COMPROMISE, PEACE and PUBLIC JUSTIFICATION

POLITICAL MORALITY BEYOND JUSTICE

Fabian Wendt

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To Anita

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Contents

1

Introduction

'All government […] is founded on compromise and barter,'[1] as Edmund Burke reminds us. Compromises are made whenever two or more political players design a piece of legislation, coordinate in international politics, or prepare a new constitution in some country. But while compromises are pervasive in politics, the moral issues involved in compromising have not been studied in sufficient depth and detail in political philosophy. At least since the publication of John Rawls's *A Theory of Justice* in 1971, the main focus of political philosophy has been on justice. An impressive amount of research is devoted to theorizing distributive, retributive, and corrective justice, both on the level of abstract principles and on the level of more specific applications. But although justice is, without a doubt, a highly important moral value, it is not all that counts in politics. If we understand 'political morality' as the set of moral considerations that applies to politics, then justice does not exhaust political morality. In this book, I will argue that peace and public justification are values that provide moral reasons to make compromises in politics, including compromises that establish unjust—or not fully just—laws or institutions.

[1] Burke 1775/1908: 130–131.

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Peace is a surprisingly neglected value in political philosophy, and public justification is rarely considered in the context of compromising. In exploring the morality of compromising, the book thus provides some outlines for a map of political morality beyond justice.[2]

The Model Politician Making Compromises

Imagine a 'model politician' who has good reason to believe to have sound views on justice.[3] You can also imagine that the model politician actually *has* sound views on justice. I will not say anything about what sound views on justice are.[4] I would like to speak to liberal egalitarians, libertarians, socialists, and conservatives at the same time. The guiding question of the book is what reasons the model politician has to make compromises that establish unjust laws or institutions. Whether you are a liberal egalitarian, a libertarian, a socialist, or a conservative: the question whether you have moral reasons to make such compromises is relevant from each of those perspectives. I argue that the model politician often has moral reasons to compromise and, in particular, that peace and public justification are moral values that provide the model politician with moral reasons to compromise.

Take the case of a model politician in government who is preparing a proposal for a tax reform. Because being our model politician, she has sound views on justice and is justified in believing to have sound views on justice, and she has a justified belief about which bundle of tax laws would be most just. She also deliberates about compliance problems, and comes to develop a view about what her favorite bundle of tax laws would be. Yet many of her fellow politicians in government and in parliament, many leaders of influential organizations and interest groups in society, and even more of her fellow citizens disagree with her about the justice of her proposed tax laws, and some passionately oppose it. The disagreement can be rooted either in different views about what the correct or

[2] On theories as maps, see Schmidtz 2006: 21–28.

[3] Here I follow Wall 1998: 30–31.

[4] I say something in Wendt 2016d.

sound conception of justice is (in the abstract) or in different views about the proper application of an agreed-upon abstract conception of justice to the case of tax laws. Under such circumstances of disagreement, she might not be able to get her favorite proposal through, at least when some of the disagreement comes from people she has to directly coordinate with, like the finance minister or the chairman of her parliamentary group. If she cannot get her favorite proposal through, she obviously is forced to compromise, that is, to agree on a proposal that she thinks is a mere second-best (if she does not want to withdraw altogether). In addition, I will argue in this book, she might also have *moral* reasons to compromise in light of the disagreement on justice she faces. If it turns out that her original favorite proposal is not publicly justifiable—that some do not have sufficient reasons to accept it, then this is morally relevant. If she refrains from implementing just tax laws because they are not publicly justifiable, then she makes a compromise for moral reasons.

Another model politician finds himself in a commission that is to design a constitutional reform for a country that went through a civil war among several religious groups. He is about to propose an electoral system that grants those different religious groups some representation in parliament. He does not think that the system is just. He is a convinced democrat and thinks that every vote should count equal, and that parliament should as clearly as possible mirror the number of votes a party or person received. But he knows that it would undermine peace to not grant representation to each religious group, and so he agrees to an unjust electoral system for the sake of peace. He makes a compromise for moral reasons.

It may sound as if the notion of 'compromise' is not quite accurate to describe what I am after. While our model politicians will have to agree to a proposal that they do not regard as the most just one, it may not seem clear that they have to agree to an overall second-best. If there is a plurality of values, and justice is but one of them, then of course all values have to inform the model politician's position on, for example, tax laws or electoral systems. Values have to be balanced against each other. But there is no 'compromise' involved, because the model politician does not accept the tax laws or the electoral system as a second-best, but as the best proposal, given the circumstances. I do not think that is right. Peace and public justification are values, but they are not values that inform the

model politician's position on what the best tax laws and the best electoral system would be. The model politician will think: 'If only my fellow politicians and citizens were smarter, or morally less corrupt, or less hostile towards each other, they would agree that my favorite proposal really is the best one, but unfortunately they do not. Under these circumstances, I will have to accept this other proposal and, of course, this is the best proposal given these circumstances. But I still think that the proposal I originally came up with is the best one.' Alternatively, the model politician may think: 'I can see that my fellow politicians and citizens have reasonable views, but still they are wrong. Under these circumstances, I will have to accept this other proposal and, of course, this is the best proposal given these circumstances. But I still think that the proposal I originally came up with is the best one.' In that sense, the model politician agrees to a second-best in our two examples, and hence is making a compromise.

Realism and Non-ideal Theory

Because I am interested in political thinking beyond justice, I share some of the concerns of 'realist' political theorists and philosophers.[5] The book is about the need to compromise in light of persistent conflict and, in particular, in light of disagreement on justice, which nicely fits most realists' (and agonists') emphasis on the conflictual nature of politics.[6] In contrast to (some) realists, though, I do not mean to say that there is something wrong with theorizing justice, or that theorizing justice is not about politics.[7] I do not say anything here about *how* theorizing justice should proceed, but I certainly assume that there is a sound theory of justice and that justice is a value that properly applies to politics and should guide the deliberations of model politicians and citizens. More generally, realists sometimes oppose an 'ethics first' approach to politics.[8] They think it is misguided to apply moral principles or values to politics. I do

[5] For an overview of realism, see Galston 2010 and Rossi and Sleat 2014.

[6] See Waldron 1999: 1–4, Mouffe 2005, Sleat 2013: chs. 2–3.

[7] See Waldron 1999: 3, Sleat 2013: 8–9.

[8] Mouffe 2005: 5, Williams 2005: 1–3, Geuss 2008: 6–9.

not believe that one can give up an 'ethics first' view without giving up normative or evaluative political thinking.[9] Ethics encompasses political morality, even though of course some moral values and principles apply specifically to politics. Accordingly, while I deal with political morality beyond justice, I will make straightforward moral claims. In that sense, the book may not be considered 'realist' in spirit.

Because I am interested in political morality beyond justice, it may also seem that I am engaged in 'non-ideal theory.'[10] Yet there are many different issues at stake in the debate about ideal and non-ideal theory, and it should be helpful to briefly relate my work to these issues. Laura Valentini writes in her overview: '[T]he debate on ideal and non-ideal theory has for a large part revolved around Rawls's theorizing about justice, and this article is no exception. That is, much of my discussion will focus on ideal and non-ideal theorizing about *justice* in particular.'[11] If the debate is about how theorizing justice should proceed, then I am engaged neither in ideal theory nor in non-ideal theory, because I do not theorize justice at all. If the categories of ideal and non-ideal theory are to apply to my project, they have to apply to theories of political morality more generally, not theories of justice. Following Valentini, one can distinguish three debates within the debate about ideal and non-ideal theory: one is about the relevance of feasibility constraints, one is about the assumption of full compliance, and one is about the need of an 'end-state' theory that sets the goal for social reform.

If ideal theory is normative political theory without certain kinds of feasibility constraints (e.g. set by human nature), while non-ideal theory accepts such feasibility constraints,[12] then I am arguably doing neither ideal theory nor non-ideal theory, because I will not be making many *normative* claims at all (Chap. 15 is an exception). Instead, I mostly talk about moral *values* and their foundation, and so feasibility concerns do

[9] See Erman and Möller 2015 for an argument to this conclusion. See also Wendt 2016b and 2016c: 241–242. Some realists, though, are skeptical about the very distinction between the normative and the descriptive (Geuss 2008: 16–17).

[10] For an overview of the debate about ideal and non-ideal theory, see Valentini 2012. On realism and non-ideal theory, see Sleat 2014.

[11] Valentini 2012: 2.

[12] Estlund 2008: ch. 14, 2011.

not directly apply to my project. Moral values should inform the model politician's thinking about normative matters, of course, but values are not normative by themselves. They first of all guide *evaluative* judgments. What the model politician should do, in a certain situation, what tax laws or electoral system he or she should support and enact, for example, is a normative question that is to be decided in light of the evaluations provided by all relevant values. But a theory about what some value *is* does not have direct normative implications. At least it does not imply that we have a moral duty to implement that value at any price. If thinking about moral values, so understood, means engaging in ideal theory,[13] then I am engaged in ideal theory.

If ideal theory presupposes full compliance with justice, while non-ideal theory asks about how to deal with injustice,[14] then obviously I am not engaged in ideal theory here: I think about situations where the model politician has reasons to agree to unjust arrangements, and such situations would not easily come up if everyone would comply with justice. In that sense, then, I am doing non-ideal theory. I also do not presuppose compliance with any of the normative principles (beyond justice) that I set out in this work (although, again, for the most part, I am not even concerned with normative principles, but with moral values).

If ideal theory means elaborating the goal for social reform by painting a picture of a 'well-ordered society,' while non-ideal theory means thinking about the means to bring the real world closer to that goal,[15] then I am doing neither ideal theory nor non-ideal theory. I do not paint a picture of a well-ordered society, either in an abstract way or on the institutional level, and I do not reflect on the transition to a well-ordered society. If non-ideal theory is normative and evaluative political theory without a presupposed specific picture of the well-ordered society,[16] then I am doing non-ideal theory here.

[13] Cohen 2003: 244–245, 2008: 307, Stemplowska 2008: 330, Swift 2008: 364.

[14] Rawls 1971: 8, 245, 351, 2001: 13, Simmons 2010.

[15] Rawls 1971: 245–246, 1993/1996: 285, 1999: 89, 2001: 13, Simmons 2010.

[16] Sen 2009, Schmidtz 2011, Wiens 2012.

Public Justification and Peace as Distinct from Justice

The main claim of the book is that peace and public justification are moral values that provide the model politician with moral reasons to make compromises, including compromises that establish unjust laws or institutions. Obviously, then, I take peace and public justification to be values that are distinct from justice. This is not clearly common sense, so let me explain.

I treat public justification as a value of its own. (It may be more accurate to speak of 'public justifiability' as a value, but as the term 'public justification' is more common, I will stick to it.) Public justification is not identified with justice, nor do I presuppose any close connection between public justification and justice. I want to leave open how justice is to be conceived and argue that public justification sometimes gives the model politician moral reasons to agree to unjust arrangements, whatever justice is. There is one account of justice that draws a close connection between justice and public justification, namely, contractualism. Contractualist understandings of justice assume that justice is the subject of an agreement in an appropriately designed choice situation that models equality or impartiality, like most prominently Rawls's original position. In a sense, then, a conception of justice is to be publicly justifiable, from a contractualist point of view. But even if contractualists are right about this, public justification could still be considered as a value of its own, at least if public justification is applied to other subjects besides conceptions of justice as well. Thus what I say about public justification should be compatible with contractualist understandings of justice. Of course, it is also compatible with natural rights libertarianism or luck egalitarianism, for example. I will argue later that this disentanglement of public justification and justice can also be found in the work of major public reason liberals like John Rawls and Gerald Gaus.

As I regard public justification and justice as two distinct values, it is clear that public justification is to be considered as one value among others. This, I think, naturally leads to the claim that the model politician can be justified in his or her views about the morally best tax laws or the morally

best electoral system, even when these tax laws or this electoral system is not publicly justifiable. This puts me into opposition with public reason liberals who uphold a principle of public justification, that is, take public justification as a strict requirement for the moral justification of, for example, constitutional essentials, laws, or moral rules. Because I conceive of public justification as one value among others, it becomes also possible to understand it as providing reasons to compromise on what the morally best tax laws or electoral system would be.

In contrast to public justification, peace is a value that has been surprisingly neglected in contemporary political philosophy. As with public justification, I emphasize that peace and justice are distinct. I argue against conceptions of peace that conceptualize peace as subsuming social justice or as requiring radical non-interference, against views that regard justice as necessary for achieving sufficiently stable peace, and against views that see peace as a mere precondition for achieving justice and not a value of its own. My concept of peace is a rather modest one. Peace is basically understood as the stable absence of violence based on modus vivendi arrangements.

An Overview

I now provide a brief summary of the chapters that are to come. In Part I, I develop a picture of what compromises are. Basically, compromises are agreements among two or more parties in which the parties accept some arrangement they regard as a mere second-best (Chap. 2). When they agree to something they regard a *moral* second-best, they make a 'moral compromise.' The notion of a moral compromise suggests a distinction between two levels of moral evaluation (Chap. 3): one that determines what one regards as morally best, and one that determines what one should be willing to agree to when others disagree about what is morally best. In a moral compromise, one agrees to an arrangement that is a second-best from the perspective of the first level of evaluation. Second-level values provide moral reasons to make moral compromises. I also discuss what genuine agreement or consent is (Chap. 4), and I distinguish different kinds of compromises: principled and pragmatic compromises, rational and irrational compromises, fair and unfair compromises, and

'rotten' compromises (Chap. 5). These distinctions are helpful for the discussion of the 'deontic morality of compromising' (Chap. 15).

Peace and public justification are two values that provide us with moral reasons to make compromises in politics. This is the main claim of this book. In Part II, I introduce my account of peace. I argue that peace should be understood as the stable absence of violence based on modus vivendi arrangements (Chap. 6). I also debate why peace should be considered a value (Chap. 7), I discuss the relation between peace and justice, and I critically discuss more demanding notions of peace (Chaps. 8 and 9). In Part III, I introduce the notion of public justification, which can basically be understood as multi-perspectival acceptability (Chap. 10). The details of a conception of public justification depend on what one regards as the source of its value, though, and so I devote large parts to a discussion of that issue. I argue that stability (Chap. 11), respect (Chap. 12), and community (Chap. 13) are all considerations that explain the value of public justification, although they point to different directions regarding the more precise conceptualization of public justification. I also argue that they cannot justify a strict principle of public justification. Public justification, I conclude, should be considered as one value among others. (Although the book is about compromises, note that Parts II and III can also be read in abstraction from that context, as contributions to debates about modus vivendi and public justification, respectively.)

In Part IV, I bring all threads together. I discuss several topics related to compromises made for peace and public justification. I start by defending the claim that peace and public justification are indeed values on the second level of moral evaluation and not on the first (Chap. 14). They provide us with moral reasons to compromise on what is morally best. (I do not claim that there are no other values on the second level.) I then defend some claims in what I call the 'deontic morality of compromising,' that is, the theory of the moral duties and obligations politicians have in and after compromising (Chap. 15). I test the plausibility of some claims by spelling out what they imply for compromises made for peace and public justification. Next, I ask whether compromises made for peace and public justification tend to establish liberal institutions or even liberal institutions of a specific kind (Chap. 16), and I discuss the relation between state legitimacy and compromising (Chap. 17).

Part I

Compromise

2

What Compromises Are

The main claim of this book is that peace and public justification are values that provide moral reasons to compromise in politics. Before being able to argue for this claim, I have to develop a reasonably precise conception of compromises. This is what I aim to do in this and the next three chapters.[1] The core of the notion of a compromise, I suggest, is that two or more parties agree to an arrangement which they regard as a mere second-best.

Agreeing on a Second-Best

Compromises are, first of all, something agreed to by two or more parties.[2] What the parties agree to is the content of the compromise. Compromises can concern a variety of things, from the choice of a restaurant for dinner to the design of a piece of legislation. I will call the content of a compromise an 'arrangement.' But not all agreements on some arrangement are

[1] This book is an exercise in systematic political philosophy. I do not engage very much in the history of ideas. For a conceptual history of compromise, see Fumurescu 2013.

[2] Jones and O'Flynn 2013: 119–120.

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compromises. What is distinctive about compromises is that all parties regard some *other* arrangement—not the one agreed upon—as the optimal solution. Thus in a compromise, we have dissent on what would be the best arrangement, but we have consent that the arrangement agreed upon is better than having no arrangement at all. It is something all parties can live with as a *second-best*.[3] (They can also accept it as a third-best or fourth-best, of course.) This, I think, is a truism about compromises.

What if some parties regard the arrangement as the best one and some regard it as a second-best? We then have a compromise from the perspective of some parties, and not a compromise from the perspective of other parties. I think that this result is not surprising. Indeed, when one gets one's first-best option, one does not make a compromise. The same arrangement can thus be a compromise from the perspective of some, but not from the perspective of others. But to simplify matters, I will usually assume that a compromise is an arrangement that is a second-best from the perspective of all parties. We then have a compromise 'tout court,' a compromise from the perspective of all the parties.

Moral Compromises and Non-moral Compromises

Compromises are made against a background of conflict. When all parties agree about what the best arrangement would be, no compromise is needed. They can just implement that arrangement. Compromise is necessary against a background of conflict. The conflict can either be a conflict of interests or a conflict based on incompatible moral convictions. I will refer to the latter as a 'moral conflict.' The notion of a moral conflict is to be understood in a broad sense, but it is not to cover conflicts based on incompatible altruistic interests. Interests can be altruistic without being conceived as a moral concern, as Amartya Sen makes clear by distinguishing between 'sympathy' and 'commitment': 'If the knowledge of torture of others makes you sick, it is a case of sympathy; if it does

[3] The notion of a 'second-best' is not to be understood in the technical sense as discussed in economics (Lipsey and Lancaster 1956–1957).

not make you feel personally worse off, but you think it is wrong and you are ready to do something to stop it, it is a case of commitment.'[4] Moral conflicts are conflicts based on incompatible 'commitments' in Sen's sense. For the realm of politics, Richard Bellamy distinguishes between 'conflicts of interests for limited resources, ideological conflicts involving rival rights-claims and the collision of opposed identities each seeking recognition.'[5] In my taxonomy, the first are conflicts of interests, the second are moral conflicts, and the third are usually also moral conflicts (because seeking recognition will usually be a commitment).

