Ethics in Politics

Political ethics, a subfield of applied (or practical) ethics, is concerned with normative questions about voters, politicians, lobbyists, and other individual political agents. Compared with other fields in applied ethics (such as biomedical ethics and business ethics) political ethics has not developed into an area of intense interest in academic philosophy. Debates over the main questions in political ethics occur in mainstream news, on social media, in living rooms and neighborhood bars, etc., but for the most part have not bled over into the pages of philosophy journals and books. This volume aims to (begin to) fill this gap in the philosophical literature. It contains seventeen original papers by a diverse range of leading scholars on central questions in political ethics.

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Ethics in Politics

The Rights and Obligations of Individual Political Agents

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Introduction

Emily M. Crookston, David Killoren, and Jonathan Trerise

Political ethics is a subfield of applied (or practical) ethics. This subfield is primarily concerned with moral or otherwise normative questions surrounding individual agents acting in political contexts. Political ethics sits alongside other subfields in applied ethics—e.g., biomedical ethics (which is concerned, in part, with individual agents acting in medical or clinical contexts) and business ethics (which is concerned, in part, with individual agents acting in business contexts).

The latter half of the twentieth century saw an explosion of philosophical research in biomedical ethics, business ethics, and other subfields of applied ethics. Yet political ethics has, for the most part, been on the back burner. Courses in political ethics are not regularly offered in philosophy departments at major universities, and there are surprisingly few publications in the subject. This is not to say that no one has been working in political ethics; there have been important and valuable contributions (which are cited and discussed in the chapters of this volume). And there are even some philosophers who self-identify as "political ethicists" (many of whom are contributors to this volume). Nevertheless, it's fair to say that political ethics hasn't been a hotbed of research. Why?

There are probably many reasons. Surely institutional factors must play some role. Increased demand from students aiming for careers in medicine and business leads colleges and universities to devote substantial resources to ethical training oriented toward those careers, so it is perhaps unsurprising that many philosophy departments can support research in areas like biomedical ethics and business ethics. By contrast, the same level of demand simply doesn't exist for coursework that prepares students for professional political work—e.g., postgraduate study in political science or careers in politics.

But such institutional factors do not entirely explain the relative neglect of political ethics among philosophers. After all, philosophy is not a discipline known for restricting itself to ideas that meet popular demand. Some of the hottest research topics in metaphysics, for example, are seen by outsiders (and even some insiders) as arcane and impractical. So the mere fact that students and administrators may perceive political ethics as lacking direct relevance for career preparation can only be part of the story.

So we want to propose a further explanation for the failure of the discipline to embrace political ethics as an important subfield in applied ethics. We think it just might be John Rawls's fault.

John Rawls is undisputedly the dominant political philosopher in the modern era, and this has many important implications for the shape of political philosophy today. To begin with, Rawls's ideas have profoundly influenced the core methodologies used to develop and critically evaluate various positions in political philosophy. So, for example, Rawls's idea of the original position, and his idea of reflective equilibrium, represent the default approach in virtually all corners of Anglophone political philosophy. Equally importantly, Rawls's work has profoundly influenced the substantive content of the positions that political philosophers are willing to consider. For instance, Rawls's difference principle generally has to be at least mentioned (if not necessarily endorsed) in developing any substantive view regarding, e.g., political principles or systems of government. In these ways and in many others, the main views in contemporary political philosophy are nearly always defined in relation to Rawls's thought.

But there is another, equally important consequence of Rawls's shadow over the field. Rawls has not only influenced our methodology and our substantive views; he has also influenced the content of the very questions that political philosophers are willing to entertain and investigate.

In *Justice as Fairness: A Restatement* (2001), the most widely consulted version of Rawls's grand theory, Rawls includes a famous discussion of the roles of political philosophy. The "practical role," which Rawls appears to regard as political philosophy's most important role, is "to focus on deeply disputed questions and to see whether, despite appearances, some underlying basis of philosophical and moral agreement can be uncovered." The disagreements that Rawls has in mind are disagreements about how society should be organized and governed: his principal example is the conflict between libertarian and egalitarian approaches in political theory. Here Rawls evinces a focus on the level of society and social and political organization (as opposed to the level of the individual agent) as the paradigm level at which to ask and answer questions in political philosophy. This pattern continues throughout nearly all of Rawls's influential work in this area.

This is not to say that Rawls is not at all interested in individuals. But he is interested in individuals principally in terms of their usefulness in getting at normative questions about social structures and how they shape institutions. Thus, for example, Rawls says that political philosophy should play the role of "reconciliation"—it should "calm our frustration and rage against our society and its history" by showing us that our society's institutions are rationally defensible. Here, as elsewhere, Rawls's interest in individual members of society is mainly confined to their status as *complainants*, who may demand that society justify its intrusions into their lives; but he is not particularly interested in individuals in terms of their status as *agents*, who must make their own choices and justify their own actions.

Consequently, in Rawls's capacity as political philosopher, he has much to say about how society ought to be organized, but has does not assign central importance to questions about what each of us—as individuals, as citizens, as politicians, as voters, or more broadly, as members of a society—ought to do.[1]

To be sure, Rawls is not the originator of the view that political philosophy should focus on collectivities, societies, governments, etc., rather than individuals. That view has in fact been widespread for a very long time. Henry Sidgwick, in his landmark book *The Methods of Ethics* (1874), presents the distinction between "Ethics" and "Politics" as follows: "Ethics aims at determining what ought to be done by individuals, while Politics aims at determining what the government of a state or political society ought to do and how it ought to be constituted" (15). This view of the difference between "Ethics" (or moral philosophy) and "Politics" (or political philosophy) was standard at the time of Sidgwick's writing, and remained so throughout the twentieth century. Rawls (as well as Sidgwick, for that matter) should be regarded as a transmitter, rather than an originator, of this view, which we might call the *anti-individualistic conception* of political philosophy. Nevertheless, as transmitter of that conception, Rawls has been profoundly influential simply by virtue of his total dominance of the field in so many respects.

And so it happens that political philosophers in the modern era have generally followed Rawls in adopting and presupposing the anti-individualistic conception of political philosophy. Thus we have reached a state of affairs in which political philosophers will readily discuss whether or how democracy is to be justified as a system of government, but have been fairly quiet (at least until quite recently) about questions concerning whether or how individual citizens in a democracy ought to vote. Likewise, political philosophers have much to say about the function of the judiciary in a just state, but have been virtually silent about how a prosecutor or a judge ought to conduct herself in the courtroom. Similarly, political philosophers have written copiously about the normative significance and justification of representation in a legislature designed to be responsive to the will of the people, but have written very little about the many moral dilemmas faced by the individuals who act in the context of representative legislatures, such as senators and lobbyists. Even among political philosophers who focus on what Rawls calls nonideal theory, most emphasize how institutions should go about conforming to the ideal, rather than on how individuals should conduct their lives from within the reality of a non ideal system. The picture one gets is that political philosophers believe that their role is to examine normative questions concerning societal and governmental structures, but not to examine normative questions that directly concern the individuals who must act and live *within* societal and governmental structures.

Now, it is an open question whether political ethics should be considered a subfield within political philosophy. (On one view, in line with the anti-individualistic conception of political philosophy, the sorts of normative questions about individual agents that concern political ethics do not belong to

political philosophy because such questions belong to *ethics*, and ethics does not overlap with political philosophy.) Nevertheless, it seems reasonable to suppose that political philosophers would be the philosophers most likely to have the training and interest necessary to make important contributions within political ethics. And so, we suggest, the fact that political philosophers have been primed by Rawls and those who follow him to sideline the main questions in political ethics goes some distance toward an explanation of the fact that political ethics is not more prominent than it is.

Whatever the reason, it is fair to say that political ethics hasn't been an area of intense research focus for philosophers. This is unfortunate, given that the main questions within political ethics are matters of great concern for all of us—philosophers and non-philosophers. Indeed, the public sphere—in newspapers, cable news shows, social media on the Internet, as well as real-life contexts such as family gatherings, work-related social functions, etc.—echoes constantly with debates over questions about how politicians, voters, and other agents in political contexts ought to conduct themselves. Philosophers have the tools to make unique and meaningful contributions to these debates and so it is regrettable that philosophers have heretofore been mostly absent. True, there are many philosophers who use platforms such as newspapers or blogs to participate in public debate over political issues concerning politicians, voters, and other individual agents; but there are not many philosophers who have chosen to focus on such political issues in their professional philosophical work.

We intend the present volume, which contains original chapters on political ethics by a diverse range of moral and political philosophers, to be a major step toward a more active literature in political ethics. These chapters amply demonstrate that lively and robust philosophical investigation of political ethics is not only possible, but also desirable. We hope that the chapters in this collection will inspire more work in this area and will set an agenda for political ethics in the years to come.

The book is divided into five parts.

Part I: Lying in Politics contains two chapters on politicians' lies. Chapter 1, by Jason Brennan, entitled "Murderers at the Ballot Box: When Politicians May Lie to Bad Voters" argues in favor of a permissive view of political lying. Chapter 2, by Kay Mathiesen and Don Fallis, is entitled "The Greatest Liar Has His Believers: The Social Epistemology of Political Lying." The central question: Given that politicians are generally regarded as untrustworthy and thus are unlikely to be believed, why do they go on making promises? To address this question, Mathiesen and Fallis recruit the tools of social epistemology to develop an account of the function of political speech and political lies.

Part II: Nonideal Politicking contains five chapters on a set of interrelated ethical problems that are, in various ways, distinctive of the politician qua professional. In Chapter 3, by Jaime Ahlberg, entitled "Nonideal Politicians or Nonideal Circumstances? Rethinking Dirty Hands," Ahlberg picks up the

widely discussed Dirty Hands problem in political ethics usually attributed to Michael Walzer. The problem arises from the apparent fact that being a good politician seems, on occasion, to require immoral deeds. Ahlberg adopts an innovative non-consequentialist strategy for eliminating the possibility of dirty hands conflicts. Chapter 4, "In Defense of Partisanship," by Neil Sinhababu, offers a consequentialist defense of partisan political action and a reliabilist defense of partisan belief-formation. Sinhababu argues that partisanship, often criticized as an unreflective approach to politics, is in fact a good way to engage with political systems that share America's electoral and coalition structure. Chapter 5 by Shane Courtland is similarly contrarian: in "A Defense of Senate Obstructionism" Courtland argues for the unpopular view that American Senators can permissibly engage in obstructionist tactics. Next, Jon Rick, in Chapter 6 entitled "Conviction and Open-Mindedness: A Lesson on Political Revision from Adam Smith," provides a historically embedded reflection on the difficulties in being both a politician of conviction who sticks by her principles and a politician who is open-minded and thus willing to revise her principles when given good reason to do so. Finally, in Chapter 7 entitled "Voter Ignorance and Deliberative Democracy," Chad Flanders confronts two schools of thought about voter ignorance and deliberative democracy. On the one hand, says Flanders, a number of libertarian thinkers have argued that voter ignorance leads to bad outcomes and therefore seriously challenges the desirability of deliberative democracy. On the other hand, deliberative democrats are concerned about legitimacy more than outcomes. Flanders puts these two opposing camps into dialogue with one another in order to argue that although voter ignorance is to some degree problematic for deliberative democrats, "it's not as big of a problem as the libertarians make it out to be."

Part III: The Ethics of Voter Reasoning contains four chapters that are concerned broadly with what it means for citizens to take seriously voting as a civic responsibility. If voting is indeed an important civic responsibility, it seems plausible to suppose that citizens should try to reason well as they make up their minds about how to vote. But how exactly should voters go about this? Chapter 8, by Annabelle Lever, is entitled "Must We Vote for the Common Good?". As Lever observes, it is widely assumed (without much argument) that voters must vote for the "common good," i.e., voters should consider the normatively compelling interests or ends of one's fellow citizens when they go to the polls. But Lever attempts to cast doubt on this assumption, and ultimately argues that it is morally permissible for voters to vote on the basis of considerations other than the common good. In Chapter 9, Julinna Oxley defends a "liberal, progressive feminist view of democratic governance" according to which citizens should try to increase the number of women in public office. However, according to Oxley's view, the goal of "gender parity" in politics should be subordinate to the goal of "gender justice," i.e., the goal of eliminating social, political, and economic oppression of women. In Chapter 10, "A Demarcation Problem for Political Discourse," David Killoren, Jonathan Lang, and Bekka Williams consider several possible solutions to the problem

of how a voter can justify drawing a line that separates candidates to be considered and evaluated from candidates to be set aside and ignored. Finally, Chapter 11, by J.B. Delston, entitled "Public Reason and Its Limits," argues in favor of "the exclusive view" of public reason, which recommends altogether omitting any appeals in political discourse to what Rawls called "comprehensive doctrines" (a category which includes but is not limited to religious beliefs). According to Delston, the value of political liberalism can be realized only if individual voters make decisions about which policies to support without appealing to personal ideas of the good.

Part IV: Why Vote? contains four chapters on whether (and when) voting or not voting is irrational or wrong. A number of philosophers and economists have argued that voting is irrational because (in a nutshell) any one vote is virtually certain to have no effect on the outcome. Others—in particular, Jason Brennan, as noted, a contributor to this volume—have argued that voting without a minimum level of political knowledge and rationality is immoral. Chapter 12, by Patrick Taylor Smith, entitled "Why Bad Votes Can Nonetheless Be Cast and Why Bad Voters May Cast Them," is a direct response to Brennan's idea that there is something morally wrong with the act of casting a "bad" (e.g., ill-informed) vote. Smith argues, contra Brennan, that "our voting behavior is akin to our labor-market participation; we have wide discretion and need not pursue justice directly with our individual actions." Chapter 13, by Marcus Arvan, entitled "The Rationality of Voting and Duties of Elected Officials," argues for a mixed view about the rationality of voting: Arvan contends that voting is typically rational for the members of a party's base, but irrational for "swing" or independent voters. Along the way, Arvan also argues that elected officials have a moral duty to respond to public opinion polls while in office. Chapter 14, by Ben Saunders, entitled "A Defence of the Right Not to Vote," is a response to the compulsory voting systems that already exist in several countries around the world and are occasionally proposed for implementation in the United States. Saunders analyses the right not to vote as a right not to be forced to vote and argues that this follows from a general right to be free. Chapter 15, by Eric Roark, entitled "Expanding on the Wrongness of Bribery: The Morality of Casting a Vote," begins with the observation that bribed votes are apparently impermissible, and then argues that the impermissibility of bribed voting carries the surprising implication that a wide range of other kinds of voting which are generally regarded as acceptable are in fact impermissible.

Part V: Arguing on Others' Behalf contains three chapters concerning lobbyists and lawyers—two groups of political agents whose distinctive contribution to the political system is to represent and defend the interests of their clients by means of persuasive argument. Chapter 16, by Michael Huemer, is entitled "Devil's Advocates: On the Ethics of Unjust Legal Advocacy." Huemer presents a sure-to-be-controversial attack against the "zealous advocate" view—the view that an attorney has a duty to zealously advocate for his client's interests, regardless of whether that outcome is just or unjust. Chapter 17, by Zachary Hoskins is entitled "Prosecutors, Guilty Pleas, and the

Consequences of a Conviction." Hoskins considers prosecutors' ethical responsibilities to help ensure that defendants understand the full range of consequences that may accompany guilty pleas. He argues that prosecutors should help inform defendants of the range of legal consequences to which it is reasonably likely they will be subject. In Chapter 18, entitled "Are Lobbyists Lawyers?" Suzanne Dovi and Jesse McCain argue that lobbyists are unlike lawyers in important respects, and contend that zealous advocacy of lobbyists can harm democratic procedures in ways that the zealous defense of the guilty does not.

The chapters in this volume demonstrate both the depth and the breadth of topics within political ethics. We hope that perusing these chapters will inspire other philosophers to take political ethics seriously as a subfield of applied ethics. Given the vast number of philosophers with an apparent penchant for writing editorials for the *New York Times*, blogging and tweeting about local and national political issues, and engaging others in ethical arguments about politics in the comment sections of blogs and Facebook (not that the editors of this volume would know anything about that), we believe that our hope is not in vain. It seems only natural that these ideas should move from the pages of social media to the pages of philosophy journals.

Note

1 This is not to say that Rawls is silent about questions about moral issues at the individual level. Indeed, some of Rawls's most influential views bear in a direct way on individuals: consider, e.g., his views about the nature of civil disobedience, his doctrine of public reason which outlines a "duty of civility" on the part of citizens participating in political life, and his view about the "natural duty" of citizens to support just institutions. However, we think it's fair to say that Rawls develops these ideas in the service of larger theory about normative issues concerning the state and other collectives, rather than as components of a freestanding theory in political ethics. (We're very grateful for Patrick Taylor Smith and to Ben Saunders for pushing us on these points.)

Part I

Lying in Politics

1 Murderers at the Ballot Box

When Politicians May Lie to Bad Voters

Jason Brennan

According to a popular accusation, in 2008, candidate Obama promised Ohio voters that he would renegotiate NAFTA and impose protectionism. Afterward, Obama's economic advisor Austan Goolsbee told Canada's prime minister that, "Obama's sallies against NAFTA were simply demagogic ploys designed to get him votes…Obama was lying, so the Canadian bigwigs had nothing to worry about."[1]

I take no stand on whether these accusations are true. But I will argue that in many cases, behavior like this should be commended, not damned. The economic case for free trade is close to overwhelming; almost every economist Left and Right supports free trade, and even the "skeptics" support it most of the time. If the accusations are true, then Obama protected the world, my fellow citizens, my children, and me from culpably misinformed and foolish Ohio voters. Thanks, Obama!

Lying is not always wrong. Lying is permissible (and perhaps even obligatory) in certain circumstances. In this paper, I argue that these circumstances often obtain in democratic politics.

Democratic voters are usually—not just sometimes, but usually—ignorant, misinformed, and irrational about political matters. I will argue that lying to bad voters can be justified to prevent them from imposing unjust harms upon innocent people. This seems heretical. But, I will argue, it follows from 1) commonsense ideas about the morality of lying and 2) well-established empirical work on voter behavior.

My thesis may seem radical, but I really am just arguing that voters are nothing special. My view is merely that we may treat voters the same way we may treat everyone else. I accept the *Moral Parity Thesis*:

> *The Moral Parity Thesis*: The conditions under which a person may, in self-defense or defense of others, lie to voters are the same conditions under which a private person may lie to another private person.

In contrast, those who believe politicians must not lie to voters might implicitly accept what I call the *Special Immunity Thesis*:

> *The Special Immunity Thesis*: The voting electorate enjoys a special immunity against being lied to in self-defense or defense of others. The conditions under which it is permissible for a person to lie to voters are much more tightly constrained than the set of conditions under which it is permissible for one private person to lie to another.

Most people believe that under certain circumstances, in order to stop one person from unjustly hurting another (or even from hurting himself), it can be permissible or even obligatory to lie. But most people then exempt voters from being targets of such defensive lying. I argue this is a mistake.

Note that while I believe democratic politics provides ample occasions for rightful lying, I do not thereby assert that most of politicians' actual lies have been permissible. Politicians frequently lie to promote their narrow self-interest, or the interest of the few, at the expense of justice and common good. While I think politicians often would have been justified in telling certain lies, that does not mean they often have been. Just as a person who says that killing can be permissible in certain circumstances does not thereby condone most actual acts of killing, so a person saying that lying is often permissible does not thereby condone most actual instances of lying.

Commonsense Morality on the Rightness of Lying

Commonsense morality and most major moral theories hold that lying is only presumptively wrong. The prohibition against lying is not absolute.[2] In the right circumstances, a person is not merely *excused* in lying, but is *justified*.[3]

Murderer at the Door

Consider the following case: Your friends, fleeing an ax murderer, hide in your basement. The ax murderer appears at your door and politely asks, "Might you be hiding people in your basement? I'd like to murder them, if you don't mind."

Almost everyone judges that in this case, you don't owe the murderer the truth. Indeed, it would be *wrong* to tell the murderer the truth: "I cannot tell a lie. My friends are downstairs." You may use whatever deceptive tactics are necessary. (A fortiori, you can kill the ax murderer if necessary to protect your friends.)

The Murderer at the Door is commonly regarded as a counterexample to certain absolutist moral theories. If some moral theory implies that it is *wrong* to lie to the Murderer at the Door, then the theory is for that reason and to that extent false.

Of course, this considered judgment—that it is permissible to lie to the Murderer at the Door—could be mistaken. Perhaps some philosopher will produce a compelling argument showing us that lying is indeed wrong. But, thus far, no one has, and so far no extent moral theory is itself more plausible than the claim that we may lie to the Murderer to at Door.

With this is mind, here is a sketch of a theory of *defensive lying*, itself modeled on Jeff McMahan's theory of defensive killing[4], in turn modeled on English common law, [5] which in turn captures commonsense moral thinking.[6] By default, lying is presumed wrong. However, a person can become *liable to be deceived* by performing (or intending to perform) certain deeply wrongful, harmful, or unjust actions. A person is liable to be deceived A) when he is doing (or intending to do) something deeply wrong, unjust, or harmful to others, or B) to prevent him from causing greater injustice. Defensive lying might also be governed by a doctrine of *necessity*: when a non-deceptive alternative is equally effective at stopping the wrongdoer from committing injustice, then perhaps it is wrong to lie. Further, whether defensive deception is merely permissible or obligatory depends in part on whether the potential liar is in danger of retaliation or not. If I can lie with impunity to the murderer at the door, then I should; but if the murderer at the door might try to kill me for lying, then lying is permissible (and heroic), but not required. I suspect most people accept this broad outline, though they would dispute some of the exact details of any full theory.

With that, now consider a variation on the Murderer at the Door example. Suppose, à la the *Lord of the Rings* movies, a wizard wants to cast a enchantment on government leaders that will cause them to make harmful political decisions.[7]

The Evil Wizard

An evil wizard has misplaced his magic wand. He knows you know where it is. He asks, "Do you know where my wand is? I need it to cast a magic spell that will magically induce government leaders to implement a number of stupid economic and political policies, thus greatly harming many people."

Here it still seems not merely excusable, but justifiable to lie to the evil wizard. The wizard also plans to cause serious harm and injustice, just through a more convoluted means than the Murderer at the Door.

Suppose we change the example. Make the wrongdoer a group of wizards, rather than just one. Instead of just lying about a wand's location, you instead trick them into casting a helpful rather than a harmful spell. These changes seem to make no moral difference.

The Evil Wizard Consortium

A group of evil wizards plan to cast the *Hurt People via Bad Government* spell, just like the evil wizard in the previous case. You cannot stop them from casting a spell. However, the wizards forgot the words to the spell. They ask you for the magic words. You have two options. You can give them the words for the *Hurt People via Bad Government* spell. Or, you can lie, and supply them with the words to *Help People via Good Government*. This spell will magically induce government leaders to produce good policies that in turn produce just and beneficial outcomes. It will also dupe the wizards into thinking they cast the evil spell.

Again, in this case, lying seems at the very least permissible and admirable. Suppose we add in some additional facts: You know you can get away with lying, and are not under any threat of retaliation. In that case, it seems impermissible to tell the truth, and perhaps even obligatory to lie.

Now, suppose we change the wizards' motives. Suppose the wizards wish to help people, but are misguided about how to do so. Just as parents might mistakenly believe that refusing to vaccinate their kids helps them, so wizards might mistakenly believe a harmful spell is a helpful spell. Just as parents might stubbornly cling to such false beliefs in the face of overwhelming evidence to the contrary, so might wizards.

The Benevolent but Mistaken Wizards I

Some wizards want to help people by casting a spell. These wizards mistakenly believe that the spell *Hurt People via Bad Government* actually *helps* people. They want to cast that spell in order to help others. If the wizards realized their mistake, they would not cast the spell. However, for various reasons, the wizards in question are too dumb, stubborn, or biased to listen to reason. Any attempt to convince them that *Hurt People* actually hurts people fails. They cannot be stopped from casting some spell or other.

However, they forgot the magic words to *Hurt People* and ask you what the words are. You have three options: 1) You can lie to them; you can give them the words to *Help People via Good Government*, but tell them those are actually the words to *Hurt People*; or, 2) You can do nothing, in which case someone else will tell them the real words to the *Hurt People* spell; or, 3) You can tell them the truth; you can give them the real words to *Hurt People*.

The Benevolent but Mistaken Wizards II

Some dumb but well-meaning wizards want to cast *Help People via Good Government*. To cast this spell, they must first write the words on a scroll, and then burn the scroll in the fires of Mount Doom. Being nice but stupid, they mistakenly write down the words for *Hurt People*. They ask you to deliver the spell to Mount Doom. You could try to explain to them that these are the wrong words, but experience shows the wizards are too stubborn and unreasonable to realize their mistake. However, you could just promise to deliver their spell, but lie, and replace their *Harm People* scroll with a *Help People* scroll.

These cases are almost identical. In the first, you lie; in the second, you make a lying promise. In these two cases, the wizards desire *de dicto* to help, but they also desire *de re* to hurt people. But thwarting their *de re* desires, you assist them in achieving their deeper *de dicto* goal of helping. In both cases, it once again seems not only permissible, but also (unless one is under threat of retaliation) obligatory to deceive the wizards.

In the cases above, the wizards will magically impose bad government upon innocent people. In some cases, they want (*de dicto*) to hurt people; in others,

they want (*de dicto*) to help, but are stubbornly misinformed. Now, let's ask: does it make any moral difference if we replace the wizards with voters, and replace magic spells with the democratic process?

The Evil Electorate

A group of malevolent voters wants to use the government to hurt people whom they dislike. To do this, they need to select representatives who will implement various harmful and unjust policies. You can't stop the voters from voting for someone who advocates such policies. However, you can trick them into thinking that *you* advocate these policies, even though you don't. Once elected, you can then refuse to implement their favored policies, and instead implement good policies.

For instance, suppose they support an unjust war or Jim Crow laws. You can lie and tell them you do, too. Once in power, you can just refuse to start the war or to impose Jim Crow. The good news is that the voters are probably too dumb to notice that you tricked them, so you can probably get away with it in the long term.

The Benevolent but Dumb Electorate

A group of dumb but nice voters wants to use government to help others and promote justice. To make this happen, they need to select a number of good representatives, i.e., representatives who will implement policies that will in fact produce beneficial and just outcomes. However, the voters are ignorant, uninformed, misinformed, and irrational in how they process social-scientific information. Thus, they have mistaken beliefs about what it takes to help people and produce just outcomes. They will only, therefore, vote for politicians who pledge to support what are in fact bad policies, policies that would undermine rather than hinder the voters' own deepest goals. You are in a position to trick them, though. You could lie to them, and tell them that if elected, you will implement their favored harmful policies. However, once elected, you could instead impose good policies, policies that will in fact help people and produce beneficial outcomes. The good news is that the voters are probably too dumb to notice that you tricked them, so you can probably get away with it in the long term.

At first glance, at least, these two cases seem analogous to the cases above. In both the wizards and the electorate cases, a group of people intends (whether out of malevolence or misinformation) to cause great harm and injustice. They should thus be considered liable to being deceived. If deception is necessary or the best way to stop them, then it seems that lying is at the very least permissible, and perhaps (if one can lie with impunity) even obligatory.

There is at least one important disanalogy between the Benevolent but Dumb Electorate in the case above, and real-life electorates. In the case above, everyone in the electorate is benevolent and dumb. In real-life electorates, the

overwhelming majority of voters are benevolent and dumb, but a very small minority are benevolent and smart. Thus, if a politician follows my thesis in this paper, she will not only lie to dumb voters who are liable to be lied to, but also to smart voters who are not. Is that reason to think voting is wrong? I think not. To see why, consider another Murderer at the Door type case.

Murderers and Philanthropists at the Door

You are hiding Jews in your attic who are escaping persecution. Six people knock at your door at the same time. Five of them are SS agents hoping to find and kill any hidden Jews. One, you realize, is from the resistance, and is hoping to help Jews escape. When the SS agents ask you if you're hiding Jews, if you lie, you'll end up not only lying to them, but lying to the agent from the resistance, who is trying to help.

In a case like this, if you lie, you do not merely lie to people who are liable to be lied to, but also to an innocent person who is not liable. Nevertheless, in lying, you most likely don't *harm* the person from the resistance, and it still seems like a justifiable or at least excusable response under duress.

If you accept this judgment, then you can apply similar judgments to cases of lying to the electorate. Suppose (correctly, as we'll see below) that the majority of voters are misinformed and support dangerous, harmful, and unjust policies, while a minority are well-informed and support good policies. If a politician lies in order to get elected, and then imposes good policies, she will have lied not only to bad voters who have it coming, but to the good voters as well. However, at least she will not have harmed the good voters, and she can compare her situation to the Murderers and Philanthropists at the Door case. She can say to the good voters, "I'm sorry I had to deceive you, but if I'd told you the truth, the bad voters would have gotten their way, and we all would have suffered."

For some reason, when we switch out evil wizards for evil voters, or misguided wizards for misguided voters, most people's judgments change. In their view, there is something special about voters that makes it wrong to stop them from hurting innocent people. While defensive lying is permissible against evil or benevolent but dumb wizards, it is impermissible against evil or benevolent but dumb voters, though the wizards and voters seem to be doing the exact same thing.[8]

People must thus either hold 1) that the wizard and electorate cases are not closely analogous, or 2) that there is something about an electorate that gives it special immunity against defensive lying. However, as I will argue below, there are no good grounds for believing 1 or 2. Instead, readers should join me in believing that it is not only permissible, but righteous, to lie to bad voters.

The Overwhelming Majority of Voters are Benevolent and Dumb

In this section, I briefly summarize empirical research on voter behavior. This research indicates that for the most part, most voters (and most citizens) are

ignorant, misinformed, irrational, but well meaning when it comes to politics. There are hundreds of books and articles documenting these flaws at great length and detail; I provide only a summary here. If you are unfamiliar with this empirical work, you can just re-interpret my thesis as a conditional statement: *If* voters were this bad, *then* it would often be permissible for politicians to lie in defense of others.

I begin with some good news about motivation. Political scientists overwhelmingly find voters tend to vote sociotropically, rather than selfishly.[9] That is, they tend to vote for what they *perceive* to be in the national interest, rather than in their self-interest. Voters desire *de dicto* to help others, not to hurt them.

That said, there is plenty of bad news about ignorance and misinformation. As political scientist Philip Converse summarizes, "The two simplest truths I know about the distribution of political information…are that the mean is low and the variance is high."[10] (The mode and median are also low.) Legal theorist Ilya Somin, author of *Democracy and Political Ignorance*, says, "The sheer depth of most individual voters' ignorance is shocking to many observers not familiar with the research."[11] In his extensive review of the empirical literature on voter knowledge, Somin concludes that at least 35 percent of voters are "know-nothings."[12] Political scientist John Ferejohn agrees: "Nothing strikes the student of public opinion and democracy more forcefully than the paucity of information most people possess about politics."[13]

For example, during election years, most citizens cannot identify any congressional candidates in their district.[14] Citizens usually don't know which party controls Congress.[15] During the 2000 US Presidential election, slightly more than half of Americans knew Gore was more liberal than Bush, but did not seem to understand what the word "liberal" means. Significantly less than half knew that Gore was more supportive of abortion rights, more supportive of welfare-state programs, favored a higher degree of aid to blacks, or was more supportive of environmental regulation, than Bush.[16] Only 37 percent knew that federal spending on the poor had increased or that crime had decreased in the 1990s.[17] On these questions, Americans did worse than a coin flip.

Similar results hold for other election years.[18] The American National Election Studies surveys eligible voters on basic political information, such as who the candidates are or what these candidates stand for. On this test of *basic* political knowledge, the top 25 percent are somewhat well-informed, the next 50 percent do little better or worse than chance, and the bottom 25 percent are systematically misinformed (they make systematic mistakes and do worse than chance).[19]

Note that these statistics are just on measures of *basic political knowledge*, easily verifiable facts such as what the unemployment rate is or who the incumbents are. Voters fare even worse on tests of social-scientific knowledge—economics, sociology, political science—the knowledge needed to form sound policy judgments. Most voters would not just fail ECON 101, but would make systematic errors.[20]

Political knowledge makes a major difference in how voters vote and what policies they support. For instance, Martin Gilens, Scott Althaus, and Bryan Caplan, each using different data sets, find that low-information and high-information voters have systematically different policy preferences, and these different preferences are not explained by demographic differences.[21] Misinformed or low-information voters tend to support what social scientists (both Left and Right) consider destructive social, military, and economic policies. For instance, Gilen notes that high-information Democrats have systematically different policy preferences from low-information Democrats. High-income Democrats tend to have high degrees of political knowledge, while poor Democrats tend to be ignorant or misinformed. Poor Democrats approved more strongly of invading Iraq in 2003. They are more strongly in favor of the Patriot Act, of invasions of civil liberty, torture, protectionism, and of restricting abortion rights and access to birth control. They are less tolerant of homosexuals and more opposed to gay rights.[22]

Voters are not merely ignorant or misinformed, but also epistemically irrational. The field of political psychology finds that most voters suffer deeply from a wide range of cognitive biases. As political psychologists Leonie Huddy, David Sears, and Jack Levy summarize: "Political decision-making is often beset with biases that privilege habitual thought and consistency over careful consideration of new information."[23] These biases include motivated reasoning,[24] intergroup bias,[25] confirmation bias,[26] and availability bias,[27] among others.[28] In general, voters tend to form political beliefs on the basis of little to no evidence, and then stick to those political beliefs no matter what new evidence they encounter. They regard those with whom they disagree as moral monsters. Few process political information in a minimally rational way.

I don't have space here to show that voters are as terrible as I think they are. Readers can examine the sources I cite and the relevant literature themselves.[29] For those skeptical of or unfamiliar with this research, just consider my thesis to be conditional: if voters were as bad as I think they are, then it would sometimes be permissible to lie to them.

To be clear, how voters vote is not the only thing that determines what policies governments will impose. For a wide variety of reasons, government bureaucracies, agencies, and politicians have significant freedom in imposing or implementing policies against voters' wishes.[30] What government does is not simply a function of voters' will. This essay assumes that how voters vote makes some significant difference, but if that were false—if voters' votes didn't matter much at all—then there would be no reason to lie to them, as, by hypothesis, doing so would be unnecessary to protect the innocent from wrongful harm.

"They're Only Hurting Themselves" and Pure Proceduralism

Let's turn to considering potential explanations for why voters enjoy a special immunity against defensive lying. One purported disanalogy between the

wizard and voter cases goes as follows: "The evil wizards hurt *other* people. The voters only hurt themselves. People have a right to hurt themselves, and we should not stop them from doing so."

That people have a right to hurt themselves seems plausible. If I eat five bags of Cadbury Mini Eggs daily, I might develop diabetes. But it's plausible to hold that I have a right to eat myself to death, and no one should stop me or interfere with me for doing so, however imprudent it may be.

This objection fails because it's not true that bad voters are just hurting themselves. An electorate is not a unified, unanimous body whose decisions only affect themselves. In every democracy, some people impose their decisions upon others. Bad voters hurt the smart and well-informed minority of voters, people who abstained from voting, future generations, children, immigrants, and foreigners who are unable to vote but who are still subject to or harmed by that democracy's decisions. For instance, Americans' fondness for military intervention hurts Iraqi children, not just themselves. Political decision-making is not choosing for oneself; it is more like choosing for everyone.

Further, even if (contrary to fact) voters were "just hurting themselves" there might be *some* cases where paternalistic lying is permissible. Suppose Bob is about to eat a candy bar containing a fatal dose of cyanide. You tell him it contains cyanide, but he thinks you're joking. However, suppose if you lie and say it contains peanuts (which he's allergic to), he will believe you. In this case, it seems at the very least *excusable*, and perhaps justifiable, to lie to Bob. One can imagine analogous cases involving politicians and voters.

Closely related to the "they're only hurting themselves" objection is another objection that holds that it is a mistake to say that it is unjust for the majority of voters (out of malice, ignorance, or irrationality) to impose harmful government upon others. Instead, some democratic theorists are attracted to a view called *pure proceduralism*. Pure proceduralism holds that there are no independent moral standards for evaluating the outcome of the decision-making institutions. So, for example, the political theorist Jürgen Habermas holds that so long as we make and continue to make decisions through a particular highly idealized deliberative process, any decision we make is just.[31]

The motivation behind pure proceduralism is typically that since people disagree about what justice requires, democracy is the fair way to resolve their disputes. But as David Estlund has pointed out, this does not give us any particularly good reason to prefer democracy—we could fairly decide political outcomes by rolling dice or flipping a coin.[32] Beyond that, pure proceduralism has some deeply implausible implications. According to a pure proceduralist, so long as democracies arrive at a decision through the right decision-making method, then whatever they decide is for that reason just. But this implies that if a democracy were to, for example, follow Habermas's idealized rules of deliberation, and then, as a result, decide to impose Jim Crow laws, start a nuclear war against Haiti, legalize infant rape, and assign citizens to marriages by government fiat, then these policies would be just. Upon reflection, few people would be willing to bite such bullets. Instead, it's much more plausible

that in a wide range of cases, there is an independent truth of the matter about what democracies ought or ought not do.

Legitimacy and Authority[33]

Many people might believe there is an obvious justification for the Special Immunity Thesis: Democratic electorates have a special moral status. Unlike wizards, the democratic electorate is both legitimate and authoritative. They have the right to rule. We have a duty to obey them and not to interfere with or sabotage them. Thus, while it's permissible to lie to an evil or benevolent but dumb wizard, it's not permissible to lie to an evil or benevolent but dumb electorate.

The Concepts of Authority and Legitimacy

To evaluate this purported justification of the Special Immunity Thesis, we must first clarify what the terms "legitimacy" and "authority" mean.

A government or a government body (including the electorate) is legitimate just in case it is permissible for that government to stand, and to create, issue, and enforce rules using coercion. A government is authoritative (or "has authority") over certain people just in case those people have a moral duty to obey that government's laws, edicts, and commands. Legitimacy is the moral power that is supposed to make it permissible for the government to impose speed limits on you. Authority is the moral power that it supposed to make it impermissible for you to ignore the limits. In short, "legitimacy" refers to the moral permission to coerce, while "authority" refers to a moral power that induces in others a duty to submit and obey.[34]

Remember, in this paper, I am arguing only that it's permissible (or obligatory) to lie to voters to stop them from committing severe injustices or wrongful harms. The person who advances the objection we're now considering—that democracies are legitimate and authoritative—must therefore hold that democracies may legitimately and/or authoritatively commit severe injustice and wrongful harms. Otherwise, the present objection would be irrelevant.

In fact, most popular theories of legitimacy and authority hold that governments can sometimes have legitimacy and authority to perform unjust actions. So, for instance, David Estlund believes that under certain circumstances, governments may force you to follow unjust orders, and you have a duty to obey. For instance, he thinks that if a jury follows proper procedures but mistakenly convicts a man you (a jailer) know to be innocent, you would still have a duty to jail him. Or, if a democratic legislature follows proper deliberative procedures, mistakenly begins what you (a citizen) know to be an unjust war, and conscripts you, then you have a duty to fight.[35]

Legitimacy and Authority are Logically Independent Properties

Legitimacy and authority are independent moral properties. Most theories of legitimacy and authority try to ground both properties on the same principles, such that governments have both or neither. But, as a matter of logic, a government (or an electorate) could have one without the other. Having legitimacy does not suffice to have authority; having authority does not suffice to have legitimacy.

To illustrate how a government-like entity could be authoritative but not legitimate, imagine a theory called "pacifist monarchism". This hypothetical political theory holds that we are each duty-bound to obey our queen. However, this theory forbids all violence and coercion. The queen may not coerce people into following her commands. She may not employ a military or police force. She may not use violence even to stop others from acting violently. This hypothetical political theory holds that the queen is authoritative, but not legitimate. This theory may be silly, but is coherent; it contains no logical contradiction.

Governments could also be legitimate but not authoritative. That is, a government might permissibly stand, create and enforce laws, issue and enforce commands even if no citizens have the duty to obey or defer to that government. The government could permissibly force citizens to obey, but citizens would have no obligation to obey. In fact, as I'll discuss below, there's reason to think this view—that certain governments have legitimacy but not authority—is now the dominant position among political philosophers who write about authority and legitimacy.

Legitimacy is Irrelevant to this Debate

For the sake of argument, let me grant the following position (which I in fact reject[36]):

> Super-Duper Democratic Legitimacy: A democratic electorate may legitimately do whatever it damn well pleases, even implementing horrifically unjust policies. For instance, the democratic majority may legitimately suspend all civil liberties and place everyone in a pain amplifier for eternity if it so desires.

The reason I can grant this statement, without undermining my thesis, is that once we distinguish correctly between authority and legitimacy, it turns out legitimacy has *no* bearing on whether it's permissible to lie to voters. Even if Super-Duper Democratic Legitimacy were correct, it would remain an open question whether one can sometimes or even always lie to the electorate.

By definition, if a government has legitimacy to do X, then it has moral permission to use violence to enforce its ability to do X. If a government has legitimacy to issue rule X, then by definition it has moral permission to force you

to comply with X. Yet, we just discussed in the previous section, the fact that a government has legitimacy to do X, or to force you to do X, does not imply citizens must let the government do X or obey the government when it does X. That a government legitimately does X tells us nothing in itself about what citizens may or may not do in response. Citizens might instead have no duty to obey. They may even be free to resist, to lie, or even to fight back violently.

Thus, without contradicting my thesis I could just agree that Evil Electorates may legitimately start unjust wars, or that Benevolent but Dumb Electorates can legitimately flush the economy down the toilet. I could still hold, without contradiction, that a politician may lie to these electorates.

Democratic legitimacy does not do the work the objector needs it to do here. The objector needs to establish not that democratic governments have legitimacy, but that they have what I am calling *authority*.

Authority Probably Doesn't Exist

If, for whatever reason, democratic electorates had authority, this might explain why it is wrong to lie to voters. By definition, authority is the moral power that induces in others the duty to defer and obey. Democratic authority might require a kind of deference to the electorate. However, there's a serious problem with invoking democratic authority to defend the Special Immunity Thesis: There's strong reason to believe that *no* governments, democratic or otherwise, have *any* authority. The doctrine of government authority has been subjected to sustained and overwhelming philosophical criticism over the past 30 years. Following A. John Simmons's seminal work on political obligation, the dominant view among political philosophers who work on this topic is that while certain governments have legitimacy (as I've defined it), none have authority.[37] (Or, more precisely, they might have authority over a tiny subset of their citizenry.) Michael Huemer similarly concludes, after reviewing the literature, "Skepticism about political obligation [i.e., authority] is probably the dominant view" in philosophy now.[38]

Despite this, it may be that certain democratic electorates do indeed have authority. My point here is that we seem to lack good grounds for thinking they do. Since philosophers have spent 2500 years failing to prove that governments have authority, we should probably assume they don't. At some point, perpetual failure by the world's smartest people to prove that X is evidence that not-X.

Authority isn't All-or-Nothing

Suppose, contrary to the state of the philosophical literature, that democratic governments do in fact have some sort of authority. Even if, heroically, this were established, it takes even more work to defend the Special Immunity Thesis.

To say a government has authority means that there is at least one situation where a person has a duty to do something *because* the government commands that person to do it. But a government can have authority over some issues

without having complete authority over everything. Indeed, every extant believer in democratic authority thinks that democratic governments have only a limited scope of authority. Further, the government might have authority over many issues, but this authority might only be presumptive rather than absolute. Perhaps democratic authority could be outweighed by contrary considerations or stronger obligations, such as an obligation to protect others from severe harm.

Recall that my thesis is that it might be permissible (or obligatory) for a politician to lie to or make a lying promise to voters in self-defense or defense or others, in order to stop those voters from causing governments to commit severe injustices or serious harms. Even if we accept, for the sake of argument, that democratic electorates have some basic level of authority, the person who defends democratic authority must also show that these governments specifically have the authority to commit *severe* injustices and harms, the very injustices and harms one private person would be justified in lying to another private person to defend. So, the objector has a double burden. The objector must not only show that democratic governments have a kind of general authority, but must specifically show that democratic governments have authority to commit great injustices and severe harms.

In short, it's plausible that some democratic governments have a limited scope of legitimacy. Some democratic governments legitimately stand, and create and enforce certain rules. However, this by itself tells us nothing about whether politicians may lie to voters. The objector needs to establish instead that voters have the specific *authority* to commit severe injustice and harm. So far, no one has done so.

Public Reason and Sincerity

Many political philosophers now endorse the "public justification principle," which claims that coercive political power is illegitimate unless it can be justified to the individuals subject to that power "by their own lights" or on the basis of reasons they, in some way, "recognize as valid".[39] Just what this principle amounts to is hotly debated.

In the first instance, the public justification principle is meant to be a partial theory of political legitimacy: coercive institutions are legitimate only if there are certain undefeated, publicly available reasons in favor of them. However, some advocates of public justification—though by no means all of them[40]—go further, and claim the principle also constrains politicians' and/or citizens' speech, by limiting the kinds of arguments they may make in public about politics.

To my knowledge, Micah Schwartzman provides the strongest, most thorough defense of the claim that the public justification principle requires politicians to be sincere. If Schwartzman is right, and if the public justification principle is right, then this could be a problem for my thesis. I happen to think the public justification principle and the theories built atop it are false, but since these theories remain popular, I pause here to examine whether my thesis is incompatible with these theories.

Schwartzman wants to ground the duty of sincerity on the epistemic benefits of public deliberation. His first premise is that citizens cannot deliberate well unless the reasons for various proposed political actions are public. His second premise is that democratic deliberation will tend to "improve the quality of political decisions."[41] According to Schwartzman, this premise is "the linchpin of his argument." From there, Schwartzman adds a few more premises, and goes on to conclude that politicians must be sincere.

Rather than reiterate and evaluate Schwartzman's entire argument at length, I will take him at his word that this second premise—that public deliberation among citizens tends to improve the quality of political decisions—is indeed the linchpin of his argument. If so, then his argument seems to fall off the axle.

It is almost tautological to assert that ideal deliberators—perfectly rational, unbiased people who decide only on the basis of reasons, and who process evidence in a scientific way—would make better decisions after deliberating. But whether real-life deliberation among real-life citizens improves the quality of political decisions is an empirical question, which depends on political psychology.

In fact, political psychologists and political scientists have produced a massive body of empirical work on how democratic deliberation actually proceeds and what it actually does to people. The results are highly discouraging for deliberative democrats. For instance, in a comprehensive survey of all the extant (as of 2003) empirical research on democratic deliberation, political scientist Tali Mendelberg concludes that the "empirical evidence for the benefits that deliberative theorists expect" is "thin or non-existent."[42] More recent research continues to vindicate this conclusion.[43] As political scientist Diane Mutz remarks, after reviewing this research, "It is one thing to claim that political conversation has the *potential* to produce beneficial outcomes if it meets a whole variety of unrealized criteria, and yet another to argue that political conversations, as they actually occur, produce meaningful benefits for citizens."[44]

It is thus unclear how Schwartzman's argument applies to real-world democracy. Schwartzman might be right that it's wrong to lie to (and thus sabotage) good deliberators, but those aren't the people I'm talking about here. I'm talking about actual voters and actual deliberators out there in the world.

Even if these worries were swept aside, at most, the public justification principle would forbid *some* lies, but not all of them. Remember, the fundamental idea underlying the public justification principle is that coercion is presumed unjust, illegitimate, and non-authoritative unless it is justified in a suitably public way to all reasonable people.[45] On public justification theories, there is a massive asymmetry in what it takes to *justify* coercion versus what it takes to *invalidate* it. Every reasonable person has a special power to block coercion and invalidate purported authority. At most, the public justification principle implies that when a politician lies, he thereby fails to publicly justify any coercive actions he defended on the basis of those lies, and so these coercive actions are illegitimate. But the public justification principle leaves open that

the politician could lie in order to *stop* coercive policies from being implemented. The whole point of the public justification principle is to make it difficult to *impose coercion*, not to *stop coercion*. Coercion needs to be publicly justified; non-coercion does not. The sincerity objection, if right, only forbids the politician from imposing coercion on the basis of lies, but doesn't forbid him from lying to stop others from imposing coercion.

Thus, suppose voters want to start an unjust war, impose Jim Crow, and implement deeply harmful economic protectionism. Suppose I make a lying promise to voters that I will do each of these things when elected president. When, after being elected, I refuse to start the war, oppress blacks, or stop people from buying Korean cars, I do not coerce anyone, but rather fail to coerce people. Thus, my non-actions do not fall under the scope of the Public Justification Principle. Even if the Public Justification Principle (as Schwartzman believes) somehow forbids insincerity, it should only apply to cases where I lie in order to coerce, not when I lie in order to stop coercion.

The Dangerous Misapplication Objection

Another objection goes as follows:

> People are poor judges of consequences, and poor judges of when it is permissible to lie or not. Also, people—especially the kinds of people who choose to become politicians—are biased to rationalize their self-serving decisions. They tend to delude themselves into thinking they're lying in rightful self-defense or defense other others, when really they're just serving their self-interest in immoral ways.

This objection says that my argument is self-effacing. If politicians believed it, they would misapply it.

This objection fails for the same reason self-effacingness objections usually fail. That people are bad at applying theory does not show that the theory is wrong. Theories provide a criterion of right action, a set of principles that explains what makes actions wrong or right. It may turn out that because we are biased, dumb, or whatnot, when we internalize and try to act upon the correct moral theory, we consistently make mistakes and end up violating the theory. If so, the theory would not be a useful on-the-ground decision-procedure, but that doesn't make the theory false.

As an analogy, consider that certain physics equations explain why baseballs land where they land. However, outfielders would never catch fly balls if they tried to apply the equations on the field. The equations correctly explain and predict the ball's path, but do not provide a "decision procedure" for catching balls.

Lying is morally risky behavior. It takes good judgment and virtue to know when the special circumstances in which lying is permissible arise. We should be self-aware and recognize that we are prone to error. We should recognize

that we are biased to rationalize self-serving lies. However, none of this shows that lying to voters is always or even usually wrong.

Further, the Dangerous Misapplication Objection applies just as well in situations in which one civilian lies to another. Thus, even if the objection were sound, it would fail to justify the Special Immunity Thesis, as it is compatible with the Moral Parity Thesis. The Dangerous Misapplication Objection doesn't have special grounds for distinguishing lying to voters from lying to civilians. Perhaps we're statistically more likely to mess up lying to voters than civilians, but that doesn't make the principles governing the two different. It just makes it harder to apply the same principles to one case than the other.

Voter Retaliation, Stability, and Weberian Legitimacy

A new objection goes as follows:

> If politicians believed that it was permissible, in self-defense or defense of others, to lie (or making lying promises) to bad voters, then they would lie frequently. But then voters would realize they are routinely being lied to. They would just vote out the defensive liars, and vote in politicians who would give them what they really want. At best, defensive lying will just delay injustice. Further, once voters see they are being lied to, the political system will become unstable. There will be a lack of perceived legitimacy, and this will have various negative consequences.

In short, the idea is that lying to potentially harmful voters will tend to lead to bad consequences.The voters will just realize you lied, punish you (by voting you out of office), and then do what they intended to do anyway (by electing someone who will truthfully promise to do what they want). Further, if politicians felt free to lie to voters, the democratic system would become unstable. There would be a perceived lack of legitimacy, which might lead to more crime, corruption, or other dangers.

One response to this point is just to grant it, but then say it's not so much an objection as an elaboration. Defensive lying, like most defensive actions, is strategic. Whether one should lie or not in self-defense depends on how well it will work, and what the side effects of the action will be. Much of this is already covered by the necessity component of the theory of defensive lying. Now, just when and under what conditions lying works, and how well it works, is an interesting question for political scientists to analyze. But there is no special moral worry here.

That said, it is far from clear that the objection's empirical assumptions are true. The objection claims that voters will tend first to notice that politicians made lying promises, and then punish them for doing so. However, empirical political science seems to indicate otherwise. Voters are *terrible* at retrospective voting.[46] During election years, most citizens cannot identify any congressional candidates in their district.[47] Citizens generally don't know which party controls

Congress.[48] They have no sense of who was in power or what those people had the power to do.[49] They do not know what influence incumbents had, or how to attribute responsibility to different incumbents.[50] Most voters pay little attention to politics, and they have short memories. Further, politicians who make lying promises can always just lie again and say that they *tried* to do what voters asked, but were *sabotaged* by members of the other political party. Since the better-informed voters tend to suffer from intergroup bias, they will often just accept this explanation.

One final worry about this objection: suppose it were true that if I make a lying promise to voters, they would just realize I lied, and then vote me out come the next election. It's not clear why this would count as an objection to defensive lying. If it's justifiable to stop injustice, it's also usually justifiable to delay it. By analogy, suppose I know that my lying to the Murderer at the Door won't stop him from killing my friends, but will merely delay their deaths by four years. (They will escape for a short time, but he will eventually track them down.) It seems strange to conclude that lying would thereby be wrong. Thus, it seems strange to conclude that lying to voters is wrong when such lies only delay them from causing unjust wars or imposing disastrous economic policies.

The Slippery Slope Objection: Can We Also Kill Voters in Self-Defense?

One final worry about my argument is that it may lead to even more radical conclusions. The argument I am making is based on the doctrine of defensive lying, which is itself isomorphic to the doctrine of defensive killing. One might make the following objection:

> If voters' actions constitute a serious threat of causing unjust harm, then it should not merely be permissible to lie to them. According to the argument, bad voters are analogous to a block of wizards casting a harmful spell. If so, then it should be permissible, if necessary, to kill them. But that seems false. If so, then we should be suspicious of this line of argument. Perhaps voters do enjoy a special immunity against being killed, and if so, then perhaps they also enjoy a special immunity against being lied to.

In short, the worry here is that if it's implausible to think voters could be appropriate targets of defensive violence, then by extension it's implausible to think voters could be appropriate targets of defensive deception.

On one hand, perhaps this slippery slope is worth the slide. I can at least imagine circumstances in which it would not seem absurd to think voters are rightful targets of defensive violence. Imagine, for example, that my small democratic city state is about to vote on whether to launch a nuclear weapon against a defenseless neighboring city state. Suppose the attack is wrong, and suppose that I know every other voter except for me is dead set on launching the attack. Suppose the missile will fire as soon as the vote finishes. In that case,

I would not judge it impermissible to, for example, blow up a few polling places to stop the vote.

But if in principle, in certain cases, voters could be rightful targets of defensive violence, in real-life modern democracies, it's much hard to find these kinds of case. Consider: According to the commonsense theory of defensive violence, one of the conditions for defensive violence against someone liable to defensive violence is that it must be *necessary* to stop him or her from committing the severe injustice. The necessity condition at the very least means that there is not an equally good and effective non-violent means of stopping that person. One reason why violence would rarely be permissible against voters is that this necessity condition will rarely obtain.

First, politicians could *lie* to voters instead, as they often do. Killing is a last-resort defense; it's at most permissible if lying and other sorts of defensive sabotage don't work. The claim that politicians may lie to dangerous voters does not lead down a slippery slope to the claim that vigilantes may kill them; instead, it may be that the possibility of lying to voters is one of the things that protects voters from being rightful targets of violence.

Second, the necessity proviso of the doctrine of defensive killing also calls for minimizing the amount of violence. To stop wrongdoers from committing a severe injustice or harm, one shouldn't kill five hundred thousand people who are liable to be killed when killing just a few is equally effective. So, when violence is justified against state agents, it will most likely have to be targeted at a small number of people. For instance, suppose voters vote to maintain slavery as a legal practice, and they support politicians who in turn support the Fugitive Slave Act. Now, suppose I see a police officer about to capture an escaped slave. It seems plausible to me that I can kill the police officer to make sure the slave stays free.[51] But it's hard to see how killing Southern voters would help, or be more effective, than directing violence directly against the people who enforce the law.

One might think that these responses invalidate the argument for lying to voters. After all, if defensive violence should be more closely targeted, then so should lying, right? There's something to this worry, and it represents an important caveat. If there are other, more effective ways to stop bad and unjust policies from being implemented than by lying to voters, then we should indeed use these other ways.

However, it's also plausible that the conditions under which it's permissible to lie are significantly less stringent than the conditions under which it's permissible to use defensive violence. One reason for this is that defensive lying will often (perhaps usually) not cause harm to anyone, while killing and other forms of violence do. As we discussed above in the section called 'The Overwhelming Majority of Voters Are Benevolent and Dumb, when you lie to both the SS agents and the person from the resistance, you don't *harm* the agent from the resistance. Killing, well, kills, and other forms of violence are harmful as well. Accordingly, the stakes in justifying violence are much higher than they are for justifying killing.

Consider: Suppose we are having a referendum on whether to nuke the island nation of Tuvalu for fun. Suppose polls reveal the majority of voters support nuking Tuvalu. If, in order to stop the referendum from taking place, I bomb the polling places, I will most likely kill, injure, and maim a large number of innocent people. Lying to voters, in contrast, will just cause them to have false beliefs, and is not likely to cause any significant harm.

The slippery slope objection gets something right. My general claim here is that voters do not enjoy a special immunity against being lied to. I would similarly endorse the claim that voters do not enjoy special immunity against being killed. Instead, I'm happy to accept that what it takes to justify lying to or killing non-political agents is the same as what it takes to justify lying to or killing political agents, though of course I've only argued against special immunity to being lied to in this paper. Still, the point is that it's much harder to justify killing or hurting other people (regardless of whether they are private civilians, political agents, or civilians performing political activities) than it is to justify lying to them. The conditions for justifiable violence are far more stringent. Accordingly, the slope between "you can lie to bad voters" and "you can kill bad voters" is not so slippery.

Conclusion

Politicians frequently lie for personal gain, or to benefit the few at the expense of the many. In the real world, when we see politicians lying, this is almost always corrupt and immoral behavior.

But this doesn't imply that political lying is always wrong, or that occasions for political lying are rare. Commonsense holds that we may lie in self-defense or defense of others, to stop people from causing certain harms and injustices. Research on voter behavior indicates that voters frequently support harmful and unjust laws and policies, because they are misinformed, ignorant, and irrational. Lying, I have argued, is a justifiable way to stop these voters from hurting the rest of us. Just as it is right to lie to the Murderer at the Door, it is right to lie to the Murderer at the Ballot Box.

Notes

1 Tarpley 2008, 166.
2 Even Kant most likely accepted that lying could be permissible in special circumstances. See, e.g., Mahan, 2009; Varden 2010.
3 When one is merely excused in lying, the act is still wrong, but the lying agent's liability or blameworthiness may be reduced. (So, for instance, if I lie under duress, because I am being ordered to do so with a gun to my head, the act is wrong, but I am not blameworthy for it.) However, when an act is justified, rather than merely excused, the act is not wrong at all.
4 McMahan 2011, 8–9.
5 See LaFave 2003, 569–574.
6 Hasnas 2014.

7 In *The Lord of the Rings*, Gríma Wormtongue, in conjunction with the wizard Saruman, magically manipulates King Théoden into making harmful political choices.
8 See, for example, Schwartzman 2011; Habermas 2001; Rawls 1971, 130, 138; Cohen 2009; among others, argue that democracy requires "sincerity" or "publicity", i.e., that participants (including politicians) offer sincere and full explanations for what they want to do or are in fact doing.
9 Chong 2013, 101; Funk 2000; Funk and Garcia-Monet 1997; Miller 1999; Mutz and Mondak 1997; Feddersen, Gailmard, and Sandroni 2009; Brennan and Lomasky 1993, 108–114; Green and Shapiro 1994; Markus 1988; Conover, Feldman, and Knight 1987; Kinder and Kiewiet 1979; Huddy, Jones, and Chard 2001; Rhodebeck 1993; Ponza, Duncan, Corcoran, and Groskind 1988; Sears and Funk 1990; Caplan 2007; Holbrook and Garand 1996; Mutz 1992; Mutz 1993; Citrin and Green 1990; Sears, Lau, Tyler, and Allen, 1980; Sears and Lau 1983; Sears, Hensler, and Speer 1979.
10 Converse 1990, 372.
11 Somin 2013, 17.
12 Somin 2013, 17–37.
13 Converse 1990, 3.
14 Hardin 2009, 60.
15 Somin 2013, 17–21.
16 Somin 2013, 31.
17 Somin 2013, 32.
18 See, for example, Althaus 2003, 11.
19 Althaus 2003, 11–12.
20 Caplan 2007; Caplan 2008; Caplan, Crampton, Grove, and Somin 2013.
21 Gilens 2012, 106–111. Althaus 2003, 129; Caplan 2007.
22 Gilens 2012, 106–111.
23 Huddy, Sears, and Levy 2013, 11.
24 Westen, Blagov, Harenski, Kilts, and Hamann 2006; Westen 2008.
25 Haidt 2012; Westen, Blagov, Harenski, Kilts, and Hamann 2006; Westen 2008.
26 E.g., Kahan, Peters, Dawson, and Slovic, 2013.
27 Tversky and Kahneman 1973.
28 Chong 2013.
29 In particular, see Achen and Bartels 2016 and Brennan 2016b for thorough reviews of this empirical literature.
30 E.g, see Gilens 2012.
31 Habermas 2001.
32 Estlund 2008, 6, 75–82.
33 This section incorporates material from Brennan 2016b.
34 Estlund 2008, 2. In earlier political philosophy, the terms were used in sloppy or non-uniform ways. However, in the last ten years or so, it has become the convention to use the terms exactly as I define them here. There is also a sociological concept of "legitimacy," associated with Max Weber, where sociological "legitimacy" refers to the a government's perceived authority. This concept of legitimacy is irrelevant to the debate here.
35 Estlund 2007.
36 Brennan 2016a.
37 See, e.g., Simmons 1996, 19–30. Note that Simmons does not use the words authority and legitimacy the way I do, as the definitions I use became standard later in the literature. For a survey showing how untenable most accounts of political obligation are, see Smith 1996. See also Applbaum 2010.
38 Huemer 2013, 19.
39 Vallier and D'Agostino 2013.

40 Gaus 1996; Gaus and Vallier 2009; Kang 2003.
41 Schwartzman 2011, 381.
42 Mendelberg 2002, 154.
43 For a review of this research, see Brennan 2016b, Chapter 3.
44 Mutz 2006, 5.
45 See Gaus, 2003, 208–218, for a summary of these commitments.
46 As Achen and Bartels 2016 show, voters have an extremely short time horizon for retrospective voting, and their retrospective voting behavior is dominated by things outside of politicians' control.
47 Hardin 2009, 60.
48 Somin 2013, 17–21.
49 Caplan, Crampton, Grove, and Somin 2013.
50 Ibid; Healy and Malholtra 2010.
51 For a further exploration of this issue, see Brennan 2016a.

References

Achen, Christopher H. and Bartels, Larry M. 2016. *Democracy for Realists*. Princeton: Princeton University Press.

Althaus, Scott. 2003. *Collective Preferences in Democratic Politics*. New York: Cambridge University Press.

Applbaum, Arthur Isak. 2010. "Legitimacy without the Duty to Obey," *Philosophy and Public Affairs* 38: 216–239.

Brennan, Geoffrey and Lomasky, Loren. 1993. *Democracy and Decision*. New York: Cambridge University Press.

Brennan, Jason. 2011a. *The Ethics of Voting*. Princeton: Princeton University Press.

Brennan, Jason. 2011b. "The Right to a Competent Electorate," *Philosophical Quarterly* 61: 700–724.

Brennan, Jason. 2016a. "When May We Kill Government Agents? In Defense of Moral Parity," *Social Philosophy and Policy* 32.

Brennan, Jason. 2016b. *Against Democracy*. Princeton: Princeton University Press.

Caplan, Bryan. 2007. *The Myth of the Rational Voter*. Princeton: Princeton University Press.

Caplan, Bryan. 2008. "What if the Median Voter Were a Failing Student?" *The Economist's Voice* 5: 1–5.

Caplan, Bryan, Crampton, Eric, Grove, Wayne A., and Somin, Ilya. 2013. "Systematically Biased Beliefs about Political Influence: Evidence from the Perceptions of Political Influence on Policy Outcomes Survey," *PS: Political Science and Politics* 46:760–767.

Chong, Dennis. 2013. "Degrees of Rationality in Politics," in *The Oxford Handbook of Political Psychology*, ed. David O. Sears and Jack S. Levy, pp. 96–129. New York: Oxford University Press.

Citrin, Jack and Green, Donald. 1990. "The Self-Interest Motive in American Public Opinion," *Research in Micropolitics* 3: 1–28.

Cohen, Joshua. 2009. "Deliberation and Democratic Legitimacy," in *Democracy*, ed. David Estlund, pp. 87–106. Malden, MA: Blackwell.

Conover, Pamela, Feldman, Stanley and Knight, Kathleen. 1987. "The Personal and Political Underpinnings of Economic Forecasts," *American Journal of Political Science* 31: 559–583.

Converse, Philip. 1990. "Popular Representation and the Distribution of Information" in *Information and Democratic Processes*, ed. John A. Ferejohn and James H. Kuklinski. Urbana: University of Illinois Press.

Estlund, David. 2007. "On Following Orders in an Unjust War," *Journal of Political Philosophy* 15: 213–234.

Estlund, David. 2008. *Democratic Authority*. Princeton: Princeton University Press.

Feddersen, Timothy, Gailmard, Sean and Sandroni, Alvaro. 2009. "A Bias toward Unselfishness in Large Elections: Theory and Experimental Evidence," *American Political Science Review* 103: 175–192.

Funk, Carolyn, 2000. "The Dual Influence of Self-Interest and Societal Interest in Public Opinion." *Political Research Quarterly* 53 (2000): 37–62.

Funk, Carolyn and Garcia-Monet, Patricia. 1997. "The Relationship between Personal and National Concerns in Public Perceptions of the Economy," *Political Research Quarterly* 50: 317–342.

Gaus, Gerald. 1996. *Justificatory Liberalism*. New York, Oxford University Press.

Gaus, Gerald. 2003. *Contemporary Theories of Liberalism*. Washington, DC: Sage Publishing.

Gaus, Gerald and Vallier, Kevin. 2009. "The Role of Religious Conviction in a Publicly Justified Polity," *Philosophy and Social Criticism* 35: 51–76.

Gilens, Martin. 2012. *Affluence and Influence*. Princeton: Princeton University Press.

Green, Donald and Shapiro, Ian. 1994. *Pathologies of Rational Choice Theory.* New Haven: Yale University Press.

Habermas, Jürgen. 2001. *Moral Consciousness and Communicative Action*. Cambridge, MA: MIT Press.

Haidt, Jonathan. 2012. *The Righteous Mind*. New York: Pantheon.

Hardin, Russell. 2009. *How Do You Know? The Economics of Ordinary Knowledge*. Princeton: Princeton University Press.

Hasnas, John. 2014. "Lobbying and Self-Defense," *Georgetown Journal of Law and Public Policy* 12, special issue 2014: 391–412.

Healy, Andrew and Malholtra, Neil. 2010. "Random Events, Economic Losses, and Retrospective Voting: Implications for Democratic Competence," *Quarterly Journal of Political Science* 5: 193–208.

Holbrook, Thomas and Garand, James C. 1996. "Homo economus? Economic information and economic voting." *Political Research Quarterly* 49(2): 351–375.

Huddy, Leonie, Jones, Jeffrey and Chard, Richard. 2001. "Compassion vs. Self-Interest: Support for Old-Age Programs among the Non-Elderly," *Political Psychology* 22: 443–472.

Huddy, Leonie, Sears, David, and Levy, Jack S. 2013. "Introduction," in *The Oxford Handbook of Political Psychology, 2nd Edition*, ed. Huddy, Leonie, Sears, David, and Levy, Jack S., pp. 1–21. New York: Oxford University Press

Huemer, Michael. 2013. *The Problem of Political Authority*. New York: Palgrave MacMillan.

Kahan, Dan, Peters, Ellen, Cantrell Dawson, Erica, and Slovic, Paul. 2013. "Motivated Numeracy and Enlightened Self-Government," unpublished manuscript, Yale Law School Public Working Paper No. 307, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319992 (accessed September 12, 2016).

Kang, John. 2003. "The Case for Insincerity," *Studies in Law, Politics, and Society* 29: 143–164.

Kinder, Donald and Kiewiet, Roderick. 1979. "Economic Discontent and Political Behavior: The Role of Personal Grievances and Collective Economic Judgments in Congressional Voting," *American Journal of Political Science* 23: 495–527.

LaFave, Wayne. 2003. *Criminal Law, 4th Edition*. Washington, DC: Thomson-West.

McMahan, Jeff. 2011. *Killing in War*. New York: Oxford University Press.

Mahan, James Edwin. 2009. "The Truth about Kant on Lies," in *The Philosophy of Deception*, ed. Clancy Martin, pp. 201–224. New York: Oxford University Press.

Markus, Gregory. 1988. "The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis," *American Journal of Political Science* 32: 137–154.

Mendelberg, Tali. 2002. "The Deliberative Citizen: Theory and Evidence," in *Research in Micropolitics, Volume 6: Political Decision Making, Deliberation, and Participation*, ed. Michael X. Delli Carpini, Leonie Huddy and Robert Y. Shapiro, pp. 151–193. Amsterdam: Elsevier.

Miller, Dale. 1999. "The Norm of Self-Interest," *American Psychologist* 54: 1053–1060.

Mutz, Diana. 1992. "Mass Media and the Depoliticization of Personal Experience," *American Journal of Political Science* 36: 483–508.

Mutz, Diana. 1993. "Direct and Indirect Routes to Politicizing Personal Experience: Does Knowledge Make a Difference?" *Public Opinion Quarterly* 57: 483–502.

Mutz, Diana. 2006. *Hearing the Other Side*. New York: Cambridge University Press.

Mutz, Diana. 2008. "Is Deliberative Democracy a Falsifiable Theory?" *Annual Review of Political Science* 11: 521–538.

Mutz, Diana and Mondak, Jeffrey. 1997. "Dimensions of Sociotropic Behavior: Group-Based Judgments of Fairness and Well-Being," *American Journal of Political Science* 41: 284–308.

Ponza, Michael, Duncan, Greg, Corcoran, Mary and Groskind, Fred. 1988. "The Guns of Autumn? Age Differences in Support for Income Transfers to the Young and Old," *Public Opinion Quarterly* 52: 441–466.

Rawls, John. 1971. *A Theory of Justice*. Cambridge, MA: Harvard University Press.

Rhodebeck, Laurie. 1993. "The Politics of Greed? Political Preferences among the Elderly," *Journal of Politics* 55: 342–64.

Schwartzman, Micah. 2011. "The Sincerity of Public Reason," *Journal of Political Philosophy* 19: 375–298.

Sears, David O. and Funk, Carolyn L. 1990. "Self-Interest in Americans' Political Opinions," in *Beyond Self-Interest,* ed Jane Mansbridge, pp. 147–170. Chicago: University of Chicago Press.

Sears, David and Lau, Richard. 1983. "Inducing Apparently Self-Interested Political Preferences," *American Journal of Political Science* 27: 223–252.

Sears, David, Hensler, Carl, and Leslie Speer. 1979. "Whites' Opposition to 'Busing': Self-Interest or Symbolic Politics?" *American Political Science Review* 73: 369–384.

Sears, David, Lau, Richard, Tyler, Tom and Allen, Harris. 1980. "Self-Interest vs. Symbolic Politics in Policy Attitudes and Presidential Voting," *American Political Science Review* 74: 670–684.

Simmons, A. John. 1996. "Philosophical Anarchism," in John T. Sanders and A. John Simmons, eds., *For and Against the State: New Philosophical Readings*. pp. 19–40. Boulder: Rowman and Littlefield.

Smith, M. B. E. 1996. "The Duty to Obey the Law," in *Companion to the Philosophy of Law and Legal Theory*, ed. D. Patterson, pp. 457–466. Oxford: Blackwell.

Somin, Ilya. 2013. *Democracy and Political Ignorance*. Stanford: Stanford University Press.

Tarpley, Webster Griffin. 2008. *Obama: The Postmodern Coup: The Making of a Manchurian Candidate.* San Diego: Progressive Press.

Tversky, Andrew, and Kahneman, Daniel. 1973. "Availability: A Heuristic for Judging Frequency and Probability,"*Cognitive Psychology* 5: 207–233.

Vallier, Kevin, and D'Agostino, Fred. 2013. "Public Justification," *Stanford Encyclopedia of Philosophy,* Spring 2014 edition, ed. Edward N. Zalta, available at http://plato.stanford.edu/entries/justification-public/ (accessed September 12, 2016).

Varden, Helga. 2010. "Kant and the Murderer at the Door…One More Time: Kant's Legal Philosophy and Lies to Murderers and Nazis," *Journal of Social Philosophy* 41: 403–420.

Westen, Drew. 2008. *The Political Brain*. New York: Perseus Books.

Westen, Drew, Blagov, Pavel S., Harenski, Keith, Kilts, Clint, and Hamann, Stephan. 2006. "The neural basis of motivated reasoning: An fMRI study of emotional constraints on political judgment during the U.S. Presidential election of 2004." *The Journal of Cognitive Neuroscience* 18: 1947–1958.

2 The Greatest Liar Has His Believers

The Social Epistemology of Political Lying

Kay Mathiesen and Don Fallis

> Truthfulness has never been counted among the political virtues, and lies have always been regarded as justifiable tools in political dealings. Whoever reflects on these matters can only be surprised how little attention has been paid, in our tradition of philosophical and political thought, to their significance.
>
> *Lying in Politics: Reflections on the Pentagon Papers* by Hannah Arendt

> [A]s the vilest writer has his readers, so the greatest liar has his believers.
>
> *The Art of Political Lying* by Jonathan Swift

Introduction[1]

The old joke goes, "How can you tell if a politician is lying? … His lips are moving." For many people this is no joke. According to a recent poll, in the United States only 45 percent of people have trust in politicians (see Jones 2016 2014) and worldwide only 15 percent of people "trust government leaders to tell the truth" (Edelman 2014).[2] It has been suggested that we live in an era of "post-truth politics" where politicians lie with abandon and impunity (Krugman 2011; see also Keyes 2004 and Alterman 2005). Philosopher Jason Stanley (2012) argued in a *New York Times* opinion piece that the public "no longer expect or care" whether politicians tell the truth.

But if the public, pundits, political scientists, and philosophers are right that there is no reason to expect politicians to tell the truth, we are left with a puzzle about political speech. The primary function of saying something is to have an effect on the epistemic state of others. When I tell my husband that I prefer daffodils to daisies, or I tell my landlord that the roof is leaking, I do so in the hope and expectation that they will believe me. Moreover, such epistemic change is rarely the ultimate goal of communication. We typically target people's beliefs in order to influence their behavior (e.g., I would like my husband to buy daffodils and I would like the landlord to fix the leak). Politicians say things in the hope that they will convince the public to support their policies, to vote for them, to not vote for their opponent, to donate to their campaign, etc.

If it is true that people do not trust politicians to tell the truth, then it seems to follow that they won't believe what politicians say and, hence, no one will behave as the politician intends. So, why do politicians bother to lie—or indeed say anything at all?

In this chapter, we attempt to solve this puzzle by using the tools of social epistemology to explain how and why politicians lie and are often so successful at it. Social epistemology, broadly, is the study of the formation of beliefs in a social context. The study of political lying falls within the domain of social epistemology since it concerns both beliefs formed by the "social evidence" of testimony (Goldman and Blanchard 2015) and attempts to influence the beliefs of *groups*. While there has been some recent philosophical research on groups as *sources* of testimony (see Tollefsen 2007, Fricker 2012) and specifically as liars (see Lackey 2014); this chapter looks at the other side of the equation. We focus on groups as *receivers* of testimony, in particular, as receivers of deceptive testimony.

Our argument in this chapter proceeds as follows: We begin by characterizing political lying as intentionally deceptive statements uttered in a political context by (or in the name of) a politician. We then present Gordon Tullock's (1967) classical view of political lying—viz., politicians lie when they believe that the benefits of intentionally deceiving a large number of people outweigh the costs. We then consider Jason Stanley's (2012) claim that politicians no longer intend to deceive the public and are up to something quite different when they lie. According to Stanley, politicians are not concerned with representing the world as being a certain way, but with representing *themselves* as being a certain way. We note a number of problems with Stanley's account of political lying and we explain how even known liars may hope to be believed and, thus, influence voters with their statements. This explanation only goes part of the way, however, in accounting for the ubiquity of political lying. Thus, in the third section of the chapter, we show how politicians can be more effective in deceiving the public when they target the public *qua* members of social groups, rather than just as individuals. Finally, while the main focus of the chapter is to explain how political lying functions, we conclude by briefly considering some ethical implications of our social epistemological analysis of lying.

What is a "Political Lie"?

Political lies are a subset of political speech. We will call speech political if it is uttered by, or in the name of, a politician (either as a candidate for office or in his/her role as a government official) in a political context. While politicians in their political roles may engage in political speech to other individuals, the most distinctive form of political speech is speaking to groups—in speeches, articles, television appearances, and (of course) ads. It may not always be clear whether some utterance is political speech. For instance, was former president Bill Clinton's lie about his affair with Monica Lewinsky political speech? What he said was clearly about a "private matter." If it had been uttered merely to his

wife, it would not have been political speech. But, given that it was also uttered to the White House Press Corp in the context of a public scandal, it was also political speech.

What makes a particular act of political speaking a lie? While many philosophical accounts of lying require that the liar actually assert something that she believes to be false, the term "lie" is often used more broadly in the political context. For example, PolitiFact's (2015) "truth-o-meter" puts political lies on a spectrum that includes statements that are merely misleading, such as "half truths." Sissela Bok's (1978, 15) definition of a lie nicely captures how lie is used in the context of political speech. According to Bok, a lie is "an intentionally deceptive message in the form of a statement." In this chapter, we follow Bok in extending the label "lie" to statements that intentionally omit important information or that are otherwise misleading.

In keeping with this definition of lie, our discussion of political lies will include both intentionally false statements and *spin*. Spin involves bringing the audience's attention to a particular aspect of, or interpretation of, a situation. The intent behind spin is to represent the world in a way that is beneficial to the one doing the spinning. While spin may sometimes be used in ways that promote truth, it is often done with the intention to deceive. Spin includes such things as cherry picking facts that are favorable to the speaker, while leaving out unfavorable facts, as well as "lexical selection" wherein the speaker selects words and expressions that describe the situation in a way that is beneficial to the speaker (Manson 2012, 204–205).

In this chapter, we give a number of examples of political lies. Of course, for any particular case, it may be that what the politician said was not actually a lie, but only an honest mistake. The intentions of others can sometimes be difficult to determine. For this reason, fact checkers, such as PolitiFact, focus only on whether a statement was inaccurate, not on whether the politician knew it was inaccurate. There are good reasons, however, for us to retain the intention condition on lying. Our goal in this chapter is to understand why politicians would *decide* to mislead the public, not why they might mistakenly do so. Furthermore, without the intention condition, political lying is not something for which politicians could be morally praised or blamed.[3] While we do not focus on the morality of political lying here, our analysis should not undercut the possibility of such evaluations. Thus, we will not count unintentionally false or misleading statements as lies.

We follow the standard philosophical view, according to which, in order for something to be a lie, the speaker must intend the audience to believe something false.[4] Some may be skeptical, however, whether political speech is something that can be described as either true or false. Politicians frequently talk about morals and values, which according to some philosophers do not admit of being true or false (see Sinnott-Armstrong 2011). However, even a skeptic about values can lie about them. For example, suppose a politician gives a speech in which she asserts, "Abortion is murder." Suppose further that the politician is a moral skeptic and believes that it is neither true nor false that abortion is murder.

Does that mean that the politician did not lie? Our answer is no; the politician is lying to the public because she intends to mislead the public into believing that *she believes* that abortion is wrong and will act accordingly.

Moreover, many claims made by politicians are about facts. For example, in the 2008 Presidential campaign, Mitt Romney falsely claimed that Chrysler was moving Jeep production to China (see Blow 2012) and in the 2016 campaign for the Republican nomination Marco Rubio falsely claimed that there are more illegal immigrants in the country than there were five years ago (PolitiFact, 2016). These are simple factual matters, the truth of which is not particularly difficult to determine. Ultimately, the phenomena that we are concerned with here is political speech that is intended to influence the epistemic state of voters in ways that are not guided by a concern for accuracy, evidence, or completeness and where the politician is concerned to hide or distort what they actually believe. This is what people are upset about when they decry lying politicians.

The Classical View of Political Lying

We do not just want to understand what political lying is, however. We want to understand the way political lying works—its "logic" if you will. Gordon Tullock (1967) provides an account of the logic of political lying in the chapter on "The Economics of Lying" from his influential book *Toward a Mathematics of Politics*. There are three features of Tullock's account that, taken together, constitute what we will call the "classical view" of political lying. First, according to Tullock, politicians lie when they intentionally say or imply something false and they intend their audience to believe it. We will call this the *deceptive plank* of the classical view. Second, a lie to a group is equivalent to the sum of lies to a number of individuals (137). In other words, if we want to analyze how a lie to a group functions, we can treat it as a set of lies to individual persons. We will call this the *summative plank*. Third, politicians lie when the anticipated benefits of telling the lie exceed the anticipated costs (see also Davis and Ferrantino 1996). In particular, politicians will lie when the expected benefit of the lie being believed exceeds the expected costs of getting caught in the lie.[5] We will call this the *cost-benefit plank*. In what follows, we consider how this classical view might be modified to give a more sophisticated and more accurate account of political lying.

Stanley on Political Lying[6]

We are now in a political landscape that is quite different from that considered by Tullock almost 50 years ago. As we noted at the beginning of this chapter, some argue that we live in an era of "post-truth politics" where, "Americans no longer expect or care about candidates making honest assertions in the public sphere. They no longer expect consistency and honesty from politicians, and the savvy political campaigner recognizes that there is no cost to making

statements that contradict even their most well-known beliefs" (Stanley 2012). According to the classical view, politicians lie when the benefits of doing so exceed the costs. A politician benefits from lying when she gets her audience to believe what she says and, as a result, gains their support. But if the public no longer believes what politicians say, she will not be able to deceive them and, thus, she has nothing to gain by lying. This sort of reasoning will be familiar to those who know Kant's argument that lying is always morally wrong (1996 [1785], 57). Kant argued that, if everyone lies when it is to his or her advantage, we will not believe what anyone says, thus making lying pointless. If Stanley and others are right about our current political climate, we may need to jettison the deceptive plank of the classical view.

They may be putting the case too strongly, however. We surely are not skeptical of politicians *all* of the time. For instance, when they claim that there is an imminent threat that requires military action, the American public often buys it. For example, prior to the second Iraq War, the second Bush administration famously deceived the American public about there being weapons of mass destruction (WMDs) in Iraq (see Carson 2010, 212–223, Mearsheimer 2011, 49–55).[7] While the classical view may allow us to explain political lying in such contexts, people are likely to be more skeptical of what politicians say during political campaigns. There is clearly a lot of lying in this context. So, we will follow Stanley and restrict our focus to understanding why politicians lie in campaigns.[8]

If politicians don't intend to deceive when they lie during political campaigns, why do they continue to do it? One possible explanation for why politicians continue to lie in an environment of public skepticism is that the politicians are either ignorant or irrational. In other words, perhaps they don't know that the public does not trust them, or they just feel compelled to lie even though there is no benefit to doing so. But surely some politicians are quite savvy; and those who are not typically hire experts to help them understand the electorate and to craft their messages. Thus, even if we can explain away some political lying as the result of ignorance and irrationality, we still need an account of why informed and rational politicians continue to lie.

In order to explain the continued ubiquity of political lying, Jason Stanley (2012) considers in detail two statements made by Mitt Romney during the 2012 Presidential campaign. First, the Romney campaign claimed that Obama had "raided" (or "funneled out") $716 billion from Medicare. In fact, Obama's health care law simply involved reductions in future payments to private insurers. The plan did *not* call for a cut in benefits. Moreover, this very same cost saving was part of the Romney campaign's own plan to save Medicare from insolvency. Second, the Romney campaign claimed that Obama had eliminated the work requirement of the welfare reform law. In fact, Obama was merely considering granting waivers to states to increase the flexibility of the work requirement of the welfare reform law. The plan was actually to make it easier to get more people on welfare back to work.

According to Stanley, Romney was not trying to convince anybody that these claims were true. Indeed, they were demonstrably inaccurate, and it was fairly easy to check that this was so. Stanley claims that Romney's goal was to give a certain impression of himself. Romney wanted to show the voters that he, like them (but unlike Obama), is concerned about Medicare cuts and government spending on welfare.[9] So, Stanley's answer to the question of why a politician would lie if no one believes her is that the politician does not intend her utterances to be believed. Instead, the politician intends to make the public believe that she is particular sort of person—the sort of person whom the public would like to vote for.

Stanley's answer captures an important insight about what motivates much political speech. Crafting an attractive and relatable image of the politician is one of the central goals of a campaign. Consequently, much of what politicians say is intended to communicate something other than what they actually say. Indeed, this is the same insight that Harry Frankfurt (2005 [1986]) had in his work *On Bullshit*. According to Frankfurt, the bullshitter does not care whether what she says is true and may not even care whether people believe it. Instead, a standard goal of the bullshitter is to give the audience a certain impression of herself. In fact, one of Frankfurt's main examples is a bullshitting politician:

> Consider a Fourth of July orator, who goes on bombastically about "our great and blessed country, whose Founding Fathers under divine guidance created a new beginning for mankind." … the orator does not really care what the audience thinks about the Founding Fathers, or about the role of the deity in our country's history, or the like. … the orator intends his statements to convey a certain impression of himself. … He wants them to think of him as a patriot, as someone who has deep thoughts and feelings about the origins and the mission of our country, … and so on.
>
> (2005 [1986], 16–18)

One might worry that we (and Stanley) have changed the subject from political lying to political bullshitting. Political lying, as we have characterized it, is intentionally communicating something that is false by asserting the falsehood, or at least by saying something that directly implies it. But the bullshitter does not necessarily say or even imply anything false. His deception lies primarily in his pretending to be up to one thing (e.g., informing the public about Obama's cuts to Medicare) while he is really up to something quite different (e.g., representing himself as someone who (unlike Obama) cares about protecting Medicare).

However, as Frankfurt (2002, 341) points out, bullshitting and lying are not mutually exclusive categories (see also Fallis 2015, 337). According to Frankfurt, bullshit can also be a lie when the bullshitter believes that what he asserts is false. For example, Frankfurt's orator might have said, "When Washington was a child, he chopped down a cherry tree, but wouldn't tell a lie about it." In that case, the orator would (unlike the apocryphal young George)

be a liar. But he would also be a bullshitter, because his goal in telling the story is to get the audience to believe that he is a certain kind of person.

Despite its virtues, there are problems with Stanley's analysis of political lies. To begin with, even if we granted that political lies are frequently not intended to get people to believe what is said, we still need an explanation of why politicians would bother to bullshit. Bullshit, like lies, is typically intended to influence behavior by getting people to acquire certain beliefs, such as the belief that the politician is a great person, a person who can get things done, a person who is beholden to no special interests. Moreover, those beliefs may be false, e.g., the politician might not be the person she is representing herself to be. Why would the public distrust what politicians say, while at the same time trusting how politicians portray themselves? Furthermore, in many cases politicians *do* intend for people to believe the false statements they make. Many political lies are quite different from the cherry tree lie. In most cases it would benefit a politician if at least some of the audience actually believe her claims. And, as we argue below, it would often be reasonable for her to expect them to do so.[10]

While Stanley and others claim that no one is going to be deceived by political lies, it is not clear that we, the voters, are so completely impervious to what politicians say. Even in a campaign, it may be possible for politicians to deceive with their lies (see Fallis 2015, 339). First of all, some members of the public will believe what politicians say, because they are not completely rational. Politicians typically address very large audiences. Thus, it is not surprising if some of these people are quite credulous. As Jonathan Swift reminds us in the quote we chose as the motto for this chapter, "as the vilest writer has his readers, so the greatest liar has his believers" (Swift 2004 [1710], p. 195). Thus, even if a politician says something that is extremely implausible, or that can easily be shown to be false, some people will believe.

Moreover, it does not follow from the fact that someone always lies when it is to his advantage that we ought never to believe him. As Derek Parfit points out (2011, 278), even if we always lie when it is to our advantage, it may often be to our advantage to tell the truth. As a result, we should give some credence to liars, because they will sometimes speak the truth. Given that liars don't lie all the time, it is possible for them to influence people's beliefs and behavior with deceptive statements. This is true even in contexts where it is completely open that sincerity is not to be expected. For instance, if I am playing poker in Vegas, I am not going rely on my opponent's claim that she has a really strong hand. It is perfectly permissible to bluff in such contexts; thus, I would be a fool to take her at her word. Even so, she is not necessarily wasting her breath when she asserts, "Your best move here would be to fold." Her comment might increase my uncertainty just enough to cause me to fold. In other words, her words may not lead me to believe she has a strong hand, but it may change my degree of belief in whether she has a strong hand. Similarly, even though there is a lot of distrust of politicians in America, a politician may still be able to increase people's degrees of belief in a direction that is beneficial to her.

Of course, the benefits of just convincing a few people, or just changing people's degrees of belief, are only sufficient to explain why politicians lie if those benefits exceed the costs. Stanley claims that politicians pay no cost for lying, because no one cares if politicians lie. If he is right, then even a small benefit from lying would motivate politicians to lie. Evidence suggests, however, that there often *is* a cost to political lying. Being publicly known as a liar (rather than just being suspected of being one) is still bad for politicians these days. Negative campaign ads frequently try to dissuade people from voting for the opposing candidate by saying that she has lied (Lee 2012). In the 2016 race for the Republican nomination for President, candidates frequently accused each other of lying; in one debate some variant of "liar" was used 20 times or more (Zezima 2016).

While there are costs to being caught lying, convincing a relatively small portion of the electorate, or just creating doubt in their minds, may often result in enough of a benefit to outweigh this cost. The small group of gullible people may be the swing voters who turn an election. In other words, politicians may be like Nigerian email scammers—they only need a few people to bite the hook in order to get a sufficient payoff to make lying worthwhile. Similarly, just creating doubt may be sufficient to sway an election. For instance, even if a false political ad does not convince me that a particular candidate would dismantle Medicare, I still might not vote for that candidate because I am now somewhat uncertain about her full commitment to Medicare.

In sum, while it is true that politicians are often more concerned with the impression that they are making than with the literal truth of what they say, the view of political lying advocated by those who talk of "post-truth politics" is inadequate. Contra Stanley's stated view in the *New York Times*, politicians often do intend to deceive and are frequently successful in doing so. As we have discussed above, even when they are widely distrusted, politicians can convince a few gullible swing voters and can create doubt in the minds of many voters. But even more can be said to account for the ubiquity of political lying in the face of widespread skepticism of what politicians say. As we argue in the following section, one important way that politicians can successfully use deception to get votes—or at least deprive the other candidates of votes—is by exploiting epistemic vulnerabilities of social groups.

How to Lie to Groups

We have said that political lying is intentionally deceptive testimony addressed to a group. According to the summative plank of the classical view, a lie to a group can be analyzed as a large set of lies to individuals. We argue here, however, that to truly understand how political lying functions, we must reject the summative plank.

Mass Marketing

Tullock's summative analysis of political lying was appropriate for the era of mass media and mass advertising. When lying to a large number of people all at once, my goal is to convince as many of them as possible. Advertisers in mid-twentieth century America did this by targeting the "average consumer," what one advertising executive called "Mrs. Middle Majority" (Sivulka 2011, 341). However, such *mass lies* are not the most effective way for politicians to convince people. More effective strategies move beyond treating the populace as a mere collection of individuals and leveraging the fact that people can be seen as separate social groups.

Targeting

In the 1960s and 70s, advertisers began to target particular groups of consumers with different advertising campaigns (see Sivulka 2011, 271). Politicians use the same sort of strategy, targeting their messages—including their lies—to particular groups. Such targeting can facilitate deception by allowing politicians to make contradictory promises and portrayals of themselves to different audiences. A vivid, though fictional, example of this was depicted on the television series *Boardwalk Empire*. After a racial incident involving the KKK, "Nucky" Thompson (based on the real life New Jersey politician Enoch L. Johnson) gives two very different speeches to a black church and a white church. (As has been said, Sunday morning is the most segregated time in America.) At the black church, he says that he will not rest "until these hooded cowards are brought to justice." To the white congregation, he talks of teaching the "coloreds" a lesson using an "iron fist" (see Fallis 2013, 102).

Such targeting can be even more effective if politicians take advantage of "group polarization." More and more, we get information only from sources (and interact only with people) with whom we are likely to agree (see Sunstein 2007, 52–54). Studies indicate that in such contexts people's views tend to become more extreme (see Sunstein 2007, 60–63). It seems plausible that such extremism would make audiences more susceptible to certain sorts of lies. For instance, a Republican who goes on Fox News can expect an audience that will be ready and willing to believe any statements about the nefarious doings of the Democrats (and vice-versa for a Democrat on MSNBC).

Indeed, a politician is more likely to be believed when she is addressing an audience of her own party. Numerous studies show that people are more likely to believe information when it is consistent with what they already believe. Furthermore, people are likely to seek out information that confirms what they believe, and are unlikely to seek information that would disconfirm their beliefs (see Mullainathan and Shleifer 2005, 1032). Even when confronted with evidence that a politician is lying, people may not change their minds. In fact, when newspapers correct a falsehood it can make people believe the lie even more strongly (see Nyhan and Reifler 2010). Thus, while the public may in

general think that politicians are liars, they are likely to believe politicians who say things that confirm what they already believe.[11]

There are dangers to targeting, however. In the current media climate, it has become more difficult to ensure that statements are heard only by the intended audience (see Axford and Huggins 2001, 165). If, like Nucky Thompson, one says different things to different audiences, one risks being exposed as a pandering flip-flopper. Also, one may say things to the target audience that would not go over well with other members of the public. For example, Romney clearly did not intend his statement that 47 percent of Americans are dependent on the government to be heard beyond the select meeting of big donors. It was, however, recorded and posted on the internet, dealing a significant blow to his popularity. Similarly, Obama got in trouble when his statement to a group of donors in San Francisco—that people in small Midwestern towns "get bitter, they cling to guns or religion or antipathy to people who aren't like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations"—was widely reported (see Zeleny 2008). This difficulty is only increasing over time. Ubiquitous recording devices, the ease of posting to the internet, and 24-hour news outlets make it almost impossible to keep audiences segregated. In such an environment, it is easy to, *Daily Show* style, cut together the various statements of politicians to show them directly contradicting themselves. In some ways, then, this form of targeting is less effective than previously.

Collective Identity

Another way that politicians can take advantage of group dynamics in order to make their deceptions more convincing is by exploiting a sense of collective identity amongst members of their audience. In some cases, a politician may appeal to a pre-existing collective identity—such as racial, ethnic, or regional identities. In line with Stanley's point that politicians are frequently concerned with representing themselves as a particular sort of person through their speech, politicians may say things in such a way that it classifies them as members of an identity group. One technique that is used to do this is "code switching." Politicians frequently use different ways of speaking to different audiences—e.g., accents, word choice—in an effort to signal that the politician is "one of them." For example, when Obama speaks to African-American audiences his cadences and pronunciation change markedly from how he speaks to white audiences (see Beam 2010).

Once such collective identity is made salient, the politician can bet that the dynamics of "intergroup attribution bias" will kick in. Numerous studies have shown that, once people see themselves as members of a particular group, they are likely to engage in reasoning that is biased in favor of members of their own "in-group" and against members of the "out-group" (see Brewer and Kramer 1985; Hewstone et al. 2002). In particular, people are more likely to attribute good motives to members of their own group and bad motives to those of an

out-group. So, it is not surprising that, while people say that politicians are generally untrustworthy, they will believe politicians who portray themselves as belonging to the same in-group.

Common Belief

Often, it is in the interest of politicians not to just get a number of people to believe their lies, but also to get them to believe that other people believe them. In other words, a politician may want his or her lie to be *common belief* amongst a group of persons. Some proposition *p* is common belief amongst a group when each member believes that *p*, each member believes that each member believes that *p*, each member believes that each member believes that each member believes that *p*, and so on ad infinitum (see Lewis 1969, 56).[12]

When a politician lies during a public speech to supporters or during an interview on a TV show watched mainly by supporters, he or she can easily produce such common belief. The members of the audience know that other like-minded persons are hearing the same thing. In many cases, the audience may be relatively confident that other members of the audience believe what is being said. This is more easily determined during a public speech when a line gets a big round of applause, but when a Democrat is on MSNBC or a Republican is on Fox News, it is reasonable to assume that most viewers agree with what they are saying and know that other MSNBC or Fox viewers also agree. Social media undoubtedly adds to this effect, giving people immediate feedback on what their online friends and favorite *politweeters* think about a politician's most recent statement.

A politician can gain a number of benefits from such common belief. First, we often will only act on a belief if we believe that others believe it. For example, in the context of direct political action, Michael Suk-Young Chwe (2013, 10) writes that:

> Rebelling against a regime is a coordination problem: each person is more willing to show up at a demonstration if many others do… Regimes in their censorship thus target public communications such as mass meetings, publications, flags, and even graffiti, by which people not only get a message but know that others get it also.

What is true of rebellions is also true of protests, rallies, and other actions that provide support for a position or a politician. As we note above, politicians often lie in order to motivate the public to do things that will benefit the politician politically. When such benefits require collective action, politicians will seek to create common belief amongst their audience.

An interesting form of deceptive political speech that uses a unique form of targeting to create a sense of collective identity and common belief is the "dog whistle" (see Safire 2008, 190; Goodin 2008, 226). A politician uses a dog whistle when she speaks to a mixed audience of people who belong to different

groups, using language in such a way as to communicate something to one group that she does not communicate to the others. Just as only dogs can hear an actual dog whistle, only some people can "hear" what the politician is communicating. Dog whistles appeal to group characteristics and group dynamics to target audiences while avoiding making contradictory assertions, thereby avoiding the accusation of lying. Thus, they make it easier to avoid one of the main drawbacks to targeting.

While dog whistles may often go unnoticed by those at whom they are not targeted, it is possible to identify them occasionally. For example, at the presidential debates in 2004, George W. Bush was asked about his policy for appointing Supreme Court Justices, in particular whether he would only appoint Justices committed to overturning *Roe v. Wade*. In his answer, he referred to the *Dred Scott* decision of 1857, which held that African-Americans could not be American citizens. He said, "Another example would be the *Dred Scott* case, which is where judges, years ago, said that the Constitution allowed slavery because of personal property rights. That's a personal opinion. That's not what the Constitution says" (Noah 2004). While to many people this seemed just like the usual "borderline-coherent ramb[ling]" they expected from Bush, an article in *Slate* claimed that it was, in fact, "an invisible high-five to the Christian right":

> To the Christian right, "*Dred Scott*" turns out to be a code word for "*Roe v. Wade*." Even while stating as plain as day that he would apply "no litmus test," Bush was semaphoring to hard-core abortion opponents that he would indeed apply one crucial litmus test: He would never, ever, appoint a Supreme Court justice who condoned *Roe.*
>
> (Noah 2004)

Numerous popular right-wing pundits and political groups had regularly equated the *Dred Scott* and *Roe v. Wade* decisions. Conservatives who listened to channels featuring these voices were familiar with *Dred Scott = Roe v. Wade* trope. Thus, they heard something in what Bush said that others did not. That Bush was committing himself to selecting an anti-Roe justice would be obvious to them and this would be common belief amongst this group. At the same time, using this language signaled to the Christian right that Bush was one of them, because he shared a language and set of background assumptions with them. Dog whistles may be used intentionally to deceive one group of people, while telling the truth to another. Furthermore, while Bush's dog whistle may have honesty expressed his views to the conservatives, dog whistles may be used to deceive even those who can "hear" them, while avoiding the potential cost of being caught outright in saying something false.

Group Belief

Common belief is one type of *collective belief*. However, a lying politician may find it easier and more useful to create a more ontologically robust form of collective belief—viz., a belief held by the group itself. A number of philosophers have argued that groups may believe propositions even when very few or even none of the individual members of the group believe it personally. Margaret Gilbert (1989), for example, has argued that a group has a belief when the members of the group let the belief stand as the view of the group. Groups may do this, according to Gilbert, by either verbally or tacitly accepting the belief as that of the group. Such group beliefs create an obligation on the part of the members to speak and act in line with the group belief. Thus, a politician who is unable to deceive a large number of individual voters, may nevertheless be able to deceive the group as a whole and rely on the members to act in accordance with the group belief (rather than in accordance with their own individual beliefs).

One might wonder how it is possible that members of a group can accept a belief as that of the group, while not believing it themselves. There are well-known cases, however, where, even though each member of the group knows that something is false, everyone believes that everyone else believes that it is true, and they let the belief stand as the view of the group. This results in people behaving *as if* they themselves individually believe it. As Steven Pinker (2011, 561) describes it:

> There is a maddening phenomenon of social dynamics variously called pluralistic ignorance, the spiral of silence, and the Abilene paradox, after an anecdote in which a Texan family takes an unpleasant trip to Abilene one hot afternoon because each member thinks the others want to go. People may endorse a practice or opinion they deplore because they mistakenly think that everyone else favors it.

Such phenomena can make it possible for politicians to influence the public with their lies, even when everyone (individually) sees through them. For example, Pinker suggests that pluralistic ignorance may have been responsible for the German people supporting the Nazi project of exterminating the Jews. Furthermore, in many cases merely believing that others believe something will be sufficient for people to change their minds, as numerous studies of social conformity have amply illustrated (see Cialdini and Goldstein 2004).[13]

Implications for the Ethics of Political Lying

Our main goal in this chapter has been to understand the forms and dynamics of political lying, rather than to assess it ethically. Nevertheless, we conclude with a few reflections on the ethical implications of our analysis.

First, it is worth asking whether there is any point to discussing the ethics of *political* lying in particular apart from just lying in general. Is political lying any worse (or better) ethically speaking than other forms of lying? In this volume, Jason Brennan argues that we should apply the same standards of ethical evaluation to political lies as we do to interpersonal lies. However, if it is true that in the current political climate no one expects politicians to tell the truth, then it seems that political lies may not be as morally bad as most interpersonal lies. If I expect you to lie, then I will not rely on your word and, hence, your falsehoods will be less likely to harm me. If the politician is aware of this, then it seems he is no more morally culpable than the person who bluffs at the poker table.

However, we have argued that, in many cases, people do believe what politicians say. Are people themselves to blame for believing politicians when there is ample evidence that they engage in political lying? Jennifer Saul (2012, 83–84) argues that, even if gullible people are partly responsible for their own deception, this does not lessen the moral responsibility of the liar. She defends her view by comparing the person deceived by a liar to the person who is robbed by a thief. Saul notes that the reckless victim who knowingly walks through a bad neighborhood at night bears more responsibility for being robbed than the cautious person. Similarly, the gullible voter who takes the politician at his word without checking up on the facts bears more responsibility for being deceived than does someone who gets her information from sources that have a better track record for telling the truth. Saul goes on to point out, however, that "being partly morally responsible for a wrong done to one does nothing to alter the nature of that wrong" (83). Consequently, while the public may be culpable in their own deception, the culpability of the politician is not thereby lessened.

Thus, there are reasons to think that the political liar is not less blameworthy than the interpersonal liar. Is the political liar *more* blameworthy? One reason to think that political lying is often worse than lying in general is that a political lie is a lie to a group. Thus, it is intended to deceive many people at once. If it is bad for me to deceive one person, then would it not be much worse for me to deceive one hundred people? This is just the nature of political actions generally, however. Whether for good or for ill, political actions typically affect many more people than our individual interpersonal actions. This means that they can also do more good. Thus, it need not be any harder for a politician to justify his lies to many than it is for us to justify our lies to one or two people (see Walzer 1973). However, politicians may be tempted to lie when it will only benefit a few people, or perhaps only themselves (see Bok 1978, 174–175). In such cases, political lies probably are worse than interpersonal lies.

Finally, it is worth noting that an interesting puzzle arises in those cases of group belief where no individual believes the lie. In such a case, it seems that the liar has deceived no one. And yet, the consequences are the same as if he had deceived them all. However, if one has an ontologically robust conception of groups, one may argue that the politician did deceive someone—the group itself. Thus, it seems that whether the politician deceived anyone in such cases will hinge on a controversial question in social ontology.

Conclusion

Jason Stanley and others have argued that in this era of "post-truth politics" the public no longer expects politicians to be truthful. But this creates a puzzle—what is the point of lying to someone who won't believe what you say? In this chapter, we have used the tools of social epistemology to explicate how political lying functions and how it remains effective even in the face of an admittedly skeptical public. We have argued that, while Tullock's "classical view" of political lying provides a useful starting point for an account of political lying, his merely summative picture of political lying obscures the ways in which lying to social groups can differ from simply lying to a large number of individuals. Once we give proper attention to the truly social nature of political lying, the success of lying politicians becomes easier to explain.

We have argued that there are a number of reasons why politicians may expect their lies to be successful. First, at least some members of the public are credulous and will irrationally believe what a politician says even when they know that politicians frequently lie. Second, even liars tell the truth sometimes; thus, the public may rationally believe what the politician says when they think it is a context where he or she has no motivation to lie. Third, politicians need not get the public to believe their lies whole hog; like bluffers at a poker table, it will often be sufficient to just move public's degree of belief in a direction that is beneficial to the politician. Furthermore, politicians can make their lies even more effective by exploiting the epistemic vulnerabilities of groups, such as attribution bias, belief polarization, code words, and pluralistic ignorance.

Notes

1 For many helpful suggestions, we would like to thank Emily Crookston, Tony Doyle, David Killoren, Matthew Kopec, Jonathan Trerise, the audience at the Sawyer Seminar on Collective Epistemology (Northwestern University), and an audience at the Center for the Philosophy of Freedom (University of Arizona).

