i> Σ	y z		z		z	

Display 1

In Display 1 we see that, isolating the perspective of Σx , all concur on the ordering $M_1 > M_2 > M_3$. But is not clear that this will help a great deal after the full range of evaluative standards are brought into play. In Display 1 all three members of the public agree under full justification that Σx is relevant to the judgment and that Σz is not; yet we still can generate three different orderings of the proposed moral requirements under full justification. The moral disagreement implicit in evaluative pluralism, bracketed in the first stage, is apt to reassert itself under full justification.

5. The Burdens of Justification and Rights as Jurisdictions

5.1 Rights as Partitioning the Moral Space

We can conceive of all moral issues as constituting a space, and so our problem is how to regulate that space — what moral requirements we are to share that instruct us how to act in various parts of that space. Kant's and Rawls's proposals conceive of the problem of moral legislation as finding a common way of regulating the moral decision space. We can think of this as a centralizing response (which is implicit in Kant's understanding of a *law*). Under conditions of deep evaluative diversity, centralizing responses tend to collapse under the burdens of justification: they aim to take as inputs a large body of diverse rankings and yields as an output a

determinate favored result. The Kantian legislation procedure only yield results if the information pool — i.e. the relevant differences in evaluative orderings — is greatly limited.

Coping with these “burdens of justification” requires, I believe, largely abandoning centralizing responses to public justification. Rather than a seeking a uniform way to regulate the moral space, we must partition it. We can devolve authority over different parts of it to different individuals. As Fred D’Agostino has pointed out, “[i]n effect, we say that in a society with n individual members, there are n separate spheres in which an answer ... may be sought, each of which is, in theory, inviolable and particular to the individual who occupies it.”⁴⁶ If we partition the moral space in this way, for each and every person, there is some part of the moral space over which her evaluative standards have public standing. In that part of the moral space controlled by a person, her evaluative standards are sovereign, and others must respect those standards in that space.

Such partitioning yields a system of jurisdictional rights. As I noted in section 1, Hart pointed out that some rights grant the rightholder “authority or sovereignty in relation to some specific matter.”⁴⁷ Jurisdictional rights are individualized spheres of moral authority, in which the rightholder’s judgment about what is to be done provides others with moral reasons to act. A regime of jurisdictional individual moral rights is thus a form of public justification — or perhaps it is better understood as a way to settle the problem of public justification in such a way that in the future it is no longer a collective problem. Benjamin Constant, I think, saw this in his famous lecture on “The Liberty of the Ancients Compared with that of the Moderns.” Constant noted that liberty of the ancients consisted of “exercising collectively, but directly, several parts of the complete sovereignty.”⁴⁸ For the ancients, freedom manifested itself as a centralized, collective activity. In contrast, the moderns conceive of freedom in terms of individualized spheres in which their own values hold sway, such as freedom of association and religion, the right to “choose a profession and practice it, to dispose of property, and even to abuse it; to

⁴⁶ D’Agostino, *Incommensurability and Commensuration*, p. 105.

⁴⁷Hart, “Are there Natural Rights?” p. 184.

⁴⁸ See Benjamin Constant, “The Liberty of the Ancients Compared with that of the Moderns” in *Political Writings*, Biancamaria Fontana, ed. (Cambridge: Cambridge University Press, 1988), 311.

come and go without permission, and without having to account for their motives or undertakings.”⁴⁹ John Gray once noted how private property rights economize on collective justification:

The importance of several [i.e., private] property for civil society is that it acts as an enabling device whereby rival and possibly incommensurable conceptions of the good may be implemented and realized without any recourse to any collective decision-procedure. ... One may even say of civil society that it is a device for securing peace by reducing to a minimum the decisions on which recourse to collective choice — the political or public choice that is binding on all — is unavoidable.⁵⁰

Property rights, then, are quintessentially jurisdictional. To own property is to have a sphere in which one’s evaluative standards have great authority for others. But we should not think that jurisdictional rights are exhausted by several property. Mill’s defense of a “self-regarding sphere” in which “the individual is sovereign” is the classic liberal case for individual jurisdictions.⁵¹ Such a sphere is composed not simply of property rights (in fact, Mill has little to say about property in *On Liberty*), but crucially, of privacy rights too. Insofar as one is acting within one’s private sphere, one is authorized to act on one’s controversial evaluative standards and others are bound not to interfere in certain ways, not to disseminate information about one’s activities, and so on. Also included within such a private sphere are various rights of association.