In a conflict of interests, all parties regard some other arrangement as better serving their interests, although they may agree that the arrangement agreed on is a fair compromise, given the partially conflicting circumstances. In a moral conflict, they regard some other arrangement as morally better. A compromise that emerges from a moral conflict can be called a *moral compromise*. In a moral compromise, one accepts an arrangement that one thinks is a *moral* second-best.[6] A compromise that emerges from a conflict of interests can be called a *non-moral compromise*. In a non-moral compromise, one accepts an arrangement that is a second-best from the point of view of one's interests.

Sometimes it is suggested that a moral compromise has to be accepted for moral reasons.[7] I do not see a reason to assume this: one can accept a moral second-best for non-moral reasons, and one can accept a non-moral second-best for moral reasons. The former happens when one accepts a moral second-best because it is in one's interest to do so. This does not seem to be very uncommon. The latter happens, for example, when you do not like Chinese food, but nonetheless accept a Chinese restaurant for dinner because your dinner guest loves Chinese food and you think that there is a moral imperative to accommodate her preferences.

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[4] Sen 1977: 326. Harsanyi's distinction between ethical and subjective preferences is related (1955), although 'ethical preferences' are much more narrowly defined than Sen's 'commitments'; they are necessarily based on impartial considerations (Sen 1977: 336–337). For an extensive discussion of the distinction between conflicts of interest and conflicts of value, see Willems 2015: chs. 1–5.

[5] Bellamy 1999: 103.

[6] Benjamin 1990: 12, 23, May 2011: 583, Archard 2012: 404.

[7] Lister 2007: 2, Zanetti 2011: 428.

Two Accounts of Consent

As said, compromises are something agreed to. Sometimes the content of a compromise, the arrangement agreed upon, is fixed in a legal contract. At other times, compromises take the form of more informal agreements, comparable to 'mutual promises,' where two or more parties promise to each other to stick to the terms of an arrangement. J. Patrick Dobel speaks of 'co-promises,' for that reason.[8] A conception of compromise, therefore, has to say something on what it means to give consent or to agree to something. I will here introduce some basic ideas and say more on consent in Chap. 4.

There are two accounts of what consent (or agreeing) is. Alan Wertheimer calls them the 'subjective' and the 'performative' view.[9] According to the subjective view, consent is a mental state or a mental act.[10] According to the performative view, consent is a certain kind of public act, observable and understandable by others.[11] I will here adopt the performative view. The mental act or mental state of consent is better called 'acceptance.' Compromise requires consent, not acceptance.

There are two reasons for this. First, compromises are something made by two or more persons together. A mere mental act, in contrast, is something that is not visible to others. It is something one does alone. Confusingly, the notion of 'compromise' is sometimes used in single-person cases as well, but in a different sense: one can 'compromise one's values' without interacting with other persons.[12] Integrity is an issue that bridges the two senses of 'compromising,' because one can compromise one's values in making compromises with others.[13] But here, I want to focus on what intersubjective compromises are.

The second reason is that compromises are morally binding for the parties. By making a compromise, the parties impose moral obligations

[8] Dobel 1990: 8.

[9] Wertheimer 2003: 144.

[10] Hurd 1996, Alexander 1996.

[11] Simmons 1979: 83, Archard 1998: 4, Wertheimer 2003: 144–152.

[12] See May 2011: 583, Lepora 2012. One can also compromise one's interests without interacting with other persons.

[13] See Benjamin 1990.

on themselves to stick to the terms of the compromise, and they generate moral rights to have the others stick to the compromise. Consent, as relevant in compromises—but also in promises or in consent to sexual relations or to medical treatment, for that matter—is 'morally transformative': it creates moral obligations and rights the parties did not have before. (More on these moral obligations in Chap. 15.) This morally transformative power of consent can only be explained by the performative view of consent, as Wertheimer makes clear: '*B*'s consent is morally transformative because it changes *A*'s reasons for action. If we ask what could change *A*'s reasons for action, the answer must be that *B* performs some token of consent. It is hard to see how *B*'s mental state can do the job.'[14] A compromise thus requires publicly recognizable consent to accept some arrangement, by at least two parties, not a mere mental act or mental state of acceptance.

Hence, when I say that the parties 'agree' or 'consent to' a compromise, I always have the performative view in mind. Usually, when the parties agree to a compromise, they will of course also accept it (as a mental act), and expect the others to accept it, too. But agreeing and consenting on the one hand, and accepting on the other hand, are different things. Mere acceptance does not make a compromise.

What Compromises Are Not (or Need Not Be)

There are four other properties that are sometimes brought up as additional necessary conditions for the existence of a compromise. First, it is sometimes assumed that compromises are always made out of self-interest. Second, it is sometimes argued that compromises always reflect the balance of power among the parties. Third, it seems quite natural to assume that a certain process of 'compromising'—which involves bargaining and the making of mutual concessions—must precede the agreement that constitutes the compromise. Fourth, and in tension with the first and second points, some have argued that compromises cannot be 'mere' balances of power or 'mere' bargains, but involve a more cooperative mindset.

[14] Wertheimer 2003: 146.

First, compromises need not be made out of self-interest. It can be non-moral reasons that motivate people to accept some particular compromise, but it can also be moral reasons. This is so in both conflicts of interests and moral conflicts. As long as an arrangement is agreed to as a second-best, we have a compromise. We can keep silent on the kinds of reasons for making a compromise.

Second, compromises need not mirror the distribution of power among the parties, no matter how 'power' is conceived.[15] The stronger party can abstain from exploiting her power and decide to bargain on equal terms. She could do so for moral reasons, for example, but still regard the arrangement as a second-best. But even in compromises made for non-moral reasons, there is no conceptual necessity that stronger parties try to use their power to get the best possible outcome for themselves.

Third, must compromises be the outcome of a process of compromising, that is, of bargaining and making mutual concessions? Of course, typically compromises are based on a process of bargaining which leads to an explicit agreement that is fixed either in a contract or in a more informal way. But this is not necessarily so. One can agree to something as a second-best without any such process having taken place.[16] This is quite obvious in the case of tacit consent, but even explicit consent to a second-best need not be preceded by bargaining. There are other methods to pick one out of several options and to agree on that option (as a second-best): collective choice is one such option, spontaneous coordination another.[17]

Fourth, and in contrast to the first two points, some philosophers distinguish compromises from 'mere' balances of power or 'mere' bargains. Of course, they do not claim that compromises never mirror the distribution of power or are never made out of self-interest. Still they think there is something more to compromises. The main idea—which can be spelled out in different ways—is that people have a cooperative mindset in compromises, while they have a purely strategic mindset in mere balances of

[15] Physical strength, financial resources, and military strength are not always the most important assets (Schelling 1960: Ch. 2).

[16] Accordingly, Benjamin distinguishes compromises as an outcome and compromising as a process (1990: 4–8). Some, though, understand compromise as 'essentially procedural' (Gaus 1990: 353, see Golding 1979: 7–8).

[17] See Gaus 2011a: 393–409.

power or mere bargains.[18] I see no reason why agreements that are made with a purely strategic mindset should not be regarded as compromises. As we use the term in ordinary language, at least, there certainly are compromises between parties that have a purely strategic mindset. This is not to say that the distinction between compromises made with a strategic mindset and compromises made with a more cooperative mindset is not important. It will be a major topic in what I call the 'deontic morality of compromising.' But the distinction does not mark a difference between compromises and something else.

Summary

In a compromise, two or more parties agree to an arrangement—the content of the compromise—but they regard the arrangement as a mere second-best. In moral compromises, they agree to what they see as a moral second-best; in non-moral compromises, they agree to a second-best from the point of view of their interests. Agreement or consent is to be understood as performative, not as a mental act or mental state. Compromises need not be agreed to for reasons of self-interest, they do not have to mirror the distribution of power, no process of bargaining must precede a compromise, and the parties need not have a cooperative mindset.

[18] See Golding 1979: 16–19, Benditt 1979: 26–27, Benjamin 1990: 5, Bohman 1995: 268, Weinstock 2006: 244, Lister 2007: 17–18, Margalit 2010: 39–41, also Gutmann and Thompson 2012: 16–17, 101–117. Skeptical about the distinction between compromises and mere bargains are Jones and O'Flynn 2013: 120.

3

Two Levels of Moral Evaluation

In this chapter, I distinguish two levels of moral evaluation. The distinction is necessary if we are to understand the conceptual possibility of making moral compromises for moral reasons. Later in the book, I will defend the claim that there indeed are moral reasons to make moral compromises (namely, reasons provided by the values of peace and public justification). The distinction between two levels of moral evaluation therefore is at the heart of this book.

Can One Make a Moral Compromise for Moral Reasons?

There are many different kinds of reasons to agree to a compromise, depending on the circumstances. This is true of both moral and non-moral compromises. As explained in the previous chapter, in moral compromises, one agrees to an arrangement that is a moral second-best, and in non-moral compromises, one agrees to an arrangement that is a second-best from the point of view of one's interests. One can have moral reasons to make a non-moral compromise, one can have non-moral reasons to

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make a non-moral compromise, one can have non-moral reasons to make a moral compromise, and one can have moral reasons to make a moral compromise.

One could argue, though, that the last combination is conceptually confused. Is it really possible to make moral compromises for *moral* reasons? The reason why it looks conceptually impossible to make moral compromises for moral reasons is as follows: if the moral reasons to compromise are conclusive, then the model politician (from the introduction) is morally required to compromise. But then the compromise no longer looks like a moral compromise: the model politician simply does what is morally required when agreeing to the compromise. It is not a moral second-best to agree. Because moral compromises were introduced as compromises where one agrees to a moral second-best, the model politician no longer makes a moral compromise when he is morally required to make the compromise. Therefore, it seems, it is impossible to make moral compromises for moral reasons.

To make sense of moral compromises made for moral reasons, one has to introduce a distinction between two levels in the moral evaluation of arrangements. This is what I do and elaborate in this chapter. But before presenting my own defense of the possibility of moral reasons to make moral compromises, I will reject two other possible strategies to make sense of the idea that there could be moral reasons to make moral compromises.

The first of these strategies is to redefine the notion of moral compromises. Moral compromises as introduced above are compromises where the parties agree to some arrangement they regard as *overall* morally suboptimal. One could now modify this by saying that in a moral compromise, one agrees to an arrangement that is morally suboptimal regarding *one particular* moral value. Then one could make a moral compromise in agreeing to an arrangement that is *overall* the morally best arrangement under given circumstances. The problem with this proposal is that it widens the notion of moral compromise too much. One can rarely, if ever, get the best world regarding *every* moral value at stake. We always have to make trade-offs between different values. Of course, it is true that there can be moral reasons to make moral compromises in that sense. There can be moral reasons to make moral compromises because there can be moral

reasons to make a trade-off between moral values one way or another. But this is not a very interesting thesis. Moral compromise would become pervasive. I would like to defend the much more interesting claim that there can be moral reasons to make compromises where the arrangement is *overall* a moral second-best, not only with regard to a particular moral value. And this is what we should mean by 'moral compromise.'

The second strategy is to admit that there cannot be conclusive moral reasons to make a moral compromise, but to emphasize that there can at least be non-conclusive moral reasons to make a moral compromise. There can be situations where it is overall morally wrong to agree to a compromise, but where nonetheless there is *a* moral reason to agree to it. When a person consents to the compromise in this situation, he makes a moral compromise he thinks is (overall) morally wrong to accept, but still he makes the compromise for some (weaker) moral reasons—and for additional non-moral reasons. These additional non-moral reasons are necessary to explain why he accepts the compromise despite thinking that it is overall morally wrong to do so. In the end, then, the person does not make a moral compromise for moral reasons or at least *not only* for moral reasons. Of course, it is true that there can be non-conclusive moral reasons to make moral compromises, so understood. But again, this is not a very interesting claim and (probably) nobody will dispute it. I would like to defend the more interesting claim that there can be *conclusive* moral reasons to make moral compromises.

The Solution: Two Levels of Moral Evaluation

I now come to my defense of this claim. Let me introduce a distinction between two levels of moral evaluation. On the first level, one considers reasons that determine one's view of what the morally best arrangement would be. I call it the 'morally best$_1$ arrangement.' Justice and other moral values provide such reasons. In light of these moral values, one determines what the morally best$_1$ arrangement would be, what the morally second-best$_1$ arrangement would be, what the morally third-best$_1$ arrangement would be, and so on. One develops a first-level ranking. On the second level, one considers moral reasons to agree to arrangements that fall short

of what one regards as the morally best$_1$ arrangement. Such reasons are provided by moral values that become relevant under circumstances of disagreement about what would be morally best$_1$. I will argue later that there are at least two moral values that are providing moral reasons on this second level (although there may be more): peace and public justification. Considering these moral values, one may come to the conclusion that, under these circumstances of disagreement about what is morally best$_1$, one should, all things considered, be willing to agree to some arrangement that is not the morally best$_1$ arrangement. One develops a view on what, all things considered, the morally best$_2$ arrangement and the morally second-best$_2$ arrangement would be (etc.). One also develops a view on what the range of morally acceptable$_2$ arrangements is, all things considered (i.e. both first- and second-level values considered). But one does not change one's mind about what the morally best$_1$ arrangement would be. It is only due to the unfortunate fact of disagreement about what would be morally best$_1$ that one is willing to accept something less than the morally best$_1$ arrangement. When one goes on to in fact agree to an arrangement that is among the morally acceptable$_2$ arrangements, but is not the morally best$_1$ arrangement, then one has made a moral compromise for moral reasons.

The very notion of making a moral compromise for moral reasons presupposes the distinction between two levels of moral evaluation, between reasons that inform one's view about what would be best and reasons to accept something inferior than that. As Simon May puts it, moral compromise 'occurs when disagreement is invoked as a reason to accept a political position otherwise perceived to be morally inferior.'[1] When one makes a moral compromise for certain reasons, then these reasons are not reasons to *correct* one's view of what the morally best$_1$ arrangement would have been.[2]

Nine more comments should help to clarify this distinction between two levels of moral evaluation. First, it should be noted that I want to presuppose neither that there is always exactly one morally best$_1$ arrangement

[1] May 2005: 318, see also Kuflik 1979: 51, Gutmann and Thompson 1996: 93, Lister 2007: 19–21, May 2011: 584–586, Zanetti 2011: 436–437.

[2] May 2005: 319.

nor that there is always exactly one morally best$_2$ arrangement. If value pluralism is true, then there may sometimes be several arrangements that are equally good$_1$. Hence, there may sometimes be a *set* of morally best$_1$ arrangements, whereby each of them may be good$_1$ in virtue of different values, yet *overall* being equally good$_1$ as the other members of the set, and better$_1$ than some other arrangements ranked second-best$_1$. Likewise, one might often be unable to determine exactly one morally best$_2$ arrangement, but only a set of morally best$_2$ arrangements. Now one can argue that, if value pluralism is true, sometimes arrangements are even incommensurable in value. When two arrangements are incommensurable in value, then neither is one better than the other nor are they equally good$_1$.[3] I agree that some things are incommensurable in value (it is hard to meaningfully compare Elvis Presley to Michelangelo and pizza to tennis). But compromises will not very often make such comparisons necessary. They will let us compare different movies, or different law proposals, and hence issues of incommensurability will come up less likely. But even situations where we indeed have incommensurable arrangements as the potential contents of a compromise do not pose an unsurmountable problem for my account. Incommensurable arrangements have to be treated as if they were of equal value, for practical purposes, and it may still be possible to rank them over some other arrangements. For example, if arrangement *X* and *Y* are incommensurable in value, yet *X* is better$_1$ than *Z* and *Y* is better$_1$ than *W*, then *X* and *Y* can be treated as better$_1$ than *Z* and *W*.

Second, compliance problems are not excluded on either level. If one is to decide about the actual implementation of some institutional arrangement, compliance problems of course are relevant for what one thinks would be the morally best$_1$ arrangement. But one might also have a view about what the morally best$_1$ arrangement would be in circumstances where people are better and less corrupt than they are in the real world and where compliance problems are hence negligible.

Third, not all values that somehow have to do with disagreement are values that come into play on the second level. Take justice. If disagreement about the proper distribution of the burdens and benefits of cooperation

[3] Raz 1986: 342, Gray 2000: 34.

is one of the so-called circumstances of justice,[4] then justice obviously has to do with disagreement. Yet it is not a second-level value. John Rawls's theory of justice, for example, is simply a view on how burdens and benefits should be distributed, not a view he adopts because others disagree with his view on how burdens and benefits should be distributed. What makes a value a second-level value is that it becomes relevant under circumstances of disagreement about what institutional arrangements to implement. One's view on what justice requires usually informs one's view on what institutional arrangements to implement; it does not provide reasons to agree to something inferior from what one wants to implement.

Fourth, I do not mean to imply that the two levels should be kept strictly separate in one's deliberations, or that they *are*, as a matter of fact, kept strictly separate in people's deliberations. Of course, one can, when evaluating arrangements, think about first- and second-level values at the same time. The distinction is only meant as an analytical tool.