2 The Edelman poll is more on point than the Gallup poll, because Edelman actually asks whether politicians can be trusted *to tell the truth*. Gallup has been polling the US public on levels of trust in government since 1972, but they only ask about whether people trust the government to act in the interests of the public, not whether they trust government officials to tell the truth.

3 Persons may be morally responsible for errors that are due to willful negligence, or for failing in a duty to know important facts. But these moral failings are distinct from lying and should be treated separately.

4 Some (e.g., Carson 2010, 15–17) argue that lies actually have to be false. However, we follow most philosophers in only requiring that the liar *believe* that what she says is false (see Mahon 2015).

5 Tullock also includes amongst the potential cost of a lie the pain in the conscience of the liar in having to do something against his own moral code. But we will set aside this sort of cost here.

6 We would like to acknowledge that we are giving rather more close philosophical scrutiny to an opinion piece than may seem quite fair to Stanley. However, we find Stanley's view as stated in the article sufficiently interesting and common to merit

such a discussion. And, unfortunately, Stanley has not further spelled out his views on this topic in any academic publications.

7 At the very least, they deceived the American public about *the evidence* that they had for there being WMDs in Iraq (see Carson 2010, 216).

8 See Fallis (2015, 335–336) for a discussion of the various motivations for politicians to lie in other contexts.

9 Following Stanley, we are focusing here on Romney's lies and bullshit, but we don't want to suggest that only Republican politicians lie. In fact, one of President Obama's statements was named PolitiFact's Lie of the Year in 2013 (see Holan 2013).

10 This is even true of Donald Trump's campaign for the 2016 Republican presidential nomination, during which PolitiFact rated 78 percent of what he said mostly or completely false. Indeed, one commentator opined that, "Trump is not a liar. He's something worse: a bullshit artist" (Heer 2015). However, while Trump frequently refuses to back up his claims when challenged, he clearly does intend people to believe his claims about such things as his own wealth and his promises to end illegal immigration. (Given his success in convincing people that Obama was not born in the United States, he has good reason to think he will be successful.)

11 According to a recent report, campaigns are now using social media to target individual voters: "Using a bit of code embedded on its website, the Walker team was able to track who visited the donation page, tell which potential backers shared interests with existing supporters and determine who was learning about the candidate for the first time. It could then use that information to target prospective voters with highly personalized appeals" (Parker 2015). In such an environment, it really is as if the politician is lying to one person at a time. There are drawbacks to this individualistic approach, however. It undermines the ability to create common belief, the advantages of which we discuss below.

12 David Lewis actually uses the term *common knowledge* for this sort of concept. But in this chapter, we will use the term *common belief* as it may seem awkward to say that people have common *knowledge* of a lie.

13 Interestingly, there are some indications that there has been a decrease in conformity in the U.S. since the 1950s when Asch (1955) did his original experiments (see Bond 1996).

References

Alterman, Eric. 2005. *When Presidents Lie: A History of Official Deception and its Consequences*. New York: Penguin.

Asch, Solomon E. 1955. "Opinions and Social Pressure." *Scientific American* 193(5):31–35.

Axford, Barrie and Richard Huggins. 2001. *New Media and Politics*. London: Sage.

Beam, Chris. 2010. "Code Black." *Slate*, available at www.slate.com/articles/news_and_politics/politics/2010/01/code_black.html (accessed September 12, 2016).

Blow, Charles M. 2012. "Liberty to Lie." *New York Times*, available at http://campaignstops.blogs.nytimes.com/2012/11/01/liberty-to-lie/ (accessed September 12, 2016).

Bok, Sissela. 1978. *Lying*. New York: Random House.

Bond, Rod and Peter B. Smith. 1996. "Culture and Conformity: A Meta-Analysis of Studies using Asch's Line Judgment Task." *Psychological Bulletin* 119(1):111.

Brewer, Marilynn B. and Roderick M. Kramer. 1985. "The Psychology of Intergroup Attitudes and Behavior." *Annual Review of Psychology* 36(1):219–243.

Carroll, Lauren. 2016. "Marco Rubio incorrectly says illegal immigrant population is higher than 5 years ago." *Poltifact.com*, available at www.politifact.com/truth-o-meter/statements/2016/jan/31/marco-rubio/marco-rubio-incorrectly-says-illegal-immigrant-pop/ (accessed September 12, 2016).

Carson, Thomas L. 2010. *Lying and Deception*. New York: Oxford University Press.

Chwe, Michael Suk-Young. 2013. *Rational Ritual: Culture, Coordination, and Common Knowledge*. Princeton: Princeton University Press.

Cialdini, Robert B. and Noah J. Goldstein. 2004. "Social Influence: Compliance and Conformity." *Annual Review of Psychology* 55:591–621.

Cohen, Ted. 1999. *Jokes*. Chicago: University of Chicago Press.

Corn, David. 2012. "Secret Video: Romney Tells Millionaire Donors What He REALLY Thinks of Obama Voters." *Mother Jones*, available at www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser (accessed September 12, 2016).

Davis, Michael L. and Michael Ferrantino. 1996. "Towards a Positive Theory of Political Rhetoric: Why Do Politicians Lie?" *Public Choice* 88:1–13.

Davis, Wayne A. 1999. "Communicating, Telling, and Informing." *Philosophical Inquiry* 21:21–43.

Edelman. 2014. "2014 Edelman Trust Barometer," available at www.edelman.com/insights/intellectual-property/2014-edelman-trust-barometer/trust-around-the-world/index.html (accessed July 25, 2015).

Fallis, Don. 2013. "When It's Right to Lie to a Bootlegger." Pp. 101–113 in *Boardwalk Empire and Philosophy*, eds. Richard Greene and Rachel Robison-Greene. Chicago: Open Court.

Fallis, Don. 2015. "Disinformation, Deception, and Politics." Pp. 334–340 in *American Political Culture*, ed. Michael Shally-Jensen. Santa Barbara: ABC-CLIO.

Frankfurt, Harry. 2002. "Reply to G. A. Cohen." Pp. 340–344 in *Contours of Agency*, eds. Sarah Buss and Lee Overton. Cambridge: MIT Press.

Frankfurt, Harry G. 2005 [1986]. *On Bullshit*. Princeton: Princeton University Press.

Fricker, Miranda. 2012. "Group Testimony? The Making of a Collective Good Informant." *Philosophy and Phenomenological Research* 84:249–276.

Gilbert, Margaret. 1989. *On Social Facts*. Princeton: Princeton University Press.

Goldman, Alvin and Thomas, Blanchard. 2015. "Social Epistemology." *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/epistemology-social/ (accessed September 12, 2016).

Goodin, Robert E. 2008. *Innovating Democracy*. Oxford: Oxford University Press.

Heer, Jeet. 2015. "Donald Trump is Not a Liar." *New Republic*, available at https://newrepublic.com/article/124803/donald-trump-not-liar (accessed September 12, 2016).

Hewstone, Miles, Mark Rubin, and Hazel Willis. 2002. "Intergroup Bias." *Annual Review of Psychology* 53(1):575–604.

Holan, Angie D. 2013. "Lie of the Year: 'If You Like Your Health Care Plan, You Can Keep It.'" *Politifact.com,* available at www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/ (accessed September 12, 2016).

Jones, Jeffrey M. 2016. "Americans' trust in political leaders, public at new lows." Gallup.com. www.gallup.com/poll/195716/americans-trust-political-leaders-public-new-lows.aspx (accessed October 21, 2016).

Kant, Immanuel. 1996 [1785]. *Practical Philosophy*, ed. M. J. Gregor. Cambridge: Cambridge University Press.

Keyes, Ralph. 2004. *The Post-Truth Era: Dishonesty and Deception in Contemporary Life*. New York: St. Martin's.

Krugman, Paul. 2011. "The Post-Truth Campaign." *New York Times*, available at www.nytimes.com/2011/12/23/opinion/krugman-the-post-truth-campaign.html (accessed September 12, 2016).

Lackey, Jennifer. 2014. "Group Lies." Paper presented at the International Workshop on Lying and Deception, Mainz, Germany.

Lee, Kristen A. 2012. "Liar, Liar, Pants on Fire: Obama, Romney Campaigns Slam the Other for ~." *New York Daily News*, available at www.nydailynews.com/news/politics/liar-liar-pants-fire-obama-romney-campaigns-slam-dishonesty-article-1.1133422 (accessed September 12, 2016).

Lewis, David. 1969. *Convention: A Philosophical Study*. Cambridge: Harvard University Press.

Machiavelli, Niccolo. 1979 [1513]. *The Portable Machiavelli*, eds. Peter Bondanella and Mark Musa. New York: Penguin.

Mahon, James. 2015. "The Definition of Lying and Deception." *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/lying-definition/ (accessed September 12, 2016).

Manson, Neil C. 2012. "Making Sense of Spin." *Journal of Applied Philosophy* 29:200–213.

Mearsheimer, John J. 2011. *Why Leaders Lie*. New York: Oxford University Press.

Mullainathan, Sendhil and Andrei Shleifer. 2005. "The Market for News." *American Economic Review* 95(4):1031–1053.

Newey, Glen. 1997. "Political Lying: A Defense." *Public Affairs Quarterly* 11:93–116.

Noah, Timothy. 2004. "Why Bush Opposes Dread Scott: It's Code for Roe v. Wade." *Slate*, available at www.slate.com/articles/news_and_politics/chatterbox/2004/10/why_bush_opposes_dred_scott.html (accessed September 12, 2016).

Nyhan, Brendan and Jason Reifler. 2010. "When Corrections Fail: The Persistence of Political Misperceptions." *Political Behavior* 32:303–330.

Parfit, Derek. 2011. *On What Matters (vol. 1)*. Oxford: Oxford University Press.

Parker, Ashley. 2015. "Facebook Expands in Politics, and Campaigns Find Much to Like." *New York Times*, available at www.nytimes.com/2015/07/30/us/politics/facebook-expands-in-politics-and-campaigns-find-much-to-like.html (accessed September 12, 2016).

Pinker, Steven. 2011. *The Better Angels of Our Nature*. New York: Viking.

Plato. 2004 [380 BCE]. *Republic*, trans. C. D. C. Reeve. Indianapolis: Hackett.

PolitiFact. 2015. "About PolitiFact." *Politifact.com*, available at www.politifact.com/about/ (accessed September 12, 2016).

Rutenberg, Jim, and Jackie Calmes. 2009. "False 'Death Panel' Rumor Has Some Familiar Roots." *New York Times*, available at www.nytimes.com/2009/08/14/health/policy/14panel.html (accessed September 12, 2016).

Safire, William. 2008. *Safire's Political Dictionary*. New York: Oxford University Press.

Saul, Jennifer. 2012. *Lying, Misleading, and What is Said: An Exploration in Philosophy of Language and in ethics.* Oxford, UK: Oxford University Press.

Sinnott-Armstrong, Walter. 2011. "Moral Skepticism." *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/skepticism-moral/ (accessed September 12, 2016).

Sivulka, Juliann. 2011. *Soap, Sex, and Cigarettes: A Cultural History of American Advertising*. Boston: Cengage Learning.

Skillicorn, David and Christian Leuprecht. 2015. "Deception in Speeches of Candidates for Public Office." *Journal of Data Mining and Digital Humanities*, Episciences.org. 1–43. https://hal.archives-ouvertes.fr/hal-01024985v3

Stanley, Jason. 2012. "Speech, Lies, and Apathy." *New York Times*, available at http://opinionator.blogs.nytimes.com/2012/08/30/speech-lies-and-apathy/ (accessed September 12, 2016).

Sunstein, Cass R. 2007. *Republic.com 2.0*. Princeton: Princeton University Press.

Swift, Jonathan. 2004. *A Modest Proposal and Other Prose*. Barnes & Noble Publishing.

Tollefsen, Deborah. 2002. "Organizations as True Believers." *Journal of Social Philosophy* 33:395–410.

Tollefsen, Deborah. 2002. "Organizations as True Believers." *Journal of Social Philosophy* 33:395–410.

Tollefsen, Deborah. 2007. "Group Testimony." *Social Epistemology* 21:299–311.

Tullock, Gordon. 1967. *Toward a Mathematics of Politics*. Ann Arbor: University of Michigan Press.

Walzer, Michael. 1973. "Political Action: The Problem of Dirty Hands." *Philosophy & Public Affairs* 2:160–180.

Zeleny, Jeff. 2008. "Opponents Call Obama Remarks 'Out of Touch.'" *New York Times*, available at www.nytimes.com/2008/04/12/us/politics/12campaign.html (accessed April 12, 2008).

Zezima, Katie. 2016. "Liar, liar: A Charged Word Is Now Common in the GOP Race." *The Washington Post*, available at www.washingtonpost.com/politics/liar-liar-a-charged-word-is-now-common-in-the-gop-race/2016/02/19/96464d34-d63e-11e5-b195-2e29a4e13425_story.html (accessed September 12, 2016).

Part II

Nonideal Politicking

3 Nonideal Politicians or Nonideal Circumstances?

Rethinking Dirty Hands

Jaime Ahlberg

It is sometimes said that the people who would make desirable political leaders are the very people who refuse to engage in politics. Playing the political game well involves 'dirtying one's hands', frequently engaging in the kinds of action-types that good people typically avoid: manipulation, slander, strong-arming, deception and outright lying, and at times the initiation of violence. The willingness to engage in such action-types, the thought continues, signals a corrupt character—just the kind of person we would want to distance from positions of responsibility for the health and wellbeing of our social and political community.

And yet, it is also a common assumption that in order to be successful in achieving worthwhile political ends, the politician will often be required to act in ways that appear to be less than moral, or even to be wrong. This is, presumably, *why* we think those who are good people are reluctant to be politicians. To win an election, candidates—even those with good ends in view—are pressed to deceive potential voters or to slander their unscrupulous opponents. And when in office, the politician might have to keep information from or deceive the public, threaten political enemies, or renege on promises in order to achieve good or worthy medium or long-term political ends.

Given these assumptions, what are we to conclude about the possibility of a moral politician: a politician who acts rightly in the world, with all of its moral messiness? Michael Walzer encapsulates the nature of the moral politician as follows:

> Here is the moral politician: it is by his dirty hands that we know him. If he were a moral man and nothing else his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean.[1]

Here Walzer indicates that the role of the politician necessitates engaging in action-types that morality forbids, and thus that one cannot be a politician without acting wrongly. The politician must have 'dirty hands.' Nonetheless, the passage also indicates that such action, done within the context of the politician's role, is somehow consistent with being moral. Many puzzles arise out of this conception of the moral politician, but here I want to tackle just one:

how can a politician act rightly while also being required to engage in objectionable action-types in order to achieve worthy political ends?

I will make use of the distinction between ideal and nonideal theory in order to begin to answer this question. Briefly, ideal theory describes the realm of value that governs social practices and individual behaviors when they comply with the dictates of morality. Nonideal theory describes the realm of value that governs practices and behaviors under conditions of systematic departure from the dictates of morality. Ideal theory sets a goal for our institutions and for ourselves to achieve, if and when it is possible to do so.[2] It helps us to diagnose instances of immorality, and can be helpful in guiding us to achieve more ideal conditions by identifying that which we ought to instantiate in the world if possible. Employing the distinction between ideal and nonideal permits a principled explanation of the common intuition that even the moral politician is required to act in ways that appear in some sense to be wrong. Specifically, nonideal conditions provide a context within which politicians are licensed to act in ways that would not be permitted under ideal conditions. It is the fact that the actions would be wrong in the ideal context that creates the unease with following through with them, though of course nonideal theory can provide a principled justification for such departures, thus legitimating them. Further, under a Rawlsian conception of ideal and nonideal theory, the distinction can supply a method for determining when actions mark permissible departures from ideal morality and when they do not. This is what enables the distinction between the moral and the *im*moral politician.

The essay proceeds as follows. In the next section, I describe dirty hands conflicts in more detail and outline some influential responses to them. Doing so helps to situate my account in the current literature. The section provides a Rawlsian model for moving from ideal to nonideal theory in the context of individual moral action and in the following section I argue that this structure applies to political office. In "Principles for Politicians", I offer a sketch of the kind of principles that govern politicians in the nonideal political arena. The final section concludes.

Situating the Account

Dirty hands conflicts are usually characterized as those in which the agent in question—here the politician—must choose between actions which are all bad, but are not equally bad. Choosing one action over the other(s) is the right, even obligatory thing to do. Because of this 'dirty hands' cases are not true dilemmas, since in a true dilemma whatever decision the agent makes will be wrong. In dirty hands cases there is thus a kind of "resolution" about what ought to be done.[3] And yet, though there is a right action to take, that action is nonetheless "somehow wrong, shameful, [or] the like" as Michael Stocker has put it, and as a result there is a "remainder" that the agent carries after she has committed the action. [4] Perhaps she has a special type of regret or guilt for acting in such a way. At the very least she experiences compunction about having done it. Dirty hands cases thus have a paradoxical flavor: there is a strong sense in which the

action is both right and wrong at the same time, even though it is on balance the morally preferable action.

A standard illustration of a dirty hands conflict is precisely the politician of good character who must engage in morally questionable tactics for admirable political ends. Michael Walzer famously describes a case in which a political candidate who is a morally good person and who is motivated to do social good via the office he seeks "must win" an election, but the price of winning the election is promising grant contracts to a dishonest ward boss for the construction of schools over the next four years. We know that a good person will take issue with having to make this deal. Plausibly, the competing principles the candidate is torn by include something like fair equality of opportunity on the one hand, and on the other the realization that other candidates would be sure to do *even worse* in their pursuit of power and prestige. So, Walzer writes:

> [W]e view the campaign in a certain light, estimate its importance in a certain way, and hope that he will overcome his scruples and make the deal. It is important to stress that we don't want just *anyone* to make the deal; we want *him* to make it, precisely because he has scruples about it. We know he is doing right when he makes the deal because he knows he is doing wrong. I don't mean merely that he will feel badly or even very badly after he makes the deal. If he is the good man I am imagining him to be he will feel guilty, that is, he will believe himself to be guilty. That is what it means to have dirty hands.[5]

It should be apparent that there is a puzzle here, for as Walzer put it: "How can it be wrong to do what is right? Or, how can we get our hands dirty by doing what we ought to do?"[6]

Disagreement abounds on how to appropriately characterize dirty hands cases, whether to accept or deny their existence, and even whether they are conceptually possible.[7] Some are tempted to reject the puzzle by denying the existence of dirty hands. One sort of denial of dirty hands cases is consequentialist. The consequentialist strategy for dissolving the puzzle is straightforward. Doing the right thing is simply doing what will lead to the best consequences, so there is no sense in which a wrong is committed.[8] Granting the ward boss the contracts is in no way wrong, if it brings about the best state of affairs, on balance. A very different way of denying the existence of dirty hands conflicts is to take an absolutist deontological line: it is simply wrong to lie, kill, etc., and one must never do such things. Kant offers a moral theory paradigmatic of this stance. Whether granting the contracts is wrong simply depends on whether doing so is in violation of any duties one has to refrain from doing so.

For those who accept the existence of dirty hands, there are a variety of ways of situating them within or against morality. Some have argued that in specific cases, non-moral 'oughts' can trump moral 'oughts.' Machiavelli provides the most prominent and influential expression of this view as it relates to politics, arguing that politics exists outside of morality to the extent that acting politically

is subject to a different set of rules. "[A] prince […] must learn how not to be virtuous," he famously says.[9] Alternatively, one could have a hybrid moral theory, which brings different kinds of moral reasons to bear on what the right thing to do is, depending on what is at stake. Threshold deontologists, for instance, hold that some moral lines must never be crossed but that beyond those, consequentialist calculations can come into play. Plausibly, killing one's opponents will always be impermissible, though it is less obvious that granting the ward boss the favor will turn out to be such a serious violation.

In what follows I will deny the existence of dirty hands conflicts without taking either an absolutist deontological stance or a consequentialist stance. I will also not adopt a threshold deontological stance, as what I propose will be deontological through and through. Instead, I will focus on the nature of the conditions that can justify deviance from ideal rules of conduct when one is acting in the role of politician in the actual, nonideal world. In claiming that such deviance is *justifiable*, I deny that the structure of typical dirty hands cases applies to the typical action of the politician: it is not the case that one and the same action is right *and* wrong. Rather, many of these are cases in which the politician can act fully rightly, even when doing something that would be forbidden in a better world than the one in which we live. Importantly then, nonideal conditions can legitimate actions within the context of public office that would otherwise be illegitimate. It will be my goal here to outline the kinds of conditions that can perform this legitimating function, as well as to indicate the boundaries of that legitimization.

Individual Morality in the Nonideal World

A great deal of theorizing about ideal and nonideal conditions adopts an institutional framework and works under the purview of *justice* in particular. So, many political philosophers, John Rawls prominent among them, have been interested in understanding how a perfectly functioning human *society* should be organized given "reasonably favorable circumstances"—the best, but not impossible, circumstances we can imagine human societies inhabiting. But they have also been interested in how to understand justice in the context of real societies—those that have, uncontroversially, histories of historical injustice, or other social or natural contingencies that prevent them from realizing full justice. The way Rawls puts it, ideal theory ought to "provide some guidance in thinking about nonideal theory, and […] about difficult cases of how to deal with injustices. It should also help to clarify the goal of reform and to identify which wrongs are more grievous and hence more urgent to correct."[10] Ideal theory thus tells us what to aspire to if we can, even if it does not provide us with the principles we ought to directly live by.[11]

An analysis of dirty hands conflicts must focus, in the main, on the morality of individual action rather than the structure of institutions. Of course, in democracies a politician's individual action is often judged for its appropriateness and legitimacy according to the extent to which it is sanctioned by the

institutional mechanisms that represent the will of the public. In this way, democratic political roles must always be understood as institutionally embedded. Nevertheless, here I develop an account that begins with how *individual* behavior that is forbidden in so-called ideal contexts can nonetheless be permissible. Following Rawls's lead, I will explore the principles of right as they apply to individual conduct and how those principles are justified alongside of, and sometimes within the context of, his institutional framework. I thus aim to sketch a set of individual principles of right action in nonideal contexts, when one occupies a political role.

Rawlsian *requirements* are moral rules that govern the right conduct of individuals.[12] They are made up of the *natural duties*, which we all share as moral agents, and one's particular *obligations*. Rawlsian natural duties apply to all persons in virtue of their moral status.[13] They include, as examples, the negative duties not to be cruel or cause unnecessary suffering, not to injure, and not to harm the innocent. Positive duties include, again as examples, the duty to help one another, the duty of justice, and the duty of mutual respect. It is worth noting that Rawls divides the natural duties into positive and negative duties, and that he thinks that the negative duties have a priority over the positive ones. Rawls does not develop a complete account of the duties, and nor does he give a systematic account of the priority rules governing them.

Ralwsian obligations arise from voluntary action.[14] Their content is determined by the rules of the (just) practices we collectively decide to involve ourselves in, and they are usually owed to definite persons. Rawls assigns the principle of fairness a central position in ethical theory, as he thinks it governs *all* obligations. Voluntary commitments (whether explicitly or implicitly made) are thus meaningful from the moral point of view insofar as they figure in our social practices. Such commitments derive their content from the rules that govern the social practice in question, and are binding when the following conditions are met: the institution is a "mutually beneficial and just system of social cooperation"; compliance with its rules involves some sacrifice (even if only some restrictions on one's liberty); the relevant benefits are created by compliance with its rules; free-riding is possible; one has accepted the benefits.[15]

Nonideal theory becomes necessary when one is no longer operating within a fair system, according to Rawls. When one is carrying more than one's fair share of social burden, or restricted from accessing the benefits of cooperation for instance, it becomes reasonable to question whether one is still bound to one's obligations and natural duties.

The distinction between ideal and nonideal theory has been employed by ethicists in order to analyze a variety of cases, some involving social policy and some involving individual behavior.[16] Here I draw on Tommie Shelby's use of the distinction to investigate the obligations of the black urban poor under conditions of rampant social injustice.[17] Shelby's analysis is helpful for my purposes in two ways. First, it provides a clear illustration of how to apply Rawls's theory of the morality of individual action to a nonideal case, and motivates Rawls's framework as a plausible one. Second, the case of the black urban poor provides a helpful

contrast to the case of the politician. Examining the relevant similarities and differences between the two illuminates how we ought to think about the duties and obligations surrounding political office in the actual world.

Under a Rawlsian view, civic obligations are only owed to those with whom one is cooperating to maintain a fair basic structure. But "the existence of the dark ghetto—with its combination of social stigma, extreme poverty, racial segregation (including poorly funded and segregated schools), and shocking incarceration rates—is simply incompatible with any meaningful form of reciprocity among free and equal citizens."[18] Shelby thus questions whether the deviant conduct and attitudes prevalent in the 'dark ghetto' are *unreasonable* in that they express an unwillingness to abide by the fair terms of social cooperation that others accept. And further, he asks what obligations ghetto residents have if the US system is either flawed or fundamentally unjust.

He argues that the civic obligations of ghetto residents are plausibly relaxed from the moral perspective, given that even their basic liberties are not secured. The obligations to work and to develop one's talents thus may well not apply to many of the black urban poor for example. The natural duties are more difficult to relax in the nonideal context because they apply to everyone in virtue of their personhood. Since they are not contingent upon operating within a just system, oppression is not sufficient to license fully suspending them. Gratuitous violence, killing (other than in self-defense), indifference to the suffering caused by one's actions, and ignoring the humanity in others will always be forbidden from the moral point of view. As a result, 'gangster criminality', as Shelby calls it, is forbidden (violence, threats, intimidation, recruiting children into gangs) because it fails to express sufficient concern for the suffering of others and for the humanity in others. Nevertheless, some forms of crime may be consistent with upholding one's natural duties in the ghetto environment: shoplifting and other forms of (nonviolent) theft; gang membership; 'victimless crimes' like prostitution, welfare fraud, tax evasion, and the selling of stolen goods.[19]

Even in the nonideal context the natural duties rule out the most serious instances of disrespecting and/or harming others for personal gain, though actions implicated in harms may be permitted. Infractions against innocents (children and the most vulnerable) will always be wrong, though some crimes against adults, even those who are also among the urban poor, might be justified given the conditions of the ghetto. Civic obligations can be relaxed since (he argues) the fair terms of cooperation do not exist for the ghetto poor.

How can we move from Shelby's analysis to thinking about a politician in nonideal circumstances? First, note the central glaring similarity: in both cases agents are acting within a context in which others are not acting morally, and in so doing, threaten genuine cooperation. In the case of the ghetto poor this includes others who are acting on gangster and hustler codes of conduct. In the case of the politician it includes those who would utilize their finances, political power, knowledge, or perhaps military position for personal or political gain, regardless of law or morality. Consider again Walzer's example of the prospective candidate who must decide on a course of action given the presence

of a corrupt opponent and a ward boss leveraging his political and financial power for future favors. In both the dark ghetto and the realm of politics, those who are compelled by morality are in a bind: how is one to respond to others' immoral actions without thereby corrupting oneself, and/or making oneself complicit in the disintegration of cooperative interaction?

Note a second similarity between the two cases regarding the systemic scope of the problem. Both the resident in the dark ghetto and the politician can know with a high degree of certainty that she will be faced with responding to the immoral conduct of others. These are not isolated and fully unpredictable instances of bad behavior that cannot be anticipated. They are, rather, characteristic of the context within which these agents act. That the immoral behavior of others is systemic contributes to the instability of the cooperative venture. When one cannot rely on others abiding by a basic principle of fairness, confidence in the social practices one engages in is diminished. One might even question the nature of the social practice one engages in; the dictates of the norms of cooperation and the content of its benefits and burdens can be obscured by significant noncompliance.[20]

Despite these two similarities, there are seemingly relevant differences that would press on the appropriateness of the analogy between the residents of the dark ghetto and politicians. In particular, such differences threaten the plausibility that principles of right might be relaxed, or even modified, in cases in which politicians are confronted with the immoral behavior of others. Here are three important disanalogies:

1 Politicians are not *wronged* in their circumstances. The black urban poor, by contrast, are oppressed.
2 Politicians *choose* to occupy their nonideal circumstances. This is unlike the case of the black urban poor, who do not choose to enter the ghetto and often cannot leave it.
3 Politicians are subject to a special kind of role morality *qua* politicians, and not merely general morality. The black urban poor do not occupy any particular role, other than that of general citizen.

In the next section I will argue that none of these differences undermines the application of the ideal/nonideal distinction to the case of politicians. Of course, thinking about the role of the politician in the nonideal world will have to follow a different course, but I will argue that the distinction, in the context of a Rawlsian framework, offers appropriate guidance for how to think it through. Further, exploring these potential disanalogies illuminates the unique features of the political role and how it varies across ideal and nonideal circumstances.

Applying Rawls's Structure to Political Office

Let me consider each of the potential disanalogies in turn.

First, politicians are not *wronged* in their circumstances, which might lead one to conclude that they have less license to deviate from ideal principles than

those who are. Shelby's agents are wronged insofar as they are oppressed, cut off from important benefits of social cooperation, and thus not fully subject to the demands of reciprocity encoded in law. Walzer's politician who is considering giving the contract to the dubious ward boss is not, just by being presented with the proposal, wronged. And she doesn't look wronged by the fact that, if she refuses the ward boss, her opponent will win the election.[21]

Importantly, there need not be a wrong in order for one to be in a nonideal circumstance. Nonideal conditions are simply those that mitigate the responsibility to do what is otherwise morally required. In the Rawlsian view, nonideal 'natural conditions' and contingent historical circumstances (which need not involve wrongdoings), can also serve this mitigating function.[22] In such cases, the ideal should guide us just as it does in nonideal contexts involving wrongdoing; it diagnoses the ways in which circumstances fall short and can help to prioritize movements toward the ideal. Further, as I will discuss further in a moment, not being wronged by a system might generate an obligation for some self-sacrifice (also a deviation from the ideal), when that system is implicated in wrongs to others.

Second, membership in the dark ghetto is different from occupying political office because membership is almost always nonvoluntary. Ghetto residency is not entered into by choice, and in almost all cases it cannot be exited by choice. Because Rawlsian civic obligation arises out of voluntary commitment to the terms of social cooperation, the 'deviant' conduct and attitudes prevalent in the ghetto are not unreasonable in current nonideal circumstances (granting Shelby's argument). The ghetto residents are not unreasonable because they do not express an *unwillingness* to abide by the fair terms of cooperation that others accept and abide by, precisely because others are *not* accepting and abiding by those terms. Now, they might be considered unreasonable if they could leave the ghetto but do not solely because they prefer to live by gangster or hustler codes of conduct rather than according to a principle of fair play.[23] Presumably to do that *would* be to express an unwillingness to abide by the norms of social cooperation. But that is not the situation; their situation is inescapable.

Politicians, on the other hand, *seek out* the career that they understand will put them into nonideal circumstances. They do not as a rule face steep barriers to exit. Many of them can very well quit politics. And, in the case of the aspiring politician, she could easily choose a different profession. The voluntary nature of occupying office throws into doubt the impulse to mitigate politicians' obligations to adhere to ideal standards of conduct when others fail to do so. If politicians could leave the profession rather than deviate from ideal standards of conduct, or simply avoid the profession altogether, then part of Shelby's argument for relaxing ideal standards simply does not apply because we have as yet no reason to suppose that obligations should be mitigated in circumstances that one *chooses* to enter. Politicians look more like willing participants in dealings they can predict to be shady, if not outright immoral. They are not, like the residents of the ghetto, trapped by circumstance.[24]

While the objector is certainly correct that any one person may decline to enter or to continue in political office, it is not the case that *everyone* may decline.[25] The existence of political office is a strict prerequisite for the maintenance of our democratic system of government, which (ideally) operationalizes a mutually beneficial system of social cooperation. Insofar as we value representative democracy we rely on people to act as the arbiters of our political system; we need someone to do it. If no one wanted to be a politician we would have to make political office a more enticing prospect, so as to secure participation. The necessity of political office is, in this way, like the necessity of parenting. What matters from the social perspective is that people raise children, from whatever motives.[26] If people were sufficiently uninterested in becoming parents, society would have to either make childrearing a more interesting prospect or develop sufficiently good state-run ways of rearing children. Holding political office and raising children are in this way quite unlike most of the other projects and professions people in society hold, even the highly valuable and esteemed ones. We could have a society without garbage collectors, firefighters, and doctors, albeit probably a less good one.[27] We could not have a viable democratic society *at all* without office holders and parents.

This fact is of relevance to the nature of political office-holding. The role must allow for responsiveness to on-the-ground conditions, whatever those conditions happen to be,[28] because having the role is a basic precondition for a just democracy. Strict adherence to ideal principles against a background of injustice would not allow for this sort of responsiveness.[29] But then, the willingness of the participants in entering, and remaining, in the role of office-holding looks immaterial to the question of whether nonideal principles are appropriate in this case. What settles that question is the nature of the role itself, and its necessity for democratic society. While Shelby was able to argue that the obligations of the ghetto poor are sometimes suspended because membership in the dark ghetto is nonvoluntary, the case for modifying political obligations in nonideal circumstances has to be different. Political obligations are altered insofar as is required to uphold the purpose of the role of office-holding. I will elaborate on the role of office-holding in the next section.

Secondly, it is worth noting that even if the *obligations* incurred by occupying political office are acquired voluntarily, the *natural duties* involuntarily apply to all persons. So even if the voluntariness of office implied that a politician's obligations could not be relaxed in nonideal circumstances (which I have already argued it does not), it would not follow that her natural duties could not be relaxed. Depending on how the nonideal natural duties are characterized, this may be highly relevant to a politician in the nonideal world. I provide examples in the next section.

Lastly, and as already hinted, deviation from the ideal may mean one has *more onerous* obligations than one would in a better world. Plausibly, the case of the politician is like this. Successful political candidates are a small subset of the population, and a subset that has nearly always received the intended benefits and opportunities made available by the social system. Further,

positions in offices of responsibility are scarce goods, and themselves are sources of power and opportunity. In addition to relaxing the demandingness of the obligations of those who are more vulnerable and less powerful, nonideal theory might well demand ratcheting up the demands on those who are benefitting from the unjust scheme, intentionally or not. *Choosing* to cash in on one's opportunities by occupying political positions of status in an unjust world plausibly makes one subject to these greater demands. Nonideal theory would help to explain why, and help give content to those additional obligations and/or duties if they indeed exist.

The last potential disanalogy to consider is that politicians are subject to a special kind of role morality where the black urban poor are not. One might think that because role morality is merely conventional, it is not subject to the ideal/nonideal framework. There is no *ideal* doctor, teacher, parent, or politician. There are only the norms and rules we associate with those roles, which ought to be applied in each circumstance in which they occur.

First, it is not quite right to say that the black urban poor do not occupy a role. They do: the role of citizens. One aspect of Shelby's inquiry involves the responsibilities and obligations of the black urban poor *as citizens*. And, he finds that a major mitigating factor with regard to their obligations is that this group of citizens has been wronged in various ways because their standing as citizens has not been properly respected.

Nevertheless it is true that politicians are also citizens, and that beyond this they occupy an additional, more specific role. This is not a fatal disanalogy. Role morality is, in part, conventional. But it being conventional is not enough to guarantee that role morality is not subject to the ideal/nonideal distinction. We *do* say something ideal about social roles when we outline the norms and rules that govern their appropriate performance. This is the purpose of Rawls's principle of fairness; it defines obligations in the context of just conventions. Consider the role of physician. Determining the obligations of doctors involves outlining the rights and responsibilities of doctors and their patients against a background of at least moderate resources. Cases involving medical triage are instances of special (i.e. nonideal) cases because they involve circumstances of limited resources and/or extreme demand, in which doctors cannot mete out their usual responsibilities. In such cases different rules for action must be developed for doctors, rules that would be inappropriate and even immoral to follow in the more typical case. I am imagining the role of the politician in this same sort of way. The mere fact that it is conventional does not show that it is not subject to principles of right, which can vary across ideal and nonideal circumstances.

In this Rawlsian framework, the relevant work to be done in determining the principles that govern politicians is to clarify how the natural duties and the obligations attached to political office yield the requirements that apply to them. I will sketch the beginnings of an account of this in the next section.

Principles for Politicians

Building a Rawlsian account of ideal/nonideal political ethics requires determining how the natural duties are relevant to politicians' actions as well as the obligations attached to political office. But first, determining the content of those duties and obligations in the nonideal world involves invoking a methodological principle that indicates the relationship between ideal and nonideal principles. Thus far, the following methodological principle has been implicit in my discussion of the connection between ideal and nonideal:

> Methodological Principle for Nonideal Theorizing: When deriving nonideal principles, adhere to the substantive and methodological commitments of ideal theory.

This principle is inspired by Rawls's claims regarding the role of ideal theory, and it is operational in most of the works in nonideal theory I have cited in this paper.[30] The application of this principle is not algorithmic; it requires judgment and argument in each case in which it is invoked. In this way it is more difficult to apply than a consequentialist calculus, because applying it is not a (merely) quantitative enterprise.

To establish its prima facie plausibility, consider a brief example of how the Methodological Principle might be applied. Think about Rawls's brief treatment of the topic of civil disobedience in *A Theory of Justice*. Rawls imagines a "nearly just" society in which there is nevertheless some systemic injustice, and in which citizens consider combatting the injustice with civil disobedience rather than overt violence. Importantly, civil disobedience is inconsistent with the demands of ideal justice; in the act of intentionally disobeying the law, one is refusing to do one's part in upholding the scheme of social cooperation. And yet, Rawls argues that it can be justified in the case he imagines, and that it is preferable to violent uprising. Robert Taylor summarizes Rawls on this point:

> Certain features of civil disobedience—its nonviolence, its "fidelity to law" (e.g., willing acceptance of punishment), and especially its public, expressive nature, which addresses itself to the reason of fellow citizens and appeals to liberal-democratic principles that they share—reveal its consistency with the spirit, if not the letter, of ideal theory.[31]

Civil disobedience is superior to violence as a method of resistance because it reveals commitment to the values that drive theorizing at the ideal level. The substantive value commitments of ideal theory, in this way, function to orient reasoning about two very different responses to injustice.

In what follows I sketch an application of ideal principles for individual action to politicians in the real world using the methodological principle. This sketch will not be comprehensive because I am not offering a full account of political ethics. Further, I will only offer brief examples to illuminate the

principles I derive. Many of the activities politicians typically engage in will thus not be addressed. Nevertheless I hope to say enough to show how such an account could be made richer by the incorporation of more detailed and varied examples. I begin with the natural duties and what they imply.

Do not injure or harm the innocent, and do not cause unnecessary suffering are the duties that carry with them the most urgency. Taking people's lives in order to advance politically will be straightforwardly forbidden. So will taking the lives of innocents even to assure 'better consequences' for one's polity. For instance, executing an innocent in order to stop a rash of crime would be forbidden on these grounds.[32] Causing greater suffering for society's most vulnerable populations in order to advance one's career would also be impermissible, even if the alternative involves a less scrupulous candidate moving ahead. Thus far we have the following candidate principle:

> (1) Prioritize meeting the most urgent ideal principles: refrain from causing unnecessary suffering; refrain from killing or harming innocents.

The positive natural duties are less straightforward. For Rawls, the duty of justice demands working to achieve and maintain a just society. This is important from the standpoint of *stability* because it solves a kind of *assurance* problem—it keeps self-interest in check; it alleviates apprehension that others are *not* doing their part to uphold justice. Rawls writes:

> This instability is particularly likely to be strong when it is dangerous to stick to the rules when others are not. It is this difficulty that plagues disarmament agreements; given circumstances of mutual fear, even just men may be condemned to a condition of permanent hostility. The assurance problem, as we have seen, is to maintain stability by removing temptations of the first kind, and since this is done by public institutions, those of the second kind also disappear, at least in a well-ordered society.[33]

When society is *not* well-ordered, when other people are not working toward maintaining a just society, instability is more likely. Consider Walzer's case again, of the demand to grant a favor to a ward boss in order to secure the election. One's opponent is not motivated by acceptable political ends, and will win if one does not accept the deal. The corruption creates the circumstance and the corruption is not one's own doing. Being motivated to minimize corruption (i.e. move toward full justice as required by the duty of justice) might well accurately characterize the motivations of our virtuous candidate, and the only way to do that is for him to work within the corrupt system. While the duty of justice would prohibit the *initiation* of such a bribe, it would plausibly permit (though not require) the *acceptance* of a bribe in corrupt circumstances such as these.

Alan Donagan has suggested that the acceptance of the bribe in Walzer's case is a form of self-defense against the corrupt behavior surrounding the

election: "it is not wrong to defend yourself by means of corruption already initiated by others."[34] Characterizing the acceptance of the bribe as self-defense is, however, counterintuitive.[35] Another response to the ward boss's offer is not to run at all, or to publicly expose the offer knowing that doing so will ruin one's chances at office. The candidate is not defending any right of his to win the seat. Rather, the duty of justice moves us toward promoting a more just system, and it is plausible that in this case the acceptance of the bribe can achieve that. Dropping out of the race or accepting loss by not accepting the bribe would, alternatively, not be movements toward a more just system.

Two general principles suggest themselves in light of these considerations:

> (2) Act in ways that maintain and promote justice, when it is possible to do so. (This is the duty of justice.)[36]
> (3) Do not act in ways that make the nonideal circumstances *less* tractable than they already are.

Under these two principles common political behaviors, some of which are legal, would be forbidden. Accepting money in exchange for political promises, with no intention of doing so in the service of maintaining or promoting justice, would not be permissible. Nepotism would not be permissible. And obviously, the use of deception to shield oneself from punishment or to secure undeserved rewards would be impermissible.

The duty of mutual respect involves, among other things, being willing to listen to those with whom one disagrees, being able to assemble good reasons for one's actions and being willing to offer those reasons to others. Campaigning well often seems to demand thwarting this duty, as it usually involves slandering and lying in order to compete on a level footing (especially in high-profile and high-stakes races).[37] But if so, how is one to campaign effectively in a world in which others are not listening, not acting on the basis of mutually agreeable reasons, and not offering those reasons? Here we have to remember the second principle above and say that being the initiator of dirty campaigning looks to be prohibited because it is contrary to the spirit of mutual respect (respect not only for one's immediate interlocutors, but also one's potential constituents). But assuming that one is running against those who are engaging in such tactics, I suggest the following principle:

> (4) Be *able to* act on the duty of mutual respect when one's peers make it impossible to do so openly.[38]

Negative ad campaigning may well turn out to be permissible on these grounds, particularly when the ads are based in truth and in response to an opponent who is not conducting herself in a manner consistent with the standards of mutual respect. When one's peers *are* likely to act on the standards of mutual respect, then perhaps the standard ought to be higher than stated in (4). But, in such cases, it is unclear that we are in the realm of the nonideal.

What about the *obligations* that attach to the political role? Rawls's illustration of how obligations are generated is the political act of running for office. It is worth quoting at length:

> This act gives rise to the obligation to fulfill the duties of office, and these duties determine the content of the obligation. Here I think of duties not as moral duties but as tasks and responsibilities assigned to certain institutional positions. It is nevertheless the case that one may have a moral reason (one based on a moral principle) for discharging these duties, as when one is bound to do so by the principle of fairness. Also, one who assumes public office is obligated to his fellow citizens whose trust and confidence he has sought and with whom he is cooperating in running a democratic society. […] All of these obligations are, I believe, covered by the principle of fairness.[39]

Politicians are arbiters of social justice, above and beyond being agents of justice in the way that all citizens are. Like their fellow citizens, they are bound by the rules and norms that shape the scheme of social cooperation from which they derive many benefits. But they are also particularly responsible for the maintenance and improvement of that scheme: for making moves via law and policy to keep the system running, and to move it in the direction of justice as much as is possible. Generally speaking then, the role of the politician involves acting so as to maintain the political and institutional infrastructure necessary for political achievement and stability. In a democratic, constitutional regime, the roles of politicians will *also* involve: reflecting the wills of citizens; promoting our shared (ie political) values, as well as the distinctive values of their office; and maintaining transparency regarding one's actions and policies, for the sake of accountability and legitimacy. The content of political obligations will vary by particular political role, and in a democracy, will vary according to the wills of citizens. It is impossible then to enumerate a precise, general list of political obligations.

Conclusion

The distinction between ideal and nonideal dissolves the need to identify dirty hands conflicts as paradoxes of morality. In the cases under consideration the right action does not have a component of wrongness imbedded in it. It is, all things considered, the right action. It perhaps has the flavor of wrongness because it is not what morality prescribes in the fully just world, and in this sense it falls short of the ideal. That does not thereby make it wrong, though it probably explains why good people have compunction about performing them.

Importantly, I have not focused on cases in which acting on ideal principles in the nonideal context could cause one to act wrongly. These are perfectly possible, and in the nonideal world, probably prevalent. As Walzer points out, we want his scrupulous candidate to make the deal with the ward boss so that

he can win the election. In going further, we might say that to fail to make the deal on account of his scruples would be to prioritize a kind of individual moral purity over the promotion of justice, and would thus be wrong. To fail to engage would be to give up the game to those who have no scruples.[40]

A limitation of the Rawlsian framework I have adopted is that it is only justified within the domestic sphere. Consequently, more needs to be said in cases involving international conflicts. These are perhaps the harder cases—those involving war, international terrorism, and global poverty—because these are the cases in which deontological moral principles seem to forbid actions that could alleviate or prevent enormous amounts of suffering.[41] I will just stress that only global principles can handle these cases, and that when we have determined the basis for those principles we will then have a guideline for thinking through these harder cases. Some theorists have developed cosmopolitan Rawlsian principles designed to govern the laws of nations, and Rawls himself began this work in his *Law of Peoples.* I suggest we take the lead from these and similar works.

A strength of the Rawlsian model is its ability to connect the requirements of politicians with the wills and behaviors of their constituents. This creates terrain for *shared* responsibility for political action in nonideal circumstances. Certainly the political arena is rampant with unsavory characters, and citizens cannot be held to blame for all of the things elected officials do in office. But, the fact that politicians are integral to the maintenance of democracies suggests that every citizen has some responsibility to make the profession of politics less morally difficult for those who enter it. Perhaps there ought to be a presumption that citizens be more politically active and better critical thinkers than they currently are (insofar as they can), and we ought to support the background institutions necessary for facilitating civic behaviors. Or, perhaps legislative interventions on the mechanics of politics are in order, through campaign finance reform for example. These measures might well be good ideas for other reasons as well, of course. The important lesson is that political ethics must address the fact that the context in which politicians operate reflects the state of the society they are charged with governing.

Let me conclude by returning to the question with which I began: is it possible to be a morally good politician in a nonideal world like our own? I believe so. Contra Walzer, we should not expect to know the morally good politician by her dirty hands. Rather, we shall know her, when it is possible to, by understanding that her actions are governed by the nonideal principles appropriate to her context. Determining the content of those principles is difficult, and even more difficult is using reasoning and judgment to apply those principles in real life situations. Being a morally good politician in the nonideal world is complicated and demanding. But understanding that it is possible—that morality is spacious enough to accommodate the necessity of countering deviousness, corruption, and even cruelty—is perhaps a first consolation and a reason to be hopeful that good people will sometimes undertake the challenge.

Notes

1 Michael Walzer "Political Action: The Problem of Dirty Hands" *Philosophy and Public Affairs* 2:2 (1973), 168.
2 For this understanding of the role of ideal theory, see: Zofia Stemplowska "What's Ideal about Ideal Theory?" and Ingrid Robeyns "Ideal Theory in Theory in Practice," both in *Social Theory and Practice* 34:3 (2008).
3 See Rosalind Hursthouse *On Virtue Ethics* (New York: Oxford University Press, 2002), 78.
4 Michael Stocker *Plural and Conflicting Values* (Oxford: Clarendon Press, 1990), 50–52.
5 Op. cit. 1, 166.
6 Ibid., 164.
7 For influential arguments in favor of the existence of 'dirty hands' cases, see for example: Thomas Nagel "Ruthelessness in Public Life" *Mortal Questions* (Cambridge: Cambridge University Press, 1979); Michael Stocker "Dirty Hands and Ordinary Life" in *Cruelty & Deception: The Controversy Over Dirty Hands in Politics* ed. Paul Rynard and David P. Shugarman (New York: Broadview Press, 2000), 27–42; Michael Walzer "Political Action: The Problem of Dirty Hands" (op. cit.); Bernard Williams "Ethical Consistency" *Problems of the Self* (Cambridge: Cambridge University Press, 1973). For arguments against the conceptual possibility of dirty hands see: Richard Brandt "Utilitarianism and the Rules of War" *Philosophy and Public Affairs* 1:1 (1972), 145–165; R.M. Hare "Rules of War and Moral Reasoning" *Philosophy and Public Affairs* 1:1 (1972), 166–181.
8 See Kai Nielson's "weak consequentialist" rejection of dirty hands conflicts: "There is No Dilemma of Dirty Hands" in *Cruelty & Deception: The Controversy Over Dirty Hands in Politics* ed. Paul Rynard and David P. Shugarman (New York: Broadview Press, 2000), 139–156.
9 Niccolò Machiavelli *The Prince,* trans. George Bull (London: Penguin Books, 1995), 48.
10 John Rawls *Justice as Fairness: A Restatement* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2001), 8.
11 For an exploration of how ideal theorizing is relevant in nonideal circumstances, see Adam Swift and Stuart White "Political Theory, Social Science, and Real Politics" in *Political Theory: Methods and Approaches* Ed. David Leopold and Marc Stears (Oxford: Oxford University Press, 2008), 49–69.
12 John Rawls *A Theory of Justice: Revised Edition* (Cambridge, Mass: The Belknap Press of Harvard University Press, 1999), 93–98.
13 Ibid., 98–101
14 Ibid., 96–98.
15 Elsewhere in his writings Rawls also calls this the principle of fair play. For the definition offered here, see John Rawls "Legal Obligation and the Duty of Fair Play" *Collected Papers* ed. Samuel Freeman (Cambridge, Mass: Harvard University Press, 1999), 122.
16 For examples of the ideal/nonideal distinction being used to analyze social policies and/or types of individual action, see: Sarah Williams Holtman "Kant, Ideal Theory, and the Justice of Exclusionary Zoning" *Ethics* 110 (1999), 32–58; Christine Korsgaard's "The Right to Lie: Kant on Dealing with Evil" *Philosophy and Public Affairs* 15:4 (1986), 325–389; Tamar Schapiro "What is a Child?" *Ethics* 109:4 (1999), 715–738; Robert Taylor "Rawlsian Affirmative Action" *Ethics* 119 (2009), 476–506.
17 Tommie Shelby "Justice, Deviance, and the Dark Ghetto" *Philosophy & Public Affairs* 35:2 (2007), 126–160.
18 Ibid., 150.

19 Ibid., 152.

20 It strikes me that the systemic nature of the immorality in the dark ghetto and the political arena marks a departure from Kant's discussion of the murderer at the door in his "On the Supposed Right to Lie because of Philanthropic Concerns" in *Grounding for the Metaphysic of Morals: with On a Supposed Right to Lie because of Philanthropic Concerns* (Hackett Classics) 3rd Ed., trans. James W. Ellington (Indianapolis: Hackett Publishing, 1993). In that essay, Kant considers whether one is morally permitted to lie to a deceptive, murderous stranger in order to avoid disastrous consequences, and replies with an unequivocal "no". But the murderer is an anomaly, confident in the effectiveness in his deception partly because one does not expect such nefarious visitors at one's front door. (This is particularly relevant to Korsgaard's discussion of Kant on this point, op. cit. 16). The politician and the ghetto resident *do* expect to be encountering agents who are acting immorally, and/or from unclear motives, and must prepare themselves for action on the basis of that assumption. A complete account of political ethics would fully capture the significance of systemic immorality to how politicians ought to develop good character and judgment, thus going beyond the prescriptive principles I present in the section.

21 Admittedly, the race is made unfair by the ward boss's behavior, and one can say that the ward boss is acting immorally. But if the candidate *is* wronged by this unfairness or in virtue of facing the ward boss's immoral behavior, then this potential disanalogy dissolves.

22 Childhood and profound cognitive disability are paradigm 'natural conditions' that make the instantiation of full justice impossible. An example of a contingent historical circumstance that necessitates nonideal theory would include society lacking the technological or social means to approach full justice. Perhaps, for example, a society lacks an understanding of mechanized agriculture, and cannot support the nutritional requirements of its citizenry without it. The requirement that all have their basic needs met is acknowledged (assuming this is a requirement of justice), but the society cannot devise a solution for meeting them. No wrongdoing is standing in the way of full justice being met; it is an historical contingency that stands in the way. Whether natural conditions or historical contingencies stand in the way, the point is that *different* principles must govern in such cases.

23 Of course, Shelby does not consider this possibility because it is not a relevant likelihood.

24 I thank the editors of this volume for encouraging me to think about this potential disanalogy more carefully.

25 Certainly, the existence of politicians is a modern convention, and one could very well make the argument that *because* we can expect politicians to morally compromise themselves in the execution of their political duties, we should not depend on people occupying those roles. If we simply eliminate political office on the grounds that dirty hands conflicts or wrongdoing are unavoidable, then there is nothing to morally resolve. While I will not argue for it here, I do not think we should eliminate political office on these grounds.

26 See Serena Olsaretti "Children as Public Goods?" *Philosophy & Public Affairs* 41:3 (2013), 226–258.

27 Though, for an argument for collectivizing socially useful but undesirable work, see Paul Gomberg's *How to Make Opportunity Equal: Race and Contributive Justice* (Malden, MA: Blackwell Publishing, 2007). Again, thanks to the volume's editors for pressing me on this argument in helpful ways.

28 So long as the circumstances of justice hold, of course. See Rawls *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971), 126–130.

29 Many arguments elaborating on the importance and relevance of nonideal principles for responding to injustice have already been noted. See op. cit. 2, 16, 17.
30 Holtman explicitly offers a methodological principle very like this one in her paper "Kant, Ideal Theory, and the Justice of Exclusionary Zoning" op. cit., 40. See also the works of Shelby, Korsgaard, and Schapiro, cited above.
31 Taylor, op. cit. 16, 490.
32 Rawls famously discusses the impermissibility of instituting a policy like this in "Two Concepts of Rules" *The Philosophical Review* 64:1, (1955), 3–32.
33 John Rawls *Theory of Justice* revised edition, 296.
34 Alan Donagan *The Theory of Morality* (Chicago: University of Chicago Press, 1977), 186. See Dennis Thompson's discussion of Donagan's argument in his *Political Ethics and Public Office* (Cambridge, Mass: Harvard University Press, 1987), 15.
35 This is precisely how Korsgaard describes the permission to lie to the murderer at the door in Kant's scenario: doing so is a means of defending oneself against being used as a tool in someone else's evil plans. Walzer's case is different. The candidate is not trapped in the sense that Kant's agent is. He is confined to a corrupt system, but it is that circumstance which justifies the taking of the bribe, so long as he is motivated by the duty of justice in doing so.
36 The notion of it being *possible* to promote justice introduces a number of complications, and they cannot all be addressed here. Let me say that I mean to include what it is morally possible to do. Whether it is possible to promote justice depends upon, among other things, the totality of one's duties and obligations. For an engaging discussion of what one "can" do in nonideal contexts see David Estlund's chapter "Utopophobia: Concession and Aspiration in Democratic Theory" in his *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008), 258–276.
37 William Galston has a fascinating analysis of Michael Dukakis's failed presidential campaign against George H. W. Bush. According to Galston, Dukakis's attempt to remain above the mire of negative campaigning allowed Bush to sway the polls in his favor. Galston identifies Dukakis's resistance to 'uncivilized' debate as too squeamish given the enormity of the stakes of the election. William Galston *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2005), 84–86.
38 See Dennis Thompson's discussion of the importance of mutual respect, op. cit.
39 Ibid., 97. Other examples Rawls provides of when people assume obligations include the act of marrying, assuming a position of authority (judicial or administrative positons), making promises and having tacit understandings, and even the act of joining a game.
40 Of course, Walzer's case is stylized. Any real case will involve much analysis of the details, judgment about what is possible, what the likely outcomes are, and just how much one's proposed act promotes justice in the short, medium, and long terms. For a real case similar to Walzer's, see Galston's discussion of the Bush v. Dukakis presidential race, op. cit. 32, in which Galston impugns Dukakis's "squeamish" moral character for his refusal to engage Bush in negative campaigning. Here I mean only to point out the possibility that absolute adherence to ideal standards in the nonideal world puts one at risk of committing serious moral errors.
41 I have in mind here Walzer's cases of 'supreme emergency', in which he thinks it becomes permissible for governments to kill innocents in war in order to avoid great loss of human life. See his *Just and Unjust Wars* (New York: Basic Books, 1992). Interestingly Rawls also adopts the supreme emergency exemption in his *Law of Peoples* (Cambridge, Mass: Harvard University Press, 1999).

4 In Defense of Partisanship

Neil Sinhababu

Political parties are central institutions of most modern democracies. Many citizens ascribe moral importance to supporting a party and trust it while mistrusting its opponents. These ethical and epistemic forms of partisanship are sometimes criticized as thoughtless ways of acting and forming beliefs.[1] This essay explains why partisanship is justified in contemporary America and environments with similar voting systems and coalition structures.

The first section discusses how political parties operate. The makeup of party coalitions explains their candidates, policies, and ideologies, largely through primaries. The next section then explains how helping a party succeed can have genuine ethical significance. If parties are the best vehicles for affecting policy, the importance of instituting better policies makes the better party's victory important. Epistemic Partisanship: When Partisan News Sources are More Reliable explains how trusting one party and mistrusting another can be a reliable way to form true beliefs. If sociological factors that promote bias are heavily concentrated in one party coalition, its media will be less reliable, while the opposing party's media may exceed the reliability of nonpartisan media. The final section applies these arguments to contemporary political systems.

How American Political Parties Work

The nature of each political party is determined by the coalition of voters, interest groups, and media organizations animating it. These groups' activities explain what parties do, which ideology they have, and how they compete in elections.

A narrower construal of parties might focus on institutions with "Democratic" and "Republican" in their names and the politicians officially affiliated with them. But the operations of these institutions don't explain which candidates the parties nominate, which policies they support, and how they strive against each other in general elections. A variety of other institutions, described as "party actors" by political scientists like Cohen *et al.* (2008), make up party coalitions and determine what the parties do. Party actors in the Republican coalition include anti-abortion groups, the National Rifle Association, and Fox News. Mirroring them on the Democratic side are labor unions, Emily's List,

and media figures like Rachel Maddow and Stephen Colbert. Wall Street is an influential actor in both parties because of its enormous wealth.

Party actors such as labor unions and feminist groups are integrated into Democratic campaigns and influence whom the party nominates. At a fundraiser in Oregon, I saw a speaker pass around a pie chart of outside groups that had provided organized volunteer support for Democrats in the last gubernatorial election. Nearly half of the support came from labor unions, nearly half came from feminist groups, and the rest came from the League of Conservation Voters. Influential donors and politicians recognized these groups' role in the party. They gain influence from such recognition. Democratic candidates court them, since their ability to mobilize supporters helps in winning elections. Party actors have many goals beyond partisan politics, and their self-conception need not be as partisan organizations. But they affect electoral politics by supporting candidates who promote their interests. Anti-abortion groups, the National Rifle Association, and the broad coalition of conservative organizations called the Tea Party play a similar role on the Republican side.

Fox News is a party actor of another sort. As a news channel promoting Republican views, it transmits ideas from party elites to ordinary voters. This gives Republican voters strategies for how to achieve ideological goals—for example, contacting their representatives about developments in Congress or by voting for particular candidates in primaries. By telling viewers that Democrats have done outrageous things, it motivates them to vote for Republicans and donate to Republican candidates. *The Onion* subtly plays a similar role with Democrats. While its satirical format prevents it from being explicitly partisan, sophisticated media observers note its effectiveness in communicating left-wing political messages.[2]

The power of these party actors is quite fluid, and they can struggle with each other to control a party. White supremacists who openly supported segregation were significant Democratic Party actors before the Civil Rights Act, but their influence has collapsed with the progress of racial equality. Supporters and opponents of trade agreements, immigration restrictions, financial industry regulation, and war contend with each other for influence within major parties. Before the reforms of 1972, party insiders worked all this out in the proverbial smoke-filled rooms. But as Cohen *et al.* (2009) write in discussing presidential nominations,

> that system is a far cry from the one that exists today… Today, in contrast, the voting public chooses almost all of the delegates to the national party nominating conventions. They do so by means of state-by-state primary elections and caucuses in which candidates win delegates in rough proportion to the popular vote for them in that state".
>
> (1–2)

The same holds for lower offices. Party actors' influence is ultimately determined by their ability to help candidates win. Some, like Fox News and any issue-oriented group with an email list, wield influence by communicating

with voters. Others provide campaign contributions. Either way, candidates have incentives to seek their favor. Party actors gain and lose influence with candidates as they gain and lose influence over voters.

My discussion of parties excludes minor parties, as they're very different institutions from major parties. In America's two-party system, minor-party and independent candidacies are similar. After losing his primary in 2006, Joe Lieberman started a new party called "Connecticut for Lieberman" and ran as its nominee. He won the general election only because the Republican nominee's gambling addiction had gotten him thrown out of casinos, leaving many Republicans open to voting for him. Connecticut for Lieberman isn't like major parties. It didn't have meaningful primaries, won only because the Republican was a gambling addict, and didn't outlive its candidate. Like most minor-party and independent candidates, Lieberman's success required prior fame and strange circumstances.[3]

Bernie Sanders' 2006 election to the Senate as an independent Socialist in Vermont had its own special circumstances. Explicitly supported by the state and national Democratic leadership, Sanders was functionally a Democratic candidate. He voted like one before and after his victory.[4] While the Green and Libertarian parties sometimes have competitive primaries, only the thinnest permanent coalitions of party actors and voters surround them. Given the stark differences between major and minor parties, partisanship in this essay will only involve supporting major parties. I'll treat supporting a minor party as equivalent to nonpartisanship.

Party coalitions explain the parties' distinctive combinations of issue positions. The Republican Party is largely a coalition of white evangelical Christians and wealthy people and businesses. The fact that wealthy Southerners are often white evangelicals helps to unify this coalition. The Democratic coalition brings together diverse groups whose favored policies conflict with those of the Republican coalition. This is why Jews, African-Americans, gays and lesbians, supporters of abortion rights, labor unions, and environmentalists are all firmly Democratic despite their demographic differences.

The social conservatism supported by the dominant strand of American Christianity forbids gay marriage and abortion, and worries many Jews who

Table 4.1 %Obama – %GOP nominee in exit poll

%Obama – %GOP nominee in exit poll	*2008*	*2012*
Jews	78–21	69–30
African-Americans	95–4	93–6
Gay / Lesbian / Bisexual	70–27	76–22
Union households	59–39	58–40
White evangelicals	24–74	21–78
National popular vote	53–46	51–47

Source: http://edition.cnn.com/ELECTION/2008/results/polls.main/ (accessed October 26, 2016)

remember how politically dominant ethnoreligious groups killed their ancestors. Fervent black support for Democrats comes from class and racial divisions that began with slavery. Despite their seemingly unrelated concerns, labor unions and environmentalists unite against businesses whose pursuit of profit conflicts with workers' interests and the environment.

Partisans recognize these coalitions, supporting their coalition partners and acting spitefully against opposing coalition members. Democrats have warm feelings towards the poor, blacks, Hispanics, working class, and union members; while Republicans feel close to businesspeople.[5] Negative attitudes towards opposing coalition members are also common.[6] Republicans who lacked previous signs of pro-environmental sentiment increased their home energy usage after receiving reports on it and how it could be reduced, and Rush Limbaugh told his listeners to waste energy during Earth Hour to spite environmentalists.[7]

Coalition politics, not ideology, unifies parties. While party ideologies certainly differ, coalition politics better explains party ideology than vice versa. The simple equations of "Republicans=the wealthy + white evangelicals; Democrats=opponents of Republicans" explains why Republicans offer libertarian arguments against taxation but resist libertarian arguments for abortion rights, and Democrats do the opposite. The wealthy fear progressive taxation, while white evangelicals oppose abortion rights. Broad political ideologies like libertarianism are only selectively accepted by the parties, as coalition politics requires. The demand for ideological consistency on issues that don't stand in immediate practical conflict (like taxation and abortion) comes mainly from a group weakly represented in both coalitions: intellectuals who care about consistency.

After coalitions come together, ideology develops around them. Consistent opposition to government power wouldn't serve either party's interests, so neither party has such an ideology. Republican ideology combines white evangelicals' favored social policies with economic royalism. Democratic ideology combines tolerant social views favorable to its diverse coalition with mild redistributionism. If academics tend to support Democrats, that may be because abstract theorizing often doesn't match the intricacies of dominant ethnoreligious groups' idiosyncratic views. In any case, party ideology is explained from the coalition members' interests up, rather than from philosophy down.

Republican views of abortion, contraception, homosexuality, and generous financial assistance for single mothers display how parties' favored policies arise from their members' antecedent views rather than being derived from abstract considerations. Opposition to abortion is usually expressed in terms of concern for fetal life. This might make anti-abortion views seem harmonious with government support for contraception, tolerance for homosexuality, and generous assistance for single mothers. Contraception prevents unplanned pregnancies and abortions, homosexual sex can't result in abortion, and financially assisting single mothers reduces economic incentives to have abortions. But the Republican Party opposes free contraception, homosexuality,

and generous financial assistance for single mothers along with abortion. Conservative Christians' ideal of sexual abstinence until heterosexual marriage explains all of this. Abortion, contraception, homosexuality, and single motherhood are condemned as departures from this ideal. Since the wealthy oppose redistribution, they join evangelicals in opposing financial assistance for single mothers and raise the specter of such assistance in attacking other redistributive programs.

It may seem surprising that anything general could be said about the ethical and epistemic significance of such philosophically ungainly institutions as political parties. But people are complicated too, and sometimes it's right to trust one instead of another. When a political system gives us two parties to choose from, we may be right to trust one and mistrust its rival.

Ethical Partisanship: Support Major Parties and Use Primaries to Steer Them

This section presents a simple ethical justification for partisan action. As I'll assume, it's important to improve public policy on the issues at stake in electoral politics. And as I'll argue, the best way to achieve this important goal is by supporting the better party and by improving the parties' policies through primaries. So that's what we should do. I'll explain why supporting the better major party is the best strategy in general elections. Then I'll describe how primaries allow voters to improve the major parties.

My defense of partisanship focuses on electoral politics. It doesn't address many valuable activities that could change society without involving government policy, which fall outside electoral politics and need not be pursued in a partisan way. Examples include reducing prejudice against disadvantaged groups and changing social institutions that aren't governments. I'll also set aside government activities themselves, like criminal trials and military campaigns. I'll also set aside efforts to popularize an idea with the hope that it'll eventually be implemented by policymakers, if no electoral means to that end are specified. But this leaves many important issues within electoral politics. Social services, taxation, criminal justice, civil rights, nuclear nonproliferation, immigration, and war are all matters of government policy that have massive effects on people's lives, and over which the electoral system has ultimate control.

This section won't assume that either party has the right answers on any substantive question of public policy. I'll instead assume that you have the right answers. Whatever these answers may be, acting through the major parties is the best way for you to translate them into policy. Even if the parties favor deeply flawed policies, primaries let you democratically change their policy commitments. Then you can support a major party with the right policies in a general election. Of course, if your favored policies would be disastrous, my advice will help you cause disaster. It's good if people with disastrous views leave electoral politics, or better yet, pursue counterproductive means. But the

optimal political agent will combine excellent policy preferences with effective means. In contemporary America and similar systems, these means involve using the major parties as vehicles of political change.

America has two major political parties because of how its elections are structured: each voter votes for one candidate, and the candidate with the most votes wins. This system can reject the most popular policy merely because multiple candidates support it. Suppose policy A is more popular than policy B by a 60–40 percent margin. Then the democratic process should deliver policy A. But if two similar candidates support A, and only one candidate supports B, a 30–30 percent split between the A-supporting candidates lets the B-supporting candidate win with 40 percent. The coalition favoring A can avoid losing this way by establishing a party and having a primary. The winner gains the party's nomination for the general election and the loser withdraws. This concentrates votes for A on one candidate. Political scientists call the principle that plurality-vote systems become two-party systems "Duverger's Law."[8]

Running for office outside a major party risks dividing the pool of voters who support one's favored policies, delivering victory to one's least favorite major-party candidate. The classic example is Ralph Nader's 2000 Green Party presidential campaign. Al Gore would've won if just 1 percent of the 97,488 Nader voters in Florida had instead voted for him, overcoming George W. Bush's 537-vote margin of victory in the state. Bush went on to invade Iraq, cut taxes on the rich, appoint right-wing Supreme Court justices, and do many other things likely to make Nader voters wish that Gore had won instead.

The counterproductive nature of minor parties is well-understood by political tacticians. The $66,000 donated to Pennsylvania Green Party Senate candidate Carl Romanelli came entirely from Republican sources, except for $30 from the candidate himself.[9] $40,000 came from identifiable supporters of Romanelli's Republican opponent Rick Santorum, or from their housemates. Romanelli received 99.95 percent of his funding from Republicans who hoped that he would cut into the Democratic share of the vote. Knowing how counterproductive minor parties are, hard-nosed tacticians among their ideological opponents coordinate funding schemes to prop them up.

Trying to get a major party to support a policy by voting for a minor party endorsing that policy is similarly ineffective. The major party may instead concede that policy's supporters to the minor party, and seek other ways to make up the lost votes. This is especially likely when the minor party is further from the center than the major party. If Democrats move right and win over a Republican voter, they gain a vote while the Republicans lose a vote. But if Democrats move left and win over a Green voter, they gain a vote without reducing the Republican total. So as long as Greens have less support than Republicans, winning Republican votes is twice as good as winning Green votes. Nader's pivotal role in 2000 certainly didn't create a left-wing resurgence within the Democratic Party. Two years later, 22 Democratic Senators voted for the Iraq War.

If your favored policies don't have major-party support, working through primaries is the way to get support for them. This strategy has firm mathematical

foundations and has been used by Tea Party groups to control the Republican Party. Far from permitting only two options, the two-party system allows many different options in primaries, and democratically selects two of the most popular ones for the general election.

Primaries make parties responsive to new ideas. Suppose 30 percent of voters favor policy X, 30 percent favor policy Y, and 40 percent favor policy Z. Even if one major party has historically favored X and the other has favored Y, Z-supporters can change this by voting in one of the two existing parties' primaries. Since their numbers exceed those of any party's previous supporters, they can carry a candidate who favors Z to victory in either party's primary. Old party actors are likely to struggle against the Z-supporters for control of the party. But Z-supporters are positioned to win this struggle. Modern primaries are decided at the ballot box, allowing greater popular support for Z to lead its candidate to victory.

Primaries make it easier to take over an existing party than to win with a new one. Winning three-way general elections requires at least a third of the voters. 34 percent will win if the opponents are divided at 33 percent and 33 percent, but usually the opposition won't be so neatly divided and more than 34 percent will be needed. But over a third of the electorate is always enough voters to take over one of the two major parties and win its nomination. If over a third of the population supports a policy, it's mathematically impossible for both major parties to consist of more than a third of the population entirely opposing the policy. So ideas with enough democratic support to win three-way general elections will always have enough support to enter and win a major-party primary.

The success of the Tea Party shows how primaries can democratically transform parties. Unhappy with Republican leaders for compromising with Democrats, Tea Party groups supported conservative candidates in Republican primaries against mainstream candidates favored by the party establishment. Senators whose Tea Party support helped them defeat established mainstream Republicans include Ted Cruz, who defeated former Texas Lieutenant Governor David Dewhurst; Marco Rubio, who defeated former Florida Governor Charlie Crist; and Mike Lee, who defeated longtime Utah Senator Bob Bennett. Many other Tea Party candidates won Republican Senate primaries against strong mainstream candidates only to lose general elections to Democrats. By my count, Tea Party candidates defeated moderate Republicans in primaries but lost general elections a total of seven times in the 2010 and 2012 Senate elections.[10]

The Tea Party used its success in primaries to steer the Republican Party. Political scientist Dave Hopkins notes that "Most Republican senators are more worried about losing a primary election than a general election, and their behavior is understandable given these electoral incentives."[11] Bennett lost his primary partly for co-sponsoring Democrat Ron Wyden's health care bill. Richard Lugar lost the Indiana Republican primary largely for co-sponsoring successful nuclear nonproliferation legislation with Barack Obama and supporting his judicial nominees. The threat of losing primaries makes Republican legislators afraid to

cooperate with Democrats, just as the Tea Party desires. The Tea Party demonstrates control over a party can be acquired through primaries, even if it sometimes uses its control so aggressively as to be counterproductive.

Working through the parties need not involve individually acting through official party organizations or knowing much about the details of elections. Partisanship can instead involve supporting an organization that works through official party organizations and has such knowledge. Emily's List donates to pro-choice women. Most of this money goes to Democratic candidates, since pro-choice female candidates are usually Democrats. Even if some of these donors don't see themselves as supporting the Democratic Party, their donations promote their ideological goals by helping it succeed. Likewise, these donors' contributions also help pro-choice female candidates win Democratic primaries, whether they can identify the candidates or not.

Individuals can also let more knowledgeable party actors act through them. On Election Day 2004 in Detroit, I saw African-American voters requesting voter guides made by local activist groups. Determining how to vote in all the different elections on the ballot takes time and effort, so these voters quite reasonably delegated that work to community activists whom they trusted. My arguments apply more directly to groups like Emily's List and the community activists. If their strategy is to vote for major parties in general elections and steer them using the primary system, they're choosing the right means to their ends. If donors and voters affiliate themselves with organizations which choose these means, they're also making the right choices.

Opponents of the two-party system might argue for withholding support even from the better party, in order to undermine the two-party system and eventually create a better system. Some institutions can be undermined in analogous ways. If you want to help in undermining the cola industry, you might abstain from buying Pepsi or Coke, even if you prefer one to the other. If most people did so, the cola industry would collapse. So can you help in undermining the two-party system simply by not voting or doing anything to support either party?

The zero-sum nature of political competition prevents nonparticipation from undermining the two-party system. Even if most people didn't participate, a major-party candidate would still win, giving one party coalition the outcome it wanted. Unlike the cola industry, where Pepsi and Coke care about their own profits and don't especially care to exceed the other's profits, each party cares less about its raw vote total than about exceeding the other. Winning or losing 5,000,000 to 4,500,000 is no different from winning or losing 5,000 to 4,500. So massive nonparticipation is no threat to the two-party system. If one thinks instead of voting for a third party, one faces the Duverger's Law argument discussed earlier in this section. The structure of American elections compresses political coalitions into two parties, so that multiple similar candidates don't divide a majority and cause its defeat.

Ending the two-party system requires changing America's voting structure. Instead of having everyone vote for one candidate and letting the candidate

with most votes win, one might institute Instant Runoff Voting. My arguments might not apply to such a system, depending on the details. Those interested in ending the two-party system should explore such options.

Epistemic Partisanship: When Partisan News Sources Are More Reliable

The case for epistemic partisanship is as simple as the case for ethical partisanship. As I'll assume, we should trust news sources that reliably produce true belief.[12] And as I'll argue, the structure of American political coalitions and media suggests that the most reliable sources of true belief on public policy issues will be concentrated within one party's media infrastructure. So we should trust these partisan news sources. I'll consider the question of whether Iraq had WMD as a case study of how one party's partisan media can exhibit superior reliability.

As the first section of this chapter describes, partisan news sources aren't limited to official party institutions. Fox News is a partisan source, almost as much as the Republican National Committee. To not regard people who trust Bill O'Reilly and Sean Hannity as Republican epistemic partisans just because Fox isn't legally owned by the Republican Party would be a mistake. Other partisan sources on the Republican side include talk radio hosts like Mark Levin and Rush Limbaugh. Democratic partisan news sources include TV hosts like Rachel Maddow, John Oliver, and Stephen Colbert. Both sides have a large network of partisan social media groups and blogs. While many major newspapers are nonpartisan news sources, they also create a limited zone for partisan media on their opinion pages.

Since partisan sources promote an excessively favorable view of their party and an excessively unfavorable view of the opposing party, one might wonder how partisan media could be more reliable than nonpartisan media. Political parties are interested parties when it comes to information that could affect our votes, giving their media outlets incentives to mislead us. In some environments, this will indeed make nonpartisan media sources more reliable than partisan ones.

In other environments, nonpartisan media may have a centrist bias that prevents it from getting to the truth, making one party's media more reliable. Of course, the opposing party's media is then likely to be very unreliable. I won't argue that partisan media is generally more reliable. Instead, I'll explain how one party's media could provide the most reliable sources.

As I'll explain, partisan media is likely to contain especially reliable and especially unreliable sources of information, because it ties itself tightly to some sources while disconnecting itself from others. When sources of information favor the party's interests, its media will amplify their statements and defend their credibility, while the opposing party's media will ignore them or attack their credibility. Media outlets defending the credibility of sources will trust them in the future and convince their viewers to do so. Attacking a

source's credibility has the opposite effects. Over time, this will lead opposing parties to trust very different sources. Parties trusting reliable sources will have highly reliable partisan media, and parties trusting unreliable sources will have highly unreliable partisan media. A party that ties itself to a mix of highly reliable and highly unreliable sources will have a partisan media that sharply varies in reliability.

Climate scientists and Christian religious leaders are sources of this kind. While environmentalists in the Democratic coalition regard climate science as providing useful information about environmental outcomes, it threatens the profits of oil companies in the Republican coalition. So while Democratic media respects climate scientists, Republican media attacks their credibility. The reverse is true with Christian religious leaders, who are respected by the Republican Party's religious base but whose opposition to feminism and homosexuality earns Democrats' enmity. Republican media respects them; Democratic media mocks them. If climate science is reliable, Democratic media will be right about climate-related issues while Republican media will be systematically mistaken. And if Christian religious leaders are especially reliable, Republican media will have a spectacular source of guidance that Democrats ignore.

The coalition structure of American politics explains how more reliable sources of true belief might be concentrated in one party's media, with less reliable sources concentrated in the other. The Republican coalition consists mainly of white evangelicals and wealthy people and businesses. The Democratic Party is a diverse collection of groups whose policy preferences conflict with those of Republicans. If beliefs favoring the distinctive policy preferences of white evangelicals or of wealthy interests are especially likely to be true, Republican media will be more reliable. But if these groups' distinctive policy preferences result from biases that less diverse and wealthy coalitions avoid, Democratic media will be more reliable. I'll focus on the two groups making up the Republican coalition in explaining this.

While Republican media supports policies favored by white evangelical Christians, the diversity of the Democratic coalition prevents the idiosyncratic views of any one group from dominating its ideology. Instead, it promotes a broadly egalitarian ideology congenial to its black, feminist, Jewish, and LGBT supporters' interests. Self-aggrandizing or idiosyncratic views within these groups aren't emphasized within Democratic media, to avoid alienating coalition partners. Presenting blacks as superior to whites would alienate white lesbians, and presenting lesbians as superior to heterosexuals would alienate black heterosexuals. So Democratic media promotes ideals of equality that a diverse coalition can agree on.

Each party defends the reliability of sources of information promoting its favored policies, and attacks the reliability of contrary sources. So if something special about white evangelicals explains the reliability of the sources that favor their policies—for example, if divine revelation gives them good information—Republican media will be more reliable. But if their distinctive

views result from the sorts of biases that are smoothed out by the demands of maintaining a diverse coalition, Democratic media will be more reliable.

Economic issues work similarly. If ideas favoring the wealthy are generally right, Republican media will be more reliable. But if society is biased in favor of the wealthy because wealth helps them promote dubious ideas favoring their interests, Democratic media will be more reliable. Since wealth provides influence within both parties, Democratic media may itself be biased in favor of the wealthy, though less so than Republican media. Whether society is unduly biased in favor of wealth or against it will thus affect which party's media is more biased.

So whether Democratic or Republican media is systematically more reliable comes down to two questions. Are beliefs supporting white evangelicals' favored policies more or less likely to be true than beliefs supporting a diverse coalition's opposition to these policies? And are beliefs supporting the favored policies of the wealthy more or less likely to be true than beliefs supporting a broad coalition's opposition to these policies? If the answer to both questions is "more," Republican media will be more reliable. If the answer to both questions is "less," Democratic media will be more reliable. The answers may differ, making one party more reliable on one cluster of issues but not on another. But there's a near-50 percent chance of the answers lining up (assuming the independence of the questions), making one party's media more reliable than the other on a broad range of issues.

Nonpartisan media has its own biases. Broadcast news networks, national magazines, and major newspapers seek to appeal to an audience that spans both parties. Broader audiences provide greater advertising revenue, biasing nonpartisan sources to stand in the center of their potential audience, with special care to flatter the most widely held views. They may focus especially on appealing to the wealthy, since advertisers will pay more to communicate with an audience that can spend more money on their products. Even if nonpartisan journalists can easily discover facts refuting a popular ideology, their management must be careful not to alienate its supporters and especially the wealthy. These facts will emerge more clearly in the media of a party opposing that ideology.

Nonpartisan media isn't non-ideological. Instead, it combines the ideology of the social and economic forces controlling it with the ideologies that help it meet its organizational goals—usually, maximizing profits by maintaining a broad and wealthy audience. Absorbing a broad range of popular ideologies may promote its reliability, if this prevents any group's idiosyncratic or self-aggrandizing views from wholly capturing it. But when one such view dominates society, it's likely to also dominate nonpartisan media. So nonpartisan media will usually provide news that promotes the interests of many powerful ideologies, especially those with popular support or economic control over it.

This defense of the greater reliability of some partisan media applies only to public policy issues. Nonpartisan media is likely to be more reliable on other questions, such as politicians' personal scandals. Partisan incentives to defend

allies and attack enemies are merely biases in these cases. There's no obvious reason why one party's politicians would be more scandal-prone than the other, or why one party's media would be more fair-minded.

The question of whether Iraq had weapons of mass destruction provides the best case study in how partisan sources can be more reliable than nonpartisan ones on public policy issues. Obviously there are many cases available for assessing the reliability of various types of media. But the issue of whether Iraq had weapons of mass destruction, particularly nuclear and biological weapons which could kill people by the millions, stands out as a good test case. First, it concerns a public policy issue rather than a personal scandal. Second, it's a simple and narrow factual question to which the answer has been demonstrated. Third, media institutions of all kinds had time to deliberate about whether Iraq had WMD, making their results a genuine sign of their nature. Fourth, this question had political significance unequalled by any similarly narrow factual question in American politics over the last four decades. Widespread false belief that Iraq had WMD led the US to start a war that cost trillions of dollars, thousands of American lives, and hundreds of thousands of foreign lives.[13] No question of public policy in my lifetime with such a simple factual answer was discussed so long and proved so significant.

With President Bush enjoying massive public support after the 9/11 attack, nonpartisan media heeded administration warnings that the "smoking gun" for Iraq having WMD might take the form of a "mushroom cloud." Bush speechwriter Michael Gerson suggested these phrases in a September 5, 2002 meeting, and they were later used publicly by Condoleezza Rice.[14] Media outlets casting doubt on these warnings would alienate supporters of a popular president. This came through most clearly in the media treatment of UN weapons inspector Hans Blix, whose investigations into Iraq weren't revealing the weapons that Bush described. Blix was derided as ineffectual by nonpartisan media at all levels, from op-ed writers to the 2004 comedy *Team America: World Police*.[15]

New York Times reporter Judith Miller was foremost in convincing America that Iraq had WMD, with a series of stories passing along false testimony from supposed defectors and dissidents. One of her sources claimed "to have done repair or construction work in facilities that were connected with all three classes of unconventional weapons: nuclear, chemical, and biological programs."[16] Another pseudonymous source claimed that "All of Iraq is one large storage facility" and that the Iraqi arsenal included "12,500 gallons of anthrax, 2,500 gallons of gas gangrene, 1,250 gallons of aflotoxin and 2,000 gallons of botulinum" as well as 5 tons of VX gas.[17] An anonymous source claimed that a Russian scientist had given Iraq a "particularly virulent strain of smallpox."[18] As Jack Shafer writes, "Miller, more than any other reporter, showcased the WMD speculations and intelligence findings by the Bush administration and the Iraqi defector/dissidents. Our WMD expectations, such as they were, grew largely out of Miller's stories."[19] As the invasion began, Miller went to Iraq with a US military team seeking the weapons of mass destruction, and wrote several more stories describing new WMD evidence.[20] All this evidence proved false.

Republican media firmly supported Bush, his WMD claims, and the war. The image of a manly, plain-spoken Texan protecting America against Arab Muslims helped Bush consolidate white evangelical support. Republican columnists described Bush's decision to invade Iraq with poker metaphors, explicitly connecting them to his Texas background.[21] Republican attacks on the credibility of war opponents, including European WMD skeptics, provided a perfect foil for this image of Bush. One right-wing blogger wrote:

> Now I don't know what the hell is up with the Europeans, but I can't help but compare them to International Ice Skating Judges. They try to give the appearance of straight-laced professionals interested in fair play and sportsmanship, but you know they're just a bunch of hucksters on the take. And why are European bureaucrats the worst liars?[22]

This attitude ran to the top of the Republican Party, where Bush administration officials disregarded Blix's reports. The media of a party dominated by white evangelicals frequently conflated the Arab Muslims of the Ba'ath Party with those of al-Qaeda, so that attacking Saddam Hussein could avenge the crimes of Osama Bin Laden. Laurie Mylroie's fanciful claims that Hussein was responsible for the 9/11 attacks made her a favorite on Fox News.[23]

Skepticism about WMD found a home only in Democratic media. At that time, no left-wing counterpart to Fox News had emerged. So the core of Democratic partisan media became a network of blogs such as *Daily Kos* (named for its founder, Markos Moulitsas). Moulitsas and other bloggers criticized the supposed WMD evidence, noting for example that an Iraqi plane described by Colin Powell as able to launch chemical attacks on America was made of balsa wood and duct tape, and had a maximum range of five miles.[24] Many of them drew the correct conclusions from Blix's inability to find WMD.[25] In December 2002, Moulitsas wrote of the Bush administration,

> I don't believe they have any evidence. Otherwise, what better way to rally world support than to prove once and for all to everyone that Iraq was lying? Give the inspectors the name of just ONE facility suspected of having WMD, have the inspectors swoop in, find the evidence, and reveal it to the world.

Fellow Democratic blogger Duncan Black drew similar conclusions in a post titled "Blix Says Powell Lying."[26] Satirical articles by *The Onion* contrasted this lack of evidence with the plentiful evidence for North Korean WMD.[27] They expressed this skepticism before the invasion, when policymakers could've avoided war, and before military investigations proved them right.

No single example could conclusively demonstrate the greater reliability of more diverse and less wealthy coalitions. But the question of whether Iraq had WMD is the best individual test of reliability in recent American history, as it's a simple and settled factual question of immense policy significance where

everyone had months to deliberate. It nicely illustrates how differences in coalition structure give rise to differences in the transmission of reliable information. While a diverse party learned the truth from foreign experts, nonpartisan media mocked them. Charles Krauthammer provides a final word on the reliability of parties whose ethnoreligious biases prevent them from learning from foreigners. In May 2003 with no WMD in sight, he counseled fellow Republicans to be patient: "Hans Blix had five months to find weapons. He found nothing. We've had five weeks. Come back to me in five months. If we haven't found any, we will have a credibility problem."[28]

A Partisan Conclusion

My allegiance is to the Democratic Party. Its diversity prevents the idiosyncratic and self-aggrandizing views of any one demographic group from dominating it. If God doesn't communicate specifically with evangelical Christians and the races are equal, the ethnoreligious homogeneity of the Republican Party is unlikely to deliver any countervailing benefits. Democratic media also is less supportive of the wealthy, who can easily promote dubious ideas favoring their interests. This makes its partisan media systematically more reliable, giving it better-informed policies. Since major parties are the best vehicles for enacting policy changes, I support Democratic candidates and strive to improve Democratic policies through primaries.

The factors favoring Democratic partisanship also favor supporting similar parties in similar political environments around the world. India's Congress Party, the current Canadian Labour Party, and arguably the Australian Labor Party are more diverse and less wealthy than their opponents. They can be expected to pursue better policies, because their coalition makeup mitigates bias from wealth and idiosyncratic ethnoreligious views. These countries' parliamentary systems don't fully share America's rigid plurality-rule structure, so many of my conclusions regarding partisan action will hold in a weaker form. But if other factors promote an American-style two-party system, the relevance of my arguments will rise.

Can Republicans reasonably dismiss this openly partisan argument as an extension of Democratic media into an unusually highbrow venue? I've argued that one party's media is likely to be very unreliable, and Republicans will think that party is mine. But as you've seen, broad sociological observations about the structure of party coalitions and their biases entail my epistemic conclusions. To respond, Republicans will need an alternative sociology of the parties, or perhaps an argument that the distinctive views of white evangelicals result from a connection to God rather than bias. Accepting the sociology that I've presented, and thinking that the distinctive views of dominant ethnoreligious groups and the wealthy emerge from biases, I can only conclude that the Democratic Party is more worthy of support and that its media is more worthy of belief. I practice the partisanship I preach.

Notes

1 Such criticisms are catalogued in Nancy Rosenblum (2008) *On the Side of the Angels*, Princeton University Press.
2 Malone, Noreen (2013) "The Onion Is The Country's Best Op-Ed Page. Seriously", *New Republic*.
3 Anne Kornblut (2006) "G.O.P. Deserts One of Its Own for Lieberman", *New York Times*.
4 Raja Mishra (2006) "Vt.'s Sanders poised to be 1st Senate socialist", *Boston Globe*.
5 Donald Green, Bradley Palmquist, and Eric Schickler (2002) *Partisan Hearts and Minds: Political Parties and the Social Identities of Voters*. Yale University Press.
6 Jennifer Emery (2008) *Finding Common Enemies: Social Groups as Shortcuts to Partisanship*, Dissertation, SUNY-Binghamton.
7 Dora Costa and Matthew E. Kahn (2010) "Energy Conservation" National Bureau of Economic Research. Working Paper.
8 Maurice Duverger (1963) *Political Parties: Their Organization and Activity in the Modern State*, New York: John Wiley; William Roberts Clark and Matt Golder (2006) "Rehabilitating Duverger's Theory", *Comparative Political Studies* 39:6, 679-708.
9 Daryl Nerl (2006) "Republican Bankroll Taints Green Party Hopefuls", Morning Call; Paul Kiel (2006) "GOP Donors Funded Entire PA Green Party Drive", *TalkingPointsMemo.*
10 Neil Sinhababu (2012), "Senate Republicans' Primary Problem", *Donkeylicious*.
11 Dave Hopkins (2016) "Mitch McConnell Knows What He's Doing", *Honest Graft*.
12 Reliable production of true belief is regarded as fundamental to knowledge by Fred Dretske (1981) *Knowledge and the Flow of Information*, Cambridge, MA: MIT Press; and Alvin Goldman (1986) *Epistemology and Cognition*, Cambridge, MA: Harvard University Press.
13 Linda Bilmes and Joseph Stiglitz (2006) "The Economic Costs of the Iraq War: An Appraisal Three Years After the Beginning of the Conflict", NBER Working Paper No. 12054.
14 Michael Isikoff and David Corn (2006) *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War*. New York: Crown.
15 Thomas Friedman (2002) "'Sodom' Hussein's Iraq", *New York Times*.
16 Judith Miller (2001) "Iraqi Tells of Renovations at Sites For Chemical and Nuclear Arms", *New York Times*.
17 Judith Miller (2002) "U.S. Says Hussein Intensifies Quest For A-Bomb Parts", *New York Times*.
18 Judith Miller (2002) "C.I.A. Hunts Iraq Tie to Soviet Smallpox", *New York Times*.
19 Jack Shafer (2003) "The Times Scoops That Melted: Cataloging the wretched reporting of Judith Miller", *Slate*.
20 Herbert Abrams (2004) "Weapons of Miller's Descriptions", *Bulletin of the Atomic Scientists*.
21 Robert Novak (2003), "Playing Texas Poker, Bush Bets All on Iraq", *CNN*. http://edition.cnn.com/2003/ALLPOLITICS/03/06/column.novak.opinion.poker/ (accessed September 30, 2016). William Schneider (2003), "Bush Lets It All Ride on His War", *Los Angeles Times*. http://articles.latimes.com/2003/mar/23/news/war-opschneider/2 (accessed September 30, 2016).
22 Sgt. Stryker, cited by Glenn Reynolds (2003), *Instapundit*. http://pjmedia.com/instapundit/38296/ (accessed September 30, 2016).
23 Laurie Mylroie (2001) *The War Against America: Saddam Hussein and the World Trade Center Attacks: A Study of Revenge*. Washington, D.C.: American Enterprise Institute for Public Policy Research.
24 Markos Moulitsas (2003) "Iraqi 'drone' made of duct tape", *Daily Kos*.

25 Markos Moulitsas (2002) "Blix to US, UK: pony up evidence", *Daily Kos*. Markos Moulitsas (2003) "Hans Blix: Inspections working", *Daily Kos*.
26 Duncan Black (2003) "Blix Says Powell Lying", *Eschaton*.
27 *The Onion* (2003) "N. Korea Wondering What It Has To Do To Attract U.S. Military Attention". *The Onion* (2003) "Bush On North Korea: 'We Must Invade Iraq'".
28 Matthew Yglesias (2011) "Happy Krauthammer Day", *ThinkProgress* https://thinkprogress.org/happy-krauthammer-day-2efd1e76782#.8ooc6wz5a (accessed September 2016).

5 A Defense of Senate Obstructionism

Shane Courtland

Over the last decade the United States Congress has been characterized as a den of do-nothings and a body ripe with stalemates. The vast majority of ire has been focused upon the Senate. In that particular body, parliamentary tactics have derailed a record number of bills and executive appointments. As Senator Tom Harken laments, "What was once a procedure used rarely and judiciously has become an almost daily procedure used routinely and recklessly."[1] In this essay, I will argue that such obstructionism, as is witnessed in the Senate's frequent use of the filibuster, is both legitimate and acceptable.

Before proceeding to the general argument, I must acknowledge some caveats. First, this essay will primarily defend the obstruction that comes via the filibuster. There are, of course, other forms of obstruction. Although I do not focus on those forms, many of my arguments, *mutatis mutandis*, will apply to them as well. Second, I will assume, for the sake of argument, the legitimacy of the overall American system. Thus, there will be no justifications for other aspects of the system (e.g., winner-take-all districting, federalism, judicial review, and the like). I will focus strictly on the acceptability of one parliamentary tactic, the filibuster, within that system. Third, this argument is not pro-filibuster; it is anti-anti-filibuster. I will not be defending the filibuster by articulating its virtues.[2] Instead, I will argue that the critiques frequently offered against it are insufficient to undermine its legitimacy.[3] In other words, if the filibuster were to disappear tomorrow, the acceptance of this essay's arguments would not require that one ought to lament its loss. Instead, all that would be required is that one should be skeptical if someone asserts that the filibuster is illegitimate.

Filibuster Basics

There are many ways in which legislators can obstruct and delay the enactment of legislation. For example, they may file a variety of dilatory motions. These could include requesting a roll-call vote, motioning to adjourn, or disputing various parliamentary procedures. Or, instead of such motions, legislators may attempt to employ the tactic of disappearing quorums.[4] Although all of these tactics could obstruct legislation, they will not be examined in this essay.

What this essay will focus on, however, is arguably the most famous obstructionist tactic – the filibuster. The name "filibuster" appears to have been derived from the Dutch terms *vrij* and *buit.* These terms were combined into *vrijbuiter*, which loosely translates to "looters and robbers." The term then jumped between various languages, English – *flibutor*, French – *flibustier*, and Spanish – *filibustero*. The Spanish used the term to describe pirates who raided the Spanish West Indies. In the mid-nineteenth century, Americans used the term *filibusteros* to refer to men that raided and plundered across Central America. Around the 1850s, William Walker attempted to instigate a rebellion in Nicaragua. When Walker's efforts were detailed in a famous book, *Filibusters and Financiers*, he became known as the American *filibuster.* Soon after, the term *filibuster* was being employed to describe the rebellious tactics that senators used to obstruct and delay legislation.[5]

The U.S. Constitution, in Article I, Section 5, asserts that "Each house may determine the rules of its proceedings." When the Senate, then, constructed its rules the filibuster came about via the conjunction of Senate Rule XIX and the *lack* of a "previous question motion."[6] According to the former,

> When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent.[7]

In regards to the latter, there used to be a previous question motion. The original Senate rules (1789) state, "The previous question being moved and seconded, the question for the chair shall be: 'Shall the main question now be put?' and if the nays prevail, the main question shall not be put." A majority vote on a previous question motion, then, could end debate and force a final vote on the issue. In 1806, at the suggestion of Aaron Burr, the previous question motion was eliminated. This, combined with Rule XIX, led to each senator possessing the right of unlimited debate – the core of the traditional filibuster.[8]

In 1917, the Senate adopted Rule XXII. This allowed a supermajority (two thirds of the Senate, present and voting) to invoke cloture and thereby end an active filibuster. Prior to 1917, the only manner to end a filibuster was to allow the senator(s) to continue to speak until he gave up the floor due to exhaustion. After Rule XXII was invoked, each senator was limited to no more than one hour of post-cloture debate. Moreover, any amendments proposed after cloture had to be germane.[9]

As time has progressed, there have been alterations to Rule XXII. In 1975, it was amended to lower the votes required for cloture. It was lowered to three-fifths of the Senate membership (60 votes). Moreover, post-cloture debate times (i.e., total time) were reduced in 1979 and 1986. They were reduced to 100 hours and then 30 hours, respectively.[10]

Besides cloture, Senators might employ other maneuvers to circumvent filibusters. First, they could seek a Unanimous Consent Agreement (UCA)

determining the number of votes required to end debate. Unfortunately, this tool is rather ineffective. The UCA can only avoid obstruction if it is adopted before a senator realizes that he/she would like to filibuster.[11] Moreover, if the minority party thinks that there is even a chance for a filibuster, it can merely set the UCA at the cloture equivalent – 60 votes. Second, the majority could wage a war of attrition; the senator(s) would be allowed to hold the floor until he/she was too exhausted to continue. Unfortunately, the workload of the modern Senate has made attrition too costly. Gregory Koger, in *Filibustering,* writes that senators

> faced a growing set of policy problems to deal with and increasing public expectations for government action…. Also, senators were increasingly nomadic, roaming the country to cultivate political alliances and traveling the globe on fact-finding missions. It was unrealistic to expect that these globe-trotting senators could stay in the Senate to outlast obstruction on a variety of issues.[12]

Chances are, then, to stop a filibuster cloture will have to be invoked (or, perhaps, a 60 vote UCA).

As we move to the present, we have witnessed an increase in filibusters and, subsequently, the use of cloture.[13] It frequently requires that to get anything done in the modern Senate more than a mere majority is necessary. As Senator Tom Harkin states:

> I mentioned that there have already been nearly one-hundered filibusters in this Congress. That is not a cold statistic. Each filibuster represents the minority's power to prevent the majority of the people's representatives from debating legislation, voting on a bill, or giving a nominee an up-or-down vote. Under current rules, if forty-one senators do not like a bill and choose to filibuster, no matter how simple or noncontroversial, no matter that it may have the support of a majority of the House, a majority of the Senate, a majority of the American people, and the president, that bill or nominee is blocked from even coming before the Senate for consideration.[14]

What is at issue, and what will be examined in this essay, is whether it is acceptable/legitimate that a minority of senators can frustrate the will of a majority of senators? In the remainder of this essay, I will show that the common arguments against the 60 vote requirement (brought about via frequent filibustering) are unfounded.

Substantive Critique

One line of argument, the substantive critique, highlights the purportedly "good" laws (or executive appointments) that have been unnecessarily delayed and/or lost due to the filibuster. For example, many Democrats lament the loss

of the public option.[15] It was supported by a majority but it was killed due to a potential filibuster by Senator Joseph Lieberman. Senate Democrats needed Lieberman to support a cloture motion that would have brought healthcare reform to a vote. Lieberman refused if the public option remained in the bill; the public option was, then, removed. In addition, the filibustering of civil rights legislation could be viewed as another example(s). Infamously, this legislation was delayed considerably by a dedicated minority of Southern Democrats.[16]

The substantive critique moves from this lamentation and quickly shifts to the removal of the procedure. Here is the general form of the critique:

1 Procedure β prevents the enactment of policy ϕ.
2 ϕ is obviously good.
3 Good policies ought to be enacted.
4 We ought to remove procedural impediments the prevent the enactment of good policies.

Therefore, we ought to reject/remove β.

Hugh Hewitt, a law professor at Chapman University's Fowler School of Law, provides a recent example of this style of critique. He details an argument, offered by former Senator Jim Talent and Phoenix Seminary's Wayne Grudem. Hewitt writes, they

> both pointed out that so much damage has been done by the president and his allies in Congress that the repair job will require passing laws…. Much needs to be repealed and righted, and that won't happen even with a Republican president and GOP Congressional majorities in 2017 if at least 41 Democrats remain in the Senate.[17]

With this example, β is the filibuster and ϕ is the Republican "repair job" secured by the enactment of good legislation.

What can be said of the substantive critique? It seems, at least prima facie, valid. In addition, premise (1) can be assumed for this essay. It seems trivially true that the filibuster (β) prevents the enactment of some policies (ϕ). Moreover, as long as one attaches a *ceteris paribus* clause, I am willing to concede that premise (3) is also true.

Premise (2) and premise (4), however, are problematic. Let's examine the latter premise first. Every plausible procedure, including majority rules, possesses the ability to inhibit the enactment of good policies. If there was a procedure that would never prevent the enactment such policies, it would be one of the more profound discoveries in political philosophy.[18] At best, all that we can hope for is a procedure that, with a reasonable degree of probability, will fail to impede the enactment of good policies.

Even if this concession is made, the fatal flaw in the substantive critique resides in premise (2). What is needed is a non-contentious manner of

determining what constitutes an "obviously good" policy. Any attempt, however, will be undermined by the acknowledgement of something akin to John Rawls' "burdens of judgment." In *Political Liberalism*, Rawls lists a number of reasons why we should expect reasonable pluralism regarding moral and political principles. They are as follows:

a The evidence – empirical and scientific – bearing on the case is conflicting and complex, and thus hard to assess and evaluate.
b Even where we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments.
c To some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases; and this indeterminacy means that we must rely on judgment and interpretation (and on judgments about interpretation) within some range (not sharply specifiable) where reasonable persons may differ.
d To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ….
e Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment.
f [A]ny system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized. This is because any system of institutions has, as it were, a limited social space. In being forced to select among cherished values, or when we hold to several and must restrict each in view of the requirements of the others, we face great difficulties in setting priorities and making adjustments. Many hard decisions may seem to have no clear answer.[19]

According to Rawls, the import of the burdens of judgment is that "many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion."[20] In other words, the conjunction between the complexity of the issues involved (principles associated with moral and political values) and the epistemic limitations of human agents, leads to disagreement amongst such agents.

Public policy governs a wide array of interactions. These policies are laden with (or, at the very least, presuppose) moral and political concepts/values. We should expect, given Rawls' list, that there will be disagreement regarding the praiseworthiness of such policies. Provided the epistemic shortcomings of agents and the complexities of these issues, we should "recognize the practical impossibility of reaching reasonable and workable political agreement …

especially an agreement that might serve the political purpose, say, of achieving peace and concord in a society characterized by religious and philosophical differences."[21]

The general point is that it is extremely difficult (if not impossible) to determine, in a non-contentious manner, what constitutes a good public policy. This does not entail that there is no fact of the matter regarding such policies.[22] All that is required is that one recognizes that there are profound epistemic difficulties in assessing the merits of public policy. As Steven Levitt and Stephen Dubner, authors of the *Freakonomics* series, write,

> Just as a warm and moist environment is conducive to the spread of deadly bacteria, the worlds of politics and business especially – with their long time frames, complex outcomes, and murky cause and effect – are conducive to the spread of half-cocked guesses posing as fact.[23]

Thus, when one encounters an individual who claims that he/she knows of an *obviously* good public policy, an appropriate response is to be skeptical.

With the filibuster, in particular, one is dealing with policies that various groups take to be contentious.[24] In their resistance, I doubt these groups would be convinced (nor should they be) by someone offering the substantive critique. Instead, one would expect them to offer, in return, the reverse-substantive critique:

1 Procedure β prevents the enactment of policy ϕ.
2 ϕ is obviously bad.
3 Bad policies ought to be avoided.
4 We ought to keep procedural impediments that prevent the enactment of bad policies

———

Therefore, we ought to keep/maintain β.[25]

If one were to offer this critique in response to the other party's substantive critique, it would be something akin to – "One's *modus ponens* is another's *modus tollens*." If all that is offered are merely these arguments, neither party ought to be convinced. Both arguments, reverse-substantive and substantive, beg the question at premise (2).

Of course, none of this implies that premise (2) can never be justified. Instead, *and this is key*, all that is being claimed is that any attempt at justifying (2) will be contentious. There is, and perhaps always will be, reasonable disagreement as to what constitutes a good or a bad policy.[26] Because of considerations like Rawls' "burdens of judgment" and the general nature of policy decisions in a complex polity, one should always expect that the burden of proof for premise (2) will be quite high. Due to this high burden, it is reasonable to view the substantive critique as a non-starter.[27]

At this point a critic may object that there is a manner by which one may embrace these counterarguments, all the while, endorsing a line of reasoning that is akin to the substantive critique. This critic might agree with Jeremy Waldron that we live in a world that is characterized by the *circumstances of politics*. There is, accordingly, a "felt need among the members of a certain group for a common framework or decision or course of action on some matter even in the face of disagreement about what that framework or decision or course of action … should be."[28] The problem with the filibuster is *not* that it prevents the enactment of "obviously good policies." This critic would agree with the above skepticism regarding the likelihood of establishing a non-contentious justification for a "good policy." He/she would, instead, assert that the filibuster is problematic because it prevents us from coordinating our behavior.[29] Failing to enact "good policies" is not the problem; what is problematic is that it fails to enact *any* policy, good or bad. A definitive decision procedure, like majority rules, is required to coordinate action under intractable pluralism. The filibuster only serves to obstruct such decision procedures, and, according to this critic, is thereby problematic.