It is important to stress that I am not maintaining that all of our common moral requirements — indeed, not all of moral rights⁵² — are inherently jurisdictional. No doubt, under plausible depictions all members of the public under *C* will converge on some common moral requirements such as the wrongness of inflicting gratuitous suffering, principles of veracity and so on. We should not go so far as to claim that common moral requirements are always impossible under evaluative diversity; the point is that the obstacles to a robust common morality that treats all as free and equal are severe, and a critical project of liberal morality must be to show that the challenge posed by these obstacles can be met. Jurisdictional rights, I maintain, are crucial to doing so.

⁴⁹ Ibid.

⁵⁰ John Gray, *Post-Enlightenment Liberalism* (London: Routledge, 1993), p. 314.

⁵¹ Mill, *On Liberty*, Chap. 1, para. 9. I have argued that Mill’s case takes evaluative pluralism seriously in “Controversial Values and State Neutrality in *On Liberty*” in Mill, *On Liberty: A Critical Guide*, C.L. Ten, ed. (Cambridge: Cambridge University Press, forthcoming).

⁵² See note 9 above.

5.2 *The Liberal Limit on Evaluative Pluralism: Defending a Conception of “the Reasonable”*

The jurisdictional solution to the burdens of justification is an option only if, whatever disagreements we have about evaluative standards, there is consensus that, when push comes to shove, moral requirements that give one authority to act on one’s own standards are higher ranked than moral requirements that others act on one’s standards. The key to the jurisdictional solution is to allow great, but not unlimited, diversity in evaluative standards but show that this can lead to an agreement on moral requirements. The thesis that *deep evaluative pluralism engenders deep moral disagreement* thesis must be rejected, at least in its strongest form.

How can this be done? Recall Rawls’s stylized history of European toleration, from initial insistence that all live according to one’s own creed, to an uneasy standoff between churches that most highly value having all live according to their creed but accept the pragmatic impossibility of this, to the deep acceptance of toleration in the sense that one’s evaluative standards simply do not endorse demanding that others live according to one’s creed.⁵³ Now it is not necessary that members of the public go this far: they need not entirely abandon the view that their evaluative standards give them reason to make moral demands on others to adopt their creed, or vision of the good. They do, however, have to rank these proposed moral demands lower than the moral right of each to act on his own values. Once this becomes a characteristic of people’s evaluative outlooks, a liberal morality of rights becomes possible. When Rawls supposes that the parties to the original position are “reasonable” one of the things this means is that they seek mutually acceptable terms of cooperation in the sense that they are not devoted to requiring that others adhere to their controversial values. But to refrain from insisting that others live according to my controversial values and to insist on the importance to me of my own fidelity to these values, is simply to say that each living according to her own lights is ranked higher than insisting that each conforms to one’s preferred evaluative standards.

⁵³ Rawls, *Political Liberalism*, pp. xxviff.

Amartya Sen showed formally how a regime of jurisdictional rights is inconsistent with unanimous legislation (and, so we can see, public justification) when people care more about regulating others than being free to act as they see fit.⁵⁴ Sen conceives of a person having a right R as having authority to decide the social preference over at least one pair of alternatives (a,b) such that if a person chooses $a > b$ that is the social preference; and if the person chooses $b > a$ then that is the social preference. This conception of a right has been disputed, but it perfectly captures the conception of rights as devolved ways to cope with evaluative diversity: instead of a collective choice over the pair (a,b) , the social choice is devolved to a single agent.⁵⁵ However, Sen showed that attributing such rights to two persons, and assuming all possible orderings of social states are permissible, the social outcome selected by the rights can conflict with the Pareto principle (that if for everyone $a > b$, then the social preference must be $a > b$). More formally, Sen demonstrated how combining rights, Pareto and no restriction of preference orderings, can result in intransitive social preference. Sen nicely summarizes his argument:

There is a book (e.g. *Lady Chatterley's Lover*) which may be read by Mr. A ("the prude") or Mr. B ("the lascivious") or by neither. Given other things, these three alternatives define social states, a , b and o respectively. Consider now the following possibility. The prude A most prefers o (no one reading it), then a ("I'll take the hurt on myself"), and lastly b ("Imagine that lascivious lapping it up"). The lascivious [Mr. B] prefers most a ("it will give that lilywhite baby a nice shock), then b ("it will be fun"), and last o ("what a waste of a good book"). On grounds of individual freedom, since B wants to read the book rather than no one reading it, b is socially preferred to o ; note that in *either case* A does not read the book here. Similarly, since A does not want to read it, o is socially better than a . But a is Pareto superior to b , yielding a preference cycle.⁵⁶

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

Some see this as a case against individual rights: they can conflict with the Pareto criterion, which can be seen as the core principle of unanimous collective self-legislation. If all members of P under C rank M_1 as better than M_2 then certainly the collective legislation should be M_1 (rather than M_2). If we combine this principle with individual rights to decide the social (moral) preference over some options, we

⁵⁴ Amartya Sen, "The Impossibility of a Paretian Liberal," *The Journal of Political Economy*, 78 (Jan-Feb. 1970): 152-157. For an extended, and accessible, discussion, see Sen's "Liberty, Unanimity, and Rights," *Economica*, New Series 43 (Aug. 1976): 217-245.

⁵⁵ Nozick, for one, criticized it in *Anarchy, State and Utopia*, pp. 165-66. Cf. Sen. Sen's "Liberty, Unanimity, and Rights," pp. 229-231.

⁵⁶ Sen, "Liberty, Unanimity, and Rights," p. 218.

can get a social preference — or a public morality — that is intransitive, and so irrational. What is crucial here is that *A*'s (and *B*'s) values run counter to the scheme of jurisdictional rights because *A*'s higher ranked standards are to get *B* to act as *A* wishes, rather than *A* valuing acting as he wishes in his own moral decision space. Many have accused liberals of supposing that people's aims are inherently selfish, or that their value systems are purely self-centered. This is not so, but the criticism is not totally unfounded (given that it has been so often made, that should not be surprising). The liberal ideal of a non-authoritarian morality becomes possible only when value systems generally converge on the *higher* importance of each living by one's own lights than having other's live by one's lights. Moreover, we must remember that liberal individuals do not simply have self-interested reasons to live by their own lights: their overall evaluative standards lead them to conclude that it is more important for people to live by their own lights than for others to live according to standards one thinks are best.

The core idea, then, is that we can (i) maintain great evaluative diversity in the ways of living to which we are committed (in my more formal rendering, our orderings of evaluative standards) and yet (ii) achieve moral agreement if we (iii) converge in our evaluative standards regarding the priority of each of us living according to his or her preferred standards over having all live according to his preferred standards. This is indeed a limit on evaluative pluralism, but it is also a type of limit that, at the same time, makes it possible for wide range (perhaps, indeed, the widest feasible range) of plural standards to be implemented. This limit of evaluative diversity is a core element of a compelling interpretation of the much criticized Rawlsian notion of "reasonable comprehensive view."

5.3 The Reasonable v. the Modus Vivendi

Now some insist that this is far too strong a supposition, and is far too much of a restriction on true pluralism. Public reason liberalism, it is charged, begins with grand pronouncements that the fundamental problem for public justification is evaluative pluralism but then admits into the relevant justificatory public only those who highly rank living according to their own evaluative standards. In Rawlsian terms this means that those who do not share this ranking are "unreasonable." A number of critics have insisted that this is an anemic pluralism: evaluative

pluralism, they insist, is only genuine when it leads to moral disagreement. Gray has argued that this highly restricted notion of the reasonable renders such public reason liberalism “a species of fundamentalism, not a remedy for it.”⁵⁷ To make matters worse, Gray argues that this limitation of pluralism is not necessary to justify liberal toleration: a *modus vivendi* — a standoff between those with deeply conflicting standards of evaluation — will suffice to ground something like liberal toleration.

In Rawls’s stylized history, *modus vivendi* was the dominant understanding of toleration at the close of the religious wars: a conviction that others ought to live according to one’s standards, tempered by a belief that it is impossible to get them to do so. Now it is important to see that even a plausible *modus vivendi* has to assume that, overall, individuals place a high value on living according to their own lights. Suppose for example, the relevant individuals have the evaluative orderings in Display 2. Let us say:

$\forall x, \forall y, \forall z$ = all others ought to live according to the evaluative standard x , or y , or z . (Read “ $\forall x$ ” as “for everyone, that they live according to Σx .”)