Fifth, it should be noted that the parties to a moral compromise made for moral reasons will not only have to accept less than what they regard as the morally best$_1$ arrangement, they will also usually not be able to get what they regard as the morally best$_2$ arrangement. The reason is that they will also disagree on what the morally best$_2$ arrangement would be, that is, the arrangement that is morally best in light of all first- and second-level values. For that reason, they will in the end have to agree to an arrangement that all parties find morally acceptable$_2$, albeit falling short of what they regard as morally best$_2$. Now one may be suspicious that this clarification amounts to a concession that the distinction between two levels of moral evaluation does not have much of a point. But this is not so. The point of the distinction between the two levels of moral evaluation is that it enables us to clearly see in what sense the parties agree to a moral second-best for moral reasons. It is a moral second-best relative to what one regards as morally best when bracketing the fact of disagreement about what is morally best. This bracketing is done on the first level of moral evaluation. Second-level moral values provide moral reasons to accept less than what would be morally best when bracketing the fact of disagreement about what would be morally best. In other words, they

[4] Hume 1738/1978: 484–495 (book 3 part 2 sec. 2), Rawls 1971: 4, 127.

provide moral reasons to accept less than what would be morally best$_1$. That one usually gets neither what one deems morally best$_1$ nor what one deems morally best$_2$ is true, but it does not undermine the point of distinguishing the two levels of moral evaluation.

Sixth, an objector could argue that justice—the paradigmatic first-level value—can provide moral reasons to agree to a moral second-best as well and that hence there is no point in the distinction between first- and second-level values. Justice provides moral reasons to agree to a moral send-best, the objector says, when a person agrees to accept less than the morally best$_2$ arrangement because it comes at least as close as possible to justice, given the circumstances. In reply, justice co-determines (together with other first-level values) what the morally best$_1$ arrangement would be and (together with all first- and second-level values) what the morally best$_2$ arrangement would be. So indeed we can assume that the person agrees to a moral second-best from the point of view of *both* levels of moral evaluation. But it is a *moral compromise* because she agrees to a morally second-best$_1$ arrangement, not because she agrees to a morally second-best$_2$ arrangement. To see this, imagine the unusual case where what she accepts is a morally second-best$_2$ arrangement, but at the same time *is* the morally first-best$_1$ arrangement. This can happen when second-level values like peace and public justification would provide strong reasons for a person to accept less than what justice and other first-level values demand, but the arrangement that actually is agreed upon realizes what the person thinks justice and other first-level values demand. It is not the morally best$_2$ arrangement, because second-level values are not (fully) realized, but it is the morally best$_1$ arrangement, because justice and other first-level values are fully realized. It would be odd to say that the person who agrees to establish such an arrangement is making a moral compromise. What matters is whether the person agrees to a moral second-best$_1$, not whether she agrees to a moral second-best$_2$. Only when agreeing to a moral second-best$_1$ does she make a moral compromise. Second-level moral values provide moral reasons to make moral compromises, so understood. The distinction between two levels of moral evaluation therefore indeed has an important point.

Seventh, how should we describe what a person does when she agrees to an arrangement because it comes as close as possible to justice, given

the circumstances? She does of course make a moral compromise, as long as she agrees to a morally second-best$_1$ arrangement (i.e. a not fully just arrangement). But she does not make a moral compromise for moral reasons, when she does not consider second-level moral values and hence moral reasons to accept less than the morally best$_1$ arrangement. Instead, she accepts a morally second-best$_1$ arrangement for the simple reason that implementing the first-best$_1$ is not feasible. She tries to get an arrangement that comes as close as possible to the morally best$_1$ one. In other words, she accepts a morally second-best$_1$ arrangement for non-moral pragmatic reasons. (For the notion of 'pragmatic reasons,' see Chap. 5) Now, someone may protest that of course she makes moral compromises for *moral* reasons when she wants to come as close as possible to what justice demands. In reply, I concede that *if* one classifies her reasons as justice-based moral reasons, then justice provides moral reasons to compromise, too. Justice would then be a value that operates on both levels of moral evaluation. This would not be a worry for my account because the distinction between two levels of moral evaluation does not depend on a rejection of that claim. Nonetheless, I think it would be misleading to say that a person has justice-based moral reasons to compromise when she tries to come as close as possible to what justice demands. What she does, in the end, is to agree to a less than fully just arrangement because she cannot get a fully just arrangement. If she could get full justice, then she would take full justice. This shows that she does not have *moral* reasons to agree to less than full justice. If she had moral reasons to agree to less than full justice, then she would have reasons to agree to less than full justice even if she could get full justice. This, at least, is how I would like to understand compromises made 'for moral reasons.' Feasibility reasons thus should not count as *moral* reasons to compromise and so justice is not a value that provides moral reasons to compromise.

Eighth, as I hope was clear in the exposition, whether a person makes a compromise depends on what *she thinks* is best. People with flawed views on justice make moral compromises when they agree to an arrangement that falls short of what they think would be just. Yet as explained in the introduction, I usually presuppose the perspective of the 'model politician,' that is, someone who has sound moral views. Sometimes it is not important whether we presuppose the model politician's perspective

or that of someone with flawed moral views, but sometimes it is (especially in Chap. 15). I will remind the reader when it is important to have the perspective of the model politician in mind.

Ninth, second-level values are not defined as values that are necessary to adjudicate between first-level values. What makes second-level values second-level values is that they provide moral reasons to accept a second-best arrangement relative to what would be the best arrangement in the absence of disagreement about what the best arrangement would be. An implication is that the distinction between two levels of moral evaluation can be maintained even when advocating a strictly value monist theory like hedonist utilitarianism. A hedonist utilitarian can distinguish between the arrangement she would advocate in the absence of disagreement about what the best arrangement would be, and the arrangement she advocates in light of the fact of disagreement about what the best arrangement would be. When providing reasons for why an arrangement would be best in the absence of disagreement, she is engaged in the first level of moral evaluation, when providing reasons for why an arrangement would be best all things considered, she is engaged in the second level of moral evaluation. Hence, even a hedonist utilitarian can make moral compromises for moral reasons, even though there is no plurality of values in her theory. Yet a hedonist utilitarian may not see any special significance in the fact of disagreement about what the morally best arrangement would be, because she does not see any distinct and specific moral values that become relevant in light of such disagreement. For that reason, she might question the point of making the distinction between two levels of moral evaluation. When she rejects the distinction between the two levels, she thereby rejects the possibility of moral compromises made for moral reasons, because she does not have any standard relative to which an arrangement could be accepted as a moral second-best. Hence, the distinction between two levels of moral evaluation better fits moral theories that acknowledge the special significance of disagreement and endorse a plurality of values. Later on, I will argue that indeed there is a plurality of values in politics (justice, peace, and public justification, among others) and that some of these values (peace and public justification, among others) become relevant specifically under circumstances of disagreement about what the best arrangement would

be. Besides hedonist utilitarianism, there are other views that are monist (at least in the political realm). Most prominently, some philosophers treat justice as the master value in politics. On the first pages of *A Theory of Justice*, John Rawls writes that 'an injustice is tolerable only when it is necessary to avoid an even greater injustice.'[5] According to such a view, there are no second-level values that could provide moral reasons to make compromises that establish unjust arrangements, be it principled or pragmatic moral reasons. Instead there are only non-moral pragmatic reasons to accept less than full justice. One could speak of 'justice monism.' In contrast to justice monism, I will argue that peace and public justification are values that provide moral reasons to make compromises that establish unjust—or not fully just—arrangements.

A Test

How do we know whether some arrangement is accepted as a second-best$_1$? How do we know whether someone is making a compromise when he agrees to an arrangement? Simon May has proposed a test:

> One way to test whether an agent supports a position as a compromise or as the best choice is to assess whether it is the option that she would persuade the other parties to accept, ceteris paribus, had she the ability to persuade them to accept any of the alternatives.[6]

In other words: when a party accepts an arrangement as a second-best$_1$, then she would, if she could, persuade the other parties to agree to some other arrangement, namely the arrangement she regards as the best$_1$ one. When a party accepts an arrangement as a first-best$_1$, then she would not persuade the other parties to agree to some other arrangement, if she could. Of course, time can change things. What was once regarded as a second-best$_1$ can now be regarded as a first-best$_1$. But the test could

[5] Rawls 1971: 4. Famously, he calls justice the 'first virtue of social institutions' (1971: 3). See also Gosepath 2004: 9.

[6] May 2011: 584.

determine whether an arrangement is, at a certain point in time, accepted as a second-best$_1$ or a first-best$_1$.

Is this test appropriate to determine whether some arrangement is accepted as a second-best$_1$? Here is a first objection: according to the test, every social arrangement is a second-best$_1$ because one can always dream of a better arrangement. For example, one can compare a given arrangement to the arrangement that is successfully designed to lead to one's maximum happiness. If a person could persuade the other parties to agree to the arrangement that successfully leads to her maximum happiness, she would do so. Hence the test has no point: persons would always persuade the other parties of some other arrangement. One reply is that real people do not dream of arrangements like this; they are more moderate in their expectations. Moreover, they have moral beliefs that often lead them to see only fair and reciprocal arrangements as desirable. The question is not what arrangements a party *could* think of as optimal but what arrangement she *actually* thinks of as optimal. If we conceive the test in this way, then some arrangements will actually be accepted as the optimal solution and thus the test will not be pointless. This is a good reply, as far as it goes, but still the test seems too permissive and the objection stands: it seems odd that *if* somebody thinks that arrangements designed to her maximum happiness are optimal, then every agreement she makes becomes an agreement on a second-best$_1$. Thus the test must be reformulated. I propose to say that a person accepts something as a second-best$_1$ when, *among all mutually advantageous options*, it is not the option which she would persuade the other parties to accept, had she the ability to persuade them to accept any of the alternatives. Because arrangements that are not mutually advantageous are irrational to accept for some of the parties, they are not an adequate reference point for what a party would consider as the 'best' arrangement.[7] It should be emphasized that 'mutual advantage' need not be cashed out in terms of the parties' interests, but can also be cashed out in terms of the parties' moral views, broadly understood.

[7] As Gauthier says, 'to claim more than one's largest possible portion of the co-operative surplus would be idle, or worse since if one were to press such a claim, one would only drive others away or face exclusion oneself' (1986: 134).

A second objection is that the test implausibly presupposes that the persuasion of others is costless. Normally, persuasion takes time and efforts. Are we to suppose that the person could persuade the others at no price? I think we should indeed understand the test in that way. What we want to filter out is what the person regards as the best arrangement (within the constraints of mutually advantageous options) and that should not be dependent upon how stubborn and difficult to persuade the other persons are. How stubborn they are will determine what arrangement can be agreed upon, but it should not determine what one of the parties regards as best.

A third objection is that the test would let too many arrangements be 'compromises' where we would hesitate to speak of compromises. I think of cases where a clear convention against changing the arrangement in question is accepted by the parties. Think of exchanges in the marketplace. Surely some agreements in the marketplace should be classified as compromises. When I buy a used car from a private person, there is a process of bargaining and one may plausibly see the price one agrees on at the end as a compromise. The reason why it is plausible to see it as a compromise is, I think, not so much because there is a bargaining process but because there is a convention that allows adopting one arrangement (i.e. a price, in this case) or another. In contrast, where we have fixed prices, like, for example, when buying milk at the grocery store, 'agreeing' on the price cannot plausibly be regarded as making a compromise. But, so the objection goes, the test would classify market interaction in a grocery store as involving an agreement on a second-best$_1$ and hence a compromise, because prices in a grocery store are indeed accepted as a second-best$_1$: I would prefer to get the milk for much less money, and accordingly, if I could, I would persuade the seller in the grocery store to give me the milk for less money. As long as the price is still mutually advantageous, this would be my first-best$_1$ arrangement (price). Conversely, the seller also accepts the price as a second-best$_1$. She would prefer me to pay more and accordingly would persuade me to do so if she could. Again, this will normally not be ruled out as long as the price is still mutually advantageous. So why is it not the case that I make a compromise when I buy milk at the grocery store? The answer is that we should speak of compromises only in situations where conventions allow to bargain over an arrangement. These conventions *can*

be very local. Thus even if a society does not have a convention that allows to bargain over certain things, a couple of people may start to allow such bargaining and hence make compromises in that realm. The test thus needs a second modification: not only must the relevant imaginable arrangement be within the mutually advantageous range of options, we must also have a situation where conventions allow the parties to pick one out of a set of available options.

The test asks whether one would persuade *the other parties* of some other arrangement. A fourth objection is that the test is to determine whether some arrangement is accepted as a second-best$_1$, that is, whether it is an arrangement that is accepted *in light of disagreement* about what the first-best$_1$ arrangement would be. For that reason, the test should take *all* disagreeing persons into account, even when they are not party to the compromise, but merely affected by it. It should ask whether we would persuade everyone affected of some other arrangement.

The test may now, with the modifications in place, be able to determine what it means to accept some arrangement as a second-best$_1$, but it does still not determine what it means to accept some arrangement as a compromise. We have to make explicit that in order for a person to agree to some arrangement as a compromise, it has to be agreed to by at least one other party as well. Hence, I propose the following test for whether some arrangement is accepted as a compromise:

A person *A* makes a compromise in agreeing to an arrangement *X*, if and only if:

(1) *A* and at least one other person *B* both agree to *X*,
(2) *A* would persuade everyone affected of a different mutually advantageous arrangement *Y*, if she could do so at no costs, and
(3) conventions allow to bargain over the arrangement.

Condition (2) determines whether something is accepted as a second-best$_1$. Conditions (1), (2), and (3) together determine whether an arrangement is agreed upon as a compromise. If I would not persuade everyone else of an arrangement, if I could, then it is not the arrangement I regard as the best$_1$ one (but possibly as the best$_2$ one); if I accept the arrangement nonetheless, then I made a compromise.

Summary

In a moral compromise, one agrees to accept an arrangement that one regards as a moral second-best. A moral second-best is a moral second-best from the point of view of what I call the first level of moral evaluation. The distinction between two levels of moral evaluation explains how one can make moral compromises for moral reasons: one can agree to a moral second-best from the point of view of the first level of moral evaluation for moral reasons that come into play on the second level of moral evaluation. Whether a compromise is made can be determined by a test.

4

Consent

Compromises are something agreed or consented to by two or more parties. In this chapter, I discuss what genuine consent is.

Explicit and Tacit Consent

Consent need not be explicit. One need not sign a contract or give an explicit promise. One can also give tacit consent.[1] For example, one gives tacit consent to pay the bill once one takes a seat and orders a meal in a restaurant. One need not explicitly say that one will later pay the bill. The difference between tacit and explicit consent is not that one says or writes something verbal in the latter kind of consent. One can give explicit consent by nodding one's head. The difference is that, when giving explicit consent, one performs an action that has no other purpose than to give consent.[2] When giving tacit consent, one gives consent without performing an action whose sole purpose is to give consent. Tacit consent is much

[1] The idea of tacit consent was most famously invoked by Locke 1689a/1960: 341–342, 347–349 (§§ 110, 119–122). See also Simmons 1979: 75–100, 1998.

[2] Simmons 1998: 168, Saunders 2012: 71.

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more difficult to handle than explicit consent, of course, because it seems both unclear under what conditions tacit consent is given and what exactly one consents *to* when tacit consent is given. As I said earlier, in compromises, two parties agree to accept some arrangement and thereby give rise to new moral obligations, and this presupposes that it is clear *what* they give consent to and *that* they have actually given consent. Otherwise it is not a public act and hence no consent, on the performative view.

Regarding the first point, it seems fair to say that whether something counts as tacit consent will be determined by social conventions.[3] Some have argued that one requirement these conventions should fulfill is that expressing *dissent* should be easy and costless, or at least very cheap.[4] The idea, of course, is to block David Hume's argument against tacit consent as a foundation for political authority: it is implausible that we give tacit consent to a government by not emigrating, because emigration is such a high cost—just like we do not consent to the authority of the captain of a ship by not jumping in the water.[5] But the reason why there is no tacit consent in those cases need not be that dissent is so costly. It might just be that staying on the ship cannot count as consent to the authority of the captain, as there are not conventions that would support this. I will argue later in this chapter that one can indeed give consent even when dissent is very costly. And there is no reason why this should be different with tacit consent. Another, more plausible requirement for conventions regarding tacit consent may be that tacit consent should be 'approval tracking': people should normally approve of the things they are taken to have consented to.[6] Ben Saunders objects: 'Someone who has performed the relevant consent action—whether that be signing an explicit declaration or some action understood as tacit consent—cannot escape their obligation simply by saying that they did not mean to give their consent.'[7] That is certainly true, but still the conventions that determine what counts as consent, especially tacit consent, should plausibly be such

[3] Simmons 1998: 168, Wertheimer 2003: 153.

[4] Simmons 1979: 81, Wilkinson 2012: 74.

[5] Hume 1748/1994.

[6] De Wispelaere 2012: 73, see also Wertheimer 2003: 147.

[7] Saunders 2012: 71.

that people usually indeed want what they are taken to be consenting to, given the circumstances.

Regarding the second point (what precisely one consents to when tacit consent is given), again conventions will be decisive. A. John Simmons proposes a plausible principle that conventions should and usually will fulfill, namely that '*all* consent, including *express* consent, should be understood to be consent *to* all and only that which is necessary to the *purpose* for which the consent is given, unless other terms are *explicitly* stated.'[8]

Is there a third form of consent, besides explicit and tacit consent? Recently, David Estlund introduced the idea of 'normative' consent:[9] sometimes people are morally required to give consent; if they wrongly withhold consent nonetheless, then they have given 'normative consent'—which creates the same obligations as actual consent, be it explicit or tacit. This may be so, but a *compromise* cannot be based on normative consent, just like a promise or contract cannot be based on normative consent.

Genuine Consent

Whether consent is explicit or tacit, it must be genuine. There are cases where something looks like consent, but is clearly defective in some sense. Take the case of someone facing a threat to be beaten up if not handing over the money. Even though handing over the money is a second-best for that person, given the circumstances, and although she may utter the words 'I agree,' it is certainly not a 'compromise.' The robbed person is not really consenting or agreeing, and that is the reason why such (apparent) consent is not 'morally transformative': it does not create moral obligations. One can either say that such consent is no consent at all or that such consent is consent, but not 'valid' or 'genuine' consent.[10] I think it is more natural to straightforwardly deny that the robbed person is agreeing or consenting to hand over the money, so I will usually say that it is no consent at all, not 'invalid consent.'