There are a couple of responses to this objection. First, in regards to the Senate's use of the filibuster, the objection is overstated. In recent years, it is true that a large amount of legislation has been stalled. However, government has not completely stalled; legislation still gets passed. From the 108th Congress to the 113th Congress, we have witnessed a record amount of filibusters. Nonetheless, during this severe obstruction, Congress has enacted 2,412 laws.[30] Moreover, there are many paths, other than through the Senate, by which the government might set coordination points. On the national level, for example, the president could issue an executive order. In addition, by being a federal system, the States provide many of their own coordination points. Although there may not be certain national laws due to frequent Senate obstruction, that, however, does not prevent any State from enacting its own legislation.

Second, contrary to the critic's claims, this objection still suffers from the same problem that befalls the substantive critique. Just like an *act of omission* is still an action, we might make the same claim about a *policy of omission*. Deciding not to enact any policy regarding a particular issue is, at times, akin to having a policy of sorts. For example, let's say that Policy X provides a coordination point regarding Y. Since there is severe obstruction, the legislative body never votes on X. There is still, however, a policy regarding Y – "lack of coordination." The critic will be forced into making an argument that shows that the Policy "lack of coordination" is clearly inferior to Policy X. Those who are obstructing X, may hold that X is so bad that it is preferable to non-coordination. The critic would then have to discuss the merits of X; this places the critic into the same quagmire that sunk the substantive critique. That critic would be tasked with providing an argument that showed X is not as bad as the obstructionists claim. However, it is not clear that this could be done in a way that would forestall reasonable disagreement.

Procedural Critique

The core of the procedural critique is that majority rule is the ideal (as in: best justified) decision procedure to employ when resolving legislative disputes. Since it allows the minority to delay/stop the majority, the filibuster, according to this critique, ought to be removed. Those who offer this critique usually do so separate from the substantive merits of particular legislation. Many offer diverse procedural reasons as to why majority rule is preferable. Others, on the other hand, simply assert, without justification, that majoritarian principles are ideal.[31]

The procedural critique is, without a doubt, the most common criticism offered against the filibuster. Senator Harkin, for example, states,

> In other words, because of the filibuster, even when a party has been resoundingly repudiated at the polls, that party retains the power to prevent the majority from governing and carrying out the agenda the public elected it to implement. At issue is a principle at the very heart of representative democracy – majority rule.[32]

In addition, Norman Ornstein, co-author of *The Broken Branch*, writes, "The filibuster, once rare, is now so common that it has inverted majority rule, allowing the minority party to block, or at least delay, whatever legislation it wants to oppose."[33] In fact, there are so many examples of this critique that it would take too long merely to list those who offer it.[34]

The initial problem with the procedural critique is that it is not clear what "majority" ought to be ruling. Because of the Connecticut Compromise, the majority of the Senate clearly refers to the majority of the States. In Federalist #62, for example, Madison writes, "Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States."[35] The Compromise required equal representation of the States (2 per State, regardless of population) within the Senate. As Alexander Hamilton points out, in Federalist #22, "It may happen that this majority of States is a small minority of the people of America…"[36] It may occur, then, that a majority coalition within the Senate represents a mere minority of the people.

If the procedural critique refers to the majority of the people, as opposed to the majority of the States, then it is not obvious that the filibuster is problematic. If a minority of the population controls a majority of the senators, then perhaps the best way to advance majority rule is to advocate the frustration of a senate majority. Filibusters carried out by those who represent a majority of Americans, are not as rare as one might imagine. For example, when Democrats conducted filibusters against Republican majorities, between 1991 and 2008, the Democrats represented a majority of the people 64 percent of the time.[37] During

this two-decade period, then, more than half of all filibusters were advanced by a majority of sorts.

Unfortunately, when the procedural critique is offered, this complication is frequently unacknowledged. For example, Aaron Belkin, professor of political science at San Francisco State University, writes,

> When voters of either party send elected officials to Washington with a clear mandate for change, the filibuster prevents them from accomplishing most of what the voters want, and inaction confirms popular suspicions about government's inability to improve citizens' lives…. Congress's proper role is to reflect, not stymie, the will of the people.[38]

In addition, Jeremy Young, author of *The Age of Charisma*, writes, "Lose an election, end up with more power: welcome to the upside-down world of American filibuster politics…. The American people deserve a political system that enables the leaders they elect to bring about the policies they support."[39] The American people, oddly enough, may be represented more by the filibustering minority than by the frustrated Senate majority.

One could address this complication by only conditionally supporting the filibuster. We might imagine a critic endorsing only filibusters that were conducted with those who represented a majority of the people – all the while – rejecting filibusters that failed to represent the popular majority. This mixed strategy, the critic might add, would ensure that the proper respect is being paid to the American people. A minority of the whole, though represented by a majority of senators, would not be allowed to rule.

This mixed strategy, however, would be more of a critique against the equal representation of States, than against the filibuster. If a majority of senators (representing a minority of the whole) attempted to pass legislation, this critic, then, should openly advocate obstructionist parliamentary tactics like the filibuster. Since this strategy is only tangentially addressed to the filibuster and, in addition, presupposes a radical alteration of the American system (via a circumvention of the Connecticut Compromise [40]), I will not address it further.

For the remainder of the argument, let's assume that those who offer the procedural critique use the term "majority" to refer strictly to a majority of senators. On this view, the appropriate procedure would at best reflect the will of a majority of the States. The filibuster is problematic because it allows the representatives of a smaller number of States to delay/kill legislation proposed by a greater number. If the ideal procedure is to reign, then the filibuster must be removed.

One might add greater plausibility to this objection by acknowledging that the original Senate lacked filibusters. From 1789 to 1806, the Senate operated primarily via majority rule. Until 1806, a senator could move the "previous question," and, with the support of a simple majority, end debate. In fact, Thomas Jefferson, the Senate's presiding officer from 1797-1801, overtly advocates majority rule and, in addition, criticizes artificially prolonged

debate.[41] In Jefferson's 1801 *Manual of Parliamentary Practice for the Use of the Senate of the United States*, he writes, "No one is to speak impertinently or beside the question, superfluously or tediously. … The voice of the majority decides. For the lex majoris partis is the law of all councils, elections, &c. where not otherwise expressly provided."[42]

The procedural critique, then, could be reasserted in the following fashion. If we confine "majority" strictly to a majority of senators and we acknowledge the norms of the original Senate, the addition of the filibuster begs for a *raison d'être*. It would seem that the default position (simple majority rule) was replaced with a modified position (filibuster). A true defense, the critic might add, would require showing why the United States should have moved from the default position to the modified position. Moreover, if majoritarian procedures are truly ideal, there would be no justifiable defense for the modified position.

The response to this objection is somewhat counterintuitive. In a sense, the modified position is *not* separate from the default position. In other words, the filibuster is *not* a rejection of majority rule – it is, instead, an extension of it. The only reason there is a filibuster is due to its being tolerated by a simple majority. If the majority no longer desires to tolerate the practice, it can be eliminated with basic parliamentary moves and a simple majority vote.

This method of filibuster removal is often referred to as the "nuclear option."[43] Wawro and Schickler, in *Filibuster*, describe the method as follows:

> Yet it is possible to introduce significant changes without adopting an entirely new set of rules. This could be accomplished by establishing new precedents through rulings from the chair. At any point during proceedings… any legislator can raise a point of order regarding some aspect of the rules that is unclear, and the chair can issue a ruling based on his or her interpretation. The ruling of the chair is made without debate, but the ruling can always be appealed, and the appeal is debatable. However, it is relatively easy to prevent obstructionists from taking advantage of this opportunity to debate. A motion to table the appeal is not debatable, and tabling an appeal requires only a simple majority vote. Once an appeal has been tabled, the ruling is considered to be sustained and to constitute a precedent, which is just as binding as a standing rule. Avoiding additional obstruction on the appeal of a chair's ruling would simply require that the chair first recognize an individual friendly to the ruling who will make the motion to table.[44]

Rule XXII (in the 2011 *Senate Manual*) asserts that debate can only be ended by a motion that is "decided in the affirmative by three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting."[45] Although it seems like Rule XXII prevents a simple majority from eliminating the filibuster, the nuclear option allows the chair, backed by a simple majority, to radically reinterpret the content of Rule XXII.

In fact, Senator Harry Reid recently employed the nuclear option. On November 21, 2013, he raised "a point of order that the vote on cloture under rule [22] for all nominations other than for the Supreme Court of the United States is by majority vote."[46] Using the nuclear option, as detailed above, Reid was able to abolish filibusters on most nominations. This led Senator Orrin Hatch to lament, "Nevertheless, by using the parliamentary version of the nuclear option, fifty-two Democrat Senators effectively made sixty equal fifty-one."[47]

The only reason that filibusters are allowed is that majorities permit them. This leads to, what Wawro and Schickler refer to as, "remote majoritarianism."[48] While it is true that Senate practice may require the use of supermajorities for cloture, that practice is only sustained via majority rules. Hence, the majority is not confined by the filibuster; it always retains the right to remove this obstructionist practice.

This is all quite problematic for the procedural critique. Even when one is charitable and stipulates that "majority" refers merely to a majority of senators – as opposed to a majority of the people – the procedural critique is still a non-starter. The filibuster *never* runs afoul of the ideal procedure. Without the majority's willing participation, there would be no filibusters. The filibuster, then, only provides the illusion that the minority can obstruct the majority.

The critic, at this point, might venture one last rebuttal on behalf of the procedural critique. The problem with the filibuster is not that the majority loses control to a minority. The problem, according to this critic, is that the majority *ought* to exercise its control and fully employ the nuclear option. The true procedural critique, then, would require that remote majoritarianism (via a filibuster-tolerating majority) be converted to strict majority rule (via a complete destruction of the filibuster).

The most common manifestation of this version of the procedural critique is the call for an active government. Jeremy Young, for example, writes:

> Unlike most of America's problems, the filibuster is easy to fix: the Senate can end it forever with a simple majority vote. The 114th Congress, in particular, offers McConnell an unprecedented opportunity to get rid of the filibuster once and for all….With daunting challenges looming at home and abroad, it's vital that whoever wins the next election is able to govern effectively. The American people deserve a political system that enables the leaders they elect to bring about the policies they support. Mitch McConnell has a history of using the filibuster to stop bills he doesn't like, but ultimately, people go into politics to pass laws, not to block the other party's legislation. If the Senator wants to govern rather than to obstruct, the time to act is now: end the filibuster, restore American democracy, and get our government moving again.[49]

The reason the majority ought to employ the nuclear option, according to critics like Young, is that there are "daunting challenges" that require the Senate to

"govern effectively." Since the filibuster undermines effective government, it is imperative that the current majority remove the filibuster and get the "government moving again."

Hopefully, at this point of the essay, the shortcomings of the above critique are readily apparent. It is merely a version of the substantive critique and, thus, suffers the same problems. In fact, it begs the very same questions: Why should the government be more active? Are there "good" polices that need to be enacted? Why is a mere policy of omission insufficient? As with the substantive critique, it is hard to fathom how one could answer these questions in a manner that is not overtly contentious. Reasonable disagreement (via Rawls' "burdens of judgment") abounds. Suffice it to say, anyone who advances this critique must overcome a large (perhaps – insurmountable) burden of proof.

Concluding Thoughts

This essay's defense has not been pro-filibuster; I have not provided justifications for the merit-worthiness of this parliamentary tactic. Instead, this essay is best described as anti-anti-filibuster. The common arguments against the filibuster have been examined and rebutted. The substantive critique was shown to require a rather insurmountable burden of proof. We ought to expect that in a society like ours, inundated with reasonable pluralism, that any arguments which presuppose the obviousness of "good" and "bad" public policies will be problematic. In addition, the procedural critique has encountered a number of problems. The Senate was not constructed as a majoritarian body (where "majority" means the majority of the American people). Moreover, the existence and use of the nuclear option show that a majority of senators always retains control of the Senate. The procedural critique has been rebutted, then, without ever having to question the legitimacy of majoritarian principles.

Often these con-filibuster arguments are offered as a manner of partisan strategy. Marty Paone, who served (for 29 years) as both secretary of the majority and secretary of the minority, claims that

> following an election, if there was a change in the Majority, I would joke with my Republican counterpart that, in addition to handing over the presiding book, we would also trade speech folders: One accused the other of being an obstructionist, while the second complained of the trampling of the Minority's rights.[50]

According to Arenberg and Dove, in *Defending the Filibuster*, "The forces on the attack against the filibuster and in its defense have a way of switching sides as the majority power shifts from one political party or coalition to another."[51]

Democrats might be pro-filibuster when it comes to stopping Newt Gingrich's "Contract with America" and a plethora of George Bush's appointees. Their tune changes, however, when they are being frustrated by Republican filibusters. Likewise, Republicans advocate filibuster reform and threaten the nuclear

option when their agenda is obstructed. Yet, when the Democrats respond in kind, after years of Republican obstruction, it is referred to as a mere "power grab."[52] This, of course, is not to say that all con-filibuster arguments are strictly partisan ploys. One should, however, regard such arguments with a great deal of skepticism. If not for their hypocritical use, then, perhaps, for their lack of merit.

Notes

1 Harkin 2010.
2 For an excellent example of a pro-filibuster argument, see: Arenberg and Dove, *Defending the Filibuster*, Indiana University Press (2012).
3 By *legitimacy*, I mean, authoritative reasons for (in this case) inaction.
4 For an in-depth examination of these tactics, see: Koger, *Filibustering*, University of Chicago Press (2010): pp. 15–36.
5 Binder and Smith 1997, p. 3.
6 It is important to note, as Arenberg and Dove state, "The filibuster, although not created by the Framers themselves, grew out of the independent precedents and procedures evident in the Senate from the outset, which themselves grew out of the constitutional design for the Senate" (2012, p. 3).
7 Arenberg and Dove 2012, pp. 4–5.
8 Arenberg and Dove 2012, p. 5.
9 Arenberg and Dove 2012, p. 5.
10 Binder and Smith 1997, p. 7.
11 Koger 2010, pp. 21–2.
12 Koger 2010, pp. 167–8.
13 Since cloture motions were created (1917) there have been 1,630 motions filed, 1,210 votes on cloture, and cloture was invoked 630 times. Between the years of 2004 and 2014 – *alone* – there have been 786 motions filed (48 percent of the total), 597 votes on cloture (49 percent of the total), and cloture was invoked 398 times (63 percent of the total) [*U.S. Senate: Count of Cloture Motions in Various Congresses*]. The reasons as to why the use of the filibuster has increased in recent decades are contentious. For a more detailed account of the likely reason(s), consult: (1) Binder and Smith, *Politics or Principle*, Brookings Institution Press (1997); (2) Wawro and Schickler, *Filibuster*, Princeton University Press (2006); (3) Koger, *Filibustering*, University of Chicago Press (2010); (4) Arenberg and Dove, *Defending the Filibuster*, Indiana University Press (2012).
14 Harkin 2010.
15 The "public option" was a government-run health insurance program that would have served as an alternative to existing private insurance plans.
16 Arenberg and Dove 2012, p. 64.
17 Hewit 2015.
18 One might say a procedure that endorses all policies would satisfy this requirement. It would, in fact, never fail to enact good policies because it would never say "no." Unfortunately, I am skeptical that this would even constitute a procedure. Moreover, since some policies are a simple negation of other policies, it is impossible to coherently endorse all policies. Those policies that contradict each other would, then, not be endorsed by this permissive "procedure." Thus, there is still a chance that good policies would be impeded – via the enactment of policies that negate them.
19 Rawls 1995, pp. 56–7.
20 Rawls 1995, p. 58.

21 Rawls 1995, p. 63.
22 Of course, some policies may lack a fact of the matter regarding their overall goodness. For example, many policies merely determine a coordination point within a coordination game (what side of the road should we drive on). What may be objectively good is that there is coordination (we drive on the same side). Any particular coordination point (left side vs. right side), may be just as good as another.
23 Levitt and Dubner 2014, pp. 28–29.
24 Of course, a bill/nomination that is being filibustered is not always the bill/nomination that is contentious. Senator Harkin, for example, writes, "In this Congress, the Republican minority filibustered a motion to proceed to a bill to extend unemployment compensation. After grinding the Senate to a halt, from September 22 through November 4, the bill passed 98-0. In other words, the minority filibustered a bill they fully intended to support just to keep the Senate from conducting other business. Likewise, for nearly eight months, the minority filibustered confirmation of Martha Johnson as Administrator of the General Services Administration, certainly a relatively non-controversial position; she was ultimately confirmed 96-0. And, for nearly five months, the minority filibustered confirmation of Barbara Keenan to the Fourth Circuit Court of Appeals; she was ultimately confirmed 99-0" (Harkin 2010). In these cases, senators were using the filibuster as a tool to stop other legislation/nominations, which they did, in fact, find contentious.
25 As with the substantive critique, the reverse-substantive critique will require an adjustment of premise (4). Like the substantive critique, above, we should weaken this premise to a probabilistic claim. The premise should, then, adopt a procedure that, with a reasonable degree of probability, will impede the enactment of bad policies.
26 In response to arguments that are akin to the substantive critique, this problem does not go unnoticed by those who focus directly on the filibuster. As Binder and Smith, in *Politics or Principle*, write, "To test the thesis directly, it would be necessary to distinguish meritorious from unmeritorious legislation, popular from unpopular legislation, or, as the Byrd test would have it, 'really' wanted legislation from 'not so really wanted' legislation. Needless to say, no one would be satisfied with any test of the proposition that good measures are not killed by filibuster, or that the bad bills killed outweigh the good bills killed, so we do not pursue one" (1997, p. 128).
27 Of course, this claim is defeasible. If one were to be presented with a clear method (that all reasonable agents could accept) of determining what constitutes good or bad public policy, then one would have to reassess the substantive critique.
28 Waldron 1999, p. 102.
29 Waldron writes, "The authority of law rests on the fact that there is a recognizable need for us to act in concert on various issues or to co-ordinate our behaviour in various areas with reference to a common framework, and that this need is not obviated by the fact that we disagree among ourselves as to what our common course of action or common framework ought to be" (1999, p. 7n).
30 "Statistics and Historical Comparison." *GovTrack.us*.
31 For an excellent article that examines many of the justifications for majority rules, see: Mathias Risse, "Arguing for Majority Rule." *Journal of Political Philosophy* 12:1 (2004), 41–64.
32 Harkin 2010.
33 Ornstein 2010.
34 Woodrow Wilson, in fact, stated a similar criticism in 1917. He stated, "The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and

contemptible" (Wilson 1917). Not long after Wilson's speech, the Senate enacted Rule XXII (Arenberg and Dove 2012, p.24).

35 Hamilton, Madison and Jay 1961, p. 378.
36 Hamilton, Madison and Jay 1961, p. 146.
37 Arenberg and Dove 2012, p. 157.
38 Belkin 2013.
39 Young 2014.
40 The point of this mixed strategy, after all, would be to undermine the *equal representation of the States* (embodied by their equal representation in the Senate – regardless of population). Whenever a majority of Senators disagreed with the *popular will* (what a majority of the people would prefer – based on population), this strategy would propose obstruction.
41 Amar 2014, p. 1494.
42 Jefferson [1801] 1993, p. 27 and p. 78.
43 Senator Trent Lott is credited with coining the term "nuclear option." It has also been referred to as the "constitutional option" and the "Byrd option" (Wawro and Schickler 2006, p. 5n).
44 Wawro and Schickler 2006, pp. 32–33.
45 Standing Rules of The Senate 2011.
46 159 CONG. REC. S8417 (2013).
47 Hatch 2014, p. 12.
48 Wawro and Schickler 2006, p. 33.
49 Young 2014. The need for an active Senate, of course, appears in many places. Paul Krugman, as another example, writes, "Now consider what lies ahead. We need fundamental financial reform. We need to deal with climate change. We need to deal with our long-run budget deficit. What are the chances that we can do all that – or, I'm tempted to say, any of it – if doing anything requires 60 votes in a deeply polarized Senate" (Krugman 2009)?
50 Arenberg and Dove 2012, p. 176.
51 Arenberg and Dove 2012, p. 6.
52 This is how Senate Minority Leader Mitch McConnell referred to Democrats' use of the nuclear option (159 CONG. REC. S8417 [2013]).

References

Amar, Akhil. 2014. "Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule." *Duke Law Journal* Vol. 63: 1483–1502.

Arenberg, Richard A., and Robert B. Dove. 2012. *Defending the Filibuster: The Soul of the Senate*. Bloomington: Indiana University Press.

Belkin, Aaron. 2013, November 11. "Abolish the Filibuster to Restore Democracy." *New York Times*, available at www.nytimes.com/roomfordebate/2012/12/02/do-filibusters-stall-the-senate-or-give-it-purpose/abolish-the-filibuster-to-restore-democracy (accessed September 12, 2016).

Binder, Sarah A., and Steven S. Smith. 1997. *Politics or Principle? Filibustering in the United States Senate*. Washington, D.C.: Brookings Institution.

Congressional Record: Proceedings and Debates of the 113th Congress, First Session. 2013. Vol. 159. No. 167: S8413–8538.

Hamilton, Alexander, James Madison, and John Jay. 1961. *The Federalist Papers*. New York: Penguin.

Harkin, Tom. 2010, June 21. "Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in the Senate." *Brennan Center for Justice*. New York University School of

Law, available at www.brennancenter.org/analysis/filibuster-reform-curbing-abuse-prevent-minority-tyranny-senate (accessed September 12, 2016).
Hatch, Orin. 2014. "How 52 Senators Made 60 = 51." *Stanford Law and Policy Review* Vol. 25: 9–17.
Hewit, Hugh. 2015, February 15. "Should Republicans Kill the Filibuster?" *Washington Examiner*, available at www.washingtonexaminer.com/should-republicans-kill-the-filibuster/article/2560267 (accessed September 12, 2016).
Jefferson, Thomas. [1801] 1993. *Manual of Parliamentary Practice for the Use of the Senate of the United States.* Washington, D.C.: Washington Government Printing Office.
Koger, Gregory. 2010. *Filibustering: A Political History of Obstruction in the House and Senate*. Chicago: University of Chicago Press.
Krugman, Paul. 2009. "A Dangerous Dysfunction." Editorial. *New York Times.* 21 Dec. A31.
Levitt, Steven D., and Stephen J. Dubner. 2014. *Think Like a Freak: The Authors of Freakonomics Offer to Retrain Your Brain*. New York: HarperCollins.
Ornstein, Norman. 2010. "A Filibuster Fix." Editorial. *New York Times.* 28 Aug. A19.
Rawls, John. 1995. *Political Liberalism*. New York: Columbia University Press.
Risse, Mathias. 2004. "Arguing for Majority Rule." *Journal of Political Philosophy* 12:1: 41–64.
Standing Rules of the Senate. 2011. *Senate Manual*, S. DOC. NO. 112–1.
"Statistics and Historical Comparison." 2015, July 14. *GovTrack.us*, available at www.govtrack.us/congress/bills/statistics (accessed September 12, 2016).
"U.S. Senate: Count of Cloture Motions in Various Congresses." 2015, July 14. *U.S. Senate*. www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (accessed September 12, 2016).
Waldron, Jeremy. 1999. *Law and Disagreement*. Oxford: Clarendon.
Wawro, Gregory J., and Eric Schickler. 2006. *Filibuster: Obstruction and Lawmaking in the U.S. Senate*. Princeton, NJ: Princeton University Press.
Wilson, Woodrow. 1917, March 5. "Text of the President's Statement to the Public; Supplementary Statement from the White House." *New York Times*, available at http://query.nytimes.com/mem/archivefree/pdf?res=9E02E4DF143AE433A25756C0A9659C946696D6CF.
Young, Jeremy. 2014, December 7. "Dear Mitch McConnell: It's Time to End the Filibuster." *History News Network*, available at http://historynewsnetwork.org/article/157752#sthash.E97cjKPU.6jtSkMa0.dpuf (accessed September 12, 2016).

6 Conviction and Open-Mindedness

A Lesson on Political Revision from Adam Smith[1]

Jon Rick

Introduction: The Vicissitudes, Vices, and Virtues of Political Revision

In a letter to Adam Smith from the summer of 1772, four years before the publication of the *Wealth of Nations*, David Hume writes,

> We are here in a very melancholy situation: Continual Bankruptcies, universal Loss of Credit, and endless Suspicions…even the Bank of England is not entirely free from Suspicion…The Carron Company [a substantial ironworks] is reeling, which is one of the greatest Calamities of the whole; as they gave Employment to near 10,000 people. Do these Events any-wise affect your Theory?[2]

The broad Theory to which Hume broadly refers is Smith's political economic System of Natural Liberty. But, it is very likely that Hume also had in mind a more particular theory of Smith's concerning a topic about which the two disagreed – this being Smith's support of allowing banks to freely replace and distribute paper money instead of metal currency, a position Smith had articulated in lectures and writings from the 1760s and early 1770s.[3] Given that Hume's description of the financial crisis of his day almost sounds as if it could have been written about recent economic calamities, his question to the so-called great hero of laissez-faireism remains pointed. Although we lack an explicit reply from Smith, an answer does reveal itself in Smith's writings, and it is this: 'Yes,' to the particular-theory question, yet 'No,' to the broad-theory question. While the Scottish credit crises did lead Smith to change his views on the nature of financial regulation, his underlying conviction in the System of Natural Liberty remained unwavering.

Appreciating Smith's renunciation of deregulatory financial policy is itself a happy result; one that should help correct a still-too-prevalent conception of him as a thinker who put unqualified faith in unfettered markets. But more directly, in this essay, I aim to show that examining this episode from Smith's life can help us to reflect on and resolve a problem in political ethics concerning how to distinguish justified from unjustified revisions of political belief.

In politics, change is a capricious thing. During campaigns, it seems as if politicians and voters cannot get enough of change, with the former positioning themselves as charting new directions, advantageously resonating the latter's dissatisfaction with the existing regime. Still, change is not always a good thing in politics. John McCain exploited that ambiguity in his disparagement of rival Mitt Romney during the 2008 US presidential campaign: "Governor Romney, we disagree on a lot of issues, but I agree that you are the candidate of change."[4] While the public lauds politicians for promising to alter their opponent's policies, the change associated with revising one's *own* policy positions over time is often denounced as an arch political vice and is met with the charge of *flip-flopping*. This powerful epithet insinuates indecisiveness, timorousness, or the prioritization of self-interest. It is used to denigrate its target as a calculated panderer or an unprincipled waffler and, in either case, as someone lacking the conviction requisite for genuine leadership.[5]

Despite this widespread contempt for flip-floppers, we also accuse some politicians and their supporters of *epistemic closure*.[6] Deployed in political contexts, this term connotes a tendency toward extreme ideological bias, reflexive suspicion of all contrary arguments and evidence, and a general imperviousness to the possibility of belief revision. In short, it denigrates its target as possessing the condemnable vice of closed-mindedness. Flip-flopping and epistemic closure are accusations facing in opposite directions on the question of changing one's own political views. The charge of flip-flopping points to a political vice of irresoluteness and speaks against revising one's views, while the charge of epistemic closure points to the vice of closed-mindedness and commends receptivity to altering one's perspective.

Given these ostensibly conflicting vices, what are their converse political virtues? We can call the virtue that stands opposed to irresoluteness *conviction* and the virtue opposed to closed-mindedness *open-mindedness*. Assuming their status as virtues, this suggests that one ought to have political convictions, and yet, at the same time, hold these convictions open-mindedly. Is such convicted open-mindedness a political ideal? Wayne Riggs affirms the intuition that it is:

> [I]t seems that open-mindedness, if it is appropriate at all, is appropriate with regard to even those beliefs we hold most strongly. Indeed, we often think that it is with respect to just such beliefs that open-mindedness is *most* important. I have in mind here religious and political beliefs, and beliefs in the correctness of social norms. These are typically held very strongly, and yet it is often with respect to these beliefs that we take the charge of closed-mindedness to be the most damning.[7]

But, is it really possible to have convictions about strong beliefs and remain open-minded about them? A puzzle arises here: upon reflection it appears that these two virtues are incompatible with one another, that genuine conviction and open-mindedness are mutually unrealizable. Call this the *exclusivity challenge*. In what follows, I examine how Smith changed his political beliefs

about banking policy as an occasion for exploring this puzzle and for suggesting a way in which we can learn to live with it. While my arguments extend to conviction and open-mindedness for beliefs and persons in general, my primary focus will center on political beliefs and political agents.[8]

Smith's Change of View on Financial Regulation

In Smith's time, Scottish money consisted in both metal coinage ('specie') and increasingly paper money. Paper money took the form of promissory notes issued by banks, which were repayable in specie, minus interest, upon demand. Essentially, paper money represented lines of credit. Smith thought that the introduction of paper money in place of specie in the domestic economy offered two advantages. First, because paper money is cheaper to produce and maintain than specie, the labor and resources that would be expended on procuring precious metals might instead be directed toward commercial activity.[9] Secondly, and more importantly, using paper money in domestic circulation would free up gold and silver for use in international trade. Given that paper money functioned as promissory notes, its value was dependent on its being redeemable by the issuing bank. Accordingly, trust in paper currency varied with trust in the bank issuing it, and this trust would tend to erode with distance. As a result, gold and silver were still necessary for international trade. However, by conducting domestic trade with paper money, specie could be traded to other nations for goods and materials, which might in turn be used to expand industry at home. In this way, Smith argued that banks could effectively augment real national wealth by issuing paper money.[10]

Smith's earliest writing on this subject dates to his *Early Draft of The Wealth of Nations* from 1763:

> [Banks] enable us, as it were, to plough up our high roads, by affording us a sort of communication through the air by which we do our business equally well. That therefore, to confine them by monopolies or any other restraints, except such as are necessary to prevent frauds and abuses, must obstruct the progress of public opulence.[11]

Smith is arguing here that, just as byways through the air would permit us to turn the land used by roads to productive agricultural use, paper currency permits us to free up specie for international trade that will bring wealth into the country.[12] Importantly, in this passage, Smith also decries attempts to regulate paper currency. The idea that restraining banks from issuing paper money is bad policy is one that Smith reiterated three years later in his Glasgow *Lectures on Jurisprudence*, where he argues that, "The ruin of a bank would not be so dangerous as is commonly supposed." He goes on to maintain that even if all the paper money were issued by just one bank, and it went bankrupt, only "a very few individuals would be ruined by it," since aside from a few injudicious banks and high-risk investors, the public at large "would have very few of its

notes." Moreover, in these *Lectures*, Smith claims that the best way to minimize risk to the public involved neither regulating banks nor paper money. Rather, the best policy was to avoid giving a monopoly to a single financial institution and to encourage competition between several banks, so as to put each on its guard against failures that would benefit the others.[13] In concert with his statements in the *Early Draft*, Smith's *Lectures* reiterate his support of self-regulation for banks, with respect to distributing paper money. Still, his discussion of possible bank failures gives the *Lectures* a more defensive tone. Why is Smith even mentioning the ruin of banks?

The reason has to do with the threat of over-circulation, which occurs when banks issue more paper money than is necessary to facilitate commercial exchange. While over-circulation would not happen had "every particular banking company always understood and attended to its own particular interest," such informed prudence cannot always be counted on given problems of coordination between different banks, the failure of bankers to adequately assess the viability of their debtors, and the debt-leveraging strategies of risky entrepreneurs.[14] When there is too much paper in circulation, bank notes become devalued, and their possessors seek to return them to the bank to be redeemed for more durably valuable specie. If the over-circulation were substantial, and the banks lacked sufficient specie to redeem the paper money of subscribers, then this could induce a broad panic and a disastrous run on the banks. Such runs might drive a bank into default or failure and thereby threaten bankruptcy for the bank's subscribers as well as anyone left holding its now worthless paper. Moreover, if these banks had issued paper money in small denominations, then the ranks of hapless holders would likely include many members of the wage-laboring class. For these least-advantaged persons, the devaluation of their limited cash assets would be devastating.[15]

This, as the opening excerpt from Hume's letter indicates, is exactly what happened in Scotland between 1766 and 1772. And these staggering financial crises had a significant effect on Smith's view concerning bank regulation. While the aerial byway metaphor persists in the published version of *The Wealth of Nations,* he there describes it as perilously "suspended upon the Daedalian wings of paper money."[16] Although he did not abandon his support for paper money, Smith no longer rejected banking regulations as a viable policy:

> Paper money may be so regulated, as either to confine itself very much to the circulation between the different dealers, or to extend itself likewise to a great part of that between dealers and the consumers. Where no bank notes are circulated under ten pounds value, as in London, paper money confines itself very much to the circulation between the dealers…Where bank notes are issued for so small sums as twenty shillings, as in Scotland, paper money extends itself to a considerable part of the circulation between dealers and consumers….Where the issuing of bank notes for such very small sums is allowed and commonly practiced, many mean people are

> both enabled and encouraged to become bankers…*But the frequent bankruptcies to which such beggarly bankers must be liable, may occasion a very considerable inconveniency, and sometimes even a very great calamity, to many poor people who had received their notes in payment. It were better, perhaps, that no bank notes were issued in any part of the kingdom for a smaller sum than five pounds*.[17]

In his final and only published words on banking and paper money, Smith's revised position is that the government should regulate and prohibit banks from issuing paper notes in denominations smaller than £5 in order to ensure that the poor were not paid in notes that would render them vulnerable in the case of bank failures.[18]

Assessing Smith's Revision: Escalating Commitment and Flip-Flopping

How should we understand Smith's change in view? How does his revision stand with respect to the charges of epistemic closure or flip-flopping? To begin with, an attribution of closed-mindedness is a nonstarter. The hallmark of epistemic closure is belief-recalcitrance, which may involve agents intentionally shielding themselves from inconvenient truths, or it may involve involuntary motivated reasoning, "the tendency of people to conform assessments of information to some goal or end extrinsic to agency."[19] While many types of cognitive bias may drive motivated reasoning, two are particularly relevant to epistemic closure: *confirmation bias,* which disposes a person to interpret data so as to confirm her preconceptions; and *escalating commitment*, which is a kind of sunk-cost fallacy whereby resistance to belief-change escalates the longer a belief has been held. In all forms of motivated reasoning, then, the proper aim of belief – truth or accuracy – is supplanted by aims like self-affirmation, stability, and the avoidance of cognitive dissonance. It seems pretty clear that Smith cannot be charged with epistemic closure. The very fact that he revises his prior belief concerning the regulation of bank practices suggests that he did not respond to the financial crises from the late 1760s and early 1770s in a biased manner, simply confirming his prior beliefs about the ability of banks to self-regulate. The more serious question is whether Smith can be accused of irresolute flip-flopping, since he was (*as a critic might say*) against government regulation of banks before he was for it.

Flip-flopping is usually associated with a political agent who intentionally changes his beliefs, not for relevant reasons, but out of political expediency. For example, a politician who wants to retain office may change part of his platform, if doing so will curry his party's favor or secure the funding he needs for his reelection campaign. Since Smith never participated as a candidate in electoral politics, it would be hard to accuse him of changing his views out of electoral, political expediency – of what has been called tactical flip-flopping.[20] Moreover, whatever moral appeal his position might have in retrospect, economic historians

have argued that restricting bank notes to large denominations was not a popular position in Scotland at the time, as such a restriction would have eliminated what amounted to an easy source of credit to people of all walks of life.[21] So, Smith plainly was not engaged in cynical pandering.[22]

While is tempting to leave things here, Richard Posner and Cass Sunstein have argued that not all flip-flopping is tactical or calculated in this sense; there is also what they call *naïve flip-flopping*, which involves reversals or revisions based on irrelevant substantive commitments. To explain naïve flip-flopping, Posner and Sunstein appeal to a form of motivated reasoning they dub "merits bias," wherein a political agent is *implicitly* biased toward altering a policy position because doing so furthers some of her evaluative commitments. Importantly, the commitments that end up actually motivating the change of view are ones that ought not to have any normative bearing on the policy or position – they are normatively irrelevant to the matter at hand.[23] Unlike the tactical flip-flopper, the naïve flip-flopper is unaware that these non-relevant commitments have guided her decision-making away from the relevant grounds of decision-making. Conceptualizing naïve flip-flopping (in addition to tactical) helpfully renders a more ecumenical account of the phenomenon – one that expands the category of flip-flopping to capture too-often ignored instances of irresolute political revision, such as cases where enticements for tactical revision are largely absent. Importantly, this allows one to explore – as Posner and Sunstein do with examples from the US Judiciary – flip-flops made by political agents other than elected officials. This is relevant to my query of Smith as a potential flip-flopper, because even if Smith is not guilty of tactical flip-flopping, he still may be guilty of naïve flip-flopping.[24]

The kind of naïve flip-flopping that most interests Posner and Sunstein is *institutional flip-flopping*, in which a political agent naively reverses her position regarding the scope and legitimacy of the institutional power of government as a result of shortsighted merits bias. For example, imagine that a state passes a law banning anti-discrimination protections based on gender preference. Now, imagine a political agent with a longstanding commitment to the view that federal control over state legislation – an institutional power – ought to be extended only to protect the security of commerce. Say that she also has a strong commitment to gender equality. Driven by her commitment to gender equality, she might naively reverse her stance on the institutional powers of the federal government by arguing that the state's law should be overridden. Despite the odious inequality of this law, our political agent's revision manifests an institutional and naïve flip-flop on the power of federal government. She does not, all-things-considered, believe that such a broad institutional extension of federal power ought to be based on considerations of gender equality. From our agent's own perspective, the commitment to gender equality is, however laudable, an ultimately irrelevant consideration with respect to grounding arguments for the institutional power of government.[25]

Is Smith guilty of naïve institutional flip-flopping? Perhaps Smith's revised support of financial regulation amounts to changing his opinion about the

legitimate institutional power of government to regulate the economy on the basis of the benevolent, yet ultimately shortsighted and irrelevant, grounds of social welfare. In the wake of financial crisis and in resonance with Hume's concern, one might think to argue that Smith was pulled to advocate for financial regulation so as to do something to alleviate and further limit social harm, particularly that of society's least-advantaged. If we imagine, *for the moment*, that Smith's considered – non-merits-biased – view is that the relevant grounds (perhaps protecting individual liberty) for determining the institutional scope of governmental power over the economy are one's that tell against *any* economic regulation, one might make the case that Smith's revision in favor of bank regulation amounts to a naïve institutional flip-flop made under the influence of benevolently motivated reasoning.

To make this charge stick, one would have to show that Smith's considered position was that the government indeed lacks any legitimate institutional power to control the economy. While this thought might have currency among some who count themselves as followers of Smith, it was never Smith's view. Even in the earliest articulations of his position on the powers of government, Smith explicitly allowed for the establishment of what he calls "Police," with the power to set "regulations … with respect to trade, commerce, agriculture, [and] manufactures," and with the purpose of ensuring domestic security and promoting public prosperity.[26] Here and throughout his works, Smith maintains that promoting public prosperity and security are *relevant grounds* on which the government may justifiably regulate various components of the economy, including financial institutions.[27] Thus, by changing his *specific* view on financial regulation, Smith's revision remains consistent with his *broader* view on the relevant grounds for extending the institutional powers of government over the economy. He is not guilty of a naïve institutional flip-flop.

To take stock, I have argued that Smith's regulatory revision absolves him of both epistemic closure and flip-flopping. On the one hand, the absence of epistemic closure points towards an attribution of open-mindedness. On the other hand, although he changes his view, his avoidance of flip-flopping suggests an underlying consistency indicative of conviction. This seems a positive result for Smith – especially if one thinks that political convictions are precisely the sorts of beliefs about which it is most important to be open-minded. Yet while open-mindedness and conviction are both lauded virtues, a concern lurks regarding how we can consistently attribute both of these virtues to Smith, with respect to this single issue of financial regulation. How is it possible that Smith *both* maintains an enduring political conviction regarding financial regulation *and also* remains open-minded concerning financial regulation? Is it possible for Smith, or anyone, to hold a particular belief open-mindedly and with conviction? Ostensibly, conviction suggests holding a belief strongly and persistently, whereas open-mindedness suggests holding a belief uncertainly or, at least, with a willing receptivity to changing one's mind. As such, it would seem that a person cannot hold a belief both open-mindedly and with conviction.[28] This is what I have called the exclusivity challenge. Assessing

the force of this challenge requires looking further into what it means to hold beliefs either with conviction or open-mindedly.

Considering Conviction and Open-Mindedness

Whether or not beliefs are acquired and held with subjective strength, one can hold a belief with conviction only if one's belief is held with confident resolve, and with the dispositions of resilience and realization. Consider, first, *confident resolve*. Given the non-voluntariness of much belief acquisition, strength of belief may often be obtained unintentionally. Still, without making any controversial commitments to doxastic voluntarism, we can and should distinguish beliefs that are strongly acquired and held from beliefs held with confident resolve, where the latter requires critical reflection and endorsement. Confident resolve is achieved only when a person reflects on and endorses her beliefs as justifiably grounded. Naturally, reasonable, normative debate may arise as to what constitutes proper justificatory standards for endorsement.[29] But, whatever the method of reflective assessment one employs, confident resolve rules out the possibility of unendorsed, yet strongly held, convictions. Beliefs that are acquired and then strongly held, yet remain unendorsed – thus, held without confident resolve – are not held with conviction but are rather a sort of cognitive compulsion or fixation.[30]

The condition of confident resolve is one that applies to the endorsement of beliefs upon acquisition, but beliefs that sufficiently meet this condition may confront subsequent challenges. Just how one responds to such challenges marks the distinction between praiseworthy conviction and blameworthy dogmatism. And so, in addition to confident resolve, holding a belief with conviction also requires a disposition for *Resilience* against certain external challenges.[31] These include various types of theoretical and evaluative disagreement, empirical counterevidence, or enticements to abandon belief on non-relevant grounds such as self-interest. If one is readily open to suspending and questioning one's resolved beliefs when faced with any external challenge, then one lacks the resilience requisite for conviction. Resilience requires that the believer possess and exhibit a presumption of epistemic partiality in favor of her beliefs when challenged. The burden of proof must be placed on confronting claims, and the person of conviction must attempt to offer arguments against them or else dissolve the conflict by subsuming the claims within her own position.[32] Furthermore, resilience requires that any enticements to eschew beliefs on grounds other than their epistemic justifiability, e.g. self-interest, be resisted.[33] It is important to stress, that the epistemic partiality required by resilience involves an intentional presumption on behalf of one's belief and, as such, is not reducible to simple confirmation bias. On pain of conceptually reducing the very notion of conviction to mere dogmatism, resilience also *does not* preclude one's capacity to conform to truth-oriented norms calling for the revision of belief in the face of acknowledged, conclusive reasons against them. The alteration or abandonment of even confidently resolved convictions based

on learning them to be false or mutually unrealizable with other convictions that one holds, potentially with greater resolve, is entirely consistent with the condition of resilience. To this extent, both the confident resolve and resilience conditions of conviction run not afoul of baseline, truth-oriented norms of epistemic rationality.

By contrast with resilience, the third condition of conviction, *realization*, is motivationally proactive – it looks forward, in the sense of requiring positive engagement with the practical implications of one's conviction. Precisely what realization amounts to will vary depending on the type of belief. In general, this condition requires that the conviction-holder be disposed to act in ways that presuppose the soundness of her convictions. When it comes to beliefs with purely descriptive content, this is all the realization requires. With regard to evaluative beliefs, realization additionally requires that the conviction-holder be disposed to seek out and select actions that promote or preserve her values. And for normative beliefs, realization requires a disposition to choose actions aimed at respecting or upholding her normative convictions. For most persons, realization represents a necessary but minimally demanding requirement. Yet, when it comes to the convictions of political agents, particularly evaluative and normative convictions, realization assumes greater significance. A core function of the political agent is to develop strategies – policies – aimed at politically *realizing* the values and norms that she holds and defends with conviction. If she is not disposed to seek out means for realizing her otherwise resolved and resilient beliefs, she does not qualify as holding them with conviction.

Turning to open-mindedness, one finds multiple conceptions. On one view, open-mindedness is cashed out as being non-committal or uncertain – as not holding a particular stance: "to be open-minded about an issue is to have entertained thoughts about that issue but not to be committed to or to hold a particular view about it."[34] In this sense, one would be open-minded about financial regulation if and only if one lacked a considered opinion about the issue. While this may be an appropriate way of holding cognitive attitudes such as hypotheses, imaginings, polemical assumptions, or perhaps opinions, it does not appear to be a mode of holding genuine *beliefs*.[35] At best, one can be open-minded about weak and unresolved beliefs. On this uncertainty model, then, open-mindedness is either not really a way of holding beliefs at all, or it is merely a way of holding very weak beliefs. As such, it bears no relevance to assessing the exclusivity challenge concerning whether it is possible to hold *beliefs* with conviction yet with an open-mind.

A second view of open-mindedness fares better with respect to being compatible with holding beliefs strongly. In the words of William Hare, "open-mindedness is an intellectual virtue that reveals itself in a willingness to form and revise our ideas in the light of a critical review of evidence and argument."[36] Certainly, the willingness to form one's beliefs in response to evidence and conclusive argument is a virtue. Indeed, this is precisely what the conviction-condition of confident resolve enjoins. To this extent, open-mindedness and conviction are consistent. But, whether or not they can remain so depends on

how one interprets what is involved in being *willing to revise* one's beliefs. Just how willing to revise does one have to be to count as open-minded? On a broad interpretation, the willingness to revise requires a proactive disposition to pursue counterarguments and counterevidence to one's beliefs and to impartially reconsider these beliefs in the face of such challenges. On a narrow interpretation, the willingness to revise requires merely a disposition to revise one's beliefs when faced with contrary evidence or argument, which one acknowledges as sound, upon critical review. Which interpretation offers the best model of open-mindedness?

One benefit of the narrow account is that it looks to cohere extremely well with basic norms of epistemic rationality. However, upon consideration, this apparent advantage is actually the narrow interpretation's undoing. If the narrow interpretation exhausts the requirements of open-mindedness, then open-mindedness loses any claim to distinguishing itself as a distinct intellectual virtue: the mere willingness to form and alter beliefs in response to contrary conclusive reasons is nothing more than a baseline condition of epistemic rationality. To ensure its status as an intellectual virtue with any distinctively substantive content, open-mindedness must be construed as requiring more than the mere disposition for critical revision in response to conclusive reasons.

The broad interpretation of the willingness to revise succeeds in this regard. It generates a model of open-mindedness that requires dispositions to proactively pursue challenges to one's default beliefs and to impartially assess their grounds.[37] These additional requirements of pursuit and impartial engagement are sufficient to differentiate open-mindedness from a basic epistemic norm of rational revision in the face of conclusive counter-reasons. Thus, insofar as the broad interpretation allows for open-mindedness to stand as a genuine intellectual virtue, irreducible to the conditions of baseline epistemic rationality, there is reason to adopt it. Furthermore, unlike the initial uncertainty account of open-mindedness, this new model – call it the impartial pursuit account of open-mindedness – remains compatible with holding genuine beliefs and holding them strongly. In what follows, I will focus on this model of open-mindedness.

Assessing the Exclusivity Challenge

With these conceptions of conviction and open-mindedness in place, we are now in position to assess the exclusivity challenge. Is it possible for one to hold the same belief with both conviction and open-mindedness? That the answer is "no" becomes evident when confronting the resilience and realization conditions of conviction with the impartial engagement and proactive pursuit conditions of open-mindedness, respectively.

On the one hand, conviction's resilience demands that the believer manifest a disposition of epistemic partiality on behalf of those beliefs held with conviction. When faced with challenges to her convictions, she must not treat conflicting evidence or arguments – particularly evaluative and normative counterarguments

– with impartiality by granting them neutral credence, when compared with her confidently resolved beliefs. But, this sort of impartial engagement is precisely what open-mindedness requires. As such, these two conditions of resilience and impartiality, each of which are essential constituents of their respective virtues, are simply not mutually realizable ways of holding a belief.

On the other hand, the proactive pursuit condition of open-mindedness involves a disposition to seek out potential counterarguments or counterevidence to one's beliefs. While such pursuit may constitute a defensible strategy for testing hypotheses or when attempting to bolster one's more tepid beliefs, it is a disposition at odds with holding a belief with conviction. Specifically, proactive pursuit is not practically compatible with the realization condition of conviction, which demands that one be disposed to make choices aimed at uncovering ways of fulfilling the values and respecting the norms comprising one's convictions. Naturally, one may encounter challenges and impediments when striving for realization, and one must be reasonably receptive to such conflicts in accordance with the requirements of resilience. But being reasonably receptive to encountered challenges is one thing and proactively seeking them out is another. Just as with resilience and impartiality, realization and receptivity cannot, at least practically, mutually obtain. And, thus, the exclusivity challenge is sound: one cannot hold the same belief open-mindedly and with conviction. To see why this mutual exclusivity is challenging, particularly for political agents, consider the value of conviction and the value of open-mindedness.

To begin with, the value of conviction should not be understated. Holding beliefs with confident resolve, resilience, and with the disposition of realization are essential conditions for possessing the ground projects that constitute and define one's character.[38] A person lacking any convictions may still possess the requisite capacities for agency, and she may even be happy. But, she remains devoid of a central component of a good life: integrity of character. Jean Kazez calls such a person a "Nowhere Man" – "'Doesn't have a point of view, knows not where he's going to.'"[39] Without conviction, the Nowhere Man lacks the stability and integrity of character needed to have a clearly defined sense of self. While this is bad in and of itself, it also erodes the Nowhere Man's autonomy insofar as one lacks any unified self to determine.[40]

An implication of these claims is that one cannot genuinely *stand for something* if one lacks conviction. Putting matters this way suggests why there is a further reason grounding the additional importance of conviction in the lives of political agents. Whether elected, appointed, or merely consulted, an essential aspect of being a political agent involves publicly standing for something – openly holding evaluative and normative stances in a manner that both guides the agent's own political decision-making and serves as a bellwether to others, especially the governed.[41] A political agent devoid of convictions, who is readily receptive to changing her beliefs, would not merely be lacking a component of her own good life. She would also be infirming on the trust and welfare of those who depend on her integrity when seeking her political counsel or when submitting to her political authority.

Turning to open-mindedness, its value arises from its conjoining of intellectual humility with impartial curiosity in a world of plural values and the disagreements that emerge therefrom. By recognizing the realities of human fallibility in an ever-changing human landscape, open-mindedness disposes individuals to actively pursue open inquiry and to seriously and impartially entertain those views that pose significant challenges to their own. To this extent, open-mindedness provides persons with the dispositional resources to respond to unexpected and novel challenges to their worldview. In the words of John Dewey, "we live not in a settled and finished world, but in one which is going on, and where our main task is prospective," and holding beliefs with an open-mind is what readies a person to deal with the inevitability of such prospective change.[42]

Understood in this way, we can make sense of why open-mindedness seems particularly valuable in the case of political agents and their convictions. Recall Wayne Riggs's remark that, "it seems that open-mindedness, if it is appropriate at all, is appropriate with regard to even those beliefs we hold most strongly…I have in mind here religious and political beliefs."[43] The very intuitive thought voiced here is that open-mindedness and conviction are intellectual partners in virtue, with open-mindedness playing the critical role of preventing conviction from ossifying into closed-mindedness. However, if the exclusivity challenge is sound, then this plea for open-minded conviction *regarding particular beliefs* is misguided. And yet it is hard to shake this intuition that persons, especially political agents in plural democratic societies, ought to both have convictions yet remain open-minded regarding them. This is why the exclusivity challenge is so challenging.

Although I believe the exclusivity challenge is sound, I want to argue that we ought not be troubled by it; that we ought not see ourselves as faced with a disconcerting dilemma of having to choose between either having political convictions or remaining politically open-minded. We can remove any sting from the exclusivity challenge by showing how conviction and open-mindedness remain mutually realizable *within a particular person and with respect to intimately related beliefs*. While it is the case that one cannot hold the very same belief with conviction and with an open-mind, this does not foreclose on the potential for persons to consistently manifest both of these virtues about distinct beliefs that comprise a defined topic or issue. Focusing on the case of political beliefs, I will argue that political agents may evince both virtues with respect to a defined political issue, such as economic governance. By revisiting Smith's revision on financial regulation, I argue that he provides us with a vital lesson about how to reconcile conviction and open-mindedness, in spite of the exclusivity challenge.

Smith's Lesson on Reconciling Conviction and Open-Mindedness

The conclusion of my argument absolving Smith from epistemic closure and flip-flopping was that his revision regarding bank regulation was an intentional change of view, responsive to his own endorsed grounds for legitimate

economic governance. While he originally thought that the best political policy for promoting the values of liberty, public prosperity, and security was one that allowed banks to regulate themselves, when confronted with the financial crises that resulted from this policy, he came to see that his original position failed to realize these values. Whatever escalating momentum might have gathered behind his initial self-regulatory view did not prevent him from considering the counter-evidence and from reconsidering his position.

Within the foregoing framework of conviction and open-mindedness, three interpretations of Smith's revision suggest themselves. First, Smith's original belief supporting bank self-regulation as well as his broader beliefs concerning the legitimacy and efficacy of economic governance were beliefs that he held open-mindedly. His change of view involved no sacrifice of conviction because there were none there to be sacrificed. Second, Smith's beliefs about legitimate economic governance, as well as his original belief supporting bank self-regulation, were all held with conviction. His change of view on the latter was based on confronting overwhelmingly conclusive evidence against self-regulation (sufficiently overwhelming to override the resilience of his initial conviction). Third, while Smith's original belief supporting bank self-regulation *per se* (as well as his revised and ultimately considered belief against bank self-regulation *per se*) was held open-mindedly, his beliefs concerning the legitimacy and evaluative significance of economic governance *in general* were beliefs that he consistently held with conviction before and after his change of view concerning banks and paper money.

Of these, the third interpretation is the one I will pursue. The first interpretation is implausible given Smith's unwavering advocacy, across his writings, of the legitimacy of some economic regulation. This strongly suggests that he did indeed hold a conviction concerning the value of legitimate economic governance. While the second interpretation is significantly more plausible, it remains unhelpful with respect to exploring the possibility of reconciling conviction and open-mindedness in a manner that might alleviate difficulties posed by the exclusivity challenge (on this second reading, open-mindedness has no role whatsoever). However, by revealing the possibility of interaction between related beliefs of conviction and beliefs held open-mindedly, the third interpretation offers a model worthy of reflection – one from which we can draw an important lesson: Even if Smith did not hold his *particular*, original belief about bank self-regulation with conviction, this does *not* entail that he lacked conviction regarding economic regulation in general. To see how Smith's open-mindedness about financial regulation and his change of view about this particular belief are entirely consistent with his having conviction concerning economic regulation, we need to distinguish between two key types of political belief: (i) ideological beliefs and (ii) policy beliefs.[44]

In the political context, an ideological belief is a belief comprised of one's core evaluative and normative endorsements concerning the functions and aims of political governance. By contrast, a policy belief articulates a particular strategy for practically realizing the values/norms embraced in one's ideological

beliefs. My contention is that Smith's belief about the regulation of banking practices should be considered a policy belief. It is, for Smith, what George Stigler has referred to as instances of a "working rule."[45] Underlying this policy belief is Smith's ideological bedrock belief, which he called, "the obvious and simple system of natural liberty."[46] True to its name, Smith's political ideology of natural liberty undeniably included a robust endorsement of individual economic liberty. Yet, it was always also Smith's view that natural liberty was a value that required being balanced against the additional values of protecting public security and promoting public prosperity.

Just after suggesting the policy of regulating the issuance of small denomination bank notes, Smith defends his proscription by appealing to his core ideological belief in a manner that reflects his endorsement of achieving an evaluative balance between liberty and security:

> To restrain private people, it may be said, from receiving in payment the promissory notes of a banker, for any sum whether great or small, when they themselves are willing to receive them; or, to restrain a banker from issuing such notes, when all his neighbours are willing to accept of them, is a manifest violation of that natural liberty which is the proper business of law, not to infringe, but to support. Such regulations may, no doubt, be considered as in some respect a violation of natural liberty. But those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments; of the free, as well as of the most despotical. The obligation of building party walls, in order to prevent the communication of fire, is a violation of natural liberty, exactly of the same kind with the regulations of the banking trade which are here proposed.[47]

> If bankers are restrained from issuing any circulating bank notes…for less than a certain sum; and if they are subjected to the obligation of an immediate and unconditional payment of such bank notes as soon as presented, their trade may, with safety to the public, be rendered in all other respects perfectly free. The late multiplication of banking companies in both parts of the United Kingdom…instead of diminishing, increases the security of the public…In general, if any branch of trade, or any division of labour, be advantageous to the public, the freer and more general the competition, it will always be the more so.[48]

These remarks show significant concern for the preservation of individual liberty, and yet they do so with genuine circumspection. Smith reveals that he endorses limiting the liberty of exchange by regulation when the social costs of not doing so run high. More remarkably, his concluding suggestion is that appropriate financial regulation will serve to promote rather than hinder the socially beneficial practices of free and competitive banking. Like so many of Smith's policy justifications in the *Wealth of Nations*, his position on banking

supports free market principles, while at the same time revealing his core political ideology to be at odds with the gospel that unchecked markets will never fail. Various markets should be free to function, but only within a juridical framework that ensures the protection and realization of basic social values.[49] That the role of the sovereign state is to support and maintain a society in which the values of liberty, justice, security, and opulence are each preserved and realized is a belief that Smith held with genuine conviction. And, it is one that underlies and supports the revision of his particular policy belief about regulating banks.

Returning to conviction and open-mindedness, Smith's case study provides a valuable lesson for uncovering how political agents can be open-minded towards scrutinizing and changing their *policy* beliefs while neither flip-flopping nor sacrificing their core *ideological* convictions. The exclusivity challenge has shown us that it is not possible to hold the same beliefs open-mindedly and with conviction. As I have argued, we should not have hoped for this in the first place. This is especially so with ideological beliefs, which define a political agent's character and are the commitments that others rely on when electing, appointing, or seeking counsel from these individuals. Smith's reconciliatory lesson suggests that political agents should, *by and large*, restrict their conviction to ideological beliefs while remaining open-minded about their policy beliefs. Dividing the mental labor, as it were, of conviction and open-mindedness between these two types of political beliefs realizes the following valuable results.

Distinguishing ideological beliefs as the primary objects of conviction and policy beliefs as the primary objects of open-mindedness offers a political psychology in which political agents can manifest both virtues when determining where to stand on a political issue, such as the value, social role, and political status of economic governance. Modeled on Smith, a political agent may, with conviction, believe that it is legitimate for economic institutions to be governed to the extent that doing so fosters individual liberty, promotes public prosperity, and preserves public security. With this ideological conviction in place, the question then is what policy, when implemented, will best realize these values. Are these values best realized by a practical strategy allowing banks to regulate themselves, or are they best realized by imposing certain regulatory restrictions? Smith's answer to this question changes over time, and it does so because he remains open-minded concerning his policy beliefs. The critical point here is that his open-mindedness at the level of policy belief remains consistent with his enduring conviction regarding the value, social role, and political status of economic institutions.

Furthermore, this approach provides a perspicuous way of distinguishing many justifiable policy revisions from policy flip-flops: If a policy change intentionally reflects and preserves one's underlying ideological convictions, then it does not amount to a flip-flop, regardless of however radically different the new policy is. Given the vicissitudes involved in practically realizing one's ideological convictions, treating one's policy beliefs with open-mindedness is

often critical. Where the success of one's policy, measured by its ability to effectively realize one's ideological commitments, is contingent on empirical facts (as is the case with most economic policies), holding one's policy beliefs open-mindedly will facilitate justifiable changes of view as opposed to flip-flops. Possessing the disposition to proactively pursue and impartially engage with challenging counter-evidence to one's policy position also aids in preventing the political agent from succumbing to confirmation bias, escalating commitment, or comfortable dogmatism. Acknowledging this fact allows us to better recognize justifiable changes of political belief for what they are – the result of open-minded deliberation about how best to practically realize one's ideological convictions in a dynamic political world.

Despite these results, one might object that this reconciliatory framework is too rigid in its division of conviction and open-mindedness to ideological beliefs and policy beliefs, respectively. Is it not sometimes valuable to hold policy beliefs with conviction or ideological beliefs with open-mindedness? In response, it is important to stress that Smith's lesson and its accompanying model are intended to reveal how it is *possible* for political agents to genuinely manifest both conviction and open-mindedness on a defined political issue, despite the soundness of the exclusivity challenge. Construed normatively, I maintain only that they should largely adhere to the couplings of conviction with ideology and open-mindedness with policy *as a politically virtuous guideline, not as a rigid rule*. There are exceptions to this guideline.

Regarding policy conviction, it is important to acknowledge the legitimacy of holding policy beliefs with conviction when they are constitutively, rather than empirically and instrumentally, connected to one's ideological beliefs. What I'm suggesting is that conviction is an appropriate way of holding policy beliefs that involve limited or no empirical content. Take the example of a policy permitting marriage between all persons, irrespective of gender or gender preference, aimed at realizing one's core ideological commitment to equality. In this case, the policy is constitutively, if not conceptually, connected to one's ideological commitments, and there is no evident role for empirical considerations to bear on this issue. In cases of this sort, conviction at the level of policy belief is entirely merited insofar as it constitutively – not merely instrumentally – realizes one's ideological conviction.

A second exception includes policy beliefs with empirical content that have endured the 'test of time.' For instance, it would be misguided to suggest that one ought to proactively pursue and impartially engage with challenges to a policy prohibiting child labor, intended to realize child welfare. Perhaps the proper way to hold such enduring, yet empirical, policy beliefs is with 'presumptive' conviction, where this involves a reduced degree of epistemic partiality or resilience in comparison with the more robust resilience requisite of ideological convictions. In the case of a non-presumptive ideological conviction, robust resilience would render permissible the discounting of any challenges that fail to indicate internal incoherence within one's broader economy of endorsed ideological convictions. By contrast, the reduced

resilience of presumptive policy convictions would involve a heightened attentiveness to external challenges reflecting caution towards over-according credence to longevity in a world typified by prospective uncertainty.

When it comes to ideological beliefs, there is an important role for open-mindedness to play at the stage of acquisition and endorsement. In the phase of initial inquiry concerning matters about which one has no considered belief, the willingness to pursue and impartially assess conflicting positions is a proper and virtuous disposition, political and otherwise.[50] Still, a political agent who remained either mired in uncertainty or untethered from conviction would hardly be virtuous at all. Thus, with respect to *endorsed* ideological beliefs, I maintain that conviction carries the day over open-mindedness. As I've argued in the previous section, the spectre of a political nowhere man offers a conclusive case on behalf of the need for and value of maintaining ideological convictions. Without holding any ideological beliefs with conviction, the political agent cannot be considered as possessing any durable and publicly reliable political commitments. Such ideological vicissitude amounts to a failure of political character that has negative consequences both for the political agent herself and for those who rely on her ideological stability. Still, as the lesson from Smith illuminates, it remains possible for her to maintain enduring, ideological political convictions while also manifesting an open-mind about the policies best suited to realizing these convictions.

Notes

1 For countless counsel shaping my own revisions, I am deeply indebted and grateful to Emily Crookston, Andrew Franklin-Hall, and Amber Ross.
2 Hume (1977 [1772]).
3 Hume (1985), Smith (1978a, 1978b)
4 Dickerson (2008)
5 Safire (1982), Safire (1988), Liasson (2008)
6 Cohen (2010), Sanchez (2010a, 2010b).
7 Riggs (2010: 178).
8 The term 'political agents' is meant to be capacious enough to include political appointees (e.g. judges), political advisors, and influential political theorists/commentators (like Smith), *not merely* elected politicians.
9 Smith (1976a: 291–292)
10 Smith (1976a: 293–294)
11 Smith (1978b: 576)
12 My remarks in this section, especially those concerning the importance of Smith's metaphor as it transforms from his early to later work, are indebted to Hugh Rockoff's excellent discussions of Smith on Banking in Rockoff (2011, 2013).
13 Smith (1978a: 505–506)
14 Smith (1976a: 301–317)
15 Smith (1976a: 301)
16 Smith (1976a: 321) See also: Rockoff (2011, 2013), Checkland (1975), and Gherity (1993, 1994)
17 Smith (1976a: 322–323, emphasis added).
18 In 2014 inflation-adjusted values, £5 would have been equivalent to £601 using the retail price index and upwards of £10,820 when using a metric of relative average

income. These calculations are derived from www.measuringworth.com, a website brought to my attention by Rockoff (2013) (accessed October 26, 2016).

19 Kahan (2013: 418).

20 Posner and Sunstein (2015: 20–25). I've adapted their notion of tactical flip-flopping to apply primarily to the context of electoral politics.

21 Rockoff (2013).

22 Some remarks in his "Letter to Pulteney," might suggest a reading of Smith as altering his position on bank regulation for the tactical end of helping his friends recover from financial calamity. This is implausible, given that his ultimate policy position – limiting small paper currency denominations – would have had little effect in extricating those such as Duke Buccleuch from crisis. Smith (1977 [1772]: 163–164).

23 Posner and Sunstein (2015: 15–25).

24 Although Smith never stood as an elected politician, late in his life he did hold an appointed position in the Scottish Board of Customs. Phillipson (2010: 253–254)

25 Posner and Sunstein also consider a counterpart to naïve institutional flip-flopping, which they call "naïve substantive flip-flopping." In these cases, the naïve flip-flop concerns a particular, substantive policy position rather than a stance on institutional powers (Posner and Sunstein 2015: 20). I set aside this substantive version, insofar as it does not apply to Smith's change of view, which is best understood as a potential revision of his views on the institutional power of government to regulate the economy.

26 Smith (1978a: 5) See also: Viner (1927), Stigler (1965), Rockoff (2011, 2013).

27 Smith (1976a: 687–688).

28 Adler (2004: 128).

29 Reasonable methods and grounds of endorsement will vary depending on the content of the belief under consideration. Many concrete empirical beliefs, for instance, may achieve resolve after reflection on the reliability of one's perceptual faculties within normal environmental conditions. By contrast, evaluative beliefs will involve distinctive modes critical analysis, for example, that of surviving the scrutiny of reflective equilibrium or perhaps tests of universalizability or utility maximization in order to qualify as being held with both strength and resolve.

30 Compare the distinction between accepting a norm and merely being in the grip of it in Gibbard (1990: 5582).

31 Pianalto (2011).

32 For discussions of epistemic partiality with regard to friendship see Keller (2004) and Stroud (2006).

33 Once aware of the phenomenon of naïve flip-flopping, a person should do what she can to guard against the influence of motivated reasoning by merits bias (Levy and Mandlebaum 2014).

34 Gardner (1993: 39).

35 Shah and Velleman (2005).

36 Hare (2011: 9), see also Hare (1987, 2009).

37 Baehr (2011: 202–205).

38 Williams (1981).

39 Kazez (2007: 68–70).

40 Dworkin (1994: 224).

41 Calhoun (1995), Roberts and Wood (2007: 183*ff.*).

42 This quote from Dewey is cited in Hare (2009: 11).

43 Riggs (2010: 178).

44 In fact, ideological beliefs and policy beliefs need not be bound to political content. These concepts can be construed more broadly to cover conviction and open-mindedness in non-political contexts, though in doing so it probably helps to think of 'policy' beliefs in terms of beliefs concerning strategies for practically

implementing or realizing one's various ideological commitments. In the argument that follows, I will confine myself to the political context.

45 Stigler (1965: 3).
46 Smith (1976a: 687–688).
47 Smith (1976a: 324).
48 Smith (1976a: 329).
49 Paganelli (2015: 247–261).
50 This sort of open-mindedness when used in acquiring and endorsing an evaluative stance bears much in common with the impartial spectator theory of moral judgment that Smith develops in his *The Theory of Moral Sentiments*, Smith (1976b).

References

Adler, Jonathan (2004) 'Reconciling Open-Mindedness and Belief', *Theory and Research in Education* 2 (2): 127–142.

Baehr, Jason (2011) 'The Structure of Open-Mindedness', *Canadian Journal of Philosophy* 41 (2): 191–214.

Calhoun, Cheshire (1995) "Standing for Something," *Journal of Philosophy* 92 (5): 235–260.

Checkland, S. G. (1975) *Scottish Banking: A History, 1695–1973*, Glasgow: Collins Press.

Cohen, Patricia (2010, April 27) '"Epistemic Closure"? Those Are Fighting Words', *The New York Times*, available at www.nytimes.com/2010/04/28/books/28conserv.html?_r=0 (accessed February 19, 2016).

Dickerson, John (2008, January 6) 'The Mitt Maul', *Slate*, available at www.slate.com/articles/news_and_politics/politics/2008/01/the_mitt_maul.html (accessed February 19, 2016).

Dworkin, Ronald (1994) *Life's Dominion*, New York: Vintage Books.

Gardner, Peter (1993) 'Should We Teach Children to be Open-Minded? Or, is the Pope Open-Minded about the Existence of God?', *Journal of Philosophy of Education* 27 (1): 39–43.

Gherity, James A. (1993) 'An Early Publication by Adam Smith', *History of Political Economy* 25 (2): 241–282.

—— (1994) 'The Evolution of Adam Smith's Theory of Banking', *History of Political Economy* 26 (3): 423–441.

Gibbard, Allan (1990) *Wise Choices, Apt Feelings*, Oxford: Clarendon Press.

Hare, William (1987) 'Open-mindedness in Moral Education: Three Contemporary Approaches', *Journal of Moral Education* 16 (2): 99–107.

—— (2009) 'Why Open-Mindedness Matters', *Think* 5 (13): 7–16.

—— (2011) 'Helping Open-mindedness Flourish', *Journal of Thought* 46 (1–2): 9–20.

Hume, David (1977 [1772]) 'From David Hume, 27 June 1772', in *The Correspondence of Adam Smith*, eds. Ernest Campbell Mossner and Ian Simpson Ross, 161–163, Indianapolis: Liberty Fund.

—— (1985) 'Of Money', in *Essays: Moral, Political, and Literary*, Revised Edition, ed. Eugene F. Miller, 289–302, Indianapolis: Liberty Fund.

Kahan, Dan M. (2013) 'Ideology, motivated reasoning, and cognitive reflection', *Judgment and Decision Making* (8) 4: 407–424.

Kazez, Jean (2007) *The Weight of Things*, Malden: Blackwell Publishing.

Keller, Simon (2004) 'Friendship and Belief', *Philosophical Papers* 33 (3): 329–351.

Kolodny, Niko (2010) 'Which Relationships Justify Partiality? The Case of Parents and Children' *Philosophy and Public Affairs* 38 (1): 37–75.

Levy, Neil and Mandelbaum, Eric (2014) 'The Powers that Bind: Doxastic Voluntarism and Epistemic Obligation' in *The Ethics of Belief*, eds. Jonathan Matheson and Rico Vitz, 15–32, Oxford: Oxford University Press.

Liasson, Mara (2008) 'How Do We Define A Political Flip-Flop?', *National Public Radio*, available at www.npr.org/templates/story/story.php?storyId=92426950 (accessed February 19, 2016).

Paganelli, M. P. (2016) 'Adam Smith and the History of Economic Thought: The Case of Banking', in *Adam Smith: A Princeton Guide*, ed. Ryan Hanley, 247–261. Princeton: Princeton University Press.

Pianalto, Matthew (2011) 'Moral Conviction', *Journal of Applied Philosophy* 28 (4): 381–395.

Philippson, Nicholas (2010) *Adam Smith: An Enlightened Life*, New Haven: Yale University Press.

Posner, Eric and Sunstein, Cass (2015) 'Institutional Flip-Flops', *University of Chicago Public Law & Legal Theory Working Paper* 501: 1–41.

Riggs, Wayne (2010) 'Open-Mindedness', *Metaphilosophy* 41 (1–2): 172–88.

Roberts, Robert C. and Wood, W. Jay (2007) *Intellectual Virtues: An Essay in Regulative Epistemology*, Oxford: Clarendon Press.

Rockoff, Hugh (2011) 'Upon Daedalian wings of paper money: Adam Smith and the crisis of 1772', in *The Adam Smith Review* 6, ed. Fonna Forman-Barzilai, 237–268.

—— (2013) 'Adam Smith on Money, Banking, and the Price Level', in *The Oxford Handbook of Adam Smith*, eds. Christopher Berry, Maria Pia Paganelli, and Craig Smith, 307–322, Oxford: Oxford University Press.

Safire, William (1982, September 5) 'On Language; Flip-Flop', *The New York Times*, available at www.nytimes.com/1982/09/05/magazine/on-language-flip-flop.html (accessed February 19, 2016).

—— (1988, March 13) 'On Language; Phantom of the Phrases', *The New York Times*, available at www.nytimes.com/1988/03/13/magazine/on-language-phantom-of-the-phrases.html?pagewanted=all (accessed February 19, 2016).

Sanchez, Julian (2010a, March 3) 'Epistemic Closure, Technology, and the End of Distance', available at www.juliansanchez.com/2010/04/07/epistemic-closure-technology-and-the-end-of-distance/ (accessed September 12, 2016).

—— (2010b, April 7) 'Frum, Cocktail Parties, and the Threat of Doubt', available at www.juliansanchez.com/2010/03/26/frum-cocktail-parties-and-the-threat-of-doubt/ (accessed September 12, 2016).

Shah, Nishi and Velleman, J. David (2005) 'Doxastic Deliberation', *The Philosophical Review* 114 (4): 497–534.

Smith, Adam (1976a [1776]) *An Inquiry into the Nature and Causes of the Wealth of Nations*, eds. R. H. Campbell and A. S. Skinner, Oxford: Clarendon Press.

—— (1976b [1759]) *The Theory of Moral Sentiments*, eds. D. D. Raphael and A. L. Mackfie, Oxford: Clarendon Press.

—— (1977 [1772]) *The Correspondence of Adam Smith*, pp. 163–164, eds. Ernest Campbell Mossner and Ian Simpson Ross, Indianapolis: Liberty Fund.

—— (1978a [1762–3/1766) *Lectures on Jurisprudence*, eds. R. L. Meek, D. D. Raphael, and P. G. Stein, Oxford: Clarendon Press.

—— (1978b [1763]) 'Early Draft of *The Wealth of Nations*', in *Lectures on Jurisprudence*, pp. 562–581, eds. R. L. Meek, D. D. Raphael, and P. G. Stein, Oxford: Clarendon Press.

Stigler, George (1965) 'The Economist and the State', *The American Economic Review* 55 (2): 1–18.

Stroud, Sarah (2006) 'Epistemic Partiality in Friendship', *Ethics* 116 (3): 498–524.

Viner, Jacob (1927) 'Adam Smith and Laissez Faire', *Journal of Political Economy* 35 (2): 198–232.

Williams, Bernard (1981) 'Persons, Character and Morality', in *Moral Luck*, Cambridge: Cambridge University Press.

7 Voter Ignorance and Deliberative Democracy

Chad Flanders[1]

American voters are shockingly ignorant about politics. Not only do they not know basic facts about the structure of American government (what the three branches are, etc.) or the views of the major political parties, they do not really know in many cases even what *they believe* about politics, because what they believe can be manipulated depending on how pollsters ask the questions. People may oppose welfare, for instance, but favor increasing money transfers to the poor—which is pretty much what welfare is.[2] Even worse, when voters are motivated to seek out more information, and do seek out that information, they tend to do so in a biased way by gathering information from those sources which tend to confirm their existing opinions.[3] So even intelligent voters tend to be ignorant about what the other side thinks. Now, one would think that such massive and pervasive ignorance would matter not just to the effective running of our democracy, but also matter to the normative desirability of democracy itself. And one would think philosophers who defend democracy would spend a lot of time worrying and obsessing about the problem of voter ignorance, and how to fix it.

To a large extent they haven't, even though many major philosophical theories of democracy are theories of deliberative democracy, which (as the name might suggest) make heavy cognitive demands on ordinary citizens. Citizens don't just have to vote intelligently, they have to discuss and debate and deliberate intelligently.[4] A number of mostly libertarian thinkers (who I'll just call, for shorthand, "the libertarians"[5]) have taken them to task on this omission, arguing that voter ignorance presents a problem for the normative desirability of democracy, and a bigger problem for both the feasibility and desirability of deliberative democracy. If deliberative democracy is going to be an attractive theory, it has to say more about how ordinary citizens aren't really all that ignorant where it counts, or how ordinary citizens can get the knowledge they need to make good decisions, or maybe even why ignorance doesn't matter all that much. But they haven't done this yet, or what they have said seems painfully short of what is necessary for the task. This is, at least, what the libertarians have asserted in a number of recent books and articles.[6]

In this chapter, I'm going to defend the deliberative democrats' relative indifference to the problem of voter ignorance. I do think it's a problem for them, but it's not as big a problem as the libertarians make it out to be. The

libertarians and the deliberative democrats have different concerns, and this difference leads them many times simply to talk past one another. The libertarians view democracy as justified mainly in terms of what good outcomes it can produce. Obviously, if you have ignorant voters or even irrational voters, you stand a good chance of getting bad or sub-optimal outcomes. The deliberative democrats, on the other hand, are worried more about legitimacy. It's less clear that ignorance matters here, because a legitimate policy doesn't have to be the best or even a good policy. A law can be legitimate even if it's really harmful, and it's only if we collapsed efficiency and legitimacy that the libertarians would have a knock-down point. But it's not clear that we should collapse them. At the same time, there *is* some intersection between legitimacy and causing harm—and so between legitimacy and voter ignorance. That is, the libertarians have a point, although not as big a point as they make it out to be. I spend the last part of my paper trying to draw out this point.

My argument here is meant to be schematic. I don't dig deep into the opposing positions because I want to see why the two sides have failed, by and large, to engage with one another, and in this task abstraction is my friend and not my enemy. For my relatively narrow purposes, it is enough that I work with abstract ideal types on both sides, and not get into the detail of any one thinker's position. That said, I do focus on Jason Brennan's work on voting ethics in my exposition of the libertarians' position and on Rawls's version of "public reason" for the deliberative democrats. The fact that these two books don't talk to one another directly, or really at all, is both evidence of my point and sets up the aim of my project in this essay nicely: putting the two sides into a sort of dialogue with one another and seeing when, and if, the two sides score points against one another.

The Libertarian Objection to Deliberative Democracy, Briefly Stated

Start with a basic and even crude conception of democracy. Both the libertarians and the deliberative democrats will oppose it, but for different reasons, and their difference here speaks to an even deeper difference in how they approach the problem of voter ignorance. On the crude picture, democracy is just an aggregation of people's preferences. The people vote their desires, and the majority wins and the policies it favors get implemented. Democracy on this picture is simple majority rule, where the preferences of the majority aren't "laundered" at all. They—meaning the majority—get to rule, raw and unfiltered.[7]

What's wrong with this picture? Plenty is wrong with it, but begin with where the libertarians see the main problem, which is that if voters are ignorant, their preferences are going to be ignorant, and when they vote those preferences we will get polices that are ignorant or (what in the end amounts to the same thing) politicians who will be tasked with implementing preferences that the ignorant favor. What's wrong with ignorant policies? Well, they may not be the best polices. They probably will often be pretty bad policies, and this is bad. Bad polices have real consequences. Bad policies can harm people: bad policies

can lead to worse life prospects for people. They can lead to people losing their jobs, or the economy going into recession (or not getting out of a recession more quickly than it would have if there were good policies). Bad policies can lead to wars; to people fighting and dying for unjust causes.[8]

Here we get to the fundamental problem with ignorant voters, as the libertarians see it. If you are just acting on your preferences and the bad outcomes only affect you, then this is fine and even good for you: you are expressing your autonomy and living your life. You are responsible for the consequences of your actions, and rightly so. But when you vote, your vote at least potentially will lead to bad outcomes for other people and even coercing other people to do things that they otherwise wouldn't do.[9] If voters are ignorant or if they otherwise act irrationally, then other people will probably suffer.

On Jason Brennan's picture, this reasoning leads to the conclusion that most people have a positive duty not to vote, never mind that they may have the fundamental right to vote. If you don't know what you are doing when you vote, and not voting has no effect or only a negligible effect on your well-being, then you just shouldn't vote. Your ignorant vote has a chance—maybe not a huge chance, but a chance—of causing there to be a policy to be implemented that harms people. So just don't do it; don't vote: voting would be a morally wrong thing for you to do, in the same way it would be morally wrong for a person untrained in medicine to do advanced surgery.[10] In later work, Brennan has pushed this logic even further, suggesting that maybe some people shouldn't even have the right to vote.[11] But his argument works in both the modest and the more extreme versions.

Brennan is admirably forthright in his understanding of why voter ignorance matters to the normative assessment of democracy. He says that we should look at democracy as an instrument—his example is a hammer.[12] A good hammer is one that pounds nails well; a bad hammer doesn't. Democracy is a useful instrument insofar as it gives us good outcomes. If it doesn't, then it's a bad instrument. Lots of ignorant voters voting makes democracy a bad instrument, and so less normatively desirable. As we shall see, this instrumentalist perspective, common to the libertarians, is an important way in which they differ from the deliberative democrats. If we look at democracy less instrumentally and more as something that might be intrinsically good, we might worry about voter ignorance less. In fact, this is what I will argue is a main reason that deliberative democrats haven't taken seriously the challenge of voter ignorance.

But I am getting ahead of myself, because this point is about the *second* take I think deliberative democrats will have on voter ignorance. We need to go over their first take, first.

The Deliberative Democrats' First (and Shorter) Take on Voter Ignorance

I mentioned above that deliberative democrats won't like the basic/crude picture of democracy where democracy just means the aggregation of voters'

unfiltered preferences. They won't like it, not because it leads to bad outcomes, or not necessarily because it leads to bad outcomes, which is why the libertarians are leery of it. Rather, deliberative democrats don't like preference democracy because they think that the people should deliberate before they vote. That's what makes them deliberative democrats, after all. Simple preferences won't do; they want what voters reflectively endorse, after a period of more or less protracted discussion and debate with their fellow citizens. And this emphasis on deliberation may lead us to a simple and possibly effective response to the libertarians' worry about voter ignorance. Voters may be ignorant by themselves, but after a period of discussion and debate, they may no longer be ignorant! Problem with voter ignorance solved.

But, firstly, it is not immediately obvious that deliberation by itself can fix voter ignorance. If you put a bunch of ignorant people in a room, it is not clear that they will become more educated, especially if their ignorance is based in ignorance of the facts. Ignorant people may even make other people less knowledgeable if their ignorance engenders doubt—and especially if the ignorant are more persuasive, or if the partial knowledge of the voters who deliberate tends to reinforce itself, leading people to double down on their biases. And if ignorance goes deep, beyond lack of factual knowledge to ignorance of basic principles of reasoning, then deliberation among the ignorant could simply be a mess.

Deliberative democrats have been aware of this, and so they have proposed various measures to "cure" voter ignorance. They have proposed deliberative polls, or they have suggested that we have a "deliberation" day where voters get together to talk and reason with one another before they go off and vote.[13] I see these proposals as well meaning, but as caught in a dilemma. On the one hand, most of the proposals are quite modest. Most of them are, frankly, half-measures, more promissory notes about future, larger projects than they are realistic proposals that could be implemented anytime soon. Their success seems very modest, and their large-scale implementation seems extremely speculative. They end up not really making a serious dent in the problem of voter ignorance, or at least this is how they strike me.[14]

But that gets us to the other horn of the dilemma. The more aggressive these proposals become, the more they seem utopian. We would have to spend a lot of money, or radically change our educational system, or reshape how we conduct elections; and not just a handful of elections, but most or nearly all elections.[15] The utopian vision is stirring, but it is also very far out of reach. It suggests a reformulation of elections so that they are geared primarily toward deliberation rather than (mere) aggregation; this is no small feat. So we have the following situation. The deliberative democrats propose, seriously, deliberative democracy as the only normatively acceptable approach to democracy, but then they say we have to transform society so that we as citizens can live up to the ideal. Deliberative democracy then becomes utopian in a bad sense: a proposal for a society very far, almost *unrealistically* far, from our own.

Maybe there is a middle ground that is appealing and something we could live with. Maybe we can do small-scale deliberative experiments, and these

will help in small ways, at the margins. They can result in some real meaningful changes in parts of some societies.[16] But we are still left with the gaping problem of voter ignorance for most major elections. And then we have to ask, what about those cases where ignorant voters vote and have large sway over policy outcomes? Either we have to temporarily suspend those, or find some other grounds for justifying the much-less-than-ideal deliberation that exists in the status quo. My sense is that these half-measures end up mostly giving the game away to the libertarians. They concede the problem of voter ignorance, and lament it, but then throw rather scrawny deliberative proposals at it. We end up either with voter ignorance unchanged, or a theory—deliberative democracy—that is suitable only for a society that is almost unimaginably unlike ours. All the *big* decisions in a democracy seem to be made by people who are largely ignorant. Deliberative democrats need another take.

The Deliberative Democrats' Second (and Longer) Take on Voter Ignorance

The key to why deliberative democrats have mostly—save for the mostly paltry proposals on deliberation that they have on offer—ignored voter ignorance is because they do not view democracy mostly as an instrument, as a "hammer," in Brennan's metaphor. They start with democracy as something intrinsically good. That is, it is good in its own right, quite apart from the good results it may produce. Now, this can be taken too far. Brennan is right to this extent: if democracy routinely puts out bad results, really bad results, then this would be a real problem. It would suggest not just that democracy was not normatively desirable, but perhaps not even sustainable. A democracy that consistently resulted in laws that crushed the economy, or that regularly led the nation into unwinnable wars would probably be a democracy that was not long for this earth. So there is a threshold condition on democracy; it has to produce tolerable results. But it by no means has to produce the best results. Deliberative democrats will insist, however, that for democracy to be justified it has to produce legitimate results.

The idea that democracy is primarily justified instrumentally is mostly a non-starter for the deliberative democrats. They value democracy because it is intrinsically good: maybe it is an expression of collective autonomy and that is good. Maybe people just have a fundamental right to participate in governing themselves. I am not so much concerned with which particular way we cash out the intrinsic value of democracy, except to note that this is usually where deliberative democrats start from, and not with the idea that democracy is a tool used to fix some problem. Democracy is worthy in its own right, or rather, democracy considered in a certain way is valuable. Not just any sort of democracy will do—as we've seen, deliberative democrats don't like pure preference democracy. They think that we need deliberative democracy to get at something really worthwhile.

But deliberation has to work under certain constraints in order to realize the value of a deliberative democracy. Deliberation done in the wrong way doesn't

show respect to the participants in the process, and more profoundly, doesn't lead to legitimate outcomes. And this gets us to the main way I want to cash out the difference between the libertarians and the deliberative democrats when it comes to the value of democracy. For the libertarians, democracy is good if it leads to good outcomes. For deliberative democrats, democracy is good because—when done the right way—it leads to outcomes that are legitimate in the eyes of the participants. Good and legitimate outcomes aren't the same thing. An outcome that is legitimate may be a bad policy. It may be inefficient and it may actually end up causing people to suffer. But these defects don't detract from the legitimacy of the outcome, if the outcome was the result of the right process.

The constraints that deliberative democracy needs in place to work (i.e., to generate legitimate outcomes) will differ from theorist to theorist, and here I take the case of John Rawls, not because he is the best example of a deliberative democrat but precisely because in a way he is not the best. His sketch of what deliberation should look like is in one respect extremely minimal. It works at a very high level of abstraction. Rawls is not so much concerned with concrete instances of deliberation, or the creation of new deliberative fora. He is content to say things such as, in America, the Supreme Court is the "exemplar of public reason," and to not give many examples (outside of Supreme Court opinions) of what good citizen deliberation, or deliberation between elected officials, would look like. But the very crudeness of Rawls's picture is helpful, because it shows what constraints even a vague conception of deliberative democracy would have.

For Rawls, a policy is legitimate if it is justified on terms that other citizens could not reasonably reject, or phrased more positively, that other citizens could reasonably be expected to accept. Justifying policies in this way is a matter of respecting other citizens.[17] As part of the process, giving reasons that other people may be expected to accept shows them respect in that you are giving them reasons that they can realistically consider as reasons. You are seeking to justify a policy to them in terms they can at least understand, even if they do not ultimately agree with them. These reasons Rawls calls "public reasons."[18]

And when a policy gets passed and is justified in terms of public reasons, this means that even the people who were on the losing end of the debate can see the policy as legitimate: it was justified in terms that people could see as reasons, even if they (the losers) thought that the reasons were not the most persuasive ones. Compare this to someone who loses a debate that was not justified in terms he could understand as reasons: suppose a policy passes just because it favors the wealthy, and the people who supported it were happy to justify the policy in terms of naked self-interest. The losers in this case would rightly be resentful of the result; in a way, they hadn't been treated with respect as part of the process. They were treated as an obstacle.

Most deliberative democrats have some line they draw between reasons we can share (public reasons) and reasons we can't (non-public reasons). The line will be more or less strict, more or less inclusive, depending on the theorist. The

way Rawls draws the line is between reasons that are public and reasons that are based on a person's "comprehensive doctrine." The clearest example here is reasons that are based on someone's religious beliefs. If a person tries to justify public policy X because his religion dictates that X is required, then other people may not be able to understand his reasons as reasons they can share. They may not share his religious beliefs; or they may share those beliefs, but differ in the best interpretation of them. Religion is something that, in modern society, people can reasonably disagree about. So religion can't really be a source of public reasons. A religious reason is something a lot of people just won't see as a reason ("So what if your god requires it, I don't believe in your god.").[19]

A policy that is passed based on non-public reason isn't a legitimate policy for Rawls. Interestingly, Rawls doesn't say much about a policy that is passed by voters who are ignorant, or who have bad or biased information. These are the kinds of policies that libertarians are worried about, because they tend to be harmful policies. Why would Rawls ignore the problem of voter ignorance? One answer to this question is that he doesn't, or not entirely, and I'm going to get to this in the final part of my essay. But by and large, Rawls disregards the problem of voter ignorance and I think the emphasis deliberative democrats place on legitimacy begins to explain why. To start with, we can say that for Rawls and maybe for deliberative democrats more generally, voter ignorance doesn't make a policy illegitimate in the same way that not following the rules of public reason makes a policy illegitimate.

But why would *that* be? Here we can take a distinction commonly made in the philosophy of law to help us see the difference between a policy that is passed as a result of voter ignorance and a policy that is passed based on what Rawls sees as an illegitimate process. A process that results from voters deliberating, and using public reasons, but making factual mistakes or showing factual ignorance may result in a policy that hurts some people, or at the very least a less than ideal policy—less ideal than a policy that would be passed with full information, or with expert briefing. Such a policy may cause harm. But it does not involve any wrong being done. Harms can happen but not involve wrongs.[20] An example is in tort (personal injury) law. Maybe someone has exercised reasonable care, but he still gets into a car accident. The person who is hurt in the accident is certainly harmed. But because the harm wasn't intentional, the person hasn't been *wronged*. Compare this to someone who commits a serious crime—say, assaulting someone. Assuming that the assault was intentional, the crime not only hurts someone, it also wrongs someone. A harm is just an injury, but a wrong is something more: it adds insult to injury.

Deliberative democrats are concerned about legitimate and illegitimate policies. They are concerned not in the first instance about policies that may harm people, but policies that may represent a wrong being done to people. The main wrongs are policies that are passed in a way that don't show respect to others, because the wrong sorts of reasons were used, reasons to which people may reasonably reject. To introduce yet another distinction, deliberative

democrats are concerned that we behave "reasonably" with one another. Being reasonable doesn't always mean doing the most rational thing. In fact, doing the most rational thing in the wrong way may be unreasonable. Maybe it's right that policy X be passed; but if you don't justify that policy to others in terms they can reasonably be expected to accept, that rational policy may nonetheless not be reasonable. The best result isn't necessarily legitimate. And it follows, too, that a bad result isn't necessarily illegitimate either.

The reason why libertarians and deliberative democrats talk past one another, and why the former see a big problem where the latter tend not to, is that they are speaking in different registers. The libertarians look at democracy being inefficient when ignorant voters vote. The deliberative democrats don't see this as the main priority. Democracy is intrinsically good even if it doesn't give us the best of all possible policies, and that goodness comes from a certain process that respects people. When we deliberate with bad or insufficient information, we are not necessarily being disrespectful. We may be well-meaning and ignorant and vote for flawed laws and even more flawed politicians and still be reasonable and respectful for all that.

Why Voter Ignorance Should Still Be a Concern for Deliberative Democrats, but Perhaps Not a Huge One

But this is too quick, for the following obvious reason. There has to be a point at which a person's voter ignorance does show disrespect to other citizens. Deliberation, while not exhausted by facts, certainly relies on some facts, and if you don't know those facts and those facts are relevant to good deliberation, then this is a problem. Moreover, this problem turns into a problem of respect when that ignorance isn't just incidental, but somehow deliberate. How could this be? Suppose you are willfully ignorant about a certain policy or fact; you refuse to listen to the facts on the other side, and you refuse to do any research in support of your position. In short, you close yourself off to the facts, because you don't want to be persuaded. Nonetheless, you endorse policy Y anyway, even though you don't know the facts and have gone out of your way to not learn the facts. It is hard not to see this as a matter of disrespect to your fellow citizens. You are being intentionally ignorant about something that you are proposing as something they should accept. Here's a point where you seem to be doing something wrong, and not just something potentially harmful.

Call this a situation of *culpable ignorance*, where you are putting your head in the sand because you don't want to know the facts. When you do this, you are acting in a way that really wrongs your fellow citizens. Certainly citizens show culpable ignorance when they are intentionally ignorant, when they really go out of their way to stay ignorant, and they close their ears when anyone starts talking about the facts contrary to their own point of view. But we should probably go further than this, saying that citizens have a duty to be reasonably informed about the issues they deliberate about and vote on. They should be able to assess, from a layman's point of view, the factual basis of the issues at

play. They should stay on top of things, or at least try their best to do so.[21] Their votes should not just be blind choice. This may involve using any of the proxies deliberative democrats write about—they can consult experts, they can rely on cues provided by party labels. These things can stand in for a person's actual knowledge. They satisfy the basic duty of a citizen to be informed. And indeed, Rawls says citizens do have such a duty, and that they fail to show civic virtue when they enter into deliberation or into the polling booth without any real knowledge of the issues. Rawls makes this a moral duty, not a legal requirement, but it is a requirement all the same.

Interestingly, Brennan also says of citizens that they can vote only when their votes are justified. That's what counts as "good voting." Brennan doesn't specify what he means by justification, and mostly leaves this to the epistemologists. But the tenor of his position suggests again that he is thinking in the mode of rationality rather than reasonability. On his view, being justified sets a pretty high standard. It is not about being reasonably well-informed so that you are not insulting those with whom you deliberate. It's a matter of getting as close as you can to getting the right answer about what the best policy is. His brief remarks on the subject show that this is quite a demanding standard.[22] You don't just need to know enough to get by, to have a rough sense of the issues and the debates, but really to read deeply in various fields. It is a daunting task, and the upshot seems to be that most voters will not be justified in voting on Brennan's view. If our standard is reasonableness, and not strict rationality, we can afford to relax things a little bit. Be open minded, don't be closed to the facts, read up on things and you'll be reasonable.[23]

I rest this conclusion on a rough sense of what respect should mean in the deliberative context (where being respectful is not the same as being right), but also on two other considerations that are discussed by Rawls, although not in the context of responding to voter ignorance. They are prominent in discussions by other deliberative democrats, and some do use them to respond to the difficulties posed by voter ignorance.[24] The first consideration is that many things that voters deliberate and vote about are not facts, but values. Rawls seems to think these are the main things voters should be worried about. Voters can argue and debate about what rights we should protect, or about what America's position in the world should be. Some of these things are more or less insensitive to facts, or when they are, voters may just vote generally to promote certain values and leave it to their representatives and select experts to realize those values.

So maybe some of the hard questions, the questions where Brennan wants voters to have a deep knowledge base, aren't really on the table, or if they are, they are not there in a way where the voters in the first instance have to know things. And this seems right. When we vote for a politician, we are voting for his broad positions, or his or her ability to lead, and these things seem to be based largely on value judgments. Our vote for a particular politician may rely on factual questions, but only in a derivative way. We may assume that the politician we elect will have people that will look at the facts for us.[25] Moreover,

on some issues there may not really be any factual questions at issue. The debate on these issues may revolve more around the values we have than around facts.

But it would be fatuous to insist that there is a strict divide between facts and values, because mistakes about the former may lead to bad value judgments. Ignorance about economics (about the economic benefits of free trade or immigration, for example) may lead us to support policies that are not efficient, and our views about human nature (such as about free will and responsibility) may lead us to take views on criminal justice that are harsh or unfair. Some of these mistakes may be mediated by experts that are chosen by the politicians we elect, but some may not. Sometimes, we voters get what we want, even if the facts aren't really with us. We may be stuck with politicians with the wrong values, and those values may be based on ignorance of the facts. If we knew more, we'd probably vote better.

This leads me to my second consideration that makes me think voters don't need to be fully rationally justified in their votes and that they just need to make a good-faith effort to be informed about the issues. The libertarians are highly confident about certain answers being the right ones, especially in economics. And, to be fair, they are probably right about some things, and almost certainly right that there are better and worse answers. But there is room for reasonable disagreement here. Facts can be open to multiple interpretations, and experts disagree on many economic issues—even down to raising the minimum wage, on which there used to be a pretty solid consensus (i.e., that it was bad).[26] If people are doing their best to be somewhat informed and they come to differing conclusions, this is probably to be expected given that there is even disagreement on what the right answer is among those who are fully informed. The libertarians' position would be stronger if there were obvious answers that people in their ignorance were just completely oblivious of. But there don't seem to be many obvious answers, not even in economics.[27]

Rawls says that the state of modern society is one of reasonable pluralism, which he says is based in something called "the burdens of judgment."[28] One of the reasons we have plural views is because we have differing interpretations of certain facts about the world. But this pluralism is importantly reasonable, because there is room for disagreeing about those facts while still remaining reasonable. Rawls sees deliberation as primarily and properly about the basic values we have in a democracy, and especially over those things he calls "constitutional essentials and basic justice."[29] These are big, broad, framework issues, not technical scientific or economic questions, although our position on them will inevitably be based on the factual understandings we have. Voters deliberate reasonably when they talk about these issues on terms other people may be reasonably expected to accept—and when they make a good-faith effort to be informed about the factual issues that are implicated in their debates about values. Voter ignorance is a problem, but so long as voters live up to this relatively modest standard, it is not a huge problem for deliberative democrats given what they care about.

A Possibly Disconcerting Conclusion[30]

I have said that voter ignorance isn't a huge problem if citizens make a good faith effort to keep themselves informed and abreast of the factual issues at the heart of many debates. This is enough for them to show respect to their fellow citizens, especially given that a lot of these debates aren't factual at all, but about values, and also because the facts in many cases are subject to different interpretations. A reasonably informed electorate is all we need for our policies to be legitimate. They may not be the best policies, but they can in good conscience be called legitimate, and legitimately ours. We may worry about some policies causing people harm, but the fact that they do doesn't represent an existential threat to democracy. Democracy can still be normatively justifiable and desirable, even if voters are less than fully justified in voting and deliberating the way they do because of their ignorance about certain matters. This, in fact, is an important realization, and the libertarian critique is helpful in bringing it out. If we are defenders of democracy—and we should be—then it is important to get right what it is exactly we are defending, what it is about democracy that is desirable.

But what if it turns out to be very hard for voters to get even reasonably well-informed about certain factual matters, let alone to be experts in those areas? What if the information that is out there is polluted—inaccurate and biased? What if this misinformation is particularly pervasive? In a rather despairing passage, Rawls writes this about the state of American democracy which I quote at length:

> Deliberative democracy also recognizes that without widespread education in the basic aspects of constitutional democratic government for all citizens, and without a public informed about pressing problems, crucial political and social decisions simply cannot be made. Even should farsighted political leaders wish to make sound changes and reforms, they cannot convince a misinformed and cynical public to accept and follow them. For example, there are sensible proposals for what should be done regarding the alleged coming crisis in Social Security: slow down the growth of benefits levels, gradually raise the retirement age, impose limits on expensive terminal medical care that prolongs life for only a few weeks or days, and finally, raise taxes now, rather than face large increases later. But as things are, those who follow the "great game of politics" know that none of these sensible proposals will be accepted. The same story can be told about the importance of support for international institutions (such as the United Nations), foreign aid properly spent, and concern for human rights at home and abroad. In constant pursuit of money to finance campaigns, the political system is simply unable to function. Its deliberative powers are paralyzed.[31]

One way of reading this is to show that Rawls's theory of deliberative democracy is really an ideal theory, and that we are far from reaching the preconditions for a Rawlsian society.[32] Too much is getting in the way. Campaign finance reform

is obviously high on Rawls's list, but there are probably a host of other reforms he would prefer before he would say that we can actually deliberate legitimately. Rawls seems to think that the existing obstacles to deliberative democracy prevent it being realized anytime soon. This goes to the response I sketched out earlier in this paper, on the deliberative democrats' first take on voter ignorance. It's a problem, and we need to do a lot to solve it, and until then, our theory just doesn't apply. Deliberative democracy is a theory for another world, and not really for our world—not yet.

I don't like this conclusion, and I think we can have deliberative democracy right now, but this suggests the following disconcerting possibility. Suppose that, because of big money in politics, the information a voter who makes a good-faith effort to get is all slanted one way. Maybe a corporation pays big money to popularize its views on global warming, and those views aren't consonant with the best science on the subject. The voter, let's say, is really trying to get informed, but the marketplace of ideas is flooded with bad information. In the noise of a campaign, it becomes harder and harder to really be well-informed. The reasonable person may be trying to do his best to do his duty, but the society as a whole just isn't helping him out—the social world is conspiring against his efforts to be reasonably well-informed. He is not being deliberately ignorant, and he is not even being culpably ignorant. He is being reasonable enough, given the circumstances. But this reasonableness is not helping him get the right information.

Do we have a problem with policies that are the result of such a social world, where voters who try just can't get good information? The policies, we can stipulate, will be less than perfect. They will be the result of bad information, and voters who are ignorant of the truth. They may end up causing real harm. But this is what we already knew about voter ignorance. The policies, I think, would still be legitimate. Legitimacy, to this extent, swings free of the best or the most rational policies. If voters are trying to be well-informed and deliberating on the basis of reasons that all can share, the policies that are the outcome of this deliberation are legitimate policies.[33] What would be the basis for saying that they aren't? Reasons that reflect only one side of a debate may still be reasons, after all. And if citizens accept these reasons, and vote accordingly, the resulting policies will be the legitimate policies of those citizens.

This may seem a disconcerting conclusion. It may make us think that voter ignorance is, after all, a problem. Shouldn't it matter to legitimacy that voters are reasoning on the basis of biased information, on propaganda? Shouldn't we say, like Sunstein does, that the only authentic and autonomous deliberation is deliberation that is "fully informed"?[34] But this is the risk of letting voters vote at all now, in the real world, rather than having experts rule or waiting for voters to become "truly informed," which may be (and probably will be) never. And of course money in politics and the sway of propaganda is a problem. My point here now is that it is not necessarily a problem that means that we cannot have a deliberative democracy. We can, even if our results are not the best and are the product of ignorance and misinformation. That's what it means when we put legitimacy first, rather than the rightness of our outcomes, and when we

treat democracy as something more than a hammer but as something of worth in its own right.

Notes

1 Thanks to Mike Neblo for conversations and for references, and to Jen Rubenstein for detailed comments on an earlier draft. An audience at the Vanderbilt Social and Political Thought workshop in early September 2015 gave me useful feedback, especially Brooke Ackerly, Emily Nacol, Christopher Slobogin, and Larry Bartels. A Washington University Political Theory Workshop was especially useful in refining a later draft, and I thank Dan Aldrich for his detailed comments on that occasion. Shelby Hewerdine pitched in with some very helpful edits.

2 For these facts, see Louis Menand, "Fractured Franchise," *The New Yorker* (July 9, 2007). I should offer a disclaimer up front: I am for the most part assuming the existence of voter ignorance. I do not propose here to defend its actual existence or to rebut those who say it does not exist. My paper should be read for the most part as saying only that *if* voter ignorance exists, then deliberative democracy is still desirable. (Obviously, if voter ignorance doesn't exist, deliberative democracy is probably still desirable as well!)

3 See Illya Somin, *Democracy and Political Ignorance* (Palo Alto: Stanford University Press, 2013): 78–80 ("[P]eople tend to use new information to reinforce their preexisting view on political issues while discounting evidence that runs counter to them.").

4 For an example, see Cass Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993): 164.

5 The libertarians include Illya Somin, Bryan Caplan, and Jason Brennan. All are, I believe, card-carrying libertarians as a matter of fact. But this is not just a coincidence. In general, the thrust of their books is that voters systematically make mistakes about correct economic policy, favoring more government intervention in the economy than is optimal (and optimally, regulation should be quite minimal, if not non-existent). Although libertarians are not generally consequentialist, they do care about the harm we do to each other—either as individuals or collectively—hence their worry about bad democratic decision-making. See *infra* nn.7–8.

6 In addition to Somin, see also Jason Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2011) and Bryan Caplan, *The Myth of the Rational Voter* (Princeton: Princeton University Press, 2007).