I_x, I_y, I_z = an evaluative standard according to which one values living according to x , y , or z . (Read “ I_x ” as “the value to me of living according to Σx .”)

P1	P2	P3
$\forall x$	$\forall y$	$\forall z$
$\forall y$	$\forall z$	$\forall x$
$\forall z$	$\forall x$	$\forall y$
I_x	I_y	I_z

Display 2

In Display 2, each individual P_i prefers that everyone lives according to P_i ’s evaluative standards, but each also ranks last the importance of her living according to her own lights. All three members of the public evaluate as better any way of living together under a common standard to each going it alone. Because in Display 2 each member of the public’s primary concern is that we all live according to a common evaluative standard, there is no reason to think that a *modus vivendi* will arise. “Me, living according to my preferred standard” is ranked by everyone as

⁵⁷ John Gray, *The Two Faces of Liberalism* (Oxford: Polity, 2000), p. 21.

lower than all living under some (any) common standard: it is Pareto-dominated by all other options. It might be replied that none of the other options stand a chance of adoption, but it is by no means clear that this is a relevant rejoinder. The core point is not what stands a chance of being accepted by everyone, but one's evaluative ranking; even if everyone will not accept that they ought to live according to my preferred evaluative standard, this in itself does not show that I should not rank universal conformity to it as the best option. However, let us suppose that the individuals are concerned not simply with what they evaluate as the best outcome, but also its feasibility — whether it can become the common standard for society. This still will not lead them to a *modus vivendi*. Assuming the orderings in Display 2, in which all the individuals hold that coordinating on some common standard is more important than being able to live according to one's own preferred evaluative standard, they have a reason to coordinate on some common standard ($\forall x, \forall y, \text{ or } \forall z$) rather than risking failure to coordinate. Each going their own way is not favored by anyone. To better see why a *modus vivendi* will not arise in Display 2, consider a special case of these orderings:

Alf	Betty	Charlie
\forall Windows	\forall Apple	\forall Linux
\forall Apple	\forall Linux	\forall Windows
\forall Linux	\forall Windows	\forall Apple
I-Windows	I-Apple	I-Linux

Display 3

In this case each highly values using the same operating system as do others; going it alone is again Pareto-dominated. In Display 3 — where each wishes to do as others do — should one option (perhaps simply because of some random event) become slightly more popular than the others, people will gravitate to that option (as it stands the best chance of universal acceptance), and we witness a “bandwagon” effect based on the increasing returns for everyone of adopting the more popular option.⁵⁸

⁵⁸ For an important analysis, see W. Brian Arthur, *Increasing Returns and Path Dependency in Economics* (Ann Arbor: University of Michigan Press, 1994).

The point here is that a plausible case for a *modus vivendi* must itself suppose a restricted pluralism of evaluative rankings. Display 4 gives the quintessential ordering that many think would give rise to a *modus vivendi*:

P1	P2	P3
$\forall x$	$\forall y$	$\forall z$
Ix	Iy	Iz
$\forall y$	$\forall z$	$\forall x$
$\forall z$	$\forall x$	$\forall y$

Display 4

In Display 4, each ranks as most important that everyone lives according to her preferred evaluative standard, but next most important is the value of her (perhaps alone) living by her standard. Even the orderings in Display 4, however, do not immediately lead to toleration or a *modus vivendi*; so long as the first option for each is a moral requirement that everyone lives according to her preferred standard, there may be moral conflict and attempts at imposition. A *modus vivendi* can come about, though, by each eliminating her favored option from the feasible set (“I’d like everyone to be a Catholic, but others continue to successfully resist, and given their probability of success, further attempts to impose my standards are too costly; so I will simply no longer consider it as a feasible option”), thus producing the orderings of Display 5:

P1	P2	P3
Ix	Iy	Iz
$\forall y$	$\forall z$	$\forall x$
$\forall z$	$\forall x$	$\forall y$

Display 5

Once we have the orderings of Display 5, a *modus vivendi* in the form of jurisdictional rights can arise. P1 says to P2: “if you allow me a sphere to live according to x , I will allow you a sphere to live according to y ,” and so with P3, etc. Let us say:

$\forall Mx, \forall My$ or $\forall Mz$ = a moral requirement that everyone acts on x , or y , or z .
 (Read “ $\forall Mx$ ” as “for all, a moral requirement that she acts on standard x .”)