[8] Simmons 1998: 169.

[9] Estlund 2005.

[10] Estlund 2005: 354.

There are two ways to accommodate the intuition that there is no genuine consent in the robber case. First, one can introduce some criteria of voluntariness: consent or agreement must be voluntary and only voluntary agreement can constitute a compromise. The robbed person, in that view, is not voluntarily agreeing to do what the robber wants her to do, and that is the reason why we have no agreement and no compromise at all. Second, one can introduce moral constraints on what a party to a compromise may do or threaten to do in order to get others to agree. On this view, the reason why there is no genuine agreement in the robber case is that the robber makes morally impermissible threats. I will argue that we need both kinds of criteria. For the robber case, though, moral constraints are the decisive criterion that shows why no genuine consent has been given. But let me develop this in greater detail.

Voluntariness

I begin with the first idea, voluntariness. A compromise certainly is something *voluntarily* agreed to. When a person lacks the cognitive or emotional capacities that are necessary to understand what he does in agreeing, then he cannot 'voluntarily' agree. Children, mentally retarded, and intoxicated persons might in that sense not be able to give genuine consent, at least to some things: for example, children may relatively early be able to give consent to spend a week at a boy scout camp, while they are not yet able to give consent to have sexual intercourse.[11] In any case, when people do not have the requisite cognitive and emotional capacities, then their 'will,' so to speak, does not have the transformative power that is needed for consent.

Voluntariness in that sense does not help us in the robber case, though, because we can assume that the victim has the requisite capacities to agree. So should we develop a more demanding notion of voluntariness? We have to be careful. If 'voluntarily' comes to mean something like 'wholeheartedly,' then there would be no compromises at all, because

[11] Wertheimer 2003: chs. 11–12.

compromises are never agreed to wholeheartedly; recall that they are agreed to as a second-best.

Generally speaking, one can give voluntary consent even while being in unfortunate circumstances or while being in a situation where dissent would be very costly. A striking example is the case of a patient whose leg is gangrenous and who must choose between amputation and death.[12] When she consents to having her leg amputated, she voluntarily consents in unfortunate circumstances and under circumstances where dissent would be very costly. Less obviously, the same holds in another case, where a lecherous millionaire offers to pay for the expensive surgery of a child who would die without the surgery, but only on condition that the child's mother becomes his mistress.[13] Again the mother may voluntarily consent though being in unfortunate circumstances and though dissent would be very costly. This is, of course, not to say that what the millionaire does is morally legitimate; his offer is certainly exploitative, and maybe coercive. It is just to say that nonetheless the mother can voluntarily agree to his terms. Alan Wertheimer sums this point up as follows:

> [It] is a mistake to think that difficult circumstances and inequalities should be regarded as invalidating consent in either morality or law. To the contrary. It is scarcity and constraints that explain the need for morally transformative consent. […] Moreover, second best is often the best that people can do. […] It is difficult to defend principles that prevent people from consenting to transactions that will move them from an unjust or unfortunate situation to a better situation.[14]

But what if somebody *puts* another person in an unfortunate condition in order to be able to make his exploitative offer? Take the case of a saboteur who manipulates a woman's car in order to later be able to offer her to repair it if she sleeps with him (say in the desert, where nobody else is around). Can the woman give voluntary and morally transformative consent to sleep with him if he repairs the car? Joel Feinberg denies this.[15]

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[12] Wertheimer 2003: 172.

[13] Wertheimer 2003: 164, 175.

[14] Wertheimer 2003: 191–192, see 1987: 236–237.

[15] Feinberg 1986: 244.

Only when the first party is *not* responsible for the unfortunate situation (as in the case of the lecherous millionaire) can the second party give voluntary and morally transformative consent. I will assume that Feinberg's judgment about these cases is correct. But what explains the difference? In what sense is the woman acting voluntarily and giving genuine, morally transformative consent in the one case, but acting involuntarily and not giving genuine, morally transformative consent in the other case?

Maybe it is that she is exploited only in the case of the saboteur. But if exploitation means 'taking unfair advantage of somebody's situation'—no matter how that is spelled out in detail—then both cases are exploitative.[16] Hence this is not the relevant difference between the two cases.

Maybe it is that only the offer of the saboteur is coercive, while the offer of the lecherous millionaire is not coercive, and coercion undermines voluntariness. This is the idea of David Zimmerman.[17] Before we can assess Zimmerman's idea, at least some words on the tricky subject of offers, threats, and coercion are in place.

In both threats and offers, person *A* announces to person *B* that she will bring about certain consequences just in case *B* does (or does not) a certain thing. So what is the difference? The standard answer is that threats make person *B* worse off relative to some appropriate baseline, while offers make person *B* better off relative to some appropriate baseline.[18] There can also be 'throffers,' when a threat is combined with an offer: a person *A* then makes a proposal according to which she will make some other person *B* better off if *B* does a particular thing (an offer), but to make *B* worse off if she does not that particular thing (a threat).[19] The difficult question is what the appropriate baseline for 'better off' and 'worse off' is. It may be the way things normally go or it may be the way things morally should go. The most prominent defense of an account of threats and offers with a non-moralized baseline is presented by Zimmerman, the most prominent defense of an account of threats

[16] For prominent theories of exploitation, see Wertheimer 1996, Sample 2003.

[17] Zimmermann 1981: 131–138.

[18] Nozick 1969: 447, Wertheimer 1987: 204.

[19] Steiner 1975/1991: 129, Nozick 1969: 449.

and offers with a moralized baseline is presented by Wertheimer.[20] The two baselines can diverge, most obviously in cases of entrenched injustice, like in Robert Nozick's case of a slave-owner who regularly beats his slave, but then proposes to stop beating him in case he does a certain thing.[21] (Is it an offer or a threat?) I will try to stay agnostic on how to determine the appropriate baseline.

How do threats and offers relate to coercion? Not all threats are coercive.[22] First, for a threat to be coercive, the coerced person must *actually* comply *in order* to avoid the threatened consequence. A person is not coerced to do something if she just does not do it, or if she does it, but not to avoid the consequence of not doing it, but because she likes it, for example. For that reason, harmless threats will for the most part not be coercive. Second, and most importantly, the core of a coercive threat is that 'no other choice seems to be "available,"'[23] or, as Harry Frankfurt puts it: '[a] person who is coerced […] has *no choice* but to do it.' And this, it seems, happens when the relative difference in the attractiveness of the options (complying or not complying) is so great that the person cannot but comply, given her preferences.[24]

But if this were all there is to coerciveness, then offers could be coercive too, namely offers where the relative difference in the attractiveness of the options (accepting or not accepting the offer) is very great, and where the person accepts the offer in order to get what is offered. This certainly is the case in both the case of the saboteur and the case of the

[20] Zimmerman 1981, Wertheimer 1987: 206–221, 2003: 165–170. An alternative to baseline-accounts of threats and offers has been offered by Day. According to Day, only threats make conjunctive actions impossible. When somebody threatens to do *X* if I do *Y*, then I can no longer do *Y* without her doing *X*. When somebody offers to do *X* if I do *Y*, I may refuse and still do *Y* without her doing *X*. An additional condition is that I was able to do *Y* before the other person made her proposal (1977/1987: 42).

[21] Nozick 1969: 450–451.

[22] I here do not follow Wertheimer's terminology. According to him, all threats are 'coercive proposals,' but only some threats lead to actual 'coercion.'

[23] Murray and Dudrick 1995: 112.

[24] Frankfurt 1973/1988: 36. Frankfurt suggests that a coercive threat 'appeals to desires or motives which are beyond the victim's ability to control' (1973/1988: 39, 1975/1988: 49, see Feinberg 1986: 191–192). But the coerced person is still *choosing* (Murray and Dudrick 1995: 111, Day 1977/1987: 46), and so the point of coercion lies not so much in a psychological pressure but in the huge difference in the attractiveness of complying and not complying.

lecherous millionaire. In both cases, the woman agrees to sexual intercourse in order to get the help offered and the difference in the attractiveness of the options is very great. So if this account of coercion were correct, then coercion would not mark a difference between the two cases and hence not give us a reason to think that genuine consent can be given in the case of the lecherous millionaire, but not in the case of the saboteur.

However, this cannot be the right account of coercion anyway. It cannot be right because it would not only make exploitative offers like those of the lecherous millionaire and the saboteur coercive, but also morally unproblematic or even generous offers that are very tempting, like when the millionaire simply offers to pay for the surgery for nothing. The difference in the attractiveness of the options (accepting or not accepting) is very great, again, so the woman 'has no choice but to accept,' and she would certainly accept the offer in order to get what is offered. Hence, the generous offer would implausibly have to be classified as being coercive.

This is the point to return to Zimmerman's idea that the offer of the saboteur is coercive, but the offer of the millionaire is not (and, as I put it, that this is the reason why one cannot give *voluntary* consent in the saboteur case). Zimmerman backs his claim with his own account of coercion in offers. All offers are proposals that make the person receiving the proposal better off compared to the non-moralized situation without the proposal, according to this account. The main claim, then, is that 'for *P*'s offer to be genuinely coercive it must be the case that he actively prevents *Q* from being in the alternative pre-proposal situation *Q* strongly prefers.'[25] With this account, the saboteur makes a coercive offer because he has put the woman in the unfortunate situation: he prevents her from being in her strongly preferred pre-proposal situation. The lecherous millionaire, on the other hand, does not make a coercive offer because he does not prevent the mother and her child from being in their strongly preferred pre-proposal situation: he is not responsible for the sickness of the child. So if we accept Zimmerman's account of coercive offers, then we have a reason why the woman cannot give genuine consent to the saboteur, while the mother can give genuine consent to the lecherous millionaire: only the former makes a coercive offer.

[25] Zimmerman 1981: 133.

But Zimmerman's account, I think, is not convincing. I agree with Wertheimer that a person cannot plausibly be 'coerced' to do a certain thing when in doing it she is *better off* relative to the relevant baseline.[26] By definition, an offer makes people better off relative to the relevant baseline, whether that baseline is moralized or not. If one accepts a non-moralized baseline, then both the saboteur and the lecherous millionaire are clearly making offers because they are making the woman better off relative to that baseline. Zimmerman is certainly right about that. But because they are making her better off, their proposals cannot be coercive.[27]

As a side note: With a moralized baseline, one *might* come to the conclusion that both the lecherous millionaire and the saboteur are making a threat, after all, because the baseline is the scenario where the saboteur and the millionaire are doing their moral duty and help the woman without exploiting her. From that perspective, they are issuing a threat not to help if she is not sleeping with them. A threat makes the threatened person worse off and hence can be coercive. It is easy to see, though, that this would again not mark a distinction between the cases of the millionaire and the saboteur.

A second intuition that speaks against Zimmerman's account is that a person cannot plausibly be 'coerced' when a proposal enhances her options and in that sense enhances her freedom. Coercion always restrains the options of the coerced person. True, paternalist coercion can sometimes enhance the coerced person's *long-term* options, as when someone is coercively prevented from selling himself into slavery. But coercion always limits a person's immediate options, the options he has on the table at this particular moment. Zimmerman agrees that making unfree is essential to coercion (as opposed to exploitation).[28] In both the cases of the lecherous millionaire and the saboteur, the women's options have been enhanced

[26] Wertheimer 2003: 171–172. This also speaks against Feinberg's claim that coercive offers are those that 'offer a prospect that is not simply much preferred, but one which is an exclusive alternative to an intolerable evil' (1986: 235).

[27] Interestingly, Wertheimer also points out that in cases like that of the lecherous millionaire, the woman is overall better off with the millionaire, while in cases like the one with the saboteur, she was overall better off without the saboteur, because he had actively put her in the miserable pre-proposal situation (2003: 175–176). This sounds similar to Zimmerman's account. Yet probably he thinks that this can be cashed out by an adequately modeled baseline (see 1987: 237–238).

[28] Zimmerman 1981: 134.

relative to the non-moralized status quo (which seems the adequate baseline for assessments of freedom). Interestingly, this also speaks against a moralized baseline for distinguishing threats and offers because it would mean that there could be coercive threats that are yet freedom-enhancing.[29] In any case, whether the other person had put her in the current situation or not does not seem to make a difference regarding the question whether *now* the proposal enhances her freedom. Of course, putting her in an unfortunate situation was a serious, but *distinct* infringement of her freedom.

Moral Constraints

I conclude that we cannot invoke the criterion of voluntariness (as opposed to coercion) to account for the difference between the saboteur and the millionaire case.[30] The real difference between the two cases must lie elsewhere. It is, as Feinberg puts it, that the saboteur doubly wronged the woman: he not only made an exploitative offer but also violated her moral rights by manipulating her car.[31] And *this*, the violation of her moral rights in order to get her to accept an exploitative offer, is what nullifies the woman's later consent. Likewise in the robber case with which we started this discussion: it is the threat to violate moral rights that nullifies the consent.

Through a long train of thought, then, we have finally come to the second criterion for genuine consent: no party to a compromise may violate certain moral constraints, because such violation nullifies the consent to the compromise.[32] As the details will not matter in our context, I do not have to present a detailed account of what exactly these constraints are. But let me suggest that what nullifies consent will probably be violations of moral rights or threats of moral rights violations made in order to get consent. Not every morally impermissible act or threat invalidates consent.

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[29] Feinberg defends the possibility of *coercive*, yet freedom-enhancing *offers* (1986: 232–233). On this idea, see Wertheimer 1987: 232.

[30] Archard agrees (1998: 56–57).

[31] Feinberg 1986: 244. See also Zimmerman 1981: 134.

[32] Golding argues that, in a negotiated compromise, 'some threats are excluded by something like an equity principle,' it is 'bargaining under constraints' (1979: 15).

People might have the moral right to make some relatively harmless, but immoral proposals.[33] One can give genuine consent after facing an immoral threat, coercion, or exploitation. But one cannot give genuine consent when the other party violated one's basic moral rights in order to get one's consent or made threats to violate one's basic moral rights in order to get one's consent. (Depending on one's views about what basic moral rights people have, some forms of exploitation may count as a violation of basic moral rights.)

Another important way to violate basic moral rights in order to get 'agreement' is to deceive the other party (in certain ways—not every deception is a violation of a moral right). Wertheimer argues consistently that it is not the harm but the violation of rights that makes deception wrong.[34] Deception can take different forms: one can simply lie, but it is also possible to deceive by concealing certain relevant facts.[35] The deception can concern either the arrangement to be agreed to itself or certain background information that is relevant for the other party.[36] A seller of cars, for example, can deceive the potential buyer either regarding the car itself or regarding the certificates the car selling company has gained.

Summary

Compromises are something agreed to. Consent can be explicit or tacit, but it must be genuine. Whether consent is genuine does neither depend on whether one faces offers or threats, nor does it depend on whether these offers or threats are coercive or exploitative. Instead it depends, first, on whether one has the cognitive and emotional capacity to give voluntary consent, and, second, on whether the other party to the compromise violated basic moral rights in order to get one's consent or threatened to violate basic moral rights. When consent is not genuine, then there is no genuine compromise as well.

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[33] See Wertheimer 2003: 151.

[34] Wertheimer 2003: 199–204.

[35] Wertheimer 2003: 195.

[36] Wertheimer 2003: 197. There is a corresponding legal distinction between fraud in the factum and fraud in the inducement.

5

Types of Compromises

In Chaps. 2–4, I developed a picture of what compromises are. In this chapter, I distinguish different kinds of compromises: principled and pragmatic compromises, rational compromises, fair compromises and, finally, rotten compromises. These distinctions will be helpful in what I call the 'deontic morality of compromising' (Chap. 15).

Principled and Pragmatic Compromises

First of all, one can distinguish compromises according to the kinds of reasons to make them. I already said that one can make compromises for moral or non-moral reasons. Equally important is Simon May's distinction between pragmatic and principled reasons to compromise.[1] We often have reason to compromise because compromising is the only way to cooperate with others and thus to better realize our goals. When we compromise for that reason, then we have 'pragmatic reasons' to compromise, as May calls them.[2] For example, when one buys a used car from a

[1] May 2005.
[2] May 2005: 320.

F. Wendt, *Compromise, Peace and Public Justification*,
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private person, one has pragmatic reasons to compromise on the price, for example. Compromises made for pragmatic reasons can be called 'pragmatic compromises.'

Often, we make pragmatic compromises in order to best realize our non-moral goals. But sometimes we compromise for pragmatic reasons in order to best realize our *moral* goals. In other words, there are pragmatic moral compromises.[3] For example, when a person works for an organization that has the (moral) goal of a world in which no fishes are killed, then the person might have pragmatic reason to agree to a compromise that does not straightforwardly prohibit the killing and consumption of fish, but establishes institutions that protect fish to a greater extent than before. This might be the best the organization can do at the moment in order to get closer to its moral goal, and so it has pragmatic reasons to compromise.

It should be noted that pragmatic moral compromises need not be made for moral reasons. Pragmatic reasons *can* be moral reasons to agree to less than the morally best$_1$ arrangement, for example, when the value of peace provides pragmatic moral reasons (see Chaps. 8 and 14). Such pragmatic reasons are moral reasons to make a moral compromise. But pragmatic reasons can also be reasons to agree to less than the morally best$_1$ arrangement when the morally best$_1$ arrangement is simply not feasible. Such pragmatic reasons are not *moral* reasons to make a pragmatic moral compromise, but non-moral reasons to make a pragmatic moral compromise (as I argued in my seventh comment in Chap. 3). But as my concern in this book are moral values that provide moral reasons to make moral compromises, I will, for the most time, discuss moral compromises that are made for moral reasons, including pragmatic moral reasons.