7 See also Flanders, What Do We Want in a Presidential Primary? An Election Law Perspective, (2011) (contrasting aggregative and deliberative models of democracy): 901–945.

8 I am basically summarizing the arguments made mostly in Brennan (who is the clearest), but also in Somin and Caplan.

9 A point originally made by Mill in his *Considerations on Representative Government*.

10 I take this analogy from a similar one made by Caplan in a lecture.

11 Brennan, "The Right to a Competent Electorate," *Philosophical Quarterly* Vol. 61 (2011): 700–724.

12 Brennan at (2011) at 7–8 ("I take a certain view of the value of institutions. On my view, political institutions are like hammers. We judge them in the first instance by how function they are, by how well they help us lead our lives together in peace and prosperity.")

13 For both ideas, see James Fishkin and Bruce Ackerman, *Deliberation Day* (New Haven: Yale University Press, 2004). I have criticized deliberation day on other grounds in "Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law," *Journal of Law and Politics*, Vol. 23, 2007: 147–170.

14 Somin effectively dismantles many of these proposals in Chapter 7 of his book. He concludes that "the painful reality is that we cannot count on any major increase in political knowledge in the foreseeable future." (191)
15 Such as would be the case if we adopted something like Fishkin and Ackerman's "deliberation day."
16 There have been deliberative experiments in China that seem to have had just this kind of relatively small-scale (but not insignificant) success. See Fishkin, J, Baogang He, and Alice Siu (2006). "Public Consultation through Deliberation in China: The First Chinese Deliberative Poll." In *The Search for Deliberative Democracy in China*, Leib, Ethan J. and Baogang He, eds. New York: Palgrave MacMillan, ch. 12.
17 Rawls calls this the "liberal principle of legitimacy." Rawls, *Political Liberalism* (New York: Columbia University Press, 1993): 217.
18 See Lecture VI of *Political Liberalism*.
19 Again, religion is the most obvious example, but we can also talk about votes made purely on the basis of selfishness as not meeting the public reason standard, either. Such reasons aren't really "comprehensive" (unless one is an ethical egoist) but neither are they public. People can't see "I voted for it because it makes me better off" as a reason they should care about, and heed.
20 See, e.g., Jean Hampton, "Correcting Harms versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* vol. 39 (1992):1659–1702.
21 And they should also, as well, try to counteract the biases that they may know—or may suspect they know—that they have. They should seek out opportunities to learn about how the other side thinks, and not simply get their information from those whom they already agree with.
22 Brennan at 105.
23 Here I am channeling a years-old conversation with Mike Neblo about the virtues deliberating citizens need in a democracy.
24 See e.g., the work of Hélèn Landemore (2012) "Why the Many Are Smarter than the Few and Why It Matters." *Journal of Public Deliberation*: 8(1), art. 7.
25 On this, see Thomas Christiano on the "division of labor" in deliberative democracy. Christiano, "Rational deliberation among experts and citizens," in John Parkinson and Jane Mansbridge, eds., *Deliberative Systems* (Cambridge: Cambridge University Press, 2012): 27–51.
26 See, e.g., Paul Krugman, "Raise That Wage," *New York Times* (Feb. 17, 2013): A17.
27 There may be right answers in science. But it is a question—which I cannot take up here—about when the conclusions of science count as "public reasons." I touch on this issue briefly in "The Mutability of Public Reason," *Ratio Juris* Vol. 25 (2) (2012): 180–205.
28 See Rawls, *Political Liberalism* at 54. Rawls says that one reason we disagree about values is that "empirical and scientific evidence is often complex and conflicting."
29 On some problems with this notion, see Flanders "Animal Rights and Public Reason," in M.J.L. Wiseenburg and David Schlosberg, eds., *Political Animals/ Animal Politics* (New York: Palgrave, 2014), 44–57.
30 Thanks to Mike Neblo for discussions that prompted this part.
31 Rawls, "The Idea of Public Reason Revisited," *University of Chicago Law Review* Vol. 64 (1997): 765–807.
32 See, e.g., Samuel Freeman, *Rawls* (Oxford: Routledge, 2007): 402–3, for this interpretation of Rawls.
33 Of course, this is consistent with voters also wanting to get *better informed*. But the point in the text is simply: the fact that they are not yet fully informed or ideally informed or even well-informed does not mean that the policies that they pass *doing their best to be informed* are illegitimate.
34 See Sunstein, *The Partial Constitution*, at 176.

Part III

The Ethics of Voter Reasoning

8 Must We Vote for the Common Good?

Annabelle Lever

Must we vote for the common good? This isn't an easy question to answer, in part because there is so little literature on the ethics of voting and, such as there is, it tends to assume without argument that we must vote for the common good. Indeed, contemporary political philosophers appear to agree that we should vote for the common good even when they disagree about seemingly related matters, such as whether we should be legally required to vote, whether we are entitled to vote secretly rather than openly, or what form of democracy is most morally desirable.[1] Such agreement is puzzling, then, given the extensive disagreements that surround it. Hence, the aim of this paper is to consider whether the only morally correct way to vote is to vote for the common good. My hope is that even those who are not persuaded by the answers that I can offer at the moment, will find that the question is less easy to answer than they may have thought, and that the ethics of voting merits more sustained attention than it has received thus far.

Most of us suppose that people are ethically bound to vote for the candidate who will best advance the common good of citizens – at least in national elections in democratic states – because voting for those who will govern us helps to define the type of society that we are, and can fundamentally affect the lives of our fellow citizens. It is wrong to vote without due consideration for those who may have to acknowledge as theirs the government that results from our choice.[2] Voting in national elections means helping to choose the government that will represent our country to the world and that will legally commit us, as citizens, at home and abroad. So even if our electoral choice has no other consequences for our fellow citizens, these features of national elections are enough to make the ethics of voting a morally weighty matter. Specifically, given the ways that elections bind citizens, it seems that we should vote in ways that reflect our interests in the legitimacy of the government that will act in our name, and will claim to represent our freedom, equality and happiness.[3]

Nonetheless, there is something puzzling about the idea that there should be one and only one ethically correct approach to our choice as voters when, in all other aspects of life, acting ethically requires us to decide amongst *competing ethical criteria* – to consider the competing claims of friends and strangers, for example, or of parents and children; of global justice and domestic justice, or of

justice to present and future generations. If the only morally correct way to vote is to vote for the common good, the sole legitimate cause of ethical disagreement as voters would be how best to define and pursue the ends that we have in common. Given reasonable pluralism, we can expect substantial disagreement about these matters.[4] Still, this picture of the ethics of voting seems too simple – in part because it strips out so much of the ethical content we might expect voting to have, such as issues of the *relative weight* we should attach to our shared good as citizens compared to other ends which we are morally permitted, or required to pursue. While the common good of our fellow citizens is important, can this be the only thing that we have to think about in order to know what we should do as voters, and is it really plausible that our shared good is always more important ethically than other considerations – at least when it comes to voting?

In order to concentrate the paper on the question that concerns us, I will abstract from doubts about whether societies can have a common good.[5] Instead, I will assume that there is nothing particularly obscure about the idea that large numbers of people might have normatively compelling interests in common – interests in peace, physical security, in freedom, equality, well-being, respect, happiness and the like – even if it can be difficult to provide any very determinative content for those interests, and efforts to go beyond abstractions tend to generate reasonable disagreement amongst citizens. I will also assume that our common good cannot be reduced to what we happen to agree on or to desire at the moment – that what we are concerned with is an ethically compelling account of our shared interests, rather than the interests that we happen to share at the moment, or that we can currently agree that we share. Considerations of justice, as well as other ethical considerations, therefore form part of our understanding of what we have in common and of what we should pursue collectively as citizens.

I will refer, at various points, to interests that are legitimate but not shared. By this, I mean interests which are consistent with the freedom and equality of others, but which are, at least at present, objects of reasonable disagreement.[6] Examples of interests which are legitimate, but not shared, are interests in practising a *particular* type of religion, tolerant of others and accepting of democratic government, or interests in marrying a *particular* person, with their free and informed consent. By contrast, interests in acting according to one's conscience are interests which will be legitimate and shared, if our different conscientious convictions are shared and consistent with the freedom and equality of others. Likewise, interests in physical security may be widely shared and legitimate, although some of our interests in security may be rather specific, given our hobbies or professions. I assume that, even if consistent with the legitimate claims of others, these would be instances of personal, rather than common, interests. Interests that are illegitimate – however widely shared – are interests in domination, in coercion and exploitation, all of which may advance our particular interests as individuals and as members of diverse social groups, but which cannot be squared with a commitment to the freedom and equality of

others, or with democratic government as the political expression of that commitment.

Unfortunately, we sometimes confuse legitimate and illegitimate interests, because we make factual mistakes about what will, indeed, advance people's freedom and equality, or we make normative mistakes – for example, about the differences between democratic and undemocratic government. In particular, we sometimes confuse reasonable disagreement with the expression of preferences, whether reasonable or not. By contrast, I assume that reasonable disagreement concerns disagreement about matters of fact, value and interpretation which reflect beliefs that are logically consistent, fit with the best available evidence on the matter at hand, and are compatible with a willingness to treat others as free and equal. Logic and the best available evidence are often insufficient to decide amongst competing claims of fact, interpretations of ideas or claims about what is valuable. So, interests that are legitimate but not widely shared generally reflect reasonable disagreement about how best to live, or what to do as individuals and as a society.

Justice, Voting and the Common Good

People need to have some ends in common for us to attribute a 'common good' or 'collective interest' to them. This agreement must be explicit, if the ends that people have in common are to form the deliberate objects of collective action and to order their judgements, and shape their motivations. Moreover, if the common good is to explain and justify the ethics of any decision – whether to the individuals concerned or to other people – this agreement must have ethically significant content and be constrained in ways that reflect ends which people are morally entitled to pursue collectively as well as individually. At least some of these ethical considerations will be considerations of justice – or of what members are entitled to expect of each other and of the basic institutions of their society – though their shared good need not be limited to questions of justice, or to principles of social justice in particular.

Assume, then, that we live in a society with a shared conception of the common good – shared interests in physical security and freedom, for example. These shared interests give us some interests in international justice, not just justice within our borders, and some interests in protecting the environment, both natural and cultural. This is partly because global justice and the protection of our natural and built environment affect our security and freedom as a society. More strongly, however, we accept that the principles of justice that should govern our society mean that other people and other societies are entitled to enjoy freedom and physical security too, so long as they do not aggress or injure others. And so, a logical entailment of our shared conception of the good would be that we have duties of justice to non-citizens living in distant lands, as well as to those who will be citizens of our society in the future. It therefore seems that we are in the fortunate situation where we can pursue our common interest as citizens without worrying that this will bring us into conflict with the

legitimate claims of others. Put simply, it looks as though voting for what best advances our common good is consistent with the duties of justice that we owe to others – at least in ideal theory.[7]

If we can vote to advance the common good without injustice, does it follow that under duly idealised conditions we have a duty to vote only on considerations of the common good? The answer, I think, is 'no'. First, there is no reason to assume that elections under ideal circumstances inevitably – or, even, usually – result in at least one candidate being obviously better than the others from the perspective of the common good, however we define the latter. For example, although we are in a society with a clear common good, and competing political parties seeking to provide the best interpretation of that good, the alternatives before us may strike us as equally compelling – and for good reason. Granted, some parties may be stronger on some points than on others, or have a more credible idea about how to advance one particular aspect of our shared interests. But then, they may be less good in other ways – we may be unsure how realistic their economic or political assumptions are, or if they are psychologically plausible. And so, even abstracting from issues of enforcement and assuming that people are genuinely motivated to pursue the common good, it would be wrong to assume that a concern for the common good always gives us a determinate answer to the question 'how should I vote?'.

In such cases, a concern for the common good might give us no definite reason to favour one candidate over others. If we are to have reason to vote, therefore, we must be morally entitled to treat some consideration other than our common good as dispositive of our electoral choice. Fortunately, we will almost certainly not lack for ethical considerations which we might use as tie-breakers, because while principles of justice that we share may not be sufficient to discriminate amongst the candidates, there may be important principles of justice on which, as a society, we do not have unanimity and, of course, there are many important ethical considerations which are not principles of justice at all. There are ethical ideals – of world peace and harmony or of happiness and wellbeing which may be ethically compelling even if our society is far from unanimous on their importance. So, while not part of our common good, as we currently understand it, these are reasons for action which are capable of being accepted by others who see themselves as our equals. It seems ethically permissible to look to these other ethical considerations as tie-breakers, if we are unable to decide amongst electoral candidates based upon our shared interests.

Indeed, if candidates are equally good from the perspective of our shared interests, it seems permissible to decide in favour of one of them based on their consequences for our *personal interests*, because candidates may have different consequences for our ability to advance that part of the common good which concerns our personal interests. We would therefore have based our vote on considerations of the common good as far as we were able, but our vote would, nonetheless, have reflected other factors too – though ones consistent with maximising our shared ends.

For example, we may believe that one candidate rather than another has a deeper commitment to peace, though both are equally good from the perspective of our shared interests, because one of the candidates is a pacifist and therefore holds an approach to peace which, while 'sectarian' and 'unworldly', as Rawls put it,[8] may strike us as a tie-breaker when we compare the best candidates based on something that is of ultimate importance to us – world peace. Or suppose that two candidates are equally good from the perspective of the common good, but that the consequence of their economic plans differ for our interests in university education. Because both candidates are consistent with my legitimate interests, they both have policies which treat my interests in university education fairly. I have no complaints on that score. However, one of them has policies for funding access to universities which will cost me less than the other. If the candidates are otherwise tied on my best understanding of the common good (because one is better at some things, but worse on others, or because I am not sure that I believe the proposals can really be implemented, much as I like them), it seems permissible to use the different consequences of their policies for my access to university as a tie-breaker. The common good is consistent with me paying a variety of different prices for my university education; just as it is consistent with a variety of different outlooks on peace. However, some of these advantage me more than others *without implying injustice to other people*, according to the principles of justice that we explicitly share. My suggestion is that where all else is equal, it must be ethically acceptable to use these differences as a tie-breaker.

Maximising v. Satisficing the Common Good

It looks, then, as though in ideal theory we can imagine voting based on considerations other than the common good. But the cases that we have just looked at are highly particular, even if they might occur quite frequently, and the permission to vote on factors other than the common good that they imply is highly constrained. Specifically, it amounts to the supposition that we are allowed to treat other ethical factors as determinative of our vote in cases where we would otherwise have to decide a tie at random, or lack ethically significant reasons to vote at all. But do we have reasons to think that it is only in such circumstances that it would be ethically acceptable to vote on considerations which are not widely shared? Again, I think the answer must be 'no'. A commitment to pursue the common good of our fellow citizens does not entail a duty to *maximise* that good, or to suppose that the pursuit of our common ends is more important morally or politically than everything else. If, on the one hand, the justification for government *is* that it enables us to pursue together ends that we could not pursue separately, it hardly follows that we judge the pursuit of these joint ends more important than other things. Recognising this, we accept that the use of coercive power must be justified in ways that we can all accept and that, as a general matter, this makes it wrong to give priority to our personal objectives – however idealistic and altruistic – when determining

who will exercise political power and why. Seeing each other as equal partners in a voluntary cooperative enterprise, means that I cannot co-opt others without their consent for my own ends. But it does not follow that I must therefore *maximise* rather than *satisfice* our common good, or do so in all circumstances.

Imagine that we are members of a society with a shared conception of the common good that we actively seek to promote. We face an election with a variety of different candidates, all of whom are adequate from the perspective of the common good, and some of whom are better than adequate. However, in addition to reasonable disagreement about which candidates *are* best, looked at solely from the perspective of our shared interests, we also have reasons to rank the candidates quite differently based on legitimate interests which we do not share. That is because we all have a variety of personal interests which are consistent with treating others as equal citizens and valuing their freedom and wellbeing even though others do not share them. At least some of these personal interests are of great ethical importance to us. Thus, in addition to our shared ends, some of us hold personal ends which require us to strive for the greatest good of the greatest number of people, others amongst us believe that service to god is of the greatest ultimate importance, and others that it is of the utmost importance to secure natural diversity for future generations, or to preserve great works of art and to make them widely accessible.

As a general matter, our different personal objectives give us no reason not to vote for the candidate/s we each judge best according to our conceptions of the common good, because there is sufficient overlap between what is best for us all and our most important personal commitments. However, occasionally that is not the case. The question, then, is what, if anything, follows for the ethics of voting from the fact that our most important personal commitments may be at odds with the ends that we share as citizens?

Imagine that the preservation of some especially beautiful artistic or archaeological site in a poor country abroad is more vulnerable than anyone had thought. Urgent and expensive action is needed to protect it. Some candidates openly argue that we should take this action (along with people in other countries), even if it means that we will have to put off other projects that we had wanted to pursue, and which were clearly relevant to the advancement of our shared interests. Other candidates disagree, because they are unpersuaded that the best interpretation of our shared interests includes protecting the site, special though it is. That is the position of the candidate you think most likely to advance the common good. You therefore agree with the candidate that saving the site may not be the best way to use collective resources if all we consider are our shared interests. But you are not persuaded that this *is* the only thing that we should consider, in the circumstances. You are aware that you face an ethical dilemma – but are comforted by the fact that all of the candidates are clearly adequate from the perspective of the common good. And so you decide to vote for the candidate who, out of those who are best from the perspective of the common good, is also willing to protect the site. You accept that if this is to be an ethically acceptable way of voting, other people, too, must

sometimes be entitled to satisfice, rather than maximise, the interests that we share. But that does not bother you overmuch, because you think that it is consistent with a commitment to equality and solidarity that we must sometimes satisfice rather than maximise our shared goals, in order to accommodate each other's conscientious convictions, even if these are not widely shared.

Is it morally wrong to vote in the way that I have just described? If it is wrong, it seems that this must be because we have duties to maximise the common good, or to treat our shared ends as more important than anything else, at least when it comes to voting. However, I am not sure why we should assume this, even under idealised conditions. We can agree that our shared ends should usually *take primacy* over other considerations when determining the use of collective resources and powers without supposing that they must be the *only* things that we consider.[9] It seems odd, after all, to suppose that it would be better to randomise or to abstain when considerations of the common good are not determinate, than to use ethically weighty, but not generally shared, considerations to determine our choice amongst electoral candidates. But if such weighty but personal considerations can act as a tie-breaker in such cases, why suppose that it is morally wrong to attach *any* weight to them in other cases? After all, the difference between the best and the next best, from the perspective of the common good, may not be very great but the difference between them from the perspective of our particular concerns may be substantial, perhaps irreparable. It seems dogmatic to insist that it would be morally wrong to vote for the next best in such a case.[10] Even where the difference between the best and the next best is greater, we can hardly be accused of culpable indifference to the freedom and equality of others if the person we deem second best is deemed best by some, even many, thoughtful and conscientious citizens. And while it is much less clear that we are entitled to satisfice, rather than to optimise if the gap between the satisfactory and the best is really quite large, I have suggested that this might sometimes be permissible and quite distinct, ethically, from pursuing one's self-interest at the expense of others.[11]

The Ethics of Voting and Ideal Theory

If the arguments we've looked at are plausible, the ethics of voting, even in ideal theory, are more complicated than we might have supposed, because respect for each other's moral capacities does not mean that we must always vote to maximise the legitimate interests which we share as citizens. On the contrary, solidarity can manifest itself through a generalised permission to satisfice rather than maximise shared interests on occasion, given the ethical dilemmas in voting which conscientious citizens may face.

One of the difficulties about being a voter, ethically speaking, is that we can only vote on the choices before us and, however much we might wish for things to be different, we cannot expect there to be so many good candidates – even in ideal theory –that it is easy to decide how to vote. Moreover, as a voter it is generally difficult for us to influence political debate, or to reshape existing

conceptions of the common good if we come to think that they are inadequate. In short, one of the difficulties about voting ethically is that voters at election-time are more like price-takers than price-shapers, in that their ability to shape the electoral choices before them is now largely set. We can deliberate publicly on those choices, and try to improve them at the margins, but for the most part, once an election is called, town meetings and questions to political parties and candidates are better at *informing* us about the choices we face than at enabling us to *influence* those choices themselves.

Nor, it must be said, is it easy for individuals to influence the choices that will be put before the electorate without dedicating large amounts of time and energy, over very long periods, to the task of influencing the political agenda. This may be possible for most people at some moments in their lives, but even for people who care about politics, or who are particularly civic-minded, such forms of political engagement may be difficult to sustain and may prove a less productive use of time and energy than other forms of political or civic engagement.

Taken together, these points suggest that the ethics of voting need to consider not only what people can do with their vote – at least, as part of an electorally-winning coalition – but also what they cannot do.[12] The reasons to insist that voters should only vote for the common good reflect the important point that elections seek to define a legitimate government, with the power to bind citizens morally and politically. However, once we acknowledge that voters do not get to choose the candidates before them, and may have had rather limited opportunities to influence the political agenda between elections, it is easy to see why, even in ideal theory, voters may face a choice between the candidate that seems best to them when they consider only their shared interests as citizens, and the candidate that seems best to them when they consider what they should do more generally.

There are many things which we should do which have no particular relevance to electoral ethics. We can give money to charity, volunteer our time and experience, as well as our money; set up associations of different sorts or participate in ones that are already established; we can write letters to the press, demonstrate, protest and generally seek to advance the ends that strike us as ethically important without feeling obliged to further those ends by *voting*. However, sometimes politics can promote or impede ends that we think are of such importance that we have ethical reasons to vote that we otherwise lacked, and to vote one way rather than another. I conclude then that, even in ideal theory, we do not have to vote for the common good, or treat our shared interests as citizens as the sole criteria of electoral choice. Unfortunately, it is not easy to estimate how often we are permitted to vote on other considerations, although there is surely much more that can be said on the matter than I can offer here. However, we are likely to confuse reasonable disagreement over the *best interpretation* of the common good with disagreement over the *relative weight* and importance of our common good, as long as we insist that our shared interests are the sole legitimate basis for voting. Such confusion will be

particularly problematic in so far as we are concerned with the relationship between claims of justice and claims of the common good.

Thus far, we have assumed that if our conception of the common good reflects principles of justice, then we will never face a conflict between claims of justice and claims of the common good. However, it is hard to be confident that this is true, given the reasons for supposing that rights are not absolute.[13] Even when we try conscientiously to give others their due, and are not impeded by injustice from acting, we may be unable to honour the conflicting claims upon us. This is a sufficiently familiar occurrence to suggest that, even in ideal theory, the principles of justice we affirm as part of our common good may give us reasons for action which are at odds with other principles of justice – of global justice, for instance, or of justice to future generations. In such cases we are faced with a conflict of duties within our shared conception of justice – between the principles we affirm as part of our shared ends, and those principles which we affirm when we reflect on the claims of others.

We can describe the moral situation we face in terms of a conflict within our shared conception of justice, but we might also describe it as a conflict within our shared conception of the good, in so far as a commitment to justice is something that we share. But we may experience, and want to describe, our situation as one which pits the claims of justice against our common good. We are particularly likely to describe our situation this way if we believe that the conflict we face gives us reasons to subordinate our common good to the just claims of those who are not our fellow citizens. If the conflict arises in circumstances consistent with ideal theory – being the result of misfortune rather than injustice – we will have no good reason to *revise* our conceptions of the good or the just, but will, rather, have to decide on the *priority* to give our different duties, based on the conceptions of goodness and justice that we currently have. In short, even in ideal theory it is reasonable sometimes to believe that we should vote on considerations of justice *rather than* of the common good.

Conclusion

It is hard to know how different our circumstances as democratic citizens are from the world assumed by ideal theory. If we are fortunate, we can assume that we have a shared interest in justice with our fellow citizens even if we find it hard to agree on the principles that define that interest, or to act upon them as we could or should.[14] It is plausible, however, that we will face more occasions than in the circumstances of ideal theory when our best understanding of the common good is not precise enough to determine how we should vote. There are likely more circumstances when it will seem ethically compelling to satisfice, rather than to maximise the common good, in part because we may be concerned with determining which is the 'least bad' option of the ones we face, rather than trying to evaluate which of several appealing options to choose given uncertainties about our knowledge, or about the likely consequences of

different policies. Above all, we will likely face many more circumstances where justice will be a *constraint* on our common good, rather than *an expression* of it.[15] Democratic citizens in non-ideal states, then, may face many of the same dilemmas as their counterparts in ideal theory and, like the latter, may feel unsure how to describe or evaluate the demands upon them. Ideal theory suggests that such doubts are often reasonable, and admit of no easy resolution, because even in the world of ideal theory we do not always have to vote for the common good.

Notes

1 It is noteworthy that this agreement seems to apply whether the authors are working in what is called 'ideal' or 'non-ideal' theory. Specifically, Jason Brennan, Lisa Hill, and Brennan and Pettit all assume that we are in non-ideal circumstances, where voters are likely to vote selfishly or carelessly unless prevented from doing so. Yet they all insist that we have a duty to vote for the common good *if* we vote, although Jason Brennan and Hill disagree on whether we *are* morally required to vote, and Geoffrey Brennan and Philip Pettit believe that we are morally required to vote openly, not secretly. For the differences between ideal and non-ideal theory see John Rawls, *Political Liberalism* (New York, NY: Columbia University Press), 1993, p. 285. Jason Brennan, *The Ethics of Voting* (Princeton: Princeton University Press) provides a rare discussion of the idea that we should vote for the common good in ch. 5, 119–124, but because the only alternative he presents to voting for the common good is voting in a purely egoistic manner, the discussion is fairly superficial. Lisa Hill, 'On the Justifiability of Compulsory Voting: Reply to Lever', *British Journal of Political Science* 40 (2010): 917–923. Geoffrey Brennan and Philip Pettit, 'Unveiling the Vote', *British Journal of Political Science* 20, no. 32 (1990): 311–333.

2 Joshua Cohen treats what I would call 'the authorisation aspect' of democratic government as fundamental, compared to other aspects, such as its ability to affect our interests. This aspect of democratic government is also critical to Eric Beerbohm's interesting book. Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge MA: Harvard University Press, 2009), 154–180, especially 154–155. Beerbohm, Eric, *In Our Name: The Ethics of Democracy* (Princeton, N.J.: Princeton University Press, 2012.). As Cohen and Sabel say, in their joint essay, 'directly-deliberative polyarchy', footnote 13 – 'A common rationale for democracy is that it treats people as equals by giving equal consideration to their interests…. We avoid this rationale because we do not find the idea of equal consideration of interests normatively plausible'. Joshua Cohen and Charles Sabel, 'Directly Deliberative Polyarchy' in *European Law Journal,* 3.4, (1997) 313–342. Available free online at www2.law.columbia.edu/sabel/papers/DIRECTLY-DELIBERATIVE%20POLYARCHY.pdf (accessed October 1, 2016).

3 For a discussion of the common good in the context of an interpretation of Rousseau, see Joshua Cohen, *Rousseau: A Free Community of Equals* (Oxford: Oxford University Press, 2010), especially pp. 44–50.

4 On reasonable pluralism see Joshua Cohen, 'Moral Pluralism and Political Consensus', in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer (Cambridge: Cambridge University Press, 1993), 270–291.

5 William Riker, *Lib*eralism *Against Populism* maintains that social choice theory shows that the idea of a common interest is incoherent, and that the idea of a general

will must depend upon a populist ideal of groups as united by a single will. For the difficulties with Riker's views see Joshua Cohen, 'An Epistemic Conception of Democracy', originally published in *Ethics* 97.1, (1986) 26–38.

6 My conception of interests which are legitimate, but not shared, is therefore broader than Rawls' idea of reasonable comprehensive conceptions of the good, though inspired by it. See *Political Liberalism*, Lecture 2, section 3.

7 For Rousseau, justice and interest always agree, so long as citizens are willing to impose on others only those constraints on their liberty which they accept for themselves. This is not a purely formal requirement, as Cohen emphasises, because 'the common good needs to be interpreted against the background of the fundamental commitment to treat associates as equals', *Rousseau*, p. 43

8 John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1972). section 58.

9 The language of primacy figures repeatedly in Cohen's interpretation of Rousseau. However, this seems to be a reflection of Cohen's interpretive argument that Rousseau seeks the unity of the general will through individuals *ordering* their preferences so that concern for shared ends dominates, rather than supposing that citizens have *no* other ends, as some have thought. There is no suggestion that Rousseau – or, indeed, Cohen – thinks that voters may permissibly vote for anything other than the common good. See *Rousseau*, 33–40, 54 where citizens 'deliberate about conduct by giving first consideration to reasons of the common good' – which might suggest that second and third consideration goes to something else. However, in practice this seems not to be the case.

10 My argument here has affinities with worries about the absolute priority that Rawls gives to improving the situation of the worst-off social group, once the Equal Basic Liberties and Fair Equality of Opportunity have been secured. Such an absolute priority makes sense if the situation of the Worst Off is either very bad or very much worse than everyone else. To the extent that these are not the case, it can seem harder to justify. However, granting absolute priority to the worst-off social group, on Rawlsian assumptions about the relationship between their situation and that of others, means that we do not have to make complex interpersonal comparisons in order to know when improvements in people's wellbeing are justified. Thus, considerations of transparency and solidarity may favour stringent priority rules, even if we're not sure that they are required by fairness, or that economic inequality *is* justified in order to improve the wellbeing of others.

11 By contrast, Jason Brennan supposes that satisficing rather than maximising cannot be justified, because he assumes that 'if you take on the office of voter, you acquire additional moral responsibilities, just as you would were you to become the Federal Reserve Chairman…The electorate decides who governs…They owe it to the governed to provide what they justifiably believe or ought to believe is the best governance, just as others with political power owe it to the governed to do the same'. *Ethics of Voting*, pp. 128–129. However, the difficulty with this way of thinking, is that it treats voting as a special office, rather than a natural exercise of democratic rights, and ignores the difference between the power of an individual voter and the power of legislators or Chairmen of the Federal Reserve. For the reasons why this matters, and its significance for arguments against open voting, see Annabelle Lever, 'Mill and the Secret Ballot: Beyond Coercion and Corruption', *Utilitas*, 2007, 354–378.

12 Annabelle Lever, 'Compulsory Voting: A Critical Perspective', *British Journal of Political Science* 40, no. 4 (October 2010): 897–915.

13 Jeremy Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993) especially the discussion of Nozick's conception of rights in chapters 1 and 2. For other objections to Nozick on rights, see Jonathan

Wolff. Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (London: Polity Press, 1991).

14 For a particularly interesting analysis see Joshua Cohen and Charles Sabel 'Deliberative Polyarchy', section 3, with its claim that institutional failure, at present, makes it unnecessarily hard for citizens to agree on solutions to collective problems '…we assume that for some substantial range of current problems, citizens agree sufficiently much about the urgency of the problems and the broad desiderata on solutions that, had they the means to translate this general agreement into a more concrete, practical program, they would improve their common situation, and possibly discover further arenas of cooperation. This is not to make the foolish claim that everyone endorses the same ranking of solutions, only that they prefer a wide range of alternatives to the status quo.'

15 Annabelle Lever, 'Mill and the Secret Ballot', 375–376.

References

Beerbohm, Eric. *In Our Name: The Ethics of Democracy*. Princeton, N.J.: Princeton University Press, 2012.

Brennan, Geoffrey, and Philip Pettit. 'Unveiling the Vote'. *British Journal of Political Science* 20, 32 1990: 311–333.

Brennan, Jason. The Ethics of Voting. Princeton: Princeton University Press, 2011.

Cohen, Joshua. 'An Epistemic Conception of Democracy'. *Ethics* 97.1. 1986. 26–38.

——. 'Moral Pluralism and Political Consensus', in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer, 270–291. Cambridge: Cambridge University Press, 1993.

——. 'Procedure and Substance in Deliberative Democracy'. In *Philosophy, Politics, Democracy: Selected Essays*, 154–180. Cambridge MA: Harvard University Press, 2009.

——. *Rousseau: A Free Community of Equals*. Oxford: Oxford University Press, 2010.

Cohen, Joshua and Charles Sabel. 'Directly Deliberative Polyarchy', *European Law Journal,* 3.4. 1997. 313–342.

Hill, Lisa. 'On the Justifiability of Compulsory Voting: Reply to Lever'. *British Journal of Political Science* 40. 2010. 917–923.

Lever, Annabelle. 'Mill and the Secret Ballot: Beyond Coercion and Corruption'. *Utilitas*, 2007, 354–378.

——. 'Compulsory Voting: A Critical Perspective'. *British Journal of Political Science* 897–915.

Rawls, John. *A Theory of Justice*. Cambridge MA: Harvard University Press, 1971.

——. *Political Liberalism*. New York, NY: Columbia University Press, 1993.

Riker, William. *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice.* USA: Waveland Press. 1988.

Waldron, Jeremy. *Liberal Rights: Collected Papers 1981–1991*. Cambridge: Cambridge University Press, 1993.

Wolff, Jonathan. *Robert Nozick: Property, Justice and the Minimal State*. London: Polity Press, 1991.

9 Gender and the Ethics of Political Representation

Julinna Oxley

> Mommy, why can't girls be the President?
>
> My daughter, age 6, looking at a poster of American Presidents

In recent years, a political representative's gender has come to be seen as an important factor in democratic governance. This is primarily because women hold public office at rates far below their proportion of the general population. Should more women be elected to political office? If so, how should this be accomplished? Should citizens be encouraged to vote for women, or should democracies enact laws that aim to increase the number of women in legislature? At present, nearly a hundred democracies have achieved high percentages of women participating in elected office by implementing some type of quota provision for the selection of female candidates.[1] In other democracies, there are independent, grassroots movements that seek to build coalitions of women for the purposes of governing, and independent organizations that train women to run for political office so that more women are elected. But are these interventions ethically justified? And do citizens have an obligation to take a political candidate's gender into consideration when voting? Do women with the aptitude, skills, and resources have a special reason to run for office?[2]

This chapter will examine the above issues by arguing that (a) more women worldwide should be elected to public office in order to bring about gender equality, and (b) citizens should consider a candidate's gender when selecting a political representative. The first half of the chapter summarizes the arguments in favor of increasing the numbers of women in political office, and shows that, taken together, these arguments give citizens sufficient reason to take gender to be a relevant consideration when voting. The second half of the chapter examines different strategies for increasing the number of women in public office. I defend a liberal, progressive feminist view of democratic governance, which claims that the best way to end gender oppression is to use existing political systems to bring about equality, and argue that citizens should seek to elect more women to office. In elaborating this thesis, I distinguish between *gender parity* in politics (electing women to public office in equal proportion to men) and *gender justice* (the more substantive goal of eliminating gender

inequality, manifested as social, political, and economic oppression); I argue that the goal of gender parity should be subordinate to the goal of gender justice, because attempting to make women "equal" to men merely by electing them to political office, without attempting to improve the social situation of women by challenging oppressive gender-normative social practices, is a futile goal.[3] And yet, ending gender oppression is, I hope to show, an impossible task if women do not participate in powerful decision-making institutions. It is for this reason that gender must remain a relevant consideration in democratic governance.

Why More Women?

In the United States, the vast majority of people elected to national political office are men. In 2015, men comprised 80.6 per cent of the national Congress; this statistic has been consistent for around twenty years, with the number of women in Congress remaining essentially flat in the last decade. The number of women in state legislatures is slightly better, with women averaging 23–24 per cent of delegates.[4] That being said, if current trends continue, it will take more than a hundred years – until 2121 – for women in the United States to reach parity with men in electoral politics.[5] The United States average of women in Congress (19.4 per cent) is slightly lower than the worldwide average of 22.1 per cent women represented in national legislative seats; it ranks 96th worldwide for percentage of female representatives in the national legislature. In Rwanda and Bolivia, a *majority* of legislative seats in the lower (and only) chamber are held by women, and the Nordic countries (Sweden, Iceland, Finland, Denmark, and Norway) also historically have very high rates of female representation in national legislatures, ranging from 37–43 per cent.[6] At the other end of the spectrum, women in Saudi Arabia lag far behind. In December 2015, women were allowed to vote *and run* for office for the first time in Saudi Arabia's third-ever democratic municipal council races. Nearly a thousand female candidates ran for office, but only twenty-one were elected.[7]

Many of the arguments for increasing the number of women serving in elective office aim at legislative reform to boost women's participation rate in elective office.[8] But as I aim to show, these arguments also imply that *individual citizens* have an obligation to take the gender of a political candidate into consideration and that citizens have (defeasible) reasons to vote for women candidates *qua* women. This does not necessarily imply that constituents should vote for a *specific* woman, but the arguments I articulate suggest that more women should run for office, more programs supporting women candidates should be implemented, and more people should support and vote for women candidates. Roughly speaking, there are three kinds of ethical arguments that support this view:

1 Consequentialist-style arguments suggest that more women in the legislature generate better outcomes for (a) everyone and (b) women, since women behave differently as political representatives. (This includes the

view that women can be positive role models for young girls and women who may also be interested in political leadership.)

2 Democratic representation arguments claim that women are best suited to represent women because (a) *descriptive representation* (representatives who are descriptively similar to their constituents) is the best way to achieve *substantive* representation (where constituents' *interests* are represented in the legislature), and (b) *descriptive representation* will increase *de facto* democratic legitimacy.

3 Justice-oriented arguments posit that constituents should elect women (a) as a way of compensating them for historical injustices, (b) because it is fair for women to have half of the seats in a representative government, and (c) this will bring about full gender equality in the state.

Consequentialist Arguments

A very popular argument for increasing women's participation in government is that the range of policy solutions proposed in male-dominated legislatures is more limited because women are not participating in meaningful ways. The talent pool of qualified individuals who could effectively solve problems is underutilized; women's human capital is not being implemented; women can bring new ideas and creativity to governance and should have input into critical decisions.[9] This argument goes two directions: it suggests that, on the one hand, the outcomes will be better for *everyone* if more women participate in elected office. On the other hand, women *in particular* will benefit from greater women's participation in government, since they will more effectively address women's social issues such as workplace discrimination, reproductive rights, and sexual harassment.

Is this argument empirically true? The answer depends on how women's contributions are measured. There are many vectors of action to be examined: comparisons of how men and women legislators think about women as a constituency; whether individual women legislators write more bills on women's issues, whether they sponsor these bills, vote for them, and whether they are effective at passing such legislation within existing male-dominated power networks; women's legislative style; whether women accomplish more with greater numbers of women (or "critical mass"); and how women influence various areas of the bureaucracy outside of the legislature. Since I am unable to treat these topics in detail due to limitations of space, I highlight the most notable conclusions to be drawn regarding the consequences of women participating in elective office for other women.[10]

Research shows that, compared to men, women legislators prioritize bills related to children, family and women, as well as to healthcare and social services.[11] But do they do this because they care about women, or because they are voting along party lines? Sociological studies of voting patterns and bill sponsorship face the challenge of determining whether a woman legislator's vote is in virtue of her support of women or in virtue of her support for her party

affiliation. There are a few thorough case studies, and one study by Swers found that congresswomen *are* more likely to vote for "women's issue" bills than their male counterparts, even when accounting for party affiliation.[12] (Here I define "women's issue" bills as bills that aim to increase women's autonomy and social equality, provide improved access to services such as maternal public health and affordable reproductive planning services, recommend equal income (bills that seek to lower the wage gap or the poverty rate), or pass better labor laws that protect women from exploitation (anti-discrimination, appropriate regulation of women's work, etc.).[13] That being said, women's likelihood of voting along with their party affiliation is highly dependent on the party in power and the social climate in which they vote, since they have strong incentives to vote along party lines.[14] Additional support for the claim that women utilize their woman's perspective in solving problems comes from India, where women village chiefs invested in different public goods than male village chiefs, thus suggesting that women and men legislators see social problems differently, and in ways that affect their legislation.[15]

When examining women's effectiveness at getting their bills turned into law, further research by both Lyn Kathlene and Michele Swers shows that there are many factors that contribute to the efficacy of women's contributions, including the issue area, outside crises, the party in power, committee processes, and the specific makeup of the legislative body. In general, women are equally effective as men, but with several caveats. For one, women's proposed crime bills were far less likely to be passed than their bills on prisons; the likely explanation was that women's approach to crime focused more on prevention rather than punishment, and that, given the significant challenges faced by the prison system, innovative thinking about prison reform was quite welcome.[16] In addition, women experienced significant unequal treatment in the legislative process, as they were treated differently than men.[17]

Women also display a different legislative style, in that they view the opportunity to be in power as an opportunity to get things done, rather than an opportunity to exercise control over or influence people.[18] In studies of women's approach to legislating, they typically were more democratic and participatory, sought consensus on issues, and included many points of view when writing their legislation.[19] Moreover, their legislation tended to highlight the needs of other traditionally disadvantaged groups. For example, Bratton and Haynie found that women are more likely to introduce bills thought to be in the interest of African Americans (e.g., school integration and funding of sickle cell anemia research). Likewise, Black legislators are more likely to introduce bills of interest to women.[20]

These individual differences in how women approach legislation are just one way of viewing the effects of electing women to office. A second area of research is on women as a collective, and whether larger percentages of women will impact the legislative process. Scholars use the term "critical mass" to describe the percentages of women needed to better pursue their policy priorities and legislative styles. Although scholarship varies with respect to what is

considered 'larger' percentages of women, 30 per cent is generally considered the point at which women's presence is more likely to make a difference.[21] Many organizations promoting women's leadership have proposed 30 per cent as the target goal for women's participation in government and the decision-makers at any power table.[22] In her early research on women in male-dominated organizations, Kanter found that women in a skewed group (e.g., 85 per cent men, 15 per cent women or less) are often viewed as tokens and were found to be more visible than men, suffer from stereotyping, and feel compelled to conform to dominant (male) norms. Because token women feel pressure to blend into the male culture, they may find it difficult to form alliances with other token women to further their interests.[23] With larger numbers of women in corporate organizations, greater proportions of women make it possible for women to form coalitions and disrupt traditional male monopolies, and make inroads with more traditionally 'elite' representatives.[24]

But it turns out that larger percentages of women are not always more successful in passing legislation that benefits women. Bratton examined whether critical mass affected women's sponsorship of bills and their success at passing those bills in the legislatures of California, Illinois, and Maryland from 1969 to 1999.[25] Women in all three state legislatures consistently sponsored more women's interest bills than did men, regardless of the percentage of the legislature they held—suggesting no effect of critical mass (compared to party membership). In fact, Bratton found that as the percentage of women in the legislatures of these states rose from around 5 per cent to around 27 per cent, gender differences in bill sponsorship actually diminished. Moreover, women were better able to *pass* the legislation they proposed when they were a smaller percentage of the legislature. (Likewise, in Argentina, the number of proposed bills supporting women's rights increased when more women were elected to office (1983–2007), but the number of those bills that actually *passed* declined.[26]) Yoder's explanation for this phenomenon is that when women's numbers increase in legislature, they threaten male power and prestige, which leads to more competition and hostility; men are threatened by female power and subsequently reduce their tendency to compromise or accommodate.[27] Psychological research shows that both men and women overestimate the amount of time that women talk, and that men overestimate the percentage of women in the room: thus, until men's perceptions of women change, they may not be as responsive to their deliberative contributions.[28]

The appropriate conclusion to draw is that critical mass may not be as significant a factor in influencing policy outcomes as originally thought – smaller percentages of women seem to be equally effective. Michelle Saint-Germain, in a study of the Arizona state legislature, found gender differences in the sponsorship of women's interest bills once women reached merely 15 per cent of the legislature.[29] Moreover, recent research shows that minority party women are better able to keep their sponsored bills alive through later stages of the legislative process (compared to minority party men), but that majority party women are *less* successful with their bills (perhaps because they

sponsor a greater amount, and a wider array, of legislation).[30] Power is unevenly distributed in legislatures, and substantial numbers are not necessarily required for legislative success – rather, legislative style has shown to be more important in the long run.

Finally, there is significant cultural impact of electing women leaders on the citizenry at large. This is the *symbolic* function of political representation, which describes how a constituency's beliefs about leadership and power are expressed in the image of a leader. It captures the way that citizens publicly represent to themselves ideologies of power and domination. The symbolic function of political representation can be (a) *individual* for a constituent who accepts a representative as a leader with power to govern, and (b) *social* insofar as political representatives express and characterize the broader cultural meanings of power and leadership.[31] By electing more women to public office, they can come to be accepted as appropriate and legitimate political leaders. In addition, the election of more women to public office is psychologically important for younger women and girls who see women representatives as role models. Research shows that girls and women are particularly inspired by female role models, and female role models influence women's choice of career paths in ways that are particularly important in male-dominated fields.[32] More women in elected office means a more diverse group of public figures to serve as role models for future generations, and paves the way for other women to become accepted as political leaders with power and influence.[33]

Descriptive Representation and De Facto Legitimacy

The second argument supporting the view that more women should be elected to democratic office emerges from debates regarding the nature of political representation. The main line of argument is that women have relevant similar experiences and interests (such as childbirth, familial social roles, sexism, abuse and/or harassment), and so they will prioritize women's issues more than male legislators. This view emerges from the concept of representation that Pitkin describes as *descriptive representation*, where a representative stands for a group by sharing the race, gender, ethnicity, or other relevant social experiences, of her constituents. This is distinct from, but compatible with, *substantive* representation, where legislators represent constituents by promoting their material interests and policy preferences.[34] Although Pitkin ultimately dismisses descriptive representation as an appropriate basis for political representation, because it focuses on characteristics of the representative at the expense of attending to the representative's actions, Anne Phillips later made a landmark case for the "politics of presence," the view that political deliberation requires the participation of key groups, such as women. According to Phillips, the women's interests are best represented when they are present in political institutions and places where important decisions are made; women's interests are realized in the course of deliberation, which involves weighing different options, considering

competing concerns, and deliberating on implementation strategies. It is only when women are present for this process that they can benefit and realize their own interests.[35] To use Pitkin's terms, women's *substantive* representation is best achieved by *descriptive* representation.

Jane Mansbridge agrees that representatives whose backgrounds mirror the experiences and social markers of their marginalized constituents are better able to identify interests, improve deliberation, and promote loyalty among constituents. But she is skeptical of this global thesis and specifies that the deliberative function of democracy requires descriptive representation only in four contexts.[36] First, in contexts of group mistrust, descriptive representation can promote communication and thus also bring about substantive representation. Second, in contexts of 'uncrystallized,' not fully articulated interests (such as Phillips describes), descriptive representation improves the quality of deliberation on policy issues and thus enhances substantive representation. In two other contexts, descriptive representation promotes other goods: it creates social meaning in historical contexts where members of a certain group's ability to rule and govern has been questioned; and finally, it increases *de facto* political legitimacy (citizens actually accepting the legitimacy of their own democracy), in contexts of past discrimination, when historically marginalized people are largely absent or minimally represented in the legislature, and when the state is perceived as unresponsive or uninterested in a specific group of citizens' interests.[37]

Will Kymlicka, further argues that gender (and ethnicity) are far too broad to adequately capture the wide range of experiences and perspectives of people within those groups.[38] There are many different factors that go into social identity, including race, religion, ethnicity, social class, education, family history, personal interests, etc., and so it is a mistake to think that, for example, any Latina woman could adequately represent all Latina women. Latina women as a group are very different: they are wealthy, poor, religious, non-religious, educated, working-class, straight, lesbian, and they have differing opinions on a wide range of social, economic and political issues. Iris Marion Young also argues that representatives of marginalized people should not be expected to represent *all* marginalized people within that group.[39] It is better to have *more* representatives from these groups so as to avoid tokenism, and to allow disagreement between the marginalized groups and thus to create richer discourse.

Young identifies a second objection to the argument that women would best represent women, and this is that electing representatives who precisely mirror their constituents is not as important as actually representing the material interests of people in marginalized groups. Descriptive representation may not ultimately be required – what is most important is that the perspectives of those in differentiated social groups be represented. This can be done by electing someone who stands "in social relations that provide him or her with similar experiences and social knowledge to those with the descriptive attributes."[40] Young suggests that we should not assume that any (one) woman is better situated to represent

(all) women, and nor should we limit specific minority group representation to members of that group. People who understand the perspective of women (and other marginalized people) and care about it, but who are not members of these groups, may also be well-situated to argue for their interests.[41] While I agree with Young's critique that the representation of a marginalized perspective is critical, this should only be a last resort option. As Manbridge argues, in contexts of mistrust, which is currently the case in U.S. politics, it would be better for minority voices and marginalized people to represent themselves.

Justice and Equality Arguments

I now turn to three arguments that support increasing the proportion of women in government which are based on different conceptions of justice: a *reparations* argument claiming that women should be elected in order to compensate them for historical injustices, a *gender parity* argument that says that women should be elected at greater rates so that they are equally represented in elected government, and a *gender justice* argument that says gender oppression and subordination should be eliminated, in order to achieve social gender equality, and this is achieved with greater women's representation. The last two arguments are often merged, but my goal is to show here that the gender parity argument and the gender justice argument are distinct.

According to the idea of historical reparations, people who have been materially wronged by another group's actions deserve compensation for having suffered a wrong. In the present context, reparative justice would seek to right the wrong of women being denied the right to vote for centuries, by making special efforts of some sort – seats reserved for women, requirements of proportional candidacy on ballots, additional funding for elections, etc. – to increase women's representation in the legislature. The claim is that since women were prevented from participating in democratic processes for centuries, and this was unfair to them, women's inclusion is now critical to achieving democratic justice. The first step is to right the wrong by extending women the right to vote (which has now been accomplished), and the second is to compensate women for the wrong they have experienced. Forms of compensation might include financial compensation, or perhaps prohibiting male candidates from running for office for several hundred years, or just for a decade, to give women a chance to catch up to men in terms of power.[42] Of course, there are many important objections to this strategy, namely, that the women who currently exist did not experience the wrong of being denied the right to vote, so they do not need to be compensated for this wrong. Since women who experienced the wrong are now dead, and it is impossible to compensate them, this strategy is a nonstarter. Rather, is better to examine women's current situation, acknowledge that residual sexism still impedes the lives of women, and pass legislation that stops this phenomenon. I describe how this can be accomplished in the following section.

A second view is that women deserve special consideration as political candidates, and in order for them to reach equality with men, they need to reach

equality in terms of *parity* in political representation. On this view, political equality is reached when women fulfill the same leadership roles that men do, at the same rate that men do. Women should be elected to political office, and then they will be acknowledged as (political) equals, acceptable political actors with prestige, power and authority, and not just political anomalies. This expands a citizenry's conception of appropriate power, authority, and leadership. The goal of gender parity is to increase the numbers of women occupying positions of power traditionally occupied by men. This is what I call a 'first-wave' feminist approach to power and governance, as it seeks to promote women of any political persuasion, policy agenda, and philosophical outlook. It is merely about promoting women (as a biological category) and getting women into powerful positions, without any considerations of gender, race, or more importantly, class or social status.[43]

There are two worries with the gender parity argument. The first is that efforts to elect women *qua* women may lead to mere *tokenism*, so that marginalized populations appear to be included in governance structures (so that social equality seems to have been achieved), but that substantively, nothing changes. While tokenism may not be the intention of those who support gender parity, it is often the *end result* of such efforts: merely electing women into office does not necessarily change widespread sexist attitudes. The second problem with the parity argument is that not all female legislators are interested in women's issues. Some have no interest in bringing about a better situation for women by narrowing the wage gap, lowering the poverty rate for women, providing better maternal public health, or improving access to reproductive planning services. In other words, *descriptive representation* does not necessarily bring about *substantive representation*. This is why it is critical to distinguish the goal of gender parity from the goal of gender justice, since, at least in some cases, adopting the goal of parity may in fact be *antithetical* to achieving gender justice. And since the goal of gender parity is distinct from the goal of gender justice, it is entirely possible for women to reach parity in the legislature, but *still* be socially, politically, and economically oppressed.

This brings us to the argument that women should be elected to political office because they deserve *gender justice:* women should be elected to office in order to surmount social, political, and economical gender inequality. They should help to eliminate the wage gap, end discrimination and sexual harassment in the workplace, increase support for maternal health services, improve access to reproductive planning services, and address minority women's issues. In particular, women should seek to bring about justice in matters relating to child rearing (such as child care tax credits, paid maternal leave, and subsidized daycare) as it is women's social role as a caregiver that has historically limited their opportunities.[44] As I envision it, gender justice is a progressive liberal feminist goal more characteristic of second-wave feminism, contending that society is structured in ways that favor men, and aiming to secure equal social, political and economic opportunities for women, equal civil liberties and sexual freedoms, and ending discrimination, bias, gender oppression and female subordination by working within the existing political system.

The gender parity and gender justice arguments both acknowledge that women are substantially hindered by residual sexism found in the stereotypes that guide social expectations for men and women. The stereotypes of masculinity and femininity strongly limit women's leadership potential in the political arena. Citizens' conceptions of effective leadership are thought to involve character traits that are stereotypically associated with men and masculinity. These include being dominant, aggressive, forceful, tough, ambitious and competitive. Feminine traits include being loving, compassionate, caring, nurturing, empathetic, and expressive, and these are usually seen as inimical to power. These stereotypes are problematic in that they rely on essentialism, and as a result, socially expected gender norms limit women's potential for leadership success in politics. When men are aggressive or dominant, it is considered acceptable and even admirable. But when women demonstrate authority, competence, and strong leadership, they are likely to be viewed as masculine and less interpersonally appealing. They are perceived as bossy, "bitchy" and controlling, rather than strong, powerful and competent.[45] Research on implicit bias shows that these judgments are deeply entrenched, and that even people who explicitly aver sexist attitudes still associate leadership traits with men, and nurturing traits to women.[46] In fact, research on implicit bias shows that female candidates have to be more qualified than their male opponents to succeed in an election because many voters do not perceive women as leaders.[47] While this widespread phenomenon makes it very difficult for women to succeed in positions of political leadership, I propose solutions to this problem in the following section.

In sum, these arguments show that there are many good reasons to elect women to political office: they pursue legislative agendas that consider the perspectives of underrepresented groups; there will be greater diversity among the women serving, so that more perspectives are represented; there will be "better legislation" on women's issues by improving the deliberation and policy-making process on issues related to women and gender; they are successful at passing legislation promoting women's issues, their presence is important for contributing to *de facto* legitimacy (especially when there is mistrust between citizens and legislators), and electing women to powerful positions is critical for bringing about gender justice and changing oppressive social norms. The hope is that women's participation and influence in the executive and judicial branches of government will become more robust, female voters will change the way they envision the political process, the way citizens view women in leadership positions will improve, and societies will be better situated to achieve substantive gender justice.

State-Sponsored Strategies for Increasing Women's Participation

These arguments can be used to support both state-sponsored initiatives to increase the participation rate for women in government, and individual citizens' rationales for electing more women to public office. I now examine whether these strategies are ethically justified.

I begin with legislative interventions, which are the most controversial. These include (a) reserved seats which set aside a percentage of seats in parliament for women, (b) legal candidate quotas, or laws that require political parties to have a certain percentage of women on their candidate list (also called "parity laws" or "legislative quotas"), and (c) coalition-building and leadership training programs. There are several forceful objections to these practices, namely, they are unfair to men, they are insulting to women, and they force women to participate in a system that may or may not benefit them. I argue that some of these legislative mandates can surmount these objections and be ethically justified, provided that they do not mask women's inequality and subordination, or require them to participate in a system that undermines their autonomy.

Quotas or Set-Asides

Twenty countries have quota systems that reserve various percentages of seats for women in legislature, with percentages ranging from 10–30 per cent.[48] Quota systems are the most radical way of promoting women in politics because they guarantee that women serve in the legislature. The assumption behind legislative quotas, it seems, is that the game of politics is rigged against women: there is a vast gendered, raced, and classed system that maintains historical networks of power, and so women need a head start (if you will); they need some way of guaranteeing their participation in the democratic process, and the best way to do that is by reserving seats for women.

There are four major objections to quotas. First, they are perceived to be unfair to men. Parliaments have a set number of seats, and if some are reserved for women, then it is likely that some qualified men will be prevented from serving in office. This objection could be answered by showing that the women who serve in office *are* just as qualified as men, and that it is not unfair to men, because they have so many social advantages over women to get elected in the first place. Moreover, if women are guaranteed an opportunity to participate in decision-making processes, their voices are heard, and they contribute to the creation of social policies that will improve society. Yes, the mandate to elect women is coercive and inflexible, but some might argue that, at least in principle, it is justified as a short-term measure to get women involved in politics, since it will jumpstart the process of changing institutional norms, expectations, and practices to include a wider range of voices.

A second problem is that quotas may be perceived as insulting to women, since they imply that women could not get elected on their own merits. While this may be true in some cases, there are undoubtedly many women who are elected that are highly qualified and legislate well.[49] Nevertheless, the reserved seats system can lead constituents to think that the women legislators are only there because of the quota and not because they deserve to be there, which may diminish the respect that others hold for women and their potential to make substantial contributions to policy. Moreover, introducing quotas can create significant conflicts within the party organization.[50] Of course, conflict can be

good, because it reveals biases in the system and networks of power that hitherto may have been unacknowledged.

Third, quotas may require women to participate in a system that is "dirty," rigged, morally corrupt, and personally damaging (in that they may have to make too many personal sacrifices with respect to family or other values to participate in office). Not all quota systems are implemented in genuine democracies, and in those countries, women are implicated in a system that doesn't always serve their best interests or the interests of society.[51] Thus, in these quasi-democracies, quotas are a mixed bag: for example, although Iraqi female members of parliament have been regularly insulted by their male colleagues and relegated to working on "women's issues," a few have become political role models for a younger generation of aspiring female politicians coming up through the ranks.

But the main problem with quotas is that they do not (necessarily) reduce women's overall oppression or social situation of subordination. In fact, the implementation of quotas may actually *mask* the problem of gender oppression. Using evidence from sub-Saharan Africa, Shireen Hassein argues that quotas can have profoundly negative effects on deepening democracies when they are adopted in cultures where the "key institutions of democracy and human rights are weakly developed or absent, and where elected political actors are weakly accountable to electoral constituencies. Quotas may fast-track women's representation but they do not fast-track equality or democracy."[52] In these cases, quota systems can give the *appearance* of gender equality without working for the *substance* of gender equality. Pervasive problems such as women's economic equality or equal sexual roles can be dismissed, because people point to the fact that women are in power in the legislature.

The appropriate conclusion to draw regarding quota systems is that they may work in some places, but not others, depending on the cultural context, political climate, and political goals. They have increased women's genuine political power in Sweden, for example, but have been largely ineffective in South Korea. Because electoral gender quotas can be counterproductive, they should therefore be pursued *only* if it is unlikely that *candidate quotas* (or parity laws, discussed in the next section) will be ineffective. If laws mandating legislative seats for women are implemented only for a few election cycles, they could be effective by boosting women's participation rate, and establishing their credibility and capability, but without the further appearance of political corruption. Over the long term, though, they are likely to be seen as democracy-corrupting, and so states will likely want to pursue less radical measures to include women in democratic offices.

Parity Laws

Some nations have attempted to boost women's participation rate in government by adopting parity laws, which require that half of the people running for a specific political party be women. More than twenty European countries,

including France, have adopted this system. In some areas, political parties have voluntarily introduced gender considerations into their party's candidate selection process.[53] Each party must present an equal number of female and male candidates for the elections conducted via proportional representation, in order for that ballot to go forward into an election. In France, for example, the names must rotate between male and female on the ballot. After parity laws were implemented in France, the proportion of women town councilors rose from 25.7 per cent to 47.5 per cent in municipalities with more than 3500 residents; in Senate elections, the number of female senators increased from 5 to 20.[54] The line of argument that best supports such laws is that modest procedures for governing our elections are justified for the sake of democratic stability, and to promote diverse and inclusive representation. This rationale can also be used to justify and reform the redistricting process, where citizens are grouped together in areas in order to prevent (or create) voting blocks by claiming that broader and more inclusive representation contributes to the healthy functioning of a democracy. Such practices are ways of thwarting discrimination and engendering social trust and stability, and so these efforts at inclusive representation are ethically justified.

Another way to defend parity laws is to argue that the influence of overrepresented, privileged groups, especially those who marginalize and oppress in virtue of their privileged status, should be limited. This is Suzanne Dovi's argument praising "exclusion," and she argues that the best way to improve the representation of historically disadvantaged groups is to show that it is morally justifiable and desirable to limit the power of those who oppress.[55] She defends an "oppression principle" according to which democracies should marginalize those who oppress and those whose privileged status sustains oppression. One could argue that parity laws *limit* (even if they do not exclude) the influence of oppressive groups, by constraining the percentage of historically advantaged population candidates (i.e. men) to, at most, half.

Another objection to parity laws can be formulated from Andrew Rehfeld's analysis of quotas as a type of "qualification for office," which he defines as rules or circumstances that have the effect of differentially distributing probabilities of success to candidates for office. It is surely the case that parity laws, which require equal proportions of both genders on a given ballot, fit this description.[56] Rehfeld argues that the use of qualifications for office always violates two presumptive democratic rights, namely the right to an "unrestricted choice set" for voting and an equal right to run for any office. Requiring these qualifications may be justified on the basis of some other value set, such as an appeal to justice, or to right historical wrongdoing. But ultimately, qualifications for office of any kind "must be justified not merely by reference to their purported pragmatic benefits (to secure voice, political maturity, correspondence with a constituency, etc.), but against the costs to democratic legitimacy that are involved in their use at any time."[57] Rehfeld's point is that we should acknowledge that these rights violations have a democratic cost, which he says has been missing from the international enactment of quotas.

While Rehfeld is right to note that the actual passage of these laws expresses a preference for justice as we understand it today (correcting for past oppression; combatting current voter discrimination; better law), over pure democracy, I suspect that most countries implementing them know this and yet do so to combat the unfairness of current democratic practices, where ballot access is limited to those with the financial resources needed for the filing fees required for running for office, social capital, and the temporal resources needed to acquire petition signatures. Moreover, one could respond to Rehfeld's charge by arguing that constraining ballot selections to equal numbers of men and women does not substantially impede voters' right to select whomever they want to represent them; it merely offers a more diverse group of people from which to choose. Since parity laws merely change the probabilities that someone of a certain gender will be elected, in cases where parity laws are implemented with no other ideological constraints or requirements, they do not *substantively* undermine democratic processes or violate basic principles of fairness. They merely level the playing field.

The final concern regarding parity laws is whether they are effective in bringing about gender equality. Since women are not always socially accepted as leaders, and still experience sexist discrimination from fellow representatives, once they are elected to office, serving is a challenge. For example, French legislator Veronique Massonneau was mocked by being 'clucked at' like a chicken while she was making a speech about pension reform on the floor of the legislature.[58] And women elected to public office are hindered by "glass ceiling" effects rooted in discrimination, and have difficulty gaining power or moving up the political ranks. But even if women experience discrimination while in office, this merely shows that while parity laws may help to catapult women into elected office, they alone are insufficient for doing the social work of overturning gender stereotypes, addressing implicit bias, and surmounting inequality.

Coalition-Building and Leadership Training Programs

In nations that have not enacted institutional mandates, there are grassroots efforts to increase women's representation in government. For example, in the U.S., there are many leadership development programs that groom women for office by providing networking opportunities, strategies for navigating the political system, and workshops to develop personality skills needed for substantial leadership positions. These programs are nonpartisan, and do not require commitment to a specific political agenda. They merely serve as a networking and support system for women.

The rationale for these organizations is that the dearth of women in office is best explained not by institutional inertia but by vestiges of traditional sex-role socialization. According to research by Fox and Lawless on gender and political candidacy, women run for political office at rates far below that of men. There is a wide gender gap in the candidate selection process that they say is best

attributed to traditional gender socialization. In a survey of potential candidates from the four professions that are most likely to yield political candidacies for state legislative and congressional offices (law, business, education, and politics), they show that women who share the same personal characteristics and professional credentials as men express significantly lower levels of political ambition to hold elective office.[59] The gender gap among the pool of eligible candidates is attributed to two aspects of the candidate selection process: (a) women are significantly less likely than men to receive a political source's encouragement to run for office; and (b) women are significantly less likely than men to deem themselves qualified to run for office.[60]

Fox and Lawless conclude that because most women perceive political culture as male, have the majority of family responsibilities, and perceive themselves to be unqualified based on social stereotypes, women would benefit from a political recruitment process that provides social, psychological, and other resources along the way. There are many women's organizations that seek to rectify the recruitment disadvantage so that women become more politically ambitious and have a greater chance of emerging as candidates. These include The White House Project, a national, nonpartisan organization that advances women's leadership; and, the Women's Campaign Forum's "She Should Run" campaign, a nonpartisan, online effort to build the pipeline of Democratic and Republican pro-choice women and inject them into the networks that can promote eventual candidacies. Many women's organizations have also recently launched aggressive campaigns to bring more women into political circles and positions of power. Fox and Lawless show that these organizations are effective in mitigating the recruitment gap, especially among Democrats.[61]

These programs are ethically sound in that they do not interfere with democratic processes, do not violate principles of fairness, and do not limit men's ability to run for office. While men may object by claiming that there are no special programs designed for them, it turns out that men don't need them, since they do not lack the confidence and social capital needed to merely run for office. In fact, there are several reasons to believe that programs targeted at women's advancement should exist in plentitude: women's traditional social role in the family makes their running for office more challenging than men's, women generally do not have the social capital and connections to power networks that men do, and women need to advance politically in order for genuine equality to be achieved.[62] In my view, these programs should, at the very least, encourage women to support at least *some* women's issues, such as labor laws, family-leave policies, discrimination and harassment laws, women's treatment during arrest and incarceration, etc. that is compatible with their party's platform. While many support women-centered social policy, ideally, these organizations would incorporate feminist goals of dismantling gender oppression so that being elected to office has the potential to make a substantive difference in achieving gender justice and not just gender parity.

Individual Citizens' Obligations

What are the ethical obligations of individual citizens with respect to gender and political representation? Having shown that there are many reasons to support women candidates, my goal now is to schematize these reasons into a feminist theory of voting that includes gender considerations. I will argue that citizens have an obligation to consider the gender of a political candidate and recognize that judgments of a candidate's viability and likeability are influenced by gendered conceptions of leadership. Second, I argue that individual citizens should care about *gender justice* as a primary concern, but even if citizens believe this value is outweighed in some cases by another value, they should still remain committed to the goal of *gender parity*, and should vote with that in mind. Finally, I argue that women should run for office and that this is an important part of the story of rectifying women's underrepresentation and bringing about gender parity, if not gender justice.

As I described earlier, the traits that people take to be indicative of good leadership are associated with males and masculinity, such that female candidates are unfairly disadvantaged from the starting point. Citizens expect women to be kind and nurturing, but expect leaders to be forthright and strong. When women display masculine qualities, citizens dislike it; they interpret the candidate's speech, body language, or actions, negatively.[63] This creates a double standard that is impossible for women to meet. Female candidates also experience heightened scrutiny with respect to appearance, demeanor, wardrobe, expressions of emotion, and tone of voice, in ways that male candidates are *never* judged.[64] Thus, individual citizens should be educated about sexist judgments, and learn to scrutinize their own judgments of candidates by asking whether their opinions are influenced by their gendered expectations of candidates. Citizens readily accept traits such as quirkiness, hot-temperedness, and aloofness in male candidates, even though they would be entirely unacceptable in a female candidate. Studies show that voter perceptions of a candidate's competency for office is largely related to gender.[65] But citizens should attempt to correct their judgments of a candidate and come to recognize their own sexism, especially if they endorse male candidates that are *less* qualified, have *less* knowledge of domestic and foreign policy, and who pitch *fewer* innovative ideas than female candidates. By learning about implicit bias and sexist judgments, citizens' judgments of women's political behavior can become more fair.[66] This obligation to reflect on gendered judgments is a general obligation that all citizens have, and is discharged by reflecting on the reasons one has to support a particular candidate that are independent of social, gendered stereotypes.

Once a citizen comes to a less biased judgment of the candidates, he is now in a position to evaluate them with respect to the types of policies and platforms that they support. As I argued earlier, *gender justice* is a critically important social goal, and is more important than gender parity because women *and men* can pass laws and policies that dismantle gender oppression. This means that

a candidate's commitment to *gender justice* is more important than a candidate's *gender*: this means that it is better to elect a man that supports gender justice than a woman who does not. Thus, ideally, citizens will next ask whether a candidate supports gender justice in the form of social policies and programs. There is a long history of men who have politically worked to bring about women's equality, and given their positions of prestige, authority, and lack of apparent personal motivation, men are often in a better position to lobby for women's rights on certain issues.[67] Of course, this reason is *defeasible*, meaning that it can be overridden by other political priorities, but given the slow progression of equal rights for women, gender equality should remain a top priority.

Citizens who are not committed to gender justice can still take gender to be a relevant consideration, by instead prioritizing gender parity in *absenc*e of any other gender-related democratic goals. Here is how this could work: when choosing between candidates of similar political persuasion but different genders, other things being equal, an individual should vote for the candidate who would contribute to gender parity. (Of course, citizens rarely take two candidates as equal, since they often support candidates based on 'likeability', which weighs heavily in favor of men. But the view I am sketching here strongly encourages citizens to look past personality and instead focus on leadership skills and party platform.) This *ceteris paribus* clause encourages individuals who reject the goal of gender justice to adopt instead the goal of gender parity, for the reasons cited earlier. In other words, citizens are encouraged to value gender parity even if they do not endorse the goal of gender justice, and are justified in supporting female candidates that detract from the goal of gender justice (if they do not adopt that value), because voting for women would contribute to the overall goal of more women participating in government. I acknowledge that this may have the unfortunate outcome of recommending that citizens elect women who are antifeminist, but it is not clear that this is more harmful than electing men who are antifeminist. Granted, conservative parties would then *appear* to be more gender-inclusive than they actually are, but, on the bright side, their female candidates generally endorse basic liberal feminist views such as women working outside the home, women's autonomy and liberty in her career selection, and women's financial, legal and social independence. These factors can be critical to passing legislation that contributes to women's equality, for there is a better chance that she could act in coalition with other women representatives once she is in office. In the short term, electing a woman who does not support gender justice will be no worse than electing a man who does not support gender justice; in the long run, this woman serving in office will help to overturn gender stereotypes and enable the electorate to get used to the idea of women serving in leadership positions.

Finally, and most importantly, all citizens should encourage women to run for political office, since women are rarely urged to do so. Women who are interested and capable of doing so should attempt a career in politics, at a time in their lives when it makes sense to do so. Given the problems that women face

from social stereotyping, women should be trained to run for office. This is not to say that all capable women are obligated to run for office. Some women should serve as advocates for women candidates, and other women should attempt to dismantle patriarchy by pointing out how social stereotypes limit people's options. Moreover, this does not mean that men should bow out of politics because they think that a woman should run – but if a man knows a woman who is also politically-minded, capable and interested, he should support her candidacy for office before running himself.

Conclusion

I hope to have persuaded readers that a political representative's gender is a critically important ethical consideration in democratic governance. I've argued that political institutions need more women to participate, and in order to increase women's participation rate, citizens have an obligation to consider a candidate's gender when voting, whether they vote in countries that utilize quotas or parity laws, or in democracies that have no institutional mandates. Citizens have an obligation to learn about the ways in which their own judgments of political candidates are influenced by gender stereotypes, and to adopt gender justice as an important social value, even if that value is ultimately trumped by some other political value when they vote. In the end, the effort to make women "equal" by electing them to political office may be a small but critical step in bringing about gender equality and eliminating the prevailing social norms that position women as subordinate to men.

Notes

1 This includes reserved seats, legislated candidate quotas, and voluntary political party quotas. The most recent statistics can be found at www.quotaproject.org/, where a global database of political quotas for women is housed (accessed October 26, 2016).

2 Many thanks to David Birks, David Killoren, Holley Tankersley, Justin Weinberg, Keira Williams, the audience at the 2015 South Carolina Society for Philosophy conference, and the editors of this book for extremely helpful feedback on this chapter.

3 This thesis is pragmatic, and neutral with regard to theories of gender as a social or biological construct. The position endorsed in this chapter is even compatible with a position argues that the binary gender system is an oppressive social construct rooted in oppression, and not just merely a way of distinguishing between the sexes. On this view, while sexual difference functions as the *physical* marker to distinguish two groups, physical markers are not all of what it means to 'be a man' or 'be a woman.' Rather, the physical markers are used as a *justification* for treating the members of each group differently, as either oppressed or privileged. Male and female, like other categories of oppression, are defined *hierarchically* and are part of a broader complex of oppressive relations. (See Sally Haslanger, "Gender and Race: (What) Are They? (What) Do We Want Them To Be?" *Nous* 34 (1):31–55 (2000).) True justice means overturning and dismantling these concepts and replacing them with a more egalitarian notion of gender that is open to different conceptions of gender. Seen in this light, political action is seen as critical to subverting and

dismantling gender constructs, even if it is just the tip of the iceberg and should lead to wholesale change regarding our conceptions of gender and race.

4 The Congressional Research Service (2015), "Women in Congress: Historical Overview, Tables, and Discussion" p. 10. www.fas.org/sgp/crs/misc/R43244.pdf (accessed October 26, 2016).

5 Details of the calculation can be found at: www.washingtonpost.com/blogs/she-the-people/wp/2014/05/22/women-will-reach-political-parity-in-2121-why-will-it-take-so-long/ (accessed October 26, 2016).

6 See the Inter-Parliamentary Union's statistics, as of June 1, 2016: www.ipu.org/wmn-e/classif.htm (accessed October 26, 2016).

7 This is likely because only 130,000 women were registered to vote in Saudi Arabia, compared to 1.36 million men. See www.npr.org/2015/12/19/459491653/after-historic-elections-in-saudi-arabia-whats-the-future-for-women (accessed October 26, 2016).

8 Several of the arguments I mention below are usefully summarized in Chapter 1 of *Women, Politics and Power: A Global Perspective,* edited by Paxton, Pamela Marie and Hughes, Melanie M. Pine Forge Press, 2007. See also Phillips, Anne, 1995. *The Politics of Presence*. Oxford: Clarendon Press; Siim, Birte, 2000. *Gender and Citizenship. Politics and Agency in France, Britain and Denmark*. Cambridge: Cambridge University Press; Drude Dahlerup, ed., *Women, Quotas and Politics,* Routledge, 2006; Drude Dahlerup and Monique Leyenaar, eds. *Breaking Male Dominance in Old Democracies,* Oxford University Press, 2013.

9 This argument appears in many politically important places: U.S. Glass Ceiling Commission. (1995) *Good for business: Making full use of the nation's human capital. Executive summary,* Washington, DC: U.S. Government Printing Office; Murray, Rainbow, ed. (2010) *Cracking the Highest Glass Ceiling: A Global Comparison of Women's Campaigns for Executive Office,* Santa Barbara, CA: Praeger; Palmer, Barbara, and Simon, Dennis. (2006) *Breaking the Political Glass Ceiling: Women and Congressional Elections*. New York, NY: Routledge; Linda Tarr Whelan (2011) *Women Lead the Way*: *Your Guide to Stepping Up to Leadership and Changing the World*, Berrett-Koehler Publishers.

10 For a thorough treatment of these topics, I refer readers to Chapter 8 in Pamela Paxton and Melanie Hughes, *Women, Politics and Power: A Global Perspective*, *3rd Edition*, CQ Press (SAGE), 2017.

11 *Women, Politics and Power: A Global Perspective, 3rd Edition*, CQ Press (SAGE), 2017, Chapter 7.

12 Swers, Michele L. 1998. "Are Congresswomen More Likely to Vote for Women's Issue Bills Than Their Male Colleagues?" *Legislative Studies Quarterly* 23: 435–448.

13 It is important to define "women's interests," in the present context, since there is a long history of legislators defining women's interests paternalistically: protective labor laws and laws prohibiting female suffrage were originally defined by male representatives as "better for women," even though these laws actually limited women's liberties and their rights.

14 Republican women are typically in this position, as democratic bills and platforms tend to prioritize women's issues.

15 Raghabendra Chattopadhyay and Esther Duflo, "Women as Policy Makers: Evidence from a Randomized Policy Experiment in India," *Econometrica*, Vol. 72, No. 5 (September, 2004), 1409–1443. This study found that women elected as leaders under the reservation policy invest more in the public goods more closely linked to women's concerns (drinking water and roads in West Bengal and drinking water in Rajasthan), and invest less in public goods that are more closely linked to men's concerns (education in West Bengal and roads in Rajasthan).

16 *Women, Politics and Power: A Global Perspective, 3rd Edition*, p. 201.

17 Ibid, p. 229. Women gave a smaller percentage of speeches than men, and had less power in face-to-face interaction time, such as in committee meetings.
18 A 2001 survey of United States state legislators found that a majority of both men and women say that the increased presence of women has made a difference to the way legislators conduct themselves on the floor of the legislature (Ibid., p. 205). These numbers suggest some spillover from female legislators to their colleagues, at least in the United States. There is evidence that women's presence affects their colleagues, but also appears to highlight the needs of other traditionally disadvantaged groups.
19 Paxton and Hughes note that Margaret Thatcher and Indira Ghandi were famously autocratic in their roles as prime minister (Ibid., p. 231).
20 Ibid, p. 233.
21 This is largely due to Dahlerup's research in Scandinavia. See her "From a Small to a Large Minority: Women in Scandinavian Politics," *Scandinavian Political Studies*, December 1988, p. 281.
22 This includes the political realm (including the UN General assembly) and corporate boards in the US, see www.2020wob.com/ (accessed October 26, 2016).
23 See Rosabeth Moss Kanter, "Men and Women of the Corporation," Basic Books, 1977.
24 While this is a reasonable expectation, Dahlerup argues that if the only women in politics are token women, they may not be able to make a difference to policy or legislative style ("From a Small to a Large Minority: Women in Scandinavian Politics" 1988).
25 Kathleen Bratton, "Critical Mass Theory Revisited: The Behavior and Success of Token Women in State Legislatures," *Politics & Gender*, Volume 1, Issue 1, March 2005, pp. 97–125. This study ruled out party and district characteristics.
26 Htun, Mala, Lacalle, Marina, and Juan Pablo Micozzi. "Does Women's Presence Change Legislative Behavior? Evidence from Argentina, 1983–2007" *Journal of Politics in Latin America*, 2013, Vol. 5 Issue 1, p95–125. This study compares three periods of time with varying levels of women's presence in both legislative chambers (the first without quotas, the second with a quota in one chamber, and the third with full quota implementation in both chambers). The results confirm the necessity of distinguishing between the process of legislative behavior and its outcome. The study shows that many more women's rights bills were introduced when women held a greater share of seats in both chambers. However, the approval rates of these bills actually declined. Despite their greater presence, women continue to be marginalized in the legislature and to suffer reduced political efficacy.
27 There is empirical evidence that the presence of women brings out this temperament (in other words, men are not just being jerks because they enjoy it), including evidence from New Zealand that once women reached 15 per cent of the legislature, hostility toward them increased; in the US, male congressmen gave more PAC money to men and less to women, as the proportion of women increased, and in comparisons of the proportions of women in leadership committees, men were less likely to be including and collaborative as the numbers of women in leadership rose. See *Women, Politics and Power: A Global Perspective*, pp. 236–238.
28 Anne Cutler and Donia R. Scott, "Speaker sex and perceived apportionment of talk," *Applied Psycholinguistics* 11 (1990), 253–272.
29 Michelle Saint Germain, "Does Their Difference Make a Difference? The Impact of Women on Public Policy in Arizona Legislature," *Social Science Quarterly* 70(4), March 1989, pp. 957–968.
30 See Craig Volden, Alan E. Wiseman, and Dana E. Wittmer, "When Are Women More Effective Lawmakers Than Men?" *American Journal of Political Science*, Volume 57, Issue 2, April 2013, pp 326–341. This is true even in women's issue areas, where both minority and majority party women dedicate more of their efforts,

but to very different effects. Majority party women have become less effective as Congress has become more polarized.

31 This function was first articulated by Pitkin in *The Concept of Representation*, University of California Press, 1972.

32 Research suggests that the gender of the role model is quite salient for women compared to men. See Penelope Lockwood, ""Someone like Me Can Be Successful": Do College Students Need Same-Gender Role Models?" *Psychology of Women Quarterly,* 30 (2006), p. 36–46; Drury, Siy, and Cheryan. "When do Female Role Models Benefit Women? The Importance of Differentiating Recruitment from Retention in STEM" *Psychological Inquiry*, 22 (2011): 265–269.

33 Another factor is proximity. Burns, Schlozman and Verba (2001) found that women who live in areas with higher densities of female-elected officials are more likely to express an interest in politics. (See *The Private Roots of Public Action: Gender, Equality, and Political Participation*, Harvard University Press, 2001).

34 The fourth kind of representation she identifies is *authorized* representation, where a representative is legally empowered to act for her constituents. *The Concept of Representation*.

35 Anne Phillips, *The Politics of Presence*, Oxford University Press, 1995.

36 Jane Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes'," *The Journal of Politics*, Vol. 61, No. 3 (Aug., 1999), (628–657), p. 629.

37 Ethnicity has also been identified as an appropriate basis for descriptive representation, in order to make it easier for certain groups to be represented and to increase a government's *de facto* legitimacy. See Mala Htun, "Is Gender Like Ethnicity? The Political Representation of Identity Groups," *Perspectives on Politics*, Vo. 2, Issue 3, September 2004, p. 439–458.

38 Will Kymlicka, *Multicultural Citizenship*: *A Liberal Theory of Minority Rights*, Oxford University Press, 1996, p. 139.

39 Iris Marion Young, *Inclusion and Democracy*, Oxford University Press, 2000. The perspectives of structurally differentiated groups should be included in the deliberations of governing bodies, since these groups have "different understandings of the causes of the problems and conflicts and the possible effects of proposed solutions. They have differing perceptions of one another and different understandings of the society's history and current relationships." P. 145.

40 Ibid., p. 148.

41 Briefly, a new development in political philosophy regards how political ideology, framing techniques, and public political rhetoric may in the end be more important in crafting how women and minorities are addressed. In other words, *who* does the reasoning regarding political issues may not be as important as the *rhetoric* used to frame the issues relating to women and minorities. See Jason Stanley, *How Propaganda Works*, Princeton University Press, 2015, for a discussion of the role that ideologies play in public deliberation and reasoning about social issues, and how it can undermine democratic deliberation.

42 With respect to women, there is at least one historical precedent: reparations to Korean "comfort women" (women who were sex slaves during the Japanese occupation of Korea) were settled in December 2015. The best known reparation argument, of course, regards reparations for slavery: Locke, Jefferson, and W.E.B. Du Bois, Frederick Douglass and many others have argued that slaves and their descendants deserve financial compensation for the injuries of slavery and its aftermath.

43 This is 'first-wave' in the sense that it is merely about guaranteeing women the same rights as men, but without examining the deeply engrained social context of patriarchy, or, whether "equal rights" are distributed equally among all women, regardless of race or class.

44 Many liberal feminists argue that the primary source of women's subordination is her social role in the family, not just her biological role in reproduction or the male tendency to sexual violence (other oft-cited explanations for why women are the 'weaker' sex). See for example J.S. Mill *The Subordination of Women* (1869) and Susan Moller Okin (1984) *Justice in the Family*, Basic Books.

45 The literature here is immense. Stefanie K. Johnson, Susan Elaine Murphy, Selamawit Zewdie, Rebecca J. Reichard, "The strong, sensitive type: Effects of gender stereotypes and leadership prototypes on the evaluation of male and female leaders," *Organizational Behavior and Human Decision Processes*, Volume 6, Issue 1, May 2008, Pages 39–60. See also Samantha C. Paustian-Underdahl, Lisa Slattery Walker and David J. Woehr, "Gender and Perceptions of Leadership Effectiveness: A Meta-Analysis of Contextual Moderators" *Journal of Applied Psychology* (2014) Vol. 99, No. 6, 1129–1145. In an effort to surmount this stereotyping, Sheryl Sandberg started the movement "Ban Bossy" which seeks to overturn the words used to describe women in leadership. "When a little boy asserts himself, he's called a "leader." Yet when a little girl does the same, she risks being branded "bossy." Words like bossy send a message: don't raise your hand or speak up, and this hinders girls' development. http://banbossy.com/ (accessed October 26, 2016).

46 Scientific research has demonstrated that biases thought to be absent or extinguished remain as "mental residue" in most of us. Studies show people can be consciously committed to egalitarianism, and deliberately work to behave without prejudice, yet still possess hidden negative prejudices or stereotypes. Corrine A. Moss- Racusin , John. F. Dovidio, Victoria Brescoll, Mark J. Graham, Jo Handelsman, "Science faculty's subtle gender biases favor male students" Proceedings of the National Academy of Science, vol. 109 no. 41, October 2012, 16474–16479. Implicit Bias test – Harvard.

47 Many studies show that the Implicit Association Test (IAT) predicts voting behavior. See, for example, Cecilia Hyunjung Mo, "The Consequences of Explicit and Implicit Gender Attitudes and Candidate Quality in the Calculations of Voters," *Political Behavior*, June 2015, Volume 37, Issue 2, pp. 357–395.

48 See www.quotaproject.org/ for a complete summary (accessed October 26, 2016). Quotas can be found in local, regional, and national levels. For example, in India, 30 per cent of seats are reserved for women at the local level, and none at the national level.

49 Iraq has a quota reserving 25 percent of parliamentary seats for women. Of the 86 current female parliamentarians, only 5 won enough votes in 2010 to be elected without the quota. SOURCE.

50 For a summary of the documented negative impacts of mandated quotas, see Drude Dahlerup, and Monique Leyenaar, eds. *Breaking Male Dominance in Old Democracies,* Oxford University Press, 2013.

51 Quota systems have been recently implemented in Iraq, Libya, Tunisia, Morocco, Egypt, and Jordan. Many would argue that these repressive regimes do not truly include the voices of women since they are not true democracies. And in many communist states of the twentieth century, quotas were employed as a way of paying lip-service to equality declarations made by state-sponsored socialism. Thus, in several modern European democracies, quotas are not regarded as positive measures, but as negative reminders of non-democratic practices.

52 "Perverse consequences? The impact of quotas for women on democratization in Africa," in *Political Representation*, edited by Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood and Alexander S. Kirshner, Cambridge University Press, 2009, p. 212.

53 This includes the major political parties in Germany, Norway, Spain, Sweden, and many others. For a summary, see: www.quotaproject.org/systemParty.cfm (accessed October 26, 2016).

54 Mariette Sineau, "Institutionalizing Parity: The French Experience" International IDEA, 2002, Women in Parliament, Stockholm, www.idea.int/publications/wip/upload/CS-French_Exp-sineau.pdf (accessed October 26, 2016).
55 Suzanne Dovi, "In Praise of Exclusion," *The Journal of Politics*, Vol. 71, No. 3, July 2009, p. 1172.
56 Andrew Rehfeld, "On quotas and qualifications for office" in *Political Representation*, edited by Ian Shapiro, Susan C. Stokes, Elisabeth Jean Wood and Alexander S. Kirshner, Cambridge University Press, 2009, p 246.
57 Ibid., p. 265. I speculate that the explanation that quotas or parity laws have never even been seriously *discussed* as an option in the United States, is that they would broadly be perceived as a substantive encroachment on democratic liberty.
58 Story here: www.theguardian.com/world/2013/oct/18/wave-sexism-french-politics-backlash (accessed October 26, 2016).
59 Folke, Olle and Rickne, Johanna, "The Glass Ceiling in Politics," *Comparative Political Studies*, April 2016, Vol. 49 (5), p 567–599; see also Kerevel, Yann and Kerevel, Yann, "Explaining the Marginalization of Women in Legislative Institutions" *Journal of Politics*, Oct 2013, Vol. 75 (4), p 980–992.
60 Richard Fox and Jennifer Lawless, "Entering the Arena: Gender and the Decision to Run for Office," in *American Journal of Political Science* 48(2), 2004, p. 264–280.
61 Ibid., p. 275.
62 Richard Fox and Jennifer Lawless, "If Only They'd Ask: Gender, Recruitment, and Political Ambition," *The Journal of Politics*, Vol. 72, No. 2, April 2010, p. 310–326.
63 "Elect Her" is a candidate training program present on many college campuses. See also Kelly Dittmar, "Encouragement is not Enough: Addressing Social and Structural Barriers to Female Recruitment," *Politics & Gender*, Volume 11, Issue 4, December 2015, p. 759–765.
64 For example, Hillary Clinton was described as "shrill," "brash" and "angry" when she spoke passionately on the presidential campaign trail; these words were never used to describe male candidates who did the same, or worse, behaviors. A scientific analysis of this phenomenon here: www.theatlantic.com/video/index/493814/the-science-behind-hating-hillarys-voice/ and: www.theatlantic.com/science/archive/2016/08/hillarys-voice/493565/ (accessed October 26, 2016).
65 Appropriately, Cosmopolitan magazine enumerates various differences here: www.cosmopolitan.com/politics/news/a57548/female-male-politicians-double-standards/ (accessed October 26, 2016).
66 Tessa Ditonto summarizes the research on gender and candidate likeability, all of which show this to be true, and then reports the findings of her own recent study, which showed that as long as the candidate seemed competent and qualified, a candidate's gender didn't matter. But when voters were presented with a candidate who seemed less than competent, women candidates did far worse than men. Essentially, competent and incompetent men stood an equal chance of receiving a vote, whereas an incompetent female candidate in one's own party led to the voters selecting the candidate in *the other party*; in other words, voters didn't seem to care whether a candidate was competent, but whether he was a man. (Tessa Ditonto, "Candidate Competence: Is There a Double Standard?" Available at www.cawp.rutgers.edu/footnotes/candidate-competence-there-double-standard (accessed October 26, 2016).
67 There are examples of individuals learning to surmount implicit bias. For example, police officers can be trained to eliminate bias with respect to race and shooting unarmed Black suspects (E.A. Plant and B.M. Peruche, "The consequences of race for police officers' responses to criminal suspects," *Psychological Science* March 2005, 16(3): 180–183). See also Iris Bohnet, *What Works: Gender Equality, By Design* (Harvard University Press 2016). She reviews the impact of diversity and leadership training, networks and mentorship/sponsorship, and argues that to

overcome gender bias in organizations and society, we should focus on de-biasing institutional systems (e.g., how we evaluate performance, hire, promote, structure tests, form groups, etc.) rather than trying to de-bias individuals. In Jennifer Saul's and Michael Brownstein's *Implicit Bias and Philosophy, Volume 2*, several philosophers argue that both individual effort and communities (and institutions) must work in tandem to eliminate implicit bias. See especially, "A Virtue Ethics Response to Implicit Bias" by Clea F. Rees and "Implicit Bias, Context, and Character" by Michael Brownstein, both of whom use psychological studies to show that debiasing is possible.

68 Examples include John Stuart Mill in England, August Bebel in Germany, Charles Fourier in France, and Henry Browne Blackwell in the United States, among many others. Jackson Katz and Michael Kimmel currently spearhead this work.

10 A Demarcation Problem for Political Discourse

David Killoren, Jonathan Lang, and Bekka Williams

One of the main roles for a citizen in a democratic society is to engage in *political discourse*, i.e., to engage in (written or oral) conversation about political issues. Political discourse often (though not always) takes the form of debate, in which the participants take up a position on a disputed question and try to persuade other participants of their position. People from all walks of life take part in these debates, in all sorts of venues—from television and radio, to Facebook and Twitter, to workplaces and neighborhood bars. In this debate-style form of political discourse, a wide range of different questions can be up for debate (and, as the discourse unfolds, the questions themselves can evolve). But during the run-up to an important election, the simplest and most common question is: *Whom should we elect*? In the United States at present (late May, 2016) there is a lot of discussion about whom "we" (the American people) should elect as President of the United States in the upcoming presidential election.

In this paper, we introduce a problem for political discourse surrounding that simple question—*Whom should we elect*? We'll take political discourse about the American presidential election of 2016 as our main example.

Normally, a participant in political discourse supports a given candidate and opposes others; it is unusual to get involved in political discourse without supporting any particular candidate. To *support a candidate* seems to have at least two components: (1) to support a given candidate typically includes playing a role of advocacy in political discourse—presenting arguments in favor of that candidate, responding to objections against that candidate, raising objections against opposing candidates, etc.; and (2) to support a given candidate is to be prepared to act in a certain way—e.g., to be prepared to cast a vote for that candidate when the election occurs.

But how do we—and how should we—go about selecting a candidate to support? One method that quickly presents itself is what we'll call the *two-stage procedure*.

In the first stage, the *option-identification* stage, one produces an initial list of candidates—the *option list*. The option list is (roughly) a list of candidates whom one could support; alternatively, it is a list of candidates who are up for consideration. In 2016, any voter's option list is likely to include Hillary Clinton

and Donald Trump, as they are the presumptive nominees of the two major parties. The list may also include various third-party candidates—e.g., Gary Johnson, who will be the Libertarian Party candidate for President, or Jill Stein, who is poised to be the Green Party candidate. And the list may include Bernie Sanders, who as of this writing is still trying to win the Democratic nomination. There may be others appearing on any given voter's option list as well.

In the second stage, which we'll call the *evaluation stage*, one compares the various candidates in the option list in order to reach a judgment about which candidate is best. Thus, for instance, a utilitarian voter may try to choose the candidate who would as President do the most to promote general happiness, whereas a libertarian voter may try to choose the candidate who would as President do the most to promote individual freedom and protect individual rights. Politically conservative voters may proceed with the view that the best candidate will be the one who will keep things more or less as they are (or will restore things to the way they used to be). Other voters may rely mainly on considerations about virtue, with the thought that the best candidate for President will be the one with the best character. Some voters may eschew general principles altogether and rely entirely on gut-level feelings to decide which candidate is the best one. In short, different voters will approach the evaluation stage in different ways.

We conceive of the two-stage procedure as a procedure that each individual participant in political discourse deploys for herself in order to make up her own mind about whom to support. Thus different voters may have different actual option lists: e.g., a longtime Green Party activist will almost certainly include Jill Stein in her option list, whereas Stein will be absent from the option list of a voter who has never even heard of the Green Party. Of course, voters can also influence one another regarding their option lists. Thus, the Green Party activist may, in conversation, persuade a less engaged voter to at least consider Jill Stein for President—that is, to add Jill Stein to his option list. Likewise, at the evaluation stage, voters can profoundly influence one another, even though each voter must execute the evaluation stage on her own to make up her own mind about whom to support.

We do not claim that all or even most voters consciously or explicitly deploy the two-stage procedure. However, it seems plausible that most voters approach the question of whom to support in a way that *functionally amounts to* our two-stage procedure. In real-world political discourse, much of the discussion appears to occur at (what we are calling) the evaluation stage: voters in political discourse typically seem to be involved in discussion and debate about which candidate is best. But one cannot even discuss which candidate is best unless one first knows which candidates are up for consideration—i.e., it seems that one cannot enter the evaluation stage without first having passed through the option-identification stage. Thus, even if participants in political discourse never consciously set out to assemble an option list before they begin to think about which candidate to support, it appears that they must somehow come to possess such a list.

In any real-world discourse—especially discourses that transpire over the course of months or years, as is the case in a Presidential election—it seems likely that the two-stage procedure will be deployed in a dynamic, ongoing way. For instance, when a new candidate enters the race and begins to gain supporters, this may result in an expansion of the option list. When a candidate drops out of the race, this may result in a contraction of the option list. And so we might say that the option list is, in effect, curated on an ongoing basis by the voter, rather than decided once and for all. And when the option list changes, the voter may then have to re-enter the evaluation stage and may thus reach a new verdict about which candidate is best. Similarly, when new considerations come to light—e.g., one's favorite candidate turns out to have an unsavory past, or one's least-favorite candidate puts in a very persuasive debate performance—then a voter may choose to re-enter the evaluation stage.

We suspect that many voters move back and forth between stages—continually modifying their option list and revising their views in light of new information and new arguments about which candidate in the option list is best. Thus the two-stage procedure is useful as a model of voter decision-making only if we remember that it is does not result in a single, once-and-for-all judgment, but is instead a pattern of reasoning that can be revised and redeployed continually.

The central question for this paper is then: What is the right way (and what are some of the wrong ways) to assemble an option list? This is a demarcation problem; it is the problem of how a voter can justify *drawing a line* that separates candidates to be considered and evaluated from candidates to be set aside and ignored.

This problem is important. Candidates have good reason to work very hard to earn a place on voters' option lists. Bernie Sanders, for example, is currently fighting to remain in consideration among Democratic primary voters; and his opponent, Hillary Clinton, and her supporters are doing whatever they can to persuade voters to give up on Sanders (i.e., to persuade voters to drop Sanders from their option lists). This behavior is not the least bit mysterious. If a candidate is not on voters' option lists, then he cannot win the election.

We'll proceed as follows. Throughout the paper, we'll consider a series of different criteria that can be used to select an option list. In the first section, we'll consider a criterion based on media prominence, according to which a candidate earns a place on our option list by being prominently discussed in mainstream news sources. In the next section, we'll consider a criterion based on legal electability, according to which a candidate earns a place on our option list simply by being legally electable. In the third section, we'll consider a criterion based on probability, according to which a candidate earns a place on our option list if her election is (at least) minimally probable. In the fourth section, we'll consider a pair of consequentialist criteria, according to which a candidate earns a place on our option list if (roughly) the consequences of including her in the option list are sufficiently good. In the fifth section, we'll consider (and reject) a contrastivist solution to the demarcation problem. And in the final section, we'll consider a criterion based on practical possibility,

according to which a candidate earns a place on our option list as long as we (the electorate) can elect her.

As we indicated above, we'll focus throughout the paper on the demarcation problem as it applies particularly to the political discourse in presidential politics in the United States in 2016. We think our remarks here can apply fairly straightforwardly to a wide range of other political discourses in the United States and elsewhere; but we will not attempt to explicitly draw general lessons. In the end, we do not intend to finally solve our demarcation problem for political discourse. Our primary aim is to show that this problem is important and difficult, to survey some of the main available solutions to it, and to develop some of the arguments for and against these solutions.

The Media Prominence Criterion

In the next several sections, we want to consider various criteria, or rules, that a voter could use to determine which candidates to include in her option list and which ones to exclude. Here's the first one that we'll discuss:

> The Media Prominence Criterion: A candidate X is to be included in the option list if discussion of X is prominent in mainstream news media.

A voter who relies on the Media Prominence Criterion will certainly include both Hillary Clinton and Donald Trump in her option list, as they are both obviously prominent in news coverage of the election. She is likely also to include Bernie Sanders in her option list, at least for now, because Sanders is still receiving a lot of mainstream media attention. She will not consider Jill Stein (the likely Green Party candidate) or Gary Johnson (the likely Libertarian Party candidate) because these individuals have received almost no discussion in the press thus far. And there are a great many others she'll exclude, as well. For instance, she will exclude Vermin Supreme, a bizarre individual who wears a boot as a hat and has run for President in elections since 2004, and has (unsurprisingly) received very little media attention.

We suspect that few voters would openly endorse or defend the Media Prominence Criterion, but it seems that this criterion is in fact implicit in many voters' approach to political discourse. For example, Donald Trump has by many measures garnered more media attention than any other primary candidate (in either party),[1] and this disparity appears to partially explain Trump's high level of support in the polls as well as the stagnating support seen for candidates who struggle for coverage.[2] In response, Bernie Sanders has claimed that there has been a "Bernie Blackout" in political journalism[3] and that Donald Trump's rise is "an indictment of the media."[4] Whether such claims are true is up for debate, but it seems clear that the quantity of candidates' media coverage causally contributes (for better or worse) to the range of candidates that voters are willing to consider; that is, it appears that voters rely heavily on the media to tell them which candidates are worthy of consideration and which are not.

Thus, we suggest, many voters behave in political discourse *as if* they rely on the Media Prominence Criterion, even if they do not endorse that criterion in a conscious or explicit way.

Yet it is very difficult to see how the Media Prominence Criterion could be justified. The mere fact that prominent journalists and pundits are discussing a candidate does not seem like a reason, on its own, to think that the candidate is worthy of voters' consideration; likewise, the fact that a candidate *isn't* being prominently discussed does not seem like a reason to think the candidate *isn't* worthy of discussion.

To support this point, consider other contexts. Imagine a recent college graduate who is trying to decide on a career. Such a person would be ill-advised to consider all and only those careers that are given prominent attention in mainstream media. After all, if our college graduate relies on such a criterion, she may overlook an unusual, little-discussed, or simply unpopular career that will suit her perfectly. Or consider a more trivial decision-making context: a couple who are trying to decide on a place to go out for dinner. If they want to consider the best dining options available to them, they should not confine their attention only to those restaurants that are very prominent in, say, online restaurant listings; such an approach could exclude many out-of-the-way restaurants that might be every bit as good, or better than, the most obvious locations.

Thus, it seems that versions of the Media Prominence Criterion applied in certain other decision-making contexts are hard to justify. Despite this, of course, it could well be that the Media Prominence Criterion *as applied to political discourse* is defensible. As we have emphasized, however, the mere fact that a given candidate has achieved (or has failed to achieve) media prominence does not, on its own, seem like any kind of reason to think that voters should give (or not give) serious consideration to that candidate. In other words, the Media Prominence Criterion seems like an utterly arbitrary answer to our demarcation problem.

Yet it could well be that media prominence of a given candidate is correlated with some other feature (or set of features) which does (or do) give voters a reason to consider that candidate. Of course, in order to determine whether this is true, we'll need to identify the feature(s) in question—that is, we'll need to identify an altogether different, more fundamental criterion. Once we do that, then it might turn out that the Media Prominence Criterion is justifiable as a *reliable heuristic* for that more fundamental criterion. Hence, even if we may ultimately want to defend the Media Prominence Criterion as a reliable heuristic, we'll still need to have an alternative, more basic criterion in terms of which to defend it.

The Legality Criterion

Here is another approach that a voter could use in deciding on her option list:

> The Legality Criterion: A candidate X is to be included in the option list if that candidate could be legally elected and sworn in as President.

A first problem for the Legality Criterion is that it does not exclude very many candidates from consideration—although it does exclude *some* candidates. The Constitution states:

> No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.
>
> (Article II, Section 1)

These restrictions mean that we cannot legally have Arnold Schwarzenegger, for instance, as President (since he is not a natural born citizen). Nor can we have a President Justin Bieber (since he is not thirty-five years old). Plausibly, we also cannot legally have Huckleberry Finn or Abraham Lincoln as President (assuming that fictional people and dead people both fail the Constitution's residency requirement). If we restrict our option list to those who can be legally elected and sworn in, then we are able to exclude *some* individuals from consideration. But there is still an enormous number of potential candidates left: that is, there is an enormous number of individuals in the United States who meet all of the constitutional (and other legal) requirements for being elected and sworn in as President.

This means that if voters rely on the Legality Criterion, they will need to consider a massive collection of different individuals in political discourse. They'll certainly have to consider Hillary Clinton and Donald Trump. And they'll have to consider third-party candidates such as Gary Johnson and Jill Stein. They'll also need to consider extremely weird candidates as well, such as Vermin Supreme. And they'll need to consider literally *millions* of others. It bears noticing that some of those millions of people would make very good presidents. The list of legally electable presidents includes not just professional politicians, but also humanitarians, philosophers, economists, historians, scientists, activists, artists, spiritual leaders, etc.—people who have devoted their lives to the advancement of human rights and the common good, and who could be enormously beneficial to the United States and to the world if they were given the power of the American presidency.

Given that there are millions of legally electable potential presidents, if voters were to rely on the Legality Criterion, then this would utterly transform political discourse. At present, political discourse focuses on a very small, very manageable set of different candidates. For many people, that set includes *just two* individuals—the Republican nominee and the Democrat nominee. For others, the set includes a few others—usually a handful of third-party candidates. With such small option lists, voters typically find it relatively easy to perform the evaluation stage, the second stage of the two-stage procedure that we described in the Introduction. After all, even a casually attentive voter is normally able to compare and contrast two or three different candidates. But if

the option list were to include millions of individuals, the evaluation stage would become a full-time job. Indeed, it might not be possible for a single voter, or even a large team of voters, to meaningfully compare millions of different potential presidents.

Therefore, the first problem for the Legality Criterion is a practical one: it would produce unmanageably huge option lists. A second problem for the Legality Criterion is that the mere legality of electing and swearing in a candidate does not, on its own, seem like a positive reason to think that that candidate ought to be considered as a candidate for president (even though a candidate's legal electability may count as a *necessary* condition of her inclusion in one's option list). Consider again the couple from the previous section who are trying to decide where to go for dinner: it would be a bit odd for them to approach their problem by first listing every restaurant anywhere in the world that they could legally choose for dinner, and then to attempt to compare all of those restaurants. One might reasonably ask them why they are using legality as a way to construct their initial list. And it would be reasonable to ask the same question of any voter who relies on the Legality Criterion.

The Probability Criterion

One of the reasons why the Legality Criterion seems problematic is that it requires voters to consider candidates who almost certainly will not be elected as president. Consider Vermin Supreme—the candidate who wears a boot as a hat. Many people will say that Vermin Supreme should be excluded from consideration because he is sure not to win. Of course, Vermin Supreme also has a number of other disadvantages as a candidate. No one, not even Vermin Supreme, believes that Vermin Supreme would make a good President. But there are many individuals who *would* perform very well as President, and could be legally elected as President, but seem unworthy of consideration simply because they are almost certain not to be elected. Consider Russ Shafer-Landau, the moral philosopher, who is by all accounts exceedingly wise and virtuous. Assume, at least for the sake of argument, that Shafer-Landau would perform well as President. Assume even that he would be better as President than Hillary Clinton or Donald Trump. Nevertheless, many people will say that Clinton and Trump deserve a place in our option lists, whereas Shafer-Landau does not, simply because the odds of Shafer-Landau being elected are so remote.