$R(x,y,z)$ = a right of each to act on her preferred evaluative standard.

So we now have (Display 6) a ranking of *moral requirements* based on Display 5’s ranking of evaluative standards.

P1	P2	P3
$R(x,y,z)$	$R(x,y,z)$	$R(x,y,z)$
$\forall My$	$\forall Mz$	$\forall Mx$
$\forall Mz$	$\forall Mx$	$\forall My$

Display 6

Display 6, however, is essentially the sort of ordering of moral requirements that liberal reasonable people have — not, of course, simply on feasibility grounds, but because they have come to embrace the primary importance (to be sure, within a range) of each living according to her own understanding of what is important. The “reasonable” liberal ranks the possible moral requirements as:

P1	P2	P3
$R(x,y,z)$	$R(x,y,z)$	$R(x,y,z)$
$\forall Mx$	$\forall My$	$\forall Mz$
$\forall My$	$\forall Mz$	$\forall Mx$
$\forall Mz$	$\forall Mx$	$\forall My$

Display 7

The difference between the liberal and the simple *modus vivendi* ranking of possible moral requirements, then, is that whereas the “reasonable liberal” ranks (1) everyone being able to live on the evaluative standard she adheres to as better than (2) everyone being required to live on the liberal’s own preferred standard — based, say, on the importance of reciprocity — the *modus vivendi* argument simply drops (2) (i.e., everyone being required to act on my standards) from the feasible set. But in both cases jurisdictional spheres are the best option in the remaining set. The line between *modus vivendi* and reasonable accommodation is thus an exceptionally fine one. This strengthens Rawls’s conjecture that reasonable accommodation can arise out of a *modus vivendi*. The distinction indeed is far less important than either Gray or Rawls supposes. Some may have Display 7 orderings because they think they are the only fair and reciprocal orderings, or because they possess evaluative grounds for thinking that each should find salvation in his own way, while yet others have Display 6 orderings on pragmatic grounds. The important point is not agreement in evaluative standards, but in orderings of moral regulations. And while there is much to say for the greater stability of a moral order that does not rely on merely pragmatic considerations, those who uphold the requisite ordering on pragmatic grounds nevertheless have good reasons to accept the jurisdictional solution.

Liberal “reasonable” orderings of moral requirements are thus not especially “sectarian” when compared to orderings that lead to a *modus vivendi*. They are, rather, the sort of orderings that are generally required for a non-authoritarian morality (or, we might say, mutual accommodation) under conditions of deep evaluative pluralism.

6 Jurisdictional Rights as *De Jure* Authority

Let us recall our problem and where we have traveled thus far. A moral claim on others is a claim to a sort of authority over their actions; liberalism, however, is premised on a non-authoritarian conception of the moral order. Such a moral order is possible only if each person — to employ Kant’s depiction — is both legislator and subject. If each has reason to endorse a moral requirement, then when others make demands on the basis of such a requirement one is requiring the action of oneself. This proposal, which shows how a liberal moral order is possible, seems to run aground on the second pillar of liberalism, evaluative pluralism. If free and equal moral persons employ different evaluative standards, then it is dubious that they will often converge in their universal legislation. We thus confront the specter of deep moral disagreement. I have argued that one way to maintain a common morality in the face of disagreements in evaluative standards is to partition the moral decision space so that each person has authority, based on her own evaluative standards, within her sphere. A system of jurisdictional rights accomplishes this; so long as members of the public are conceived of as primarily valuing living their own lives by their own lights, the jurisdictional proposal provides the key to understanding how a common non-authoritarian morality is possible under evaluative pluralism.