The other kind of reasons we may have for both moral and non-moral compromises are, in May's terminology, 'principled' reasons. Principled reasons are reasons to agree to a compromise that do not refer to the compromise as an instrument to attain some goal. Using Philip Pettit's distinction between honoring and promoting values, one could say that one honors values in making a compromise for principled reasons, while

[3] Jones and O'Flynn 2013: 121, May 2005: 320.

one promotes values in making a compromise for pragmatic reasons.[4] Compromises made for principled reasons can be called 'principled compromises.' Principled reasons to compromise will often be moral reasons, but they can also be (non-moral) epistemic reasons. In this book, I will deal with principled *moral* reasons only, though.

Compromises can of course be made for both pragmatic and principled reasons at the same time. How should such compromises be classified? If a person would not compromise without the relevant principled reasons, then the compromise should count as a 'principled compromise,' otherwise it should count as a 'pragmatic compromise.'

As a side note: Daniel Weinstock has argued that consequentialist moral theories should also count as providing principled moral reasons. He writes: 'I see no reason, other than a dogmatic rejection of consequentialism from the set of plausible moral theories, to deny this kind of compromise the moniker of "principled."'[5] In fact, consequentialist theories might be able to accommodate the idea of principled moral reasons. Consequentialists could say that what we regard as principled moral reasons are reasons based in 'secondary rules'[6] or in rules of thumb on the level of 'intuitive thinking,'[7] for example. But a direct appeal to consequences should indeed not count as providing principled moral reasons, because such reasons are not reasons to honor some value but to promote some value.

May has argued that in politics—though not in private life—there are only pragmatic reasons to compromise (see Chap. 14).[8] In this chapter, I will concentrate on private life examples to make the existence of principled reasons to compromise plausible. Later, I will argue that there in fact are principled moral reasons to compromise in politics. The more straightforward case is non-moral compromises. When a person plans a camping trip with friends, she has principled moral reasons to accommodate their interests and accept arrangements that she deems suboptimal from the

[4] Pettit 1991/2002: 97.

[5] Weinstock 2013: 552–554.

[6] Mill 1863/2002: 251, 256–259.

[7] Hare 1981: chs. 2–3.

[8] May 2005.

point of view of her interests. Of course, she also has pragmatic reasons to compromise in that case, but she arguably has principled moral reasons as well (having to do with the value of friendship). For that reason, she might have principled moral reasons to accept a camping trip that involves fishing, even though she does not like fishing, just because her friends love fishing so much and because the value of friendship is important.

Much more suspect may be the idea that there can also be principled moral reasons to agree to *moral* compromises. But at first sight, the possibility of principled moral reasons to agree to moral compromises seems equally straightforward as the possibility of principled moral reasons to agree to non-moral compromises. When the person not only dislikes fishing but is a vegetarian who thinks it is morally wrong to kill animals, then she seems to still have the same principled moral reasons to compromise, reasons that have to do with the value of friendship. Again, she would thus have a principled reason to accept a camping trip where at least some time is dedicated to fishing, even though she thinks it is morally wrong to kill animals. In other words, she has a principled moral reason to make a moral compromise.[9]

The distinction between two levels of moral evaluation captures nicely what happens in this example. When the vegetarian thinks about ways to spend her vacation, then a camping trip that includes fishing is certainly not the morally best$_1$ arrangement. So if she comes to accept a camping trip that involves fishing, she must have made a moral compromise. When she takes notice of the fact that her friends disagree with her on the issue of the moral standing of animals, and acknowledges that the value of friendship is a second-level moral consideration that can allow or even require concessions on moral issues, she might come to the conclusion that she should agree to the compromise that involves fishing, all things considered. The camping trip with some fishing activity becomes the morally best$_2$ arrangement or at least one of the morally acceptable$_2$ arrangements. Hence, she makes a moral compromise for moral reasons.

[9] For another example, see May 2011: 585–586.

Rational Compromises

I will not be able to develop and defend an original theory of what makes a compromise rational. Nonetheless, I want to at least describe the options and tentatively suggest what might be the most appropriate conception of rational compromises.

Generally speaking, a compromise is rational just in case it is rational for all of the parties to agree to the compromise, and a compromise is irrational just in case it is irrational for at least one of the parties to agree to the compromise. Quite clearly, it is irrational for a person to agree to a compromise that makes things worse for her compared to the situation without the compromise. Employing the language of decision and game theory, 'better' and 'worse' can be understood in terms of preference satisfaction. If agents have well-ordered preferences (transitive, complete, etc.), then their preferences can be captured by a utility function and 'utility' can serve as a measure of preference satisfaction. Personal interests and likings as well as moral convictions can be modeled as preferences. Accordingly, the distinction between conflicts of interests and moral conflicts disappears when all these things are modeled as preferences represented in a utility function. Both first- and second-level moral values can be modeled as preferences. Rationality, then, can be understood as the maximization of expected utility. So described, the question we are dealing with is how agents can maximize expected utility in bargaining situations.[10] And the first step is the claim that it is irrational to agree to a compromise that makes one worse off in terms of utility compared to having no agreement.[11]

But this is not all we can say about rationality and irrationality in compromising. Among the arrangements that actually make all parties better off, some are not rational to agree to: it is irrational to agree to a compromise that makes all parties better off compared to not having any agreement at all, but makes all parties worse off compared to *other* available arrangements. In other words, rational compromises are Pareto-optimal,

[10] Gauthier 1986: 145.

[11] I leave out compliance problems. I assume that people can stick to the terms of the compromise, and so deal with what Gauthier calls 'ex ante agreement' (1986: 14).

irrational compromises are not Pareto-optimal. Yet there may be several available Pareto-optimal compromises. Is there some criterion to discriminate between rational and irrational compromises among them? In fact, game theorists have often assumed that there must be exactly *one* rational compromise in every bargaining situation: the aim has been to pick out exactly one rational agreement as the 'solution' to the 'bargaining problem.'[12]

Relevant for our context are cooperative non-zero-sum games. Games are non-zero-sum when all players can win something, although no player can get everything she wants. This is the situation where compromises are rational to make: a situation where all players can agree to an arrangement as a second-best (i.e. no player gets everything), which they judge as being better than having no agreement at all (i.e. all win something from cooperation). A game is cooperative when the players can communicate.[13] This is where bargaining takes place. Earlier, I emphasized that compromises do not have to be preceded by a bargaining process. Sometimes, though, there is at least 'tacit bargaining' involved,[14] and when not even tacit bargaining is involved, it is plausible to think that it is rational to agree to accept an arrangement just in case rational bargaining *would* have led to this particular compromise. Thus I assume that the following is relevant for all compromises, not only compromises with preceding bargaining procedures.

So let me ask again: what makes a compromise rational beyond making all parties better off and being Pareto-optimal? I will try to give a simplified and non-technical description of the most prominent answers. The most prominent answers are provided by John Nash and John Harsanyi, David Gauthier and Thomas Schelling. I start with Gauthier.

Gauthier explains the bargaining process in two stages:[15] on the first stage, each person proposes an arrangement to agree on. Usually, the parties propose different arrangements: person *A* proposes an arrangement that grants more utility to *A* than the arrangement proposed by *B* which,

[12] Nash 1950.

[13] Nash 1953: 128.

[14] Schelling 1960: ch. 3.

[15] Gauthier 1986: 133. His account is based on Kalai and Smorodinsky 1975.

in turn, grants more utility to *B* than the one proposed by *A*. On the second stage, the parties make concessions: they now propose arrangements that grant less utility to themselves and more utility to the other parties, compared to their original proposals. On the first stage, says Gauthier, it is rational for each party to claim the 'largest possible portion' of the cooperative surplus to which she contributes.[16] On the second stage, Gauthier argues, it is rational for a person to concede when the relative magnitude of her concession is not greater than that of the concession any of the other parties is supposed to make.[17] The relative magnitude of a concession can be determined without interpersonal comparisons of utility.[18] Instead, it is explained as follows: the absolute magnitude of a concession is the difference in utility between the compromise a party originally proposed and the compromise she is now supposed to accept. The absolute magnitude of a 'complete concession' is the difference in utility between the compromise the party originally proposed and the utility she has at the initial bargaining position (i.e. without getting to any agreement at all). The relative magnitude of a concession is the proportion between these two utility differences.[19] When all parties make rational concessions on the second stage, they end up with a compromise that demands the smallest possible relative concession from any of the parties.[20] This is the 'principle of minimax relative concession.'[21] It determines one uniquely rational compromise among the available arrangements that make all parties better off and are Pareto-optimal.

The relative magnitude of concessions does not play any role in the Nash–Harsanyi account of rationality in bargaining.[22] Nash argues, basically, that the rational compromise is determined by the relative bargaining and threat advantage of the parties.[23] As Harsanyi explains,

[16] Gauthier 1986: 134, see 1986: 143.

[17] Gauthier 1986: 143.

[18] Gauthier 1986: 134.

[19] Gauthier 1986: 136.

[20] Gauthier 1986: 137, 140.

[21] Gauthier 1986: 137, 145. It is also employed in Gaus 1990: 347, ch. 9.

[22] For a comparison between the Nash–Harsanyi solution and his own, see Gauthier 1986: 146–150.

[23] Nash 1950, 1953.

> in Nash's theory each party is ready to exert pressure on the other party by the threat of a strike whose actual occurrence, if agreement failed, would cost the threatening party more than a concession would, provided the threat is likely to exact better terms from the other party if agreement succeeds.[24]

In other words, whether a threat is rational to make depends on the proportion between the increased costs of not getting an agreement to oneself and the increased costs of not getting an agreement to the other party. The person who proportionally loses more when no agreement on a compromise can be achieved rationally concedes. In the end, the rational compromise rational parties end up with is the one that maximizes the product of the differences between the utilities that the individuals have without a compromise and the utilities they gain with the compromise.[25]

Schelling presents a very different account of rationality in bargaining. His theory is most commonly applied to coordination problems where the parties do not have conflicting interests, but have to coordinate on one out of two (or more) equally good arrangements (e.g. on a meeting point). When the parties coordinate on such an arrangement, they are not making a compromise. But Schelling's theory can also be applied to more conflictual situations like the ones we are dealing with.[26] According to him, it is the 'intrinsic magnetism' of certain compromises that makes them the subject of rational agreement, and sometimes several possible compromises will have that magnetism.

> The final outcome must be a point from which neither expects the other to retreat […]. If we then ask what it is that can bring their expectations into convergence and bring the negotiation to a close, we might propose that it is the intrinsic magnetism of particular outcomes, especially those that enjoy prominence, uniqueness, simplicity, precedent, or some rationale

[24] Harsanyi 1956: 154, see Nash 1953: 131.

[25] For much more detailed exposition and discussion, see Harsanyi 1956, 1977: ch. 8, Luce and Raiffa 1957: 124–134.

[26] Barnett 1983: 623–626.

that makes them qualitatively differentiable from the continuum of possible alternatives.[27]

These arrangements are 'focal points;' there are psychological reasons why parties to a compromise usually agree on such points. But the main reason why they are focal points is that, according to Schelling, there just is nothing else speaking in favor of particular possible arrangements relative to others. Of course, Schelling's account will often not determine *one* rational compromise. There may be several focus points. But his theory will scale down the class of rational compromises at least a bit.

I now come to objections to the three accounts. I begin with Schelling. A main objection to Schelling's account is that there may be a good psychological explanation why people agree on focal points, but that it is much less clear that it is *rational* to accept a compromise just because it has some 'magnetism.' Focal points seem arbitrary, from a rational point of view.[28] Much more would have to be said, but this is not the book to do so. The objection, in a nutshell, is that Schelling does not provide an account of rationality in bargaining, but a psychology of bargaining.

It has been argued that neither is Gauthier's principle of minimax relative concession a principle of *rationality* in bargaining. Gauthier explains why it is irrational to concede relatively more than others: 'Since each person, as a utility-maximizer, seeks to minimize his concession, then no one can expect any other rational person to be willing to make a concession if he would not be willing to make a similar concession.'[29] But, as Gilbert Harman rightly remarks, the second part hardly follows from the first.[30] There just is no argument why it could not be rational to concede relatively more than the other party, namely when the other party has a greater threat advantage and hence can *afford* to concede relatively less. If one has the greater threat advantage, it seems clearly not irrational to expect others to make a concession one would not be willing to make oneself.

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[27] Schelling 1960: 70.

[28] See Harsanyi 1961: 193, Gauthier 1975: 207–211, Harman 1988: 8. But see also Sugden 1995, 1993: 167–172, Janssen 2001.

[29] Gauthier 1986: 143–144.

[30] Harman 1988: 7.

In light of these objections against Schelling and Gauthier, the Nash–Harsanyi theory seems most widely accepted among game theorists today. Even Gauthier later changed his mind.[31] But let me briefly discuss a worry one could have regarding the Nash–Harsanyi theory as an account of rational compromises. One may argue that it is not an adequate account of rational compromises because it does not take stability issues seriously. Michael Moehler proposes an 'amended' Nash solution according to which we should distribute 'each according to her basic needs and above this level according to her relative bargaining power' as a more stable solution to the bargaining problem.[32] Somewhat similarly, Edward McClennen argues that bargaining in accordance with Nash's model tends to produce resentment because not giving place for fairness considerations and argues, more radically, that 'the only arrangement acceptable to all would be an equal division.'[33] It is important to see, though, that both Moehler and McClennen are concerned with a very special case of compromising, namely with social contract theory, that is, a compromise on very basic moral or political principles for society. In this book, I am not concerned with social contract theory. My concern in this chapter are rational compromises in general, not rational compromises on a social contract. McClennen concedes that in many other contexts, the Nash–Harsanyi solution is perfectly appropriate.[34] Yet Moehler's and McClennen's stability argument could be taken to show that the standard (unamended) Nash–Harsanyi solution is at least sometimes not the adequate account of rational compromises. But I do not think that Moehler's and McClennen's argument can show this (nor is it their intent to show this, as far as I can see). If people with a greater threat advantage have indeed a long-term interest in stability, such that they are better off in not fully exploiting their threat advantage, then it is of course

[31] Gauthier 1993: 177–178, 2013. Some have objected that even the Nash–Harsanyi solution makes use of at least one assumption that it cannot make in the name of rationality (Schelling 1960: 267–290, Thrasher 2014: 693). It assumes (in some sense) a symmetry among the parties. For a defense of symmetry, see Harsanyi 1961: 189. For discussion see also Sugden 1993: 162–167.

[32] Moehler 2010: 448, 452–455. In another article he presents a generalized and universalized version of the amended Nash solution as a general principle of conflict resolution (2012: 95–101).

[33] McClennen 2012: 70, 73–74.

[34] McClennen 2012: 83.

rational for them to not fully exploit their threat advantage. But this is just another way of saying that their threat advantage is not that great, after all, when they consider their long-term interest in stability. To not accept the Nash solution as a basic political principle in a social contract (i.e. as the *content* of a compromise), but to instead accept Moehler's amended Nash solution or McClennen's equality principle, may simply be rational according to the standard Nash–Harsanyi account of rationality in compromising, as soon as the parties consider their long-term interest in stability.[35]

So let us assume that it is indeed the Nash–Harsanyi solution that presents the criterion for rational compromises. There is one caveat, though: recall that there are moral considerations built into our account of compromises: if persons violate basic moral rights in order to get the other parties to agree, or if they threaten to violate basic moral rights to get the other parties to agree, then the arrangement is not genuinely agreed to and hence not something appropriately called a compromise (see Chap. 4). Therefore, according to my account, a rational compromise is determined by the bargaining and threat advantage of the involved parties, but within the moral constraints that allow genuine agreement and thus compromises. It may sometimes be rational to threaten to violate basic moral rights, but it does not lead to a rational *compromise*. A compromise is rational if and only if it is rational for all parties to accept it, given the moral constraints that secure genuine agreement.

Fair Compromises

I now come to the notion of fair compromises. Earlier (in Chap. 4), I followed Wertheimer in arguing that compromises can be made in very unfortunate situations, when not agreeing is very costly, and even when the other party makes an exploitative offer. It is beyond the scope of this book to explicate the ways in which an initial bargaining position can be unfair (although I of course do not deny that initial bargaining positions

[35] Moehler argues that McClennen cannot claim this for his equality principle (2015). He argues that rationality is *morally constrained* by the moral ideal of equality in McClennen's account.

can be unfair). Following Gauthier, one should distinguish between the fairness of compromises given the initial bargaining position, and the fairness of the initial bargaining position.[36] A compromise can be unfair, even though the initial bargaining position was fair; and a compromise can be fair, even though the initial bargaining position was unfair.

And there is another distinction to be made. We can distinguish between the fairness of the process of bargaining (if there is such a process) and the fairness of the outcome, that is, of the arrangement the parties agree to in the end.[37] Fair bargaining processes may lead to unfair arrangements and fair arrangements may be agreed to after an unfair bargaining process. All this, to repeat, can happen against the background of an unfair or fair initial bargaining position.

Let us first consider outcome fairness, the fairness of the arrangement agreed to in a compromise. There seems to be wide agreement that Nash's bargaining solution is not a fairness criterion. Rawls remarks that 'to each according to his threat advantage is hardly the principle of fairness.'[38] Gauthier's principle of minimax relative concession is a much more plausible candidate for a fairness criterion.[39] The most promising argument for making Gauthier's principle of minimax relative concession the default principle of outcome fairness is that it gives everyone what she *deserves.* This is so because the principle is sensitive to the relative contribution each party makes to the cooperative surplus and demands that relative to that contribution everyone has to make an equal relative concession. Robert Sugden writes that the principle of minimax relative concession 'corresponds fairly closely with some common intuitions about fairness or impartiality.'[40] But other moral considerations, having to do with the parties' needs, for example, can also become relevant for the fairness of an arrangement. What makes a compromise fair depends on the circumstances, in the end. But at least in cases where no other moral considerations are relevant, the principle of minimax relative concession can be

[36] Gauthier 1986: 151, see also Luce and Raiffa 1957: 129–130.