Thus, as an alternative to the Legality Criterion, we may wish to consider a criterion founded on probability, such as the following:

> The Probability Criterion: A candidate X is to be included in the option list if the election of X is (at least) *minimally probable*.

The first problem for defenders of the Probability Criterion will be to present and defend a minimum probability cut-off. How probable does a candidate's election need to be in order to count as "minimally probable"? If a candidate's

odds are 17 percent, is that sufficient? What about 1 percent? The challenge is to identify a probability cut-off that excludes *just enough* candidates. Here there may be intramural disagreement among defenders of the Probability Criterion. Some may take a relatively permissive approach. They may say that certain quite unlikely candidates such as Bernie Sanders, Jill Stein, and Gary Johnson have good enough chances to merit inclusion—although presumably even the most permissive advocates of the Probability Criterion will want to say that *extremely* unlikely candidates, such as Russ Shafer-Landau, do not have good enough chances. Others may take a relatively restrictive approach. They may say that candidates like Sanders, Stein, and Johnson might be excellent candidates, better even than the presumptive nominees of the major parties, but their odds are just not good enough to warrant consideration. One problem, for defenders of the Probability Criterion, will be to explain why a given probability cut-off is to be used; presumably, the cut-off should not just be chosen at random.

A deeper problem for the Probability Criterion will be to explain why probability should be taken into account at all. For, in many contexts, probability seems utterly irrelevant to the question of which options one should consider.

Consider the following case. Moe has made a promise to meet Susan for coffee at noon, and it is now 11:45 a.m. Moe can still keep his appointment if he leaves right away. In this situation, there is a wide range of things that Moe can do: he can leave right away to keep the appointment; he can take a nap; he can jump out the window—and so on. Now suppose that Moe is extremely lazy and thus is very unlikely to choose to keep the appointment. (Odds are he'll take a nap instead.) In this case, the mere fact that Moe is very unlikely to fulfill his promise does not seem like any reason whatsoever to exclude that option from consideration. In this case, if we are interested in the question of what Moe ought to do, we should not confine our attention merely to the things that Moe probably will do. Likewise, if we are interested in the question posed at the outset of this paper—*Whom should we elect*?—then it may seem like a basic error to exclude a given candidate from consideration just because we are not likely to elect him or her.

To respond to this analogy, defenders of the Probability Criterion need to present a relevant difference between the case of Moe and the case of political discourse. That is, they need to explain why probability is relevant in deciding which options to consider in political discourse, even though probability (as against mere possibility) is irrelevant in deciding which options to consider in a case of individual decision-making (such as Moe's). We'll return to this issue below.

Consequentialist Criteria

It is possible to approach the construction of an option list in a consequentialist way. We'll consider two possibilities along these lines.

Let's say that the *locally optimific option list*, for any given individual in any given circumstance, is the option list whose adoption by that individual would

have the best consequences in that circumstance. By way of illustration, suppose you are engaged in political discourse with a friend who is considering two candidates—Ronald Stump and Gerald Clump. As it happens, Stump and Clump are both terrible candidates, although Stump is slightly better than Clump. Your friend is currently leaning toward Clump, the worse option. You think your friend should vote for neither Stump nor Clump; you have a third alternative in mind. However, you also know that if you even mention any candidate other than Stump or Clump, your friend will dismiss you completely. The only hope you have of reasoning with your friend is to concentrate on an option list that includes only Stump and Clump. And if you do that, then you have a good chance of persuading your friend to vote for Stump, the lesser of the two evils. In this case, it appears that adopting an option list containing only Stump and Clump would have the best consequences—that is, Stump and Clump comprise the locally optimific option list in this circumstance.

We want to consider a criterion according to which the option list in any given circumstance should be locally optimific:

> The Act-Consequentialist Criterion: A candidate X is to be included in the option list if X would be included in the locally optimific option list.

We grant that in some cases, at least, the fact that a given option list is locally optimific looks like a reason in favor of it. But the Act-Consequentialist Criterion nonetheless fails to describe an acceptable approach to political discourse in general.

To begin, notice that the Act-Consequentialist Criterion looks like a straightforward application of act-consequentialism—the view that, in general, in any given circumstance of choice, one should always do whatever would have the best consequences. The Act-Consequentialist Criterion is, specifically, an application of act-consequentialism to one particular task in political discourse—the task of assembling an option list. This is but one of several different tasks that we must perform in the course of engaging in political discourse. As we'll now argue, however, a broadly act-consequentialist approach to political discourse is hard to defend; and this causes problems for the Act-Consequentialist Criterion.

The first problem with a broadly act-consequentialist approach to political discourse is an obvious one: it simply will not sit well with non-consequentialists. Consider the evaluation stage, the second stage of our two-stage procedure—the stage at which one has to decide which candidate in one's option list to support. To be sure, *some* people will apply consequentialist principles in order to make that decision, but certainly not all of us will do so. For instance, imagine a libertarian non-consequentialist who believes that we should support the candidate who has the most respect for property rights, individual liberty, and so on. Suppose this libertarian non-consequentialist is ready to grant that respect for rights and liberties does not always produce the greatest good, but she thinks that questions about the greatest good are simply beside the point.

She thinks that we must support respect for rights and liberties just because that is the right thing for us to do, regardless of whether this will have especially good consequences. Anyone who takes that sort of view, or any other non-consequentialist view, will be unhappy with a broadly act-consequentialist approach to political discourse.

But there is a more fundamental problem with the broadly act-consequentialist approach to political discourse. Notice that participation in political discourse rarely has very good consequences. Most of us are unable to persuade very many people (if any) to change their minds about politics; most conversations about politics simply have no significant consequences at all. Thus, we suspect, whenever one is engaged in political discourse, there is almost always something else that one could be doing instead that would have better consequences, such that an act-consequentialist approach to political discourse would mean that nearly all of us should radically curtail the extent of our participation in political discourse. Therefore, anyone who thinks that political discourse is a civic duty, or even an acceptable pastime, for most ordinary citizens ought to reject the act-consequentialist approach to political discourse.

In response to this, the defender of the Act-Consequentialist Criterion could say that she is not recommending that we take a broadly act-consequentialist approach to political discourse. Rather, she is recommending only that we take an act-consequentialist approach to *one specific task* in political discourse—the task of constructing an option list. Once the option list is constructed, then we are free to approach the other tasks in political discourse (including the task of deciding whether to participate in political discourse at all) according to any non-consequentialist approach we choose. But this is not plausible. If we are going to approach most of our activities in political discourse in a non-consequentialist way, then it is quite difficult to see why we should accept an act-consequentialist approach for the task of constructing an option list.

Let us now consider an alternative to the Act-Consequentialist Criterion. To describe the alternative we have in mind, we'll need to introduce a new bit of terminology. Let's say that the *globally optimific option list*, for any given individual in any given circumstance, is the option list whose universal adoption by everyone *in that individual's political society* would have the best consequences. So, for instance, if it would be best for our society if we were to continue to consider Bernie Sanders for President, even though he is presently very unlikely to win the Democratic nomination, then Bernie Sanders belongs on the globally optimific option list. Likewise, given that it would not be best for our society to consider Vermin Supreme as a candidate for President, Vermin Supreme has no place in the globally optimific option list.

With that piece of terminology in place, let us now consider the following criterion:

> The Rule-Consequentialist Criterion: A candidate X is to be included in the option list if X would be included in the globally optimific option list.

We are calling this a "rule-consequentialist" criterion because it is a direct application of rule-consequentialism—the view that, in general, in any given circumstance of choice, one should always act in accordance with whatever rule or set of rules would have the best consequences if they were universally adopted by everyone[5] in one's society.

One of the advantages of the Rule-Consequentialist Criterion is that it, unlike the Act-Consequentialist Criterion, yields a procedure by which members of a political society can coordinate a common option list. The *locally* optimific option list will vary from individual to individual, simply because individual circumstances can vary; but the *globally* optimific option list will, by definition, be shared by all of the individuals in a given political society. Thus, if we adopt the Rule-Consequentialist Criterion, then we can all reach a point where we are considering and discussing the same collection of candidates.

But the Rule-Consequentialist Criterion is hard to defend—simply because rule-consequentialism is hard to defend. We won't rehearse all of the many well-known problems for rule-consequentialism here.[6] We'll just point out that rule-consequentialism suffers from a basic problem of motivation. It is simply unclear why anyone should be required to act in accordance with a set of rules that *would* have the best consequences if they were universally adopted, given that those rules *aren't* universally adopted. Rule-consequentialism thus comes across as a kind of oblivious idealism—an idealism that requires us to indulge the fantasy that we are living in an ideal society even though our society is in fact very far from the ideal. Given that rule-consequentialism is very hard to motivate as a general principle, it is hard to see why we should accept rule-consequentialism as applied to the narrow task of constructing an option list.

Contrastivist Solutions

To this point, it has proved difficult to arrive at a defensible criterion by which to identify an option list. We'll return to the search for a defensible criterion in just a moment. But first we want to consider a more radical solution, one which claims that the selection of the option list is, in a certain way, beside the point. According to this solution, anyone who properly undertakes the evaluation stage will be able to reach a correct judgment—regardless of the option list that they choose during the option-identification stage.

At first glance it seems very counterintuitive to think that one's choice of option list is completely irrelevant to ascertaining what an agent should do. To see this, recall the case of Moe from page 185. Imagine you are engaged in the deliberative process of deciding what it is that Moe should do. Then it seems all-important that you should first arrive at an option list that, at the very least, contains the option that Moe *keep his promise to Susan*. If at the outset of the deliberative process that option is excluded, then you will not even consider the possibility that Moe ought to keep his promise to Susan. This in turn will lead you to (erroneously) judge that Moe ought to do something other than fulfill his

promise. Hence, it seems reasonable to conclude that failure to carefully select our option list can lead to incorrect judgments about what ought to be done.

Yet an alternative view is available. According to this view, the very meaning of judgments about what ought to be done encodes the option list used to reach those judgments. For example, suppose that a person who begins deliberating about what Moe should do exits their option-identification stage with a short option list that excludes the option of Moe keeping his promise—e.g., the two-option list {have a sandwich, burn down a hospital}. And suppose this same person then uses that list to go about the business of deciding what Moe ought to do (i.e., she progresses through what we have called the "evaluation stage"). After reaching her verdict, imagine that the person confidently utters:

1 Moe ought to have a sandwich.

This seems the wrong result, since it would presumably be better for Moe to keep his promise rather than have a sandwich. However, for proponents of the alternative view under consideration, the resulting judgment above is *not* wrong. It only seems wrong, they will argue, because we are not interpreting the meaning of the judgment correctly. The full meaning of the above judgment doesn't reveal itself until we take into account the option list used to arrive at the judgment. Once we take into account the option list utilized, the above judgment can be seen as being elliptical for the following:

2 Moe ought to have a sandwich *rather than* burn down a hospital.[7]

But if the person's judgment that "Moe ought to have a sandwich" is interpreted as meaning that "Moe ought to have a sandwich rather than burn down a hospital," then there seems to be nothing erroneous about the person's judgment after all. Given that having a sandwich is arguably a much better option than burning down a hospital, the judgment seems entirely correct.

Of course, if our deliberator had started out with a different option list—e.g., {have a sandwich, burn down a hospital, keep promise to Susan}—then she would likely have reached a different result, namely that:

3 Moe ought to keep his promise to Susan.

But given the expanded option list used to arrive at this result, the judgment would actually be elliptical for (and would thus mean) the following:

4 Moe ought to keep his promise to Susan *rather than* burn down a hospital or have a sandwich.

And notice that (4) is not inconsistent with (2). In fact, once we understand the meanings of these two different judgments, both seem to be true.

We call this view about the semantics of 'ought' claims the *contrastivist view*. The view is contrastivist in that it interprets the meaning of judgments about what we ought to do as tacitly referencing a contrast class of alternatives, alternatives that comprise the option list that is evaluated to arrive at the judgment.

We can develop a similar contrastivist semantics for political discourse. Such an account would claim that the meaning of any judgment of the form "We ought to elect X" is determined by the option list used to arrive at that judgment. For instance, if we are given an option list such as {Hillary Clinton, Donald Trump}, then we might decide that:

5 We ought to elect Hillary Clinton.

But such a judgment would really just be elliptical for:

6 We ought to elect Hillary Clinton *rather than* Donald Trump.

If, on the other hand, we are given an option list such as {Hillary Clinton, Donald Trump, Bernie Sanders}, then we might judge that:

7 We ought to elect Bernie Sanders.

But by this we would only be saying that:

8 We ought to elect Bernie Sanders *rather than* Hillary Clinton and Donald Trump.

And our support might shift again if Jill Stein is included in the option list—and might shift yet again if Russ Shafer-Landau is included in the option list. But, according to the contrastivist account, these shifts in support do not represent any fundamental change of mind. Instead, they each represent fundamentally compatible judgments, each of which is equally correct. To think otherwise is to fail to take account of the semantic influence that one's chosen option list has on the meaning of the claims one makes in political discourse.

This contrastivist account is compatible with (but does not require) a further view, according to which there just isn't any correct or incorrect way to assemble the option list. Once augmented with this view, the contrastivist account provides a kind of deflationary solution to the demarcation problem that motivates this paper. If we suppose, in accordance with the contrastivist account, that every judgment with the surface form "S ought to x" is merely elliptical for a judgment of the form "S ought to do x *rather than* y" (where y is a set of alternatives determined by the option list used to arrive at that judgment), then it seems to follow that our initial selection of an option list does not affect our ability to reach true judgments at all. Thus, any option list we might choose has the potential to yield true judgments; and thus, one might think, there is really no way to go wrong in selecting the option list at the start. Of course, on

this account, it is still possible to err *after* we've selected our option list (e.g., if we mistakenly judge that one option in the option list is better than another, when in fact the first option is worse than the second one). But contrastivism seems to imply that we cannot make any error *in the selection of the option list itself*; and so it is simply unnecessary to search for a criterion with which to justify the selection of one option list rather than another.

This solution to our demarcation problem is tantalizing, but far too quick. To begin, note that production of true 'ought' judgments is not the *only* thing that political discourse aims to achieve. (If it were, people would just go around speaking tautologies in the context of political discourse!) To see why this matters, return to the case of Moe. Even if the contrastivist analysis of our judgments about Moe is correct, it still seems clear that there are better and worse ways to construct an option list with regard to Moe. For instance, we seem clearly to be missing something if our option list includes just one option, as in {have a sandwich}. If we begin with this option list and then reach the judgment that *of course* Moe ought to have a sandwich, then we seem to have gone wrong somehow—regardless of whether we accept a contrastivist interpretation that implies that this judgment is somehow true. Likewise, if we consider an option list like {burn down a hospital, detonate an atomic bomb in a major city}, and then reach the judgment that Moe ought to burn down a hospital (because clearly this is better than detonating an atomic bomb in a major city), then we seem to have made a mistake at some point along the way. In particular, we have mistakenly left out some options that ought to have been considered.[8] Simply put, even on the contrastivist analysis, it seems eminently plausible to suppose that there are better and worse ways to construct an option list for Moe.[9]

And much the same will be true of political discourse. Imagine a misogynist who is unwilling to even consider candidates who are not men. If this misogynist refuses to consider Hillary Clinton or Jill Stein for President and thereby reaches the judgment that we ought to elect, say, Donald Trump (or Bernie Sanders, or whomever), then it seems quite clear that an error was made in the selection of the option list—even if we are prepared to grant that the misogynist's judgment about whom to support is perfectly sound given the option list with which he started.

It is important to underscore that we are not objecting to a contrastivist semantics for 'ought.' We grant for the sake of argument that contrastivism might provide the most plausible semantics for that word. What we deny is the further claim (which is neither required nor entailed by the contrastivist semantics) that there are no wrong ways to choose an option list. We'll still be in need of a principled criterion to use in selecting an option list regardless of whether we accept a contrastivist account of political discourse.

The Practical Possibility Criterion

In this section, we're going to try to motivate a strong inclusivism about political discourse. According to this inclusivism, participants in political

discourse should assume an option list that includes every candidate who *can* be elected. This view shares practical difficulties with the Legality Criterion (considered on pages 182–184). As we noted before, the Legality Criterion would imply that participants in political discourse must consider option lists that are unmanageably large. The inclusivism that we'll suggest here has precisely the same problem. Despite this problem, we think that this inclusivism has some advantages that cannot be easily dismissed.

Return to the case of Moe. When we are trying to decide what Moe ought to do, what are the options that we should be prepared to consider? Here's a simple answer: we should be prepared to consider any and all of the various actions that Moe *can* perform. Thus, for instance, no matter how desirable it might be for Moe to end world poverty instantly with a snap of his fingers, this is not an action that we should consider, simply because it is not something that Moe can do. But anything that Moe can do is fair game for consideration—even if he is very unlikely to do it. Thus, we should be prepared to consider the possibility that Moe ought to keep his promise, even if he is not likely to do so. And, by the same token, we should also be prepared to consider various outlandish options—e.g., the option of Moe dumping the entire contents of his bank account into GiveDirectly's coffers.[10] If we are going to set such outlandish options aside, we'll need to do so at the evaluation stage, by showing that they are in some sense inferior to the alternatives; we cannot simply discard such options at the outset without consideration.

We think that this view of how to reason about what Moe ought to do is highly plausible. And we want to suggest that an analogous view of how to approach political discourse is also plausible.

At the beginning of this paper, we suggested that the central question of political discourse surrounding the upcoming American presidential election is this: *Whom should we elect*? This question is structurally similar to the question about Moe: *What should Moe do*? Thus, we might want to approach political discourse in a way that is analogous to the approach we've suggested for the case of Moe. The idea here is straightforward. Our option list should include all (and only) the different candidates we *can* elect, just as Moe's option list should include all (and only) the actions he *can* perform. Or, if we want to introduce a bit of jargon, we might say that the option list in the case of Moe should include all of the actions that are *practically possible* for him, and that the option list in the case of political discourse should include all of the *practically possible* candidates. If it is practically possible for us to elect a given candidate, then she belongs in our option list; otherwise not. Here's a criterion based on this idea:

> The Practical Possibility Criterion: A candidate X is to be included in the option list if it is practically possible to elect X.

Notice that the idea of practical possibility that we are working with here is not directly related to probability. The idea is *not* that if a given candidate is unlikely to win, then her election is practically impossible. True, people do sometimes

use the language of practical possibility in this way. For instance, it has been said that "Bernie Sanders cannot win," by which it is meant that he almost certainly will not win. And that is true—he almost certainly will not win. But there is also an important sense in which he *can* win even though he almost certainly will not. He can win because we can elect him. Indeed, we can elect him rather easily. All that we need to do, in order to elect him, is to show up to support him at the polls in sufficient numbers on election day, and then he would win.

To be clear, the claim here is that *we*—as a collective, i.e., as the mass of voters—can easily elect Bernie Sanders. The claim is not that *any given individual* can bring it about that Bernie Sanders is elected. Indeed, no one is able to ensure Sanders's election. But of course, it is in the nature of the democratic process that no one voter is able to bring about any electoral outcome. An individual voter is unable to bring it about that Hillary Clinton is elected, just as surely as she is unable to bring it about that Bernie Sanders is elected. In other words, it is difficult (indeed, it is not even possible) for an individual voter to elect Hillary Clinton, but it is easy for *us*—the collective mass of voters—to elect her. The same seems true of Bernie Sanders: no one voter can elect him, but all of us, collectively, can do so easily. And so, according to the Practical Possibility Criterion, Sanders needs to be included in our option list when we engage in political discourse.

What can be said for the Practical Possibility Criterion? Thus far, we have tried to motivate that criterion by analogy with the case of an individual agent like Moe. But how strong is this analogy?

Here is one way to develop the analogy. We might argue that the collective mass of voters, the electorate, comprises a *group agent*—an agent made of individual agents. This group agent has various options open to it, just as an individual agent such as Moe has various options open to him. That is, there are various things that the electorate can do, just as there are various things that Moe can do. Now, none of the participants in political discourse is identical to the electorate—each of us, in political discourse, stands outside of the electorate (despite being partly constitutive of it). In political discourse, we are engaged in a conversation about what it—the electorate—ought to do. Analogously, we can discuss what Moe ought to do without being identical to him—that is, we can discuss what he, as an individual agent, ought to do. And when we are talking about what an individual agent (such as Moe) ought to do, our task is straightforward: we should consider the list of all of the things he can do; we should try to find the best option in that list; and we should judge that he ought to choose that best option. Likewise, according to the present analogy, when we are talking about what a group agent (such as the electorate) ought to do, our task is equally straightforward: we should consider the list of all of the things that it can do; we should try to find the best option in that list; and we should judge that the group agent ought to choose that best option.

There are two primary points where the analogy can be disputed. First, one might argue that the electorate is not a group agent, and indeed isn't an agent

at all. At a minimum, one might claim, an agent is capable of acting (as against merely exhibiting behavior) and this requires some kind of mental life, or at least a capacity to grasp and respond to reasons. But the electorate as a whole has no mental life and cannot grasp and respond to reasons (even though the individual voters who constitute the electorate do have a mental life and can grasp and respond to reasons). Second, even if it is granted that the electorate is a group agent in some important sense, one might still argue that the point of political discourse is not to reach a judgment about what that agent ought to do. Rather, political discourse is concerned with judgments about how we, as individual voters, ought to direct our support. On this account, the guiding question in political discourse is not *Whom should we elect?* but is instead *Whom should I support*?

The first of these points raises an issue that we'll unfortunately be unable to resolve here. The question of whether a collective, such as an electorate, can count as a genuine group agent is exceptionally difficult, and there are good arguments on both sides.[11] We are of the view that group agents exist and that an electorate can count as one, and we have defended a view along these lines elsewhere.[12] In defense of that sort of view, we might initially point out that people often talk as if these sorts of collective entities can be responsible for what they do. For instance, many observers of the Republican Party have argued that when the Republican Party chose Donald Trump as its presumptive nominee, it failed in some culpable way. It is not immediately clear how to make sense of this kind of talk unless we assume that these sorts of collective entities can count as agents (since, after all, responsibility seems to require agency; we do not hold non-agents such as comets or viruses responsible for their behavior). And so ordinary talk about collective entities in politics seems, at least at first blush, to presuppose that these entities can be agents of some sort.[13] But this is only an initial argument for the possibility of group agents; it is not a conclusive argument for that view.

In response to the second point, we are prepared to grant that *Whom should I support*? is a guiding question political discourse, but we don't think that this causes serious problems for the analogy that we have presented. After all, supporting a candidate in political discourse paradigmatically involves defending the judgment that we (the electorate) ought to elect that candidate. To support a candidate is, as we observed in the introduction, to provide arguments in favor of that candidate; and it is hard to see what an argument in favor of a candidate would be if it were not an argument for the view that we ought to elect that candidate. And thus, we suggest, even if political discourse is most directly concerned with questions about individual support of candidates, it is still very difficult to get around the conclusion that political discourse is centrally concerned with the question *Whom should we elect*?

The major advantage of the Practical Possibility Criterion is that it can finally provide a *principled* way to decide which candidates to consider, and which candidates not to consider, in political discourse. And if one finds the analogy with Moe that we developed above compelling, then the Practical Possibility

Criterion may begin to look very tempting. As we acknowledged at the start of this section, however, the Practical Possibility Criterion faces a serious practical problem, because it would entail a vast expansion in the range of candidates that need to be considered in political discourse.

Unlike the Legality Criterion, however, the Practical Possibility Criterion—as we've argued—has strong theoretical virtues on its side that the alternatives lack. It may be, then, that while the view has practical difficulties, it is nonetheless the most plausible criterion available.

Conclusion

Our central question in this paper has been: When a voter is engaged in political discourse surrounding an election like the American presidential election of 2016, what is the right way to assemble an option list—a list of candidates to be considered? We've argued that voters need to have a principled criterion by which to separate candidates to be considered and evaluated from candidates to be set aside and ignored. Throughout the paper, we've considered a number of such criteria. We've made a preliminary case in favor of the Practical Possibility Criterion, according to which voters should be prepared to consider each and every candidate whose election is practically possible. As we've observed, the Practical Possibility Criterion seems to imply an extreme inclusivism about political discourse—because there seem to be a vast range of candidates whose election is practically possible.

If participants in political discourse were to abide by this sort of inclusivism, there would perhaps be some good effects. The range of practically possible candidates includes a great many individuals who could do great good if given the power of the presidency, as we pointed out in the second section. It is arguable that an inclusivism that requires us to consider those individuals would be beneficial. But this sort of inclusivism would also seem to have a number of unwelcome effects. After all, it appears that voters simply do not have the resources to consider all practically possible candidates, given that there seem to be many millions of such candidates. This seems like a powerful objection to our style of inclusivism.

There seem to be three ways that we could conceivably respond to this objection. First, we could argue that it is actually not as difficult as it may initially seem for participants in political discourse to consider millions of different candidates. (To pursue this strategy, we would need to offer a method that voters can use to meaningfully compare millions of individuals. It does not seem inconceivable that such a method could be developed; but that task lies well beyond the scope of this paper.) Second, we could argue that in fact the number of candidates who can be elected as president is in fact not very large—perhaps numbering in the dozens rather than in the millions. (To pursue this strategy, we might try to develop a fairly restrictive view about what an electorate "can" do. If it turns out, for instance, that in fact the electorate literally *cannot* elect anyone other than a small handful of candidates—say, a dozen or

so—then our inclusivism would suddenly be much more manageable.) Third, we can bite the bullet and simply accept that, on our view, a truly principled approach to political discourse will require voters to get involved in an extremely difficult and time-consuming comparison of millions of different individuals. Voters would then be faced with an unfortunate choice between either approaching political discourse in an unprincipled way, by arbitrarily selecting a manageable number of candidates to consider, or approaching political discourse in a principled but extraordinarily burdensome way.

We are not sure which, if any, of these responses to the present objection against the Practical Possibility Criterion is viable. Given this, we do not wholeheartedly endorse that criterion. We think the Practical Possibility Criterion *may* be the best such criterion available, but we are also hopeful that some superior criterion can be developed and defended.

Notes

1 According to the Tyndall Report (Tyndall 2015), an analysis of news coverage by ABC, CBS, and NBC by media analyst Andrew Tyndall, in the first four months of 2016 Donald Trump received approximately three times as many minutes of news coverage on the three major networks than as Hillary Clinton and Bernie Sanders.

2 As one illustrative example, consider that *ABC World News Tonight* offered 81 minutes of Trump coverage over the course of 2015 while only about 20 seconds was afforded to Sanders coverage. (See Boehlert, 2015 and Nichols, 2015 for this and other disparity details.)

3 For example, see (Sanders Campaign, 2015).

4 For example, see Scott (2015) and CBS News (2015).

5 Alternatively, Rule-Consequentialism is sometimes defined in terms of the set of rules that would have the best consequences if adopted by *most of the people* in one's society. (For a defense of this version of Rule-Consequentialism, see Brad Hooker (2013), "Rule-Consequentialism," in Hugh LaFollette and Ingmar Persson (eds.), *The Blackwell Guide to Ethical Theory* (Second Edition), Wiley-Blackwell, 238–260, esp. pp. 247–249.) But note that the Rule-Consequentialist Criterion could be easily modified to accommodate this version of Rule-Consequentialism without impacting our comments here.

6 For a classic rebuttal, see J.J.C. Smart (1956), "Extreme and Restricted Utilitarianism," *The Philosophical Quarterly* 6.25: 344–354.

7 Jonathan Schaffer (2004; 2006) has advocated for an interpretation of verbs like 'knows' and 'prefers' that is similar to what we are describing here for 'ought.' According to Schaffer, a sentence such as "Ann prefers chocolate" contains a covert, contextually determined variable that makes it elliptical for a sentence of longer form that references a contrast class (e.g., "Ann prefers chocolate *rather than strawberry*").

8 In discussing a contrastivist account of moral judgments, Baumann (2008) has argued that such judgments are special in that some options must always must be present in the contrast classes that we use in moral reasoning. Specifically, in comparison with other normative judgments, moral judgments "…are certainly less 'pragmatic' and more 'absolute'. There is a moral value at stake here…This value 'forces' us to include certain options in the contrast class" (p. 465). We think that this point applies with just as much force to the judgments of political discourse.

9 Admittedly, not everyone would agree with us on this point. For instance, Sinnott-Armstrong (2006, pp. 434–452) has argued that there can be no account of what it means for a contrast class in moral epistemology to be more relevant than another. Sinnott-Armstrong writes: "I suspend belief about which contrast class is relevant and about whether any contrast class is relevant, even in a given context."

10 What exactly does it mean to say that an agent such as Moe *can* do X? If a definition is needed, we think the one offered by Peter Vranas (2007) is satisfactory; Vranas writes: "I understand the claim that an agent *can* do something as the claim that the agent has both the ability and the opportunity to do the thing. The agent has the *ability* to do the thing in the sense of having the requisite skills, physical capacities, and knowledge—even if *psychologically* she is "unable" to do it…, and even if it would be *unreasonable* to expect her to do it…. The agent has the *opportunity* to do the thing in the sense of being in a situation which allows her to exercise her ability…" (170–171).

11 For a defense of the view that *at least some* collectives are agents, see Christian List and Philip Pettit (2011), *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press).

12 David Killoren and Bekka Williams (2013), "Group Agency and Overdetermination" (2013), *Ethical Theory and Moral Practice* 16.2: 296–307.

13 For views of collective obligations according to which collectives have obligations only if they are agents, see (for example) Holly Lawford-Smith (2012), "The Feasibility of Collectives' Actions," *Australasian Journal of Philosophy* 90. 3: 453–467; and Stephanie Collins (2013) "Collectives' Duties and Collectivization Duties," *Australasian Journal of Philosophy* 91.2: 231–248. Alternatively, one could accept that groups can have obligations (and thus culpably fail to meet them) yet reject the agency criterion for obligation. For arguments that collective obligation does not require collective agency, see: Bill Wringe, "Global Obligations and the Agency Objection" (2010), *Ratio* 23.2: 217–230, and "From Global to Institutional Obligations" (2014), in Peter French and Howard Wettstein (eds.), *Midwest Studies in Philosophy* 38: 171–186); and Felix Pinkert, "What We Together Can (Be Required to) Do" (2014), also in *Midwest Studies* 38: 187–202.

References

Baumann, Peter. (2008), "Problems for Sinnott-Armstrong's Moral Contrastivism," *The Philosophical Quarterly* 58: 463–470.

Boehlert, Eric. (2015, December 11), "ABC World News Tonight has devoted less than one minute to Bernie Sanders' Campaign this year," *mediamatters.org*, available at http://mediamatters.org/blog/2015/12/11/abc-world-news-tonight-has-devoted-less-than-on/207428 (accessed May 20, 2016).

CBS News. (2015, December 24), "Bernie Sanders blames Donald Trump's rise on the media," *cbsnews.com*, available at www.cbsnews.com/news/bernie-sanders-says-donald-trumps-rise-is-an-indictment-of-the-media/ (accessed May 20, 2016).

Collins, Stephanie. (2013), "Collectives' Duties and Collectivization Duties," *Australasian Journal of Philosophy* 91.2: 231–248.

Hooker, Brad. (2013), "Rule-Consequentialism," in Hugh LaFollette and Ingmar Persson (eds.), *The Blackwell Guide to Ethical Theory* (Second Edition), Malden: Wiley-Blackwell, 238–260.

Killoren, David and Williams, Bekka. (2013), "Group Agency and Overdetermination," *Ethical Theory and Moral Practice* 16.2: 296–307.

Lawford-Smith, Holly. (2012), "The Feasibility of Collectives' Actions," *Australasian Journal of Philosophy* 90. 3: 453–467.

List, Christian and Pettit, Philip. (2011), *Group Agency: The Possibility, Design, and Status of Corporate Agents*, Oxford University Press.

Nichols, John. (2015, December 10), "The Discourse Suffers When Trump Gets 23 Times As Much Coverage as Sanders," *The Nation*, available at www.thenation.com/article/the-discourse-suffers-when-trump-gets-23-times-as-much-coverage-as-sanders/ (accessed May 20, 2016).

Pinkert, Felix. (2014), "What We Together Can (Be Required to) Do," in Peter French and Howard Wettstein (eds.), *Midwest Studies in Philosophy* 38, 187–202.

Sanders Campaign. (2015, December 11), "Why the Bernie Blackout on Corporate Network News?" Press release on www.berniesanders.com, available at https://berniesanders.com/press-release/why-the-bernie-blackout-on-corporate-network-news/?version=meter+at+1&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=https%3A%2F%2Fwww.google.com%2F&priority=true&action=click&contentCollection=meter-links-click (accessed May 20, 2016).

Schaffer, Jonathan. (2004), "From contextualism to contrastivism," *Philosophical Studies* 119.1: 73–103.

Schaffer, Jonathan. (2006), "Contrastive Knowledge," in T. Gendler and J. Hawthorne (eds.) *Oxford Studies in Epistemology* Volume 1, pp. 235–271.

Scott, Eugene. (2015, December 24), "Sanders: Trump is 'bombastic' so he can get media coverage," *cnn.com*, available at www.cnn.com/2015/12/24/politics/bernie-sanders-donald-trump-new-day/ (accessed May 20, 2016).

Sinnott-Armstrong, W. (2006), *Moral Skepticisms*, pp. 434–452, Oxford: Oxford University Press.

Smart, J.J.C. (1956), "Extreme and Restricted Utilitarianism," *The Philosophical Quarterly* 6.25: 344–354.

Tyndall, Andrew. (2015), "Let the Trump Circus Continue," blog post - tyndallreport.com, 2016, available at http://tyndallreport.com/ (accessed May 20, 2015).

Vranas, Peter. (2007), "I Ought, Therefore I Can," *Philosophical Studies* 137: 167–216.

Wringe, Bill. (2010), "Global Obligations and the Agency Objection," *Ratio* 23.2: 217–230.

Wringe, Bill. (2014), "From Global to Institutional Obligations," in Peter French and Howard Wettstein (eds.), *Midwest Studies in Philosophy* 38, 171–186.

11 Public Reason and Its Limits

The Role of Truth in Politics[1]

J. B. Delston

> A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.
>
> (James Madison, Federalist No. 10[2])

When we engage in political decision-making, we want to avoid coercing others based on our own private conceptions of the good life. To this end, Rawls introduces what he calls "public reason," which outlines how citizens, officials, and the judiciary should deliberate about political issues according to political ethics for a tolerant and democratic liberal society.

Public reason is necessary for understanding political liberalism itself.[3] If the question political liberalism is meant to answer is how to have a just society made up of reasonable pluralism, then the subject of this paper is at the heart of whether and how political liberalism can fulfill its purpose. We need to know how to make political decisions while maintaining respect for individual commitments.[4]

In this paper, I contend that allowing comprehensive doctrines to enter into public reason undermines its very purpose and is dangerous to society. It increases instability, decreases toleration, undermines public reason, and pushes a democracy away from the liberal tradition. I argue both against Rawls's later leniency and against those who wish to bring comprehensive doctrines completely into the public domain. Instead, I support what is called the exclusive view of public reason, which recommends omitting appeals to comprehensive doctrines.

Public reason is public in three ways: it is used by the people, is about the people, and is for the people (Rawls, 1999b, p. 133). While public reason is primarily directed at judges and legislators, citizens are also engaged when making official decisions, citizens are also asked to think like legislators when they vote or are otherwise entering the public sphere as a civic duty.[5]

The subject of public reason is a political conception of justice (Rawls, 1999a, p. 266). Political conceptions of justice have three important features:

they govern the basic structure of society, they are distinct from comprehensive doctrines, and they arise from widely accepted ideas in the public political structure (Rawls, 1999b, p. 143).

A comprehensive doctrine is essentially our conception of the good, which we pursue as our purpose in life. Thus, everyone has one and it is central to our lives. Rawls states, "Such a conception is an ordered family of final ends and aims which specifies a person's conception of what is of value in human life, or alternatively, of what is regarded as a fully worthwhile life" (Rawls, 2001, p. 19). Examples include utilitarianism, religion, and any other way of thought that encompasses the entire end of all human action.[6]

In *Political Liberalism*, Rawls supports what he calls an "inclusive" understanding of public reason in which comprehensive doctrines may enter public reason so long as they support public reason (Rawls, 2005). Later, in "The Idea of Public Reason Revisited," he defends a more relaxed "wide view" of public political culture, which includes what he calls the proviso (Rawls, 1997).

First, I critique the proviso from a theoretical standpoint. Second, I critique the proviso from a practical standpoint, arguing that the proviso would be harmful to society. Although these two parts of my paper focus on the proviso, the arguments also challenge views similar to Rawls's such as the ones Audi, Gutmann, and Thompson defend.[7] And, of course, my arguments, if successful, would refute those philosophers who argue that comprehensive doctrines should play a bigger role in public reason than Rawls allows.[8] Third, I argue that the inclusive view is unnecessary for public reason, wrongly adds a truth standard, and leads to confusion. Thus, a better solution is to exclude comprehensive doctrines from public reason in an exclusive view. If they follow my view, citizens in liberal democracies would refrain from incorporating comprehensive doctrines in public reason as a way of fulfilling their moral duties to each other. I show that this view does not fall prey to similar problems and is a clear, effective, and just way of promoting public reason.

A. Theoretical Critiques of the Proviso

Rawls's proviso says that a comprehensive doctrine can enter the public sphere only if a public reason that supports the same conclusion is given in due course at a later date (Rawls, 1999b, p. 152). The proviso is internally inconsistent and fails to serve as a model for civic virtue because it: (A1) allows political coercion based on comprehensive doctrines alone, (A2) does not satisfy reciprocity, and (A3) weakens the justification public reason gives to the political legitimacy of a political system.[9]

(A1) Public reason cannot answer every political question nor is it required to determine questions of law or policy.[10] Yet, we are required to argue within the confines of public reason on matters of basic justice and constitutional essentials, even if public reason itself does not resolve them. Abiding by the proviso, we could vote on and enforce basic legislation under the assumption

that public reasons will someday be given to support those laws, even if no public reason is possible. This conclusion is unacceptably illiberal, potentially coercing atheists and members of minority religions to gain compliance with the dominant religion.[11]

(A2) Reciprocity gives the theoretical ground for justice, it constitutes our civic virtue, and it is essential to attain civic friendship. Reciprocity is the most fundamental civic virtue because it is the basis for our respect for one another, it promotes cooperation with fair terms, and it shows toleration.[12] Comprehensive doctrines do not satisfy the criterion of reciprocity; by definition, they appeal to values that are not accepted by all and impose our own conception of the good on others (Rawls, 2005, p.li). Reciprocity cannot be upheld if we expect others to make political choices based on comprehensive doctrines they do not accept.[13]

(A3) The proviso also weakens the legitimacy of a political system because legitimacy is based on reciprocity:

> Hence the idea of political legitimacy based on the criterion of reciprocity says: Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions…are sufficient, and we also reasonably think that the other citizens might also reasonably accept those reasons.
>
> (Rawls, 1999b, p. 137)

Laws and decisions based on comprehensive doctrines, then, are not legitimate. One of the main purposes of public reason is to confer legitimacy on the political liberal system, so a policy that violates this purpose is unacceptable.

B. Practical Critiques of the Proviso

The proviso also raises practical concerns about its success and implementation in society. I put forward four practical arguments against the proviso that prevent it from providing the basis for an ethical political life: (B1) no rules define how to satisfy the proviso, (B2) it undermines stability, and (B3) it fosters abuse of public reason.

(B1) Rawls acknowledges that "… the details about how to satisfy this proviso must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance" (Rawls, 1999b, p. 153). No specifications can stipulate how to satisfy or implement the proviso, leading to *ad hoc* decisions. Disagreement on what constitutes the fulfillment of the proviso means disagreement on how to use public reason and how to determine which laws are legitimate. Rawls's own constraints on the concept of the right, which all principles of justice must meet, would not be satisfied: generality, universality, publicity, ordering, and finality (Rawls, 1999a, pp. 113–117).

(B2) The proviso threatens the stability of society as a result of the time lapse.[14] The time period between offering comprehensive reasons and giving

public reasons is indefinite, making uncertainty common.[15] Until a public reason is given, reliance on comprehensive doctrines might cause strife within society. If citizens know that the time lapse could be long, they could be less willing to come to an agreement on issues where only a comprehensive doctrine is invoked.[16]

The proviso also incentivizes citizens to use comprehensive doctrines much more often than they otherwise might. Avoiding appeals to our own religion in recommending a policy, especially when we know we are talking to someone of a different religion, makes sense. However, after such appeals are condoned through the proviso, we are much more likely to use them in deliberation. Similarly, the more often we see others use comprehensive doctrines, the more likely we would, and a vicious cycle may arise.[17] Comprehensive doctrines are thus dangerous to society, but this practical problem points us in the direction of what a successful view should do: increase stability, not undermine it.

(B3) Citizens should be sincere in their proposals, but uncovering unintentional abuse would be epistemically impossible. Furthermore, rationalizing or being in denial about our reasons is easy when we feel strongly. And, we do not need public reasons in mind, making unintentional abuse easier.[18] Relying on knowing another's mind to differentiate compliance from abuse is a liability for any public policy. An objective standard would serve as a better basis for guiding public moral life.

C. The Inclusive View

In this section, I criticize Rawls's original position, so to speak, on public reason: the inclusive view. If comprehensive doctrines are required to support public reason, wouldn't they serve as a better guideline for citizens as well as protect against the practical problems that arose with following the proviso? I argue that the inclusive view: (C1) is unnecessary, as evidenced by the civil rights movement, (C2) wrongly adds a content limitation of truth on public reason, (C3) makes knowing whether the relevant conditions in society are met epistemically difficult, and (C4) does not foster good understanding of public reason. In the next section, I argue that exclusion is a better alternative.

Rawls's "inclusive view" does not allow comprehensive doctrines to enter into public reason except when comprehensive doctrines explicitly support public reason, such as when society is not well ordered and reciprocity is being violated (Rawls, 2005, p.lii). Movements like abolitionism, in which activists fighting against slavery called upon religious beliefs, nevertheless make society more well-ordered (Rawls, 2005, p. 251). They strengthened liberal democratic ideas—public reasons—and made society more just despite appealing to comprehensive doctrines by protecting a political conception of justice in the first place. To differentiate it from the proviso, I assume that only when public reasons are already given for a given conclusion may comprehensive doctrines be used.[19] The inclusive view thus has two parts: first, reciprocity is being violated because society is already unjust, and second, public reasons are given concurrently.

(C1) When discussing the American civil rights movement, Rawls consistently appeals to Martin Luther King, Jr.'s work; it was in part King's rhetoric that convinced Rawls that comprehensive doctrines are needed in public reason (Rawls, 2005, p. 251). Do King's appeals to Christianity justify the inclusive view because of the inroads he made in ending Jim Crow laws? King appeals primarily to public reasons, such as *Brown v. Board of Education*, arguments from Lincoln and Jefferson, and tenets in analytical jurisprudence on the definition of law. Additionally, the religious references themselves are actually public reasons. Rawls agrees, saying, "Religious doctrines clearly underlie King's views and are important in his appeals. Yet they are expressed in general terms: and they fully support constitutional values and accord with public reason" (Rawls, 2005, p. 250 note 39).[20] I argue King's use of Christianity does not justify the inclusive view.[21]

King was very vocal about the influence Mahatma Gandhi's nonviolent philosophy and civil disobedience had on his thinking. He cites Gandhi throughout his works, including referencing Gandhi's idea of *satyagraha* as helping him realize that nonviolent resistance is relevant to racial injustice and not just interpersonal conflicts[22] (King, 2003, p. 38). King discusses not only Christian ideas, but also references Babylonian, Greek, and Jewish principles, suggesting one need not hold these comprehensive doctrines to understand him[23] (King, Jr., 2000). When King does discuss Christianity, he does so in a generalized way.[24] He calls Jesus "an extremist for love," and cites not principles of faith but aspects of a moral exemplar, often giving a gloss on the ancient Greek word for love, *agape,* used in the gospels (King, Jr., 2000, p. 14, p. 47, p.256, p.335).[25]

On the other hand, King is extremely critical of "the white church and its leadership" of his time, absent notable exceptions. His famous *Letter from Birmingham Jail* is critical of the majority of Christian believers, including the "white moderate," and people who routinely appealed to religion to justify their views. King is a Christian leader, addressing his words to other Christian leaders in that text. However, nothing in his *Letter* requires a belief in Christianity.[26]

(C2) The inclusive view amounts to a restraint on content, but public reason is meant to provide guidelines for inquiry. Rawls permits the use of comprehensive doctrines in discourse defending abolitionism and the civil rights movement because those movements made society more just.[27] But if a reason or argument has to be correct, then public reason has predetermined content and is no longer a methodology. According to the inclusive view, those on the right side of the debate are subject to different constraints than those on the wrong side.[28] Thus, while Martin Luther King, Jr. would be permitted to appeal to Christian ideals to support civil rights, the Alabama clergy who authored "A Call for Unity" would not. Of course, these individuals should not argue against equal rights at all, but admonishing them for discussing Christianity is an odd way to make this point and a difficult principle to put into practice due to the asymmetry. Like Martin Luther King, Jr.'s commitment to nonviolence, which constrains the means towards achieving human rights

separately from the substantive content of human rights, public reason is meant to constrain the means we use to discuss constitutional essentials and matters of basic justice separately from the content of justice. The nonviolent civil rights activists did not take themselves to be held to looser standards of conduct because they were on the side of the right, and the same holds for public reason.

(C3) To justify using comprehensive doctrines in public reason, one must make a case for why society is not well-ordered. Often, such a discussion begs the question, since one's opponents disagree that society is unjust. The meta-discussion about the discussion will complicate and distract from the matter at hand.

And, just as determining whether one is on the side of justice so as to find out whether one can permissibly appeal to comprehensive doctrines is epistemically difficult, determining whether one's society meets the right conditions to trigger the inclusive view is epistemically difficult. The inclusive view is therefore practically difficult to follow.[29]

(C4) When we deliberate in every day life, we do not distinguish comprehensive from public reasons (Rawls, 2005, p. 251). So, citizens are likely to find this norm of reasoning unusual and not be proficient with it, especially if no clear distinction emerges in practice. Because the inclusive view[30] would allow comprehensive and public reasons to become intermingled in the public sphere, civic education could not easily remedy this effect.

D. The Exclusive View

Thus far, we have seen that comprehensive doctrines cannot enter into public debate absent concurrent public reasons, and that even when concurrent public reasons are available, comprehensive doctrines are unnecessary and obstructionist. As discussed, public reasoning based on comprehensive doctrines threatens to undermine central political values, like reciprocity, toleration, stability, public reason, and political conceptions of justice. Even if good reasons recommend including comprehensive doctrines in the public political sphere, the costs to society are too great. On the other hand, in a perfectly ideal society, even Rawls does not think comprehensive doctrines are needed in public reason because comprehensive doctrines will not further strengthen public reason (Rawls, 2005, p. 248). I do not propose that we abandon comprehensive doctrines, which are important components of the good life. What policy should good citizens adapt on the role of comprehensive doctrines? What guidelines should voters and officials use in public debates on essential matters of justice?

When considering an answer, protecting freedom of speech is crucial.[31] Martha Nussbaum stresses this point, saying,

> Rawls's account of free speech… insists that the same view of free speech protects the unreasonable and the reasonable (PL, 343, etc.); no political,

> religious, moral, or philosophical speech can be censored, in Rawls's view, absent the existence of a grave constitutional crisis…
>
> (Martha C. Nussbaum, 2002, p. 509)

Telling people that they should limit the use of comprehensive doctrines in the political sphere does not mean outlawing such comments to any extent. Rather, dictates are normative and should not be enforced with political constraint. Any recommendation on public reason would be an "intrinsically moral duty" and a duty of civility (Rawls, 1999b, p. 56). This distinction between moral and political obligation is significant since it protects our basic rights and freedoms. Thus, the question of this paper is fundamentally a question of political ethics.[32]

Rawls says that he considered the exclusive view but was persuaded it was too strict by Amy Gutmann and Lawrence Solum and thus does not defend it in *Political Liberalism*[33] (Rawls, 2005, p. 247). But the reasons Gutmann and Solum give to abandon the exclusive view, such as references to Martin Luther King Jr., actually support the exclusive view, as discussed above. Furthermore, the exclusive view avoids the many problems cited in Rawls's other alternatives.[34]

The exclusive view avoids the theoretical complaints. By excluding comprehensive doctrines, we would not be in danger of passing laws based on comprehensive reasons, only to find out later that no public reasons support those laws, avoiding the problems laid out in (A1). Most importantly, the exclusive view does not violate reciprocity as discussed in (A2). The Abolitionism example shows that the only time when the inclusive view allows comprehensive doctrines to enter into public reason is when reciprocity is already being violated in more fundamental ways. On the other hand, when a society has serious violations of reciprocity, for example, denying groups of citizens important rights, freedoms, or opportunities, comprehensive doctrines are not helpful and groups have been more successful without appeal to them. By avoiding violations of reciprocity, the exclusive view upholds justice, civic virtue, basic democratic ideals, and the separateness of reason and rationality. It also upholds legitimacy, discussed in (A3).

Another benefit of the exclusive view is that violations are clear and apparent. Since the proviso allows comprehensive doctrines into public reason even when society would not know whether reasonable reasons could be given, knowing when it is violated is near impossible. The exclusive view does not face this problem. Determining when we have satisfied the requirements of public reason is easy, and settling rules on a case-by-case basis is not required, as we found necessary with the proviso. The restrictions are set out in advance and any confusion can also be clarified in advance. Therefore, it would also avoid the practical problems the proviso faces from (B1).

One practical problem we found with the proviso in (B2) is that it does not maintain stability. Reciprocity and reasonableness are important for having productive discussions and for coming to agreements, so public reason must support these virtues. In fact, according to Rawls, societies cannot be stable

without reasonableness, which we already found was lacking in the proviso, and was upheld by the inclusive view. By having stricter requirements on comprehensive doctrines, we can avoid some threats of instability. Thus, we satisfy one of the desiderata that arose in developing the critique of opposing positions.

We also found in (B3) that under the proviso, invoking comprehensive doctrines in a way that abused public reason was easy. For example, Rawls required sincerity, but knowing when citizens are sincere would be practically difficult under the proviso, perhaps even to themselves. The exclusive view sidesteps both intentional deception and unintentional misuse of public reason entirely by maintaining an objective standard. Therefore, the exclusive view reinforces political stability and prohibits abuse of public reason in ways that the proviso and inclusive view could not.

Is the view I defend likely to devolve into duplicitous or insincere contributions to public reason as in (B3)?[35] After all, I explicitly recommend limitations on what reasons citizens offer for their positions. If they thereby must offer reasons they do not accept or even believe to be false, then they speak insincerely. This practice could threaten the stability of society by undermining community values.

Nothing about my view requires or encourages people to give reasons they think are false.[36] Offering reasons that you think are false is not only insincere and intellectually dishonest, but also is likely to be ineffective. Reasons also can take an if-then form, such that disagreeing with the antecedent does not mean one disagrees with the reason. However, one may be advised not to offer the reason one takes to be best in this model. For example, environmentalists debate whether biocentric or anthropocentric arguments are the most effective in convincing others to protect the environment. Suppose environmentalists argued that anthropocentric reasons are more compelling because they appeal to beliefs and commitments people already have, such as self-interested ones.[37] This shift does not require them to advocate reasons they believe to be false—we have good anthropocentric reasons to protect the environment—just to avoid the reasons they take to be best.

Of course, the objection is not that I defend such duplicitous reasoning, especially since civic virtue explicitly rules it out, but that my view leaves me open to such abuses. We should be skeptical that reasoning from a public perspective would necessarily lead to intellectual dishonesty. First, one can be open and honest about taking on the public perspective for the purposes of public reason, even if it means focusing on reasons one does not find the most compelling. Second, since public reasons are more likely to find broad support than comprehensive ones, finding some you do accept is likely. Making this effort shows a respect and humility that garners mutual trust. One can offer reasons one does accept but does not find most convincing, one can offer reasons one only conditionally accepts, or one can offer reasons one does not accept but in a open, generous, and pluralistic spirit.

However, even if my view did require such intellectual dishonesty or encouraged such abuse, it is in the same boat with other opposing views.[38] In the inclusive view, citizens still have to give public reasons concurrently and with the proviso, at some point in the future. So, these same objections apply to alternative approaches. That is, even if adopting the perspective of public reason is difficult for citizens, the objection applies to the wide view and the inclusive view. The difference is, the exclusive view does not fall prey to the myriad of practical problems that arise in the opposing views.

Is the view I defend too strict?[39] In (C1), I argued that comprehensive doctrines were not necessary. Showing that the civil rights movement would have been unsuccessful without using religion in public reason or that it would have occurred faster in this counterfactual would be difficult. But, given the myriad of problems that comprehensive doctrines raise, and given the high stakes for justice in these movements, I aim to shift the burden of proof to those who defend the inclusion of comprehensive doctrines. We have already seen that influential activists and theorists did not appeal to religion in ways that violate the exclusive view. On the other hand, religion was commonly used to support racial hierarchy.[40] In the absence of clear answers as to what complex intersection of factors led to the success of these crucial movements, and acknowledging the concrete risks, theoretical and practical, of including comprehensive doctrines, we have reason to err on the side of the exclusive view.

The exclusive view easily avoids the problems in (C2), since it applies equally to both sides of the debate. And, the worries we had with the inclusive view in (C3) do not apply, because the status of society does not determine citizens' civic duties. I would even argue that so far from confusing citizens on public reason, as the inclusive view did according to (C4), the exclusive view fosters a better understanding of public reason, because it maintains clear and consistent objective boundaries.

What about homogeneous societies where all citizens share the same perspective and thus the same dangers from relying on comprehensive doctrines do not arise? Although one could logically conceive of a society in which every reasonable person supports the same comprehensive doctrine, it is unlikely under free institutions. Rawls rightly points out that "the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy" (Rawls, 2005, p. 36). So, a homogeneous society would count as a community (Rawls, 2005, p. 40). A democratic society cannot be a community, which is "governed by a shared comprehensive religious, philosophical, or moral doctrine" because it would violate the scope of public reason and the most basic democratic principles (Rawls, 2005, p. 42). So, while possible to imagine such a society, we should resist the notion as implausible.[41]

This discussion shows that not only does the exclusive view avoid the problems in the inclusive view or wide view, but it also achieves the proper

goals of public reason. While we can use whatever reasons we like when discussing matters of basic justice, good and reasonable citizens will wish to employ public reason in the best way and exemplify the highest civic virtue. The exclusive view can supply citizens with exactly what this means and do so in a way that will maintain stability, promote tolerance, and uphold liberalism.

Conclusion

Public reason is essential to political ethics. Rawls states, "The idea of public reason specifies at the deepest level the basic moral and political values that are to determine a constitutional democratic government's relation to its citizens and their relation to one another" (Rawls, 1999b, p. 132). Upholding those basic moral and political values is vital. In this paper, I consider the question of what role, if any, comprehensive doctrines should play in public reason. This small question goes to the heart of public reason's purpose. We must choose a role for comprehensive doctrines that neither negates public reason nor causes us to abandon our values. I argue that the best way to keep our most basic values and to sustain public reason is to limit the role of comprehensive doctrines as a requirement of civic duty. The exclusive view should guide citizens' approach to dialogue in the public sphere, leading them to voluntarily refrain from appeals to comprehensive doctrines to preserve the foundations and legitimacy of society.

Notes

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2 Hamilton, Madison, Jay, & Kessler, 2003, p. 73.

3 For example, Rawls states "…political liberalism tries to answer the question: how is it possible that there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines?" (Rawls, 2005, p. 133). Similarly, Dombrowski argues, "The problem that political liberalism as a philosophical stance is meant to solve can be stated quite directly: How is it possible to have a just society over time composed of free and equal citizens who are divided, sometimes profoundly so, by incompatible comprehensive religious (or philosophical) doctrines that are nonetheless reasonable?" (Dombrowski, 2001, p. 3)

4 Sarah Song discusses the need for accessible public reasons given a background of religious and cultural diversity in (Song, 2007, p. 70). For example, she states, "If individuals recognize one another as free and equal and also accept that there is reasonable disagreement over religious and cultural commitments, then they must offer reasons that go beyond appeals to their own particular interests, commitments, and identities in defending particular outcomes. Instead, they must state how the outcome they favor is in the best interest of all participants in the dialogue." (Song, 2007, p. 71)

5 At the global level, Rawls relies on representatives to engage in public reason on the Law of Peoples. For a discussion of this point and a reason to think private individuals should be included, see McKittrick-Sweitzer, 2015, pp. 9–10. In this paper, I follow Rawls in discussing public reason as it is limited to fundamentals. Following Rawls on this point allows me to narrow the scope of my paper without ruling out the possibility of broader applications. For a discussion of broadening this scope, see Quong, 2011.

6 For a discussion on why liberal democracy is fundamentally different in this respect from religion, see, for example, Sullivan, 1992. Political liberalism is not a comprehensive doctrine because it does not tell us what ends to pursue and is not specific enough to govern all human action. In fact, we can contrast political liberalism with comprehensive liberalism, in which we justify liberalism by reference to specific comprehensive theories like utilitarianism or egalitarianism (Cudd, 2004, p. 41).

7 Robert Audi, in *Religion in the Public Square* defends "the principle of secular rationale" (Wolterstorff & Audi, 1996). See also Audi's principle of secular rationale as it relates to reciprocity (Audi, 2011, p. 76). Gutmann and Thompson highlight the necessity for reciprocity in reason giving, but allow the discussion to include comprehensive reasons (Gutmann & Thompson, 2004, p. 144). Gaus and Vallier defend the inclusion of comprehensive doctrines in public reason (Gaus & Vallier, 2009; Vallier, 2011). Vallier defends a "convergence" view of public reason in which reasons do not have to be accessible to all.

8 For example, Michael Huemer takes this view in (Huemer, 1996). Huemer denies that overlapping consensus can be achieved with people espousing certain comprehensive doctrines; however, Huemer's definition of "reasonable" differs from Rawls's in some ways.

9 Also, if in discussing "fair terms of social cooperation" we invoke what we think is good for ourselves, then, in Rawlsian terms, we instantiate a case in which rationality is inappropriately let into the sphere of the reasonable (Rawls, 2005, pp. 50–51).

10 Kyla Ebels-Duggan uses this failure of public reason to justify reliance on comprehensive doctrines when public reason cannot solve our dilemmas (Ebels-Duggan, 2010). I explain below why I do not think this solution is helpful.

11 The proviso makes this outcome predictable, even likely. The motivation to use a comprehensive doctrine to justify constitutional essentials, on the assumption that a true public reason will eventually be found, though one currently does not exist, suggests a rushed and careless approach to public reason or even an intellectually dishonest one.

12 Any political conception of justice allowed by the original position must include the criterion of reciprocity (Rawls, 1999b, p. 14). Abandoning reciprocity would affect our basic democratic ideals in addition to affecting justice. In the words of Gutmann and Thompson, "Deliberative democracy takes reciprocity more seriously than do other theories of democracy, and makes it the core of its democratic principles and practice" (Gutmann & Thompson, 2004, p. 133).

13 It is also thought that our powers of empathy are weakened in this context because we are not able to imagine ourselves in the position of those who make judgments on the basis of comprehensive doctrines we do not share (Donaldson, 1991, p. 102).

14 However, see Weithman, 2011, p. 331.

15 The "in due course" constraint complicates this matter. For any given time restriction, as long as one comes up with a new comprehensive reason before it runs out, the clock begins again, allowing a loophole in which no public reason need ever be given so long as one restarts the clock, ad infinitum. I thank Larry May for this point.

16 It is implausible to think that the stability of society will be completely unharmed by all threats, even if it rebounds from threats very quickly. Thus, if one can avoid

threats to stability in the first place, this preventative action is better than a reliance on a society that is completely resistant to harm or one that can survive all threats.

17 In *Justice as Fairness*, Rawls stresses the importance of reasonableness for stability: "[A] requirement of a stable constitutional regime is that its basic institutions should encourage the cooperative virtues of political life: the virtues of reasonableness and a sense of fairness, and of a spirit of compromise and a readiness to meet others halfway. These virtues underwrite the willingness if not the desire to cooperate with others on terms that all can publicly accept as fair on a footing of equality and mutual respect." (Rawls, 2001, p. 116). Being reasonable is not just beneficial, but also required for stability. Yet the proviso undermines reasonableness. Therefore, insofar as the proviso violates reasonableness and reciprocity, stability is also at risk.

18 These problems could be easily exacerbated, according to Audi, who points out that, "What begins as candor and a search for a better understanding of the issues can easily degenerate into an unnecessary hardening of positions that might have been reconciled" (Wolterstorff & Audi, 1996, p. 35).

19 Although Rawls does not explicitly add this requirement, it is in keeping with his intent and differentiates this view from his later proviso.

20 Rawls asserts that he does not know whether King or the Abolitionists fulfilled the proviso, but that they could have (Rawls, 2005, p.1ii note 27). Others argue that Abolitionism is irreducibly evangelical Protestant (Sandel, 1994). However, this view is controversial to say the least (Macedo, 1997, p. 20).

21 Dombrowski also points this out in (Dombrowski, 2001, p. 122).

22 For example, see King, 2003, pp. 16–18, King, 2003, p. 86, and King, 2003, p. 164, among many other places. King also talks about visiting India throughout his works (King, 2003, p. 39).

23 Throughout his writings and speeches, King discusses a vast array of poets, philosophers, and public figures with broad appeal beyond just Baptist Christianity, including Aristotle, Martin Buber, John Donne, Ralph Waldo Emerson, William Faulkner, Anatole France, Mahatma Gandhi, Friedrich Hegel, Martin Heidegger, Bob Hope, Karl Jaspers, Thomas Jefferson, Søren Kierkegaard, Abraham Lincoln, Chief Albert Luthuli, Niccolò Machiavelli, Pandit Jawaharlal Nehru, Friedrich Nietzsche, Plato, Edgar Allen Poe, Jean-Paul Sartre, and William Shakespeare, just to name a few. He discusses not only issues of social justice pertaining to African American, Jewish, Mexican, Muslim, Hindu, and poor white citizens in the United States, but also global issues such as in India, Vietnam, China, South America, Africa, and the Caribbean.

24 This is why Andrew March argues that "religious reasons" are a diverse category (March, 2013).

25 Other civil rights leaders also had Christian roots but moved beyond Christianity in their activism. For example, see Ransby's discussion of Ella Baker (Ransby, 2005, p. 45).

26 In his, "I Have a Dream" speech, King reserves the last sentence for a call across religious lines—"Jews and Gentiles, Catholics and Protestants" to join together in rejoicing for freedom (King, 2003, p. 220). He also discusses the alliance of various sects within Christianity, such as at the Montgomery protest (King, 2003, p. 17).

27 This is not to say that Rawls is a relativist. Not all comprehensive doctrines are treated equally for Rawls: they must be reasonable and compatible with liberalism, for example. For a discussion of the relationship between liberalism and truth for public reason, see (Fortier, 2010).

28 In his rejection of just war theory, McMahan accepts a similar asymmetry for the just and unjust sides of war (McMahan, 2004).

29 Given the limitations of the citizens living in an unjust society in the first place, those opposing a move towards a more well-ordered society are the least well situated to

make such determinations, further complicating the success of public reason. Cudd discusses the limitations of "the imaginary domain" in (Cudd, 2004, p. 57).

30 As well as the proviso.

31 One of Vallier's primary reasons for supporting a "convergence" view of public reason as opposed to a consensus one, which opposes comprehensive doctrines in public reason, is that a consensus view restricts liberty. Thus, maintaining a commitment to freedom of speech is significant to the debate. Vallier does describe the ostracism and blame that attends moral violations of public reason as restrictions on liberty, but one normally does not describe moral restrictions such as the moral prohibition against murder as a restriction on liberty (Vallier, 2011).

32 Although on this question, see Whitfield, 2015.

33 I argue Rawls should return to his first inclination. In fact, he does return to this view, seemingly defending it in his later work, *Law of Peoples* (Rawls, 1999b, p. 55).

34 Jeffrey Stout calls this the "contractarian program of restraint" in Stout, 2005, p. 160.

35 I thank Gregory Whitfield and Eric Wiland for this objection.

36 On the flip side of this concern, we often see people taking time to disagree with those who come to the same conclusion they do, despite being enmeshed in contentious debates. For example, Mary Ann Warren offers reasons why prochoice arguments fail and Don Marquis offers reasons why traditional antiabortion arguments fail in respective works in this debate (Marquis, 1989; Warren, 1973).

37 For independent reasons, I think environmentalists should adopt exactly the opposite tactic.

38 It is also in the same boat as other moral dictates governing conversation, such as dictates to be charitable or polite to others. Would such restrictions lead to citizens acting phony? Possibly, but such worries do not lead us to lift moral restrictions on being nice to each other.

39 Rawls's examples, namely Abolitionism and the civil rights movement, suggest that his exceptions come along only about once every hundred years. Of course, the United States was not well-ordered previous to these movements (and the perpetuation of racism since them has continued), which means that comprehensive doctrines would have been allowed during the United States' entire long history, according to the inclusive view. But the scope of public reason is narrow, since these restrictions only apply to discussions of constitutional essentials and matters of basic justice. Furthermore, a long and helpful tradition discusses the compatibility of religion with liberalism. For example, human rights doctrine is sometimes viewed as incompatible with Asian, Islamic, or non-Western comprehensive doctrines. As a result, liberals variously argue against such claims. For example, see Roosevelt, 2000, p. 322, An-Na'im, 1990, pp. 66–74, Ilesanmi, 1997, Nussbaum, 1999, Sen, 1999, Bell, 2009, Swaine, 2009, Metz, 2011, March, 2011, Tampio, 2012, Audi, 2013. These texts explore how the relevant comprehensive doctrines are reasonable and not that the relevant constitutional essentials are justified by religion.

40 This is a well-known point, but it is worth pointing out that King, Jr. also discussed it in several places, for example, stating: "You know, there was a time when some people used to argue the inferiority of the Negro and the colored races generally on the basis of the Bible and religion" (King, 2003, p. 211). He goes on to identify and refute the common argument of his day, that "sociological and cultural" reasons support segregation.

41 I thank Lavender McKittrick-Sweitzer for this discussion.

References

An-Na'im, A. A. (2015). "Islam, Islamic Law and the Dilemma of Cultural Legitimacy for Universal Human Rights." In *Applied Ethics: A Multicultural Approach*, 6th ed. May, Larry and Jill B. Delston, eds., 84–91. New York: Routledge.

Audi, R. (2011). *Democratic Authority and the Separation of Church and State*. New York: Oxford University Press.

Audi, R. (2013). *Rationality and Religious Commitment* (Reprint edition). New York: Oxford University Press.

Bell, D. A. (2009). *Beyond Liberal Democracy: Political Thinking for an East Asian Context*. Princeton: Princeton University Press.

Cudd, A. (2004). The Paradox of Liberal Feminism: Preference, Rationality, and Oppression. In A. R. Baehr & A. Allen (Eds.), *Varieties of Feminist Liberalism* (pp. 37–61). Lanham: Rowman & Littlefield Publishers.

Dombrowski, D. A. (2001). *Rawls and Religion: The Case for Political Liberalism*. Albany: State University of New York Press.

Donaldson, T. (1991). *The Ethics of International Business*. Oxford: Oxford University Press.

Ebels-Duggan, K. (2010). The Beginning of Community: Politics in the Face of Disagreement. *Philosophical Quarterly*, *60*(238), 50–71. http://doi.org/10.1111/j.1467-9213.2008.591.x (accessed October 2, 2016).

Fortier, J. (2010). Can Liberalism Lose the Enlightenment? *The Journal of Politics*, *72*(4), 1003–1013.

Gaus, G., & Vallier, K. (2009). The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry and Political Institutions. *Philosophy and Social Criticism*, *35*(1–2), 51–76.

Gutmann, A., & Thompson, D. (2004). *Why Deliberative Democracy?* Princeton, N.J.: Princeton University Press.

Hamilton, A., Madison, J., Jay, J., & Kessler, C. R. (2003). *The Federalist Papers*. (C. Rossiter, Ed.) (1st Edition). New York: Signet.

Huemer, M. (1996). Rawls's Problem of Stability. *Social Theory and Practice*, *22*(3), 375–395.

Ilesanmi, S. O. (1997). Civil-Political Rights or Social Economic Rights for Africa? A Comparative Ethical Critique of a False Dichotomy. *Annual of the Society of Christian Ethics*, *17*, 191–212.

King, Jr., D. M. L. K. (2000). *Why We Can't Wait*. (J. Jackson, Ed.). New York: Signet.

King, M. L. (2003). *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (J. M. Washington, Ed.) (Reprint edition). San Francisco: HarperOne.

McKittrick-Sweitzer, L. (2015). *The Instability of The Law of Peoples and a Suggested Remedy*. Unpublished MA thesis: University of Missouri-Saint Louis.

McMahan, J. (2004). The Ethics of Killing in War. *Ethics*, *114*(4), 693–733.

Macedo, S. (1997). In Defense of Liberal Public Reason: Are Slavery and Abortion Hard Cases? *American Journal of Jurisprudence*, *42*(1), 1–29.

March, A. F. (2011). *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (1 edition). New York: Oxford University Press.

March, A. F. (2013). *Rethinking Religious Reasons in Public Justification* (SSRN Scholarly Paper No. ID 2217691). Rochester, NY: Social Science Research Network. http://papers.ssrn.com/abstract=2217691 (accessed October 2, 2016).

Marquis, D. (1989). Why Abortion is Immoral. *The Journal of Philosophy*, *86*(4), 183–202.

Metz, T. (2011). Human Rights: African Perspectives. In *Encyclopedia of Global Justice*, 501–505. New York: Springer.

Nussbaum, M. C. (1999). Judging Other Cultures: The Case of Genital Mutilation. In *Sex & Social Justice* (pp. 118–129). New York: Oxford University Press.

Nussbaum, M. C. (2002). Rawls and Feminism. In S. Freeman (Ed.), *The Cambridge Companion to Rawls*. Cambridge: Cambridge University Press.

Quong, J. (2011). *Liberalism without Perfection* (1st edition). Oxford; New York: Oxford University Press.

Ransby, B. (2005). *Ella Baker and the Black Freedom Movement: A Radical Democratic Vision*. Chapel Hill: University of North Carolina Press.

Rawls, J. (1997). The Idea of Public Reason Revisited. *The University of Chicago Law Review*, *64*(3), 765–807.

Rawls, J. (1999a). *A Theory of Justice* (Revised ed). Cambridge, Mass.: Belknap Press of Harvard University Press.

Rawls, J. (1999b). *The Law of Peoples; with "The Idea of Public Reason Revisited."* Cambridge, Mass.: Harvard University Press.

Rawls, J. (2001). *Justice as Fairness: A Restatement*. (E. Kelly, Ed.) (2nd edition). Cambridge, Mass.: Belknap Press.

Rawls, J. (2005). *Political Liberalism: Expanded Edition* (2nd edition). New York: Columbia University Press.

Roosevelt, E. (2000). *The Autobiography Of Eleanor Roosevelt* (Reprint edition). New York: Da Capo Press.

Sandel, M. J. (1994). Review. *Harvard Law Review*, *107*(7), 1765–1794. http://doi.org/10.2307/1341828 (accessed October 26, 2016).

Sen, A. K. (1999). Democracy as a Universal Value. *Journal of Democracy*, *10*(3), 3–17. http://doi.org/10.1353/jod.1999.0055 (accessed October 26, 2016).

Song, S. (2007). *Justice, Gender, and the Politics of Multiculturalism* (1st edition). Cambridge; New York: Cambridge University Press.

Stout, J. (2005). Religious Premises in Political Argument. In T. Cuneo (Ed.), *Religion In The Liberal Polity* (pp. 157–172). Notre Dame, Ind.: University of Notre Dame Press.

Sullivan, K. M. (1992). Religion and Liberal Democracy. *The University of Chicago Law Review*, *59*(1), 195–223.

Swaine, L. (2009). Demanding deliberation: political liberalism and the inclusion of Islam. *Journal of Islamic Law and Culture*, *11*(2), 88–106. http://doi.org/10.1080/15288170903273003 (accessed October 26, 2016).

Tampio, N. (2012). *Kantian Courage: Advancing the Enlightenment in Contemporary Political Theory* (1st edition). New York: Fordham University Press.

Vallier, K. (2011). Convergence and Consensus in Public Reason. *Public Affairs Quarterly*, *25*(4), 261–280.

Warren, M. A. (1973). On the Moral and Legal Status of Abortion. *The Monist*, *57*(1), 43–61.

Weithman, P. (2011). *Why Political Liberalism?: On John Rawls's Political Turn*. Oxford: Oxford University Press.

Whitfield, G. (2015). Self-respect and public reason. *Critical Review of International Social and Political Philosophy*, *0*(0), 1–20. http://doi.org/10.1080/13698230.2015.1031933 (accessed October 2, 2016).

Wolterstorff, N., & Audi, R. (1996). *Religion in the Public Square: The Place of Religious Convictions in Political Debate*. Lanham, Md.: Rowman & Littlefield.

Part IV

Why Vote?

12 Why Bad Votes Can Nonetheless Be Cast and Why Bad Voters May Cast Them

Patrick Taylor Smith

Introduction

There is a long-standing debate between institutionalists and individualists about distributive justice.[1] Institutionalists argue that the principles of justice apply to the basic structure of society and that individuals only have duties to support just institutions and follow their rules. Individuals are not required to bring about greater distributive equality in their day-to-day participation in the market or within the family. Individualists, or monists, take the opposite tack. They argue that individuals—when engaging in the market or making decisions within the intimacy of the family—should be guided directly by the principles of justice. The difference between the two views is perhaps clearest when we look at the labor market. An institutionalist would suggest that individuals may justly use their labor power to drive hard bargains in their own self-interest as it is the job of the basic structure to properly incentivize the relevant choices and distribute the relevant benefits of the position. Yet, if the basic structure cannot fully compensate for these hard bargains, then the resulting inequality could—on the institutionalist view—nonetheless be just if it resulted from morally legitimate exercises of individual discretion within a just system. Individualists, by contrast, would argue that those with increased labor power should be willing to accept contracts with lower salaries or longer hours so that the difference can be then distributed to the least well-off. In other words, institutionalists argue that the natural duty of justice consists in following the rules of the system and supporting the institutions while individualists argue that it consists in directly instantiating the principles of justice in their day to day interactions.

Though he does not frame it this way, Jason Brennan[2] opens up an interesting new front in the debate between institutionalists and individualists. Voting, like one's labor market decisions, is an area where we have granted individuals broad discretion. An institutionalist account of voting would suggest that, while individuals may vote better or worse along various metrics, the natural duty of justice would only require that they follow the rules and vote in ways that support the institutions performing the moral work of maintaining background justice. *Pace* the institutionalists, Brennan argues that individuals have a duty

to vote in a way that is sufficiently likely to serve the common good. That is, individuals have a duty to directly instantiate the principles of justice in their voting behavior. To do otherwise—out of either negligence or malice—is akin to pollution; it is a deployment of political power that harms others. As a consequence, not only are individuals who fail these conditions obligated to refrain from voting, they may be coercively prohibited from so doing under the appropriate circumstances. It seems to me that Brennan has insightfully picked a serious pressure point against the institutionalists; the idea that we ought to leave justice to the institutions when we are *voting* seems manifestly absurd.

Yet, the purpose of this paper is to offer an institutionalist rejoinder to Brennan's argument and to make a case for the claim that individual voting obligations are much more minimal than Brennan suggests and that even these more minimal obligations are not coercively enforceable except under very rare circumstances. Put more succinctly, I wish to show that our voting behavior is akin to our labor market participation; we have wide discretion and need not pursue justice directly with our individual actions. There are two elements to my argument, and they both concern how the individual voter relates to political institutions. First, I want to show that some findings in social epistemology undermine key inferences in Brennan's argument. Namely, a properly constructed system that contains irrational or bad actors can lead to superior results over a similar or less well-constructed system that lacks them. That is, even if we grant the claim that democratic participation is only important because it produces better substantive outcomes, the individualist argument downplays or ignores the extent to which those outcomes depend on the nature of the system even if it is populated by epistemically ideal actors.

But my other objection is more fundamental. Brennan and his interlocutors all agree that voters wield political power with their votes and that something like the 'pollution' metaphor is applicable. Each bad vote exercises power in a way that makes the world just a little bit worse. Most who object to Brennan argue that it would be unreasonable to make judgments about which voter is polluting, or they argue that each individual polluter contributes too small an amount of harm to override the costs incurred by voters by either asking or forcing them to abstain from the polluting behavior. The second objection, by contrast, is that bad voters do not pollute. The social epistemology objection suggests that the bad votes are not pollution or are unavoidable concomitants of a mechanism that generates outputs we need. My second argument, by contrast, attacks another element of the analogy. Pollution, as it is typical understood, is an action that causes at least an iota of harm by itself. Pollution is normally founded on actions that are *naturally* harmful. Yet, this is not true of voting. In fact, I shall argue that there are categories of irrational social action—participation in the market, elections, and knowledge production—that are not intrinsically harmful but only harmful as part of a social system. This, I shall argue, changes the nature of individual obligation. Namely, these obligations are institutionalist: support just institutions, reform bad ones, and generally follow the rules. Voting well can be part of that but it need not be.

Bad Votes as Pollution

Let's turn to Brennan's underlying argument that bad votes are pollution. Political orders have great power over their citizens or subjects. Resources are redistributed, people imprisoned or protected, and projects made possible or blocked. In a democracy, the people that ultimately control this powerful machinery are voters. These voters may direct it well or badly, rationally or irrationally, in a well-informed fashion or ignorantly. Those who vote in the latter ways, in elections or in referenda, direct or risk directing the machinery of state in ways that will harm their fellow citizens. Risky behavior of this kind—when it offers no compensating benefits—is wrong. Thus, there is a *pro tanto* consideration in favor of vote abstention when one can reasonably foresee that one will vote badly. What's more, there is little individual benefit to voting and individuals do not have particularly strong interests in being able to vote. Since the *pro tanto* consideration is therefore decisive, bad voters ought to abstain from voting. Finally, if a neutral and impartial set of reasonable criteria for bad voting can be developed and enforced by the state, then it may justly restrain bad voters from voting.

Those who have objected to Brennan's argument have generally granted that bad voting is like pollution, bad voters harm, and we usually ought to avoid harming. These objections then purport to show that, despite these points of acceptance, many, most, or all particular voters lack an obligation to refrain from voting. For example, David Estlund argues that, while it is true that bad voters ought not vote, no one need accept that they are a bad voter. His argument relies on his *qualified acceptability requirement*, which states that the granting of political authority must be done for reasons that cannot be reasonably rejected from any qualified point of view.[3] To claim that an individual ought to abstain from voting or participating in political decisions more generally is to argue that they should give up their claim to political authority to others that are in a superior epistemic or moral position. According to the qualified acceptability requirement, this demand must be justified from all qualified points of view. Estlund argues that any particular standard that might be used to assess whether a voter is incompetent and any application of that standard to particular voters will always be subject to a qualified objection. In other words, there will be irredeemable and unresolvable reasonable disagreement about who does or does not count as a bad voter. So, while it might be true that bad voters should be excluded, there is no legitimate standpoint for ascertaining who ought to abstain or be forcibly removed from the electorate. Marcus Arvan,[4] on the other hand, suggests that the *pro tanto* considerations presented by Brennan are less decisive than they appear. Namely, Brennan assumes that the costs of the obligation to refrain from voting is sufficiently low that the reasons we have to refrain from risking the potential bad effects of our voting override it. Arvan suggests that, for some bad voters, this is not so.

Yet, both of these objections accept the framing as presented by Brennan. Bad voters exercise power directly, do so negligently or maliciously, and

insofar as they reasonably come to know that they are using that power badly they have reason to refrain. In other words, voters represent tiny force vectors directing the political system in one direction or another. Bad votes push the system in a bad direction and, perhaps, enough of them will cause the relevantly unjust outputs. You should not contribute to that push. This also explains why, for example, Brennan finds strategic voting sometimes acceptable[5]: you might be actively counteracting or constraining the problematic force vectors of other voters. The key assumption in this analysis is that the political system—and its institutions—is merely the *location* of a set of capabilities, and elections are contests for control of those capabilities. Thus, voters have the real power and the system is treated as a passive element that either benefits or destroys as a result of electoral direction. Thus, the metaphor and analogy of pollution; the river may be resilient or fragile but it has no agency in structuring the way in which polluters behave.

Social Systems and Voting

My argument relies on the idea that political systems are not passive transmitters of voter preferences; rather, they mediate between votes and outcomes in epistemically and morally important ways. So, consider the following three instances of the 'pollution' argument as applied to various social systems.

> BAD SCIENCE: Many individual scientists are demonstrably irrational, factually ignorant while riven by biases of all forms and outdated theories of scientific justification. These bad actors pollute scientific practice, rendering it worse than it otherwise would be. As a consequence, we ought to prohibit scientists who are obviously biased and irrational from participating in peer review and research.

> BAD CONSUMPTION: Many individual consumers are demonstrably irrational and riven by biases of all forms, informed by deeply unjust preferences concerning the weightiness of their preferences viz other values. These bad actors pollute the market, warping the price of particular products in a direction that harms the common good. As a consequence, we ought to prohibit their participation in the market.

> BAD VOTING: Many individual voters are demonstrably irrational, ignorant and riven by bias, incapable of participating rationally in the political process. These bad actors pollute the political process, rendering it worse than it otherwise would be. As a consequence, we ought to prohibit voters who are obviously biased and irrational from participating in elections.

The general argument goes something like this. There is a practice—science, the market, or elections—that generates substantial net effects by aggregating the discrete contributions of identifiable participants. Then, we evaluate these

participants to determine whether they have uncontroversial and independently characterizable epistemic or moral vices that will lead to inadequate or incompetent contributions to the process. This leads us to conclude that removing those actors from the process will generate better end-states.

It is important to be clear about the role these analogies are playing in my argument. I am not making an argument of the following kind: the prohibitions in BAD SCIENCE and BAD CONSUMPTION are wrongful, BAD VOTING is precisely like the former cases, and therefore the prohibition on voting is wrongful. Rather, the purpose of these analogies is twofold. First, they undermine key inferences in the pollution argument. Second, the analogies point to ways to resist the pollution argument in the case of BAD VOTING. If I can show that BAD VOTING shares relevant features of BAD CONSUMPTION and BAD SCIENCE, then that gives us some reason to reject the claim that bad voters must abstain.

In order to illustrate these two roles for the analogies, let's examine one way that BAD SCIENCE and BAD VOTING might be seen to be disanalogous and determine whether it is problematic for my argument. A key difference, one might think, between bad science and bad voting is that the former is public in a way that the Australian ballot is not.[6] This, perhaps, generates a kind of accountability that somehow makes bad science acceptable. I do not deny that this is a difference, and I do not even deny that this is a *relevant* difference. However, two points are worth noting. First, we now have a much more complicated story about how bad inputs relate to bad outcomes that the pollution argument does not capture. The argument must now be that only *unaccountable* bad voting is morally prohibited because BAD SCIENCE shows us that accountable bad inputs can nonetheless be permissible. Yet, Brennan's argument does not even purport to show that votes in a properly functioning democracy are relevantly unaccountable. The second and related point is that this provides a path towards defending bad votes and bad voters. That is, if we can show that democratic systems have *comparable* features to scientific publicity in making bad inputs epistemically or morally acceptable, then we can resist the pollution argument.

With these two dialectical purposes in mind, I submit that BAD CONSUMPTION and BAD SCIENCE represent two different responses to pollution arguments. In BAD SCIENCE, we tend to have a fairly 'hands-off' reaction; let scientists police themselves. The reason for this is, I suggest, that we view science as a self-correcting system of norms where bad scientific inputs get weeded out. In the case of BAD CONSUMPTION, we do not usually constrain the *consumers* from participating in the market (we might lose valuable information if we did that) but rather we constrain what the consumers may *choose* in the market. For example, we make it so that no one can buy a car without airbags; the system has a constrained process by which only some outputs are acceptable. So, we have two different *systemic* strategies for dealing with bad inputs; the system might have mechanisms to select for or against

inputs with certain features or the system might block certain outputs from occurring, regardless of inputs.

These systematic responses open up the possibility of an institutionalist rejoinder to the pollution argument. If we think that a particular set of inputs generates outputs contrary to the common good, the institutionalist-political solution is to restructure the system rather than prohibit participation on a case-by-case basis. There are, at least, two reasons that motivate the institutionalist response. First, if individuals are subject to significant structural pressures to engage in the problematic behavior, then structural reform is much more likely to be effective in generating the desired outcomes.[7] For example, if it is rational to be politically ignorant—as Brennan suggests it is—then we might think that moral obligation will be a very weak tool to induce the supposedly desirable outcome of more widespread competent participation in democratic politics. Second, institutionalism might be justified by showing that agents cannot achieve the desirable outcomes on their own and that bad institutions will make even good contributions otiose. So, if producing justice was impossible without good institutions and bad institutions made even good contributions essentially irrelevant, then this would strongly suggest an institutionalist focus.[8]

Bad Science and Bad Voting

I plan to use BAD SCIENCE to illustrate the potential of social epistemology in offering a defense of bad votes and voters. Brennan is aware of recent social epistemological findings but suggests two reasons why they fail to undermine his argument. First, he suggests that social epistemology only shows that the requirements for competence are not extraordinarily demanding.[9] So, if the social epistemologists are correct, then the primary consequence is that people will need to be less expert to be able to vote competently. One need not be an expert; one can be competent even if one can only identify experts. Yet, this does not show that incompetent voters should still vote once we index that incompetence to the lower standard that social epistemological considerations allow. Second, Brennan is skeptical that the normal results of social epistemology actually undermine his argument in the real world because standard examples used to demonstrate the wisdom of crowds over experts generally assume a comparatively random distribution of bias.[10] Once we aggregate the crowds' beliefs or preferences, the biases in various directions cancel each other out, and the average—which presumably captures the information held by the crowd—is more likely to be correct. Yet, if a critical mass of people in the group all have the *same* bias, then the aggregation of the group's knowledge will not adequately compensate for them. As a consequence, systematic biases can lead groups to be worse than unbiased individuals at making judgments or decisions. So, Brennan can accept that, under certain circumstances, incompetent voters are not a serious problem but deny that this objection applies to real world voting *if* voters are systematically biased.

While I think Brennan's objections apply to relatively simple cases of social-epistemic aggregation, they fail to take other, more sophisticated ways in which a social system can contribute—or fail to contribute—to epistemic or practical success for individuals and groups. Consider BAD SCIENCE. It is hard to deny that scientists are subject to serious and systematic biases.[11] At the very least, they are subject to the same psychological dispositions as everyone else; scientists are not somehow transcendently separated from our society's problematic social structures. Yet, we think that scientific results are frequently well-justified, or at least science generates well-justified claims more often than other forms of knowledge production. Brennan even relies on scientific claims to show that many citizens are incompetent. Part of the reason for this discrepancy is that science is a system of institutions, norms, and practices that—when functioning well—rigorously weeds out the biased results. Unlike a crowd of people voting for the correct answer on *Who Wants to Be a Millionaire* (the audience poll is correct more often than contestants[12]), there is a selective process between input and output. The system is not merely one of neutral aggregation and this accounts for why biased and irrational scientists can nonetheless produce valid scientific results.

And these mechanisms can be used to compensate for *systematic* biases. Philip Kitcher[13] has argued, for example, that the Nobel Prize and other incentive structures can compensate for the problematic tendencies of scientists. Kitcher writes:

> Each of the members of this community made decisions rationally, in the sense that actions were chosen to maximize the chances of achieving goals, but the goals were personal rather than epistemic. Those who elected to work on [the molecule] did so because they believed that whoever discovered the structure of the [molecule] would win a much-coveted prize…[This community] might work much better…More exactly, maybe there is a distribution which is both stable and attainable and which offers a higher probability of community success than the [distributions based on individual rationality] we considered above. *The very factors that are frequently thought of as interfering with the rational pursuit of science—the thirst for fame and fortune, for example—might actually play a constructive role in our community's epistemic projects, enabling us, as a group, to do far better than we would have done had we behaved like independent epistemically rational individuals.*[14]

Kitcher argues that scientific institutions face a significant dilemma: there are strong (and often quite rational!) epistemic pressures for each individual scientist to do and believe what other scientists do and believe. Yet, this behavior will undermine the overall epistemic standing of science as the community coalesces around groupthink, failing to innovate or adopt riskier and lonelier strategies. In other words, scientists have a disposition that will undermine the standing of the entire enterprise. Yet, the solution is not to make scientists more rational—after all, the groupthink behavior is epistemically

rational in many cases—but rather to create incentives by which those who succeed by *bucking* the consensus receive outsized rewards. This motivates scientists to behave in ways that combat the pressure towards groupthink. The outputs the group values will not be optimally produced by each scientist doing what is individually rational but an appropriate set of rules, norms, and institutions can nonetheless compensate for that problematic tendency.

Interestingly, the structure of the system matters beyond the incentives. If each individual scientist had to make a judgment about whether to adopt the dominant or dark horse method, then we likely would not generate the needed diversity. Kitcher further argues that the nested structure of science helps resolve the problem:

> The trouble with large communities…is that a single deserter from method I cannot contribute enough effort to method II to make that method profitable. What is needed is for several people to jump ship together. Imagine, then, that the community is divided into fiefdoms (laboratories) and that, when the local chief (the lab director) decides the switch, the local peasantry (the graduate students) move, too…A certain amount of local autocracy—lab directors who control the allegiances of a number of workers—can enable the community to be more flexible than it would be otherwise.[15]

It is important to see that this is not simple aggregation. Key nodes in the network—scientists who receive a particular status—are granted greater weight, local autonomy, and significant resources. These local fiefdoms have the effect that—if one of the *nodes* is convinced—many scientists will then work on the dark horse methodology or theory. This then has the effect of making science—as a whole—more likely to generate progress. So, what we have are structural features of scientific practices compensating for suboptimal yet general dispositions amongst individual scientists. The selective mechanism and internal structure of the practice not only compensate for bias but also use irrational behavior *constructively* to make the system function better.[16]

The point of the foregoing analysis is twofold. First, being guided by social epistemology in improving social systems does not require that we make individual members of the system more knowledgeable, rational, or moral. Rather, the more effective and appropriate reaction is to alter the system such that the participation of non-ideal agents can be productive. Second, it is not accurate to say that what the system is doing is 'lowering' the standards needed for competence. In the scientific case, the dilemma was generated by the fact that the scientists were acting more or less rationally just as—according to Brennan—voter ignorance is itself a fairly reasonable response to various incentives. Rather, how the epistemic agents interacted with the system was much more relevant than whether they had ideal epistemic dispositions. A 'good' epistemic agent—one that was individually responsive to the evidence and well-informed—in a bad system might nonetheless produce bad results,

and a 'bad' epistemic agent in a good system might be easily compensated for and pose no threat to the epistemic status of that system. Furthermore, if the system is designed particularly well, then the ignorant or irrational contribution of the incompetent agent might be even be useful. Thus, the inferences from 'bad' agent to 'bad' contribution to 'bad' outcomes is not always—or even usually, at least in some systems—successful.

To put it another way, whatever arguments Brennan has produced to show that purely aggregative mechanisms will fail to compensate for incompetence do not directly translate to our political and scientific practices because those systems are not purely aggregative. This is not to deny that there are aggregative *elements* of our political systems, but we should not take the part for the whole. Brennan repeatedly criticizes[17] advocates for universal suffrage for retreating to *a priori* reasoning and ideal theorizing, but his own argument depends on a claim which is justified a priori if it is justified at all. Namely, Brennan proceeds from the premises that some voters are incompetent and that democratic results are not fully just to the claim that our political results would be improved if those voters stopped participating. But no empirical evidence is presented for this claim, and we have several analogous examples and some plausible models according to which, at the very least, it is not obviously true. Perhaps this was acceptable as long as we had the simple aggregation model in mind, but the inadequacy of the inference is sharply exposed by a more sophisticated understanding of how social systems generate the relevant outputs. Given the expressive and personal costs of coming to see oneself as an incompetent voter and the fact that Brennan's obligation to abstain will be concentrated on the weak and marginalized in a political system where they already lack influence,[18] it seems like we would need more than speculation.

If we take this argument seriously, it has important implications at both the individual and policy levels. Importantly, these implications seem to generate a dilemma. Generally speaking, we might think that a system is organized either virtuously or viciously. If the system is organized virtuously in the way I have outlined in that it appropriately compensates for or productively uses incompetent contributions, then prohibiting the person from participating is unnecessary from a policy perspective (and is thus probably impermissible due to a variety of considerations), and an individual voter can contribute safe in the knowledge that their contribution is not an intrinsically bad act. Now, if the system is organized viciously, then we can be confident that—almost by definition—it will lack the epistemic bona fides to decide who is an incompetent voter and will administer any (bad) criteria it develops in a biased and corrupt fashion. So, any attempt to enforce the moral obligation to abstain will almost certainly be unjust. Further, if the epistemic system is vicious, then we will have lost whatever connection between competent contributions and governance outcomes that we might have relied on to show that a particular person's vote will result in the relevant negative force vector. In a vicious system, any contribution might lead to disaster. Voting effectively and well—in terms of producing good outcomes—is likely to be excessively difficult even for

particularly competent voters. Furthermore, it will be difficult to ascertain whether one is a competent voter in the first place as the public standards, transparency, and policy information that judgment might require will be hard to come by.[19] So, one will not know whether one is competent and there will be disconnect between one's contribution and results.[20]

Vicious systems—and this is part of what makes them vicious—undermine the ability of citizens to make the sorts of judgments that would be necessary for the moral obligation to abstain to be applicable. At the very least, an argument for a particular voter's obligation to abstain would have to show that their system was vicious and that their own incompetence and its effects were sufficiently accessible to the particular voter as to ground the relevant obligation. Brennan, so far as I know, has not made this argument. He does, however, gesture at a possible example when he suggests that individuals who voted in Weimar Germany for the Nazi party ought to have abstained due to their incompetence or viciousness. I will turn to that example in the conclusion of this paper.

Regulating Voting Instead of Voters: Constitutions, Judiciaries, and Parties

I have shown that there are important argumentative gaps that block the inference from incompetent voter to bad votes and from bad votes to bad outcomes but I have not offered much evidence that political systems do, in fact, possess this more complex structure. In this section, I describe the way in which the political system mediates between the voter and the exercise of political power and how this opens up different strategies for dealing with incompetent voters. In doing so, we increase the resilience of the system, allowing it to incorporate bad votes without necessarily contributing to the kind of negative force vectors that give rise to the obligation not to vote. To illustrate this, I want to focus on BAD CONSUMPTION.

We exercise power by participating in the market. Our property rights represent a bundle of legal privileges, backed up by the coercive power of the state. And collectively, we can wield that power in ways that injure others. For example, the collective consequence of using our market power to engage in the kind of consumption that burns fossil fuels generates severe negative externalities in the form of global climate change. So, when we order steak at dinner, we generate demand for products that are themselves damaging to the interests of others. With each purchase, one can argue that we give particular outcomes a small push. What's more, our consumption choices are often driven by mistaken beliefs, irrational preferences, or immoral desires and judgments. In other words, we are frequently incompetent consumers and that incompetence has consequences.

Yet, we typically do not respond to BAD CONSUMPTION like Brennan would like us to respond to BAD VOTING. Generally speaking, we respond to BAD CONSUMPTION by limiting the choices available to consumers rather

than by prohibiting them from making choices about what to consume. We might price the externalities such that we can redistribute resources to those harmed by our consumption and leave each consumer with the option of buying the product at the higher price point. Or we might regulate products such that one cannot purchase them or can only purchase certain versions. Yet, generally we restrict *all* consumers from the relevant consumption, and we grant wide latitude to consumers as to what to purchase. I submit that we can offer similar reasons and adopt similar strategies in the case of bad voting.

First, bad voting looks much more like what I would like to call socially wrongful consumption—where one is only obligated to abstain if one has assurances from others—than naturally wrongful consumption, where one ought to refrain from actions that are intrinsically harmful. For example, bad voting is, in some ways much like fossil fuel consumption. Unlike dumping carcinogens in the water supply, it is not the case that fossil fuel consumption—in the context of climate change—is intrinsically harmful. If I dump some carcinogens in the water supply, then I have increased the risk that those consuming the water will get cancer, though perhaps only by some tiny amount. Yet, if I were the only one in the world consuming fossil fuel, then there would be no anthropogenic climate change. The earth has an absorptive capacity that permits a certain level of greenhouse gas emission without an increase in global average temperature (and human systems have the resilience to absorb some rate of climate change without negative consequences). So, any particular person's carbon emissions are only dangerous insofar as they are combined with the actions of others; individual emissions are, quite literally, harmless as they disappear into global carbon sinks or generate *de minimis* warming that human social systems absorb without noticing.

Similarly, insofar as we can make sense of a single vote that is separated from authoritarianism (that is, I elect myself president, alter the constitution etc. etc.), a single vote is harmless without the actions of others. A single vote only causes harm in the context of a social system. Consider various ways we might interpret the counterfactual where there is only one voter in a democracy. If that single voter just is dictator for life, then that certainly generates an injustice. Yet, it would be odd to say—if the system literally cannot function without this voter—that the obligation is to *abstain*. What happens to a democratic system if the single voter abstains? Does it do nothing? Operate capriciously? Rather, it seems like the obligation would be to permit other people to vote and try to make good decisions as a political collective. On the other hand, if we are talking about a single, one-off vote in a single election, then the magistrates, representatives, regulators, and the like have considerable freedom and discretion. Does everyone get to vote in the next election? If the elected magistrates are unconstrained by the voter in future elections, why are the negative consequences of the vote the responsibility of the voter? Why are these bad decisions not the responsibility of the legislators and judges who make them? At any rate, it does not seem that a single voter issuing a single vote is intrinsically harmful; the translation of that vote into the exercise of political power is done by others. It is socially wrongful. If what I am doing is not

harmful intrinsically, many other people are also doing it, and my refraining from so doing will make no difference, then it seems at least plausible that I have no obligation to refrain unless assured that other people will do so as well. This would be true even in cases, contrary to the previous section, where my incompetent vote is not productively compensated for by the social system. Once we reject the 'force vector' view of voting by which the system is completely passive, then it is harder to sustain the relatively simple inference from being a bad voter to being morally responsible for the subsequent political risk.

In fact, voting is even more attenuated from its consequences than greenhouse gas emissions. Greenhouse gas emissions interact with a natural system to generate human-independent consequences. While it is true that the nature and extent of the costs of global warming are at least partially socially determined, it is still the case that these consequences are founded on the operations and limitations of a natural system. This is not so in the case of voting. The path from bad voting to bad consequences is mediated by the actions and moral failures of many individuals and institutions. We should not treat those agents simply as if they are a natural process playing itself out. When discussing the gap between bad voting and bad consequences, Brennan argues that the Nazi voters could surely foresee the bad consequences of voting for the NSDAP.[21] Perhaps that is correct, but this is less obviously relevant when those negative consequences are the product of a social, as opposed to a natural, system. For example, imagine a voter that judges—without much thought —that it is good to grant prosecutors wide discretion in deciding which individuals to indict and bring to trial, and votes accordingly. Let's further imagine that this discretion—due to the biases of the prosecutor—leads to a racially discriminatory pattern of indictments. It seems puzzling to think that the discriminatory actions of the prosecutor should be ascribed as being the responsibility of the voter, especially if the voter lacks the biases that generated the problematic outcomes.

The key point is that the political system mediates between the voter and the outcome and the system can ensure or prohibit outcomes. And voters can *know* that certain outcomes are ensured or prohibited. So, let's take a look at a legitimate, democratic state. One striking thing about Brennan's thesis is that it is supposed to obtain even in comparatively just or legitimate political orders. An incompetent voter is an incompetent voter. Yet, a legitimate state will have significant protections against the potential bad consequences that might come from bad voting. These protections either make certain policy equilibria "sticky," requiring the more than the usual political deliberation to dislodge, or they prohibit certain changes entirely. Let's consider the following protections that are found in legitimate democracies:

1 constitutions that provide counter-majoritarian protections of basic interests;
2 independent judiciaries that provide arenas of contestation;
3 a robust matrix of civil society, press, and political parties that clarify and make possible collective, political participation, contestation, and control;
4 regular, free, and fair elections.

These protections have the effect of constraining the scope of issues up for debate in democratic and electoral politics. They provide protections to ensure that individuals—through their voting behavior—do not make or suffer from mistakes that are too severe. These various safeguards provide mechanisms and avenues of inclusion and contestation that, in a legitimate state, maintain stability around an acceptable political equilibrium while allowing for evolutionary experimentation. This, if the system is effective, will allow obvious improvements to be maintained while jettisoning mistakes and preventing catastrophe. It also generates a set of veto points that require a significant threshold of political capital to be overcome.

To sum up, it is not the case that each vote is a tiny 'push' in one direction but rather a participatory move in a complex social system that the system selects or rejects. The system is what makes possible the deployment of political power and individual voters exercise power through it, but that does not make the system passive. Bad voting is an intrinsically neutral action, mediated by a social system and a variety of other agents, and is limited by the extra-electoral mechanisms of liberal democratic politics and constitutional structure. In that context, an incompetent voter in a legitimate state—whether she knows it or not—can be reasonably sure that her votes will act as kind of proposal that the polity as a whole will reject if it is unacceptable. So, voters in legitimate states need not abstain even if they are incompetent.

If we combine this result with that from the previous section, then we get the result that voters need not abstain in either legitimate or illegitimate polities. Legitimate polities mediate through a series of safeguards and selection mechanisms. On the other hand, illegitimate or vicious political system will lack the reliability, knowledge, or moral standing needed to justify the duty to abstain, much less justify coercively preventing citizens from voting.

Another way to put the point is to focus on what *constitutes* being an incompetent voter. Pollution arguments rely on describing 'bad' inputs independently. So, Brennan relies on evidence that voters are irrational, ignorant, or immoral—features of voters that can be described without reference to purportedly unjust outcomes of the political system. What I have shown is that the contribution of the political system is decisive because it separates voters from outcomes in important ways. If the system is constructed well, then voters with those 'bad' features need not meaningfully contribute to unjust outcomes. If the system is constructed poorly, then the relationship between input and outcome is insufficiently reliable to connect those independently characterizable features to bad outcomes; *good* features are also likely to lead to bad outcomes. What's more, the mediation of the political system drives important questions about precisely *who* is responsible for the bad outcomes in ways that do not normally apply natural pollution.

If we link these points together, it has some important consequences for the obligations of individual citizens. Since it is the system through which one exercises power and it is the system that is either virtuous or vicious in preventing bad outcomes and selecting for good outcomes, it makes little sense to discuss the

obligations of competent or incompetent voters without reference to that system. Rather, the first and foremost political obligation that individual citizens have is to create, maintain, or support the legitimate institutions that make the exercise of power—by competent or incompetent voters—safe and productive.

Conclusion: The Weimar Voter and Institutionalism

So, what about Weimar Germany? When presented with the idea that voters are simply too distant and separated from the political process to have their voting behavior be subject to these obligations, Brennan presents the following example:

> The voters who put the National Socialists in power in Germany in 1932 cannot be held responsible for everything the new government did, of course. But much of what the government did was foreseeable by any reasonably informed person, and so their supporters are blameworthy.[22]

The claim is that voters for the NSDAP (the official designation for the Nazi Party) *should* have known what they were voting for, at least in broad outlines, and ought to have abstained rather than vote to put the Nazis in power. If true, this seems to be a problem for my argument because the Weimar Republic was a vicious system, voters should have known it was vicious, they could have predicted their votes were harmful, and they were responsible for their votes.

What does my view have to say about the Weimar-Nazi voter?[23] Two things are worth noting before we delve into the example a bit more deeply. First, the evidence Brennan presents for the claim that politicians give voters what they want comes from the analysis of mature democracies, which Weimar was not. Second, the key claim is that voters 'put' the NSDAP in power. Yet, we shall see that this is inaccurate.

The first element of my response is to establish *what* made Weimar a vicious system that allowed the NSDAP rise to power. Here is a (likely partial) list of the features of the Weimar system that were deeply problematic:

1. The Reichstag was radically proportional, providing a seat for every party that achieved a certain number of votes. This granted power to fringe parties and made coalition building very difficult. In other words, the Weimar system was more of a simple-aggregation system than other democracies.
2. The Weimar Republic was hobbled by a legitimacy crisis from the very beginning of its existence where it was forced the sign the Treaty of Versailles rather than the right-wing politicians and generals that fought and lost WWI.
3. Anti-democratic forces in the judiciary, civil society, and the army were unrepentant and left unpurged by the Weimar regime. There was little

commitment by these power centers to the Weimar constitution and democratic governance.

4 Article 48 of the Weimar Constitution permitted the President and the Chancellor to rule by executive decree, thus allowing a small clique to rule by fiat. This also meant that coalition-building and governance within the Reichstag were increasingly ignored and viewed as unnecessary.

5 Political norms and structures in German parties were heavily oriented towards technocratic and opaque decision-making largely insulated from democratic feedback.