A morality of rights that delimits the jurisdictions of individuals is, as I have been arguing, one that, as Hart said, gives an individual authority or sovereignty over some “matter.” To be part of a genuine liberal morality, this must, of course, be *de jure* authority: no simply *de facto* authority will do. We are concerned with a system of authority that meets the test of public justification. It is thus of the first importance to grasp what is implied by the idea of *de jure* authority or sovereignty. In his *Lectures on the Principles of Political Obligation* T.H. Green resists the idea that *de jure* sovereignty is simply “rightful authority” that has no practical force, as

when appeal is made simply to a “general will, or the mere name of a fallen dynasty exercising no control over men in their dealings with each other.”⁵⁹ Instead, Green argues, the distinction between *de facto* and *de jure* sovereignty “has natural meaning in the mouths of those who, in resisting some coercive power that claims their obedience, can point to another determinate authority to which they not only consider obedience due, but to which obedience in some measure is actually rendered....”⁶⁰ Green’s general point, and he seems entirely right, is that a political authority that has, or is likely to have, no practical effect is no political authority at all, as it cannot perform its main task of sorting out actual disagreements and coordinating activities. To be any sort of authority at all there must be some general recognition of it; only then can it perform its designated tasks. If it is not generally recognized as an authority, we might argue that it *ought* to be an authority, that it alone could qualify as a justified authority, but we cannot claim that it now is such an authority. The job of authority is to regulate and coordinate social interaction; if so, an authority that is not recognized simply is unable to perform the office of an authority, as one who is not socially recognized as a leader is unable to fulfill the position of “group leader.” We can say that a person who is not recognized — either explicitly or implicitly — as a leader *ought* to be the leader, that she would be a wonderful leader, or even that she would be the only leader worth having; but we cannot say that a person no one pays attention to is *now* the leader.

To be sure, difficult issues arise here concerning how effective, or potentially effective, a justified authority must be before we can say that it *is* the *de jure* authority. We might say that it has to have significant following, or that it has some reasonable prospect of gaining such a following. All these are complicated issues, but the crucial point is that on Green’s analysis, that “A is the *de jure* authority over Φ ” is not established simply by a moral or philosophical argument that submitting to the direction of A in Φ -matters is justified, or even uniquely justified. A *de jure* authority must meet both the (1) justification and (2) minimal effectiveness

⁵⁹ T.H. Green *Lectures on the Principles of Political Obligation* in *Principles of Political Obligation and Other Writings*, Paul Harris and John Morrow, eds. (Cambridge: Cambridge University Press, 1986), sec. 105.

⁶⁰ *Ibid.*

conditions.⁶¹ If, as Green says, we claim that rightful obedience is to be rendered only to some forgotten fallen dynasty, or a fantasized one, exercising no control over men in their dealings with each other, we are claiming that there simply is no *de jure* authority — no one has sovereignty — since no party has both minimal effectiveness and a justified claim.

Now given that *bona fide* jurisdictional rights define spheres of individual *de jure* authority over parts of social life, and given that *de jure* authority requires some minimal effectiveness or recognition, we can see that one of Green's most controversial claims is partially vindicated: viz., that a right must be socially recognized. Green's claim is too sweeping as, like so many others, he holds that our concept of rights is fully captured by a single "model" of rights, and so he gives necessary and sufficient conditions for all rights claims. If we abandon the idea that all moral (or political) rights ascriptions must conform to a single model,⁶² we will not be led to such a sweeping claim. But we can say that (1) a fundamental role of rights in liberal social morality is to define jurisdictions over which, as Mill said, individuals are sovereign, (2) that such rights can only serve their function of allowing us to live together in mutual respect only if they are a *de jure* authority, and so (3) to be such *de jure* authority some degree of social recognition is required.

7. What Scheme of Rights? Rational Indeterminacy and Social Recognition

As Gray correctly claimed, a system of rights reduces to a "minimum" the recourse to collective choice. However, no system of jurisdictional rights can do away with collective justification. Most important for our purpose is that we require collective moral justification to partition the moral decision space in some particular way. We cannot do without a common view about which, of the large set of potential partitioning systems, we shall live under. Of course not all systems of jurisdictional rights pass the test of public justification. For the first two hundred years of its existence American society upheld a system of jurisdictional rights in which the

⁶¹ This is not to claim that a *de jure* authority must be *de facto* authority; that is a significantly stronger claim.

⁶² Again, see note 9 above.

moral domains of some whites included the lives and bodies of African-Americans. To say that only a system of jurisdictional rights can cope with the burdens of justification is not to claim that any such system will suffice. Some partitions of the moral space clearly fail the test of the public justification. On the other hand, it seems that a number of schemes of rights will be acceptable to all members of the public, though they will disagree about which is best. It looks that we are back where we began, with moral disagreement and indeterminacy.