[37] Golding 1979: 7–8, Jones and O'Flynn 2013: 122–128.

[38] Rawls 1958: 177, see 1971: 134, 2001: 16.

[39] For a different notion of fairness in bargaining, see Braithwaite 1955.

[40] Sugden 1993: 159.

considered a plausible criterion of fairness. In other words, it can be considered the default principle of fairness regarding the arrangements agreed to in a compromise.

What about the fairness of the bargaining procedure (if there is such a procedure)? A bargaining procedure may be judged fair because it tends to lead to a fair arrangement, or it may be judged fair independently, without regard to its tendency to produce certain outcomes.[41] If it is judged fair independently, one can speak of 'pure procedural fairness.'[42] Yet it is not clear whether there is anything to be said about pure procedural fairness in bargaining. Peter Jones and Ian O'Flynn make some brief remarks:

> [W]e might imagine ourselves specifying conditions that govern the relative starting points of the parties to a negotiation, the kinds of pressures they can and cannot legitimately bring to bear upon the process, the types of information they should be required to divulge and the types they can legitimately keep to themselves, and so on.[43]

But the fairness of the initial bargaining position (the starting points) has nothing to do with the fairness of the bargaining procedure. Constraints on legitimate pressures and the withholding of information are certainly part of the fairness of a procedure. But an agreement based on a procedure in which one of the parties violates these constraints are not compromises based on unfair procedures, but are not compromises at all, because they were not genuinely agreed to (Chap. 4).

Jürgen Habermas can be read as offering an account of pure procedural fairness in bargaining. According to him, compromises are fair when the bargaining procedure meets certain requirements. He writes:

> More specifically, the negotiation of compromises should follow procedures that provide all the interested parties with an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all the affected interests can come into play and

[41] Jones and O'Flynn 2013: 122–123.

[42] Rawls 1971: 85.

[43] Jones and O'Flynn 2013: 123.

> have equal chances of prevailing. To the extent that these conditions are met, there are grounds for presuming that negotiated agreements are fair.[44]

The constraints on legitimate pressure that Habermas envisions seem to be much tighter than the constraints set by people's moral rights: they are equalizing bargaining power. I am not sure, though, whether equalizing bargaining power leads to procedural fairness. If we abstract from the fairness of the initial bargaining situation, nothing seems to be unfair about letting bargaining power influence the bargaining process. Of course, when the initial bargaining situation *is* unfair, then letting unequal bargaining powers prevail indeed is unfair, but this is not due to unfair procedures, but to the unfair initial bargaining situation. Maybe Habermas means that equalizing bargaining power in the process just is a means of getting to a fair initial bargaining position. But it is far from obvious that a fair initial bargaining position need always be one where bargaining power is equal. Some parties may deserve the assets that constitute their bargaining power, or at least they may be entitled to them.

So far, then, I do not think that we have an account of pure procedural fairness in bargaining. Fair bargaining procedures should thus be seen as those that tend to lead to fair compromises (as an outcome). I leave open what these procedures are and whether there is anything useful to be said on a general level.

Two final comments on fair compromises. Jones and O'Flynn wonder why we should allow people to agree on unfair compromises. If there are criteria for the fairness of a compromise, why concede people the right to make an unfair compromise? In reply to their own challenge, they present several good reasons why people should be entitled to settle on compromises as they see fit.[45] But nonetheless 'they may still have moral reason to exercise that entitlement in one way rather than another.'[46] With Jeremy Waldron, one can say that people have a 'right to do wrong' when they have the moral right to settle on unfair compromises.[47]

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[44] Habermas 1992/1996: 166–167.

[45] Jones and O'Flynn 2013: 128–129.

[46] Jones and O'Flynn 2013: 127.

[47] Waldron 1981.

A second comment: some might worry that rational compromises and fair compromises become antagonists, when Gauthier's principle of minimax relative concession is taken as an account of fair compromises while Nash's bargaining solution is taken as an account of rational compromises. It could seem that it becomes immoral to be rational in compromising. My reply is that people are not always morally required to aim at a fair compromise. On many occasions, it is morally permissible to aim at a rational compromise. Even stronger, sometimes it is even moral impermissible to aim at a fair compromise. But indeed, at other times, people are morally required not to aim at a rational compromise. I will explain these claims in Chap. 15.

Rotten Compromises

Recently, Avishai Margalit has made the notion of 'rotten compromises' prominent.[48] The idea behind introducing the notion of a 'rotten compromise' is, I think, to have a concept to denote compromises that make one's hands dirty.[49] What makes one's hands dirty in accepting a compromise is most plausibly that one agrees to an arrangement that is morally bad_1 (or very bad_1).[50] (On this notation, see Chap. 3) Hence, I propose to define rotten compromises as compromises on arrangements that do not come reasonably close to the morally $best_1$ arrangement. Let us call this the *moral badness$_1$*-account of rotten compromises.

The relevant badness can be agent-relative.[51] In such cases, the person making the compromise has to do some morally very bad_1 thing by herself. I hope that such cases are subsumed by the moral $badness_1$-account: cases where a person has to do something that is agent-relatively morally

[48] Margalit 2010.

[49] On the 'problem of dirty hands,' see Walzer 1973. According to Walzer, in politics, one necessarily gets dirty hands: one sometimes has to violate important moral principles in order to attain some more important good. But a good politician, he argues, should nonetheless feel guilty when doing so (1973: 166–172).

[50] A related idea is that rotten compromises involve the sacrifice of core moral principles (Kuflik 1979: 44–48).

[51] On the distinction between agent-relative and agent-neutral values, see Nagel 1986: 164–188, Mack 1989: 83–99.

bad_1 will usually also count as morally bad_1 simpliciter. But not all morally bad_1 arrangements will require one of the parties to do something agent-relatively morally bad_1, of course. The notion of moral $badness_1$ is broader than that of agent-relative moral $badness_1$.

One might ask whether rotten compromises also have to be *known* to be morally bad_1. The answer, I think, must be 'yes.' The claim that one can make a rotten compromise without knowing it has paradoxical consequences: one could make a rotten compromise without making a compromise at all (because thinking that one has established the morally $best_1$ arrangement). Hence, we must again presuppose the perspective of a model politician, that is, of a person who is right about what would be morally $best_1$ and is justified in believing to be right. Such a person cannot make a rotten compromise without knowing it.

The expression 'rotten compromise' has no definite meaning in English, so it should be legitimate to simply stipulate that rotten compromises are compromises that do not come reasonably close to the morally $best_1$ arrangement, when this stipulation has at least some plausibility. Nonetheless, I would like to discuss alternative accounts of rotten compromises and assess their merits.

Unlike in English, the expression 'rotten compromise' is widely used in German ('fauler Kompromiss'). But the meaning is not quite definite in German either. There are at least two different accounts that can be extracted from ordinary usage. The first can be called the *bad deal-account*. According to that account, a rotten compromise is a compromise in which I concede much more than the other parties. It is, in other words, a compromise that is a bad deal for me and is therefore rotten only from my perspective (or from the perspective of people sympathetic to my goals). But if we want to stick to the idea that making a rotten compromise means getting dirty hands, then we should reject this account. Sometimes, when the bad guys make a bad deal, the compromise may even be $better_1$ *because* one of the parties got a bad deal.

The second account can be called the *failure*-account. According to that account, a rotten compromise is a compromise that does not work. There are two main ways in which a compromise might not work. First, it can be counterproductive, making things worse relative to the goals the parties wanted to attain through compromising, compared to the situation

without the compromise. Second, it can realize the goals of the parties, although maybe to a small extent only, but have (foreseen or unforeseen) side effects that make the parties overall worse off compared to the situation without the compromise. Again, if we would like to stick to the idea that making a rotten compromise means getting dirty hands, then we should reject this account. It is certainly irrational to accept a compromise that does not work, but it is not morally relevant (at least usually).

So if we want to stick to the idea that making a rotten compromise means getting dirty hands, as I think we should, then we have to deviate from (German) ordinary language. This, I think, is legitimate. Margalit develops a notion of rotten compromise that adheres to the idea that making a rotten compromise means getting dirty hands. His main claim in his book is that there is wide moral room for making compromises for the sake of peace. But, according to Margalit, there is one kind of compromise that we are never morally justified to make: rotten compromises.[52] Metaphorically, Margalit says, a rotten compromise is like a soup with a huge cockroach in it.[53] There is something to a rotten compromise that makes it just unacceptable. Margalit's central claim about rotten compromises, then, is that they are always morally wrong to make, all things considered (i.e. it is morally wrong$_2$ to make them). They are never within the range of morally acceptable$_2$ compromises.

So what is it that makes compromises rotten, what is it that makes them morally wrong$_2$ to make? What is the cockroach in the soup? In fact, as far as I can see, Margalit suggests two different accounts. On the *inhuman regime*-account, as I would like to call it, rotten compromises are compromises that help to maintain an inhuman regime. Margalit writes, for example: 'The Constitution was based on a rotten compromise. It was rotten […] because it did help maintain an inhuman regime for a whole desert generation (indeed more than one).'[54] It is not clear, though, whether Margalit thinks we can identify a compromise as rotten without knowing the consequences of *not* accepting the compromise. Maybe he

[52] Margalit 2010: 4.

[53] Margalit 2010: 61, 97–98.

[54] Margalit 2010: 61. He refers to the American constitution and the institution of slavery. On Yalta as a rotten compromise because stabilizing Stalin's inhuman regime, see 2010: 98.

thinks that compromises are rotten just in case the consequences of *not* accepting them are morally better$_2$, all things considered. One problem with this interpretation is that it means, in the end, giving up the inhuman regime-account because *some* compromises helping to maintain an inhuman regime would no longer count as rotten, namely those where the consequences of not accepting the compromise are even worse$_2$. The consequences could be worse$_2$ because one helps to maintain two other inhuman regimes by not accepting the compromise, or because the lives of many people living under the inhuman regime could be saved by accepting the compromise. The claim that it is always morally wrong$_2$ to make a rotten compromise would become trivially true, because compromises helping to maintain an inhuman regime would only count as rotten if it is morally wrong$_2$ to make them. So maybe he thinks that compromises that help to maintain an inhuman regime are always rotten, even when the consequences of not accepting the compromise are morally worse$_2$. But when a compromise is said to be rotten even in those cases, then it seems implausible that it is always morally wrong$_2$ to make a rotten compromise (all things considered). It is not clear which of the two interpretations comes closer to Margalit's intentions. For example, he writes: 'Compromises should never be allowed in cases of crimes against humanity, except to save the lives of the people threatened by such regimes.'[55] Either compromises are rotten even when they save the lives of people threatened by such regimes, then it seems false that it is always morally wrong$_2$ to make such a compromise. Or compromises are only rotten when the consequences of not accepting them are better$_2$, then some compromises that help stabilize an inhuman regime are not rotten after all. A more general worry regarding this account is that it seems arbitrary: there are many sorts of horrible consequences, and helping to maintain an inhuman regime is only one of them.

The second account of rotten compromises suggested by Margalit can be called the *evil person*-account. According to this account, rotten compromises are moral compromises made with evil persons, with persons who 'undermine morality itself.' Margalit's main example is Adolf

[55] Margalit 2010: 63.

Hitler.[56] He writes: 'The Munich agreement is a rotten compromise, not predominantly because of its contents, but because it was Hitler who signed it.'[57] The two accounts suggested by Margalit are related. Inhuman regimes undermine morality itself, and evil political leaders are leaders of inhuman regimes. But there are other evil political agents, of course. Terrorists are an example. In any case, the second account of rotten compromises faces the same dilemma as the first: again we can ask whether compromises with evil persons are rotten even when the consequences of not accepting them are morally worse$_2$. If they are said to be rotten only when the consequences of not compromising are morally better$_2$, then the evil person-account is abandoned and it becomes trivially true that it is always morally wrong$_2$ to make rotten compromises because only compromises with evil persons that are morally wrong$_2$ to make would count as rotten. If, on the other hand, compromises are said to be rotten even when the consequences of not compromising are morally worse$_2$, then it becomes unclear why it should always be morally wrong$_2$ to make rotten compromises. Again it is unclear which reading comes closer to Margalit's intentions. He writes:

> Not every agreement with Hitler's regime is rotten by definition. For example, had the deal offered to the Allies by Adolf Eichmann on behalf of the SS's highest authorities been accepted, bartering for the lives of a million Hungarian Jews by supplying Nazi Germany with ten thousand trucks for civilian use, I would not have considered its acceptance by the Allies rotten.[58]

Either it is not always morally wrong$_2$ to make rotten compromises or some compromises with evil persons are not rotten after all. Again, a more general worry regarding this account is that it seems arbitrary: why declare compromises with evil persons as rotten when, for example, there can also be compromises that help to maintain an inhuman regime without being a compromise with an evil person.

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[56] Margalit 2010: 22–23. He also considers Stalin, but claims that Stalin is a 'lesser kind of evil' (2010: 190).

[57] Margalit 2010: 21.

[58] Margalit 2010: 23, see also 2010: 89, 137.

The main problem for Margalit, then, is that he cannot adhere to the evil person- or inhuman regime-account of rotten compromises while claiming that it is always morally $wrong_2$ to make a rotten compromise. Because both accounts also seem somewhat arbitrary, we should reject them. Now Margalit could instead uphold a moral $wrongness_2$-account of rotten compromises, according to which rotten compromises are simply compromises that are morally $wrong_2$ to make. The disadvantage, I think, is that this account no longer says anything about what cockroaches are. Admittedly, though, my own moral $badness_1$-account is not much better in this regard. What makes compromises morally bad_1 and $wrong_2$ can of course be that they help to maintain an inhuman regime. Compromises with evil persons will also often be morally bad_1 and $wrong_2$. But these are just two examples of cockroaches. It can also be other things that make a compromise morally bad_1 and morally $wrong_2$. So both the moral $badness_1$-account and the moral $wrongness_2$-account keep silent about what cockroaches are, about what makes a compromise morally bad_1 or $wrong_2$, respectively. This, I think, is unavoidable.[59] Yet how should we decide between the two accounts? The moral $badness_1$-account is, I think, more interesting and useful than the moral $wrongness_2$-account. The moral $wrongness_2$-account in the end states that there are soups with cockroaches and that we should never eat them. The moral $badness_1$-account, in contrast, states that there are soups with cockroaches and that we sometimes have to eat them. Thus the moral $badness_1$-account lets rotten compromises play a role in the description of an important moral phenomenon: we sometimes have conclusive moral reasons to accept an arrangement that is morally very bad_1. Morally very bad_1 arrangements can be among the morally $acceptable_2$ arrangements, all things considered.

Summary

In this chapter, I distinguished several types of compromises. In pragmatic compromises, one makes a compromise to attain some goal (e.g. to promote some value). In principled compromises, one makes a compromise

[59] See also Gutmann and Thompson 2010: 1131–1132, 2012: 49–50, 78–80.

to honor some value. Both pragmatic and principled compromises can be moral compromises, and both can be made for moral reasons. Nash's bargaining solution can be regarded as the criterion for rational compromises, at least as long as the moral constraints that allow genuine agreement are not violated. Gauthier's principle of minimax relative concession is a plausible candidate for being the default criterion for fair compromises, when abstracting from the fairness of the initial bargaining position. Rotten compromises should be understood as compromises that establish arrangements that do not come reasonably close to the morally $best_1$ arrangement (i.e. are morally very bad_1).

Part II

Peace

6

Peace and Modus Vivendi Arrangements

Peace is an important moral value, yet it is surprisingly neglected in contemporary political philosophy. In this chapter, I elaborate an account of peace. Roughly speaking, I argue that peace should be understood as the reasonably stable absence of violence, based on modus vivendi arrangements. I say more on its role as a second-level value that provides reasons to compromise in Part IV.

Peace and War

It is not uncommon to understand peace as the absence of war, and in particular the absence of war between states. Sometimes this conception of peace is called 'negative peace.' And indeed it looks like a truism that peace requires the absence of war. When there is a war being fought in some region, there is no peace in that region. But one should note that peace and war are very different kinds of concepts, in other respects. 'War' usually applies to bilateral (or multilateral) relations: a war is fought *against* some other party (or parties). There certainly is a notion of peace that is also bilateral. Peace, in a bilateral sense, can exist between two

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countries while both countries are fighting wars against other countries at the same time. But peace, as understood in this book, is not bilateral (or multilateral); it is not something that exists between two or more specific parties. Rather, peace is a property that applies to specific geographical regions, like most commonly a country: it means, first of all, the property of war being absent in that region.

One should also note that war is only one form of violence. Peace must also subsume the absence of other kinds of violence, albeit not the absence of *all* violence. Peace is certainly compatible with the existence of *some* violent crime in a society, but it does require the absence of civil war and recurring terrorist attacks, regular battles between different ethnic or religious groups, between citizens and state forces, or between drug cartels and state forces. As Michael Howard puts it, '[t]here is a bedrock meaning of "peace" which men have known and used ever since they were literate: the simple *absence of violence*, especially random and endemic violence, from the society in which we live.'[1] Roughly, then, peace can be understood as the relative absence of violence.

Violence

But what is violence more precisely?[2] It seems natural to regard violence as the intentional physical force used against persons or property.[3] Yet there is an immediate objection to this understanding of violence. *Peace* cannot require that people do not defend themselves against robbers and that murderers are not arrested. Hence, when a person uses force in self-defense against a robber or when the police use force to arrest a murderer, the action should not be regarded as 'violence.' Similarly, boxing should arguably not count as violence. Neither should taxation. It may

[1] Howard 1983: 18.

[2] For an overview of conceptions of violence see Coady 1986, Bufacchi 2005, Meßelken 2012: ch. 8.