So, when the Great Depression hit, a small clique of conservative politicians were able to force through—using Article 48—a series of economic 'reforms' that deepened the depression to catastrophic proportions. In this context, the NSDAP became the largest single party in Germany, though never receiving more than a third of the popular vote in any free election. The overwhelming majority of voters for the NSDAP were lodging a protest vote against the failure of the Weimar regime to deal with the Great Depression. Nazi ideology was not popular; there is no sense in which Nazi voters in 1932 were intentionally voting for the Holocaust and the Second World War. The NSDAP was, by its own admission, on the verge of collapse when palace machinations convinced President Hindenburg to appoint Hitler chancellor. No election gave Hitler control of the German state; the grant of power came from extraordinarily unpopular politicians operating under a condition of deep opacity while ruling undemocratically through emergency decrees. In exchange for accepting the chancellorship, Hitler demanded control of the police. Then, through a series of blatantly unconstitutional maneuvers—including the illegal disbanding of the Social Democratic government in Prussia—that were never ratified by anything like a free election or granted legislative legitimation, Hitler gained control over the government and the country.

I want to make several points on the basis of this short history lesson. First, the epistemic and political position of German voters concerning the NSDAP was more equivocal than is typically understood. Many German voters thought they were issuing a strategic, protest vote in the face of the center-right coalition's disastrous economic policies: NSDAP vote support almost entirely correlates with the economic conditions in Germany. As the NSDAP received more public scrutiny and its actual policies came to the fore, it became less popular. It would have been almost impossible to anticipate Hitler becoming chancellor in 1933, and it would have been difficult to anticipate the complete surrender of the major sources of resistance to the Nazi takeover. For example, what ordinary citizen could have predicted that Hitler would have his earliest and most passionate followers executed in the Night of Long Knives in order to gain the allegiance of the military and that the military would fail in its oath to protect the Weimar constitution? At any rate, most of the policies that we would later come to condemn in the Nazis were either unimagined by the Nazis themselves or were deliberately downplayed. For example, the NSDAP's

Jewish policy was *wildly* unpopular and many anti-Semitic initiatives were abandoned in the face of popular resistance until the NSDAP had solidified its control over the country. There were other indicators of Nazi perfidy. For example, the NSDAP were common instigators of street violence before it came to power, but it would have been difficult for an individual German to know who precisely caused the street violence. To sum up, it would have been very difficult to anticipate—in 1930 or 1933—the Nazi rise to power, the Nazi seizure of the state, and the consequences of that seizure.

More importantly, the case of Weimar Germany expresses the clear importance of the political system as a mediator between voter and outcome. One could readily imagine a stronger political system that appropriately constrained Hitler, leading to the collapse of his coalition while at the same time taking up the economic critique of the conditions on the ground in Germany. Granted, the NSDAP never hid—even if it did soft-peddle—its virulent anti-Semitism and racism, but most of their proposed racial policies were unconstitutional. Furthermore, the Conservative Party had long been officially anti-Semitic and had never seriously attempted to enact their anti-Jewish policies in the face of legal and social obstacles. So, voters might have reasonably thought that NSDAP anti-Semitism would be appropriately constrained. The system—which was flawed and vicious—failed in allowing Hitler to gain power without revealing himself and then allowing him to illegally and unconstitutionally seize totalitarian control.

To put it another way, if the Weimar political order had been structured better, then a vote for the Nazi party—as well as the anti-democratic Communist Party—could have served a worthwhile function. That is, it could have served as a goad for the centrist parties to abandon failed neoclassical responses to the Great Depression in order to compete for their votes. These votes could have been safely cast with the knowledge that the NSDAP would have been forced to moderate their radical tendencies or simply have those initiatives blocked by the other sources of contestation within the political order. Yet, the Weimar order failed. In the face of that failure, even well-cast votes for other parties—such as votes for the Catholic Center Party—likely contributed to or failed to do anything meaningful to prevent the disastrous rise of the NSDAP. Perhaps there was a path in the late 1920s and early 1930s that voters could have tread in order to avoid an authoritarian state, but it was an extraordinarily precarious and difficult one. Unfortunately, the viciousness of the order made it impossible for individual voters to reliably act—no matter how competently—in ways that did not risk serious injustice. The regularity and reliability of the operation of the order that would make those kinds of judgments possible simply did not exist.

Yet, there is one way in which the institutionalist can accommodate the intuition that NSDAP voters ought to have acted differently. Hitler was never shy about admitting one important fact: he was fundamentally anti-democratic. He had lead a failed putsch in 1923. On many occasions, the NSDAP made clear that it was only participating in the system in order to destroy it. It is *that* commitment that the institutionalist cannot accept. The institutionalist does

require that individuals support or work to create just institutions. At a minimum, this required that all German citizens oppose the NSDAP when they unconstitutionally dissolved the Social Democratic government in Prussia, which was their first obviously unconstitutional step towards a totalitarian government. Yet, given that Hitler was sincere—which seemed obvious given that he had already engaged in one attempt to violently overthrow the government—and that the party reached a point where it risked actually bringing its plans into being, then I would submit that that was the time where both the government and individual citizens needed to act to protect the system that made effective and just governance possible.

It is possible, I suppose, that this obligation to act could very well have taken the form of abstaining from voting. However, I very much doubt that mere abstention would be sufficient or even play a particularly important role in responding to the Nazi threat. What's more, I'm not sure it would even be necessary if a voter took other significant steps. For example, suppose there is a voter who believes that the Nazi plan of greatly increased fiscal spending is worth taking up but who strongly supports the rule of law. When the Nazis look to overstep those bounds or when the NSDAP holds intra-party debates, this voter takes courageous and costly public action to oppose the extra-democratic and revolutionary impulses of the Party. In that case, it does not strike me as obvious that this person is failing in their democratic obligations because they voted for the wrong party. But perhaps I am wrong; it is still the case that abstaining from voting would be insufficient. So, there are cases where a voter might have a duty to abstain, but these cases will be rare and will almost always be a supplement to other obligations to act to protect or reform the political system.

Notes

1 G. A. Cohen ("Where the Action is: On the Site of Distributive Justice," *Philosophy and Public Affairs* 26 (1997): 3–30) and Liam Murphy ("Institutions and the Demands of Justice," *Philosophy and Public Affairs* 27 (1998): 251–291) are representative individualists, while John Rawls (*Justice as Fairness: A Restatement*. Cambridge. Harvard University Press. 2001); Joshua Cohen ("Taking People as They are?" *Philosophy and Public Affairs* 30 (2001): 363–386); and Thomas Pogge ("On the Site of Distributive Justice: Reflections on Cohen and Murphy," *Philosophy and Public Affairs* 29 (2000)" 137–169) are representative institutionalists.

2 I focus on Jason Brennan "Polluting the Polls: When Citizens Should Not Vote," *Australasian Journal of Philosophy* 87 (2009): 535–549; *The Ethics of Voting*. Princeton. Princeton University Press; and "The Right to a Competent Electorate," *The Philosophical Quarterly* 61 (2011b): 700–724.

3 David Estlund, *Democratic Authority: A Philosophical Framework*. Princeton. Princeton University Press. 2008, 35–36.

4 Marcus Arvan "People Do Not Have a Duty to Avoid Voting Badly: Reply to Brennan," *Journal of Ethics and Social Philosophy*, January 2011. Available at www.jesp.org/articles/download/MarcusArvan.pdf (accessed October, 24 2016).

5 Brennan, *The Ethics of Voting*, 2011a, 131.

6 I thank an editor/referee for this suggestion. Similarly, one might think that instances of bad voting outnumber bad science. While there is much more bad science than

people typically believe (see endnote 11; there are some reasons to think that almost all science is bad in the relevant sense and that the interesting epistemological question is how scientific outputs can be justified given that they are occupied by epistemically problematic actors), it would not be a problem for my objection even if the claim about relative numbers was true. Brennan's pollution argument does not claim that bad voters should abstain if there are some number of bad voters; it is that bad voters should abstain. Like the publicity case, once one accepts that there are features of social systems that affect whether pollution is impermissible, then the straightforward inference in the case of voting is unjustified. The burden is now on Brennan to show that the voting is different from these cases in the relevant ways. Furthermore, I will offer some reasons, later in the paper, that legitimate democracies have features much like science and can incorporate 'pollution' fairly effectively.

7 This is one of the main arguments of Joshua Cohen (2001), "Taking People as They Are." Institutionalism is justified instrumentally; it is both more effective and sufficient in creating and maintaining a just basic structure.

8 I believe something like this view can be found in Rawls, *Justice as Fairness: A Restatement*, 2001, sections 15–16.

9 Brennan, *The Ethics of Voting*, 2011a, 104–105.

10 Jason Brennan ("How Smart is Democracy? You Can't Answer that A Priori," *Critical Review: A Journal of Politics and Society* 26 (2014): 35–37) ably summarizes these views and their reliance on non-systematic bias. He makes one small error in dealing with the Condorcet Jury Theorem. *Pace* Brennan, the mere fact that I am systematically biased does not show that my likelihood of getting the wrong answer is less than .5, but I do agree that democratic theorists are not entitled to rely on the jury theorem. For a more popular summary and discussion of these results, see James Surowiecki, *The Wisdom of Crowds*. New York. Doubleday. 2004.

11 See Helen Longino 1990 (*Science as Social Knowledge: Values and Objectivity in Scientific* Inquiry. Princeton. Princeton University Press, especially Chapters 6 and 7); Philip Kitcher 2001 (*Science, Truth, and Democracy.* Oxford. Oxford University Press, especially Chapter 8); and Carole Lee et al. 2013 ("Bias in Peer Review," *Journal of the American Society for Information Science and Technology* 64: 2–17) as some of many examples. One can even understand Thomas Kuhn (*The Structure of Scientific Revolutions*. Chicago. University of Chicago Press. 1962) as showing that scientific progress and theory choice do not proceed through anything like individual epistemic rationality.

12 Surowiecki, *The Wisdom of Crowds*, 2004, 3–4.

13 Philip Kitcher, "The Division of Cognitive Labor," *The Journal of Philosophy* 87 (1990): 5–22.

14 Philip Kitcher, "The Division of Cognitive Labor," 1990, 14–16.

15 Philip Kitcher, "The Division of Cognitive Labor," 1990, 17.

16 This has long been part of philosophical analyses of political institutions. David Hume—*Treatise on Human Nature*. Edited by David Fate Norton and Mary Norton. Oxford. Oxford University Press. 2000—for example, argues (Book III, Part 2, Section , Paragraph 6) that there is no point in trying to remove the concern for self-interest in human beings in order to enforce justice. Instead, we should create institutions where it is in their self-interest to make sure the principle of justice is followed. Kant, similarly, argues in the *Perpetual Peace* that justice would be applicable and achievable in a world populated by rational devils (Kant, I., 1991 *Political writings*).

17 See Brennan, "How Smart is Democracy? You Can't Answer A Priori," 2014.

18 Martin Gilens and Benjamin Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics* 12 (2014): 564–581.

19 Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20 (2006): 405–437, emphasize the importance of good institutions in the epistemic standing of particular agents.

20 An editor/referee offered a possible objection to these claims. What about *perversely* vicious societies that reliably identify vicious voters and obey their mandates. So, this society would be, at least, partially democratic such that it was genuinely responsive to voters and not simply using formal elections as a fig leaf for oligarchy. The educational and deliberative mechanisms of society would have to be such that we could reasonably expect bad voters to know that they are bad. Finally, it would need to reliably select bad voters without deploying exclusionary policies that would cause it to become illegitimate on institutionalist grounds. This is a tall order for a political system, and I am unsure that such a society could actually exist. However, under those special circumstances, I would have to accept that these identification arguments against the duty to abstain would fail. In some ways, one might think that this is what Brennan's Weimar Germany example purports to show. I respond to the case of Weimar Germany at the end of this paper.

21 Brennan, *The Ethics of Voting*, 2011a, 86.

22 Brennan, *The Ethics of Voting*, 2011a, 86.

23 The foregoing is based on Thomas Childers' *The Nazi Voter.* Chapel Hill. University of North Carolina Press. 1985; Richard J. Evans' *The Coming of the Third Reich.* New York. Penguin Books. 2005; and Robert Paxton's *The Anatomy of Fascism*. New York. Knopf. 2004.

References

Arvan, Marcus. "People Do Not Have a Duty to Avoid Voting Badly: Reply to Brennan," *Journal of Ethics and Social Philosophy*, January 2011.

Azoulay, Pierre; Fons-Rosen, Christian; and Graff Zivin, Joshua S. "Does Science Advance One Funeral at a Time?" *NBER Working Paper*, No 21788. (DOI): 10.3386/w21788 (2015).

Brennan, Jason. "Polluting the Polls: When Citizens Should Not Vote," *Australasian Journal of Philosophy* 87 (2009): 535–549.

——. *The Ethics of Voting.* Princeton. Princeton University Press. 2011a.

——. "The Right to a Competent Electorate," *The Philosophical Quarterly* 61 (2011b): 700–724.

——. "How Smart is Democracy? You Can't Answer that A Priori," *Critical Review: A Journal of Politics and Society* 26 (2014): 33–58.

Buchanan, Allen and Keohane, Robert. "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20 (2006): 405–437.

Childers, Thomas. *The Nazi Voter*. Chapel Hill. University of North Carolina Press. 1985.

Cohen, G.A. "Where the Action Is: On the Site of Distributive Justice," *Philosophy and Public Affairs* 26 (1997): 3–30.

Cohen, Joshua. "Taking People as They are?" *Philosophy and Public Affairs* 30 (2001): 363–386.

Estlund, David. *Democratic Authority: A Philosophical Framework.* Princeton. Princeton University Press. 2008.

Evans, Richard J. *The Coming of the Third Reich*. New York. Penguin Books. 2005.

Ferraro, Paul J. and Taylor, Laura O. "Do Economists Recognize an Opportunity Cost When They See One? A Dismal Performance from the Dismal Science," *The B.E. Journal of Economic Analysis and Policy* 4 (2005): 1–14.

Gilens, Martin and Page, Benjamin. "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics* 12 (2014): 564–581.

Hume, David. *Treatise on Human Nature*. Edited by David Fate Norton and Mary Norton. Oxford. Oxford University Press. 2000.

Kant, Immanuel. *Political Writings*. Translated by H.B. Nisbet and edited by H.S. Reiss. Cambridge. Cambridge University Press. 1991.

Kitcher, Philip. "The Division of Cognitive Labor," *The Journal of Philosophy* 87 (1990): 5–22

——. *Science, Truth, and Democracy.* Oxford. Oxford University Press. 2001.

Kuhn, Thomas. *The Structure of Scientific Revolutions*. Chicago. University of Chicago Press. 1962.

Lee, Carole J., Sugimoto Cassidy R., Zhang, Guo, and Cronin, Blaise. "Bias in Peer Review," *Journal of the American Society for Information Science and Technology* 64 (2013): 2–17.

Longino, Helen. *Science as Social Knowledge: Values and Objectivity in Scientific* Inquiry. Princeton. Princeton University Press. 1990.

Murphy, Liam. "Institutions and the Demands of Justice," *Philosophy and Public Affairs* 27 (1998): 251–291.

Paxton, Robert. *The Anatomy of Fascism*. New York. Knopf. 2004.

Pogge, Thomas. "On the Site of Distributive Justice: Reflections on Cohen and Murphy," *Philosophy and Public Affairs* 29 (2000)" 137–169.

Rawls, John. *Justice as Fairness: A Restatement*. Cambridge. Harvard University Press. 2001.

Surowiecki, James. *The Wisdom of Crowds*. New York. Doubleday. 2004.

13 The Rationality of Voting and Duties of Elected Officials

Marcus Arvan

In his recent article, "The Paradox of Voting and Ethics of Political Representation", Alexander A. Guerrero provides a new argument for the rationality of voting.[1] In brief, Guerrero argues that all things being equal, it is rational for each voter to want candidates they support to have the strongest public mandate possible if elected to office. This is because the stronger an elected official's mandate, the better able they will be to advance the voter's interests. Since voters have reason to want politicians they support to advance their interests—and every vote contributes to the mandate of candidates one supports—it follows that, all things being equal, voting is rational: *every single vote matters*, contributing to the public mandate of candidates one supports. Finally, Guerrero links this argument to the ethics of political representation. He argues that because elected officials are (morally) supposed to represent their constituents, stronger public mandates (i.e. higher vote counts) morally justify officials working as citizens' trustees, making independent decisions while in office rather than deferring to public opinion. Conversely, weaker public mandates (i.e. lower vote counts), because they indicate weaker public support, morally require officials to function as citizens' delegates, deferring to public opinion instead of contradicting it.

In short, we can render Guerrero's argument as follows:

1 The best practical measure of an elected official's popular support in their electoral jurisdiction—their *manifest normative mandate* (MNM)—has important moral implications for how they should act in office.[2]
   a The higher their MNM, the more they morally ought to act as their constituents' trustee (i.e. entrusted to decide what is "all-things-considered best") while in office.
   b The lower their MNM, the more they morally ought to act as their constituents' delegate (i.e. acting in deference to what constituents presently prefer) while in office.
2 All things being equal, elected officials with higher MNMs have stronger incentives to actually act as trustees while in office. Because "[r]epresentatives…face electoral consequences if they act in ways that displease their constituents"[3]—plausibly as a consequence of constituents

expecting them to obey moral norms of *responsiveness, fidelity,* and *guardianship*[4]—officials with higher MNMs tend to enjoy more public/political support to act as trustees, whereas officials with lower MNMs tend to face more pressure to act as delegates.

3 All things being equal, it is rational for individual citizens to want political candidates they support to function as trustees (as entrusted to decide what is "all-things-considered best") rather than as delegates (acting in deference to what constituents presently prefer) if elected to office.[5]

4 Thus (from 1–3), all things being equal, it is rational for individual citizens to want political candidates they support to have the highest possible MNM.

5 The outcome of a popular vote is the best practical measure of a political candidate's popular support in their jurisdiction (i.e. their MNM).[6]

6 Every individual vote makes a small but real difference to a political candidate's MNM.[7]

7 Thus, (from 4–6), all things being equal, it is rational for citizens to vote for political candidates they support.[8]

The present article argues that the all-things-being-equal clause of Guerrero's (3) often fails to be met, and his premise (5) is false. I then show that when these premises are appropriately corrected, several provocative—but compelling—conclusions follow about the rationality of voting and political ethics, namely:

a Voting is typically rational for the members of a political party's base.

b Voting is often irrational for "swing" voters (i.e. independent voters who are not affiliated with any political party, as well as "undecided" voters who are considering voting across party lines).

c Elected officials have a moral duty to respond to *changing levels of popular support* once in office, as indicated by properly monitored and corroborated public opinion polls of constituents, functioning more as delegates the lower their level of popular support.

Finally, I suggest that the last of these conclusions has wide-ranging implications for political ethics. I illustrate these implications by focusing on the questions—under debate in the 2016 US Presidential election cycle—of whether a sitting President has a moral duty to nominate or not nominate a new Supreme Court justice during his final year in office, and similarly, whether US Senators have a moral duty to obstruct, or not obstruct, confirmation of the President's eventual nominee. Specifically, I show how, on the argument I advance, public opinion polls on the President and Senate have complex, yet intuitive implications for how each party in the political process ought to act.

Guerrero's Three Arguments for (3)

The *paradox of voting* is a longstanding philosophical puzzle about the rationality of voting. The paradox holds that voting for political candidates is irrational because voting has significant costs for each individual voter (e.g. time, transportation, etc.), and the probability that any individual vote will decide who wins an election is vanishingly small.[9] A bit crudely, the paradox can be expressed by way of the following rhetorical question: why vote at all if voting is costly and it is a near-certainty that one's vote will not determine which candidate wins?

Many different solutions to this puzzle have been defended. Some argue that voters often have significant interests in voting for its own sake—in taking part in the political process, for instance—and that the benefits of their doing so can outweigh the costs.[10] Others argue that even if voters do not want to vote for its own sake, they often have an interest in contributing to (rather than deciding) their favored candidate's election to office.[11] Others still argue that even if the probability of one's vote deciding an election is small, the consequences of elections can be so great (in terms of political policies) that the expected benefits of even a tiny chance of deciding an election may outweigh the expected costs.[12]

Although these solutions may have some plausibility—as various types of voters can intuitively have different interests in voting (some enjoy voting for its own sake, others want to make a difference in the election, etc.)—Guerrero contends that his new solution is more satisfying, and again, has important implications for political ethics.[13] I believe Guerrero is largely correct, but that two of his premises—(3) and (5)—should be replaced with different premises that, as I explained above, lead to more complex conclusions about voting and political ethics than the conclusions Guerrero defends.

Let us begin with Guerrero's third premise:

3 All things being equal, it is rational for individual citizens to want political candidates they support to function as trustees (as entrusted to decide what is "all-things-considered best") rather than delegates (acting in deference to what constituents presently prefer) if elected to office.

Guerrero provides three arguments for this premise: an epistemic argument, an argument from efficiency, and a holistic argument. All three arguments share the same basic idea: that voters have rational grounds to *entrust* political decisionmaking to candidates they support, but not to candidates they do not support. Allow me to briefly explain each.

The Epistemic Argument

Guerrero's epistemic argument goes as follows:

> Representatives have resource advantages: they are given resources and staff to aid in their investigative work, and they have the time to devote to

> considering the issues carefully and to sift through the available information. Representatives also have access advantages: they are present during informational and deliberative meetings; and they have access to budget information, estimates regarding costs and benefits, and confidential information. Other things being equal, *it will be better, on epistemic grounds, for representatives to be morally empowered to make decisions directly* than being required to determine what their constituents believe or prefer and then let those beliefs and preferences determine their course of action.[14]

Guerrero uses the example of a butterfly enthusiast to illustrate:

> There are many reasons that, if one supports a candidate, one ought to want that candidate to be morally permitted to act as a trustee, rather than as a delegate. The 'ought' involved here stems from an individual's moral and non-moral commitments. There are those things that one wants from political actors on one's own behalf—perhaps one is a butterfly enthusiast and one has reason to believe that one's favored representative will work to protect butterfly habitats…One's support for a candidate will be based on some mixture of prudential and moral concerns. Whatever the balance of these concerns, given that one supports a candidate, one ought to want… that one's favored candidate…act more as a trustee than as a delegate.[15]

Obviously, Guerrero's example focuses on a single issue, and single-issue voters are relatively uncommon. However, the example illustrates a general point: namely, that all things being equal, if a candidate a voter supports is elected to office, that candidate is likely to *share that voter's political interests on the whole* (not just on a single issue), have *more information* at their disposal for advancing those ends, and have a *better understanding* of information for advancing those ends, than the voter themselves. In other words, all things being equal, a candidate a voter supports will be in a better epistemic position to effectively advance that voter's interests in office than the voter. So, on purely epistemic grounds—again, all things equal—voters should want candidates they support to function as trustees while in office (making independent decisions), rather than as delegates (e.g. deferring to public opinion).

The Efficiency Argument

Guerrero's second argument for (3) focuses on general interests voters have in efficiency. He writes:

> A second argument favoring representation by trustee highlights the efficiency of political representation…Part of the argument is epistemic…to be as well informed as political representatives, citizens would have to spend a tremendous amount of time, and so we should choose just a few people who

> will do the work for all of us. But part of it concerns the nature of decision making. It is faster and simpler to have one person or a small number of people making a decision, rather than a multitude of people…These efficiency concerns become even more significant when expediency is important, because of crisis, budget deadlines, and so onto have one person or a small number of people making a decision, rather than a multitude of people…[16]

In short, in addition to epistemic advantages, it is rational, all things being equal, for voters to want officials they support to function as trustees because such officials are likely to share the voter's political ends and be able to advance those ends *more efficiently* as a trustee than they would if they functioned as a delegate (attempting to measure and defer to voter's attitudes).

The Holistic Argument

Finally, Guerrero provides a "holistic" argument for (2). He writes:

> A third argument stems from the benefits of having a holistic, rather than piecemeal, approach to decision making. Representatives who act as trustees are able to assess when it is worth losing battles to win the larger war, when it makes sense to compromise, which issues should be pursued in which order, and so on. Additionally, trustees are in a position to assess and respond to the 'big picture': how proposed legislation would fit with other existing or proposed legislation, how spending on one project could limit available funding for another project, and so on. Representatives who act as delegates…may not be aware of these concerns, leading either to worse decisions being made, or to representatives spending time and effort to inform their constituents of these concerns.[17]

In short, all things being equal, individual voters who support a given political candidate have interests in *sound political strategy* (i.e. knowing when to compromise, etc.), and sound political strategy is more likely to result from the official acting on their own judgments (as trustees) rather than deferring to voters' preferences (as delegates).

The Case for Replacing (3) with a More Precise Alternative

As we have seen, Guerrero's (3) merely says that these considerations hold, all things being equal. However, as we will now see, things are often not equal, in ways that we should want to take into account rather than set aside.

Limitations of the Epistemic Argument

Guerrero's epistemic argument holds that it is generally epistemically advantageous for voters to want candidates they support to function as their

trustees while in office. As we saw above, Guerrero illustrates this by way of a simple example: a butterfly enthusiast who believes a candidate will work to protect butterfly habitats (something the voter values).

Notice that, in the case so described, the voter does indeed have epistemic grounds for wanting the candidate to function as their trustee while in office. If elected, the official will likely have more knowledge of how to effectively craft and pass legislation protecting butterfly habitats than the voter—in which case the voter has epistemic grounds to defer to them. However, these epistemic advantages accrue to the voter Guerrero describes because in addition to (i) supporting the candidate, the voter in question also (ii) supports the particular values and policy aims the candidate official has while in office: namely, the candidate's commitment to protecting butterfly habitats.[18]

However, there are at least two ways in which (i) and (ii)—support for a candidate, and support for their particular values or policies—can, and often do, come apart.

First, voters often support candidates for office while only supporting part of the candidate's political platform. For instance, suppose I have never favored butterfly preservationism, but support and vote for a candidate who favors butterfly preservation because other parts of their political platform appeal to me (I generally like their views on economic policy, foreign policy, etc.). In this case, although I support the candidate, and have epistemic grounds to want them to function as my trustee on many issues (economics, foreign policy, etc.), there is one issue I care about for which I do not have epistemic grounds to favor them acting as my trustee: namely, butterfly preservationism, which I simply do not support.

Second, many voters support candidates both pre- and post-election, while also undergoing marked shifts in their values or policy preferences regarding what they want those same candidates to do while in office. For instance, suppose I voted for a candidate who shared many of my values, among them butterfly preservation. Now suppose that after the election, I still support the official I voted for (who is now in office), but I come to renounce my previous support for butterfly preservationism (let's say I discover that butterfly preservation undermines job creation, and I care about job creation more than butterflies). In that case, while I still support the relevant official, and voted for them because of their support for butterfly preservationism, I no longer support their butterfly-preservationist policies. Yet this clearly undermines the epistemic grounds I have for wanting that official to function as my trustee while in office, at least on that issue. Although I still support the official, I now have epistemic grounds for wanting them to function as my delegate on a specific issue, adjusting to my changing preferences regarding butterfly preservationism while they are in office.

The problem for Guerrero's epistemic argument, in other words, is this: although (3) may be strictly true—all things being equal, voters do have epistemic grounds to want candidates they support to function as trustees—things are often not equal, in ways that adequate theories of the rationality of

voting and ethics of political representation should pay attention to. And indeed, many voters seem to fall into the categories I just described. First, voters often support candidates and elected officials, while only supporting some of the candidate's values or policy aims. For instance, as of March 9, 2015, about 47 percent of Americans approved of *Barack Obama's* performance as US President, while less than 40 percent support his *policy aim* of reaching a nuclear deal with Iran.[19] Second, voters often change their values and policy preferences dramatically post-election, no longer supporting particular values or policy aims of the candidate post-election. For example, while Barack Obama won the 2008 US Presidential Election popular vote by a 52.9 percent to 45.7 percent margin,[20] and a slight majority of Americans polled supported Obama's health care reform plan early on his Presidency,[21] support for Obama's plan dwindled, *well* below 50 percent over his first several months in office,[22] and has remained *under* 50 percent ever since.[23] In short, while public support for Obama has remained fairly robust,[24] support for particular policy aims of his has fluctuated dramatically.

Fortunately, we can amend Guerrero's (3) to account for these complexities, as follows:

3* It is rational for individual citizens to prefer political candidates they support to function as trustees while in office *to the extent that the candidate's values/preferences align with their own*. However, to the extent that an individual citizen's values diverge from the candidate's, it is rational for the citizen to want the candidate to function as their delegate while in office, changing course in office to represent their (the citizen's) preferences.

Limitations of the Efficiency Argument

The same considerations apply to Guerrero's efficiency argument. Guerrero argues that if a voter supports a candidate, then, all things being equal, they should want the candidate to function efficiently while in office—something the candidate can do better functioning as trustee (making their own independent decisions) rather than as a delegate (deferring to the preferences of constituents while in office). Once again, however, things are often not equal. As we have seen, for many voters there is a big difference between supporting a candidate or official, and supporting specific values or policy aims. I may support a given official because, on the whole, I think they are doing a good job, and I agree with many of their values and policy aims. And indeed, on those policy issues (the ones I share with the candidate) I do have rational grounds to desire efficiency. But now suppose I support a candidate or official but do not support some of their values or policy aims. Is it rational for me to want them to advance those values or policy aims efficiently? Surely not. On those policy aims (the ones I do not support), I should want the official—even if I support them on the whole—to be *inefficient*, deferring to my opposing values or policy preferences

on the relevant issues. As such, voters have efficiency-based grounds to want elected officials they support to function as trustees while in office only to the extent that the candidate's values/preferences align with their own—and to function as delegates to the extent that their values or policy preferences diverge. But this, again is what (3*) affirms. So, once again, we have grounds for replacing (3) with (3*).

Limitations of the Holistic Argument

Finally, the same considerations also apply to Guerrero's holistic argument. Guerrero argues that, all things being equal, voters have rational interests in candidates they support taking a holistic rather than piecemeal approach to political decisionmaking ("Representatives who act as trustees are able to assess when it is worth losing battles to win the larger war, when it makes sense to compromise, which issues should be pursued in which order, and so on"). The problem again, however, is that whether and to what extent it is rational to desire candidates one supports to engage in holistic decisionmaking depends on the extent to which one shares the candidate or official's values and policy aims. If I support an official and agree with most of their policy aims, then indeed, I should want them to engage in holistic (rather than piecemeal) decisionmaking on those issues. However, suppose I fundamentally disagree with the candidate on some other values or policy aims (for instance, abortion law). When it comes to that issue, I may have reasons to want the candidate to pursue a more piecemeal approach. For instance, suppose I generally identify as a "social conservative" and support a socially conservative candidate, but my preference on one issue (the issue of gay marriage) shifts away from the candidate's post-election. In that case, even though I generally I may be satisfied in having the candidate generally adopt a holistic approach to decisionmaking (defending "socially conservative values" on the whole), I may have reasons to want decisionmaking to occur in a peacemeal fashion on this one issue. But this is just to say that Guerrero's holistic argument also favors (3*) over (3).

The Case Against Guerrero's (5): Identifying MNMs with Elections *and* Opinion Polls

Similar considerations undermine Guerrero's fifth premise:

5 The outcome of a popular vote is the best practical measure of a political candidate's popular support in their jurisdiction (i.e. their MNM).

First, (5) is predicated upon a false assumption: namely, that a given voter's support for a candidate is an all-or-nothing thing (i.e. one either supports a candidate, or one does not). However, this conflicts with commonsense. Support for a political candidate can intuitively come in degrees. For instance, sometimes one hears voters say things like, "I support candidate X wholeheartedly. I agree

with just about all of her values and policies." Other times, however, people say things such as, "I support X, but I'm not crazy about him. I like some of his policies but not others." Further, one often hears people say things like, "I don't support X as much as I used to. I would still vote for X, I suppose. But I do not really like many of the things they are doing in office." Indeed, a person's level of support for a candidate or official can fluctuate over time, depending on how closely the candidate or official's values or policy aims match one's own. For instance, I might strongly support a given candidate on election day because I favor their butterfly-preservation polices. However, suppose that after election day, I come to renounce butterfly preservationism. In that case, I may still support that official in office—yet my overall level of support for them may wane (viz. "I don't support them as much as I used to. I like their other policies, but I reject their stance on butterfly preservation").

As such, in order to determine what the best practical measure of popular support for a candidate or official is in their jurisdiction—that is, what their manifest normative mandate (MNM) is—we need to consider different types or levels of support. I submit that, in real-world politics, elections are commonly taken as indicating something like public support for a candidate's entire political platform. When candidates win by large margins, it is commonly said that they have a "strong mandate" to govern, pursuing the set of policies they supported during the election (at least temporarily; more on this shortly). On the other hand, elections are clearly poor measures of partial and changing support for a candidate. Since each vote for a candidate is an all-or-nothing thing (a vote is a vote), one's vote cannot signal how strongly one supports a candidate. Worse still, elections cannot measure fluctuating support—the extent to which voters support more, or fewer, of the candidate's values or policy aims once elected. Elections at most measure how many people on a single day (the day of an election) are willing to support a candidate's entire political platform. Yet the extent to which we support only parts of a candidate's platform, and fluctuations of support after election-day, are in principle beyond what elections can measure.

Are there better practical levels of these other types of support—partial support for a candidate, and fluctuating levels of support over time—than elections? There are: namely, carefully conducted, publicly regulated, corroborated, ongoing public opinion polls. Now, of course, opinion polls can be poorly designed; people may give different answers to the very same questions posed in a different order; and so on.[25] And indeed, Guerrero raises these worries himself in a footnote.[26] However, rejecting the value of public opinion polls on these grounds is unwarranted, and for two reasons. First, we should not overstate methodological problems with opinion polling. Although a single poll, like any other scientific study, may be poorly designed and its results erroneous, if a polling result is replicated many times by independent investigators over time using different samples, and the poll is open to and subject to public scrutiny (both of which do occur in the case of opinion polling), then there may be compelling epistemic reasons to trust the results (within their margins of error). Second, in order to

evaluate whether public opinion polls should be utilized to measure public support for candidates and officials, we need to compare them to elections—in particular, on the issue of what we are trying to measure. As we have just seen, elections have fundamental problems when it comes to measuring what voters have rational interests in measuring: the extent to which they support candidates or officials after election-day, and the extent to which they support particular values or policy aims of the candidate or official. Opinion polls may not be perfect, but when it comes to *these* measurement-targets (ongoing public support for specific policies), they are plainly superior to elections, since again, elections can neither measure strength of any individual's support nor the extent to which they favor or disfavor candidates' values or policy aims post-election (including while in office).

Accordingly, Guerrero's (5) is false. It should plausibly be replaced by:

5* The outcome of a popular vote is the best practical measure of *popular support for a candidate's entire political platform on election-day* ("full-platform MNM"). However, the outcomes of multiple independent public opinion polls are the best practical measure of a candidate's *level of public support* (or lack thereof) and *support on particular values and policy issues* ("particular policy MNM") on an ongoing basis.

Some might wonder why, if public opinion polls can measure ongoing public support (or lack thereof) for particular policies, elections are necessary at all. My contention is that aside from playing important roles in accountability and peaceful political transition (rotating new individuals into and out of office), elections are (as I mentioned earlier) normally understood as a *temporary* signal of public support for a holistic blend of policies endorsed by a given candidate during an election cycle. For instance, it is often said, when a candidate wins an election by a large margin with large turnout, that they have a "public mandate" to pursue the policies they campaigned on. However, this way of talking about a candidate's "mandate" is typically treated by the public, other politicians, and the media, as temporary. As the official's time in office goes along, and the public gets to evaluate the official's performance in office, members of the public, media, and political sphere appear to continually reevaluate whether the official "still has a mandate." Indeed, when public opinion dramatically changes on specific issues, it is often said that the official's mandate "has run out," and that they should change course to reflect changes in public opinion. This is precisely what (5*) entails: that elections give elected officials temporary mandates to pursue the blend policies they campaigned on, but only temporary mandates, to be continually reevaluated as time goes by, on particular issues, utilizing public opinion polls.

Why Voting is Often Irrational for Swing Voters

Now that we have seen that we should supplant Guerrero's argument with (3*) and (5*), respectively, what follows for the rationality of voting? First, given

(5*), a voter should only vote for a candidate they support if they are willing to lend (temporary) support to the candidate acting as a trustee on their entire political platform if elected. Since election results are, again, interpreted as a candidate's "mandate" to follow through on their political promises prior to the election, it is rational to vote for a candidate only if one supports enough of their proposed policies to favor them having a temporary mandate to pursue their entire political platform post-election. But, while this may often be true of members of a particular party's political base—people who, generally speaking, may be willing to authorize their favored party to govern as trustees if elected—it is surely not true of many "swing voters": voters who do not align with any particular political party, or who do align with a party but are considering voting across party lines in a given election. Swing voters, generally speaking, are voters who do not support the full policy platform of *any* candidate up for election. They are often "undecided" on who to vote for precisely because, although they may prefer *parts* of one candidate's policy platform, they also find themselves attracted to parts of the *other* candidate's platform as well. When (3*) and (5*) are inserted into Guerrero's argument, it follows that it is often irrational for these voters to vote. Voting for *any* candidate would give added (albeit temporary) legitimacy to that candidate pursuing their entire political platform while in office. Yet this is precisely what the swing voter should *not* want. Given that they only support part of the candidate's policy platform, they should want *no* candidate to receive a public mandate in support of that candidate's entire political platform. Rather, the swing voter should want whichever candidate is elected to pursue whichever mix of policies they, the swing voter, most support on an ongoing basis (which, issue by issue, are better represented not by election outcomes, but ongoing opinion polls).

These implications of the revised argument are, I believe, highly intuitive. It is intuitively rational for members of political parties' base constituencies to vote precisely because, as a member of the party's base, one generally favors the party's values and policy aims—aims that, on epistemic grounds, efficiency grounds, and holistic grounds, one wants to enable one's favored candidates to pursue effectively: which is what resounding electoral wins do (providing a "public mandate" to govern). Swing voters, on the other hand, do not firmly side with the values or policy aims of any particular candidate, but are instead torn between opposing candidates' values, policy preferences, or personal qualities relevant to advancing their values or aims. Consequently, (3*) and (5*) reveal—in an intuitive fashion—why it is often irrational for swing voters to vote. It is irrational for them because higher vote totals lend normative support to the candidate serving as a trustee with respect to their political platform as a whole, which swing voters have grounds to want to avoid. According to (3*) and (5*), it is far more rational for swing voters not to vote, as that will require whichever candidate who gets elected to serve as a delegate, responding to their constituents' preferences, including the preferences that they, the swing voter, have that diverge from the candidate's preexisting values or aims.

Why Elected Officials Have a Qualified Duty to Obey Opinion Polls

Finally, in the same way, (3*) and (5*) entail a qualified duty of elected representatives to change course in response to opinion polls post-election. Premise (1) of Guerrero's argument, which I accept, holds that whether an elected official should function as a trustee or delegate depends on their level of constituent support—that the more support a candidate has, the more they should function as a trustee, and the less support they have, the more they should function as a delegate. Yet, (3*) and (5*) entail that support should be measured not merely in an "all-or-nothing fashion"—on the basis of election results—but rather on an ongoing basis, utilizing ongoing public opinion polls: as only public opinion polls can measure fluctuating levels of support for a candidate, and their particular values or policies, post-election. Accordingly, when (3*) and (5*) are combined with Guerrero's (1), the implications are these: the higher a candidate's vote total on election day and the higher their overall level of approval stays in opinion polls, the more they should function as trustees of those who voted them into office. Conversely, candidates who enjoy lower vote totals on election day or falling approval ratings while in office should function more as delegates, responding to changes in public preferences, so as to represent their constituents' evolving interests.

These too, however, are intuitive implications—indeed, ones often asserted in daily political life. Candidates who enjoy resounding electoral wins and/or maintain high approval ratings in opinion polls post-election are commonly understood as having public support for governing, whereas, regardless of what might have happened on election-day, consistently plummeting opinion polls (such as in the Vietnam War, etc.) are taken to be revocation of public support for "failed policies," and a public demand for a change of course.

Finally, as such, the argument has provocative and wide-ranging implications for political ethics. Consider two related issues under debate in 2016 US Presidential Election: the question of whether US President Barack Obama has the moral authority to nominate a new Supreme Court Justice during his final year in office, and whether it is morally right or wrong for Republican members of the US Senate to attempt to obstruct confirmation of the President's eventual nominee. Although the current argument does not specify precisely how high elected officials' MNMs must be for them to function as trustees rather than delegates, three opinion poll results are notable: President Obama's overall public approval rating from February 22–28, 2016 is 48 percent approve/48 percent disapprove,[27] Congress' is 14 percent approve/81 percent disapprove,[28] and over 56 percent of US citizens believe the Senate should hold hearings and vote on Obama's eventual nominee.[29] The revised version of Guerrero's argument that I have defended thus suggests, first, that the President is roughly equally morally justified in functioning as the American people's trustee and delegate at present—and so is not violating any duty to the American populace by putting forth a Supreme Court nominee. Second, insofar as a supermajority

of Americans disapprove of Congress but 60 percent polled want the Senate to vote on Obama's eventual nominee, the revised argument suggests that US Senators as a group have a strong moral duty to function as Americans' delegates, as well as a duty as a group not to obstruct Obama's nominee. Finally, however, insofar as citizens in some US States are strongly anti-Obama (and opposed to him nominating a new Supreme Court justice), *particular* Senators may nevertheless have a duty to their constituents (the citzens of their State) to attempt to obstruct the path of Obama's nomination. But these are all, I believe, entirely plausible conclusions. Obama's overall level of public support *does* suggest that he does have the moral authority to submit a nominee (at least as much as moral authority he lacks), public support for his nominee being heard and voted on by the Senate *does* suggest that the Senate has a collective duty to hear and vote on the nominee—while, at the same time, strong opposition in certain US States to Obama successfully appointing a new Supreme Court Justice does suggest that Senators in those states should aim to obstruct his eventual nominee. Although these implications are obviously in tension with one another, they are precisely the implications that I believe a sound democratic theory of political ethics should have: elected officials should represent their citizens. Senators who represent citizens favoring obstructionism should obstruct, those who represent citizens against obstructionism should not obstruct—and the final outcome (obstruction/non-obstruction by the Senate as a whole) should be a function of the level and kind of support that different Senators have in their respective states. That, intuitively is what democratic representation should be—each representative representing the will of their constituents, and the collection of representatives representing the will of the whole—and it is precisely the political ethics that our revised version of Guerrero's argument entails.

Conclusion

We have seen that when two premises in Guerrero's argument are corrected, the revised argument has provocative—yet quite intuitive—implications for the rationality of voting and political ethics. First, voting is generally rational for members of a political party's base. Second, voting is often *not* rational for swing voters. Finally, the lower an elected official's public support in opinion polls while in office, the greater the official's moral duty to change course, to better satisfy the changing values and priorities of the citizens they represent.

Notes

1 Alexander A. Guerrero, "The Paradox of Voting and the Ethics of Political Representation", *Philosophy and Public* Affairs, 38, no. 3 (2010): 272–306.
2 Ibid: 275–289.
3 Ibid: 279.
4 Ibid: 280.
5 Ibid: §VI.

6 Ibid: 275–276.
7 Ibid: 297.
8 Note that Guerrero does not take his argument to demonstrate that it is always rational for individuals to vote. Guerrero recognizes that this stronger thesis is implausible, as one's reasons for not voting (e.g. not being able to get off work to vote) could still outweigh one's reasons to vote. The relevant point is simply that Guerrero's MNM argument plausibly explains why, *all things being equal*, it is rational to vote for candidates one supports. See ibid: 296–297.
9 William Riker and Peter Ordeshook, "A Theory of the Calculus of Voting," *American Political Science Review* 62 (1968): 25–42; Alan Carling, "The Paradox of Voting and the Theory of Social Evolution," in *Preferences, Institutions and Rational Choice*, ed. Keith Dowding and Desmond King (Oxford: Clarendon Press, 1995): 20–43.
10 Stanley Benn, "The Problematic Rationality of Political Participation," in *Philosophy, Politics, and Society: Fifth Series*, ed. Peter Laslett and James Fishkin (New Haven, Conn.: Yale University Press, 1979).
11 Alvin Goldman, "A Causal Responsibility Approach to Voting," *Social Philosophy and Policy* 16 (1999): 201–17, at p. 217; Richard Tuck, *Free Riding* (Cambridge, Mass.: Harvard University Press, 2008): 50–62.
12 See Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), pp. 73–75.
13 Guerrero (2010): 274, fn. 7.
14 Ibid: 290 (my italics).
15 Ibid: 291.
16 Ibid.
17 Ibid: 292.
18 The distinction here between supporting a person or candidate and supporting that person or candidate's specific values or aims is crucial. It is entirely possible, on Guerrero's definition of "support" for an official (and indeed, on any commonsense construal), for a person to support an official but *not* support some of the official's values, policies, or aims. Guerrero defines support as (i) an attitude toward a candidate or official in office, or (ii) being content to authorize the person to govern (ibid: 275). One can, clearly, be content to be governed by an official even if one disagrees with some (or even all) of that official's aims. For example: I may be *content* to be governed by Jones, even if I dislike some or even all of Jones' political aims, because I dislike his political competitors' aims even more.
19 www.wsj.com/articles/the-wall-street-journalnbc-news-poll-1378786510?tesla=y (accessed July 14, 2015).
20 www.fec.gov/pubrec/fe2008/2008presgeresults.pdf (accessed July 14, 2015).
21 www.rasmussenreports.com/public_content/politics/current_events/healthcare/june_2009/50_favor_obama_health_reform_plan_45_oppose_it (accessed July 14, 2015).
22 www.rasmussenreports.com/public_content/politics/current_events/healthcare/september_2009/health_care_reform (accessed July 14, 2015).
23 www.pollingreport.com/health.htm (accessed July 14, 2015).
24 Compare Obama's approval ratings at www.gallup.com/poll/126809/obama-approval-rating-lowest-yet-congress-declines.aspx, which hovered around 50 percent during Jan–March 2010, to his health care plan ratings: www.rasmussenreports.com/public_content/politics/current_events/healthcare/september_2009/health_care_reform, which hovered around 40 percent over roughly the same period (accessed July 14, 2015).
25 See e.g., www.pewresearch.org/methodology/u-s-survey-research/questionnaire-design/ (accessed October 25, 2016).
26 Guerrero (2010): 276, fn. 11.

27 www.gallup.com/poll/116479/barack-obama-presidential-job-approval.aspx (accessed March 7, 2016).
28 www.gallup.com/poll/1600/congress-public.aspx (accessed March 7, 2016).
29 www.people-press.org/2016/02/22/majority-of-public-wants-senate-to-act-on-obamas-court-nominee/ (accessed March 7, 2016).

14 A Defence of the Right Not to Vote

Ben Saunders

Compulsory voting is often criticized for violating an alleged right not to vote.[1] Certain defenders of compulsion have sought to respond to such accusations,[2] but this task is complicated by the fact that the right not to vote – while often invoked in actual political debate – has received little, if any, philosophical defence. My aim, in what follows, is to clarify and defend a right not to vote.

I shall say more about what I mean by this right not to vote below, but first I wish to set aside some possible objections to my position. It might be objected that people are not forced to vote, or even attend the polls, but merely fined for not doing so. Since citizens can still abstain, they remain free to do so.[3] However, people are usually concerned with more than mere possibilities of action. To have sanctions attached to a particular course of action burdens, and thus abridges, one's right, even if it is not wholly removed. Thus, I do not think it adequate for defenders of compulsion to appeal to Steiner's definition of liberty.

A number of advocates of compulsion have argued that the right not to vote is respected since, at least with the secret ballot, only turnout *can* be enforced.[4] However, at least some compulsory voting laws – including Australia's – do technically require citizens to cast valid votes, even if this is currently unenforceable.[5] Further, whether or not such measures are enforceable depends on the secrecy of the ballot; voting itself would become an enforceable duty if arguments for public voting were accepted.[6]

To be sure, advocates of (so-called) compulsory voting need not favour a requirement to vote. Some explicitly advocate compulsory turnout only.[7] Even this requirement, however, might be objectionable. As Annabelle Lever has argued, to say that this respects freedom of conscience is rather like saying that mandatory attendance at church on Sunday would not violate freedom of religion, provided that no one was actually forced to pray.[8] Simply forcing people to attend the polls may be *less* objectionable than forcing them to vote, but it does not follow that it is easier to justify. While objections to such a policy are less weighty, the benefits that it brings are also less clear, so it may be less likely that the benefits of such a policy outweigh the costs than in the case where valid votes are required. The right that I defend is not simply a right not to cast a valid vote, but a right not to be compelled to attend the polls.

Is There a Duty to Vote?

Not all of those who believe in a duty to vote defend compulsion, since not all duties are properly enforceable by the state's legal apparatus. Nonetheless, many advocates of compulsion suggest that there is a moral duty to vote, which justifies creating the legal duty. As I shall show in what follows, the existence of such a duty is not fatal for my argument, since not all duties are properly enforceable. However, I wish to begin by setting out some reasons to doubt that there is any *general* duty to vote.

I do not deny that some citizens are morally required to vote on at least some occasions. It is fairly easy to establish this. Suppose that I promise my mother that I will vote. In this case, assuming that such a promise is valid, I have an obligation to vote and wrong my mother if I do not do so.[9] Such examples are not particularly interesting for our present purposes. I am not aware of anyone who doubts that promises (made in appropriate circumstances: without duress, deception, etc) create moral obligations, but most people have never promised to vote.

There may also be circumstances in which one has a duty to vote without having done anything to incur this. Suppose, for example, that a neo-Nazi party stands a realistic chance of winning an election. Here, one may be under a duty to vote against them in order to promote justice. To be sure, the chances of your vote making a difference are slim, given that you may be one among millions of voters. Derek Parfit suggests that a slim chance of making a difference may still have considerable expected value, if the difference made is large enough.[10] However, Jason Brennan argues that, even where the difference between two candidates is considerable, the expected value of a single vote is often near to zero.[11] For instance, suppose that Alpha's victory over Beta is worth $33 billion, there are 122,293,322 voters (as in the 2004 US presidential election), and the probability of any given voter supporting Alpha is 50.5 per cent (making it a close election). In this case, the expected value of one voting for Alpha is $4.77x10^{-2650}. Still, it may be that one should vote against the neo-Nazis for expressive reasons, even if the instrumental effect of one's vote is practically zero. For present purposes, I need not deny this. My claim is merely that there is no *general* duty, binding on all or almost all citizens in all or almost all elections, to vote.

A general duty to vote might be defended by appealing to some more general moral theory or principle. For instance, one might seek to establish a duty to vote by appealing to some version of the utilitarian, or 'greatest happiness', principle. The argument, in its simplest form, would go something like this:

P1 You have a duty to do what most promotes the general happiness.
P2 Your voting is what most promotes the general happiness.
C You have a duty to vote.

This argument is valid, but both premises are controversial. The first premise states the utilitarian position, which has been subject to numerous criticisms.

Even if we accept this though, premise two is exceedingly doubtful. As we have seen, the instrumental effects of a single vote are often near-zero. It seems rather unlikely that the best way for me to promote the general happiness is to vote when instead I could, for instance, visit a lonely relative or help an elderly neighbor with her shopping.

A duty to vote might alternatively be given quasi-Kantian foundations. For instance, one might argue that the citizens of a democratic state cannot will that their fellow citizens abstain from voting since, if everyone did so, democracy would collapse.[12] However, this merely serves to illustrate difficulties with the universalization test. Many seemingly innocuous maxims cannot be willed universally. For instance, the maxim 'do not take the first slice of cake' – if no one went first, then no one would have cake. Consider also the case of reproduction. If no one reproduced, the human race would die out, but if all couples had four children then over-population would be a greater problem. Intuitively, we think it acceptable for some couples to have no children and others four children, because we know that not everyone will act in that way. Standard applications of the universalization test struggle to arrive at this common-sense conclusion since they focus on the consequences of *everyone* behaving in a certain way. Perhaps a better test is to ask 'could you will that anyone feels free to act in this way?' It would be unobjectionable for any individual to choose to remain childless, given that others are reproducing. Similarly, it seems unobjectionable for any particular individual to refrain from voting, given that others are voting.

One might argue that, although not everyone needs to vote, those who do not take unfair advantage of those who do; their behaviour is wrong because it is an instance of free-riding.[13] However, free-riding is not always wrong. Suppose my neighbors plant beautiful flower borders in their front gardens; I benefit from living in a more attractive street, but I do not pay anything for this benefit.[14] Furthermore, even if we think that those who benefit from a cooperative scheme should contribute towards its costs, they need not contribute through voting. Citizens can contribute to their community in other ways, such as paying taxes, obeying the law, military service, and so forth. Finally, even if we think that citizens should vote, there is no reason to suppose that every citizen must vote in every election. Provided that each citizen votes in most elections, some would be able to abstain on any given occasion, without thereby free-riding on the contributions of others.

Another strategy is to ground a duty to vote in the role of the citizen. Luke Maring has recently defended such an approach.[15] He argues:

P1 Citizens of democratic states have a *pro tanto* moral duty to fill their role excellently.
P2 Excellent citizenship requires not disrespecting democracy.
C1 Citizens of democratic states have a *pro tanto* moral duty not to disrespect democracy.
P3 In certain circumstances, failing to vote disrespects democracy.

C2 In certain circumstances, citizens of democratic states have a *pro tanto* duty to vote (not to fail to vote).[16]

Maring devotes most of his article to defending premises two and three, arguing that abstention disrespects democracy and is therefore *prima facie* incompatible with excellent citizenship. Objections to the first premise, he suggests, rely on an implausible voluntarist account of duties.[17] I agree that not all moral requirements are voluntarily incurred. For example, children may owe duties to their parents, though they do not choose their parents or even to be born.

Thus far, Maring's argument is on solid ground. However, premise one claims not only that citizens have some non-voluntary duties but, in particular, that they have a duty to be *excellent* citizens. This claim strikes me as too demanding. Why are we required to *excel* in our social roles, rather than merely being good enough citizens? Consider, again, familial relations. Whether or not we have reason to become parents (in the sense of bringing children into the world), and whether or not biological parents have special rights or obligations vis-à-vis their biological offspring, I take for granted that those who occupy the role of primary caregivers for young children have moral reasons, and perhaps an obligation, to occupy this role. Nonetheless, it remains an open question whether they have an obligation to *excel* in this role. Perhaps excellent parents should be commended, but maybe this is because they go *beyond* what is required of them. When we are required to fill some social role, what we are ordinarily required to do is to perform it well enough, but this threshold will usually be less demanding than excellence. Thus, Maring would need to show not merely that we are morally required to be citizens, but that we are morally required to be *excellent* citizens.

Further, premise three of Maring's argument is plausible only because the 'in certain circumstances' qualifier is left without specification. I agree that *some* failures to vote may be disrespectful of democracy. Someone who attaches no importance to voting, for instance, might be someone who attaches no importance to democracy. However, I do not think that all – or even most – failures are necessarily disrespectful of democracy. Someone might value democracy but have reasons for not voting. For instance, someone who is very busy on election day might not vote and might regret not doing so. I would think that her regret signifies that she respects democracy. Maring might reply that she could be excused for not voting, but her failure to vote is still *prima facie* wrong and this is why she feels regret. There are, however, other examples. Someone might not vote on principled grounds. For instance, you might not vote in an election that takes place the day before you are due to emigrate, on the grounds that you are no longer part of the relevant demos.[18] In this case, one might better display respect for democracy by not voting than by voting.

In fact, it may be that, in certain circumstances, voting can be disrespectful to democracy. Suppose that someone votes, but they regard it as frivolous: they do not attend to party manifestoes or political debates, but vote randomly or even perniciously (say, they vote for a certain party to spite a neighbor who

they know dislikes that party). Voting in such a way might be wrong for various reasons, including the fact that it is disrespectful of democracy.[19] In short, it may be that one disrespects democracy whenever one treats one's vote as inconsequential, whether or not one votes. I suggest that someone who deliberates seriously about how, or whether, to vote respects democracy, even if they ultimately decide not to vote. Conversely, someone who votes casually, without giving the matter much consideration, may be less respectful of democracy. Thus, even if citizens are under a duty not to disrespect democracy, it is not clear that this duty favours voting over non-voting. At least, careful voting may be the ideal, but it may be better that some who do not live up to this ideal abstain, rather than that they vote carelessly.

Thus, it seems to me unlikely that there is any general duty to vote. To be sure, some people may be morally required to vote on some occasions. Indeed, it might be that all of us have an imperfect duty to vote on some occasions, though with some latitude to determine exactly when we will do this.[20] Such an imperfect duty is not properly enforced by coercing everyone to vote in every election. Indeed, even if there is a general and perfect duty to vote, such that citizens act wrongly by abstaining, it does not follow that this duty is properly enforceable by legal coercion. I assume that we are all under a *prima facie* duty not to lie, but I do not think that the state should impose legal sanctions on liars. Thus, even if there is a general moral duty to vote, it is not obvious that it should be made a legal duty too. In what follows, I shall grant – for the sake of argument – that the points made in this section are unconvincing and suppose that there *is* a duty to vote. Nonetheless, I shall argue that citizens ought not to be forced to do what they have a duty to do, since this would violate a right not to vote.

Clarifying the Right Not to Vote

Suppose that there is a general obligation to vote, so most citizens, unless excused, act wrongly when they do not vote. It is still possible that citizens have a *right* not to vote, even though they act wrongly by exercising this right. The claim that A has a right to ϕ must be distinguished from the claim that it is right for A to ϕ. One may have a right to do something that is wrong: for instance, it may be wrong to say something offensive, though it falls under one's right of free speech.[21]

We can usefully appeal to Hohfeld's analysis of juridical relations to distinguish two things that the right not to vote may mean.[22] Hohfeld defines the following relations thus: Alpha has a *claim* against Beta is the correlate of Beta owing a duty to Alpha. Note that the duty in question may be positive or negative. For instance, I may have a claim not to be assaulted, correlative to your negative duty not to assault me, and, if you try to assault me, I may have a claim against others (such as the police) to intervene, corresponding to their positive duty to do so. According to Hohfeld, only claims are, strictly speaking,

rights.[23] However, others are happy to allow that other jural relations, such as privileges or powers, are rights where they meet certain conditions.[24]

Alpha has a *privilege* (or liberty), with respect to Beta, to ϕ if and only if Alpha owes no duty to Beta not to ϕ.[25] Note that privileges, like claims, are relations involving two agents. Some privileges are held against all agents, e.g. I have a privilege against everyone to scratch my nose, because I do not owe anyone a duty not to scratch my nose. One can, however, have a privilege with respect to some people but not others. For instance, I owe no duty to you not to play loud music at home, meaning that I have a privilege with respect to you, but I may not have this privilege with respect to my roommate or neighbors (since I may owe them a duty not to play loud music).

So, if Beta owes Alpha a duty to vote, then Alpha has a claim that Beta votes. If Beta does not owe Alpha a duty to vote, then Beta has a privilege against Alpha not to vote. These are Hohfeld's first-order jural relations. Hohfeld's account also includes second-order relations.[26] A power is the ability to alter first-order relations, e.g. to create or negate a duty (and thus corresponding claims or privileges), while to have an immunity means that one's first-order relations cannot be altered (if Alpha has an immunity with respect to Beta, then Beta lacks power with respect to Alpha's jural relations). These second-order relations are not so important for our immediate purposes. There may be an argument as to whether the state has the power to impose upon Beta a duty to vote, or whether Beta has an immunity protecting her from the imposition of such a duty, but my current argument does not involve these second-order relations.[27]

Note that Hohfeld's jural relations are separable. I may have a privilege, without having any claim against interference.[28] For instance, a boxer has a special privilege to punch his or her opponent, though said opponent has no duty to allow this. Conversely, one may have a claim against interference, though one lacks a privilege. For instance, if you bought me an expensive birthday present, then I may have a duty to thank you or to buy you something when your birthday comes. In this case, I lack the privilege to do otherwise – I owe you a duty and thus wrong you if I do not do this – yet it might still be the case that you have a duty not to force me to do what I have a duty to do, i.e. I have a claim that you do not force me to comply with my duty. This would be an example of a right to do wrong.

What is the Right Not to Vote?

The supposed 'right not to vote' may refer to a privilege. This amounts simply to saying that one has no duty to vote and thus wrongs no one by not voting. This, I suspect, is what many individuals mean when they claim that there is a right not to vote. However, that you have a privilege to ϕ does not mean that others act wrongly in interfering with your ϕ-ing. To say that we do no wrong in not voting may be significant, but a mere privilege not to vote cannot on its own support an objection to compulsory voting. One might try to argue that the

law should not coerce us to do anything that we have no antecedent duty to do, and thus that we should not be coerced to do anything that we have a privilege (against all others) not to do, but this would require showing that the state's authority is very limited indeed.

Arguments about whether or not there is a duty to vote do not, therefore, settle the question that interests me here. It might be that there is no (pre-legal) duty to vote, but nonetheless the state can justifiably force people to vote. Conversely, it might be the case that we have a duty to vote but that this duty is not an enforceable one, because we have a claim not to be interfered with even when acting wrongly.

The right that interests me is a *claim* not to be prevented from not voting. This claim, if it exists, is the correlate of a duty on the part of others not to make us vote. Thus, it is this putative claim that is threatened by compulsory voting laws. I seek to show that those who would force us to vote violate a duty of non-interference that they owe to us. Before proceeding, however, several clarifications are in order.

First, I am concerned with moral, rather than legal, rights. In a state where voting is legally required, such as Australia, citizens do not have a *legal* right not to vote, but this is trivial. I am concerned with a common objection to such laws, that they violate the right of citizens not to vote. This is not simply the observation that such laws take away a legal right that citizens otherwise would have had, but rather an assertion that these laws violate a prior moral right that ought to be respected. Thus, my claim is that there is a *moral* right not to vote, which may or may not be respected by positive law.

Second, we must distinguish actually voting from merely turning out at the polling station (or even placing a spoilt ballot in a box). As noted above, in many cases only turnout is actually enforced, and at least some advocates of compulsion suggest that this is all that should be enforced, even if it were possible to do more.

The right not to vote that I wish to defend is not simply the right not to cast a valid ballot having attended the polls, but a right not to turn out in the first place. Though it may be something of a misnomer, compulsory turnout laws (where they exist) are frequently termed 'compulsory voting' laws.[29] Similarly, what I term the right not to vote is, more strictly, a right not to turn out. I think that even being required to attend the polling station is objectionable (albeit less objectionable, of course, than being required to attend the polling station and, once there, to cast a valid vote).

So, by a 'right not to vote' what I mean is that citizens have a claim that others do not force them to attend the polls, which is the correlate of the duty that others have not to force them to attend the polls. Note that my claim against you that you do not force me to attend the polls implies only that you wrong me if you force me to attend the polls. It does not imply that I have any further claim, against third parties, that they intervene in order to prevent you from violating my right. Though others may have a duty to intervene, this is not something that I defend. My position is simply that the state owes a duty, to

most citizens most of the time, not to force them to attend the polls. (I leave open the possibility of *selective* compulsory voting.[30])

Note that, since the right not to vote is invoked in protest against compulsory voting laws, I am concerned with rights *against the state* in particular. I take it as relatively uncontroversial that I have a right against most other individuals in my society that they not interfere with my non-voting. You have little standing or authority to force me to do anything, but (setting aside anarchist objections to political authority) the state more plausibly does.[31] The state has the Hohfeldian power to impose certain duties on me, as when it sets a speed limit, thereby imposing on me a duty not to exceed 30mph along a particular stretch of road. I presumably had a prior duty to drive safely, but this may have been consistent with exceeding 30mph on that particular road. In setting speed limits, the state modifies my general duty and creates this particular duty. Possibly the state also has the power to remove my claim to non-interference, licensing it to compel me to vote.

Defending the Right Not to Vote

Having outlined what I mean by a right not to vote, I will now argue that most people do in fact possess such a right. The case I offer will not, I concede, be conclusive. A complete account of any single right would require a complete account of all the rights that we possess, since the limits of any one right may be set either by other rights of the same person or the rights of other people.[32] If this is correct, then we can only make definitive claims about Alpha's right to X once we know also about her other rights Y and Z, and about Beta's rights, Gamma's rights, and so on. A full account of rights is, of course, beyond the scope of this chapter. Nonetheless, I trust that we can say something – albeit tentative – about a single right in isolation, by considering the interests that support it and the competing interests that limit it, although these remarks must be considered provisional until it is shown how the proposed right fits into a larger body of rights.

I assume, following H. L. A. Hart, that there is a general right to be free.[33] This right to be free is not absolute, but has certain limits; for instance I have a right to extend my arm, but not if this will mean punching you in the face. The limits of our rights, I suggest, depend on balancing the interests that these rights are supposed to protect. This is not intended to commit me to an 'interest' rather than a 'will' theory of rights.[34] Nor are these remarks intended to suggest that rights can be overridden by consequentialist considerations. Once our rights are appropriately specified, they constrain consequentialist reasoning, but this is compatible with consequentialist considerations figuring in an account of what rights we have. My present concern, then, is whether our general right to freedom can be limited, such that it does not include a right not to vote.

One commonly accepted justification for limiting an individual's freedom is to protect the rights of others, as when my right to move my arm is limited by your right to bodily integrity. This, I suspect, is the strongest justification for

restricting individual liberty. I shall, therefore, postpone consideration of this possibility until later. Before this, I wish to consider, and reject, some less promising justifications for limiting the right to liberty.

First, let us consider paternalistic reasons. It is sometimes suggested that individuals may be coerced for their own benefit; for instance, we might prevent individuals from engaging in various forms of risky or self-destructive conduct. Much ink has been spilled concerning the justifiability of such paternalism, particularly by the state. Anti-paternalists argue, *inter alia*, that individuals are more likely to know what is good for them than state officials are, and have a greater interest in their own good, so it should generally be presumed that people's free actions are not harmful to them.[35] Advocates of paternalism have often responded that individuals are not always as rational or as free as might be supposed and that often present choices, for instance over diet, may have long-term health consequences that consumers fail to appreciate.[36] This is not the place for a detailed examination of the rights and wrongs of paternalism. Rather, I will assume – for sake of argument – that paternalism is at least sometimes justifiable and then consider whether this is likely to justify compulsory voting.

I can think of two putative justifications for compulsory voting that rest on paternalistic considerations. First, it might be argued, following the tradition of 'civic humanism'[37], that political participation is an ingredient in the good life and thus that forcing people to participate in elections makes them lead better lives than they otherwise would have. However, the suggestion that the political life is the uniquely best form of human life is likely to strike many as far-fetched, particularly if it only amounts to periodic voting in elections. The ancients placed particular importance on political participation because they were able to engage in more meaningful forms of participation than this, participating directly in the collective life of their city-states. Even if the political life is a good one, it is not clear that voting in elections is sufficient, or necessary, to realize this good. Moreover, it might also be that this good can only be realized if people freely choose to participate; if they do so simply because they are forced to then the good is unlikely to be realized. It might be replied that people will come to value participation for the right reasons once they are habituated to it. I am not sure whether this is true but, if it is, then it looks as if it only justifies temporary coercion, for long enough to instil the appropriate habits.[38]

A second paternalistic argument focuses on the instrumental value of political participation. One reason why all groups need the vote is so that they can protect their own interests which are otherwise likely to be neglected, even by benevolent rulers. However, simply having the right to vote is not necessarily enough. If someone does not exercise her right to vote, then her interests may still be ignored. Thus, it might be suggested that individuals should be made to vote in order to protect their own interests. However, there are two problems with this argument. First, it assumes that individuals are competent to protect their interests. While individuals are usually best placed to know their interests, they may not know what will promote those interests, so ignorant voters might

vote for parties or policies that will not serve their interests. Second, as shown earlier, the effect of any single vote is minimal, so it's unlikely that forcing an individual to vote will do much to promote her interests. A more sophisticated defence of compulsion focuses not on the individual but the group: compulsory voting is a way of overcoming collective-action problems facing marginalized groups, since it is only rational for each individual to vote if they are assured that enough of their peers will vote.[39] While this might be considered a form of 'group paternalism', the justification for compelling any given individual depends on the benefits for others, rather than herself. I will therefore postpone consideration of such arguments.

Now let us consider moralistic reasons. I argued, in the first section, against the existence of any general duty to vote. However, for the purposes of the rest of this paper I am assuming that these arguments are mistaken and that there is in fact a duty to vote. Even so, it does not follow that it is the business of the state to enforce such duties. To be sure, many laws – such as prohibitions on theft and murder – forbid actions that are, at least in most cases, morally wrong. The justification of these laws, however, need not appeal to the wrongness of the actions concerned, since the laws can be justified in order to prevent the harms that victims of theft and murder suffer. Preventing harm (to non-consenting others) is a commonly accepted justification for laws and one that I will turn to shortly. For the time being, I am concerned with whether laws should enforce morality as such, that is, whether something should be forbidden simply because it is wrong, when there are no other reasons for prohibition. Appropriate 'test cases' here are cases of harmless wrongdoing.[40] Consider cases such as blasphemy or masturbation, which have been considered wrong in various cultures. My question is not whether these actions really are wrong, but whether it is the business of the law to punish these wrongs. The answer, I would suggest, is no.

Harmless wrongs do not harm any particular individual, which raises the question why such actions are wrong. In many cases, it seems that these moral injunctions have religious origins. A secular state ought not to enforce these requirements because the state is concerned with temporal order, rather than the salvation of its citizens. If certain conduct really is offensive to the gods, then this is the business of the gods, and not secular courts.[41] Furthermore, religious pluralism results in disagreement about morality. For instance, Muslims are forbidden to eat pork, but the state need not forbid the eating of pork, not only because it is not the role of the state to ensure that its citizens are good Muslims but *a fortiori* because not all citizens are Muslims at all. This example highlights the fact that a pluralistic state is bound to contain a variety of differing views about morality. Given that some citizens may find idolatry repugnant, but others may consider it a moral requirement, any attempt of the state to take sides in this matter is bound to appear wrong to some of its citizens.

The usual response is for the state to neither prescribe nor proscribe such practices, allowing citizens to act according to their conscience. Those who find idolatry distasteful need not engage in such practices themselves, but ought not

to impose their beliefs upon others, at least not through the coercive power of law. Some may consider it their moral duty not only to refrain from such conduct themselves, but also to deter or prevent others from engaging in this conduct. These people are free to encourage their fellow citizens to modify their behaviour, but not to use the coercive power of law, for this would not be justifiable to those who do not accept their views.[42]

I do not need the strong claim that it is *never* permissible for the state to prohibit harmless immorality, but only the weaker claim that it should not prohibit what is not generally accepted to be wrong. Prohibitions on, for example, incest may be justifiable because, even if purely moralistic, there is near-unanimous agreement across almost all societies that incestuous unions are wrong.[43] There is no such agreement, even within a single society, on a duty to vote.[44] Even if there *is* a general duty to vote, as I am allowing, there is reasonable disagreement about it. Thus, unlike incest, the general presumption of innocence is not overcome in the case of nonvoting.[45] Those who deny the existence of a duty to vote may be mistaken, but they are not unreasonable. As such, the exercise of state coercion over them cannot be justified in terms that they must accept.

So far, I have considered whether the state might compel its citizens to vote to prevent bare wrongdoing. However, compulsion is generally accepted in order to prevent harm. Recent advocates of compulsory voting have sought to show that abstention harms others, since if members of a particular group are less likely to vote they make it the case not only that their interests will be neglected but also that the interests they share with others like them will be neglected.[46] For instance, if young people are less likely to vote, then politicians will be less attentive to the interests of the young. Further, there is a collective-action problem here, since if it is known that young people are less likely to vote, then young people have less reason to vote, because the interests of the young are likely to be under-represented in any case. Compulsory voting offers one solution to this problem. If everyone has to turnout, then it becomes rational for everyone to vote.[47]

This argument for compulsory voting is more promising than those considered so far, since it is generally accepted that individuals can be compelled in order to prevent them from harming others. However, harm prevention can only justify compulsion if the compulsion is effective, in the sense of either reducing the harm or at least having some likelihood of doing so. Compulsion cannot be justified in order to prevent harm if there is no connection between the compulsion and reduction in harm.

Let us accept that widespread abstention amongst the members of a particular group is likely to lead to that group's interests being neglected, or underweighted, by elected politicians. The question, however, is whether compelling these people to vote will solve this problem. It is not clear that it will. First, those who are forced to turn out, but disengaged from politics, may not vote anyway. If it is known that young people are still less likely to vote, then compulsory turnout will not have the desired effect. Second, even if we assume that those who turn

out are more likely to vote, there is no guarantee that this will be good for their peers unless these people vote well (i.e. for policies that promote their interests, consistent with social justice). If people go to vote, but vote for policies that are contrary to the interests of their group, then their actions are more harmful than if they did not vote at all. Thus, forcing people to vote is not guaranteed to prevent harm. Whether it is likely to do so or not is an empirical question that cannot be settled here, but the evidence is, at best, contested.[48]

Regardless of any benefits that it realizes, compulsion comes at a cost; it will interfere with the interest that citizens have in liberty. This interest in liberty can justifiably be abridged, when necessary to prevent harm, but that is not obviously the case here. Balancing the interests at stake on each side, it seems to me that the interests citizens have in not being coerced to act in ways that they do not wish to are sufficient to justify a duty on others not to force them to vote. Correlative to this duty, then, citizens have a right not to vote. Even if their abstention is wrong, others wrong them by forcing them to vote. It does not follow from this that they have a claim that others prevent third parties from forcing them to vote. Nor does it automatically follow that civil disobedience is justified, since other conditions may have to be met for this to be the case. But forcing them to vote does, in ordinary circumstances, wrong them, by violating their right not to vote.

Notes

1 For examples of this objection, see Heather Lardy, "Is there a Right not to Vote?" *Oxford Journal of Legal Studies* 24 (2004): 304.
2 Lardy, "Is there a Right" and Lisa Hill, "On the Reasonableness of Compelling Citizens to 'Vote': the Australian Case," *Political Studies* 50 (2002): 80–101.
3 For an argument that that freedom is limited only by physical impossibility, and not by threats, see Hillel Steiner, "Individual Liberty," *Proceedings of the Aristotelian Society* 75 (1975): 37–43. For a response to Steiner, see David Miller, "Constraints on Freedom," *Ethics* 94 (1983): 66–86, at p, 75–77.
4 See e.g. Arend Lijphart, "Unequal Participation: Democracy's Unresolved Dilemma," *American Political Science Review* 91 (1997): 1–14, at p. 2, and Lisa Hill, "Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?" *Journal of Theoretical Politics* 18 (2006): 207–232, at p. 208, fn. 3.
5 Australian Electoral Commission, "Compulsory Voting in Australia," p. 4. (Available at www.aec.gov.au/About_AEC/Publications/voting/files/compulsory-voting.pdf accessed February 13, 2016). Cf. Helen Pringle, "Compulsory Voting in Australia: What is compulsory?" *Australian Journal of Political Science* 47 (2012): 427–440. These sources contradict (and refute) Hill, "Compelling Citizens," p. 82.
6 Geoffrey Brennan and Philip Pettit, "Unveiling the Vote," *British Journal of Political Science* 20 (1990): 311–333, and Bart Engelen and Thomas Nys, "Against the Secret Ballot: Toward a New Proposal for Open Voting," *Acta Politica* 48 (2013): 490–507.
7 Bart Engelen, "Why Liberals Can Favour Compulsory Attendance," *Politics* 29 (2009): 218–222.
8 Annabelle Lever, "'A Liberal Defence of Compulsory Voting': Some Reasons for Scepticism," *Politics* 28 (2008): 61–64, at p. 64, n.4.

9 John Rawls, *A Theory of Justice* revised edition (New York: Harvard University Press, 1999), 96–97, distinguishes between obligations (which arise from voluntary acts and are ordinarily owed to particular individuals) and duties (which are not). My interest, however, is in whether there is a moral requirement to vote, not whether it is a duty or obligation.
10 Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 73–75.
11 Jason Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2011), 19–20.
12 Cf. Luke Maring, "Why Does the Excellent Citizen Vote?" *Journal of Political Philosophy* 24 (2016): 245–257.
13 Herbert L. A. Hart, "Are there any Natural Rights?" *Philosophical Review* 64 (1955): 185.
14 Similar examples are found in Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974), 90–95.
15 Maring, "Excellent Citizen."
16 Maring, "Excellent Citizen," 247.
17 Maring, "Excellent Citizen," 247–248.
18 Maring, "Excellent Citizen," p. 255 allows for such cases. Cf. Ben Saunders, "Increasing Turnout: A Compelling Case?" *Politics* 30 (2010): 70–77, at p. 76, n.3. Lisa Hill, "Increasing Turnout Using Compulsory Voting," *Politics* 31 (2011): 27–36, at p. 34, n.3 points out that emigrants may still be affected by the policies of their former home. This is true but, contrary to her misrepresentation of my position, I did not say that emigrants may be unaffected, only that they are likely to be *less* affected.
19 It has been argued that some citizens have a duty *not* to vote; see Paul Sheehy, "A Duty Not to Vote," *Ratio* 15 (2002): 46–57 and Jason Brennan, "Polluting the Polls: When Citizens Should Not Vote," *Australasian Journal of Philosophy* 87 (2009): 535–549. If these arguments are right, but the citizens in question vote anyway, they may also be guilty of disrespecting democracy. I invoked Brennan's argument in Saunders, "Increasing Turnout," 74 but – contrary to the impression given by Hill, "Increasing Turnout," 34, n.3 – did not endorse it there. In fact, my argument there was that some citizens are not part of the *demos*, rather than that the ignorant or unreasonable should not vote, though part of the *demos*.
20 That voting is an 'imperfect duty' is suggested by D. G. Brown, "Mill on the Harm in Not Voting," *Utilitas* 22 (2010): 126–133.
21 See Jeremy Waldron, "A Right to do Wrong," *Ethics* 92 (1981): 21–39.
22 Wesley N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16–59.
23 Hohfeld, "Fundamental Legal Conceptions," 30–32.
24 For instance, Rowan Cruft, "Why Aren't Duties Rights?" *Philosophical Quarterly* 56 (2006): 175–192, at pp. 177–179.
25 Hohfeld, "Fundamental Legal Conceptions," 32.
26 Hohfeld, "Fundamental Legal Conceptions," 44–58. I take the term 'second-order' from Cruft, "Why Aren't Duties Rights?" 176.
27 I thank Adina Preda for discussion of this point.
28 Hohfeld, "Fundamental Legal Conceptions," 33–37.
29 Lijphart, "Unequal Participation," 2.
30 That is, compulsory voting that applies only to certain citizens, either selected at random or according to certain criteria, such as age.
31 I do not wish to base my argument on anarchist principles, since I have acknowledged the state's normative authority elsewhere, e.g. Ben Saunders, "Opt-out Organ Donation without Presumptions," *Journal of Medical Ethics* 38 (2012): 69–72, at p. 71.
32 This point was impressed upon me by Onora O'Neill.
33 Hart, "Natural Rights?"

34 Questions of justification are distinct from questions about the concept of a right, as argued by Adina Preda, "Rights: Concept and Justification," *Ratio Juris* 28 (2015): 408–415.
35 The classic anti-paternalist argument is found in John S. Mill, *On Liberty* (London: J. W. Parker and Son, 1859). References to the reprint in J. M. Robson (ed.) *Collected Works of John Stuart Mill, Volume XVIII* (Toronto: University of Toronto Press, 1977), 213–310.
36 For instance, Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge: Cambridge University Press, 2012).
37 See Athanasios Moulakis, "Civic Humanism", *The Stanford Encyclopedia of Philosophy* (Winter 2011 Edition), E. N. Zalta (ed.). Available at http://plato.stanford.edu/archives/win2011/entries/humanism-civic/ (accessed February 13, 2016).
38 I offered a qualified defence of first-time compulsory voting in Ben Saunders, "Tasting Democracy: A Targeted Approach to Compulsory Voting," *Public Policy Research* 17 (2010): 147–151. My argument there, however, was about ensuring the real opportunity to participate, rather than creating a habit. It is unlikely that such one-off compulsion would be habit-forming.
39 Hill, "Compelling Citizens," 88–90.
40 See Joel Feinberg, *Harmless Wrongdoing (The Moral Limits of the Criminal Law. Volume IV)*, (Oxford: Oxford University Press, 1984).
41 Mill, *On Liberty*, 289.
42 Cf. the liberal principle of legitimacy in John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 137. See also Edward Song, "Rawls's Liberal Principle of Legitimacy," *The Philosophical Forum* 43 (2012): 153–173.
43 See Johan Tralau, "Incest and Liberal Neutrality," *Journal of Political Philosophy* 21 (2013): 87–105, especially pp. 94–97.
44 In the 2013 British Social Attitudes survey, only 57 percent of respondents regarded voting as a duty, a reduction from 68 percent in 1994 and 76 percent in 1987. (Available at www.bsa.natcen.ac.uk/media/38978/bsa32_politics.pdf (accessed February 13, 2016) these figures are from p. 16). Though attitudes vary across different groups, these findings are not unique to the UK. According to surveys from 2011, reported in Alan Steinberg, "Why do Americans and Canadians view their Duty to Vote so Differently?" *Critical Issues in Justice and Politics* 8 (2015): 21–45, at p. 27, 815 from a sample of 1,004 Canadians believe that voting is a duty, but only 502 from a sample of 981 Americans share this view. While, in both cases, a majority of those surveyed regard voting as a duty, rather than a matter of choice, even in Canada this attitude is far from universal.
45 For an argument that the presumption of innocence should apply not only to whether an individual did in fact ϕ but also to whether ϕ-ing is wrongful, see Patrick Tomlin, "Extending the Golden Thread? Criminalisation and the Presumption of Innocence," *Journal of Political Philosophy* 21 (2013): 44–66.
46 Lijphart, "Unequal Participation," 2–5, and Hill, "Compelling Citizens," 86.
47 Hill, "Compelling Citizens," 88–90.
48 There is considerable evidence that compulsory voting laws increase both turnout and voting and that this may alter electoral outcomes. See, for instance, Anthony Fowler, "Regular Voters, Marginal Voters and the Electoral Effects of Turnout," *Political Science Research and Methods* 3 (2015): 205–219 and Michael M. Bechtel, Dominik Hangartner, and Lukas Schmid, "Does Compulsory Voting Increase Support for Leftist Policy?" *American Journal of Political Science* 60 (2016): 752–767 (DOI: 10.1111/ajps.12224). The question here, however, is not simply whether compulsory voting makes a difference to outcomes, but whether citizens become more engaged or knowledgeable. Jill Sheppard, "Compulsory Voting and Political Knowledge: Testing a 'Compelled Engagement' Hypothesis," *Electoral Studies* 44 (2016): 56–65 finds some support for the hypothesis that compulsory

voting increases citizen knowledge available at www.sciencedirect.com/science/article/pii/S0261379416300531 (accessed October 25, 2016). In contrast, Peter J. Loewen, Henry Milner, and Bruce N. Hicks, "Does Compulsory Voting Lead to More Informed and Engaged Citizens? An Experimental Test," *Canadian Journal of Political Science* 41 (2008): 655–672 finds little evidence that it does, though the experiment on students is arguably unlike real cases of compulsory voting. Peter Selb and Romain Lachat, "The More the Better? Counterfactual Evidence on the Effect of Compulsory Voting on the Consistency of Party Choice," *European Journal of Political Research* 48 (2009): 573–597 suggests that the votes of less interested and knowledgeable voters are less consistent with their political preferences, thereby questioning whether compulsory voting really promotes equal representation of political interests. See also the similar findings of Shane P. Singh, "Elections as Poorer Reflections of Preferences Under Compulsory Voting," (2016) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693254 (accessed February 13, 2016).

15 Expanding on the Wrongness of Bribery

The Morality of Casting a Vote

Eric Roark

My aim in this paper is to explore the moral conditions surrounding the casting of a vote. I begin by offering a paradigmatic case of what I take to represent casting a vote in a morally impermissible fashion, the bribed vote. I begin from the assumption that voting for a candidate or position because one was bribed to do so is morally wrong. The bribed vote is then used as motivation to look critically at other types of voting that typically do not garner similar moral condemnation. I argue that a great deal of voting is morally equivalent with the bribed vote. Throughout I will limit my moral observations to voting that takes place in large-scale democratic elections.

At first blush it might appear that it is impossible to cast a vote in a morally impermissible fashion or if not impossible that such instances are rare and reserved for cases such as bribery. The reasons why a person might cast a vote are commonly treated as a personal matter and as such a moral assessment of voting might seem for many to tread too closely to a privately held matter not owing of moral assessment. The same is not true for a host of other issues surrounding voting such as: who gets to vote,[1] poll taxes or voter identification requirements,[2] intelligence or literacy standards for voting, and a general moral or political duty to vote[3]. These topics are generally fair game for discussion or condemnation, but the reasons or motivations that a person has for voting are often treated as immune from moral scrutiny. While the above thought might represent many commonplace views about voting there is a growing body of philosophical literature that seeks to offer more nuanced views about the morality of casting a vote and of obligations owed to voters in their role as a voter. In this volume, for instance, Jason Brennan has offered a strong defense of the idea that just as lying can generally be justified to prevent great harms, lying to voters can also be justified on similar grounds.

The casting of a vote is an action that should draw our moral assessment. Consider the following example in order to bolster the claim that there are clear cases when a voter can cast a vote in an immoral fashion:

> It is a presidential election day in the United States and as usual there are two candidates A and B that have any serious hope of winning the election. Jim is a registered voter in a swing-state and has absolutely no interest in

> voting. Jim could not care less who wins the election and as far as he is concerned voting is a wasted effort and it makes no real substantive difference to him who wins the election. Jim is also an economist who subscribes to some variant of rational choice theory and has calculated that it is an irrational use of his time to vote. No interest in voting, that is, until Jim meets Mark. Mark offers Jim one hundred dollars if he will vote for candidate A. Jim, a man of his word, takes the hundred dollars and promptly votes for candidate A.

What transpired in the above example will serve as the paradigmatic case of casting a vote in an immoral fashion.

One condition of a functional democracy is a system of voting in which votes are not cast on the basis of bribes, or at least a system where bribery plays a negligible role. The bribed vote makes a mockery of democracy. A legitimate democratic system of governance relies upon much more than simply voting *per se*. Saddam Hussein, after all, was 'elected' with 99 per cent of the 'vote' during his time as leader of Iraq. At the least a legitimate democratic system of governance requires a free, informed, and non-coerced expression of voter preference. Voting, however, does play an important role within a democracy and elections wherein bribery plays a substantial role make for a sham election and by extension a sham democracy. The purpose of this paper is not to defend some version of democratic governance or even democracy generally. I merely point out that those concerned with democratic legitimacy ought to also be highly concerned with the morality surrounding the casting of a vote.

In the paradigmatic case, Mark, the briber, seems to have done something morally wrong by offering a bribe to Jim to vote in a certain way but I will not explore that point further. The concern in this paper is with the action of the voter who is bribed. Jim presumably did something wrong by accepting the bribe from Mark and voting accordingly. This assumption should likely appeal to anyone concerned with legitimate democratic governance, but if one is not concerned with such things the assumption that the bribed vote is morally wrong might prove more controversial. We can inquire, what makes Jim's action of voting in a bribed fashion morally wrong? Here I think there are a number of plausible possibilities and I shall consider each in turn.

One necessary condition of the bribed vote being morally wrong is that the bribe *actually influenced* a voter to vote in a certain fashion. Let us revise the paradigmatic case to explore this idea. Imagine that Jim is on his way to a polling site to vote for candidate A. Jim is very firm in his resolve to vote and vote for A and almost nothing is going to change his mind. Jim again runs into Mark and again Mark offers him one hundred dollars to vote for candidate A. Jim takes the hundred dollars from Mark and votes for candidate A. Did Jim do anything morally wrong? He was going to vote for A regardless of any offer made by Mark. It is arguable that Jim did something wrong by taking the hundred dollars for an act that he planned to do in any event (perhaps some type of fraud perpetrated against Mark). But despite this possibility Jim's act of

voting for A was not immoral *qua* his act of voting. Jim was going to vote for A regardless of his run-in with Mark and the bribe (if we can call it a bribe in the full sense) did not influence Jim to vote or to vote in any particular fashion. In fact, in this revised case it is not clear that Mark *genuinely* bribed Jim at all. No doubt Mark *attempted to bribe* Jim, but his attempt was completely ineffectual in swaying or influencing Jim's vote.

It is not the case, however, that a bribe's *influence* on a vote is all that is needed to explain what makes the act of casting the bribed vote immoral. The influential aspect of the bribe is necessary but not sufficient to explain the wrongness of Jim's casting a bribed vote. Merely being influenced to vote, bribe or no bribe, in a certain fashion will not in itself make an act of voting immoral. For instance, a person could be influenced to vote for a candidate because of a television commercial, family pressure or tradition, the influence of friends, advice from a union or other group, having a good feeling about the candidate, persuasive reasons given by a candidate, or many other factors. These examples point to the idea that it is not plausible to conclude that *mere influence* is enough to explain the wrongness of the bribed vote unless we want such a reason to morally indict virtually all votes. In fact, for a voter to say that they were not influenced at all should likely raise a very skeptical eyebrow. A voter who was not influenced by any external source *whatsoever* to vote in a certain fashion should probably not be voting. A person voting without the guidance of any influence would likely be voting in a blind or random fashion. More than influence is needed to explain the wrongness of the bribed vote.

Perhaps what makes the influence of the bribed vote different, from other types of influence, is that such influence involved an exchange of money or other goods. The promise of money or goods secured from a bribe might impact the will of a potential voter in ways that other types of influence do not because of some intrinsically corrupting feature of a bribe. But there is no good reason to think that there is something overpowering to the will or intrinsically corrupting that results from the influence of money or goods that is somehow distinct from many, likely most, other sources of influence. For instance, we could easily imagine that Jim received a phone call from his mother on the morning of the election that made him feel so guilty about not supporting candidate A that this experience influenced him to vote for A much more than any one hundred dollar bribe ever could. For many the lure of satisfying social pressures or feelings of political obligation are much more powerful that the promise of quick cash. Money can be a strong influence but there is nothing about it that makes it more intrinsically overpowering or corrupting to our will than other influences that we might normally encounter in respect to our role as a voter. If we want to find the source behind the immorality of a bribed vote we must keep looking beyond the scope of influence.

A bribed vote might be wrong because it is simply wrong to pay for certain goods. An argument to this effect might proceed by noting that not everything should be treated like a commodity to be bought and sold to the highest bidder. Such arguments have been advanced to argue that practices such as paid

surrogacy and organ selling are wrong.[4] This type of argument could apply toward the bribed vote. The persuasiveness of this argument will depend upon how much one is swayed by the idea that the vote is the type of thing that should not be treated like a commodity. The issue here is complicated by a number of factors, including volumes of Marxist literature arguing that a great many things, perhaps all things, should not be treated like capitalistic commodities. The Marxist story is a deep and complicated one involving an inherent exploitation associated with private property that I cannot re-trace here. If one is persuaded by such arguments then it is not a reach to suggest that votes, along with a host of other things, should not be subject to capitalistic exchange.

My view is that it is permissible, at least under certain conditions, to treat many things, though not all things, including labor as subject to capitalistic exchange. This position is an outgrowth of my view that persons have rights of self-ownership that allow them to permissibly, under certain conditions, exchange aspects of their selves, including their labor, with others. But this is also a topic that must be left in brief outline form here.[5] A person's labor is plausibly something which is generally more intimate and foundational to a person's sense of self than are the votes she might cast. But just as there is no intrinsic moral bar against selling one's labor there is likewise no such bar against selling one's vote. The bribed vote is wrong but not because a vote is simply the type of thing which is not subject to be treated like a commodity.

The wrongness of the bribed vote might be explained in terms of how it is a direct affront to the principle of 'one person, one vote.' The person who bribes another could be said to cast more than one vote, and hence violates the 'one person, one vote' principle. The difficulty with this line of reasoning is that the voter who is influenced by a bribe is still expressing his preference. No doubt the preference was influenced, in this case by a bribe, but one voter is still expressing his preference with his one vote. Imagine, for instance, that a charismatic union leader or preacher is very good at persuading others to vote in a certain fashion. Such persuasion does not detract from the principle of 'one person, one vote' and if it does then such a principle is likely to be too flimsy to mean very much. Now if the union leader or preacher hypnotized people to vote in a certain fashion then the 'one person, one vote' principle is violated, but short of extreme cases such as hypnosis or brainwashing it will be difficult to conclude that the bribed vote violates the 'one person, one vote' principle without also indicting many other morally permissible cases of voter influence from doing the same. That others influence voters in all sorts of ways does not itself detract in any morally significant fashion from the principle of, 'one person, one vote.' The search is still on for something that explains the immorality of the bribed vote.

It might be argued that the bribed vote is a special threat to democracy in a way that other types of voter influence are not. On the surface this idea seems plausible. But upon further examination this idea is difficult to defend. First, it is important to note that in the case of bribed votes, individual voters are deciding for themselves why they will vote in certain ways. The bribed vote is not the hypnotized or brainwashed vote. Voters decide what influences are

persuasive or at least have it in their power to act on such persuasion. If many voters decide that they will vote in a certain fashion because they were bribed to do so, then these voters will get the results that they decided upon. This might strike us as a sad situation, it strikes me as one, but it is in fact one way that a government decided by the will of its voters can operate. If we desire to eliminate the will of voters, because we do not like their will or what they opt to serve as effective persuasive mechanisms, then it is difficult to see why we ought to continue with a pretense of *democratic* elections. That people might vote in a certain fashion because they were bribed to do so is not a failing of democracy; it is, if anything, a failing of individual voters. In such a case the moral problem seems to lie with the voters who sold their votes, and that is a problem that extends far beyond political structure or design. Under such conditions it is not clear what type of political structure, democratic or otherwise, could salvage things. It is also an awful sign for any semblance of democratic governance if a non-negligible group of voters need strict self-protections and enforceable legal rules against bribed voting.

Further, if one were to defend the idea that the bribed vote is a special threat to democracy, one would have to offer reasons why the influence of a bribed vote is more pernicious or over-powering than other forms of influence or more dangerous in other sorts of ways. As argued above there is not much hope in such attempts. Voters often encounter many influences, some of them very persuasive and potentially pernicious, and I fail to see how the influence of bribery presents a special type of moral problem above and beyond other forms of influence that are commonly considered morally permissible in any actual functional democracy. History and cultural tradition often single out the bribe as an especially bad type of influence on the voter (and as I assumed earlier voting based on a bribe is wrong), but this is far from offering good reason(s) that the bribed vote is bad in a way that morally distinguishes it from other types of influence that almost never receive moral condemnation.

Consider again the paradigmatic case of the bribed vote and compare it with a case in which a charismatic leader endorses Candidate A. The many people who have admiration for the leader dutifully vote for Candidate A. When asked why they voted for Candidate A these voters simply say, 'because my charismatic leader told me to do so, so I did' or something to this effect. I fail to see how this revised case presents any less threat to democracy or the moral legitimacy of a vote than the bribed vote. Yet notice that while nearly all democratic governments in one form or another condemn and legally bar the bribed vote, they do no such thing with the charismatically influenced vote.[6] Some might be comfortable here suggesting that both of these cases are instances of immoral voting. That strikes me as a plausible reply given the comparable aspects of the two cases, but it is a reply that as we will see can be extended well beyond bribes and charismatic influences. Perhaps reasons can be given why the bribed vote presents more of a threat to democracy than the charismatically influenced vote, but I doubt it. With little work I suspect all sorts of examples could be constructed that clearly demonstrate that the bribed

vote (while wrong) does not present any *special* threat to democracy above and beyond all sorts of influences that fly well under the moral radar.

Additionally, it is worth noting that the bribed vote in itself will not present a special threat to democracy because of the badness that will result from such votes. Of course, an election with bribed votes could lead to bad or even awful results for the voters. But by the same token, that could be said of the charismatically influenced vote. Bribed voters are acting immorally but this is not because of the political contingencies that may accompany their votes. Awful things can result from votes irrespective of the influence of bribery. History is filled with examples of largely non-bribed democratic elections that ended in devastating results for the voters and others. The 1932 (July and November) democratic elections, of the NSDAP (National Socialist Party) in Germany, and the appointment of Hitler to Chancellor a year later, speaks to this.[7] Historical scholars debate the extent to which the 1932 elections where democratic but one point that does not seem to be in serious dispute is that the NSDAP, the party that would appoint Hitler a year later, garnered considerably more votes than any other party and the election was not a sham election such as the ones held in Iraq under Hussein's rule. Democratic elections in which bribery does not play a role can lead to absolutely morally horrible results.

Perhaps the bribed vote is wrong because it is a clearly selfish act in which a voter demonstrates her concern for self-benefit without due concern for others in her political community or those impacted by her vote. The voter is not voting because of her stance on issues or genuine support of a candidate or position or because of general concern for her community but is instead voting in a certain way because she sold her vote. The *issue* the voter cares about is her own selfish crass economic, interest. Voting, in such a case, is seen as little more than a vehicle to pad one's pockets. Note that this explanation concerning the wrongness of the bribed vote focuses heavily upon the *motive* of the voter. Perhaps the results of a vote influenced by bribery will generally go poorly for others; perhaps it will go well for others. Both are clearly possible outcomes. Contingencies aside, however, the bribed vote is wrong because the voter acted from a sense of self-benefit without proper concern for others. This analysis is plausible and, as will be discussed further as the paper develops, is applicable to issues that go well beyond a bribed vote.

Here I suspect this line of reasoning will garner the reaction in some, 'so what is wrong with this, people are self-interested creatures and why should voting behavior be any different. It is not wrong for a person to vote in ways that advance their own good.' The problem with this reply is that anyone who makes it will have a very difficult time maintaining that the bribed vote is immoral while voting for other selfishly inclined reasons is a moral activity. For some this will not present a problem. They might be happy to say that the bribed vote is morally permissible or that voting in most cases is immoral. But few people for good reason would want to subscribe to either of these positions.

Of the reasons that have been explored thus far, the immorality of the bribed vote is best explained by appealing to the bribed voter's motivation to pursue

self-benefit without consideration for others in her political community or others impacted by her vote. Many will find this explanation too simple to explain the immorality of the bribed vote. But after searching for explanations in more complex terrain this simple explanation is the best explanation. The importance of this simple explanation to explain the immorality of the bribed vote will turn out to have a much broader impact than one might expect. Now that we have a plausible reason to explain the immorality of the bribed vote, let us alter our paradigmatic case to see what implications might result from discovering what it is that makes the bribed vote immoral.

Imagine that Jim from the paradigmatic case again has no interest in voting. It is again the day of the presidential election. Jim turns on his television set and learns through a political commercial that if candidate A gets elected Jim (and others like him) will get a one-hundred-dollar tax credit. Jim listens to nothing else about the election and says, 'you had me at hundred-dollar tax credit.' Jim promptly drives to his local polling site and votes for candidate A. Did Jim do anything morally wrong? I suggest that if Jim did something wrong when he cast a vote based upon a bribe then he also did something wrong when he voted based upon the promise of a tax credit. The revised case is morally equivalent with the paradigmatic case. In the paradigmatic case Jim was induced to vote for candidate A because of the promise of monetary gain. In the revised case Jim is again induced to vote for candidate A because of the promise of, admittedly slower to arrive and less certain, monetary gain. In neither case did Jim should concern for his political community or others impacted by his vote. His motivation for voting in both cases was clearly driven by self-benefit without concern for others.

With any attempt to draw a moral analogy the success of the analogy will depend upon how tightly the analogy can be drawn. I want to now look at what I take to be the best attempts to show problems with the above analogy. One could argue that the political commercial makes no promises but instead says the candidate will do all he can to make the one-hundred-dollar tax credit a reality and this is different than the clear cash-for-vote bribe in the paradigmatic case. First, political commercials, and direct statements from the candidates themselves, often do make direct promises of the type made by a person offering a bribe to another, but let us assume no strong promise was made and the candidate simply says that she will do the best she can to get Jim and people like him the tax credit. The 'softer' version of the political commercial makes no moral difference. Would we change our mind about the paradigmatic case if we added that the briber said he would do his best to get the money later in the day (or next April 15th) and deliver it to Jim if he votes for Candidate A? It is doubtful that such a detail would change anyone's moral thoughts about the case and as such this detail about *timing* and certainty of delivering the promised cash inducement does not challenge the moral analogy that exists. We could say that Jim in the paradigmatic case is smarter or savvier than Jim who was swayed by a television commercial because he got the money for his vote up-front. But this is a pragmatic, not a moral, observation.

A person could argue that the case of the political ad is morally different because it is a message sent to, and meant to influence, millions of people as opposed to influencing one person as was done by the bribe in the paradigmatic case. But this is also not a promising way of dislodging the proposed analogy. The observation only demonstrates that the political ad attempted to influence on a mass scale and the issue of scale does not challenge the moral analogy. Viewed in a different way, the moral assessment of the paradigmatic case does not change if the briber made an underground ad heard by thousands that promised a cash bribe to any voter that voted for a certain candidate. If anything the increase in scale makes the influence more morally dubious since it has the potential to be more efficacious on the results of an election.

One could advance the view that what makes the paradigmatic case of bribed voting different than cases where a voter is primarily motivated by things such as tax credit is that the bribed voter uses her vote as a means to work outside the political process, while the person whose vote is motivated by self-interest is working directly within the political process. Such a difference could explain the wrongness found in the paradigmatic case and the moral permissibility of voting in a fashion motivated primarily by self-benefit without a concern for others. This line of reasoning will face a difficult task in trying to develop the idea that the moral evaluation of a vote should be restricted to how the vote directly impacts others through the political process.

The case could be advanced that the casting of a vote is immoral when a voter is not trying to impact the political process. But this claim is dubious. For instance, consider a case in which a person votes *only* as a means to demonstrate her support for the right to vote that her ancestors secured through hard-fought civil rights battles. The voter, for whatever reasons, does not seek to impact the political process with her vote. This voter is motived to vote solely because of a symbolic connection to history and culture that she wishes to keep. Even if this voter is not motivated in the least to direct political results or impact a general political process with her vote, I doubt a convincing case can be made that the voter cast a vote in a morally impermissible fashion. A voter need not be seeking to alter political results or work within some political process in order for her vote to be cast in a morally permissible fashion.

It could be argued that the tax credit case is different from the case of the bribed vote because in the tax credit case the politician is promising to offer a credit back in respect to taxes that a person has already paid with his own money but in the bribery case the money for the bribed vote was never that of the voter selling his vote. The tax credit gets the taxpayer his money back, while the bribe gets the voter new money that he would not have had without the bribe. The problem with this objection is that once we pay taxes and our payment is added to governmental coffers the money is no longer ours at all. To say that that the tax credit gives a person his money back is not accurate. Most people would welcome a check in the mail from the government, an electric company, the grocery store where a person shops, or anyone else for that matter that a person has once transferred money to that they once had. But if such

checks are sent, they are not giving a person his money back simply because at one time the person made a payment to these entities. A person selling his vote is getting new money that was not his before he sold his vote, likewise the taxpayer who gets a tax credit is also getting new money that was not his before the credit was afforded.

Someone might suggest that the candidate offering the tax credit is doing so because she thinks that this is in the best interest of her voters and not merely to pander to the economic interests of voters. The motives of the politician will not make any difference to the analogy. This is because, just as the politician in the revised case might well have what she considers morally upright motivations for offering the tax credit, we can apply these exact same motivations to the briber in the paradigmatic case. For instance, both Mark (the original briber) and the politician could have the *same* motivations for influencing the voter. They might both genuinely believe that their actions are best for the electorate as a whole. But just as the motivations of the briber in the paradigmatic case would sway few to think the voter who was bribed acted in a moral fashion, neither then should the motivations of the politician who offers the tax credit. In both cases the motivations of the briber and the politician respectively do not seem to play a substantial role in how we ought to morally treat the actions of the voter.

If Jim's motives for voting are altered, then I suspect so too could our moral assessment. Say that Jim hears of the tax credit and is motivated to vote for the candidate promising the credit because of his thoughts about macroeconomic fiscal tax policy and how such a credit will genuinely be best for his community. Jim, in this case, is voting not from a motive of self-benefit but instead because of how he thinks his vote will impact himself *and* others. This revision is not like the bribery case, because in this case Jim's concern is not primarily concerned with his own self-benefit.

The force of the proposed analogy between bribed votes and those done for reasons of mere self-benefit go well beyond voters who vote because of promised tax credits or similar economic influences. Money, after all, is simply a placeholder for 'something of value.' There is no good reason why *money* should be singled out as the only thing of value to a person or the only object of influence that could render a vote morally dubious. With this in mind let us consider another case. Jim as before in the paradigmatic case has no plan to vote in the presidential election but receives a mailing on the day of the election informing him that Candidate A will do everything in his power, from executive orders to packing the Supreme Court, to deport all persons who lack documented legal status and to build a massive electric fence around the land borders of the United States. Jim cares more about these issues than any others and cares about them for his own personal reasons that do not involve the broader good of others. Jim independently investigates the claims and finds good reason to think that Candidate A does indeed support such measures. He then quickly goes to his local polling site and votes for Candidate A. Is this case morally analogous to our paradigmatic case? At first it seems that this new case is

different than the paradigmatic case, but upon examination the differences are illusive.

Jim is voting because of an issue that he cares deeply about. It would make him very happy if the immigration measures noted above were instituted, just as it would make Jim from the paradigmatic case very happy to receive money for his vote. Both of these versions of Jim are concerned with their own desires being fulfilled and, as the examples are drawn, neither is voting because of a concern for others. That one is concerned in a way that involves money and another is concerned in a way that involves immigration policy is of no moral consequence. Thus I maintain that Jim who is bribed, Jim who is swayed by a tax credit, and Jim who is swayed by immigration policy should all be seen as engaging in morally equivalent actions because in each case they share the same morally relevant motivation – to vote in a fashion which promotes self-benefit without concern for others.