I have argued that liberal “reasonable” members of the public will put some rights schemes at the top of their ordering of possible moral requirements. We can expect rational disagreement about the rankings of different schemes of rights, but given what we have said about the nature of liberal (and *modus vivendi*) orderings, there will be a number of rights schemes ranked higher than common moral requirements, as in Display 8.

P1	P2	P3
$R_1(x,y,z)$	$R_2(x,y,z)$	$R_3(x,y,z)$
$R_2(x,y,z)$	$R_3(x,y,z)$	$R_1(x,y,z)$
$R_3(x,y,z)$	$R_1(x,y,z)$	$R_2(x,y,z)$
$\forall Mx$	$\forall My$	$\forall Mz$
$R_4(x,y,z)$	$\forall Mz$	$\forall Mx$
$\forall My$	$R_4(x,y,z)$	$\forall My$
$\forall Mz$	$\forall Mx$	$R_4(x,y,z)$

Display 8

Now in Display 8, rights schemes $\{R_1, R_2, R_3\}$ Pareto dominate all universal moral requirements and R_4 , but none (of R_1 - R_3) Pareto dominate the others in the optimal set. So we can say that all members of the public agree that any member of the set $\{R_1, R_2, R_3\}$ is better than any proposal outside the set. The problem is to select from this *optimal set*.

Suppose that one member of the set is presently socially recognized; it is the scheme of rights that actual moral persons generally accept and act on. Given that social recognition is a necessary condition for an effective scheme of *de jure* jurisdictional authority, the socially recognized scheme has a decisive advantage over the other members of the justified set: it meets the justification condition as well as the others do, but it alone meets the minimal effectiveness condition. It thus weakly dominates the other members of the optimal set: on no dimension does it do worse, and on some dimension it does better. Both the justification and minimal

effectiveness conditions are necessary for the jurisdictional solution to work, and only if the jurisdictional solution works can we treat each other as free and equal moral persons under conditions of evaluative pluralism. Everyone thus has a decisive moral reason to conform to the *de jure* authority of the existing scheme of rights.

The other possibility is that the current scheme is not within this optimal set of rights. In this case people need to find a way to come to converge on a member of the justified set. Now we have seen (e.g., in Display 8) that each individual will rank the various rights schemes. We have also seen (section 6) that a scheme of rights only has moral value if it is socially recognized. So we can generate (from display 8):

<i>social recognition of</i>	P1	P2	P3
<i>R₁</i>	3	1	2
<i>R₂</i>	2	3	1
<i>R₃</i>	1	2	3
<i>None</i>	0	0	0

Display 9

Display 9 translates P1-P3's ordinal rankings of possible rights schemes into an ordinal utility function, which tells how well the social recognition of each proposed scheme satisfies a person's evaluative standards. We suppose that no one wants a morality outside the optimal set (remember, this set Pareto dominates all other proposals), so an outcome outside of the optimal set is 0; the best outcome is a utility of 3. *It is crucial to stress that by "utility" here I simply mean a measure of how well an option satisfies the evaluative standards of each member of the public. Utility here does not mean "self-interest" nor is it an independent value: it is simply a summary measure of how highly the option satisfies the person's overall evaluative standards.* Now at this point our members of the public face an impure coordination game along the lines of Display 10 (which concerns simply P1 and P2):

		P1	
		R_1	R_2
P2	R_1	3	0
	R_2	0	2
		0	3

Display 10

Suppose that R_1 and R_2 are alternative moral rights (P2's utility is in the lower left, P1's in the upper right, of each cell). The uncoordinated outcomes indicate no socially recognized moral rights at all on this matter. Looked at *ex ante*, P1's evaluative standards give her reason to endorse right R_1 ; P2's lead him to endorse R_2 . *Ex ante*, P1 does not have reason to endorse R_2 as legitimate over R_1 , nor does P2 have reason to endorse R_1 rather than R_2 . They do, however, have reason to coordinate on either R_1 or R_2 in this game.