[3] Coady 1986: 4, 15–18. The criterion of intentionality can be used to distinguish between the 'doing of violence' and 'acting violently' (Audi 1971: 50, see also Miller 1971: 15). One could add that the relevant force has to be significant: it has to actually harm or injure the victim of violence (Audi 1971: 59, Miller 1971: 25–26). Some argue for including a wider range of harms, damages, and injuries, even if they are not the effect of physical force (Lawrence 1970).

seem, then, that we need a moralized notion of violence if peace is to be understood as the absence of violence. According to a moralized notion of violence, only morally unjustifiable use of force counts as violence.[4]

Yet there is a problem with a moralized account of violence: if we accept it, then a morally justified (or morally acceptable) humanitarian intervention cannot count as violence and thus cannot be considered a 'war.'[5] This seems odd. In reply one can first point out that, when a humanitarian intervention is morally justified, there obviously was violence to be interfered with and so there was no state of peace in the relevant country. Yet this does not help with the worry that a humanitarian intervention can mean fighting a 'war,' and that the moralized account of violence does not allow us to say this. In answer to this worry, one could point out that we need not define 'war' with reference to 'violence.' War could be understood, roughly, as a military engagement that involves the intentional killing of people. In that sense, a humanitarian intervention could indeed be called a 'war' irrespective of how much violence it involves (in the moralized sense). But this answer is not convincing. One may well insist that *of course* engaging in a war means engaging in *violence*, no matter if one's engagement is morally justified or not. For that reason, I think one should stick to a non-moralized notion of violence.

And the initial objection against a non-moralized conception of violence can be answered without endorsing a moralized conception. The initial objection against a non-moralized notion of violence was that peace cannot require that people do not defend themselves against robbers, that murderers do not get arrested, that nobody engages in boxing, and that there is no taxation. This suggested an account of violence that allows us to say that these actions do not involve violence, properly understood. But instead, one could simply stipulate that peace does not mean the absence of *all* kinds of violence, but only the absence of the paradigmatic kind of violence that we see in war, terrorism, riots, and so on. It means the absence of violence *except* for certain forms of violence

[4] Gert 1969, Wolff 1969: 606. Sometimes the idea of moral rights is used to moralize the notion of violence (Garver 1968/1981: 355–356, Meßelken 2012: 146–155, 179).

[5] See Coady 1986: 13.

that should not count as undermining peace. Compared to moralizing the notion of violence, this seems to be a more promising way to go.

The question is how to define more precisely the forms of violence that should not count as undermining peace. I see three possible accounts. One is to say that morally justifiable forms of violence do not undermine peace; a second is to say that consensual violence does not undermine peace; a third is to say that communally accepted forms of violence do not undermine peace.

The first account can explain why self-defense, arresting murderers, boxing, and taxation do not undermine peace: because they are morally justifiable. A disadvantage of the first idea is that it makes peace controversial: whether certain forms of violence are morally justifiable will often be disputed. Yet peace should be something that can be widely recognized as such. It should not depend on one's particular moral views, whether one can acknowledge that there is peace. Hence, what counts as violence in the peace-relevant sense should be as uncontroversial as possible.[6] Another disadvantage is that the first account ties peace too tightly to the rest of morality. Peace should be something that can be realized in morally imperfect societies, and so it cannot require the absence of all morally unjustified violence.

The second account says that consensual violence does not undermine peace. It can explain why boxing does not undermine peace. The problem is that it cannot explain why self-defense and taxation should not count as peace-undermining violence, because self-defense and taxation obviously are not consensual.

I think the third account is the best one: communally accepted forms of violence do not undermine peace. This account can explain why boxing, self-defense, the arrest of murderers, and taxation are not undermining peace: because they are accepted practices in our societies. It can also explain why the ritual scarring of children should not count as undermining peace, in certain contexts, namely, when it is incorporated in practices that are not questioned in the relevant community.[7] The third account also allows us to point to a deeper rationale for why such violence should not count as undermining peace: it is not destabilizing or at least less

[6] See Nunner-Winkler 2004: 55, Meßelken 2012: 142–143.

[7] Kukathas 1997: 70.

destabilizing than controversial or unaccepted violence. (I will get back to stability later in this chapter.)

Yet an objection to the third account is that horrible things can be communally accepted in societies, for example inhumane punishment for harmless 'crimes.' The third account urges us to say that such societies are perfectly in peace, as long as these horrible practices are not questioned. This seems problematic for an account of peace, because we want peace to be something attractive; we want to present peace as a value and to conceptualize it as such.

In response to that objection one could propose a more complicated characterization of peace: peace could be understood as the absence of violence except for violence that is either communally accepted *or* incorporated in practices that violate very basic moral requirements. This would mean to accept a mix of the third account and a more modest (and hence better) version of the first account. But I think we can make a less complicated and, therefore, theoretically more attractive move. Peace is based on modus vivendi arrangements and modus vivendi arrangements have to satisfy certain basic moral requirements, in order to count as such, as I will explain later in this chapter. In the case of a society with communally accepted, yet inhumane punishment, the problem is not that there is peace-undermining violence. The problem is that we do not have modus vivendi arrangements that satisfy these basic moral requirements. This, I think, is the most attractive way to look at the matter.

To conclude: peace does not literally mean the absence of violence. It means the relative absence of violence *except* for violence that is communally accepted. But because it is a more convenient expression, I will usually keep saying that peace is the absence of violence.

Stability and Security

Yet this is not yet an adequate understanding of peace. Peace cannot be conceived as the mere momentary absence of violence or as a very fragile absence of violence. Peace is not truce.[8] Peace is something (relatively)

[8] Truces can be important, too, as Eisikovits rightly emphasizes (2015). But, in the end, the goal must be a reasonably stable peace, not a truce or ceasefire arrangement.

stable. This is emphasized by Thomas Hobbes when he explains that the state of nature is a war of all against all: '[S]o the nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is peace.'[9] It also fits quite well with Raymond Aron's dictum that peace is a condition of 'more or less lasting suspension of rivalry between political units.'[10] Famously, Immanuel Kant envisions a highly stable peace as well: a 'perpetual peace.'[11]

But what is stability? Kenneth Boulding writes: 'Stable peace is a situation in which the probability of war is so small that it does not really enter into the calculation of any of the people involved.'[12] But to say that war (or violence more broadly) may not even 'enter into the calculation' of people is demanding too much. Likewise, it is demanding too much when Lothar Brock claims only a worldwide peace is stable enough.[13] Peace certainly does not imply *maximal* stability. Stability is a gradual concept. Peace can be more or less stable, and there is neither the possibility nor the need to define some precise measure of stability in order to determine at which point non-violence is stable enough to count as peace. Some vagueness is unavoidable.

Stability, in any case, is not mere de facto endurance (for a certain good amount of time). Something can endure by pure chance. Stability, instead, refers to certain structures that lead to robust endurance across possible worlds, so to speak. Even when there are disturbing forces at work, a stable arrangement is likely to persist.[14] Moreover, a stable system decreases the likelihood that such disturbing forces come up in the first place. Many different factors can contribute to the stability and instability of such structures: the political system, the wealth of the relevant

[9] Hobbes 1651/1996: 84 (ch. 13 para. 8). See also Sternberger 1986/1995: 95–96, Czempiel 2002/2006: 85, Brock 1990/1995: 318–320, 2002/2006: 104.

[10] Aron 1962/2003: 151.

[11] Kant 1795/2006.

[12] Boulding 1978: 13. Although, to be fair, Boulding seems to apply this to peaceful *bilateral* relations (1978: 16–17). So Canada and the USA are in stable peace because the probability of war *between them* does not really enter into the calculations of the people involved. As explained, I do not employ a bilateral notion of peace.

[13] Brock 2002/2006: 105–106.

[14] Boulding 1978: 32.

parties, their political culture, religion and ethos, whether there is economic interdependence and interaction among the parties, whether there are deterrence mechanisms, and whether there is trust and friendship or hostility among the parties (including whether there is a memory of past wars, injustice, and oppression). All these factors and others will be relevant for the stability of peace.

How about security? Although peace certainly gives people a sense of security, and although peace certainly makes life more secure, generally speaking, peace should not be *identified* with security. Peace and security are not the same. Security, like stability, is a gradual notion. One can spend more and more money on security and one may get more and more security. Peace is not gradual. It means the stable absence of violence, and while of course stability is gradual, the absence of violence is not gradual. True, the existence of just a little bit of violence—for example some violent crime—may not undermine peace, and this makes peace a somewhat vague notion, but it does not make it a gradual notion. Note, also, that security is applied in very local contexts as well, as, for example, a school or even a private apartment has its security concerns. Peace, on the other hand, applies to larger geographical regions.

Is there anything else required for having a state of peace, properly understood? Must there be genuine cooperation among the different groups in the relevant geographical area, for example? Must they even have genuine respect for their different ways of life? Insofar as cooperation and mutual respect stabilize the relationships between people, they are certainly helping to achieve stable peace. But there can also be relatively stable peace without genuine cooperation and without genuine respect, for example, when all parties have a deep-rooted disposition to mind their own business and to let other people live their own way, or when there are structures that ensure that people will be non-violent out of self-interest, for example, in light of institutions of deterrence. The Cold War, for example, was arguably a period of relatively stable peace for both the USA and the USSR, although little cooperation took place.[15]

[15] See Hershovitz 2000: 222.

Modus Vivendi Arrangements

Now a few words on modus vivendi arrangements. Modus vivendi arrangements are the instruments to realize peace.[16] They institutionalize stable non-violent coexistence. The most important task for modus vivendi arrangements is to establish procedures for conflict resolution or at least for conflict management. Such procedures *might* be identical to procedures as advocated by theorists of minimal procedural justice,[17] but procedures need not be just or fair in order to fulfill their purpose. Modus vivendi arrangements can take the form of political institutions and laws, but they can also take other forms. Most importantly, a society's moral rules and customs can have the character of modus vivendi arrangements as well.

If there was pure harmony among people, if there were no conflicts, then there could be peace without the need of modus vivendi arrangements. But as long as we have moral and non-moral conflicts, which I presuppose here, modus vivendi arrangements are needed for peace. Peace, as conceived here, does not refer to a state without any conflicts, as is suggested in Isaiah's vision of a kingdom of peace in the Old Testament (11:6): 'The wolf will live with the lamb, the panther lie down with the kid, calf, lion and fat-stock beast together, with a little boy to lead them.' John Gray writes: 'The aim of *modus vivendi* cannot be to still the conflict of values. It is to reconcile individuals and ways of life honouring conflicting values to a life in common. We do not need common values in order to live together in peace.'[18] Peace is the absence of violence *despite* persistence of conflict.

As a side note: peace, as understood here, is not only different from Isaiah's vision of a kingdom of peace, it is also different from other Christian conceptions of peace.[19] It is a worldly peace that does not rest on any religious or metaphysical views. Boulding says with an eye on

[16] In political philosophy, Rawls made the notion of a modus vivendi prominent. At about the same time, Larmore used the term 'modus vivendi' for the very different idea that principles of justice need not mirror a conception of the good (1987: 69–90, 127–130).

[17] Hampshire 1999, Ceva 2008.

[18] Gray 2000: 5–6, see 2000: 25.

[19] On the idea of peace in Christian thinking, see Czempiel 1971.

St. Paul's Epistle to the Philippians (4:1) that a '"peace which passeth all understanding" is perhaps hard to do research on.'[20] To Augustine, peace seems to mean 'right order' in many different contexts:

> The peace of the body, therefore, lies in the balanced ordering of its parts; […] the peace of the rational soul lies in the rightly ordered relationship of cognition and action; […] the peace of a city is an ordered concord, with respect to command and obedience, of the citizens; and the peace of the Heavenly City is a perfectly ordered and perfectly harmonious fellowship in the enjoyments of God, and of one another in God. The peace of all things lies in the tranquillity of order; and order is the disposition of equal and unequal things in such a way as to give to each its proper place.[21]

Peace, as understood here, simply is the absence of violence based on modus vivendi arrangements.

Modus vivendi arrangements are accepted as a second-best. If there is to be stable absence of violence, then no group can get everything it wants regarding the basic institutions that build a modus vivendi. Hence every group has to accept arrangements they regard as a second-best. But although modus vivendi arrangements have to be accepted as a second-best, they need not be something explicitly agreed to. Recall from Chap. 2 that the consent given in a compromise has to be a communicative act, like a contract or a promise, not a mere mental act. Modus vivendi arrangements, though, do not have to rely on such consent by all people who live under the arrangements. People can be born into modus vivendi arrangements. Modus vivendi arrangements can also be imposed by the winner of a war.[22] So modus vivendi arrangements, although accepted as a second-best, need not be installed as *compromises*.[23]

Not all modus vivendi arrangements are installed as compromises; needless to say, neither do all compromises establish modus vivendi arrangements. The pact between Hitler and Stalin might have been a

[20] Boulding 1978: 5–6.

[21] Augustine 426/1998: 938 (book 19 sec. 13).

[22] Hence I think it is wrong to say that an imposed peace is no peace, as Beilin seems to claim (2006: 133, 146). Beilin thinks that the 'Pax Romana' was stable, but not peace, because it was imposed.

[23] See Besson 2003: 215. This is something I did not see clearly in Wendt 2013.

compromise, but it did not establish a modus vivendi arrangement.[24] An agreement between two persons to go on a camping trip with some fishing activity might be a compromise, but it does not establish a modus vivendi arrangement. To be a modus vivendi, a compromise has to have a particular effect. At least as I want to use the term here, a modus vivendi must secure peace, that is, the stable absence of violence.

One can still be dissatisfied with this account of modus vivendi arrangements. There can be modus vivendi arrangements that seem deeply morally problematic because of strongly and unfairly mirroring the distribution of power among the involved parties, or because basic moral rights are violated. Maybe 'modus vivendi is no more than a nice Latin label for what is a far from nice proposal to grant legitimacy to more or less whatever is the outcome of the free play of brute political power,' writes John Horton, challenging his own defense of modus vivendi.[25] On the other hand, one certainly cannot argue that a modus vivendi has to realize liberal justice, if the notions of peace and modus vivendi are to have any point (see Chaps. 8 and 16). A plausible conception of modus vivendi arrangements hence claims that a modus vivendi accommodates some additional, yet very basic and uncontroversial moral requirements, in order to count as such. These basic moral requirements should form the politically relevant part of what Michael Walzer refers to as 'thin,' 'minimal,' or 'core' morality.[26]

Horton agrees. He sets constraints on both the content of a modus vivendi and its form. The content is 'primarily the avoidance of serious civil disruption and the maintenance of a level of social order that is at least sufficient to enable the parties subject to it to live minimally worthwhile lives.'[27] The form must be 'broadly consensual,' 'broadly acceptable,' or 'agreeable' to those who are party to it.[28] Although modus vivendi arrangements need not be based on explicit agreements and thus compromises, they have to at least be accepted or, even weaker, be acceptable. Usually, this requirement will be met by arrangements that secure peace,

[24] Day 1989: 478.
[25] Horton 2006: 164.
[26] Walzer 1994: 1–4.
[27] Horton 2010: 438.
[28] Horton 2010: 438–439, see 2006: 164.

but it may rule out some arrangements. Those are not appropriately called 'modus vivendi arrangements,' then. Modus vivendi arrangements will usually also satisfy Horton's constraint on content: the avoidance of civil disruption and the maintenance of social order, it seems, is just something necessary for stable absence of violence. What might rule out more is the requirement that modus vivendi arrangements must enable everyone to live a minimally worthwhile life.

It might be worth mentioning that other philosophers invoke minimal moral criteria as well. John Gray claims that 'there are limits on what can count as *modus vivendi*.'[29] These limits are set by 'evils that can make any kind of good life difficult or impossible.'[30] This is close to Horton's notion of a modus vivendi: a modus vivendi must enable people to live minimally worthwhile lives. Similarly, David McCabe regards some thin universal values as basic and not negotiable.[31] He speaks of a 'minimal moral universalism grounded in a presumption that the interests of all persons matter equally,' and of a set of human rights that 'rule out such evils as slavery and severe or permanent bodily harm, while guaranteeing access to such things as education, basic physical and psychological needs, and security.'[32] I here leave open how the moral requirements that a modus vivendi has to meet to count as such should be specified concretely. I am sympathetic to the idea of expressing them in terms of uncontroversial and basic moral rights, but I do not attempt to provide a defense of that idea here.

Are modus vivendi arrangements accepted out of self-interest? As in the case of compromises we can stay silent on the kind of reasons that motivate people to accept a modus vivendi. It can be non-moral reasons, based in self-interest, but it *can* also be moral reasons.[33] John Rawls, though, suggests that the parties to a modus vivendi do not accept it for moral reasons,

[29] Gray 2000: 138.

[30] Gray 2000: 66.

[31] McCabe 2010: 138–143.

[32] McCabe 2010: 138.

[33] Horton agrees when he says that modus vivendi may be 'a mix of morality and power' (2003: 21, see also 2010: 439–440, 20, McCabe 2010: 155–159, Willems 2012: 291–293, Wall 2013a: 483, Vallier 2015: 219–221).

but out of self-interest.[34] This, I think, is an unnecessary narrow picture of modus vivendi. The values of peace and public justification, for example, can provide moral reasons to accept a modus vivendi. I see no reason to deny this. In contrast to Rawls, Steven Wall suggests that a constitutional settlement (his term for modus vivendi) *has to* be accepted for moral reasons. He writes that 'the existence of a constitutional settlement is dependent on first-person moral judgment' and regards constitutional settlements as a 'moralized modus vivendi,' as 'complex on-going social practices that both express certain values to which political societies are committed and establish procedures for resolving disputes among members of these societies.'[35] Wall may be right that the parties to a modus vivendi must at least regard it as morally *permissible* to agree to the modus vivendi. But this, I think, does not yet mean that modus vivendi is accepted *for* moral reasons. There are simply no weighty enough moral counter-reasons to accepting the modus vivendi. But it might be true that a modus vivendi is more stable when agreed to *for* moral reasons.