The point can be pressed that voter motivations are often complicated and it is only fair to consider more complex cases where voters, bribed or otherwise, are not motivated solely by self-benefit. This consideration can begin with our paradigmatic case. Jim, in the paradigmatic case, could be motivated by more than fast cash. His vote could have been cast with an eye toward how the bribe he would secure from his vote could help others; perhaps the money from the bribe would feed his family for the week or buy his children Christmas gifts that he otherwise would not be able to buy. Would the moral judgment of the paradigmatic case change if it was added that Jim was planning to buy a proper Christmas dinner for his family and a gift for his child with the money from the bribe? It might. At the least, moral intuitions here might get shakier. Accepting the bribe was, after all, merely the means to give his family a decent holiday celebration.

Or we could add that Jim from the paradigmatic case promptly plans to, and does, donate the entire one hundred dollars from the bribe to Oxfam so that some of the poorest people in the world will not starve to death – money that he would otherwise simply not have to donate if not for his selling his vote. (An example like this demonstrates a case in which an act utilitarian might say that accepting the bribe and voting accordingly might be morally obligatory so long as the money goes to feed starving people or bring about some other good of enough moral weight.) It is not clear how these details about the good deeds that Jim plans to do with the money he received for his vote should influence how we approach the issues surrounding the morality of the vote that Jim cast. These new details, note, do not merely speak to altering the consequences of Jim's selling his vote. These details also speak to the notion that the motivations for selling a vote need not be to secure quick cash for some frivolous end.

Both the Holiday case and Oxfam case above offer examples in which a person might use the money he secures by selling his vote for non-political goods. A person could also use the proceeds from his bribed vote to secure political goods in the very same political system in which the bribe occurred. For example, a person might figure with good reason that the one hundred

dollars he secures by selling his vote for a particular election could be used to campaign for a candidate or position that would be far more consequential to the political good of his community than would his casting an unbribed vote in the election where he is bribed. The money from the bribe might go, for instance, directly to fund a candidate in a different more important and closer election. It is possible that a person could sell his vote for motivations that extend beyond his own self benefit and in fact extend to a concern for his political community. I doubt that such motivations exist for most cases of vote selling but they are certainly possible.

If the moral analogy that I have drawn stands up to scrutiny, then it suggests that much (it is difficult to say exactly how much) voting that takes place is morally equivalent with the bribed vote. In fact, it is difficult to see how any case of voting where the voter is simply acting to engage in self-benefit without concern for others is to be morally distinguished from a bribed vote. But this way of putting things leads squarely to a re-evaluation of the paradigmatic case.

Throughout the paper I have suggested categorically that the bribed vote is immoral. But this position is not defended by the analysis offered. The bribed vote is wrong when such votes are motivated by self-benefit without concern for others, especially others in one's political community. But, as earlier examples have suggested, it is short-sighted and misguided to assume that *all* bribed votes will necessarily meet this condition. This leaves us with the, admittedly odd, position that it is possible that some bribed votes are, or at least can be, cast in a morally permissible fashion. This idea will likely strike some as *prima facie* false. I understand that reaction but if that view is to be defended one must try to argue either (1) that *all* votes that result from bribery are cast by a person that is motivated by self-benefit without a concern for others, or (2) that there must be some reason other than a motivation to secure self-benefit without a concern for others that makes casting a vote as a result of bribery wrong. In respect to (1) the hope of defending the universal is nil and in respect to (2) the hope of offering such a reason is fleeting.

If the normal reaction of moral condemnation in respect to a bribed vote is justified on the grounds that such votes are instances in which a person engages in self-benefit without concern for others, then I maintain that all instances where a voter is motivated in similar ways are impermissible and ought to be subject to similar condemnation. The very thing that best explains why the bribed vote ought to be viewed as typically wrong helps demonstrate why a great many votes are cast in an immoral fashion. I propose that those who opt to vote have a moral obligation to vote in ways that are not motivated by self-benefit without concern for others. This, I contend, is simply the result of ascertaining the immorality surrounding the bribed vote and applying such reasoning to non-bribed voting.

The moral shadow that is cast by the bribed vote is the same shadow cast by a great many (perhaps most) non-bribed votes. One implication of the idea that a voter is obligated to vote in ways that are not motivated by self-interest without a concern for others is that a voter might at times have a moral obligation

to vote for candidates or policies that could impede his own benefit. One could object here that such an implication is too morally demanding of voters. The folly of this objection can be seen by holding it against the paradigmatic case. Almost no one would seriously defend the view that, under any normal set of circumstances, it is too demanding to say that voters are morally obligated not to sell their votes even when they might themselves tangibly benefit handsomely by such sales. It is not too morally demanding to say that a person ought not sell their vote especially when such sale is motived by self-benefit without a concern for others, and likewise it is not too morally demanding to say that a voter ought not act on the motivation to vote in a fashion that benefits themselves without concern for others. I should add that a voter, absent arguments in favor of a general moral or political duty to vote, could well have the moral option of simply not voting in cases where they ascertain that casting a vote in a moral fashion would make them worse off.

There are many cases where voter motivation is complicated and cannot be assigned a singular motive. There is often a vagueness and conflict faced by many voters between motivations of self-benefit and those of a concern for others. Just how much motive related to self-benefit must be present before a vote is cast in a morally dubious fashion? I hesitate to give an overly precise answer but for reasons of simplicity we can say that if a voter is *primarily* motivated by self-benefit without concern for others (especially others in his political community) then he is acting wrongly. This is probably as precise as can be hoped without knit-picking language.

Often a person who is motivated primarily by self-benefit at the ballot box can, either consciously or subconsciously, cloak this motivation in a concern for others. A voter, for instance, can speak of how a tax credit will benefit his community but all the while imagines how the tax credit will benefit him and does not really care much about the plight of others or have any idea about how tax policy will impact his community. How often this type of thing occurs is a difficult empirical question, but I have little doubt it happens frequently. Some popular political rhetoric would have people believe that generally a voter's self-benefit cannot really conflict with the greater interests of her political community – or something along these lines. This rhetoric is, if genuinely believed at all, typically the result of sophomoric or otherwise uninformed interpretations of classical economists such as Adam Smith, but I will not belabor that point here.

What is worth noting is that many voters actually believe some version of this sort of non-sense noted above and suffer from a type of political 'bad faith' or self-deception wherein they have convinced themselves that something prevents a tension between their individual interests and those of their political community. Perhaps these voters are not acting immorally because their motivations for voting *really are* concerned with others in a non-negligible sense. But in such a case the beliefs involved are so badly misinformed that larger problems likely loom close by. If a voter falsely believes that her self-benefit will almost always by a grand stroke of coincidence track the interests

of her political community, then she has no need to critically morally assess the casting of her vote since it is really not just about her self-benefit. The voter in such a case will fallaciously assume that concerns of primarily self-beneficial voting do not apply to her because she does not actually engage in largely self-beneficial voting (even when it sure seems like she does) because her interests will just happen to coincide with those of the larger political community. This widely held voter assumption could be every bit as dangerous to a legitimate democratic government as voters selling their votes. In fact, this type of political self-deception is likely worse because at least the person selling his vote realizes that he is doing something wrong.

Beginning from the assumption that the bribed vote is immoral (an assumption that came to undergo revision as the paper progressed), I argued that the reason why the bribed vote is wrong is because the voter acts with the primary motive of self-benefit without concern for others in her political community. The idea of acting from a motivation of self-benefit without concern for others in one's political community was then expanded to encompass many aspects of voter activity that are usually not held to the moral scrutiny that they deserve. Finally, I advanced the view that if a voter opts to vote then she has the moral duty to vote in a way not primarily motivated by self-benefit without concern for others.

Notes

1 Mitchell, S. David. "Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community." *Fordham Urban Law Journal* 34 (2007): 833; Tiao, Paul. "Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law." 25 (1993): 171–218.

2 Brewer, Kelly T. "Disenfranchise this: State voter ID laws and their discontents, A blueprint for bringing successful equal protection and poll tax claims." *Val. UL Rev.* 42 (2007): 191; Tullock, Gordon. "Optimal poll taxes." *Atlantic Economic Journal* 3, no. 1 (1975): 1–6; Barreto, Matt A., Stephen A. Nuno, and Gabriel R. Sanchez. "Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters." In *Annual Meeting of the American Political Science Association, Chicago, Illinois*, vol. 30. 2007; Ellis, Atiba R. "The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy." *Denver University Law Review* 86, no. 3 (2009).

3 Jones, W. H. Morris. "In Defence of Apathy: Some doubts on the Duty to Vote." *Political Studies* 2, no. 1 (1954): 25–37; Lomasky, Loren E., and Geoffrey Brennan. "Is there a Duty to Vote?" *Social Philosophy and Policy* 17, no. 1 (2000): 62–86; Hill, Lisa. "On the reasonableness of compelling citizens to 'vote': the Australian case." *Political Studies* 50, no. 1 (2002): 80–101.

4 For a well-developed argument against the commercialization of surrogacy *see* Elizabeth Anderson. "Is Women's Labor a Commodity?" *Philosophy and Public Affairs* 19, no. 01 (1990): 71–92. For a good general discussion of the history, economics, and morality surrounding capitalism and commercialization *see* Robert Kuttner, *Everything for Sale: The Virtues and Limits of Markets*. University of Chicago Press (1996).

5 For a robust discussion of my views about self-ownership *see* Eric Roark, *Removing the Commons: A Lockean Left-Libertarian Approach to the Just Use and Appropriation of Natural Resources*. Lexington Books (2013).

6 One might try to advance the pragmatic point that it would be impossible to enforce a legal sanction against votes that were strongly influenced by a charismatic influence. Aside from noting that it is not clear what force such a pragmatic point should have in our moral deliberations, the pragmatic point itself is not right. We could enforce such a rule if we were willing to expend the resources to do so. A voter, for instance, could be required to take a polygraph before she votes as an attempt to mitigate votes owed to charismatic influences or other morally dubious forms of voter motivation. Now at this juncture one could make the point that this policy would not be feasible. That is a fair point but anyone who would want to make it would have to offer some value driven (moral) argument explaining why it is not worth expending resources in such a fashion. Hence what seems initially like a pragmatic argument will necessarily quickly shift into a moral one where it is argued that one thing *ought* to be valued more highly than another.

7 It is controversial whether the 1932 German election should be treated as a democratic election. For instance, Patrick Taylor Smith's paper in this volume 'Why Bad Votes Can Nonetheless Justly Be Cast and Why Bad Voters Can Cast Them' makes the case that the 1932 elections and the ensuing election in 1933 was not democratic. Smith's account of the rise of the NSDAP is highly instructive and worth reading. Smith for instance correctly points out that the steps taken in 1933 by the NSDAP to solidify its power were in fact unconstitutional. And this point can be used as reason to think the NSDAP was not a democratically elected government. But this point, while solid on its face, is more controversial than it first appears. This is because it can be argued that the NSDAP and its coalition partners had the votes in the German government at the time to alter the constitution to their liking and proceed as they wish under constitutional guise. It is unclear why they did not do this. Perhaps it was because the NSDAP did not care much about acting constitutionally and as such saw no need to go through constitutional processes that they arguably could have engaged in. To clarify, the level of political support shown to the NSDAP, controversial as that point is, in no way makes an evil regime, as the NSDAP surely was, any less evil.

Part V

Arguing on Others' Behalf

16 Devil's Advocates

On the Ethics of Unjust Legal Advocacy

Michael Huemer

Introduction: The Problem of Unjust Advocacy

Consider the following hypothetical scenario, which I shall call the case of *The Murderer's Friend*:

> Sally and Joe have known each other for a few months and have become close friends. One day, after securing a promise of confidentiality from Sally, Joe finally confesses to Sally his darkest secret: he is a serial murderer. He has murdered six people so far. He asks Sally for advice about where to hide the body of his latest victim. Sally tries to convince Joe to stop murdering people and, moreover, to turn himself in. Joe refuses to turn himself in and remains noncommittal on future murders. Sally, good friend that she is, keeps Joe's secret and offers Joe helpful advice on how to elude the police.

I take it that most people would not even consider behaving in the manner of Sally in this example. There are two aspects of Sally's behavior that mark it as extremely wrongful. First, it is wrong for Sally to keep Joe's secret; in so doing, she allows Joe, unjustly, to get away with his crimes, and she countenances an unacceptable risk of death for innocent others, due to the likelihood that Joe will kill again. Sally is morally obligated, instead, to turn Joe in to the police.

Second, it is even worse for Sally to actively assist Joe by giving him advice on how to elude the police. Here she not merely allows serious injustices to occur but actively promotes them.

My concern here is an ethical, rather than a legal one. The point is not that Sally would be legally required to report Joe to the police. The point is that Sally would be *morally* required to report Joe and not to aid him. This would be true even if Sally lives in a legal system in which such reporting is not required. Sally's obligation here does not result from any special relationship she has with Joe, nor any special role she has taken on. It is simply a requirement for being a decent human being.

This case supports the following general ethical principle: It is prima facie wrong to knowingly contribute to seriously unjust outcomes, including

especially unjust harm to others, or to allow such injustice to occur when one is in a position to prevent it at little cost. I shall abbreviate this principle as follows:

> *The Duty of Justice:* It is prima facie wrong to cause or allow injustice.

This is stated as a prima facie duty rather than an absolute duty.[1] That is, the claim is that it is wrong to cause or allow injustice, *other things being equal*, or, *barring special exculpatory circumstances*. There may be special circumstances that render it permissible to cause or allow an injustice; it may be permissible, for example, to permit or cause a small injustice in order to prevent some much greater injustice. I shall not try to delineate all of these circumstances here. For now, what is important to note is that there is a general presumption against causing or allowing injustice to occur, such that one who wishes to defend an act of causing or allowing injustice must bear the burden of identifying the special exculpatory circumstances that render the action permissible.

This is enough to set up what I shall call "the problem of unjust (legal) advocacy." *Unjust advocacy* occurs when a lawyer pursues a legal outcome that he knows to be unjust. For example, a criminal defense attorney may defend an accused serial murderer whom the lawyer knows to be guilty; in the course of his duties, the attorney may attempt to secure an acquittal, despite his knowledge that this result would be seriously unjust. A civil litigation attorney may represent a client in a lawsuit that the attorney knows to be unfounded. Another litigator may defend a client against a lawsuit that the attorney knows to be well-founded. In a divorce proceeding, an attorney may seek a settlement that he knows unfairly favors his client. In the following discussion, I shall speak in terms of a criminal defense lawyer defending a client who is guilty of a morally serious crime, but it should be borne in mind that most of the points made apply equally to the case of a lawyer defending an unjust position in a civil case.

On the face of it, there is an obvious and powerful argument that unjust advocacy is morally wrong: as a general rule, one should not knowingly pursue injustice. Yet this sort of behavior is not only permitted by presently accepted codes of legal ethics; often, it is positively *required*. Justice White addressed the issue in the case of *United States v. Wade*:

> [D]efense counsel has no […] obligation to ascertain or present the truth. […] He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.[2]

Practicing defense attorneys often take an extremely strong and confident stand on this issue. One criminal defense lawyer, in response to the thought that "an attorney's ultimate goal must be to seek justice and not to simply win," writes, "That's not just wrong. It's absolutely, fundamentally, incontrovertably wrong."[3]

Thus, the conventional view of legal ethics, generally accepted in the legal profession, includes the following proposition, which I shall label "Devil's Advocacy":

> *Devil's Advocacy:* It is permissible and even obligatory for a lawyer to pursue unjust legal advocacy when this is in the best interests of his client.

Devil's Advocacy does not logically contradict the Duty of Justice, since the latter is only a prima facie principle. But the tension between the two principles forces us to ask: *why* is it morally acceptable for a lawyer to pursue injustice in the interests of his client? Given the normal obligation not to cause or allow injustice, to which we are all subject simply as human beings, what special exculpatory circumstances exist in the case of a lawyer that render unjust advocacy permissible?

The burden of proof, or at least of explanation, rests squarely on the shoulders of those who embrace Devil's Advocacy. Those who doubt Devil's Advocacy incur no such burden, since it is obvious on its face that promotion of injustice is, in normal circumstances, wrong. Those who think there is something special about the situation of an attorney must articulate what this special circumstance is.

Given how widespread the Devil's Advocacy view is in the legal profession, and given the extreme confidence with which it is often asserted, one might anticipate that there must be some very impressive and rigorous arguments in its favor. As we shall see, however, this is far from true.

Defending Unjust Advocacy

The Epistemological Problem

Some defenders of Devil's Advocacy appeal to a kind of external-world skepticism: it is said that a lawyer can never really *know* that a client is guilty. Even a client who confesses to his attorney *might* be lying, that is, there is a nonzero probability of this. Perhaps the client has falsely confessed because he is mentally disturbed or is protecting someone else.[4] Similarly, in a civil case, one can never be 100 percent certain of what the facts are. Therefore, it is urged, the lawyer's best course is to pursue the client's interests without regard to what he (the lawyer) believes to be just.

This is a strange argument. Typically, we do not eschew the pursuit of justice or any other value merely on the grounds that we cannot be 100 percent certain of what will promote or thwart the goal. In the case of the Murderer's Friend,

surely Sally could not be excused for disregarding the demands of justice and the welfare of innocent third parties merely on the grounds that she was not 100 percent certain that Joe was really a serial murderer. And if one really thought that any uncertainty as to what justice demanded neutralized one's reasons for acting to promote justice, it is unclear why one would not apply the same standard to all other values. Thus, why could one not claim that since one is never 100 percent certain that a given action will be in the interests of one's client, one should disregard the client's interests in deciding what to do?

Perhaps the intended argument is something like this. Suppose, as is commonly held, that it is better to let many guilty people go free than to convict one innocent person.[5] In that case, it may be morally correct to attempt to secure a person's acquittal even when that person is probably guilty. Suppose, for instance, that convicting one innocent person is worse than allowing nine guilty parties to go free. Then if there is even a 10 percent probability that a given defendant is innocent, one ought to attempt to secure an acquittal. Note that this is true regardless of whether one is a defense attorney, a prosecutor, or a juror.

This point is fair enough, but it does not address the interesting cases. The interesting cases are those in which the lawyer is convinced *beyond a reasonable doubt* that the client is guilty – or, more to the point, the probability of the client's being guilty, on the attorney's evidence, exceeds whatever ought to be the appropriate threshold for convicting a person of a crime. In this case, the argument that "it is better to let many guilty persons go free than to convict one innocent person" cuts no ice, since that point has already been taken into account in identifying the appropriate evidentiary threshold, which we have stipulated that the lawyer's evidence surpasses.

Perhaps the idea is merely that the lawyer's uncertainty as to his client's guilt *weakens* the reason the lawyer has for pursuing (what appear to be) the requirements of justice, such that some *other* reason for pursuing the client's interests can then outweigh the duty of justice. While this could be true in certain cases, it seems unlikely that uncertainty should play a decisive role in general, given that the lawyer's justified credence in his client's guilt can be extremely high (even if short of absolute certainty), and the injustice involved in pursuing a client's interests can be extremely serious. It is difficult to see why a very slight uncertainty about whether one is causing an extreme injustice must enable the duty of justice to be outweighed. We shall consider below the moral reasons that might be thought to support pursuing the client's interests regardless of justice; none will be so weighty as to plausibly outweigh the duty of justice in general, even when the inevitable uncertainty about the demands of justice is taken into account.

The Lawyer as Friend

Some view the lawyer as like a friend to his client.[6] Often, a person will support a friend's cause, even when the friend is in the wrong. And *to some extent*, we may regard this as morally acceptable, even virtuous – specifically, as a

manifestation of the virtue of loyalty. If a friend has overparked at a parking meter, it would not be virtuous to hail the traffic enforcer to ensure that your friend receives a ticket.

But while the virtue of loyalty may license *some* degree of disregard for impartial justice in the service of one's friends, this license must be quite limited. It was in light of this thought that I mentioned the friendship between Sally and Joe in the Murderer's Friend case. In that case, Sally is a friend of Joe in a clearer sense than a lawyer is a friend of his client. Yet this hardly excuses Sally's complicity in Joe's heinous crimes. Whatever moral value there may be in Sally's show of loyalty, it does not come close to outweighing the moral importance of stopping a serial murderer. The same would seem to hold for many lesser but still serious crimes.

In addition, there is, as D'Amato and Eberle put it, "certainly something strange about an instant friend whose friendship is purchased by paying a retainer."[7] While a preexisting close relationship may create certain ethical prerogatives to act partially on behalf of a particular person, it is implausible that such prerogatives are established by one's simply hiring someone specifically to help one escape justice.

Return to the case of the Murderer's Friend. We have already said that Sally's friendship with Joe does not seem to override her obligation to report Joe's crimes. Now suppose we add the following: Joe *pays* Sally $20,000 to keep quiet and to help him elude the police, and Sally accepts the money. Does this strengthen Sally's moral position, such that her failure to report Joe is now ethically justified?

Absolutely not. Sally's acceptance of hush money marks her as even more corrupt than in the original version of the story. She may be obligated to return Joe's money; regardless, her obligation to report Joe to the police persists undiminished.

The Lawyer's Function, Part 1: Faith in the System

Until now, I have considered relatively peripheral arguments in defense of Devil's Advocacy. The main argument, according to most proponents, appeals to the role of a lawyer in an adversarial justice system.[8] It is simply the job of a lawyer to represent his client's interests, regardless of where he believes true justice in the given case lies. If one is unable or unwilling to perform this function, then one has no business being a lawyer (or perhaps one is qualified only to serve as a prosecutor).

By themselves, however, observations about the responsibilities attached to a particular job carry little weight. It is equally true that it is the job of a mafia hit man to murder those whom the Boss targets for elimination, and that those who are unwilling to do this have no business being hit men. But this does nothing to justify murders carried out by hit men. If a particular job description includes activities that we are antecedently convinced are morally wrong, the mere introduction of employment opportunities for people who perform those

actions will do nothing to render them permissible; normally, it will simply mark the jobs in question as immoral jobs.

Defenders of Devil's Advocacy will say that what differentiates the job of lawyer from that of mafia hit man is the fact that the lawyer's job is socially beneficial, because it is part of a system – the adversarial justice system – that is well designed to achieve justice on the whole. But the system only functions well if the parties in it play their roles faithfully. Thus, the individual lawyer should faithfully discharge his role obligation within the system, namely, the obligation to represent his client's interests to the utmost regardless of the lawyer's own beliefs about justice.

There are two distinct arguments that might be intended here. One is the argument that a lawyer ought to have faith in the justice system, such that, despite his own unjust advocacy, the lawyer should nevertheless expect that justice will be done. Prosecutors are not so incompetent, nor juries so gullible, that a zealous defense attorney alone can cause a miscarriage of justice when the defendant should really be convicted. And of course, if one really knows that justice will not miscarry, then one's unjust advocacy does no harm.

But this argument simply requires an unjustifiedly extreme faith in the justice system. No doubt, the system usually works as intended, to punish the guilty and acquit the innocent. But there are cases in which it fails, and a lawyer can certainly be justified in suspecting that he is presently involved in such a case. This might occur, for instance, because the lawyer is privy to incriminating evidence of which the prosecution is ignorant, because the lawyer is in a position to take advantage of emotional reactions or other prejudices of the jury, or simply because the lawyer is more skilled than his counterpart on the opposite side. Of particular import, it is certainly possible, and must happen fairly often, that a lawyer is justified in attaching a nontrivial credence to the proposition that his own zealous advocacy will prove a key factor in enabling injustice to prevail.

The Lawyer's Function, Part 2: Rule Consequentialism

The second, and perhaps more common line of thinking behind the appeal to the attorney's role in the adversary system, would be based upon a roughly rule-consequentialist ethic. *Rule consequentialists* believe that the ethically correct action to perform in a given circumstance is the action that accords with the set of *general rules* such that, if people in general followed those rules, the consequences would be better for the world as a whole than they would be for any other set of general rules.[9] This is in contrast to (among other views) an *act consequentialist* ethic, which holds that the ethically correct action to perform in a given circumstance is simply the action that (given the rest of the world as it actually is or will be) will have the best overall consequences. Notably, it might be morally correct, according to rule consequentialism (but not act consequentialism), for a defense attorney to aid a murderer in obtaining release from prison, even though this action will have overall negative effects on

society, because the general rule according to which defense attorneys do their utmost to secure their clients' interests is beneficial to the justice system and society on the whole.

The first thing to note in reply to this argument is that the truth of rule consequentialism is far from obvious. The theory is highly controversial among ethicists; on its face, it is not obvious why the mere fact that it would be desirable if *everyone* followed a certain rule gives *me* a reason for following that rule, particularly when (1) it would not be desirable for *me individually* to follow the rule, and (2) my following or non-following of the rule will make no difference to whether everyone else follows it. The theory is also subject to a number of well-known and prima facie powerful objections. One objection has it that rule consequentialism collapses into act consequentialism, once we notice that act-consequentialism itself might be put forward as a possible rule. Alternately, the collapse may result from our allowing rules to incorporate exceptions (for instance, the rule regarding killing cannot simply be "don't kill people," but rather something more like "don't kill people, except in self-defense, or in defense of an innocent third party, or in a case of euthanasia, or …"); if sufficiently many exceptions are allowed to be built into a rule, then we will obtain a set of rules extensionally equivalent to act consequentialism.[10] Finally, at least on a naive interpretation (and assuming one can avoid the collapse into act consequentialism), rule consequentialism seems to generate absurd consequences, such as that it is morally wrong to become a philosophy professor, because it would be terrible if *everyone* became a philosophy professor.[11]

I lack the space to explore these objections here; I simply mention them by way of reminding the reader of why rule consequentialism is far from accepted doctrine in ethics.

I will briefly state, however, what I make of the issue. There is *something* to rule consequentialism; intuitively, it often seems correct to reason on the basis of the thought, "What if everyone did that?" When deciding whether to walk across a newly planted lawn, thus causing a tiny amount of damage to the lawn, it seems correct to consider what would be the effect of everyone (or at least a great many people) behaving in this way. But in other circumstances, the question "What if everyone did that?" seems entirely irrelevant – when I am choosing a career, it is not to the point to consider what would result were everyone to choose the same career path.

Plausibly, the difference between the two kinds of cases is this: in the cases where "what if everyone did that?" is relevant, not only is the proposed action such that it would be undesirable if many people behaved in a similar way, but also it could plausibly be considered *unfair* for the agent to behave in that manner while others refrained. Thus, we might say, it is unfair for me to walk across the lawn while others walk the long way around. But it is not unfair for me to become a philosopher while others choose other careers. That is why I have a moral reason to avoid walking across the lawn but not to avoid becoming a philosopher.[12]

If that is right, the question then becomes whether a lawyer, in failing to legally pursue injustice in the interests of his client, would be treating others unfairly. More precisely, is it unfair if one lawyer refuses to advocate injustice while others continue to do so?

It is hard to see how. The lawyers who continue to zealously advocate for their clients regardless of the demands of justice will continue to receive the emoluments to be gained from doing so – they will in fact be rendered *better off*, due to diminished marketplace competition, by the restraint of those conscience-bound lawyers who refuse to engage in unjust advocacy.

Perhaps it would be thought that the situation would be unfair to the *clients* of the conscientious lawyers (i.e., the lawyers who refuse to engage in unjust advocacy). But this provides a rather weak argument. How unfair is it that a person is denied assistance in pursuing *unjust* outcomes, while others are given such assistance? If we find that situation unfair, surely the fault lies more in those who provide assistance in pursuing injustice, rather than those who refuse to provide such assistance.

Consider another alleged case of unfairness. Some criminals are caught by the police, while others, equally blameworthy, get away with their crimes because the police never catch them. This, too, is a case of alleged unfairness consisting in unequal access to opportunities for getting away with crime. But no one would suggest that a better situation would be for all criminals to have equal opportunity to get away with their crimes. The only rational solution to the unfairness would be to attempt to deny such opportunities to all criminals.

Finally, it should be noted that it is not at all obvious that rule consequentialism favors Devil's Advocacy, because it is far from obvious that the rule whereby defense attorneys ignore justice in the pursuit of client interests really has the best social consequences. This is commonly asserted but rarely argued for. Consider an alternative rule whereby defense attorneys pursue their clients' interests only to the extent that they (the attorneys) believe is consistent with the requirements of justice. Why, exactly, would this be worse than the status quo?

Perhaps the worry is that some defendants who appear guilty would be unable to secure adequate legal representation. Let us consider three variations on this concern:

1 The concern might be that some factually guilty defendants will be unable to find someone to assist them in pursuing their unjust aim of escaping punishment. But it is hard to see how this situation would constitute a social harm.
2 Alternately, the concern might be that some defendants who are factually innocent but *appear* guilty will be unable to find a lawyer to defend them from an unjust conviction. This would be a real problem; however, the scenario is farfetched. Given the extent to which defense attorneys tend to be biased in favor of defendants – and the obvious financial interests that defense attorneys have in maintaining this bias – it is unlikely that a

factually innocent defendant would be unable to find any defense attorney who thinks there is any reasonable chance of his being innocent, such that the attorney would feel morally justified in pursuing an acquittal. While such a situation is of course possible (e.g., suppose there is overwhelming misleading evidence against the defendant), this mere possibility is not sufficient to generate a compelling argument. If we are to have a criminal justice system that punishes anyone at all, we must accept *some* risk of punishing the innocent; we must hold that there is some level of probability such that, when a defendant's probability of guilt exceeds that level, society is justified in meting out punishment. Now, it seems to me that, if a defendant cannot find any defense lawyer who thinks that he shouldn't be convicted, this is stronger evidence that the defendant is in fact guilty than the situation in which a jury in our present system votes to convict the defendant. Since we accept the punishment of a defendant pursuant to a jury conviction despite the possibility of a wrongful conviction, the smaller risk of an innocent defendant being unable to locate any defense lawyer who can in good conscience support his cause should not cause us any greater concern.

3 Finally, a more subtle issue is that even guilty defendants may require representation to avoid the violation of their legitimate rights. For instance, while a guilty defendant has no moral right to escape punishment altogether, he nevertheless has a right against being *over*punished, and competent legal representation may be necessary to safeguard this right. Suppose, for example, that a defendant in fact violated a just law, and consequently deserves some punishment; however, there were mitigating circumstances which a competent defense attorney would bring forth. It may well be that neither the prosecutor, nor the judge, nor the defendant would bring out these mitigating circumstances if no defense lawyer were present.

In this case, however, it is unclear why the defendant would be unable to secure legal representation for his legitimate interests, even in a world in which lawyers eschew unjust advocacy. For we have stipulated in this case that the defendant has interests whose protection is required by justice, and whose protection requires legal representation. The position we have advanced is not that it is unethical for a lawyer to *represent a guilty client*; the position is that it is unethical for a lawyer to *pursue an unjust outcome*. Even if this position were widely adopted and practiced, the defendant in the above scenario would still be able to secure a lawyer to assist him in avoiding overpunishment.

The Defendant's Right to a Fair Trial

Every defendant, however guilty he may appear, has the right to a fair trial. One requirement of a fair trial is that the defendant should have access to competent legal representation. Every defendant therefore has the right to such representation. But for that right to be satisfied, defense attorneys must be

willing to serve even defendants who appear obviously guilty. Therefore, one might argue, a defense attorney should be willing to represent a given client regardless of how guilty the client appears, even if the client insists on pleading not guilty.

The last sentence in the preceding paragraph is a non sequitur. The conclusion that a given attorney should represent a defendant who appears obviously guilty does not in any way follow from the preceding premises. The question with which I am here concerned is not one of *social policy* – I am not, for example, considering whether there should be a law forbidding attorneys from defending clients they strongly believe to be guilty. The question I am concerned with is one of *individual ethics*: suppose that you are a defense attorney, and a particular defendant has asked you to represent him. You are for all practical purposes certain that the defendant is guilty, yet he insists on pleading not guilty. What should *you as an individual* do? If you decline the case, you will not be denying or violating the defendant's right to counsel, any more than you would if you declined the case because you were about to go on vacation. The right to counsel does not mean the right to be represented by the specific person one most prefers, and you will not have prevented the defendant from finding another lawyer.

But what if *all* competent defense attorneys similarly reject the case? *Then* wouldn't the defendant's right to competent representation be violated? That is a matter for debate – for the reasons already given, no particular lawyer would have violated the defendant's right in this situation, nor would the state have violated the defendant's right, since the state did not prohibit anyone from representing the defendant. Fortunately, however, we need not rest on these points. It does not matter what would happen if all competent defense attorneys rejected the case, since an individual lawyer, by rejecting the case, does not thereby cause all competent defense attorneys to reject it. Bearing in mind, again, that our question is one of individual ethics, not of social policy, it is irrelevant what would happen if all lawyers rejected the case. What is relevant is what will happen if *you* reject the case. This typically will not result in the defendant's right to competent representation being violated.

Candor towards the Tribunal: Lying versus Misleading

As I have indicated, the central argument against Devil's Advocacy is one that appeals directly to the Duty of Justice. In addition, however, there is a striking tension contained in the conventional view of legal ethics. In the conventional view, it is unethical for a lawyer to actually lie in court. A lawyer may not, for example, state that his client did not commit the crime for which he is charged, if the lawyer knows that his client did in fact commit that crime. Similarly, it is unethical for a lawyer to knowingly introduce fabricated evidence, or to suborn perjury.[13]

I shall assume that the conventional view is right on this point. This gives rise to the following argument:

1 It is unethical for a lawyer to lie, suborn perjury, or introduce falsified evidence.
2 There is no ethically significant difference between (typical cases of) unjust legal advocacy and lying, suborning perjury, or introducing falsified evidence.
3 Therefore, it is (typically) unethical for a lawyer to engage in unjust legal advocacy.

Why is premise (1) true? Plausibly, the reason is that lying, suborning perjury, and introducing falsified evidence are all forms of deception, and this type of deception is particularly serious because it undermines the trial's function of determining the truth so that justice may be done. Considerations of defendants' rights do not override this concern, since defendants have no right to have false evidence introduced, nor does a fair trial require the introduction of such false evidence.

If this is correct, then it appears that we should also endorse premise (2). Unjust legal advocacy is also (typically) a form of deception. The lawyer engaged in such advocacy is, by definition, attempting to mislead the tribunal as to *how the case should be decided*. He is attempting to convince the tribunal that it should come to a particular decision, when he knows that they ought not to make that decision. This form of deception is, if anything, *more* serious than deceiving the tribunal about some subsidiary matter. If falsifying evidence is wrong because it undermines the tribunal's ability to correctly decide a case, then *a fortiori* it is wrong to mislead the tribunal directly about how the case should be decided. Considerations of defendants' rights do not override this concern, since defendants have no right that the tribunal be misled.

Furthermore, unjust legal advocacy will typically involve numerous subsidiary acts of misleading. Consider the famous 1840 trial of François Benjamin Courvoisier, in which the defendant confessed to his lawyer, Charles Phillips, during the trial. On the advice of the judge, Phillips continued to mount the best defense that he could, which turned out to involve impugning a prosecution witness with implications that she, the witness, might be lying because she herself had been involved in the crime. This was deceptive, since Phillips knew that the witness was not lying and was not involved in the crime.[14]

Phillips did not violate conventional legal ethics: he did not *lie* in court, since he did not *assert* that the prosecution witness was lying; he merely suggested it. But this is a very tenuous distinction on which to rest much moral weight. Compare the following non-judicial example:

> *The Misleading Implication:* Professor Malicius is asked to write a report for the tenure file of Professor Sobre. In his report, Malicius, seeking to sabotage Sobre's tenure case, states that Professor Sobre's drinking problem is not a conclusive reason for denying Sobre tenure, since Sobre comes to class sober at least 80% of the time. In fact, Malicius knows that Sobre has no drinking problem and is always sober.

In this case, Malicius can be rightly condemned for his deception. Malicius can hardly plead innocence by pointing to the literal truth of his statements, when his intention was to induce the audience to draw false inferences and thus to induce them to make the wrong decision in the tenure case. The intentional exploitation of false implications is not morally superior to lying. Similarly, a lawyer can hardly avoid criticism for deception by appealing to the distinction between lying to the court and merely making statements designed to induce the court to draw false conclusions.

But now consider a case in which the prosecution has failed to meet its burden of proof; nevertheless, the defense attorney knows his client to be guilty because the client secretly confessed to the attorney. The defense attorney argues for acquittal, confining himself to arguing, correctly, that the prosecution has failed to meet its burden of proof, and thus that the jury ought to acquit. Is this deceptive? One might argue that it is not deceptive, since nothing the lawyer says licenses the inference that the defendant in fact did not commit the crime, and the conclusion the lawyer wants the jury to draw – that the jury ought to acquit (based on their evidence) – is correct.

An argument can be made that this behavior is deceptive nevertheless. Suppose Alice says to Bob, "I think Charles stole my donut from the break room. I saw him chewing on something after the donut disappeared, and he had powdered sugar around his mouth." "Oh," Bob responds, "That's no reason for accusing Charles. For all you know, he might have just bought his own donut. Leave Charles alone." In fact, Bob *saw* Charles steal the donut, but he intentionally neglects to mention this, because he wants to help Charles get away with the theft. In this case, Bob could obviously be criticized for his deception. Similarly, it seems that in a criminal trial, a person who intentionally neglects to mention information establishing the defendant's guilt, with the purpose of helping the defendant get away with his crime, can be criticized for deception.

Moreover, whether the lawyer's behavior counts as "deception" or not, it appears to share in the main defect that makes deception in a courtroom wrong in general: it undermines the ability of the tribunal to serve its function of ascertaining the truth so that justice may be done.

The Ethical Lawyer

So far, I have criticized the conventional view of legal ethics. There simply is no good argument for the view that pursuit of injustice is morally permissible provided that one is a lawyer serving the interests of one's client. What ought a lawyer to do instead? Should a criminal defense attorney, for example, refuse to represent clients whom the attorney takes to be clearly guilty? Should he attempt to avoid finding out whether his clients are guilty, so that he can represent them with a relatively clear conscience? Should he leave the profession altogether?

Defending the Apparently Guilty

The proper conclusion is not that it is always wrong to defend those whom one believes to be guilty. We have said that a lawyer should not pursue a legal outcome that he knows to be unjust. But there are at least two reasons why this does not preclude defending those who appear to oneself to be guilty.

First, as suggested in above, there are cases in which outcome A has a higher probability of being unjust than outcome B, but in which if outcome B is unjust, it is *more* unjust than outcome A would be. For example, if a defendant is 75% likely to be guilty, then there is a 75% probability that acquittal of that defendant would be an unjust outcome, and only a 25% probability that conviction would be unjust. However, conviction of the innocent is much more unjust than acquittal of the guilty. Because of this, it is ethically justifiable to attempt to secure acquittal for such a defendant. This point applies as long as the lawyer has reasonable doubts as to the guilt of his client.

Second, as noted above, even the guilty have rights; it is therefore ethically justifiable for a lawyer to represent a client for the purpose of protecting that client's rights, even if he is certain the client is guilty. The lawyer may seek to prevent overpunishment or other mistreatment of the defendant. In some cases, where the expected punishment for a crime is excessive, it may be less unjust for the defendant to be acquitted than for the defendant to be convicted, even though the defendant is guilty. Barbara Babcock relates the case of a defendant facing a mandatory 20-year prison sentence for possession of heroin (her third offense). Though Babcock knew the defendant to be guilty, she successfully pursued an acquittal based upon a (rather thin) mental illness defense. In this case, the lawyer acted ethically, since it would have been much more unjust for the defendant to receive a 20-year prison sentence than for the defendant to go free.[15]

These are justice-based reasons for defending an apparently guilty client. What is not ethically justifiable is for a lawyer to simply disregard considerations of justice and pursue an apparently unjust outcome solely on the grounds that it serves the interests of his employer.

The Duty of Disclosure

Should a lawyer disclose his policy regarding unjust legal advocacy? If he does so, guilty clients may decide to seek a lawyer more friendly to unjust advocacy – in which case they are more likely to obtain an unjust legal outcome. This suggests that perhaps the lawyer should *not* disclose his policy.

Nevertheless, a lawyer who rejects unjust advocacy should disclose this policy to his clients. While the clients have no right to an unjust legal outcome, they have a right against being defrauded. Because the Devil's Advocacy view is widely accepted in the legal profession, and because this fact is widely known within our society, clients who are not told otherwise are likely to assume that they are paying for a zealous advocate who will give no regard to truth or

justice. Failure to disclose one's own quite different policy would therefore amount to one's receiving payment under false pretenses. While a lawyer has every ethical right to pursue what he takes to be justice, he does not have the right to profit from clients who take themselves to be purchasing something quite other than what he is prepared to provide.

Of course, this sort of disclosure is likely to greatly diminish a lawyer's employment prospects. Very likely, in our current environment, such a policy would end the career of any criminal defense attorney, or place severe burdens on an attorney of any other kind. This, however, provides no objection to the ethical arguments I have given. Ethics very often rules out some otherwise desirable career options. Imagine a "conscientious assassin" who only assassinates people who he is sure really deserve to be assassinated: no doubt this assassin would find greatly diminished employment prospects and would wind up being forced out of the business. But this provides no argument against the proposition that it is wrong to assassinate innocent people.

Intentional Ignorance

Many practicing lawyers attempt to avoid ethical dilemmas through maintaining ignorance. If one doesn't know whether the client is guilty, then one need not face the dilemma of deciding whether and how to defend a guilty client. Therefore, they avoid asking the client whether he is guilty and discourage the client from providing them with that information, or any information that would interfere with the lawyer's providing a forceful defense.[16]

This surely cannot be ethically correct. Imagine another case in which one seeks to maintain innocence through ignorance. I am about to turn the corner onto Mapleton Avenue. I am concerned that there may be children playing in the street, whom I might hit as I drive down the street. But I don't want to have to stop the car or take a different route; therefore, as I turn the corner, I close my eyes to avoid knowing whether there are any children in the street – with the thought that if I don't *know* that children are there, I will not be morally culpable.

This attempt at avoiding responsibility obviously fails. When performing an action with a high risk of causing a terrible outcome, one is normally obligated to gather information, if one can easily and cheaply do so, to find out whether one is in fact going to cause that outcome (and to desist if the answer is yes). Certainly one may not actively avoid such information. In the present case, the driver would be morally responsible for the outcome, should he hit a child in the street due to his failure to see the child.

Similarly, a lawyer pursuing acquittal for a criminal defendant is engaged in an activity with a high risk of causing a very bad outcome – that a criminal who otherwise would be justly punished is released without punishment. If the lawyer winds up causing that bad outcome due to his intentional ignorance as to his client's guilt, the lawyer will then be morally responsible for the outcome. Willful ignorance is not a way of avoiding responsibility. The lawyer is rather

obligated to attempt to discern whether his client is guilty, if he can do so at reasonable cost (for example, by asking the client whether he is guilty).

The Ethical Prosecutor

The ethical problem of the defense attorney defending a guilty client is often raised in popular discourse. But as Paul Butler points out, the much neglected ethical problems faced by *prosecuting* attorneys are even more serious.[17] Prosecuting attorneys argue for the conviction and punishment of criminal defendants. There are at least three important ways in which a defendant's punishment may be unjust:

1 It is unjust to punish a person for a crime he did not commit.
2 It is unjust to punish a person for an action that was not wrong (whether or not the person performed the action).
3 It is unjust to punish a person in a manner that is disproportionate to the wrong committed.

There are thus at least three distinct ways in which a prosecutor, while pursuing the punishment of a criminal defendant, may be guilty of unjust advocacy.

The first kind of unjust advocacy is widely condemned, both within and without the legal profession: a prosecutor must not attempt to secure the conviction of a factually innocent defendant, or even one who is likely to be factually innocent. Interestingly, however, the latter two types of unjust advocacy are regarded much more leniently. Prosecutors routinely prosecute defendants for behavior that is illegal but ethically blameless, such as recreational drug use (though it is unclear how many prosecutors realize that such behavior is blameless). Prosecutors will also frequently advocate for disproportionate punishments when such punishments are legally prescribed, for instance, in the case of draconian "three strikes" laws. These forms of unjust advocacy are widely accepted as part of the prosecutor's job and are not generally regarded as ethical breaches in the way that advocating for the punishment of factually innocent defendants is seen as a serious ethical breach.

Our earlier arguments against unjust advocacy would seem to apply equally well to all three types of prosecutorial unjust advocacy, just as they do to unjust advocacy by criminal defense attorneys and civil litigators. If anything, unjust prosecution is *far worse* than unjust advocacy by defense attorneys, because it is much worse to punish a person unjustly than it is to merely fail to punish a person justly, and so it is worse to advocate for unjust punishment than to merely advocate for an absence of just punishment. In a case in which a prosecutor has reason to believe that a successful prosecution of a defendant will result in an unjust punishment – whether because the defendant did not perform the act of which he is accused, or because the act was not wrong, or because the likely punishment is disproportionate – the prosecutor should decline to prosecute.

In the current regime – assuming, as I do, that many legal punishments are disproportionate and that many law-violations, including all cases of drug possession, are ethically blameless – the refusal to engage in unjust prosecution is likely to cost a prosecutor his job. This fact is unfortunate but provides no ethical defense of unjust prosecution. Similarly, a mafia employee may well fear losing his job if he should refuse to help his employers violate the rights of others – but this would provide no ethical defense for his helping to violate the rights of others.

What about the case of prosecutors who genuinely believe that almost all law-violations are blameworthy and that almost all legal punishments are just and proportionate – do such prosecutors act wrongly in prosecuting those whom they mistakenly believe deserve the legal punishments that will follow upon a conviction?

My answer is that the prosecutor's behavior is blameless if and only if the prosecutor justifiedly believes that the legal position he is advancing is just, after the prosecutor has exercised due care in attempting to discern whether that position is just. Suppose, for example, that a prosecuting attorney is called upon to prosecute defendants for drug possession. Because the relevant law is a controversial one, in order to behave ethically, this attorney must study the justice of drug prohibition (for example, by reading the academic literature on that subject), making a good-faith effort to appreciate the most important arguments on both sides before forming an opinion on the issue. Only if, after doing so, the attorney honestly finds drug prohibition to be just, will it be ethical for the attorney to prosecute citizens under the drug laws. I rather doubt that these conditions are typically satisfied.[18] I therefore suspect that there is a very large amount of unethical prosecution in the current legal regime of the United States and other countries with drug prohibition. Similar points apply to other controversial laws and controversial punishments.

Public Policy

Much of the discussion surrounding the issue of unjust advocacy appears to be concerned with public policy issues, such as whether lawyers should be censured for defending the obviously guilty. The concern of this paper, by contrast, has been one of individual ethics – what ought an individual lawyer to do when confronted with a client who wishes to pursue an unjust legal outcome?

Before concluding, I want to add one brief remark about public policy. Should there be a law according to which lawyers are prohibited from defending clients known to be guilty? The answer to this is rather clearly no – unjust advocacy should not be legally proscribed, even though it is ethically wrong. The reason is that a law proscribing unjust advocacy would have a chilling effect on the legal profession. A lawyer might, for example, believe that a particular defendant should be acquitted, but also believe (1) that the defendant *might* well be convicted, and (2) that after the defendant's conviction, the authorities *might* conclude that he, the lawyer, knew all along that the defendant

deserved to be punished. In such a case, it would be ethically correct for the lawyer to accept the case and argue for acquittal, yet the lawyer would face strong pressure to refuse the case to avoid personal risk. Thus, the result of such a law would likely be that lawyers would give up a great deal of ethically appropriate advocacy, in addition to giving up unjust advocacy.

Conclusion

The ethical dilemmas facing a lawyer with a guilty client appear frequently in popular drama, where the ethical resolution is often supposed to be for the lawyer to betray his client by intentionally sabotaging the case.[19]

I propose a less extreme means of avoiding contributing to injustice: a lawyer should inform his client up front that he will refuse to advocate for a position that he, the lawyer, finds to be unjust. If the client wishes to retain the lawyer's services after being informed of this condition, the lawyer then does no wrong by following through on the stated condition, and indeed would do wrong by failing to follow through.

Most legal professionals would confidently reject my proposal in favor of some version of Devil's Advocacy, the view that a lawyer should pursue his client's interests without regard to justice. But the confidence with which lawyers advance this view is not matched by the arguments in its support. Some appeal to the impossibility of being absolutely certain of a client's guilt, but this hardly seems to explain why pursuing an outcome that one believes to be in the client's interest is more important than avoiding something that is *almost* certainly a serious injustice.

Others view the lawyer-client relationship as a kind of friendship and appeal to the virtue of loyalty to friends. But we may doubt how much moral import should be attached to a friendship that is established on the spot by paying someone to help one get away with a crime. In any case, even a good friend should not aid his friend in getting away with serious infringements on the rights of others.

Others believe that a lawyer should have faith in the justice system, such that despite his own unjust advocacy, the lawyer should trust that the system will produce the correct outcome. But this would simply be an unjustified faith; skilled lawyers have often caused miscarriages of justice.

Other writers appeal to the defendant's right to a fair trial, which can be satisfied only if the defendant has competent representation. But in refusing to advocate for an unjust position, a lawyer does not violate anyone's right to a fair trial, since the lawyer does not prevent the defendant from hiring a different lawyer, nor does the lawyer refuse to defend the prospective client's legitimate rights.

Finally, the most common argument in defense of unjust advocacy appears to be an appeal to rule consequentialism. Specifically, it is said that the justice system as a whole works best if lawyers in general follow the rule of doing their utmost for their clients' interests, as opposed to the situation in which lawyers in

general follow the rule of pursuing what they take to be just. This argument faces two problems: first, rule consequentialism itself is a dubious ethical theory; it is unclear why the results of *everyone* following a given rule are practically relevant to an individual's decision, when the individual has no control over what everyone else will do. Second, it is hard to see in any case why it would be better if lawyers followed the rule of pursuing their clients' interests without regard to justice than if they followed the rule of pursuing justice.

There are two main arguments against Devil's Advocacy. The first is simply that it is generally wrong for a person to pursue unjust outcomes. In the absence of a sufficient countervailing argument, the presumption against promoting injustice stands. Second, it is widely accepted that it is wrong for a lawyer to lie to the court. But the sort of deception involved in unjust legal advocacy – deliberately exploiting false inferences, for example – is not morally superior to lying.

Why, then, is Devil's Advocacy so widely accepted in the legal profession? One is tempted to speculate that the financial interests of lawyers may play some role in the widespread acceptance among lawyers (but not the lay public) of this otherwise puzzling position. Surely a lawyer's services will be in greater demand if he can promise to serve his clients' interests without regard to justice than if he must impose ethical constraints on his service to his clients. The lawyer's duties to the client, however, may be abridged when the client's interests would conflict with those of the lawyer. Consider, for example, that attorney–client confidentiality is held to be so important that an attorney may not breach confidentiality in order to prevent a violent criminal from going free. It is, however, entirely permissible, according to the ABA Rules of Professional Conduct, to violate confidentiality if doing so is necessary for the lawyer to collect his fee.[20] Can it be that the collection of lawyer's fees is morally more important than preventing violent criminals from going free?

Why should we be concerned about this speculative psychological question? Many adherents of Devil's Advocacy and other doctrines in legal ethics rely at least to some degree on appeals to authority – for example, a lawyer may feel that he is on sure footing in observing the ABA's Model Rules of Professional Conduct. It is not unreasonable to suppose that many accept Devil's Advocacy because it is widely accepted in the profession, including by the ABA. It is well to remind readers, then, that these are not unbiased sources of ethical advice. To decide what constitutes ethical behavior in the legal profession requires careful examination of the relevant ethical arguments. This examination seems to reveal, as I have argued, that the conventional view of legal ethics is fundamentally misguided, and that in consequence, a great deal of standard legal practice is ethically unacceptable.

Notes

1 On the notion of prima facie duty, see Ross [1930] 1988, ch. 2.
2 *United States v. Wade*, 388 U.S. 218 (1967), at pp. 256–257.

3 Gamso 2009, responding to Jones 2009.
4 D'Amato and Eberle, 2010, pp. 14–15; Joy 2004, p. 1246n36.
5 Volokh 1997; Dershowitz 2013.
6 Fried 1976; Joy 2004, pp. 1246–1247n37. For criticisms of the view, see Dauer and Leff 1977.
7 D'Amato and Eberle 2010, p. 4.
8 Joy 2004, p. 1246n35; Freedman 1975; Dershowitz 2013, p. 68.
9 Brandt 1992, ch. 7.
10 For discussion, see Card 2007; Hooker 2007.
11 For discussion, see Huemer 2013, pp. 85–86.
12 Huemer 2013, pp. 86–87.
13 American Bar Association 2013, rule 3.3.
14 My account of the case is based upon that of Asimow and Weisberg (2009, pp. 230–232).
15 Babcock 2013, pp. 5–8. Elsewhere (Huemer 2010), I have argued that drug prohibition itself is unjust; if this is correct, then *any* punishment for drug possession would be unjust.
16 Mann 1985, pp. 103–123; Freedman and Smith 2004, p. 169.
17 Butler 2013.
18 A central reason for my doubt on this score is simply the extreme weakness of the case for prohibition; see my 2010.
19 Asimow and Weisberg (2009, pp. 248–253) discuss several examples; they conclude, however, that such betrayal "should never be tolerated."
20 American Bar Association 2013, rule 1.6. D'Amato and Eberle (2010, p. 23) suggest the explanation that the ABA rules are designed to benefit lawyers.

References

American Bar Association. 2013. *Model Rules of Professional Conduct*, available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (accessed February 23, 2014).

Asimow, Michael and Richard Weisberg. 2009. "When the Lawyer Knows the Client Is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature," *Southern California Interdisciplinary Law Journal* 18: 229–58.

Babcock, Barbara. 2013. "'Defending the Guilty' after 30 Years," pp. 1–13 in Smith and Freedman 2013.

Brandt, Richard. 1992. *Morality, Utilitarianism, and Rights*. Cambridge: Cambridge University Press.

Butler, Paul. 2013. "How Can You Prosecute Those People?", pp. 15–27 in Smith and Freedman 2013.

Card, Robert F. 2007. "Inconsistency and the Theoretical Commitments of Hooker's Rule-consequentialism," *Utilitas* 19: 243–58.

Cohen, Elliot D. 1985. "Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System," *Criminal Justice Ethics* 4: 38–59.

D'Amato, Anthony and Edward J. Eberle. 2010. "Three Models of Legal Ethics," *Faculty Working Papers*, paper 73, available at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/73/ (accessed February 2, 2014).

Dauer, Edward and Arthur Leff. 1977. "The Lawyer as Friend," *Yale Law Journal* 86: 573–84.

Dershowitz, Alan. 2013. "Why I Defend the Guilty and Innocent Alike," pp. 65–71 in Smith and Freedman 2013.

Freedman, Monroe H. 1975. *Lawyers' Ethics in an Adversary System*. Indianapolis, Ind.: Bobbs-Merrill.

Freedman, Monroe H. and Abbe Smith. 2004. *Understanding Lawyers' Ethics*, 3rd ed. Newark, N.J.: LexisNexis.

Fried, Charles. 1976. "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation," *Yale Law Journal* 85: 1060–89.

Gamso, Jeff. 2009. "Who We Are And What We Do," Gamso – For the Defense weblog, available at http://gamso-forthedefense.blogspot.com/2009/11/who-we-are-and-what-we-do.html (accessed February 2, 2014).

Hooker, Brad. 2007. "Rule-consequentialism and Internal Consistency: A Reply to Card," *Utilitas* 19: 514–9.

Huemer, Michael. 2010. "America's Unjust Drug War," pp. 354–67 in *The Ethical Life*, ed. Russ Shafer-Landau. New York: Oxford University Press.

Huemer, Michael. 2013. *The Problem of Political Authority*. New York: Palgrave Macmillan.

Jones, Keyana. 2009. "How Attorneys Can Represent Their Guilty As Charged Clients In Good Conscience," Forward Movement weblog, available at http://ourforwardmovement.blogspot.com/2009/11/how-attorneys-can-represent-their.html (accessed February 2, 2014).

Joy, Peter A. 2004. "Teaching Ethics in the Criminal Law Course," *Saint Louis University Law Journal* 48: 1239–48.

Mann, Kenneth. 1985. *Defending White-Collar Crime: A Portrait of Attorneys at Work*. New Haven, Conn.: Yale University Press.

Ross, W. D. [1930] 1988. *The Right and the Good*. Reprint, Indianapolis, Ind.: Hackett.

Smith, Abbe and Monroe H. Freedman. 2013. *How Can You Represent Those People?* New York: Palgrave Macmillan.

Volokh, Alexander. 1997. "*n* Guilty Men," *University of Pennsylvania Law Review* 146: 173–216.

17 Prosecutors, Guilty Pleas, and the Consequences of a Conviction

Zachary Hoskins

Introduction

Political philosophy studies a state's relationship to its citizens, and especially the state's exercise of power over its citizens. Nowhere is this exercise of power more evident than in the institutions of criminal justice; and in the United States, no agent of the state exercises more power over the lives of those suspected of crimes than does the criminal prosecutor. The discretion prosecutors enjoy in deciding whether and for what crimes to charge individuals gives them enormous influence over who is and is not ultimately convicted. This is especially so given that more than 90 percent of criminal convictions result from a defendant offering a guilty plea rather than from a jury verdict.[1] Prosecutors are thus political figures in that they are key agents in the exercise of state power. They are political figures in another sense, as well: Most prosecutors at the state and local levels are elected officials. A volume on political ethics thus seems an ideal forum to discuss the ethical obligations borne by this central political agent, the prosecutor.

In this chapter, I focus on one such obligation: Put simply, I contend that prosecutors should be centrally responsible for ensuring that defendants considering whether to plead guilty have access to the range of likely legal consequences of such a plea. As we will see, this is in some respects a modest suggestion. But given various realities of current legal practice in the United States, especially the pervasiveness of so-called "collateral" consequences of conviction, the proposal offered in this chapter could have potentially radical effects. In what follows, I first set the stage by discussing some broader developments in criminal justice that have made the issue of informed guilty pleas—and in particular, whose responsibility it is to ensure that defendants are informed—especially important. Then I develop and defend the proposal that prosecutors should bear greater responsibility than they currently do, indeed central responsibility, for ensuring that defendants have access to the information relevant to making an informed plea decision. I contend that this proposal is both justifiable in principle and attractive in its practical implications.

The Legal Consequences of a Conviction

When the state charges a person with a crime, it presents her with a choice: Plead not guilty and take her case to trial, or plead guilty and accept a conviction without a trial.[2] The stakes for the decision are high, in part because, by pleading guilty, the defendant signals her acknowledgement of culpability for the given charge(s). But the stakes are high for another reason, as the US Supreme Court has pointed out:

> [T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.[3]

A guilty plea is a choice not to contest one's case in court. By pleading guilty, a defendant sacrifices the presumption of innocence she enjoyed and accepts without challenge the alteration in legal status that results from a conviction—an alteration by which she makes herself liable to forms of harsh treatment by the state that would otherwise be impermissible. Thus for defendants considering a guilty plea, the consequences of a conviction are acutely relevant. Given the gravity of what's at stake, a defendant is entitled to make an informed choice about her plea.

But which consequences are relevant to a defendant in considering whether to plead guilty? The most obvious consequence of a conviction is a term of punishment. People who plead guilty may be sentenced to time in jail or prison, to community service, to pay some amount of money, to a term of probation, and so on. These are not, however, the only legal consequences of a conviction. People with criminal convictions are subject to a host of other legal burdens: They may be restricted from certain forms of employment; denied consideration for public housing, welfare assistance, or federal student loans; denied the vote; barred from fostering or adopting children, from obtaining driver's licenses, from serving on juries, from possessing firearms, and from serving in the military. They may also be subject to involuntary civil commitment, sex offender registration, mandatory deportation, and so on. And they may have their criminal records made publicly accessible (which can, in turn, affect opportunities to secure employment, housing, etc.).[4] These other legal consequences are not part of an offender's formal criminal sentence; nevertheless, they can be extremely burdensome—in many cases, more burdensome than the formal sentence itself—and often extend well after the term of formal punishment has been completed.

Until recently, courts consistently have held that the only consequences about which defendants were entitled to be notified were the so-called "direct consequences" of conviction: namely, the formal sentence itself. The other

legal consequences described above—restrictions on employment, housing, and so on—have been considered "collateral" consequences that were beyond the scope of the notification requirement. Case law on this issue has been governed by the 1970 US Supreme Court decision in *Brady v. United States*, in which the Court wrote that a guilty plea must be made "by one fully aware of the *direct* consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel … ."[5] As scholars have since noted, this passage in Brady is actually part of a larger, somewhat different discussion of the voluntariness of pleas, so the Court did not provide a rationale for the apparent restriction of the notification requirement to the direct consequences of conviction, or a discussion of which consequences are direct and which are not.[6] Nevertheless, until recently lower courts have relied on this passage as the basis for holding that defendants are entitled to be notified only about the direct consequences (again, the potential sentence), not about the variety of other, "collateral" legal consequences that follow from a conviction.

Recently, however, courts have begun to challenge the direct-collateral distinction as a basis for determining notification requirements. The primary impetus for the change was the Supreme Court's 2010 ruling in *Padilla v. Kentucky* that defense counsel must advise non-citizen clients about the risk of deportation as a consequence of a guilty plea.[7] Although deportation is legally regarded as a civil measure (a collateral consequence) rather than a criminal punishment, the Court held that deportation is such a severe burden and, for many non-citizen offenders, so likely to follow from conviction that defendants are entitled to be informed about deportation as a potential consequence.[8]

In the *Padilla* ruling, the Court pointed out that, unlike lower courts, it had never itself appealed to the direct-collateral distinction as a basis for sorting out what information a defendant is entitled to receive in considering her plea, and it declined to speak to the general appropriateness of the direct-collateral test.[9] Instead, it claimed that deportation is unique as a consequence of conviction, because of both its severity and its near certainty for non-citizen convicts.[10] Thus the Court expressly declined to weigh in on other sorts of collateral restrictions. Nevertheless, it set the stage for lower courts to do just this when it emphasized severity and certainty as the governing considerations in determining which consequences are relevant. Several lower courts have used *Padilla* as a basis for extending the notification requirement to other sorts of legal consequences of conviction. In particular, some courts have found that sex offender registration is sufficiently severe and certain that those convicted of sex offenses that would require registration are entitled to be informed about this in considering their plea.[11]

Given this movement in the lower courts, it is reasonably likely that, in time, defendants will be legally entitled to be informed about a much broader range of consequences of conviction than just the potential sentence itself. This prospect highlights the question of whose responsibility it is to ensure that defendants are informed about these potential consequences. Traditionally, it has fallen primarily to defense counsel to perform this function. Judges are

charged with ensuring, at the time the plea is entered, that it is made knowingly, "with sufficient awareness of the relevant circumstances and likely consequences."[12] But it has been the defense attorney's responsibility to inform and counsel the defendant, in the period before a plea is entered, about the range of punishments that could result.

Informing defendants about potential criminal sentences, however, is a relatively straightforward matter in comparison to making them aware of the daunting range of collateral restrictions that may follow from a conviction. These restrictions are scattered throughout statute books, differ significantly across jurisdictions, and are revised frequently by legislatures. The practical challenge is especially formidable for public defenders' offices that are already handling caseloads far greater than their resources warrant.

Despite these practical concerns, scholars—even those who have lauded the prospect of the broader scope in notification requirements—have readily accepted that the additional burden for making the relevant information available should fall primarily, perhaps solely, on defense attorneys.[13] In response to concerns about the practical difficulties for defense attorneys in discharging this responsibility, given the proliferation of collateral consequences in recent decades, Gabriel Chin writes, "While these considerations are real, … they should not stand in the way of recognizing constitutional rights of defendants, including being made aware of the serious consequences they will face after conviction."[14]

Implicit in Chin's response is a false dichotomy: Either defense attorneys bear primary, or sole, responsibility for ensuring that defendants are properly informed, or defendants will not be properly informed. In my view, we should opt for a different alternative: The primary burden of assuring that defendants have access to information relevant to their pleas should fall to prosecutors.

This thesis may seem initially implausible. In an adversarial legal system such as in the United States, it may seem that it is the job of the defense counsel to advise and advocate for her clients, whereas the prosecutor's role is to focus on securing a conviction. As Margaret Love puts it, "prosecutors have no constitutional obligation to know about collateral penalties at all."[15] My contention, however, is that they do have an *ethical* obligation to know about these collateral consequences. Furthermore, they have an ethical obligation to ensure that defendants considering whether to plead guilty—to charges that the prosecutors have chosen to bring against them—have access to relevant information about the legal consequences of doing so.

The State, Prosecutors, and Informed Plea Decisions

The case for prosecutors' central responsibility for notifying defendants is grounded in a conception of the criminal law as the institution by which the state, on behalf of the political community it serves, holds individuals accountable for crime. The state's principal representative in this endeavor is the prosecutor. As we noted earlier, a person charged with a crime is presented

with a choice: Plead not guilty and take your case to trial—where you may, if convicted, face a host of burdensome legal consequences—or plead guilty and accept the conviction, and the legal burdens that attach to it, without challenge. As the state agents responsible for deciding whom to charge, prosecutors determine who will face this choice. They also set the terms of the choice. This is most apparent in the context of plea bargaining, where prosecutors offer fewer or less serious charges in exchange for a guilty plea. The vast majority of convictions in the United States result from plea bargaining. But regardless of whether a plea bargain is offered, when prosecutors decide which offenses to charge, they thereby effectively determine what legal consequences a defendant may face as a result of a conviction.

My thesis is that because prosecutors are the agents of the state who place individuals in this decision-making situation and set the terms of the choice, they bear certain role-based ethical obligations with regard to the plea decision. First, prosecutors have an ethical obligation to be aware themselves of the full range of legal consequences that are likely to follow from a conviction (whether as a result of a guilty plea or a trial). When prosecutors make the decision to press charges, they put individuals' liberties in jeopardy, and it would be irresponsible for prosecutors not to be aware of the likely legal ramifications for these individuals of a conviction. This is just to say that prosecutors have an ethical obligation to understand the terms of the choice they put to defendants.

It is not enough, however, that prosecutors themselves understand the full terms of the choice they present to defendants. Prosecutors also have an ethical obligation to ensure that defendants have access to the terms of this choice—that is, access to relevant information about the potential legal consequences of their plea decisions. In a fairly thin sense, defendants have access to this information already; it is virtually all publicly available in statute documents and similar sources. But finding the information relevant to a given offender requires a substantial amount of time and a fair degree of legal understanding. Thus providing defendants with *genuine* access to the relevant information will require individuals with the requisite expertise to conduct significant amounts of research. Given that prosecutors are the agents of the state who are authorized to create and set the terms of the choice itself, it is prosecutors who are responsible for providing such access.

In one sense, this is a fairly modest thesis: I am not claiming that prosecutors are ethically responsible for ensuring that defendants *understand* the full implications of a guilty plea, only that they are responsible for ensuring that defendants *have access* to the relevant information. In practice, however, this proposal would have significant implications. Collateral restrictions may be created by federal or state legislatures or other regulatory bodies, and thus they are strewn throughout various statute books and policy guidelines. Different restrictions apply to different classes of convicted individuals (for example, some apply only to those convicted of felonies, not misdemeanors; others apply only to those convicted of certain types of felonies, such as drug or sex offenses). And the restrictions are subject to periodic revision. Being informed about

these restrictions is thus not a one-time proposition (as daunting as that proposition would be). Rather, it requires having access to the *current* state of potential restrictions, and this requires keeping abreast of changes to the relevant laws and policies.[16] Thus ensuring that defendants have access to the potential legal consequences of their guilty pleas requires a significant investment of time and energy. I am suggesting that this burden should be borne by prosecutors.

This may appear to be assigning to the prosecutor responsibilities that are more properly taken up by defense counsel. It is the defense lawyer's role, after all, to counsel and be an advocate for her client. Love writes that "a defense lawyer is in a position to find out what is important to his client and is ethically obligated to use what he knows about his client's situation to get the best deal he can in negotiating with the government."[17] Perhaps, then, my proposal unhelpfully blurs the lines between the respective role-based obligations of different agents in the criminal justice process.

There are a number of reasons, however, why the responsibility of ensuring that defendants have access to the relevant information should fall to prosecutors rather than defense lawyers. First, defense lawyers are frequently not agents of the state (with the exception of public defenders, lawyers provided by the state to clients who cannot afford to hire lawyers). When the state leaves it to private defense lawyers to ensure that defendants have access to relevant information regarding their plea decisions, it essentially outsources its own responsibilities to ensure that defendants are aware of the full range of legal consequences that the state is threatening to impose. Second, even focusing on public defenders, although they are agents of the state, they are not the agents who, on the state's behalf, bring charges against certain individuals and thus subject them to the prospect of burdensome treatment. Defenders do not create or set the terms of the plea choice; prosecutors do. Thus it is properly the role of prosecutors to ensure that defendants have access to the terms of the choice.

Third, as I suggested above, prosecutors have an ethical obligation themselves to understand the full terms of the choice that they (acting on the state's behalf) present to defendants. As a practical matter, this means that prosecutors have an obligation to do the requisite research in each case anyway. Thus in determining how to delegate the responsibility of ensuring that defendants have access to the relevant information, there are reasons of efficiency to assign this responsibility to prosecutors, who are already obliged to do the necessary research, rather than requiring defense lawyers to duplicate the prosecutors' efforts.

Fourth, assigning this responsibility to prosecutors need not infringe on the proper responsibilities of defense lawyers. We can consistently endorse a prosecutor's obligation to ensure that a defendant has access to relevant information about the legal consequences of a guilty plea as well as defense counsel's responsibility to advise and advocate for her client. An informed choice requires that we have access to information relevant to the choice, that we have a reasonable understanding of the information, and that we have some understanding of the comparative values we assign to these various

consequences. On my account, a defense attorney should still ensure that her client understands the nature, severity, and likelihood of the potential consequences of a guilty plea; should advise her client about what is in the client's best interests, given the client's particular values and circumstances; and in light of all this should seek to secure the best deal for her client in plea bargaining. But it is the prosecutor's obligation, as the state agent who determines whether an individual is called to account and for what—and in so doing sets the terms of the plea decision—to ensure that the defendant has access to information about the relevant potential consequences of the decision. Note that the prosecutor might typically discharge this obligation by making the relevant information available to the defense counsel, so that she can discuss it with her client.

How Much Information?

So far, I have aimed to offer a case for shifting the central obligation of ensuring that defendants have access to information relevant to their plea decisions from defense lawyers to prosecutors. The remainder of this chapter will consider various issues related to the application of this proposal. First, we should return to the question discussed earlier: namely, with how much information must a defendant be provided? As we saw, courts are beginning to undermine the traditional legal distinction between the "direct" legal consequences of a conviction (the formal sentence) and the "collateral" legal consequences (everything else). But a question remains about the range of collateral consequences about which a prosecutor is ethically obliged to inform a defendant. At least three candidate answers suggest themselves.

First, following the courts' emphasis on severity and certainty as relevant considerations, we might contend that prosecutors have an obligation to make available information about collateral legal consequences that are sufficiently severe or certain to occur. This approach raises several questions, however. Most notably, how should prosecutors determine which consequences cross the thresholds of severity and certainty and so are relevant? There is no clear, nonarbitrary answer to this question. Even the relationship between severity and certainty is unclear. Must a consequence be both severe and certain to warrant notification, or is it enough that it be either sufficiently severe or sufficiently certain? Is there interplay between the two factors? Perhaps the less certain a potential consequence is to occur, the more severe it must be to warrant notification. But how severe relative to some degree of certainty (and vice versa)?

The difficulty in setting thresholds is even greater when we recognize that severity, at least in the sense that is salient to informed decision-making, is a subjective notion. Disqualification from public housing may represent an extremely serious consequence for someone who is struggling financially and who does not have family or friends to turn to for support. Such a disqualification, however, may be regarded as trivial for someone who already owns a house.

Similarly, a ban on adoption may be regarded as much more severe by someone with an interest in starting a family than by someone who dislikes children. Thus what consequences are sufficiently severe to be relevant to a plea decision will depend on a particular defendant's circumstances and values.[18]

As a second option, then, we might contend that prosecutors are obliged to make available information about the legal consequences of conviction that are relevant given a defendant's particular circumstances and values. Suppose Sweeney and Todd are charged with identical felonies, for which one legal consequence of a guilty plea is disqualification from working as a barber.[19] Sweeney happens to be a barber, but Todd is a taxi driver (a profession for which no relevant collateral restrictions attach to the felony). Because the potential disqualification from working as a barber would be relevant to Sweeney but not to Todd, the prosecutor would have an obligation to make this information available to Sweeney (or his counsel) but not to Todd (or his counsel).

If prosecutors are obliged to make available the information relevant to defendants given the defendants' particular circumstances and values, then prosecutors would need to be aware of more about defendants than just the facts relating to their alleged offenses. They would need to have reasonable familiarity with defendants' circumstances and values more broadly. It might be objected that it is inappropriate for prosecutors to be familiar with information about defendants beyond facts related to their alleged offenses. Justice should be blind, and prosecutors pursuing justice should not be swayed in that pursuit by considerations, given a person's particular circumstances and values, of the impact a conviction might have on her. Such considerations, unrelated to whether the person culpably committed the given offense, are not the appropriate concern of the state, or of prosecutors as its agents, in calling alleged wrongdoers to account.

It is worth noting that this idea that individuals' particular circumstances are inappropriate considerations in meting out criminal justice is a controversial one. In particular, scholars have debated whether a person's subjective experience and circumstances are relevant in imposing proportionate punishment for her crime.[20] But even if we believe (reasonably, in my view) that a degree of recognition of individual circumstances is valuable in the administration of criminal justice, we should nevertheless be hesitant to expect prosecutors to have the sort of familiarity with individual defendants that would allow them to make determinations about which potential legal consequences of a guilty plea are relevant.[21]

To highlight why this is so, consider again Sweeney and Todd. In the example, Sweeney and Todd are charged with identical felonies, one legal consequence of which is disqualification from working as a barber. Sweeney is a barber, whereas Todd is a taxi driver. But now suppose that Todd, coincidentally, secretly aspires to make a living cutting hair, and he has recently decided to change careers. And suppose also that Sweeney's family member has recently died, leaving him a large enough inheritance that he can finally close his barbershop (as he has long since grown tired of cutting hair) and retire

early. In this case, the barber disqualification that results from a guilty plea will be significant for Todd but of no real concern to Sweeney. But this means that a prosecutor, to be able to inform Sweeney and Todd of the potential consequences relevant to their respective plea decisions, would need to be familiar with Todd's aspiration to be a barber as well as Sweeney's recent inheritance and wish to retire. But what if, further, Todd is typically weak-willed and fails to follow through on his aspirations—this is just the latest instance of his deciding, but ultimately failing, to pursue some new career—whereas Sweeney is terrible with money and can be expected to spend his inheritance foolishly, thus soon leaving himself in financial straits and needing to return to work? The barber disqualification might matter more to Sweeney than to Todd after all, but to recognize this, the prosecutor would need to have a sense of Sweeney's disposition toward reckless spending and Todd's tendency not to follow through on his career plans.

The examples of Sweeney and Todd underscore the more general point that which legal consequences of a conviction will be relevant to a defendant may frequently depend on a variety of factors. Prosecutors are ill-positioned to make the often complex and subtle assessments about which of the potential legal consequences of conviction will be relevant to defendants.

Given these difficulties, we might opt instead for a third alternative: Prosecutors should make available to defendants information about the full range of potential legal consequences of conviction for the given offense(s). If a conviction could, with varying degrees of certainty, lead to restrictions on, say, access to public housing, welfare assistance, gun ownership, adopting children, and employment in jobs such as barber, teacher, and police officer, then a prosecutor would be obliged to make all of this information available to the defendant considering a guilty plea. This would be so whether or not each of these is relevant to the defendant's decision given her circumstances—whether or not, for example, she has any aspiration to work as a teacher, adopt a child, or purchase a gun.

This approach would avoid some of the difficulties of the first two approaches, as there would be no need for prosecutors to determine which potential legal consequences are sufficiently severe or certain to warrant notification, or to account for the different circumstances, experiences, or values of different defendants. A prosecutor would ensure that a defendant has access to all of the potential legal consequences that attach to a guilty plea given the crime(s) for which she is charged, and the defendant (in consultation with her attorney) could determine which are salient to her decision.

A possible worry with this approach, however, is that most felony offenses, and even many misdemeanors, carry the prospect of such a plethora of potential legal consequences that merely providing defendants with a list of all of these consequences would be insufficient precisely because it would be too much. Information overload, rather than information scarcity, would undermine the prospect of an informed plea. Concerns about the effects of information overload on decision-making are well rehearsed in other contexts such as medical ethics, where the worry is that physicians, perhaps in part to guard

against litigation later, may choose simply to give patients an exhaustive list of all the possible risks, benefits, and alternatives of a proposed procedure.[22] The result may be that the patient feels overwhelmed by the glut of information and ill-equipped to filter through it to make an informed choice. Similarly, perhaps merely providing to defendants and their counsel a comprehensive laundry list of potential legal consequences may be unhelpfully overwhelming.

Although concerns about information overload are important to informed plea decisions, this worry can be mitigated by considering again the role of defense counsel in the plea process. Earlier I wrote that one of the defense lawyer's roles is to advise her client, given the client's particular values and circumstances, about what is in the client's best interests. Doing so involves, in part, sorting through the possible legal consequences with her client to determine which ones are relevant. This aspect of facilitating informed decision-making falls within the defense attorney's role as counselor. But it is the prosecutor's role, as the state's agent who creates and sets the terms of the choice situation, to make available to the defendant (and her counsel) the full terms of the choice.

Ultimately, then, I believe we should endorse the third approach, according to which prosecutors are ethically obliged to make available to defendants all of the potential legal consequences of a guilty plea. Others might disagree, instead favoring one of the other two options discussed in this section (or a different alternative). Notice, though, that on any of the approaches sketched here, it nevertheless remains centrally the prosecutor's responsibility to ensure that defendants have access to the information they need to make an informed plea. Disagreement about the scope of this requirement is consistent with agreement that however much information a defendant is entitled to be given, it is the prosecutor who is obliged to make this information available. In the final section, I discuss three further practical implications of this view, each of which I take to count in its favor.

Practical Implications

The most obvious practical implication of my proposal, as I discussed before, is that it would shift the primary burden of researching and keeping up to date about the daunting array of collateral restrictions from defense lawyers to prosecutors. One potential effect of shifting this responsibility to prosecutors would be to reduce the number of charges that are brought. In current U.S. practice, prosecutorial discretion in charging is largely unrestrained. Stephanos Bibas writes:

> They follow no Administrative Procedure Act, nor do they operate in the sunshine of public disclosure. … Legislatures keep giving prosecutors more power, not less, by expanding overlapping criminal statutes and giving prosecutors more plea-bargaining tools. Judges largely avoid interfering with prosecutorial decisions. They reason that juries will

ultimately check charges, even though few cases make it to jury trials in a world of guilty pleas.[23]

Given the largely unrestrained discretion prosecutors enjoy, they have great power in plea negotiations to manipulate charges in various ways to help ensure a guilty plea. An example of such a tactic is charge stacking, whereby, as Douglas Husak explains, prosecutors "bring a number of charges against a defendant for the same underlying conduct."[24] Husak continues: "As long as these offenses contain distinct elements, no rule or doctrine automatically prevents the state from bringing several charges simultaneously, even though, from the intuitive perspective of a layperson, the defendant has committed but a single crime."[25]

Shifting to prosecutors the responsibility for making information about the potential legal consequences of conviction available to defendants would provide at least some check on tactics such as charge stacking, as each additional charge would require research to determine if any relevant collateral consequences might follow from a conviction. Research requires resources—time, personnel—that could otherwise be spent elsewhere. Prosecutors would thus have incentives to limit the number of charges they file, and in particular to limit practices such as charge stacking. I assume without argument that this would be a desirable result.

Alternatively, shifting to prosecutors the primary responsibility of making plea-relevant information available to defendants might create a different sort of desirable incentive: namely, an incentive for legislators to rein in the number of collateral restrictions that exist at all. In other words, if prosecutors' offices find themselves stretched too thin by these additional requirements, then one solution is to bring fewer charges; but if tough-on-crime lawmakers and criminal justice officials find this solution unpalatable, then another option is to reduce the number of collateral restrictions and thereby reduce the onerousness of ensuring that defendants are informed about them. Again, here I simply assume without argument that, because there are too many collateral restrictions, a reduction in their number would be a desirable result.[26]

Finally, my proposal may have implications regarding requirements on prosecutors to disclose exculpatory evidence during plea bargaining. For a defendant, the plea-bargaining process is essentially an exercise in expected-utility calculus.[27] It involves considering the potential outcomes of a guilty plea, their respective probabilities and the utility she attaches to each outcome.[28] But it involves more than this; an informed plea decision also requires consideration of the likely outcomes if the plea is rejected and the case goes to trial. If the defendant is acquitted, of course, she will avoid punishment as well as the other legal consequences of conviction. If convicted, however, she will face a more severe punishment than had she taken the plea deal, and she will face whatever collateral legal consequences follow from the conviction.

These points highlight that a properly informed plea decision appears to require not only an awareness of the potential consequences of a guilty plea, but

also awareness of the consequences of acquittal or conviction at trial, and importantly, of the respective likelihoods of these outcomes coming to pass. Now, to be able to make an informed estimation of the likelihood of conviction should a case go to trial, a defendant (and her counsel) would need access to the evidence that will be brought against her at trial. This suggests that prosecutors have an ethical obligation to provide defendants not only with information about the consequences of conviction but also with information relevant to assessing the strength of the case against them.[29] In particular, prosecutors may be obliged to inform defendants of exculpatory evidence. The U.S. Supreme Court has ruled that the prosecution must disclose exculpatory evidence at trial.[30] Courts have since differed, however, about whether prosecutors must also reveal exculpatory evidence during plea bargaining.[31]

Many prosecutors presumably would prefer, for obvious reasons, not to reveal exculpatory evidence during plea negotiations. But I take it as a desirable implication of my view that prosecutors would be obliged to reveal such information. Given the power prosecutors wield in creating and setting the terms of the plea choice, they have an ethical obligation to ensure that defendants have information relevant to making an informed choice.

In conclusion, defendants considering a guilty plea are entitled to have access to information not only regarding the punishment they may face but also the range of collateral restrictions to which they may be subject as a result of their plea. And prosecutors, as the agents of the state who, through their charging decisions, both create and set the terms of the plea decision, have an ethical obligation to ensure that defendants have access to the information relevant to making the decision—that is, information about likely collateral legal consequences as well as punishment. This is not to say that defense attorneys have no role to play in ensuring an informed plea: They still must counsel their clients to ensure that clients understand these consequences, and that clients properly assess what these consequences mean for them, given their values and preferences. But shifting to prosecutors the primary obligation for making the information available to defendants is warranted given the prosecutor's role in creating and shaping the terms of the choice. Shifting this responsibility is also practically attractive in that it could create incentives to reduce the number of charges prosecutors bring, to reduce the number of collateral consequences that attach to convictions, or both. Shifting the responsibility would also provide additional support for the requirement that prosecutors disclose exculpatory evidence at the plea stage.

Notes

1 See Jenny Roberts, "The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators'," *Minnesota Law Review* 93 (2009): 670–740, p. 682; Jed S. Rakoff, "Why Innocent People Plead Guilty," *The New York Review of Books* (November 20, 2014), available online at www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (accessed February 13, 2016). For useful

comments on earlier drafts of this paper, I am grateful to the editors of this volume, as well as to Antony Duff, Larry May, Eric Brown, Marilyn Friedman, Jill Delston, Jeff Brown, Christopher Heath Wellman, Steve Viner, David Speetzen, and Emily Austin.

2 I don't address 'no contest' pleas here.
3 *Brady v. United States*, 397 U.S. 742, 748 (1970).
4 See generally Zachary Hoskins, "Ex-offender Restrictions," *Journal of Applied Philosophy* 31:1 (2014): 33–48.
5 *Brady v. United States*, 397 U.S. 755 (1970) (emphasis added).
6 See Roberts, "The Mythical Divide," supra note 2.
7 *Padilla v. Kentucky*, 559 U.S. 356 (2010).
8 Ibid., at sec. II.
9 Ibid.
10 Ibid.
11 See *People v. Fonville*, 804 N.W.2d 878, 894–895 (Mich. Ct. App. 2011); *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010); and generally, Margaret Colgate Love, "Collateral Consequences After *Padilla v. Kentucky*: From Punishment to Regulation," *St. Louis University Public Law Review* 31 (2011): 87–128, esp. pp. 105–109.
12 *Brady v. United States*, 397 U.S. 748 (1970). See also Federal Rules of Criminal Procedure, Rule 11 (b)(1)(h). Available at: www.law.cornell.edu/rules/frcrmp (accessed October, 25 2016).
13 See, e.g., Love, "Collateral Consequences After *Padilla*," supra note 12, p. 100; Gabriel J. Chin, "Making *Padilla* Practical: Defense Counsel and Collateral Consequences of a Guilty Plea," *Howard Law Journal* 54 (2011): 675–691.
14 Chin, ibid., p. 678.
15 Love, "Collateral Consequences After *Padilla*," supra note 12, pp. 116–117.
16 For an impressive attempt to develop and maintain a comprehensive, searchable database of collateral restrictions, see the National Inventory of the Collateral Consequences of Conviction (NICCC), a project of the American Bar Association, online at www.abacollateralconsequences.org/ (accessed October 26, 2016). If the database is kept up to date, it may mitigate the burden of finding and making relevant information available to defendants, but it will not eliminate it. As a disclaimer on the site reads: "The NICCC is intended solely for educational and informational purposes, and no part of it may be considered as constituting legal advice. Users are cautioned that this area of law is complex, voluminous, and constantly changing, and, accordingly, users should research and verify all search results for accuracy and applicability at an official federal, state or territorial database."
17 Love, supra note 12, p. 100.
18 We could of course insist on some objective threshold of severity. But the basis of our concern that a plea decision be properly informed is the sense that people should be well informed in making decisions that will significantly affect them. How a decision will affect each individual is a subjective matter.
19 See Clyde Haberman, "NYC; Ex-Inmate Denied Chair (And Clippers)," *The New York Times* (Feb. 5, 2003), online at www.nytimes.com/2003/02/25/nyregion/nyc-ex-inmate-denied-chair-and-clippers.html (accessed October 11, 2016).
20 See Adam J. Kolber, "The Subjective Experience of Punishment," *Columbia Law Review* 109 (2009b): 182–236, and "The Comparative Nature of Punishment," *Boston University Law Review* 89 (2009a): 1565–1608; and Michael Tonry, "Proportionality, Parsimony, and Interchangeability of Punishment," in Tonry (ed.), *Why Punish? How Much? A Reader on Punishment* (Oxford: Oxford University Press, 2011), p. 229. But see Andrew von Hirsch, "Proportionality in the Philosophy of Punishment," *Crime and Justice* 16 (1992): 55–98, pp. 79–80.
21 Thanks to Eric Brown for pushing me on this point.

22 See, e.g., Howard Brody, "Transparency: Informed Consent in Primary Care," *The Hastings Center Report* 19:5 (1989): 5–9.
23 Stephanos Bibas, "Prosecutorial Regulation Versus Prosecutorial Accountability," *University of Pennsylvania Law Review* 157:4 (2009): 959–1016, p. 961.
24 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), p. 22.
25 Ibid.
26 For an argument that many collateral restrictions are unjustified, see Hoskins, "Ex-offender Restrictions," supra note 5.
27 One might object to the notion that defendants' deliberations about how to plead should be governed by expected-utility calculus. Shouldn't a defendant's plea be based simply on whether or not she believes she is guilty of the offense? Rather than being forward-looking, focused on securing the best outcome for the defendant in prudential terms, decisions about how to plead to criminal charges should be primarily backward-looking, about whether a guilty plea or a not-guilty plea is appropriate, or fitting, given one's past behavior. If this is so, however, then it is an indictment of the plea-bargaining process generally. It is the prosecutor, as the state's agent, who creates a situation specifically designed to secure desired behavior (avoidance of a trial) through prudential incentives (decreased charges). It asks too much of defendants, in my view, to expect them not to make prudential calculations when placed in what is in practice typically a coercive context designed to motivate just such calculations.
28 This is not to claim, of course, that in practice each defendant always makes these calculations, or makes them well.
29 Thanks to Larry May for suggesting this point to me.
30 *Brady v. Maryland*, 373 U.S. 83 (1963).
31 See Michael Nasser Petegorsky, "Plea Bargaining in the Dark: The Duty to Disclose Exculpatory *Brady* Evidence During Plea Bargaining," *Fordham Law Review* 81:6 (2013): 3599–3650.

18 Are Lobbyists Lawyers?[1]

Suzanne Dovi and Jesse McCain

For many ethical theorists, lobbyists are like lawyers: good lobbyists, like good lawyers, should zealously advocate on behalf of their clients. The practice of lobbying can be understood as an extension of legal representation.[2] Just as the justice system should provide defense attorneys (despite any ethical and political reservations those defense attorneys might have about their clients' interests or guilt), the political system should provide lobbyists who advocate on the behalf of their clients (despite any ethical or political reservations they might have about their clients' interests or guilt). Following this logic, John Hasnas (2014) argues that lobbying is an essential form of "self-defense," protecting citizens from unjust government interference in their freedom. Lobbying of the innocent and guilty alike is crucial for political due process in modern liberal democracies. Lobbying is understood as another form of lawyering: just as those accused of crimes deserve a lawyer, those who are vulnerable to political authority deserve a lobbyist.

The potential for governments to abuse their power justifies seemingly unlimited interest representation for villains or the innocent.[3]

However, there are significant differences between lawyers and lobbyists. In fact, the primary aim of this paper is to highlight several of those differences in order to reveal the problem with reducing our ethical understandings of lobbying to legalistic ones. In other words, an understanding of ethical lobbying should not be conflated with an understanding of what is legally permissible. We highlight the important differences between lobbying and lawyering by drawing on the practices of an infamous lobbyist named Jack Abramoff. In particular, we show how Abramoff's unethical lobbying, specifically his blurring the lines between friendship and political relations, undermines the legitimacy of democratic representative processes. Our examination is less concerned with how he broke the law and how to reform existing lobbying regulations,[4] and more focused on how his *legal* actions made him an effective and influential lobbyist. For according to Abramoff's own account, he was able to "own" or "have strong influence in 100 Congressional offices at a time" (60 minute interview). Abramoff shows the difficulties in identifying and monitoring the ethical violations of lobbyists, what we call "ethical obliviousness." Citizens will need to actively resist ethical obliviousness and to do so, it is important to

recognize and maintain the tensions that exist between ethical and legal understandings of lobbying. They must also acknowledge the specific role that lobbyists have in democratic politics, a role that significantly differs from that of lawyers.

To be sure, laws regulating lobbyists aim to minimize and punish corrupting influences in the political arena. However, the efficacy of such regulations is significantly curtailed by the norms and practices of lobbyists. By being able to "own" Congressional offices, lobbyists can leverage narrow, private interests against the democratic institutional capacity to self-correct. They can undermine the legitimacy of democratic representative processes in ways that zealous lawyering on the behalf of the guilty in courtrooms cannot. Given the potential political devastation that unethical lobbying can have on democratic institutions, it is important to recognize the differences between lawyers and lobbyists. While many political actors are lawyers,[5] we should not let "lawyer think" consume and replace our ethical understanding of the kinds of behavior necessary to maintain and support democratic representation.[6] We should not rely on an overly legalistic understanding of political ethics. A secondary aim of this paper is to reveal the democratic risks that emerge from the moral ambiguities plaguing lobbying activities. Such ambiguities endanger the procedures that democratic citizens use to fairly adjudicate conflicts. If left to its own devices, the moral indeterminacy of lobbying can foster a moral free-for-all. For unlike lawyers, there is no judge to mediate, monitor, and set procedural constraints on lobbyists to foster and maintain due process.

The structure of our argument is as follows. First, we examine the constitutional grounds for ensuring that criminal defendants have a lawyer as well as the professional ethical code used to monitor and constrain lawyers' zealous advocacy. The second section uncovers how lobbyists are regulated differently: the constitutional grounds differ as does the institutional context in which lobbying regulations are enacted. The third section focuses on a particular ethical norm used for identifying the proper actions of lawyers, namely what Charles Fried (1976) describes as "the Lawyer as Friend." By highlighting why such a norm would exacerbate problems for identifying, monitoring, and sanctioning improper behavior of lobbyists, we conclude by showing the high political stakes of treating interest representation as merely an extension of legal representation.

Regulating Lawyers: Laws and Professional Norms

One U.S. legal truism is that "everyone deserves due process." Both the guilty and the innocent possess the right to have a lawyer to assist in their criminal defense.[7] According to Justice Hugo Black, "[r]eason and reflection require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him" (*Gideon v. Wainwright,* 1963). The adversarial nature of the court system requires a protective mechanism—someone whose

legal expertise can protect the autonomy of the citizen. Such legal counsel is necessary, albeit not sufficient, for judicial processes to be legitimate.

The right to legal defense has been justified in a number of different ways. William Simon argues that "Aggressive defense is supposed to level the playing field and turn the trial into a "contest of equals," or at least express the system's commitment to treat all citizens with respect" (Simon, 1993, 1707). Here political equality is institutionalized through the access to and provision of a criminal defense lawyer. The protection of the guilty is the price for equal standing. Because *everyone* deserves legal counsel according to the due process requirements found in the Constitution, legal representation, whether for the guilty or for the innocent, is an institutional requirement to the political equality upon which democratic legitimacy depends.

Legal counsel has also been conceptualized as a defense mechanism for individual freedom against the state. Legal counsel is a necessary weapon against the "danger to liberty of the over powerful state" and citizens need to respect the "value of criminal defense in checking that danger" (Simon, 1709). Legal counsel preserves democratic rights and protects against the potential abuse of democratic power. Despite philosophical differences in function, the need for counsel is constitutionally designed to ensure fair treatment under the law, commonly referred to as protection of due process (U.S. Const. amend. XIV).

The Supreme Court has gone further arguing that defendants have a right not just to a lawyer but also to an effective one (*Strickland v. Washington, 1984*). According to the holding in *Strickland*, the Sixth Amendment requires not only a right to counsel, but also a right to "reasonably effective assistance given the totality of the circumstances" (*Strickland v. Washington, 1984*). While such a threshold is difficult to precisely measure, effective legal assistance at minimum provides attorneys who abide by the judicial process and its established procedures.[8] The right to effective legal counsel thereby secures lawyers competent enough to follow proper procedures and fair judicial process. Even under this minimum definition, legal counsel takes place under a specific set of rules that must be followed, and hopefully performed well, by those advancing their interests.

The constitutional right to effective representation is further strengthened by the professional norms of lawyers. More specifically, the American Bar Association's *Model Rules of Professional Conduct* says that once having been attained, a lawyer is supposed to put the interests of the client first: "A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf" (ABA *Model Rules* 1.3, 2013). As professional advocates, attorneys are expected to provide the most dynamic representation possible: "The duty of zealous advocacy, considered to be one of the most important ethical duties, traditionally has been viewed to require single-minded devotion to a client's interests" (Lanctot, 1991, 954). Thus, being a virtuous attorney requires zealous advocacy.[9]

Zealous advocacy does have constraints. For example, the code restricts the extent of financial gains earned by the legal professional.[10] Following the code:

"A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses" (ABA *Model Rules* 1.5, 2013). While incomes are not restricted to a particular salary range, the code does specify a threshold that must be met. Fees must meet a test of reasonableness as defined by the code. Meeting this requirement is based on various substantive factors e.g. time and labor required or time limitations and experience or ability of the lawyer (ABA *Model Rules* 1.5, 2013).

For our purposes, what matters is what happens when a violation of the professional code occurs. The professional code is importantly backed by sanctions. Formal punishment of an attorney may include "private admonition or reprimand, public reprimand, suspension from the practice of law for a set period of time, and permanent disbarment from the practice of law" (Gordon, 2014). With termination of employment and professional reputation at risk, the consequences for unbounded legal advocacy and failure to play by the professional code of ethics can be severe. In extreme cases, legal disbarment can effectively end a lawyer's legal practice with or without the possibility for reversal.[11] The long-term effects of an ethical violation vary based on jurisdiction from possible bar reapplication after one to five years to an automatic ban from legal practice for life (Finkelstein, 2007). Once disbarred, reinstatement is difficult. According to the *Survey on Lawyer Disciplinary Systems* only 67 of the 674 petitions for reinstatement or readmission filed in 2011 were successful. Although rarely enacted, professional ethical associations have potentially devastating sanctioning powers that can discourage ethical violations.

More important, though, is the institutional context of lawyering: the interests of the client are advanced and institutionalized as part of the judicial process. Not only is this process mediated by third parties but decisions are bound by the determination of the court and its stakeholders. The courtroom arbitrates disputes according to specific rules, procedure, and pedagogy. The lawyer is far from an unrestrained professional rhetorician. For instance, legal advocates shall not "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer" (ABA *Model Rules* 3.3, 2013). Arguments are scrutinized by the judge or jury and evidence needs be approved by the mediation of the judge. The very nature of a legal proceeding as slow, pedagogically deliberate, and extremely formal in execution is by design: one that allows the mediating authority to determine the "winner."

The *Model Rules* also place the responsibility of monitoring their colleagues' behavior on other lawyers themselves. According to Rule 8.3: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority" (ABA *Model Rules*, 2013). Moreover, law firms can be held responsible for individual partners' ethical violations (Schneyer 1991; 2011). So not only are individual practitioners held accountable for violating certain guidelines, but the broader legal community enforces

professional accountability standards. Such peer accountability encourages a sort of collective moral consciousness, one that mutually reinforces agreed-upon ethical norms. This self-enforcing mechanism helps make the standards set forth in the ABA "moral code" not purely symbolic, but also a lived practice.

In both content (the approval of argument by a court) and procedure (the rules that govern such proceeding), legal advocates are monitored and possibly limited. By being forced to advocate within the rules of the legal process, the "lobbying" of the lawyer is necessarily limited. The legal process has the potential to correct ethical violations as they manifest, and the *Model Rules of Professional Conduct* enforce limitations that ultimately give final power to the mediator. While far from perfect, the legal system regulates and polices the ethics of its advocates, channeling a broad ethos of integrity that keeps overly zealous representation in check. The substantive outcomes of the justice system can certainly be problematic, but the legal process has built-in mechanisms to protect against the type of fraud, deceit, and abuse that may take place in the realm of the lobbyist. There are limitations on the right to provide advocacy that are debated, monitored, and enforced by the judicial process. Herein lies a significant difference between the ethics of lobbying and the ethics of lawyering: attorneys advocate within a specific ethical framework that is institutionally constrained and monitored for breaches of professional ethics.

So far our discussion of the right to counsel in judicial proceedings, specifically its ability to ensure that criminal trials are a contest of equals and judicial proceedings are "neutral" towards the parties, has been relatively abstract. According to this line of reasoning, such neutrality ultimately leads to some form of "justice," or fair outcome under the law. Romanticized in this way, judicial procedure is conceived as an equalizer of power:

> every attorney has professional and ethical obligations that must be met in all cases…those obligations do not change, whether the attorney is hired and paid a lot of money to represent Microsoft or the President…or…a person facing a loss of liberty who cannot afford to hire his own attorney.
>
> (Mann, 2010, 732)

In practice, this contest of "equals" is more problematic. While the rules of the game are certainly uniform and mediated, the legal system exists in a context of rampant inequities that distribute more "justice" to those who can afford it. Well-paid lawyers can afford to spend substantially more time on each case, and their clients have more autonomy to ensure their interests are advanced: "For ethical purposes, however, there is a significant difference between paying clients and indigent defendants. As a practical matter, the indigent client does not have the same ability to define the scope of the representation and to determine its objectives…the client can neither offer counsel more money to conduct a more extensive representation nor fire the lawyer for conducting only a minimal representation" (Green, 2003, 1175). Those who cannot afford representation, as Gideon could not, may bear the worst consequence, as

attorneys with overwhelming caseloads are consumed by a "practice of systemic neglect" (Green, 1189).

Such neglect encourages guilty pleading, minimal time for quality advocacy and abuse of professional standards. So the presumed equal standing granted to citizens clashes with the social and economic inequalities within the society at large and thereby threatens democratic legitimacy of those processes. In this way, the fairness of the procedures themselves is not questioned but the ability of such procedures to adequately accommodate the larger power inequalities introduces tensions between various democratic commitments.

In summary, the main point of this section was to demonstrate how judicial proceedings are orchestrated bouts of debate under specific regulation that guide what is said and how it is expressed. Judges play an integral role in enforcing these regulations. The extent to which lawyering is a *public* performance before third parties suggests that violations of the rules will be more easily identified. The adversarial nature of criminal proceedings encourages adversaries to police each other. As a result, the ethical compass of attorneys is on public display and built into the legal institutions in which they act. Even if representation may lack uniform quality, widely reinforced policies like the American Bar Association's *Model Rules of Professional Conduct* still enforce a specific execution of representation: that of legal procedure, monetary limits, professional conduct in court, and professional ethics mutually reinforced by the collective. Lawyers operate under the scrutiny of a judge, a system of specific rules, and even the public at large.

Within this specific legal context, everyone deserves and should be provided defense counsel in criminal cases. The fairness and justice of the procedures requires zealous advocacy for everyone. Put bluntly, even the villains deserve a lawyer who will follow the proper legal and professional codes of conduct.

Regulating Lobbyists

Like legal representation, there is constitutional protection for lobbying in that all citizens have the right to petition the government. This right to petition has been enshrined in the United States Constitution (U.S. Const. amend. I), as well as in state constitutions, in order to guarantee citizens the opportunity to participate in and influence government actions. Hence, the right to petition is an "important aspect of self-government," and is recognized as one of "the most precious of the liberties safeguarded by the Bill of Rights" (*McDonald v. Smith,* 483). Following this logic, the political expertise of lobbyists allows citizens to exercise their right to petition the government more effectively. Securing the right to lobby provides a mechanism for keeping the government in check.

The conduct of lobbyists, though, is regulated by various federal, state, and local laws.[12] For instance, the Lobbying Disclosure Act of 1995[13] was the first major legal overhaul at the federal level that required lobbyists to register as lobbyists and report their spending to the public. The purpose of that legislation

was to inform the public "who is lobbying on what issues, on behalf of whom, and for how much" (Tenenbaum, 1995). The emphasis of the federal law on disclosure reflects the belief that transparency will constrain lobbying activities.

Of course, there are loopholes. For instance, only those lobbyists who spend at least 20 percent of their activities on a particular client are required to register as a lobbyist. The *Guide to the Lobbying Disclosure Act* gives the following example of how lobbying firms can circumvent this regulation:

> A law firm has two lawyers who perform services for a particular client. Lawyer "A" spends 15 percent of the time she works for that client on lobbying activities, including some lobbying contacts. Lawyer "B" spends 25 percent of the time he works for the client on lobbying activities, but makes no lobbying contacts. Neither lawyer falls within the definition of "lobbyist," and therefore the law firm is not required to register for that client, even if the income it receives for lobbying activities on behalf of the client exceeds $3,000.[14]

Although registering lawyers is supposed to facilitate transparency, certain actions and activities constitutive of lobbying are purposely hidden from the public eye. The bill also distinguishes between contacting a legislature about the status of a piece of legislation or making an informal comment about a legislative strategy (not-lobbying) and "actively" participating in the "planning, supervision, or control of advocacy activities" (U.S. House of Representatives, 2008). Only the latter requires registration. The line between actively participating and informal comments can be razor thin.

Similarly, in 2007 Congress passed follow-up legislation to the Lobbying Disclosure Act: The Honest Leadership and Open Government Act. At face value the new law aims to increase oversight, requiring quarterly reports instead of semi-annual ones, more client details, reporting of "direct" political contributions (as separate from fundraising, a key distinction) and imposing higher fines for violations (Rochabrun, 2014). While on paper this new legislation requires more detailed disclosure than the earlier iteration, it fails to distinguish formal lobbying and gift-giving from campaign fundraising. As a result, lobbying can simply be renamed as campaign activities. As former Senator John Breaux acknowledged, "If we call it a campaign contribution, that makes it legal" (Pear, 2008). Buying members of Congress external meals and gifts is illegal under the law, but "campaign events" thrown by lobbyists with suggested donations in the tens of thousands are not (Rochabrun, 2014). Because of such technicalities, the amount of spending on lobbying *decreased* for the first time since the Lobby Disclosure Act was passed.

Given the fine distinctions between lobbying and campaigning, existing federal regulations become mute. The ambiguities of lobbying lend themselves to legal definitions open to manipulations and loopholes. Such loopholes permit lobbyists who advance the interests of undemocratic societies or values to

operate beyond the reach of the law, free to take full advantage of the unregulated moral grey space.

To further contribute to the ethical confusion about how lobbyists should act, lobbying regulations vary significantly at the state and local level. For example, some states don't require lobbyists to register while others charge lobbying fees that range from $5 to $500. Some states place disclosure requirements and prohibit travel, food and other gifts. San Antonio's City Council has a "gag ordinance" that enacts a "nocontact period" during the annual budget season. Lobbyists are literally not allowed to talk with city council members and delegate agencies during this period (Baugh, 2014). Sometimes lobbyists can be legally constrained from exercising the constitutional right to petition the government within certain time limits. In other words, local governments are allowed to suspend the right to a lobbyist in ways that would be impermissible to suspend the right to a lawyer. Such variation makes it difficult to generalize about the institutional context in which lobbyists act.

Like lawyers, lobbyists possess professional codes of ethics that supplement legal regulations. For instance, the Association of Government Relations Professionals (AGRP) has a "Code of Lobbying Ethics" to "provide basic guidelines and standards for lobbyists' conduct."