Should P1 and P2 find themselves at $\{R_1, R_1\}$ neither would have reason to act on R_2 . Given each of their rankings of the possible schemes (and their absence), they have the most reason to act on R_1 . If either refuses to act on R_1 , instead of acting on recognized jurisdictions, they act on conflicting views of their rights: there is then no *de jure* authority and no one has moral sovereignty. On the other hand, should they instead find themselves at $\{R_2, R_2\}$ each will then have most reason (given each of their evaluative rankings) to act on R_2 . Note that in neither case is the individual being induced by some external consideration to conform to a right that is not, from his or her perspective, optimal: *consulting simply his or her own evaluative standards, each has decisive reason to freely endorse whichever jurisdictional right they have coordinated on*. At right R_1 P1 can cite the requirements of R_1 to P2 and, consulting only his own evaluative standards, P2 will have a reason to conform to R_1 ; and at right R_2 P2 can cite R_2 , and P1's standards instruct her to act on it. And this even though, from the initial deliberative perspective, neither had reason to act on the other's preferred right. Thus once a common morality has arisen each person, consulting only her own evaluations of the moral possibilities, sees that she has reason to freely conform to this right if it is in the optimal set.

A one-shot two person game can give us an insight, but it is clearly an inadequate way to model the adoption of a scheme of rights. The coordination problem is not simply between two people but among many, and it is not a single

play game, but an iterated game.⁶³ We have a number of encounters with others, and each can be understood as a play in a series of impure coordination games. Now in an iterated game a person's utility (again, remember this is defined solely in terms of her evaluative criteria) is a combination of her utility in this play, plus her expectations for utility in future games. Thus P1 might sacrifice utility in one instance to "punish" P2, seeking to get P2 to act in the future in ways preferred by P1. We know that in iterated impure cooperation games based on Display 10, the play can move back and forth from one equilibrium to another.⁶⁴ However, in large N -person games with multiple coordination equilibria such alternating solutions are much harder to sustain. The key here again is increasing returns: the more people play, say, R_1 , the more it makes sense for others to act on R_1 , even those who prefer coordinating on R_2 . To go back to Display 3, the same reasoning that shows why I am now using Microsoft Windows (the increasing returns of shared operating systems) shows how we can all come to accept the same moral rights despite beginning with diverse rankings of proposed rights.

In our N -person iterated coordination game, coordinating on any rights in the optimal set is a Nash equilibrium. This can be easily seen: since everyone prefers common action of any right in the optimal set to failure to coordinate, once we have arrived at a common action based on one of the rights in the optimal set, unilateral defection would make a person worse off in terms of her own evaluative standards and her resultant moral rankings. We thus arrive at a striking result: *in this sort of moral game, coordination on any member of the optimal set is a Nash equilibrium, and so any member of the set can constitute a right that is freely followed by all, and so respects everyone's moral freedom.* The reasons to follow the right are generated by what one considers the proper evaluative standards.

⁶³ For a still excellent analysis of multi-person impure coordination problems, see Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge: Cambridge University Press, 1986), pp. 150ff. Hampton originally sets up the problem as an N -person negotiating problem, but then considers "snowballing" (what I call bandwagon) solutions.

⁶⁴ See Peter Vanderschraff and Brian Skyrms, "Learning to Take Turns," *Erkenntnis*, vol. 59 (2003): 311-346.

8. Conclusion: Recognized Rights and Non-authoritarianism

Rights are necessary to cope with the burdens of justification. But *ex ante* no scheme of rights is best in everyone's evaluative perspective. From the *ex ante* perspective, for every candidate right, it would be authoritarian to impose it on some. But *ex post*, once others are acting, if one consults only one's own evaluative standards, a rational agent will freely act on any socially recognized right that is in the optimal set. Only a socially recognized right can overcome the problems of evaluative pluralism and the indeterminacy of public justification and allow us all to respect each other as morally free persons. This, I think, is of the highest importance. We normally think of moral theory and rational reflection as seeking to provide determinate answers to what morality rationally requires. We first reflect on what a rational justified morality is and then examine our actual morality to see if it measures up. The history of this way of thinking has, I think, given us ample cause to doubt whether such rational determinacy is to be had, at least in a way that takes seriously deep evaluative diversity. Rational reflection can narrow the field, but socially recognized moral rights are needed to complete the story: to give us a common morality that, consulting only our own standards, we have reason to endorse.

*Philosophy
University of Arizona*