Any lobbyist who is retained by a third party to advance their interests, "is strongly urged to comply with this Code." Moreover, "any AGRP member found guilty by a court of a crime of moral turpitude or of violating a law directly related to any professional lobbying or political campaign activity shall forfeit AGRP membership."[15] Like the expulsion from the American Bar Association, exclusion from professional associations is one way in which ethical codes are enforced. Professional reputations can be tarnished.

However, not all lobbying organizations have sanctioning mechanisms. For instance, the National Association of State Lobbyists has a code of ethics,[16] but lacks any explicit sanctioning mechanism for enforcement of the code. As a result, the ABA controls membership and licensing of lawyers in a much more restrictive and comprehensive fashion.

After all, like lawyers, lobbyists are forbidden to lie. While the public nature of lawyering enables a lawyer's adversaries to confront and challenge a lie in court, and for a judge to sanction lawyers for lying, lobbyists' activities do not lend themselves to the same kind of surveillance. The interactions among lobbyists and Congress members can be private, where third parties are not present, let alone possess sanctioning power to enforce truthtelling. As a result even though Article 1.1 of the Code of Lobbying ethics requires lobbyists to "be truthful in communicating with public officials and with other interested persons and should seek to provide factually correct, current and accurate information," it is unclear who should police and enforce such rules. Especially when lobbying can effectively happen in one-on-one meetings and conversations. Monitoring the communications of lobbyists to public officials, their families, and friends is an incredibly onerous task when such communications can occur behind-the-scenes, in secrecy, or even at very public campaign events.

Interestingly, like lawyers, the lobbyists' professional code of ethics also demands zealous advocacy. For instance, Article V. states that "A lobbyist should vigorously and diligently advance and advocate the client's or employer's interests." Lobbyists are expected to be loyal to their clients' interests and devote time and attention "commensurate with compensation." In this way, lobbyists are discouraged from taking on certain conflicts of interest. The importance of having experts petition the government on the behalf of citizens is recognized but so is the vulnerability of those citizens to the misdeeds of lobbyists.

As can be seen, the monitoring and enforcement of lobbyists' professional codes of ethics are vastly different: the professional codes of lobbyists lack adequate monitoring and enforcement mechanisms. The adversarial system of lobbyists is not transparent in that people do not publicly disclose the verbal arguments they make to legislatures or submit their contributions to the marketplace of opinion. Clients do not know what has been said and what needs to be refuted. Such ignorance allowed Abramoff to play the various Native American tribes off each other. He lobbied on behalf of different tribes who were in competition for casino rights. The dependency of clients on their lobbyists make them ripe for abuse.

Because it is hidden from the public spotlight, the interpretations and compliance with lobbying codes depends largely on the consciences of individual lobbyists themselves. More specifically, it requires lobbyists and public officials being lobbied to recognize ethical violations. But as the case of Jack Abramoff will show, it can be very difficult to differentiate corruption from politics-as-usual. Ethical obliviousness can easily replace our democratic understanding of improper influence on public officials.

Of course, lobbying regulations are ideally designed to curb legal and ethical breeches. After all, some fines against lobbyists have been levied. For instance, in 2014, Kevin Sloat and his lobbying firm were fined a record-breaking $133,500 by California's ethics agency for making improper campaign contributions to some 40 politicians (McGreevy, 2014). The possibility for sanctioning is there. And in some sense, having some professional codes of ethics, even idealized ones, is healthier for democracies than not having any such codes at all. However, the formal and informal regulations of lobbying have a perverse effect: fostering moral ambiguities that can undermine the legitimacy of democratic institutions that enact such laws.

Nevertheless, the legal specifications for registering and falling under the category of lobbyists are so slippery that the enactment of these rules depends partially on individuals self-identifying themselves and others as lobbyists. Ethical loopholes are built into the regulation of influencing and petitioning government. Besides, even when violations are found, which is relatively rare, conviction rates for ethical violations of lobbying are abysmal: "of the 3,042 referrals the U.S. Attorney's Office for the District of Columbia received from 2009 to 2012, almost all resulted in no penalties" (Rochabrun, 2014). Since the original Lobbying Disclosure Act was passed in 1995, only two major

enforcement cases have ever been brought by the government against a lobbyist for failing to report activities (Wilkie, 2014).

Here is the important difference between the institutional context of lawyers and that of lobbyists. Lawyers exist in a highly structured and regulated professional context. In contrast, lobbyists' performances are less visible and thereby more difficult to identify as ethical breaches and more difficult to sanction. The surveillance and enforcement of the professional norms and guidelines for lobbyists is significantly left to the individual. The fox is guarding the henhouse. As we will show, the ethical obliviousness that can accompany lobbying can seriously weaken the legitimacy of democratic representative processes.

The Lawyer and Lobbyist as Friend

To explore how lobbying facilitates ethical obliviousness in more detail, we examine one prevalent understanding of the norm of zealous advocacy. In particular, we turn to Charles Fried's classic work, "The Lawyer as Friend." There Fried offers the metaphor of friendship[17] for understanding the ethical obligations of lawyers' zealous advocacy. In response to the question of whether it is ethical to defend the guilty of heinous crimes, Fried replies,

> it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests—that it is right that a professional put the interests of his client above some idea, *however valid*, of the collective interest.
>
> (1976, 1066 *our emphasis*)

So understanding zealous advocacy in terms of friendship places the client's interests first, regardless of what the substantive content of those interests is. Neither the validity of those interests, nor their impact on others, is sufficient for justifiably limiting the zealousness of a lawyer's representation. To extrapolate this point, when faced with a conflict between the polity as a whole and the client, Fried recommends that a lawyer *think* like a friend who willingly puts others' interests first.

Of course, there *are* relevant differences between clients and friends. For example, Fried recognizes that while friendships are ideally reciprocal relationships, the lawyering relationship is one-sided. Good lawyering does not require give and take, let alone the "taking turns" that Lani Guinier (1994) describes as characteristic of egalitarian democratic politics. Clients do not have to care about the interests of the lawyer, or about the interests of the wider legal and political system.

Because of its one-sided nature, Fried endorses thinking of the lawyer as a "limited purpose" friend, one who enters into a personal relation with a client in which the lawyer adopts the client's interest as his or her own (1071). The lawyer should not act on his or her own interests (when they conflict with the

client's), rather, the lawyer should replace their own interests with those of the client's. For Fried, the proper way of being a one-sided friend and thereby a lawyer requires actions that are permissible so long as they preserve and foster the client's autonomy within the law (1073).

Notice that Fried's analysis of the proper restrictions placed on lawyers' zealous advocacy highlights the fact that lawyering exists within a particular institutional context, a context that we have shown in the first section to be highly structured, monitored, and policed by parties whose interests depend on that surveillance. Having counsel enables the autonomy of the accused to be partially protected and introduces a human element into what could otherwise be a Kafkaesque legal process. The specialized advocacy of lawyers creates a space for freedom and maneuverability within the law. The extent to which the legal doctrines are foreign and unfathomable to laypeople, is the extent to which those laypeople need a lawyer as a friend.

Admittedly, Fried's moral understanding of lawyering as friendship has generated many criticisms.[18] For instance, Dauer and Leff (1977) argue that his ethical framework ignores how the system of distributing lawyers might favor those with money against those without, thereby substantiating the economic bias within the legal system. Downplaying the economic dimensions of the lawyering relationship ignores how a lawyer's obligation to his or her client can be broken if the client does not have sufficient funds to pay the lawyer (Dauer and Leff 1977, 578). The norm of zealous advocacy seemingly suggests that a lawyer should stick with the client, like a friend would for another friend going through bad times, but the reality is different: lawyers can simply resign.

Here, we want to show that the "friendship metaphor" is *not* only wrong but also problematic for understanding the proper ethical standards for the zealous advocacy of lobbyists. Instead of clarifying the obligations and duties of lobbyists, the norms of friendship in the lobbying world *exacerbate* ethical obliviousness—that is, the inability to identify the relevant moral and political norms regarding how to advocate and lobby on the behalf of others within a liberal democracy. It downplays the significance and impact of lobbying within a democratic context.

Here the experiences of Jack Abramoff, one of the United States' most notorious lobbyists during the George W. Bush administration, are instructive. According to Abramoff's (2011) autobiography, he claimed that the "best way" to get a congressional office to do a lobbyist's bidding is by offering a staffer a job that could triple his or her salary:

> *When we would become friendly with an office* and they were important to us, and the chief of staff was a competent person, I would say or my staff would say to him or her at some point, "You know, when you're done working on the Hill, we'd very much like you to consider coming to work for us." Now the moment I said that to them or any of our staff said that to 'em, that was it. We owned them. And what does that mean? Every request from our office, every request of our clients, everything that we want,

> they're gonna do. And not only that, they're gonna think of things we can't think of to do.
>
> (60 minutes interview, emphasis ours)

Again, for Abramoff the "best way" to get a congressional office to do a lobbyist's bidding is by offering a staffer a job that could triple his or her salary *after becoming friendly*. The job offer occurs in the context of becoming friends. Such a lobbying strategy contradicts the legal definition of actively participating in lobbying activities. It is a far cry from the way we typically understand bad lobbying as bribing public officials with money or gifts in order to obtain a particular legislative action. For instance, Samuel Colt gave out gift pistols in Washington in the 1850s in order to extend his patent on revolvers. Colt's gift, like any associated with traditional forms of bribery, was instantaneous and held tangible value.

In contrast, Abramoff did not need to ask for any particular favor, e.g. information about or a vote for an upcoming bill in exchange for money. Once a job offer was suggested the "future employee" would try to think of ways to help Abramoff. A possible job, one that occurs in the context of being friends, that may or may not be taken up in the future is how one gains influence in Congress. No written offer was necessarily made. Abramoff's strategy for gaining influence purposely blurs the distinctions between professional and personal relationships, as well as the activities of what counts as lobbying so that it is not within the purview of the law or professional code of ethics. He was able to blur the motivations for acting on the lobbyist's behalf so much that he could have Congressional offices working for him. The blurring of the relationship between public official/future employee and lobbyist/future boss creates space for moral maneuverability. And friendships permit disguising what one does for individual and political gain.

Abramoff's tactics reveal how friendship norms can facilitate democratic representative processes being "owned" by private interests. Putting clients' interests first, as Fried recommends for lawyers, prohibits contemporary representative processes from being responsive and answerable to the broader public. Put another way, thinking of the lobbyist as a friend threatens democratic accountability because the goods and services "traded" for information, campaign funds, and other forms of support provided by the lobbyist can facilitate private interests co-opting democratic institutions. Lobbying becomes merely an informal agreement among friends that is beyond the proper scope of government interference.

Abramoff emphasizes the importance of disguising the motivations of public officials. Abramoff claimed that "most congressmen don't feel they're being bought. Most congressmen, I think, can in their own mind justify the system … rationalize it and by the way we wanted as lobbyists for them to feel that way" (60 minutes interview, 2012). Blurring personal and professional distinctions enables public officials to understand their actions as motivated by the desire to help a friend, not take a bribe. Replacing political ethics with the ethics of

friendship enables acts of friendship to "disguise" what one does for individual and political gain.

Abramoff's use of friendship as a moral mask is not just anecdotal. According to David Cicilline and Scott Rigell (2015) "many of the ethical infractions we have seen stem not from intentional corruption but rather ignorance or misunderstanding of the rules." The extent to which taking monetary bribes or gifts has captured our thinking about improper lobbying can cover up how actions for "friends" might be more effective lobbying tools. And one of the common ways in which legal ethics can distort our understanding of "improper lobbying" is its emphasis on intentional wrongdoing that violates clearly specified legal rules. As written, current lobbying regulations emphasize the importance of personal gain, a legal concept that is narrowly construed and understood in overly individualistic terms (literally what only benefits a person directly). As a result of such an interpretation, job offers to relatives and spouses do not fall into the traditional bribery model. The law does not track future job offers as evidence of undue influence while the person is in office. Such narrow legal understandings ignore how people can be indirectly benefitted by helping other people that a person cares about and considers his or her friends. The person can be doing a favor for a friend and only incidentally contributing to his or her personal prosperity. Understanding the proper activity of lobbyists as what one would do for friends, even one-sided ones, can make it *more* difficult to detect ethical violations. It promotes ethical obliviousness.

Consider Italia Federici's testimony about her relationship with Jack Abramoff at the Indian Affairs panel hearing which illustrates this kind of misunderstanding. Federici, a political aide to Gale Norton, then Secretary of the Interior, encouraged denying an Indian tribe's casino permits at the request of Abramoff.[19] When asked about her extensive correspondence with Abramoff regarding this matter, Federici acknowledged that Abramoff did ask for assistance, but that she was "responding to Jack as a friend, as I would respond to any friend who had a need or question" (Stone, 2006, 100). Her friendship with Abramoff served as a legal defense for her lobbying efforts.[20]

Although the extent to which Federici's account is truthful may be questioned, her "friendship" defense reflects a dominant norm within American politics.[21] Because self-interests tend to be "viscerally compelling, and often unconscious" while "one's ethical and professional obligations to others…involve a more thoughtful process" (Moore and Loewenstein, 2004), conflating self-interests with obligations to friends might "unconsciously" bias a public official's reactions towards self-interests. Lobbying activities that exist in the moral "gray zone" can become more "morally palatable." Thus, a job offer that comes after friendly relations can cement the alignment of interests so that representatives and their staff try to anticipate lobbyists' needs and wants. Lobbyists do not have to ask for, let alone make campaign contributions for, information or favors that are freely given. The lobbyist as friend conflates the public and private interests so that political actors can no longer differentiate the reasons they act for others and the reasons they act for themselves.

Abramoff's analysis of how to be an effective lobbyist in contemporary politics suggests the need to understand lobbying not simply in terms of individual interests but also as social networks. After all, the value (and salary) of a lobbyist is partially determined by whom they "know" and call friends. Blanes, et al. (2011) found that "Lobbyists suffer an average revenue loss of over 20 percent when their former political employer leaves Congress." The worth of a lobbyist depreciates $177,000 per year after leaving public office in a typical lobbyist's practice. Furthermore, Blanes, et al., found this effect persists for at least three years. One's friendships and connections literally lose value with age.

But perhaps the most significant difference between lobbyists and lawyers is their performative *location:* lawyers perform in front of their adversaries as well as judges and juries while the activities of lobbyists can be isolated and less public. After all, as Frank R. Baumgartner et al. (2009) showed, most public policy issues do not reach the final stages of the policy process, nor are they well-publicized, even within the Beltway. Through informal connections, lobbyists can stop a bill before it has been introduced. The public policy making process is so complicated, covering so many different issue areas simultaneously, that it is difficult to track the bills, let alone the actions of lobbyists on those bills, or possible bills. According to Baumgartner et al., most lobbying occurs on a small percentage of the cases (what they called the "the 80/20 rule"—80 percent of the lobbying taking place on only 20 percent of the cases.) That means lobbying can exist under the public's radar. The friendships of lobbyists can displace collective goods for the immediacy of one's personal and friends' needs in ways that the immediate actors might not even be aware of.

The location of lobbying in the representative processes is so important because it can weaken horizontal accountability. Recall Guillermo O'Donnell's 1998 classic formulation of horizontal accountability: government agencies must retain separate and distinct functions in order to be able to identify who is responsible for which mistakes. If too many functions overlap among governmental agencies, then the interacting constraints of government will dissolve, enabling government agencies to be ruled by arbitrary and potentially tyrannical forces. In other words, O'Donnell claims that governments work best when there are interacting constraints that facilitate government agencies sanctioning each other.

How is the Notion of Horizontal Accountability Relevant for Ethical Lobbying Norms?

Using a friendship mode of ethics, as endorsed by Fried, would dissolve the boundaries between agencies, as well as the lines between the regulator and the regulated. Having "insider" knowledge of the political process that is not publicly available but concentrated in the hands of the few (and the resource rich) reinforces the structural inequalities of the society at large. Understanding the proper standards for lobbying in terms of friendship ignores how the

institutional constraints placed on representative processes depend on social and political distance between the regulator and the regulated. Becoming a public official's friend is problematic because government agencies lobby each other. In fact, 40 percent of the advocates in Bartmeiner et al.'s 2009 study of lobbyists were government officials themselves, not outside lobbyists (8). Friendship networks can be more impermeable than iron triangles. The danger of understanding ethical lobbying in terms of friendship is that the skills and social networks that enable effective lobbying can concentrate power in a few people's hands and undermine the institutional mechanisms used to redistribute power and promote accountability.

Being a "good" lobbyist therefore is not the same as being a good "lawyer" or a good friend. Good lobbyists should not be identified by whether they prioritize their clients' interests in the ways that friends would. Rather, a democratic ethics of lobbying requires building friendship and social networks in ways that preserve equal access and facilitate the autonomy of citizens. Because lobbyists have the ability to distribute power and create the institutional incentives that allow a congressional office to be "owned," lobbying on the behalf of villains is more dangerous than lawyering on the behalf of villains. For this reason, ethical understandings of lawyering don't travel well in the case of lobbyists. Being an ethically proper lobbyist should not be understood as being a good friend.

Notes

1 The literal answer to this question is "yes but we can't be sure how many." *The Guardian* reported in 2011 that there are approximately 13,000 registered lobbyists but there are also thousands of unregistered lobbyists in Washington. See Kaiser 2007.

2 Political theorists have long recognized the political benefits of lobbying, e.g. Thompson 1987, 1995. Contrary to public opinion against lobbyists, Bas Van der Vossen (2014) claims that there is nothing inherently wrong with lobbying. Van der Vossen downplays how doing political work for money can change the nature of the work, creating incentives to change the political system at the expense of legitimate political authority for personal gain.

3 Since democratic politics requires inclusion—that is, the opinions, interests, and perspectives of all parties affected by a policy, democratic commitments seemingly support lobbying for *all* types of interests. The more lobbying voices the better. Just as legal defense requires a voice from both sides of the table, lobbying is more just and more democratic when the diversity of perspectives is present.

4 In the end, Abramoff did go to jail: his "zealous advocacy" led him to be sentenced to six years in federal prison for mail fraud, conspiracy to bribe public officials, and tax evasion. He had to pay $25 million in restitution to Michigan's Saginaw Chippewas, California's Agua Caliente, Mississippi's Choctaws and Louisiana's Coushattas. Steven Light and Kathryn Rand reported that, "Abramoff played one tribe off another, promising access to and influence over federal policymakers while charging exorbitant fees" (2006, 230). Abramoff earned over $85 million in fees by lobbying for opposing tribes' interests and thereby creating the need for his services. He hid from the public who was profiting from his dealings with Native Americans. For instance, he shielded Ralph Reed, who did not want to be paid directly by a tribe

with gambling interests, by channeling nonprofits and charities of public officials' wives as fronts for political contributions. Abramoff pushed the boundaries of what was legally and professionally permissible.

5 For instance, the 113th Congress has 128 lawyers in the House and 45 lawyers in the Senate. See https://www.washingtonpost.com/news/the-fix/wp/2013/01/17/an-awesome-diagram-of-the-113th-congress/ (accessed October 26, 2016).

6 For a full discussion of democratic representation, see Dovi 2012.

7 The right to due process comes from a variety of constitutional sources. Famously, the Sixth Amendment guarantees the right to counsel in *federal* prosecutions but the right was not applied until 1963 to state prosecutions for felony offences. See *Gideon v. Wainwright* 372 U.S. 335. Moreover, the right to counsel does not pertain to state non-felony cases or civil cases. Hence, detained immigrants do not have a right to counsel because the Supreme Court has ruled that deportation is not a punishment, but an administrative procedure. For this reason, an undocumented immigrant has not been deprived of life, liberty, or property, so many constitutional protections do not apply. See Feere 2013. The Brennan Center found that the public defender often spends less than six minutes per case at hearings where clients plead guilty and are sentenced. See Giovanni 2012.

8 In *Strickland*, the court established a two-prong test for defendants who claim ineffective performance. First, the defendant "must show that counsel's performance was deficient," and second, "the defendant must show that the deficient performance prejudiced the defense" (*Strickland v. Washington*, 1984). Despite the ambiguous nature of these guidelines, at its core the test is more concerned with fairness of procedure: "An overriding element of *Strickland's* two-prong test is the question of whether the defendant received a fair trial" (Kirchmeier, 1996, 437).

9 Although lawyers have a duty to be the most effective advocate possible, their actions exist within a constrained institutional environment, one in which judicial process and professional codes of ethics interact as ways of monitoring and restricting their advocacy. These constraints are intended to prevent abuse. Of course, legal advocacy does not extend to client satisfaction *at all costs*. After all, "zealous advocacy does not encompass or excuse lawyers' intentional violations of ethics rules….trial lawyers should be advocates, but they cannot be zealots" (Richmond, 2002, 58).

10 Determining exactly what is a reasonable amount in context is open to significant interpretation. Only a handful of court decisions have spoken with precision on the matter. One of the earliest and most notable, *Goldstone v. State Bar*, concluded that the fee must be "so exorbitant and wholly disproportionate to the services performed as to shock the conscience" (*Goldstone v. State Bar of California*, 1931). Just what exactly warrants a shocking of the conscience is up to debate. The decision in *Goldstone* emphasized whether or not the services performed were in proportion to the amount charged, a strategy that would be echoed by later courts (*Bushman v. State Bar of California*, 1974). Still, this balance is easily muddied by the difficulty in calculating the reasonable value of services in any given situation (Romine, 1977).

11 Andrew Wolfson (2014) reported that "1,046 lawyers were disbarred nationally in 2011, or about 0.08 percent of the roughly 1.27 million practicing lawyers."

12 Despite this variation of legal regulations placed on lobbyists, there are two main types of regulations placed on lobbying: prohibitions and disclosure requirements. For a discussion of these two types of regulations, see Johnson 2006. According to Richard Briffault (2014), lobbying regulations serve four purposes: protecting the right to lobby; preventing improper influence; restricting some unfair opportunities for influence; and promoting transparency of lobbyists' activities.

13 Luneburg, W.V. (2009). "The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going." *McGeorge Law Review* 41: *85*

14 See http://lobbyingdisclosure.house.gov/amended_lda_guide.html (accessed October 5, 2016).
15 See http://grprofessionals.org/joinagrp/codeofethics/ (accessed October 5, 2016).
16 See www.statelobbyists.org/CodeofEthics.aspx (accessed October 5, 2016).
17 The friendship analogy is not just used in lawyering relationships, this metaphor is also used to understand political relationships (e.g. Bickford 1996; Schwarzenbach, 1996; Sherman 1987; Frank 2005; Guyette 2012). Philosophers ranging from Aristotle to Derrida have argued that friendships are political and political relationships are like friendships. The proper behavior of citizens is better identified by envisioning fellow citizens as friends.
18 For example, Sammons (1995) argues that the analogy of a stranger, as opposed to a friend, is more appropriate for the lawyering relationship. Shaffer and Cochran (1994) have suggested three other models for lawyering, e.g. lawyer as godfather, lawyer as hired gun and lawyer as guru.
19 For a full description of Federici's role, see Stone (2006, 98–100).
20 Federici was eventually found guilty of tax evasion and obstructing a Congressional investigation.
21 For a discussion of the literature on friendship and politics, see Heather Devere and Graham Smith (2010).

References

Abramoff, J. (2011). *Capitol punishment: the hard truth about Washington corruption from America's most notorious lobbyist.* Washington, DC: WND Books.

Abramoff, J. (2012). CBS's 60 Minutes interview. "Jack Abramoff: The lobbyist's playbook," available at www.cbsnews.com/video/watch/?ido7387331n (accessed September 23, 2013)

American Bar Association (2013). "Model rules of professional conduct." Center For Professional Responsibility, available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (accessed September 12, 2016).

Baugh, J. (2014). "Activists Protest City Council's Ban on Lobbying for Funds" *San Antonio Express*, available at www.expressnews.com/news/local/article/Activists-protestCityCouncilsbanonlobbying5714289.php (accessed August 26, 2014).

Baumgartner, F. R., Berry, M. J., Hojnacki, M., Leech, B. L., and Kimball, D. C. (2009). *Lobbying and policy change: who wins, who loses, and why.* Chicago: University of Chicago Press.

Bickford, S. (1996). *The dissonance of democracy: Listening, conflict, and citizenship*. Ithaca: Cornell University Press.

Blanes, I., Jordi, V. and Mirko, D., and FonsRosen, C. (2011). "Revolving door lobbyists: The value of political connections in Washington," available at www.voxeu.org/article/politicalscandalandvalueconnectionsinsightsbritainandus (accessed October 28, 2011).

Briffault, R. (2014). "The anxiety of influence: The evolving regulation of lobbying." *Election Law Journal*, 13(1): 160–193.

Bushman v. State Bar of California, 11 Cal.3d 558, (1974).

Cicilline, D. and Rigell, S. (2015). "Teach congress a lesson." *New York Times*, available at www.nytimes.com/2015/01/02/opinion/teach-congress-a-lesson.html (accessed September 12, 2016).

Dauer, E. A., and Leff, A. A. (1977). "The lawyer as friend." *Yale Law Journal* 86: 573–584.

Devere, H. and Smith, G. M. (2010). "Friendship and politics." *Political Studies Review*, 8: 341–356.

Dovi, S. (2012). *The good representative.* Oxford: Wiley-Blackwell.

Feere, J. (2013). "Detained immigrants and the right to counsel." Center for Immigration Studies. Available at http://cis.org/feere/detained-immigrants-and-right-counsel (accessed September 12, 2016).

Finkelstein, B. (2007). "Should permanent disbarment be permanent?" *The Georgetown Journal of Legal Ethics* 20: 587–598.

Fortune, W. Underwood, R., and Lwinkelried, E. (2001). *Modern litigation and professional responsibility handbook: The limits of zealous advocacy*, Second Edition. New York, NY: Aspen Publishers.

Frank, J. (2005). *A democracy of distinction: Aristotle and the work of politics*. Chicago: University of Chicago Press.

Fried, C. (1976). "The lawyer as friend: The moral foundations of the lawyer–client relation." *Yale Law Journal* 85: 1060–1089.

Gideon v. Wainwright, 372 U.S. 335 (1963).

Giovanni, T. (2012). "Community oriented defense: start now," available at https://www.brennancenter.org/sites/default/files/legacy/publications/COD_WEB.pdf (accessed September 12, 2016).

Goldstone v. State Bar, 214 Cal. 490, 499 (1931).

Gordon, N. (2014). "Misconduct and punishment." Center for Public Integrity, available at www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment (accessed September 12, 2016).

Green, B. A. (2003). "Criminal neglect: Indigent defense from a legal ethics perspective." *Emory Law Journal* 52: 1169–1200.

Guinier, L. (1994). *The tyranny of the majority: Fundamental fairness in representative democracy.* New York: Free Press.

Guyette, F. (2012). "Friendship and the common good in Aristotle." *Journal of Politics* 50: 896–919.

Hasnas, J. (2014). "The ethics of lobbying," *Georgetown Journal of Law and Public Policy* 12: 373.

Hasnas, J. (2014). "Lobbying and self-defense." *Georgetown Journal of Law and Public Policy* 12(SI): 391–412.

Johnson, V. R. (2006). "Regulating lobbyists: Law, ethics, and public policy." *Cornell Journal of Public Policy* 16: 1.

Kaiser, R. (2007). "Citizen k street: How lobbying became Washington's biggest business." *The Washington Post*, available at http://blog.washingtonpost.com/citizen-k-street/chapters/conclusion/ (accessed October 2, 2016).

Kirchmeier, J. (1996). "Drink, drugs, and drowsiness: The constitutional right to effective assistance of counsel and the *Strickland* prejudice requirement." *Nebraska Law Review* 75(3): 425–475.

Lanctot, C. (1991). "Duty of zealous advocacy and the ethics of the federal government lawyer: The three hardest questions." *Southern California Law Review* 64: 951–1017.

LaPira, T. (2013). "How much lobbying is there in Washington? It's DOUBLE what you think." Sunlight Foundation, available at http://sunlightfoundation.com/

blog/2013/11/25/how-much-lobbying-is-there-in-washington-its-double-what-you-think/ (accessed September 13, 2016).

Light, S. A. and Rand, K. R. L. (2005). *Indian gaming and tribal sovereignty: The casino compromise*. Lawrence, KS University Press.

Light, S. A. and Rand, K. R. L. (2006). "The 'tribal loophole': Federal campaign finance law and tribal political participation after Jack Abramoff." *Gaming Law Review* 10(3): 230–239.

Luneburg, W. V. (2009). "The evolution of federal lobbying regulation: Where we are now and where we should be going." *McGeorge Law Review* 41: 85–130.

McDonald v. Smith, 472 U.S. 479 (1985)

McGreevy, P. (2014, February 14). "Lobbyist faces record $133,500 fine for improper payments." *LaTimes*, available at www.latimes.com/local/political/la-me-pc-lobbyist-faces-record-133500-fine-for-improper-payments-20140210-story.html (accessed September 13, 2016).

Mann, P. E. (2010). "Ethical obligations of indigent defense attorneys to their clients." *Missouri Law Review* 75: 715–749.

Moore, D. A. and Loewenstein, G. (2004). "Self-interest, automaticity, and the psychology of conflict of interest" *Social Justice Research* 17(2): 189–202.

O'Donnell, G. A. (1998). "Horizontal accountability in new democracies." *Journal of Democracy* 9(3), 112–126.

Pear, R. (2008). "Ethics law isn't without its loopholes." *New York Times*, available at www.nytimes.com/2008/04/20/washington/20lobby.html?pagewanted=all&_r=2 (accessed September 13, 2016).

Peavy v. State, 766 So.216 1120 (2000).

Public Citizen (1995). "Lobbying disclosure act: A brief synopsis of key components."

Richmond, D. (2002). "The ethics of zealous advocacy: Civility, candor and parlor tricks." *Texas Tech Law Review* 34: 3–59.

Rochabrun, M. (2014). "Lobbying disclosures leave public in the dark." Center for Public Integrity, available at www.publicintegrity.org/2014/08/25/15344/lobbying-disclosures-leave-public-dark (accessed September 13, 2016).

Romine, W. (1977). "Legal fees: Gross overcharging by an attorney warranting disciplinary action." *University of Alabama Journal of the Legal Profession, Volume 2*, available at www.law.ua.edu/pubs/jlp_files/issues_files/vol02/vol02art09.pdf (accessed September 13, 2016).

Sammons, J. L. (1995). "Rank strangers to me: Shaffer and Cochran's friendship model of moral counseling in the law office." *University of Arkansas at Little Rock Law Journal*, 18(1).

Schwarzenbach, S.A. (1996). "On civic friendship." *Ethics*, 107(1): 97–128.

Schneyer, T. (1991). "Professional discipline for law firms?" Cornell Law Review 77(1): 1–46.

Schneyer, T. (2011). "On further reflection: How professional self-regulation should promote compliance with broad ethical duties of law firms management." Arizona Law Review 53: 577–628.

Schwarzenbach, S. A. (1996). "On civic friendship." *Ethics*, 107(1): 97–128.

Shaffer, T. L., and Cochran, R. F. (1994). *Lawyers, clients and moral responsibility*. St. Paul, Minn.: West Group.

Sherman, N. (1987). "Aristotle on friendship and the shared life." *Philosophy and Phenomenological Research* 47(4): 589–613.

Simon, W. H. (1993). "The ethics of criminal defense." *Michigan Law Review* 91(7): 1767–1772.

Stone, P. H. (2006). *Heist: superlobbyist Jack Abramoff, his republican allies, and the buying of Washington*. New York: Farrar, Straus & Giroux.

Strickland v. Washington, 466 U.S. 668 (1984).

Tenenbaum, J. "Lobbying Disclosure Act of 1995: A summary and overview for associations," available at www.asaecenter.org/Resources/whitepaperdetail.cfm?ItemNumber=12224 (accessed July 6, 2015).

Thompson, D. 1987. *Political ethics and public office.* Cambridge: Harvard University Press.

Thompson, D. 1995. *Ethics in congress: From individual to institutional corruption.* Washington DC: Brookings Institute.

Thompson, M. S. (1985). *The "spider web": Congress and lobbying in the age of Grant*. Cornell University Press.

U.S. House of Representatives (2008) *Lobbying Disclosure Act Guidance*, available at http://lobbyingdisclosure.house.gov/amended_lda_guide.html (accessed October 23, 2016).

Van der Vossen, B. (2014). "There is no ethic of lobbying." *Georgetown Journal of Law and Public Policy* 12: 359–372.

Wilkie, C. (2014). "For the second time ever, a lobbyist is charged with violating lobbying rules." *Huffington Post*, available at www.huffingtonpost.com/2014/03/20/alan-mauk-lobbying-violation_n_5000220.html (accessed September 13, 2016).

Wolfson, A. (2014) "Disbarred lawyers face career, personal hurdles," *USA TODAY*, available at www.usatoday.com/story/news/nation/2014/01/19/disbarred-lawyers-face-career-personal-hurdles/4651761/ (accessed September 13, 2016).

Bibliography

Abramoff, J. (2011) *Capitol punishment: the hard truth about Washington corruption from America's most notorious lobbyist.* Washington DC: WND Books.

Abramoff, J. (2013) CBS's 60 Minutes interview. "Jack Abramoff: The lobbyist's playbook." www.cbsnews.com/video/watch/?id7387331n (accessed September 23, 2013).

Abrams, H. (2004) "Weapons of Miller's descriptions." *Bulletin of the Atomic Scientists*. http://opinionator.blogs.nytimes.com/2012/08/30/speech-lies-and-apathy/ (accessed May 18, 2016).

Achen, C. H. and Bartels, L. M. (2016) *Democracy for realists*. Princeton: Princeton University Press.

Adler, J. (2004) "Reconciling open-mindedness and belief." *Theory and Research in Education* 2(2): 127–142.

Akhil, A. (2014) "Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule." *Duke Law Journal* Vol. 63: 1483–1502.

Alterman, E. (2005) *When presidents lie: a history of official deception and its consequences*. New York: Penguin.

Althaus, S. (2003) *Collective preferences in democratic politics*. New York: Cambridge University Press.

Amar, A. (2014) "Lex majoris partis: how the senate can end the filibuster on any day by simple majority rule." *Duke Law Journal* 63: 1483–1502.

American Bar Association (2013) "Model rules of professional conduct." Center for Professional Responsibility. www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (accessed September 13, 2016).

An-Na'im, A. (1990) "Islam, Islamic law and the dilemma of cultural legitimacy for universal human rights." In: *Asian perspectives on human rights*, edited by C. E. Welch and V. Leary, 66–74. Boulder, Colorado: Westview Press.

Anderson, E. S. (1990) "Is women's labor a commodity?" *Philosophy & Public Affairs* 19(1): 71–92.

Applbaum, A. I. (2010) "Legitimacy without the duty to obey." *Philosophy & Public Affairs* 38: 216–239.

Arenberg, R. A. and Dove, R. B. (2012) *Defending the filibuster: the soul of the senate*. Bloomington: Indiana University Press.

Arvan, M. (2011) "People do not have a duty to avoid voting badly: reply to Brennan." *Journal of Ethics and Social Philosophy* January. www.jesp.org/articles/download/MarcusArvan.pdf (accessed October 6, 2016).

Asch, S. E. (1955) "Opinions and social pressure." *Scientific American* 193(5): 31–35.

Asimow, M. and Weisberg, R. (2009) "When the lawyer knows the client is guilty: client confessions in legal ethics, popular culture, and literature." *Southern California Interdisciplinary Law Journal* 18: 229–258.

Audi, R. (2011) *Democratic authority and the separation of church and state*. Oxford: Oxford University Press.

Audi, R. (2013) *Rationality and Religious Commitment* (Reprint edition). New York: Oxford University Press.

Australian Electoral Commission (2016) "Compulsory voting in Australia." www.aec.gov.au/About_AEC/Publications/voting/files/compulsory-voting.pdf (accessed February 13, 2016).

Axford, B. and Huggins, R. (2001) *New media and politics*. London: Sage.

Azoulay, P., Fons-Rosen, C. and Graff Zivin, J. S. (2015) "Does science advance one funeral at a time?" NBER Working Paper, No 21788. (DOI): 10.3386/w21788.

Baehr, J. (2011) "The structure of open-mindedness." *Canadian Journal of Philosophy* 41(2): 191–214.

Barreto, M. A., Nuno, S. A. and Sanchez, G. R. (2007) "Voter ID requirements and the disenfranchisements of Latino, Black and Asian voters." In: Annual Meeting of the American Political Science Association, Chicago, Illinois, vol. 30.

Baugh, J. (2014) "Activists protest City Council's ban on lobbying for funds" *San Antonio Express*. www.expressnews.com/news/local/article/Activists-protest-City-Council-s-ban-on-lobbying-5714289.php (accessed August 26, 2014).

Baumann, P. (2008) "Problems for Sinnott-Armstrong's Moral Contrastivism," *The Philosophical Quarterly* 58: 463–470.

Baumgartner, F. R., Berry, J. M., Hojnacki, M., Leech, B. L. and Kimball, D. C. (2009) *Lobbying and policy change: who wins, who loses, and why*. Chicago: University of Chicago Press.

Beam, C. (2010) "Code Black." *Slate*, January 11, 2010. www.slate.com/articles/news_and_politics/politics/2010/01/code_black.html (accessed May 18, 2016).

Bechtel, M. M., Hangartner, D. and Schmid, L. (in press) "Does compulsory voting increase support for leftist policy?" *American Journal of Political Science* DOI: 10.1111/ajps.12224.

Beerbohm, E. (2012) *In our name: the ethics of democracy*. Princeton, NJ: Princeton University Press.

Belkin, A. (2013) "Abolish the filibuster to restore democracy." *New York Times* 11 November 2013. www.nytimes.com/roomfordebate/2012/12/02/do-filibusters-stall-the-senate-or-give-it-purpose/abolish-the-filibuster-to-restore-democracy (accessed September 13, 2016).

Bell, D. A. (2009) *Beyond liberal democracy: political thinking for an East Asian context.* Princeton: Princeton University Press.

Benn, S. (1979) "The Problematic Rationality of Political Participation," in *Philosophy, Politics, and Society: Fifth Series*, ed. Peter Laslett and James Fishkin. New Haven, Conn.: Yale University Press.

Bibas, S. (2009) "Prosecutorial regulation versus prosecutorial accountability." *University of Pennsylvania Law Review* 157(4): 959–1016.

Bickford, S. (1996) *The dissonance of democracy: listening, conflict, and citizenship*. Cornell: Cornell University Press.

Bilmes, L. and Stiglitz, J. (2006) "The economic costs of the Iraq War: an appraisal three years after the beginning of the conflict." NBER Working Paper No. 12054.

Binder, S. A. and Smith, S. S. (1997) *Politics or principle? Filibustering in the United States Senate.* Washington, DC: Brookings Institution.

Black, D. (2003) "Blix Says Powell Lying", *Eschaton*.

Blanes, I., Jordi, V. and Mirko, D., and FonsRosen, C. (2011) "Revolving Door Lobbyists: The Value of Political Connections in Washington," available at www.voxeu.org/article/politicalscandalandvalueconnectionsinsightsbritainandus (accessed October 28, 2011).

Blow, C. M. (2016) "A Bernie blackout?" *New York Times* March 16, 2016. www.nytimes.com/2016/03/17/opinion/campaign-stops/a-bernie-blackout.html?_r=1 (accessed May 20, 2016).

Blow, C. M. (2012) "Liberty to lie." *New York Times* November 1, 2012. http://campaignstops.blogs.nytimes.com/2012/11/01/liberty-to-lie/ (accessed May 18, 2016).

Boehlert, E. (2015) "ABC World News Tonight has devoted less than one minute to Bernie Sanders' Campaign this year," *mediamatters.org*, available at http://mediamatters.org/blog/2015/12/11/abc-world-news-tonight-has-devoted-less-than-on/207428 (accessed May 20, 2016).

Bok, S. (1978) *Lying*. New York: Random House.

Bond, R. and Smith P. B. (1996) "Culture and Conformity: A Meta-Analysis of Studies using Asch's Line Judgment Task." *Psychological Bulletin* 119 (1): 111.

Brandt, R. (1972) "Utilitarianism and the rules of war." *Philosophy & Public Affairs* 1: 145–165.

Brandt, R. (1992) *Morality, utilitarianism, and rights*. Cambridge: Cambridge University Press.

Brennan, G. and Lomasky, L. (1993) *Democracy and decision*. New York: Cambridge University Press.

Brennan, G. and Pettit, P. (1990) "Unveiling the vote." *British Journal of Political Science* 20(32): 311–333.

Brennan, J. (2009) "Polluting the polls: when citizens should not vote." *Australasian Journal of Philosophy* 87: 535–549.

Brennan, J. (2011a) *The ethics of voting*. Princeton: Princeton University Press.

Brennan, J. (2011b) "The right to a competent electorate." *Philosophical Quarterly* 61: 700–724.

Brennan, J. (2014) "How smart is democracy? You can't answer that a priori," *Critical Review: A Journal of Politics and Society* 26: 33–58.

Brennan, J. (2016a) "When may we kill government agents? In defense of moral parity." *Social Philosophy & Policy* 32: 40–61.

Brennan, J. (2016b) *Against democracy*. Princeton: Princeton University Press.

Brewer, K. T. (2007) "Disenfranchise this: state voter ID laws and their discontents, a blueprint for bringing successful equal protection and poll tax claims." *Valparaiso University Law Review* 42: 191.

Brewer, M. B. and Kramer, R. M. (1985) "The Psychology of Intergroup Attitudes and Behavior." *Annual Review of Psychology* 36: 219–243.

Briffault, R. (2014) "The anxiety of influence: the evolving regulation of lobbying." *Election Law Journal* 13: 160–193.

Brody, H. (1989) "Transparency: Informed Consent in Primary Care." *The Hastings Center Report* 19(5): 5–9.

Brown, D. G. (2010) "Mill on the harm in not voting." *Utilitas* 22: 126–133.

Buchanan, A. and Keohane, R. (2006)"The legitimacy of global governance institutions." *Ethics and International Affairs* 20: 405–437

Bushman v. State Bar of California, 11 Cal.3d 558, (1974).

Calhoun, C. (1995) "Standing for something." *Journal of Philosophy* 92(5): 235–260.

Caplan, B. (2007) *The myth of the rational voter*. Princeton: Princeton University Press.

Caplan, B. (2008) "What if the median voter were a failing student?" *The Economist's Voice* 5: 1–5.

Caplan, B., Crampton, E., Grove, W. A. and Somin. I. (2013) "Systematically biased beliefs about political influence: evidence from the perceptions of political influence on policy outcomes survey." *Political Science & Politics* 46: 760–767.

Card, R. F. (2007) "Inconsistency and the theoretical commitments of Hooker's rule-consequentialism." *Utilitas* 19: 243–258.

Carling, A. (1995) "The Paradox of Voting and the Theory of Social Evolution," in *Preferences, Institutions and Rational Choice*, ed. Keith Dowding and Desmond King, Oxford: Clarendon Press: 20–43.

Carroll, L. (2016) "Marco Rubio incorrectly says illegal immigrant population is higher than 5 years ago." Poltifact.com, January 31, 2016. www.politifact.com/truth-o-meter/statements/2016/jan/31/marco-rubio/marco-rubio-incorrectly-says-illegal-immigrant-pop/ (accessed May 18, 2016).

Carson, T. L. (2010) *Lying and deception*. New York: Oxford University Press.

CBS News. (2015), "Bernie Sanders blames Donald Trump's rise on the media," *cbsnews.com*, available at www.cbsnews.com/news/bernie-sanders-says-donald-trumps-rise-is-an-indictment-of-the-media/ (accessed May 20, 2016).

Checkland, S. G. (1975) *Scottish banking: a history, 1695–1973*. Glasgow: Collins Press.

Childers, T. (1985) *The Nazi voter*. Chapel Hill: University of North Carolina Press.

Chin, G. J. (2011) "Making Padilla practical: defense counsel and collateral consequences of a guilty plea." *Howard Law Journal* 54: 675–691.

Chong, D. (2013) "Degrees of rationality in politics." In: *The Oxford Handbook of Political Psychology*, edited by D. O. Sears and J. S. Levy, 96–129. New York: Oxford University Press.

Christiano, T. (2012) "Rational deliberation among experts and citizens," in John Parkinson and Jane Mansbridge, eds., *Deliberative Systems*, Cambridge: Cambridge University Press: 27–31.

Chwe, M. S.-Y. (2013) *Rational ritual: culture, coordination, and common knowledge.* Princeton: Princeton University Press.

Cialdini, R. B. and Goldstein, N. J.(2004) "Social influence: compliance and conformity." *Annual Review of Psychology* 55: 591–621.

Cicilline, D. and Rigell, S. (2015) "Teach congress a lesson." *New York Times*. www.nytimes.com/2015/01/02/opinion/teach-congress-a-lesson.html (accessed September 13, 2016).

Citrin, J. and Green, D. (1990) "The self-interest motive in American public opinion." *Research in Micropolitics* 3: 1–28.

Clark, W. R. and Golder, M. (2006) "Rehabilitating Duverger's theory." *Comparative Political Studies* 39(6): 679–708.

Cohen, E. D. (1985) "Pure legal advocates and moral agents: two concepts of a lawyer in an adversary system." *Criminal Justice Ethics* 4: 38–59.

Cohen, G. A. (1997) "Where the action is: on the site of distributive justice." *Philosophy and Public Affairs* 26: 3–30.

Cohen, J. (1986) "An epistemic conception of democracy." *Ethics* 97(1): 26–38.
Cohen, J. (1993) 'Moral Pluralism and Political Consensus', in *The Idea of Democracy*, ed. David Copp, Jean Hampton, and John E. Roemer, 270–291. Cambridge: Cambridge University Press.
Cohen, J. (2009) 'Procedure and Substance in Deliberative Democracy'. In *Philosophy, Politics, Democracy: Selected Essays*, 154–180. Cambridge MA: Harvard University Press.
Cohen, J. (2009) "Deliberation and democratic legitimacy." In: *Democracy*, edited by D. Estlund, 87–106. Malden, MA: Blackwell.
Cohen, J. (2010) *Rousseau: A Free Community of Equals*. Oxford: Oxford University Press.
Cohen, J. and Sabel. C. (1997) "Directly deliberative polyarchy." *European Law Journal* 3(4): 313–342.
Cohen, M., and Karol, D., Noel H. and Zaller, J. (2008) *The Party Decides: Presidential Nominations Before and After Reform*. Chicago: University of Chicago Press.
Cohen, P. (2010) '"Epistemic closure'? Those are fighting words." *New York Times*, April 27, 2010.
Cohen, T. (1999) *Jokes*. Chicago: University of Chicago Press.
Collins, S. (2013) "Collectives' Duties and Collectivization Duties," *Australasian Journal of Philosophy* 91.2: 231–248.
Congressional Record: Proceedings and Debates of the 113th Congress, First Session. 2013. Vol. 159. No. 167: S8413–8538.
Conly, S. (2012) *Against autonomy: justifying coercive paternalism*. Cambridge: Cambridge University Press.
Conover, P., Feldman, S. and Knight, K. (1987) "The personal and political underpinnings of economic forecasts." *American Journal of Political Science* 31: 559–583.
Converse, P. (1990) "Popular representation and the distribution of information." In: *Information and democratic processes*, edited by J. A. Ferejohn and J. H. Kuklinski, 369–388. Urbana: University of Illinois Press.
Corn, D. (2012) "Secret video: Romney tells millionaire donors what he really thinks of Obama voters." *Mother Jones*, September 17, 2012. www.motherjones.com/politics/2012/09/secret-video-romney-private-fundraiser (accessed May 18, 2016).
Costa, D. and Kahn, M. E. (2010) "Energy conservation." National Bureau of Economic Research. Working Paper.
Cruft, R. (2006) "Why aren't duties rights?" *Philosophical Quarterly* 56: 175–192.
Cudd, A. (2004) "The paradox of liberal feminism: preference, rationality, and pppression." In: *Varieties of feminist liberalism*, edited by A. R. Baehr and A. Allen, 37–61. Lanham: Rowman & Littlefield Publishers.
D'Amato, A. and Eberle, E. J. (2010) "Three models of legal ethics." Faculty Working Papers, paper 73, 2010. Available at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/73/ (accessed February 2, 2014).
Dauer, E. A. and Leff, A. A. (1977) "The lawyer as friend." *Yale Law Journal* 86: 573–584.
Davis, W. A. (1999) "Communicating, telling, and informing." *Philosophical Inquiry* 21: 21–43.
Davis, Michael L. and Michael Ferrantino. 1996. "Towards a Positive Theory of Political Rhetoric: Why Do Politicians Lie?" *Public Choice* 88:1–13.
Dickerson, J. (2008) "The mitt maul." *Slate*, January 6, 2008.
Dombrowski, D. A. (2001) *Rawls and religion: the case for political liberalism*. Albany: State University of New York Press.

Donagan, A. (1977) *The theory of morality*. Chicago: University of Chicago Press.
Donaldson, T. (1991) *The ethics of international business*. Oxford: Oxford University Press.
Dovi, S. (2012) *The good representative*. Oxford: Wiley-Blackwell.
Dretske, F. (1981) *Knowledge and the flow of information*. Cambridge, MA: MIT Press.
Duverger, M. (1963) *Political parties: their organization and activity in the modern state*. New York: John Wiley.
Dworkin, R. (1994) *Life's dominion*. New York: Vintage Books.
Ebels-Duggan, K. (2010) "The beginning of community: politics in the face of disagreement." *Philosophical Quarterly* 60(238): 50–71. Doi:10.1111/j.1467-9213.2008.591.x.
Edelman. (2014) "2014 Edelman Trust Barometer." www.edelman.com/insights/intellectual-property/2014-edelman-trust-barometer/ (accessed May 18, 2016).
Ellis, A. R. (2009) "The cost of the vote: poll taxes, voter identification laws, and the price of democracy." *Denver University Law Review* 86(3): 1023–1068.
Emery, J. (2008) Finding common enemies: social groups as shortcuts to partisanship. Dissertation, SUNY-Binghamton.
Engelen, B. (2009) "Why liberals can favour compulsory attendance." *Politics* 29: 218–222.
Engelen, B. and Nys, T. (2013) "Against the secret ballot: toward a new proposal for open voting." *Acta Politica* 48: 490–507.
Estlund, D. (2007) "On following orders in an unjust war." *Journal of Political Philosophy* 15: 213–234.
Estlund, D. (2008) *Democratic authority: a philosophical framework*. Princeton: Princeton University Press.
Evans, R. J. (2005) *The coming of the Third Reich*. New York: Penguin Books.
Fallis, D. (2013) "When it's right to lie to a bootlegger." In: *Boardwalk empire and philosophy*, edited by R. Greene and R. Robison-Greene, 101–113. Chicago: Open Court.
Fallis, D. (2015) "Disinformation, deception, and politics." In: *American political culture*, edited by M. Shally-Jensen, 334–340. Santa Barbara: ABC-CLIO.
Feddersen, T., Gailmard, S. and Sandroni. A. (2009) "A bias toward unselfishness in large elections: theory and experimental evidence." *American Political Science Review* 103: 175–192.
Feere, J. (2013) "Detained immigrants and the right to counsel." Center for Immigration Studies. http://cis.org/feere/detained-immigrants-and-right-counsel (accessed September 13, 2016).
Feinberg, J. (1984) *Harmless wrongdoing (the moral limits of the criminal law. Volume IV)*. Oxford: Oxford University Press.
Ferraro, P. J. and Taylor, L. O. (2005) "Do economists recognize an opportunity cost when they see one? A dismal performance from the dismal science." *The B.E. Journal of Economic Analysis and Policy* 4: 1–14.
Finkelstein, B. (2007) "Should Permanent Disbarment be Permanent?" *The Georgetown Journal of Legal Ethics* 20: 587–598.
Fishkin, J. and Ackerman, B. (2004) *Deliberation Day*, New Haven: Yale University Press.
Fishkin, J, He, B. and Siu, A. (2006) "Public Consultation through Deliberation in China: The First Chinese Deliberative Poll." In *The Search for Deliberative Democracy in China*, Leib, Ethan J. and Baogang He, eds. New York: Palgrave MacMillan, ch. 12.

Flanders, C. (2011) What Do We Want in a Presidential Primary? An Election Law Perspective.

Flanders, C. (2012) "The Mutability of Public Reason," *Ratio Juris* Vol. 25 (2): 180–205.

Fortier, J. (2010) "Can liberalism lose the enlightenment?" *The Journal of Politics* 72(4): 1003–1013.

Fortune, W., Underwood, R. and Lwinkelried, E. (2001) *Modern litigation and professional responsibility handbook: the limits of zealous advocacy*, Second Edition. New York, NY: Aspen Publishers.

Fowler, A. (2015) "Regular voters, marginal voters and the electoral effects of turnout." *Political Science Research and Methods* 3: 205–219.

Frank, J. A. (2005) *Democracy of distinction: Aristotle and the work of politics*. Chicago: University of Chicago Press.

Frankfurt, H. (2002) "Reply to G. A. Cohen." In: *Contours of agency*, edited by S. Buss and L. Overton, 340–344. Cambridge: MIT Press.

Frankfurt, H. G. (2005) *On bullshit*. Princeton: Princeton University Press.

Freedman, M. H. (1975) *Lawyers' ethics in an adversary system*. Indianapolis: Bobbs-Merrill.

Freedman, M. H. and Smith, A. (2004) *Understanding lawyers' ethics*, Third Edition. Newark, NJ: LexisNexis.

Freeman S. (2007) *Rawls*, Oxford: Routledge: 402–3.

Fricker, M. (2012) "Group testimony? The making of a collective good informant." *Philosophy and Phenomenological Research* 84: 249–276.

Fried, C. (1976) "The lawyer as friend: the moral foundations of the lawyer-client relation." *Yale Law Journal* 85: 1060–1089.

Friedman, M. (2002) "Sodom' Hussein's Iraq." *New York Times.*

Funk, C. (2000) "The dual influence of self-interest and societal interest in public opinion." *Political Research Quarterly* 53: 37–62.

Funk, C. and Garcia-Monet, P. (1997) "The relationship between personal and national concerns in public perceptions of the economy." *Political Research Quarterly* 50: 317–342.

Galston, W. (2005) *The practice of liberal pluralism*. New York: Cambridge University Press.

Gamso, J. (2009) "Who we are and what we do." Gamso – For the Defense weblog, November 24, 2009. http://gamso-forthedefense.blogspot.com/2009/11/who-we-are-and-what-we-do.html (accessed February 2, 2014).

Gardner, P. (1993) "Should we teach children to be open-minded? Or, is the Pope open-minded about the existence of God?" *Journal of Philosophy of Education* 27(1): 39–43.

Gaus, G. (1996) *Justificatory liberalism*. New York: Oxford University Press.

Gaus, G. (2003) *Contemporary theories of liberalism*. Washington, DC: Sage Publishing.

Gaus, G. and Vallier, K. (2009) "The role of religious conviction in a publically justified polity." *Philosophy and Social Criticism* 35(1–2): 51–76.

Gherity, J. A. (1993) "An early publication by Adam Smith." *History of Political Economy* 25(2): 241–282.

Gherity, J. A. (1994) "The evolution of Adam Smith's theory of banking." *History of Political Economy* 26(3): 423–441.

Gibbard, A. (1990) *Wise choices, apt feelings*. Oxford: Clarendon Press.

Gideon v. Wainwright, 372 U.S. 335 (1963).

Gilbert, M. (1989) *On social facts*. Princeton: Princeton University Press.

Gilens, M. (2012) *Affluence and influence*. Princeton: Princeton University Press.

Gilens, M. and Benjamin, P. (2014) "Testing theories of American politics: elites, interest groups, and average citizens." *Perspectives on Politics* 12: 564–581.

Giovanni, T. (2012) "Community oriented defense: start now." www.brennancenter.org/sites/default/files/legacy/publications/COD_WEB.pdf (accessed February 8, 2014).

Goldman, A. (1986) *Epistemology and cognition*. Cambridge, MA: Harvard University Press.

Goldman, A. (1999) "A Causal Responsibility Approach to Voting," *Social Philosophy and Policy* 16: 201–17, at p. 217.

Goldman, A. and Blanchard, T. (2015) "Social epistemology." *Stanford encyclopedia of philosophy*. http://plato.stanford.edu/entries/epistemology-social/ (accessed May 18, 2016).

Goldstone v. State Bar, 214 Cal. 490, 499 (1931).

Gomberg, P. (2007) *How to make opportunity equal: race and contributive justice*. Malden, MA: Blackwell Publishing.

Goodin, R. E. (2008) *Innovating democracy*. Oxford: Oxford University Press.

Gordon, N. (2014) "Misconduct and punishment." Center for Public Integrity. www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment (accessed September 13, 2016).

Green, B. A. (2003) "Criminal neglect: indigent defense from a legal ethics perspective." *Emory Law Journal* 52: 1169–1200.

Green, D. and Shapiro, I. (1994) *Pathologies of rational choice theory*. New Haven: Yale University Press.

Green, D., Palmquist, B. and Schickler, E. (2002) *Partisan hearts and minds: political parties and the social identities of voters*. New Haven: Yale University Press.

Guerrero, A. A. (2010) "The Paradox of Voting and the Ethics of Political Representation", *Philosophy and Public* Affairs, 38, no. 3: 272–306.

Guinier, L. (1994) *The Tyranny of the Majority: Fundamental fairness in Representative Democracy* New York: Free Press.

Gutmann, A. and Thompson, D. (2004) *Why deliberative democracy?* Princeton, NJ: Princeton University Press.

Guyette, F. (2012) "Friendship and the common good in Aristotle." *Journal of Politics* 50: 896–919.

Haberman, C. (2003) "NYC: ex-inmate denied chair (and clippers)." *New York Times*, February 5. www.nytimes.com/2003/02/25/nyregion/nyc-ex-inmate-denied-chair-and-clippers.html (accessed February 13, 2016).

Habermas, J. (2001) *Moral consciousness and communicative action*. Cambridge, MA: MIT Press.

Haidt, J. (2012) *The righteous mind*. New York: Pantheon.

Hamilton, A., Madison, J. and Jay, J. (1961) *The federalist papers*. New York: Penguin.

Hamilton, A., Madison, J., Jay, J., & Kessler, C. R. (2003). *The Federalist Papers*. (C. Rossiter, Ed.) (1st Edition). New York: Signet.

Hampton J. (1992) "Correcting Harms versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* vol. 39: 1659–1702.

Hardin, R. (2009) *How do you know?: the economics of ordinary knowledge*. Princeton: Princeton University Press.

Hare, R. M. (1972) "Rules of war and moral reasoning." *Philosophy & Public Affairs* 1: 166–181.

Hare, William (1987) 'Open-mindedness in Moral Education: Three Contemporary Approaches', *Journal of Moral Education* 16 (2): 99–107.

Hare, W. (2009) "Why open-mindedness matters." *Think* 5(13): 7–16.

Hare, W. (2011) "Helping open-mindedness flourish." *Journal of Thought* 46(1–2): 9–20.

Harkin, T. (2010) "Filibuster reform: curbing abuse to prevent minority tyranny in the senate." Brennan Center for Justice, New York University School of Law, 21 June. www.brennancenter.org/analysis/filibuster-reform-curbing-abuse-prevent-minority-tyranny-senate (accessed September 13, 2016).

Hart, H. L. A. (1955) "Are there any natural rights?" *Philosophical Review* 64: 175–191.

Hasnas, J. (2014) "The ethics of lobbying." *Georgetown Journal of Law and Public Policy* 12: 373.

Hasnas, J. (2014) "Lobbying and self-defense." *Georgetown Journal of Law and Public Policy* 12(SI): 391–412.

Hatch, O. (2014) "How 52 senators made 60 = 51." *Stanford Law and Policy Review* 25: 9–17.

Healy, A. and Malholtra, N. (2010) "Random Events, Economic Losses, and Retrospective Voting: Implications for Democratic Competence." *Quarterly Journal of Political Science* 5: 193–208.

Heer, J. (2015) "Donald Trump is not a liar." New Republic, December 1. https://newrepublic.com/article/124803/donald-trump-not-liar (accessed May 18, 2016).

Hewit, H. (2015) "Should Republicans kill the filibuster?" *Washington Examiner*, 15 Feb. www.washingtonexaminer.com/should-republicans-kill-the-filibuster/article/2560267 (accessed September 13, 2016).

Hewstone, M., Rubin, M. and Willis, H. (2002) "Intergroup bias." *Annual Review of Psychology* 53: 575–604.

Hill, L. (2002) "On the reasonableness of compelling citizens to 'vote': the Australian case." *Political Studies* 50(1): 80–101.

Hill, L. (2006) "Low voter turnout in the United States: is compulsory voting a viable solution?" *Journal of Theoretical Politics* 18: 207–232.

Hill, L. (2010) "On the justifiability of compulsory voting: reply to Lever." *British Journal of Political Science* 40: 917–923.

Hill, L. (2011) "Increasing turnout using compulsory voting." *Politics* 31: 27–36.

Hohfeld, W. N. (1913) "Some fundamental legal conceptions as applied in judicial reasoning." *Yale Law Journal* 23: 16–59.

Holan, A. D. (2013) "Lie of the year: 'if you like your health care plan, you can keep it.'" Politifact.com, December 12. www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/ (accessed May 18, 2016).

Holbrook, T. and Garand, J. C. (1996) "Homo economus? Economic information and economic voting." *Political Research Quarterly* 49(2): 351–375.

Holtman, S. (1999) "Kant, ideal theory, and the justice of exclusionary zoning." *Ethics* 110: 32–58.

Hooker, B. (2007) "Rule-consequentialism and internal consistency: a reply to Card." *Utilitas* 19: 514–519.

Hooker, B. (2013) "Rule-Consequentialism," in Hugh LaFollette and Ingmar Persson (eds.), *The Blackwell Guide to Ethical Theory* (Second Edition), Wiley-Blackwell, 238–260.

Hopkins, D. (2016) "Mitch McConnell knows what he's doing." *Honest Graft.* www.honestgraft.com/2016/02/mitch-mcconnell-knows-what-hes-doing.html (accessed October 6, 2016).

Hoskins, Z. (2014) "Ex-offender restrictions." *Journal of Applied Philosophy* 31(1): 33–48.

Huddy, L., Jones, J. and Chard, R. (2001) "Compassion vs. self-interest: support for old-age programs among the non-elderly." *Political Psychology* 22: 443–472.

Huddy, L., Sears, D. and Levy, J. S. (2013) "Introduction." In: *The Oxford handbook of political psychology*, second edition, edited by L. Huddy, D. Sears, and J. S. Levy, 1–21. New York: Oxford University Press.

Huemer, M. (1996) "Rawls's problem of stability." *Social Theory and Practice* 22(3): 375–395.

Huemer, M. (2010) "America's unjust drug war." In: *The ethical life*, edited by R. Shafer-Landau, 354–367. New York: Oxford University Press.

Huemer, M. (2013) *The problem of political authority*. New York: Palgrave MacMillan.

Hume, D. (1977) "From David Hume, 27 June 1772", in *The Correspondence of Adam Smith*, eds. Ernest Campbell Mossner and Ian Simpson Ross, 161–163, Indianapolis: Liberty Fund.

Hume, D. (1985) "Of money." In: *Essays: moral, political, and literary*, revised edition, edited by E. F. Miller, 289–302. Indianapolis: Liberty Fund.

Hume, D. (2000) *Treatise on human nature*. Oxford: Oxford University Press.

Hursthouse, R. (2002) *On virtue ethics*. New York: Oxford University Press.

Husak, D. (2008) *Overcriminalization: the limits of the criminal law*. New York: Oxford University Press.

Ilesanmi, S. O. (1997) "Civil-political rights or social economic rights for Africa? A comparative ethical critique of a false dichotomy." *Annual of the Society of Christian Ethics* 17(January): 191–212.

Isikoff, M. and Corn, D. (2006). *Hubris: the inside story of spin, scandal, and the selling of the Iraq War*. New York: Crown.

Jefferson, T. (1993) *Manual of parliamentary practice for the use of the senate of the United States*. Washington, DC: Washington Government Printing Office [1801].

Johnson, V. R. (2006) "Regulating lobbyists: law, ethics, and public policy." *The Cornell Journal of Law and Public Policy* 16(1): 23.

Jones, J. M. (2016) "Americans' trust in political leaders, public at new lows." Gallup.com. www.gallup.com/poll/195716/americans-trust-political-leaders-public-new-lows.aspx (accessed October 21, 2016).

Jones, K. (2009) "How attorneys can represent their guilty as charged clients in good conscience." Forward movement weblog, November 19. http://ourforwardmovement.blogspot.com/2009/11/how-attorneys-can-represent-their.html (accessed February 2, 2014).

Jones, W. H. (1954) "In defence of apathy: some doubts on the duty to vote." *Political Studies* 2(1): 25–37.

Joy, P. A. (2004) "Teaching ethics in the criminal law course." *Saint Louis University Law Journal* 48: 1239–1248.

Kahan, D. M. (2013) "Ideology, motivated reasoning, and cognitive reflection." *Judgment and Decision Making* 8(4): 407–424.

Kahan, D., Peters, E. Dawson, E. C. and Slovic, P. (2013) "Motivated numeracy and enlightened self-government." Unpublished manuscript, Yale Law School

Public Working Paper No. 307. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2319992 (accessed September 13, 2016).

Kaiser, R. (2007) "Citizen K Street: how lobbying became Washington's biggest business." *The Washington Post*. http://blog.washingtonpost.com/citizenkstreet/chapters/conclusion/ (accessed 2013).

Kang, J. (2003) "The case for insincerity." *Studies in Law, Politics, and Society* 29: 143–164.

Kant, I. (1991) *Political writings*. Translated by H. B. Nisbet and edited by H. S. Reiss. Cambridge. Cambridge University Press.

Kant, I. (1993 [1797]) "On the supposed right to lie because of philanthropic concerns." In: *Grounding for the metaphysic of morals: with on a supposed right to lie because of philanthropic concerns*, third edition Translated by J. W. Ellington, 63–68. Indianapolis: Hackett Publishing.

Kant, I. (1996 [1785]) *Practical philosophy*, edited by M. J. Gregor. Cambridge: Cambridge University Press.

Kazez, J. (2007) *The weight of things*. Malden: Blackwell Publishing.

Keller, S. (2004) "Friendship and belief." *Philosophical Papers* 33(3): 329–351.

Keyes, R. (2004) *The post-truth era: dishonesty and deception in contemporary life*. New York: St. Martin's.

Kiel, P. (2006) "GOP Donors Funded Entire PA Green Party Drive", *TalkingPointsMemo.*

Kinder, D. (2006) "Belief systems today." *Critical Review* 18: 197–216.

Kinder, D. and Kiewiet, R. (1979) "Economic discontent and political behavior: the role of personal grievances and collective economic judgments in congressional voting." *American Journal of Political Science* 23: 495–527.

King, Jr., M. L. (2000) *Why we can't wait*. Edited by J. Jackson. New York: Signet.

King, M. L. (2003) *A testament of hope: the essential writings and speeches of Martin Luther King, Jr*. Edited by J. M. Washington. Reprint edition. San Francisco: HarperOne.

Killoren, D. and Williams, B. (2013) "Group Agency and Overdetermination," *Ethical Theory and Moral Practice* 16.2: 296–307.

Kirchmeier, J. (1996) "Drink, drugs, and drowsiness: the constitutional right to effective assistance of counsel and the Strickland prejudice requirement." *Nebraska Law Review* 75(3): 425–475.

Kitcher, P. (1990) "The division of cognitive labor." *The Journal of Philosophy* 87: 5–22.

Kitcher, P. (2001) *Science, Truth, and Democracy.* Oxford. Oxford University Press.

Koger, G. (2010) *Filibustering: a political history of obstruction in the house and senate*. Chicago: University of Chicago Press.

Kolber, A. J. (2009a) "The comparative nature of punishment." *Boston University Law Review* 89: 1565–1608.

Kolber, A. J. (2009b) "The subjective experience of punishment." *Columbia Law Review* 109: 182–236.

Kolodny, N. (2010) "Which relationships justify partiality? The case of parents and children." *Philosophy and Public Affairs* 38(1): 37–75.

Kornblut, A. (2006) "G.O.P. deserts one of its own for Lieberman." *New York Times.*

Korsgaard, C. (1986) "The right to lie: Kant on dealing with evil." *Philosophy and Public Affairs* 15: 325–389.

Krugman, P. (2009) "A dangerous dysfunction." Editorial. *New York Times*, 21 Dec: A31.

Krugman, P. (2011) "The post-truth campaign." *New York Times*, December 11. www.nytimes.com/2011/12/23/opinion/krugman-the-post-truth-campaign.html (accessed May 18, 2016).

Krugman, P. (2013) "Raise That Wage," *New York Times*, A17.

Kuhn, T. (1962) *The structure of scientific revolutions*. Chicago. University of Chicago Press.

Kuhn, T. (1962) *The Structure of Scientific Revolutions*. Chicago. University of Chicago Press.

Kuttner, R. (1999) *Everything for sale: the virtues and limits of markets*. Chicago: University of Chicago Press.

Lackey, J. (2014) "Group lies." Paper presented at the International Workshop on Lying and Deception, Mainz, Germany.

LaFave, W. (2003) *Criminal law*, fourth edition. Washington, DC: Thomson-West.

Lanctot, C. (1991) "Duty of zealous advocacy and the ethics of the federal government lawyer: the three hardest questions." *Southern California Law Review* 64: 951–1017.

Landemore, H. (2012) "Why the Many Are Smarter than the Few and Why It Matters." *Journal of Public Deliberation*: 8(1), art. 7.

Landemore, H. (2014) "Yes we can (make it up on volume)." *Critical Review: A Journal of Politics and Society* 26: 184–237.

LaPira, T. (2013) "How much lobbying is there in Washington? It's DOUBLE what you think." Sunlight Foundation. http://sunlightfoundation.com/blog/2013/11/25/how-much-lobbying-is-there-in-washington-its-double-what-you-think/ (accessed September 13, 2016).

Lardy, H. (2004) "Is there a right not to vote?" *Oxford Journal of Legal Studies* 24: 303–321.

Lawford-Smith, H. (2012) "The Feasibility of Collectives' Actions," *Australasian Journal of Philosophy* 90. 3: 453–467.

Lee, C., Sugimoto, C. R., Zhang G. and Cronin, B. (2013) "Bias in peer review." *Journal of the American Society for Information Science and Technology* 64: 2–17.

Lee, K. A. (2012) "Liar, liar, pants on fire: Obama, Romney campaigns slam the other for dishonesty." *New York Daily News*, August 10. www.nydailynews.com/news/politics/liar-liar-pants-fire-obama-romney-campaigns-slam-dishonesty-article-1.1133422 (accessed May 18, 2016).

Lever, A. (2007) "Mill and the Secret Ballot: Beyond Coercion and Corruption". *Utilitas*, 354–378.

Lever, A. (2008) "'A liberal defence of compulsory voting': some reasons for scepticism." *Politics* 28: 61–64.

Lever, A. (2010) "Compulsory voting: a critical perspective." *British Journal of Political Science* 40(4): 897–915.

Levitt, S. D. and Dubner, S. J. (2014) *Think like a freak: the authors of Freakonomics offer to retrain your brain*. New York: HarperCollins.

Levy, N. and Mandelbaum, E. (2014) "The powers that bind: doxastic voluntarism and epistemic obligation." In: *The ethics of belief*, edited by J. Matheson and R. Vitz, 15–32. Oxford: Oxford University Press.

Lewis, D. (1969) *Convention: a philosophical study*. Cambridge: Harvard University Press.

Liasson, M. (2008) "How do we define a political flip-flop?" National Public Radio, July 10.

Light, S. A. and Rand, K. R. L. (2006) "The 'Tribal Loophole': Federal Campaign Finance Law and Tribal Political Participation After Jack Abramoff." *Gaming Law Review* 10(3): 230–239.

Lijphart, A. (1997) "Unequal participation: democracy's unresolved dilemma." *American Political Science Review* 91: 1–14.

List, C. and Pettit, P. (2011) *Group Agency: The Possibility, Design, and Status of Corporate Agents*, Oxford University Press.

Loewen, P. J., Milner, H. and Hicks, B. N. (2008) "Does compulsory voting lead to more informed and engaged citizens? An experimental test." *Canadian Journal of Political Science* 41: 655–672.

Lomasky, L. E. and Brennan, G. (2000) "Is there a duty to vote?" *Social Philosophy and Policy* 17(1): 62–86.

Longino, H. (1990) *Science as social knowledge: values and objectivity in scientific inquiry*. Princeton. Princeton University Press.

Love, M. C. (2011) "Collateral consequences after Padilla v. Kentucky: from punishment to regulation." *St. Louis University Public Law Review* 31: 87–128.

Luneburg, W. V. (2009) "The evolution of federal lobbying regulation: where we are now and where we should be going." *McGeorge Law Review* 41: 85–130.

McDonald v. Smith, 472 U.S. 479 (1985).

McGreevy, P. (2014) "Lobbyist faces record $133,500 fine for improper payments." *LA Times*. www.latimes.com/local/political/la-me-pc-lobbyist-faces-record-133500-fine-for-improper-payments-20140210-story.html (accessed June 24, 2015).

McKittrick-Sweitzer, L. (2015) *The instability of the law of peoples and a suggested remedy*. Saint Louis: University of Missouri-Saint Louis.

McMahan, J. (2004) "The ethics of killing in war." *Ethics* 114(4): 693–733.

McMahan, J. (2011) *Killing in war*. New York: Oxford University Press.

Macedo, S. (1997) "In defense of liberal public reason: are slavery and abortion hard cases?" *American Journal of Jurisprudence* 42(1): 1–29.

Machiavelli, N. (1979 [1513]) *The portable Machiavelli,* edited by P. Bondanella and M. Musa. New York: Penguin.

Machiavelli, N. (1995 [1513]) *The prince*. Translated by G. Bull. London: Penguin Books.

Mahan, J. E. (2009) "The Truth about Kant on Lies," in *The Philosophy of Deception*, ed. Clancy Martin, pp. 201–224. New York: Oxford University Press.

Mahon, J. (2015) "The definition of lying and deception." *Stanford Encyclopedia of Philosophy.* http://plato.stanford.edu/entries/lying-definition/ (accessed May 18, 2016).

Malone, N. (2013) "The Onion Is The Country's Best Op-Ed Page. Seriously", *New Republic*.

Mann, K. (1985) *Defending white-collar crime: a portrait of attorneys at work*. New Haven: Yale University Press.

Mann, P. E. (2010) "Ethical obligations of indigent defense attorneys to their clients." *Missouri Law Review* 75: 715–749.

Manson, N. C. (2012) "Making sense of spin." *Journal of Applied Philosophy* 29: 200–213.

March, A. F. (2011) *Islam and liberal citizenship: the search for an overlapping consensus*. New York: Oxford University Press.

March, A. F. (2013) *Rethinking Religious Reasons in Public Justification* (SSRN Scholarly Paper No. ID 2217691). Rochester, NY: Social Science Research Network. http://papers.ssrn.com/abstract=2217691 (accessed October 2, 2016).

Maring, L. (2016) "Debate: why does the excellent citizen vote?" *Journal of Political Philosophy* 24: 245–257.

Markus, G. (1988) "The impact of personal and national economic conditions on the presidential vote: a pooled cross-sectional analysis." *American Journal of Political Science* 32: 137–154.

Marquis, D. (1989) "Why abortion is immoral." *The Journal of Philosophy* 86(4): 183–202.

Mearsheimer, J. J. (2011) *Why leaders lie*. New York: Oxford University Press.

Menand, L. (2007) "Fractured Franchise," *The New Yorker.*

Metz, T. (2011). Human Rights: African Perspectives. In *Encyclopedia of Global Justice*. Springer.

Mill J. S. (1859). "On Liberty". In *Collected Works of John Stuart Mill, Volume XVIII*, 1977, 213–310 Toronto: University of Toronto Press.

Mill, J. S. (2015 [1861]) *Considerations on Representative Government*. New York: Dossler Press.

Miller, D. (1983) "Constraints on freedom." *Ethics* 94: 66–86.

Miller, D. (1999) "The norm of self-interest." *American Psychologist* 54: 1053–1060.

Miller, J. (2001) "Iraqi Tells of Renovations at Sites For Chemical and Nuclear Arms", *New York Times*.

Miller, J. (2002) "U.S. Says Hussein Intensifies Quest For A-Bomb Parts", *New York Times*.

Miller, J. (2002) "C.I.A. hunts Iraq tie to Soviet smallpox." *New York Times.*

Mishra, R. (2006) "Vt.'s Sanders poised to be 1st Senate socialist." *Boston Globe.*

Mitchell, S. D. (2007) "Undermining individual and collective citizenship: the impact of exclusion laws on the African-American community." *Fordham Urban Law Journal* 34: 833.

Moore, D. A. and Loewenstein, G. (2004) "SelfInterest, Automaticity, and the Psychology of Conflict of Interest" *Social Justice Research* 17(2): 189–202.

Mossner, E. C. and Simpson Ross, I. (eds) (1977) *The correspondence of Adam Smith.* Indianapolis: Liberty Fund.

Moulakis, A. (2011) "Civic humanism." *The Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/archives/win2011/entries/humanism-civic/ (accessed February 13, 2016).

Moulitsas, M. (2002) "Blix to US, UK: pony up evidence", *Daily Kos*. Markos Moulitsas (2003) "Hans Blix: Inspections working", *Daily Kos*.

Moulitsas, M. (2003) "Iraqi 'drone' made of duct tape." *Daily Kos.*

Mullainathan, S. and Shleifer, A. (2005) "The market for news." *American Economic Review* 95: 1031–1053.

Murphy, L. (1998) "Institutions and the demands of justice." *Philosophy and Public Affairs* 27: 251–291

Mutz, D. (1992) "Mass media and the depoliticization of personal experience." *American Journal of Political Science* 36: 483–508.

Mutz, D. (1993) "Direct and indirect routes to politicizing personal experience: does knowledge make a difference?" *Public Opinion Quarterly* 57: 483–502.

Mutz, D. (2006) "Is deliberative democracy a falsifiable theory?" *Annual Review of Political Science* 11: 521–538.

Mutz, D. (2006) *Hearing the Other Side*. New York: Cambridge University Press.

Mutz, D. and Mondak, J. (1997) "Dimensions of sociotropic behavior: group-based judgments of fairness and well-being." *American Journal of Political Science* 41: 284–308.

Mylroie, L. (2001) *The War Against America: Saddam Hussein and the World Trade Center Attacks: A Study of Revenge*. Washington, D.C.: American Enterprise Isntitute for Public Policy Research.

Nagel, T. (1979) *Ruthlessness in public life: moral questions*. Cambridge: Cambridge University Press.

Nerl, D. (2006) "Republican Bankroll Taints Green Party Hopefuls", Morning Call; Paul Kiel (2006) "GOP Donors Funded Entire PA Green Party Drive", *TalkingPointsMemo.*

Newey, G. (1997) "Political lying: a defense." *Public Affairs Quarterly* 11: 93–116.

Nichols, J. (2015) "The Discourse Suffers When Trump Gets 23 Times As Much Coverage as Sanders," *The Nation*, available at www.thenation.com/article/the-discourse-suffers-when-trump-gets-23-times-as-much-coverage-as-sanders/ (accessed May 20, 2016).

Nielson, K. (2000) "There is no dilemma of dirty hands." In: *Cruelty & deception: the controversy over dirty hands in politics*, edited by P. Rynard and D. P. Shurgarman, 139–156. New York: Broadview Press.

Noah, T. (2004) "Why Bush opposes Dread Scott: it's code for Roe v. Wade." *Slate*, October 11. www.slate.com/articles/news_and_politics/chatterbox/2004/10/why_bush_opposes_dred_scott.html (accessed May 18, 2016).

Novak, R. (2003), "Playing Texas Poker, Bush Bets All on Iraq"; William Schneider (2003), "Bush Lets It All Ride on His War".

Nozick, R. (1974) *Anarchy, state, and utopia*. Oxford: Basil Blackwell.

Nussbaum, M. C. (1999) "Judging other cultures: the case of genital mutilation." In: *Sex & social justice*, 118–129. New York: Oxford University Press.

Nussbaum, M. C. (2002) "Rawls and feminism." In: *The Cambridge companion to Rawls*, edited by S. Freeman. Cambridge University Press.

Nyhan, B. and Reifler, J. (2010) "When corrections fail: the persistence of political misperceptions." *Political Behavior* 32: 303–330.

O'Donnell, G. A. (1998) "Horizontal accountability in new democracies." *Journal of Democracy* 9(3): 112–126.

Olsaretti, S. (2013) "Children as Public Goods?" *Philosophy & Public Affairs* 41: 226–258.

Ornstein, N. (2010) "A filibuster fix." Editorial. *New York Times*, 28 August, A19.

Paganelli, M. P. (2016) "Adam Smith and the history of economic thought: the case of banking." In: *Adam Smith: his life, thought, and legacy*, edited by R. Hanley, 247–261. Princeton: Princeton University Press.

Parfit, D. (1984) *Reasons and persons*. Oxford: Oxford University Press.

Parfit, D. (2011) *On What Matters*, vol. 1. Oxford: Oxford University Press.

Parker, A. (2015) "Facebook expands in politics, and campaigns find much to like." *New York Times*, July 29. www.nytimes.com/2015/07/30/us/politics/facebook-expands-in-politics-and-campaigns-find-much-to-like.html (accessed May 18, 2016).

Paxton, R. (2004) *The anatomy of fascism*. New York. Knopf.

Pear, R. (2008) "Ethics law isn't without its loopholes." *New York Times*. www.nytimes.com/2008/04/20/washington/20lobby.html?pagewanted=all&_r=0 (accessed September 13, 2016).

Peavy v. State, 766 So.216 1120 (2000).

Petegorsky, M. N. (2013) "Plea bargaining in the dark: the duty to disclose exculpatory *Brady* evidence during plea bargaining." *Fordham Law Review* 81(6): 3599–3650.

Peters, M. (2003). Cartoon. *Dayton Daily News*.

Phillipson, N. (2010) *Adam Smith: an enlightened life*. New Haven: Yale University Press.

Pianalto, M. (2011) "Moral conviction." *Journal of Applied Philosophy* 28(4): 381–395.

Pinker, S. (2011) *The better angels of our nature*. New York: Viking.

Pinkert, F. (2014) "What We Together Can (Be Required to) Do," in Peter French and Howard Wettstein (eds.), *Midwest Studies in Philosophy* 38, 187–202.

Plato. (2004 [380 BCE]) *Republic*. Translated by C. D. C. Reeve. Indianapolis: Hackett.

Pogge, T. (2000) "On the site of distributive justice: reflections on Cohen and Murphy." *Philosophy and Public Affairs* 29: 137–169

PolitiFact. (2015) "About PolitiFact." Politifact.com. www.politifact.com/about/ (accessed May 18, 2016).

Ponza, M., Duncan, G., Corcoran, M. and Groskind, F. (1988) "The Guns of Autumn? Age Differences in Support for Income Transfers to the Young and Old," *Public Opinion Quarterly* 52: 441–466.

Posner, E. and Sunstein, C. (2015) "Institutional flip-flops." *University of Chicago Public Law & Legal Theory Working Paper* 501: 1–41.

Preda, A. (2015) "Rights: concept and justification." *Ratio Juris* 28: 408–415.

Pringle, H. (2012) "Compulsory voting in Australia: what is compulsory?" *Australian Journal of Political Science* 47: 427–40.

Public Citizen. (1995) "Lobbying disclosure act: a brief synopsis of key components."

Quong, J. (2011) *Liberalism without perfection.* Oxford; New York: Oxford University Press.

Rakoff, J. S. (2014) "Why innocent people plead guilty." *The New York Review of Books*, November 20. www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (accessed February 13, 2016).

Ransby, B. (2005) *Ella Baker and the Black Freedom Movement: a radical democratic vision.* Chapel Hill: The University of North Carolina Press.

Rawls, J. (1955) "Two concepts of rules." *The Philosophical Review* 64(1): 3–32.

Rawls, J. (1971) *A theory of justice*. Cambridge, MA: Harvard University Press.

Rawls, J. (1993) *Political liberalism*. New York: Columbia University Press.

Rawls, J. (1997) "The Idea of Public Reason Revisited," *University of Chicago Law Review* Vol. 64: 773, pp 759–773.

Rawls, J. (1997). The Idea of Public Reason Revisited. *The University of Chicago Law Review*, *64*(3), 765–807.

Rawls, J. (1999 [1964]) "Legal obligation and the duty of fair play." In: *Collected papers*, edited by S. Freeman, 117–129. Cambridge, MA: Harvard University Press.

Rawls, J. (1999a) *A theory of justice*, revised edition. New York: Harvard University Press.

Rawls, J. (1999b) *Law of peoples*. Cambridge, MA: Harvard University Press.

Rawls, J. (2001) *Justice as fairness: a restatement*. Cambridge, MA: The Belknap Press of Harvard University Press.

Rawls, J. (2005) *Political Liberalism: Expanded Edition* (2nd edition). New York: Columbia University Press.

Reynolds, G. (2003, *Instapundit*. http://pjmedia.com/instapundit/38296/ (accessed September 30, 2016).

Rhodebeck, L. (1993) "The Politics of Greed? Political Preferences among the Elderly," *Journal of Politics* 55: 342–64.

Richmond, D. (2002) "The ethics of zealous advocacy: civility, candor and parlor tricks." *Texas Tech Law Review* 34: 3–59.

Riggs, W. (2010) "Open-mindedness." *Metaphilosophy* 41(1–2): 172–188.

Riker, W. (1988) *Liberalism against populism: a confrontation between the theory of democracy and the theory of social choice*. Long Grove: USA: Waveland Press.

Riker, W. and Ordeshook, P. (1968) "A Theory of the Calculus of Voting," *American Political Science Review* 62: 25–42.

Risse, M. (2004) "Arguing for majority rule." *Journal of Political Philosophy* 12(1): 41–64.

Roark, E. (2013) *Removing the commons: a Lockean left-libertarian approach to the just use and appropriation of natural resources*. Lanham: Lexington Books.

Roberts, J. (2009) "The mythical divide between collateral and direct consequences of criminal convictions: involuntary commitment of 'sexually violent predators'." *Minnesota Law Review* 93: 670–740.

Robeyns, I. (2008) "Ideal theory in theory and practice." *Social Theory & Practice* 34: 341–362.

Rochabrun, M. (2014) "Lobbying disclosures leave public in the dark." Center for Public Integrity. www.publicintegrity.org/2014/08/25/15344/lobbying-disclosures-leave-public-dark (accessed September 13, 2016).

Rockoff, H. (2011) "Upon Daedalian wings of paper money: Adam Smith and the crisis of 1772." In: *The Adam Smith review 6*, edited by F. Forman-Barzilai, 237–268. New York: Routledge.

Rockoff, H. (2013) "Adam Smith on money, banking, and the price level." In: *The Oxford handbook of Adam Smith*, edited by C. Berry, M. P. Paganelli, and C. Smith, 307–332. Oxford: Oxford University Press.

Romine, W. (1977) "Legal fees: gross overcharging by an attorney warranting disciplinary action." *University of Alabama Journal of the Legal Profession* 2: 119–132.

Roosevelt, E. (2000) *The autobiography of Eleanor Roosevelt,* reprint edition. New York: Da Capo Press.

Rosenblum, N. (2008) *On the side of the angels*. Princeton: Princeton University Press.

Ross, W. D. (1988 [1930]) *The right and the good*, reprint edition. Indianapolis: Hackett.

Rutenberg, J. and Calmes, J. (2009) "False 'death panel' rumor has some familiar roots." *New York Times,* August 13. www.nytimes.com/2009/08/14/health/policy/14panel.html (accessed May 18, 2016).

Safire, W. (1982) "On language; flip-flop." *New York Times*, September 5.

Safire, W. (1988) "On language; phantom of the phrases." *New York Times*, March 13.

Safire, W. (2008) *Safire's political dictionary*. New York: Oxford University Press.

Sammons, J. L. (1995) "Rank strangers to me: Shaffer and Cochran's friendship model of moral counseling in the law office." *University of Arkansas at Little Rock Law Journal* 18: 1.

Sanchez, J. (2010a) "Epistemic closure, technology, and the end of distance." Juliansanchez.com, April 7. www.juliansanchez.com/2010/04/07/epistemic-closure-technology-and-the-end-of-distance/ (accessed September 2, 2015).

Sanchez, J. (2010b) "Frum, cocktail parties, and the threat of doubt." Juliansanchez.com, March 3.

Sandel, M. J. (1994) "Review." *Harvard Law Review* 107(7): 1765–94. doi:10.2307/1341828.

Sanders Campaign. (2015) "Press release – Why the Bernie Blackout on corporate network news?" www.bernisanders.com, December 11. https://berniesanders.com/press-release/why-the-bernie-blackout-on-corporate-network-news/?version=meter+at+1&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=https%3A%2F%2Fwww.google.com%2F&priority=true&action=click&contentCollection=meter-links-click (accessed May 20, 2016).

Saul, J. (2012) *Lying, misleading, and what is said: an exploration in philosophy of language and in ethics*. Oxford: Oxford University Press.

Saunders, B. (2010) "Increasing turnout: a compelling case?" *Politics* 30: 70–77.

Saunders, B. (2010) "Tasting democracy: a targeted approach to compulsory voting." *Public Policy Research* 17: 147–151.

Saunders, B. (2012) "Opt-out organ donation without presumptions." *Journal of Medical Ethics* 38: 69–72.

Schaffer, J. (2004) "From contextualism to contrastivism," *Philosophical Studies* 119.1: 73–103.

Schaffer, J. (2006) "Contrastive Knowledge," in T. Gendler and J. Hawthorne (eds.) *Oxford Studies in Epistemology* Volume 1, pp. 235–271.

Schapiro, T. (1999) "What is a child?" *Ethics* 109: 715–738.

Schneider W. (2003) "Bush Lets It All Ride on His War", *Los Angeles Times*. http://articles.latimes.com/2003/mar/23/news/war-opschneider/2 (accessed September 30, 2016).

Schneyer, T. (1991) "Professional discipline for law firms?" *Cornell Law Review* 77(1): 1–46.

Schneyer, T. (2011) "On Further Reflection: How Professional Self-Regulation Should Promote Compliance with Broad Ethical Duties of Law Firms Management." Arizona Law Review 53: 577–628.

Schwartzman, M (2011) "The sincerity of public reason." *Journal of Political Philosophy* 19: 375–298.

Schwarzenbach, S.A. (1996) "On civic friendship." *Ethics* 107(1): 97–128.

Scott, E. (2015) "Sanders: Trump is 'bombastic' so he can get media coverage," *cnn.com*, available at www.cnn.com/2015/12/24/politics/bernie-sanders-donald-trump-new-day/ (accessed May 20, 2016).

Sears, D. and Funk C. L. (1990) "Self-interest in Americans' political opinions." In: *Beyond self-interest,* edited by Jane Mansbridge, 147–170. Chicago: University of Chicago Press.

Sears, D. and Lau, R. (1983) "Inducing apparently self-interested political preferences." *American Journal of Political Science* 27: 223–252.

Sears, D., Hensler, C. and Speer, L. (1979) "Whites' opposition to 'Busing': self-interest or symbolic politics?" *American Political Science Review* 73: 369–384.

Sears, D., Lau, R. Tyler, T. and Allen, H. (1980) "Self-interest vs. symbolic politics in policy attitudes and presidential voting." *American Political Science Review* 74: 670–684.

Selb, P. and Lachat, R. (2009) "The more the better? Counterfactual evidence on the effect of compulsory voting on the consistency of party choice." *European Journal of Political Research* 48: 573–597.

Sen, A. K. (1999) "Democracy as a universal value." *Journal of Democracy* 10(3): 3–17. doi:10.1353/jod.1999.0055.

Shafer, J. (2003) "The Times scoops that melted: cataloging the wretched reporting of Judith Miller" *Slate*.

Shaffer, T. L. and Cochran, R. F. (1994) *Lawyers, clients and moral responsibility*. West Group.

Shah, N. and Velleman, J. D. (2005) "Doxastic deliberation." *The Philosophical Review* 114(4): 497–534.

Sheehy, P. (2002) "A duty not to vote." *Ratio* 15: 46–57.

Shelby, T. (2007) "Justice, deviance, and the dark ghetto." *Philosophy & Public Affairs* 35: 126–160.

Sheppard, J. (2015) "Compulsory voting and political knowledge: testing a 'compelled engagement' hypothesis." *Electoral Studies* 40: 300–307.

Sherman, N. (1987) "Aristotle on Friendship and the Shared Life." *Philosophy and Phenomenological Research* 47(4): 589–613.

Simmons, A. J. (1996) "Philosophical anarchism." In: *For and against the state: new philosophical readings*, edited by J. T. Sanders and A. J. Simmons, 19–40. Boulder: Rowman and Littlefield.

Simon, W. H. (1993) "The ethics of criminal defense." *Michigan Law Review* 91(7): 1767–1772.

Singh, S. P. (2015) "Elections as poorer reflections of preferences under compulsory voting." http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693254 (accessed February 13, 2016).

Sinhababu, N. (2012) "Senate republicans' primary problem." *Donkeylicious.*

Sinnott-Armstrong, W. (2006), *Moral Skepticisms*, pp. 434–452, Oxford: Oxford University Press.

Sinnott-Armstrong, W. (2011) "Moral skepticism." *Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/entries/skepticism-moral/ (accessed May 18, 2016).

Sivulka, J. (2011) *Soap, sex, and cigarettes: a cultural history of American advertising*. Boston: Cengage Learning.

Skillicorn, D. and Leuprecht, C. (2015) "Deception in speeches of candidates for public office." *Journal of Data Mining and Digital Humanities* 1–43. https://hal.archives-ouvertes.fr/hal-01024985v3 (accessed May 18, 2016).

Smart, J.J.C. (1956) "Extreme and Restricted Utilitarianism," *The Philosophical Quarterly* 6.25: 344–354.

Smith, A. (1976 [1759]) *The theory of moral sentiments*, edited by D. D. Raphael and A. L. Mackfie. Oxford: Clarendon Press.

Smith, A. (1976 [1776]) *An inquiry into the nature and causes of the wealth of nations*, edited by R. H. Campbell and A. S. Skinner. Oxford: Clarendon Press.

Smith, A. (1977) "Letter to Pulteney, 3 September 1772." In: *The correspondence of Adam Smith*, pp. 163–164, edited by E. C. Mossner and I. Simpson Ross. Indianapolis: Liberty Fund.

Smith, A. (1978 [1763]) "Early draft of the wealth of nations." In: *Lectures on jurisprudence*, pp. 562–581, edited by R. L. Meek, D. D. Raphael and P. G. Stein. Oxford: Clarendon Press.

Smith, A. (1978 [1762–3/1766]) *Lectures on jurisprudence*, edited by R. L. Meek, D. D. Raphael, and P. G. Stein. Oxford: Clarendon Press.

Smith, A. and Freedman, M. H. (2013) *How can you represent those people?* New York: Palgrave Macmillan.

Smith, M. B. E. (1996) "The duty to obey the law." In: *Companion to the philosophy of law and legal theory*, edited by D. Patterson, 457–466. Oxford: Blackwell.

Somin, I. (2013) *Democracy and political ignorance*. Stanford: Stanford University Press.

Song, E. (2012) "Rawls's liberal principle of legitimacy." *The Philosophical Forum* 43: 153–173.

Song, S. (2007) *Justice, gender, and the politics of multiculturalism*. Cambridge; New York: Cambridge University Press.

Standing Rules of the Senate, Senate Manual, S. DOC. NO. 112-11 (2011).

Stanley, J. (2012) "Speech, lies, and apathy." *New York Times*, August 30.

Statistics and Historical Comparison (2015), July 14. *GovTrack.us*, available at www.govtrack.us/congress/bills/statistics (accessed September 12, 2016).

Steinberg, A. (2015) "Why do Americans and Canadians view their duty to vote so differently?" *Critical Issues in Justice and Politics* 8: 21–45.

Steiner, H. (1975) "Individual liberty." *Proceedings of the Aristotelian Society* 75: 37–43.

Stemplowska, Z. (2008) "What's ideal about ideal theory?" *Social Theory & Practice* 34: 319–340.

Stigler, G. (1965) "The economist and the state." *The American Economic Review* 55(2): 1–18.

Stocker, M. (1990) *Plural and conflicting values.* Oxford: Clarendon Press.

Stocker, M. (2000) "Dirty hands and ordinary life." In: *Cruelty & deception: the controversy over dirty hands in politics*, edited by P. Rynard and D. P. Shugarman, 27–42. New York: Broadview Press.

Stout, J. (2005) "Religious reasons in political argument." In: *Religion in the liberal polity*, edited by T. Cuneo, 157–72. Notre Dame: University of Notre Dame Press.

Strickland v. Washington, 466 U.S. 668 (1984).

Stroud, S. (2006) "Epistemic partiality in friendship." *Ethics* 116(3): 498–524.

Sullivan, K. M. (1992) "Religion and liberal democracy." *The University of Chicago Law Review* 59(1): 195–223.

Sunstein, C. (1993) *The Partial Constitution.* Cambridge: Harvard University Press 164.

Sunstein, C. R. (2007) *Republic.com 2.0*. Princeton: Princeton University Press.

Surowiecki, J. (2004) *The wisdom of crowds*. New York. Doubleday.

Swaine, L. (2009) "Demanding deliberation: political liberalism and the inclusion of Islam." *Journal of Islamic Law and Culture* 11(2): 88–106. doi:10.1080/15288170903273003.

Swift, A. and White, S. (2008) "Political theory, social science, and real politics." In: *Political theory: methods and approaches*, edited by D. Leopold and M. Stears, 49–69. Oxford: Oxford University Press.

Swift, J. (2004) *A modest proposal and other prose*. New York: Barnes & Noble Publishing.

Tampio, N. (2012) *Kantian courage: advancing the enlightenment in contemporary political theory*. New York: Fordham University Press.

Tarpley, W. G. (2008) *Obama: the postmodern coup: the making of a Manchurian Candidate*. San Diego: Progressive Press.

Taylor, R. (2009) "Rawlsian affirmative action." *Ethics* 119: 476–506.

Tenenbaum, J. (1995) "Lobbying disclosure act of 1995: a summary and overview for associations." www.asaecenter.org/Resources/whitepaperdetail.cfm?ItemNumber=12224 (accessed July 6, 2015).

The Onion (2003) "N. Korea Wondering What It Has To Do To Attract U.S. Military Attention". *The Onion* (2003) "Bush On North Korea: 'We Must Invade Iraq'".

Thompson, D. (1987) *Political ethics and public office*. Cambridge, Massachusetts: Harvard University Press.

Thompson, D. (1995) *Ethics in congress: from individual to institutional corruption*. Washington DC: Brookings Institute.

Tiao, P. (1993) "Non-citizen suffrage: an argument based on the voting rights act and related law." *Columbia Human Rights Law Review* 25: 171–218.

Tollefsen, D. 2002. "Organizations as True Believers." *Journal of Social Philosophy* 33:395–410.

Tollefsen, D. (2007) "Group testimony." *Social Epistemology* 21: 299–311.

Tomlin, P. (2013) "Extending the golden thread? Criminalisation and the presumption of innocence." *Journal of Political Philosophy* 21: 44–66.

Tonry, M. (2011) "Proportionality, Parsimony, and interchangeability of punishment." In: *Why punish? How much? A reader on punishment*, edited by M. Tonry, 217–237. Oxford: Oxford University Press.

Tralau, J. (2013) "Incest and liberal neutrality." *Journal of Political Philosophy* 21: 87–105.

Tuck, R. (2008) *Free Riding*, 50–62 Cambridge, Mass.: Harvard University Press.

Tullock, G. 1967. *Toward a Mathematics of Politics*. Ann Arbor: University of Michigan Press.

Tullock, G. (1975) "Optimal poll taxes." *Atlantic Economic Journal* 3(1): 1–6.

Tversky, A. and Kahneman, D. (1973) "Availability: a heuristic for judging frequency and probability." *Cognitive Psychology* 5: 207–233.

Tyndall, A. (2015) "Let the Trump Circus Continue," blog post - tyndallreport.com, 2016, available at http://tyndallreport.com/ (accessed May 20, 2015).

U.S. House of Representatives (2008) *Lobbying Disclosure Act Guidance*, available at http://lobbyingdisclosure.house.gov/amended_lda_guide.html (accessed October 23, 2016).

U.S. Senate: Count of Cloture Motions in Various Congresses (2015) July 14. *U.S. Senate*. www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (accessed September 12, 2016).

Vallier, K. (2011) "Convergence and consensus in public reason." *Public Affairs Quarterly* 25(4): 261–280.

Vallier, K. and D'Agostino, F. (2013) "Public justification." *Stanford Encyclopedia of Philosophy*. http://plato.stanford.edu/entries/justification-public/ (accessed September 13, 2016).

Van der Vossen, B. (2014) "There is no ethic of lobbying." *Georgetown Journal of Law and Public Policy* 12: 359–372.

Varden, H. (2010) "Kant and the murderer at the door…one more time: Kant's legal philosophy and lies to murderers and Nazis." *Journal of Social Philosophy* 41: 402–403.

Viner, J. (1927) "Adam Smith and Laissez Faire." *Journal of Political Economy* 35(2): 198–232.

Volokh, A. (1997) "*n* guilty men," *University of Pennsylvania Law Review* 146: 173–216.

Von Hirsch, A. (1992) "Proportionality in the philosophy of punishment." *Crime and Justice* 16: 55–98.

Vranas, P. (2007) "I Ought, Therefore I Can," *Philosophical Studies* 137: 167–216.

Waldron, J. (1981) "A right to do wrong." *Ethics* 92: 21–39.

Waldron, J. (1993) *Liberal rights: collected papers 1981–1991*. Cambridge: Cambridge University Press.

Waldron, J. (1999) *Law and disagreement*. Oxford: Clarendon.
Walzer, M. (1973) "Political action: the problem of dirty hands." *Philosophy & Public Affairs* 2: 160–180.
Walzer, M. (1992) *Just and unjust wars*. New York: Basic Books.
Warren, M. A. (1973) "On the moral and legal status of abortion." *The Monist* 57(1): 43–61.
Wawro, G. J. and Schickler, E. (2006) *Filibuster: obstruction and lawmaking in the U.S. senate*. Princeton: Princeton University Press.
Weithman, P. (2011) *Why political liberalism? On John Rawls's political turn*. New York: Oxford University Press.
Westen, D. (2008) *The political brain*. New York: Perseus Books.
Westen, D., Blagov, P. S., Harenski, K., Kilts, C. and Hamann, S. (2006) "The neural basis of motivated reasoning: an FMRI study of emotional constraints on political judgment during the U.S. presidential Eeection of 2004." *The Journal of Cognitive Neuroscience* 18: 1947–1958.
Whitfield, G. (2015) "Self-respect and public reason." *Critical Review of International Social and Political Philosophy* 0(0): 1–20. doi:10.1080/13698230.2015.1031933.
Wilkie, C. (2014) "For the second time ever, a lobbyist is charged with violating lobbying rules." *Huffington Post.* www.huffingtonpost.com/2014/03/20/alanmauklobbyingviolation_n_5000220.html (accessed September 13, 2016).
Williams, B. (1973) *Ethical consistency: problems of the self*. Cambridge: Cambridge University Press.
Williams, B. (1981) "Persons, character and morality." In: *Moral luck*. Cambridge: Cambridge University Press.
Wilson, W. (1917) "Text of the President's statement to the public: supplementary statement from the White House." *New York Times*, 5 March. http://query.nytimes.com/gst/abstract.html?res=9E02E4DF143AE433A25756C0A9659C946696D6CF&legacy=true (accessed September 13, 2016).
Wiseenburg, M.J.L. and Schlosberg, D. (2014) (eds.) *Political Animals/Animal Politics*, New York: Palgrave.
Wolff, J. (1991) *Robert Nozick: property, justice and the minimal state.* London: Polity Press.
Wolfson, A. (2014) "Disbarred lawyers face career, personal hurdles." *USA Today*. www.usatoday.com/story/news/nation/2014/01/19/disbarred-lawyers-face-career-personal-hurdles/4651761/ (accessed September 13, 2016).
Wolterstorff, N. and Audi, R. (1996) *Religion in the public square: the place of religious convictions in political debate.* Lanham: Rowman & Littlefield Publishers.
Wringe, B. (2010) "Global Obligations and the Agency Objection," *Ratio* 23.2: 217–230.
Wringe, B. (2014) "From Global to Institutional Obligations," in Peter French and Howard Wettstein (eds.), *Midwest Studies in Philosophy* 38, 171–186.
Yglesias, M. (2011) "Happy Krauthammer Day." *ThinkProgress* https://thinkprogress.org/happy-krauthammer-day-2efd1e76782#.8ooc6wz5a (accessed September 2016).
Young, J. (2014) "Dear Mitch McConnell: it's time to end the Filibuster." *History News Network*, 7 December. http://historynewsnetwork.org/article/157752 (accessed September 13, 2016).
Zeleny, J. (2008) "Opponents call Obama Remarks 'out of touch.'" *New York Times*, April 12. www.nytimes.com/2008/04/12/us/politics/12campaign.html (accessed May 18, 2016).
Zezima, K. (2016) "Liar, liar: a charged word is now common in the GOP race." *WashingtonPost*,February19.www.washingtonpost.com/politics/liar-liar-a-charged-

word-is-now-common-in-the-gop-race/2016/02/19/96464d34-d63e-11e5-b195-2e29a4e13425_story.html (accessed May 18, 2016).

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