Similarly, as in the case of compromises, modus vivendi arrangements need not mirror the distribution of power, in contrast to what many, including both Rawls and Wall, claim.[36] I agree that it is probable and most often the case that modus vivendi arrangements mirror the distribution of power, but I deny that it is an essential feature of modus vivendi arrangements.[37]

Summary

It may be helpful to summarize what peace, as I want to understand it, is. A geographical region is in a state of peace, if and only if

(1) there is no violence (or almost no violence),
(2) the absence of violence is reasonably stable, and
(3) the absence of violence is based on modus vivendi arrangements.

[34] Rawls 1987: 10–11, 1993/1996: xlii–xliii, 147–149, see Gaus 2003a: 59, Rossi 2010: 26–27.
[35] Wall 2013a: 487, 489, 483.
[36] Rawls 1993/1996: 148, Gaus 2003a: 59, Rossi 2010: 26–27, Wall 2013a: 483.
[37] See also Horton 2010: 439–440, Margalit 2010: 48–49.

Modus vivendi arrangements, in turn, have the following characteristics:

(1) They are institutional arrangements that secure peace.
(2) They are accepted as a second-best.
(3) They satisfy certain minimal moral criteria.

7

The Value of Peace

Why should we care about peace? In this chapter, I argue that peace has intrinsic value and that it has instrumental value because it is in (almost) everyone's interest, and I briefly discuss John Gray's value pluralist argument for giving peace pride of place.

Peace and Interests

Violence is bad. It harms people and often constitutes a violation of their most basic moral rights. This is true at least if we ignore communally accepted forms of violence like boxing (see Chap. 6). For that reason, peace, understood as the stable absence of violence (that is not communally accepted), is intrinsically valuable. Its value is not reducible to the value of something else, it is just valuable for what it is, namely, for the absence of violence.

This could be the end of the story. But most philosophical advocates of modus vivendi try to say more, of course. They often sympathize with a

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Hobbesian outlook, broadly conceived,[1] and suggest that peace is in the *interest* of all. Gray writes:

> Peaceful coexistence is not an a priori value. In this it is no different from any other human good. It is desirable only insofar as it serves human goals and needs. There is no argument which shows that all ways of life are bound to pursue it. Nevertheless, nearly all ways of life have interests in common that make modus vivendi desirable for them.[2]

But why is peace in the interest of all? First of all, it has non-specific instrumental value for everyone. To see what non-specific instrumental value is, consider money first: '[We] do not value money only as a means to buying the latest recording of Mozart's symphonies or as a means to eating a bar of chocolate, but also as a means to satisfying whatever our future desires may be.'[3] Similarly, peace is a precondition for being able to pursue one's life projects, whatever they may be, and indeed for 'the achievement of almost any other goods.'[4] Peace has, in that sense, non-specific instrumental value.[5] Second, peace also has specific instrumental value for everyone. It is a precondition for economic growth and prosperity, something people arguably want. (True, peace is only a necessary, not a sufficient condition for economic growth and prosperity. But this does not undermine its instrumental value). Peace also has specific instrumental value because it gives people a sense of security, again something people want and need.[6] As Steven Wall says, a 'constitutional settlement [his term for a modus vivendi] is an achievement. It allows groups of people, who disagree over justice, to live together peacefully and productively.'[7]

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[1] Gray often mentions Hobbes as a proponent of modus vivendi (e.g. 2000: 25, 133). And of course, peace is what the individuals in Hobbes's state of nature want and what Leviathan is for.

[2] Gray 2000: 20, see also 2000: 5, 135–136, Moehler 2009: 196, Horton 2010: 439–440.

[3] Carter 1999: 36.

[4] Horton 2010: 438.

[5] More generally, something has non-specific value, according to Carter, 'iff the value of x cannot be described wholly in terms of a good brought about or contributed to by a specific instance of x or set of specific instances of x' (1999: 33). It is valuable 'as such,' then, without being 'intrinsically valuable.' Its value is reducible to the value of something else.

[6] Allan 2006: 114. One could also speak of a reduction of fear (Shklar 1989).

[7] Wall 2013a: 490.

Yet the claim that peace is in the interest of everyone has to be moderated somewhat. If it were straightforwardly true, one would have to wonder about all the violence in the world. First of all, to say it right away, peace does *not* seem to be in the interest of *some* people, namely, those who really 'enjoy' violence (at least if we understand 'interest' subjectively, as 'what people actually want'). Some people are malevolent.[8] Second, of course, peace is not the *only* interest of people. Sometimes, people see a reason to risk peace in order to realize something else they care about. One need not think of Nazis, corrupt dictators, and Islamist terrorists for that matter. All non-pacifists think that sometimes war and political resistance are morally justified. Most obviously, a cause worth fighting can be the restoration of peace. This, though, does not undermine the claim that peace is in these people's interest and has instrumental value for them. It is just that peace is not their only interest and that sometimes people have goals that they put above peace (and sometimes rightly so). Third, people sometimes face Prisoner's Dilemma situations where it is rational not to cooperate, even when this leads to an outcome that is not Pareto-optimal, for example, not peace. But, again, this does not show that peace is not in the interest of these people and has no instrumental value for them. It just shows that there can be strategically unfortunate situations where peace is hard to realize. So I think one can uphold the more moderate claim that peace is in the interest of almost everyone and has instrumental value for almost everyone.

Is peace a *moral* value? It is not exactly clear what specifically *moral* values are, in contrast to other kinds of values. In consequentialist moral theories, it is sometimes suggested that all values are non-moral values (knowledge, happiness, etc.), and then the promotion of these values is conceived as being morally right, according to a basic moral principle.[9] But there clearly seem to be 'moral values.' Justice certainly is a moral value. On a very broad notion of 'moral value,' moral values are all values that are relevant in the moral evaluation of institutional arrangements (or actions or character traits). And in that sense, peace clearly is a moral value. Peace is a moral value both because it is intrinsically valuable and

[8] Lomasky 2014.

[9] For example, Railton 1984/2003: 172.

because it has non-specific and specific instrumental value for most people. That peace is not in the interest of those who 'enjoy' violence does not undermine its moral value. That some people have immoral goals that they put above peace (although peace also is in their interest) does not undermine the moral value of peace either.

It should be noted that the fact that peace is in the interest of almost everyone is not only a source of its value, it is also the reason why realizing peace seems *relatively feasible*,[10] at least compared to realizing justice, for example. Feasibility concerns are one of the reasons why realist political theorists and philosophers are sympathetic to thinking about modus vivendi and peace. Peace is something that gets actually realized in the world, sometimes.

Peace and Value Pluralism

But is peace the *only* thing we should aim for? John Gray sometimes seems to make that claim.[11] To make it plausible, he relies on the doctrine of value pluralism, which is, besides Hobbesianism, a second strand in his thinking.[12] Value pluralism, as Gray conceives it, is not a relativist or subjectivist theory of value. The theory of value pluralism acknowledges the objectivity of values, but claims that there is a plurality of them. What is distinctive about value pluralism is that these plural values are taken to be incommensurable. There is no common measure for them, and for that reason they cannot be reduced to one value, like happiness or preference satisfaction, for example. As Joseph Raz explains, two values (or bearers of value) are incommensurable when it is false that one of the two is better, but also false that they are equally valuable.[13] Moreover, incommensurable values are not in harmony with each other, but often

[10] For discussion of the notion of political feasibility see Räikkä 1998, Gilabert and Lawford-Smith 2012, Lawford-Smith 2012.

[11] Gray 2000: ch. 4.

[12] Crowder argues that the two strands do not fit together: the interest-based argument reduces values to interests and is thus not compatible with value pluralism (2002: 120–121). But pointing out that peace is in the interest of all does not mean to reduce all values to interests.

[13] Raz 1986: 342, see Gray 2000: 34.

conflict: they often cannot be fully realized at the same time. These conflicts, Gray claims, are, at least sometimes, not rationally solvable.[14] Because of all of this, there is no 'best mix of values' we should aim at. Instead, we should aim at a modus vivendi that allows for different groups of people to follow their own mix of values.

A quite obvious objection against this claim has been made by George Crowder: peace, for the value pluralist, is simply one value among others. Value pluralism cannot assign any special status to peace that it could not assign to other values, like, for example, justice.

> Peace or stability […] must be weighed against other [values], like justice and community, in cases of conflict. In some cases a pragmatic settlement for the sake of stability may indeed be appropriate, but in other cases other values are properly given priority, as in demands for independence by occupied or colonized peoples. Peaceful coexistence is an important human good, but the pluralist will deny that it must be bought at any price. When Gray advances modus Vivendi as a universal goal, subject to no constraints except the thinnest of universal values, he effectively elevates peaceful coexistence to the status of a monist super-value.[15]

Gray has anticipated this objection. He argues that peace indeed has a special character (compared to other values) that is not adequately conceived in Crowder's objection:

> The pursuit of modus vivendi is not a quest for some kind of super-value. It is a commitment to common institutions in which the claims of rival values can be reconciled. The end of modus vivendi is not any supreme good—even peace. It is reconciling conflicting goods. That is why modus vivendi can be pursued by ways of life having opposed views of the good.[16]

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[14] Gray 1998: 20, see also Berlin 1958/1969: 161, 171, 1988/1990: 11–14, Galston 2002: 29–35, Crowder 2002: ch. 3, McCabe 2010: 16–25. Other value pluralists defend the possibility of making rational choices among plural values (Stocker 1990). Sometimes, incommensurability is distinguished from incomparability, because things can be ranked, at least ordinally, without having a common measure (Chang 1997: 1–2).

[15] Crowder 2002: 121.

[16] Gray 2000: 25.

Because peace is built on a modus vivendi, we have no presupposed consensus on moral issues, not even on the meaning and importance of peace. So peace is compatible with allowing people to pursue their own values and make their own weightings among plural and incommensurable values. Because most people actually have an interest in finding peaceful relations with others, most people have interest-based reasons to accept modus vivendi arrangements. Peace has specific and non-specific instrumental value for many people most of the time, and peace is in the interest of almost everyone. This makes peace relatively feasible, at least compared to the realization of justice. But this brings us back to the Hobbesian grounding of the value of peace as being in the interest of (almost) all. Value pluralism does not generate a special justification for giving priority to peace and is not a source of its value.[17] So Gray is right that peace has a special standing among values, but this has nothing to do with his theory of value pluralism, but with its being feasible without moral consensus because of being in the interest of almost all.

This also shows why Crowder's objection is right in one regard. Peace is indeed not all we should aim at in politics. One may sometimes try to get a modus vivendi that comes as close as possible to justice. And because peace need not be *maximally* stable, peace can indeed be balanced against other values. I will get back to these points later.

Summary

Peace is intrinsically valuable. It is also in the interest of almost everyone, and thus is specifically and non-specifically instrumentally valuable for most people most of the time. Peace therefore is a moral value. Value pluralism cannot show that peace has a special place among all values. What is special about peace is that it is in the interest of almost everyone.

[17] On Gray and value pluralism, see also Talisse 2000, Crowder 2006, Horton 2006, Jones 2006, Lassman 2006, Willems 2012.

8

Peace and Justice

In this chapter, I discuss the relation between peace and justice. I reject conceptions of peace that let peace conceptually subsume justice, I discuss the idea of a 'just peace,' I reject the claim that peace is a mere precondition for justice and not a value of its own, and I reject the idea that realizing justice is necessary for achieving sufficiently stable peace.

Does Peace Conceptually Subsume Justice?

Johan Galtung is considered one of the founders of peace and conflict studies as a field of social science. He starts with the claim that peace means the absence of violence,[1] but goes on to develop a highly artificial notion of violence. According to him, there is violence whenever a person's actual somatic and mental realizations are below their potential realizations, except when the actual is unavoidable.[2] Here is an example:

[1] Galtung 1969: 167.
[2] Galtung 1969: 168–169.

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> Violence is that which increases the distance between the potential and the actual, and that which impedes the decrease of this distance. Thus, if a person died from tuberculosis in the eighteenth century it would be hard to conceive of this as violence since it might have been quite unavoidable, but if he dies from it today, despite all the medical resources in the world, then violence is present according to our definition.[3]

The obvious problem with this idea is that it is unavoidable that countless potential somatic and mental realizations are not realized. I could have started playing Hockey, but I did not, so there are certain somatic and mental realizations that are not realized, although the actual state is certainly not unavoidable. Does that mean that there is violence somewhere? Is that a reason to say that we do not have peace? This is quite clearly absurd.[4]

Galtung realizes that his idea of 'potential realizations' is 'highly problematic,' but nonetheless he seems to stick to it.[5] At least he suggests that we should ask 'whether the value to be realized is fairly consensual or not.' So not all potentially realizable but unrealized somatic and mental states show that there is violence, but only some, namely, those where it is consensual that they should be realized. But it seems that this constraint is not supposed to exclude much, since Galtung claims, for example, that 'consumer's society' is violent when it leads to a non-realization of some potentialities.[6] To my mind, this is a reductio ad absurdum for a conception of peace and violence. Though Galtung aims at a conception of peace that 'can be agreed to by many,'[7] he quite clearly does not achieve that goal.[8]

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[3] Galtung 1969: 168.

[4] See also Coady 1986: 7.

[5] Galtung 1969: 169.

[6] Galtung 1969: 170.

[7] Galtung 1969: 167.

[8] One may indeed be suspicious that there are ideological purposes at work (Brock 2002/2006: 95, 100, see Daase 1996). Peace and conflict studies, according to Barash and Webel (2002: x), 'differs from most other human sciences in that it is value oriented, and unabashedly so. Accordingly, we wish to be up front about our own values, which are frankly antiwar, antiviolence, antinuclear, antiauthoritarian, antiestablishment, proenvironment, pro-human rights, pro-social justice, pro-peace, and politically progressive.'

But be that as it may. What made Galtung's conception of peace so influential is his use of the notion of *structural* violence.[9] There is structural violence when some somatic or mental potentials are not realized while no specific person can be held responsible for that non-realization. He calls the absence of personal violence 'negative peace' and the absence of structural violence 'positive peace.' But the absence of both seems necessary for peace simpliciter. In later works, he depicts 'repression' and 'exploitation' as the main forms of structural violence. He conceives of repression rather broadly as the 'opposite of diversity, freedom, pluralism,' and of exploitation as 'patterns of relations wherein after some time the total system proves to be much more beneficial for some components of the network than for others.'[10] But we need not go into the details of his accounts of repression and exploitation. It is of course possible to accept the idea of structural violence without following Galtung in the specifics.[11]

But I think one is well advised not to accept the idea of structural violence at all. Societal structures are certainly an important subject of moral evaluation, and they may well be 'unjust,' but they cannot be 'violent.' Violence presupposes that there is someone who *does* violence. Just like volcanos and cancer are not violent, societal structures are not violent. Violence is not the kind of thing that could be attributed to structures instead of persons. The notion of 'structural violence' is not stretching the meaning of violence, it breaks it.

It would be more honest to concede that one has departed from a commonsense conception of peace as non-violence, and moved to a conception of peace that subsumes *social justice* or *distributive justice*.[12] Interestingly, Galtung sometimes indeed uses the term 'social injustice' instead of 'structural violence.' He even concedes that he does so in order not to 'overwork the word violence.'[13] Others, like Michael Howard,

[9] Galtung 1969: 170.

[10] Galtung 1980: 107, 111. The resulting inequality seems to be the heart of his account of exploitation (1990: 293).

[11] As do Meyers 1994: 40, 65–66, 68, Fox 2014: ch. 4.

[12] Social justice of course applies to social structures (Rawls 1971, Young 2011).

[13] Galtung 1969: 171.

agree that peace, properly understood, subsumes justice: '"Peace" in fact is a *just* order.'[14]

I will now argue against a conception of peace that subsumes distributive justice (or retributive or corrective justice), whatever the specific conception of justice is. There is one caveat, though. Sometimes, David Hume suggests that 'rules of justice' are to be understood as rules that secure peace.[15] When rules of justice are identified with modus vivendi arrangements (rules that secure peace), then peace of course *does* subsume justice. My claim is that peace does not subsume justice *if* justice is conceived as more than rules that secure peace. Needless to say, almost all conceptions of distributive justice, retributive justice, and corrective justice conceive of justice as more than rules that secure peace. Even Friedrich Hayek's modest 'rules of just conduct,' for example, are more than rules that secure peace. They are, roughly speaking, rules that secure an abstract order that allows the emergence of spontaneous orders.[16]

The simplest reason not to let peace subsume justice is conceptual clarity. 'Everything is what it is, and not another thing,' Bishop Butler reminds us .[17] Peace is peace, and justice is justice. Galtung seems to aim at conceptualizing a value that comprises all other values. He writes: 'If this were all violence is about, and peace is seen as its negation, then too little is rejected when peace is held up as an ideal. Highly unacceptable social orders would still be compatible with peace.'[18] But, as C.A.J. Coady points out, there is nothing shocking about the fact that highly unacceptable social orders are compatible with peace, because peace simply is not the same as, for example, justice or prosperity.[19] But this may not yet convince those who believe that peace without justice just is no peace. More needs to be said.

A second reason not to let peace subsume social justice could be that such a concept can easily be abused.[20] This criticism tries to echo Isaiah

[14] Howard 1983: 19.

[15] Hume 1738/1978: 533 (book 3 part 2 sec. 6).

[16] Hayek 1973/1982: 112–114, 1976/1982: 31, 114–115.

[17] Butler 1729/2006: preface §39.

[18] Galtung 1969: 168.

[19] Coady 1986: 7.

[20] Maley 1985: 587–590.

Berlin's criticism of positive notions of freedom.[21] A notion of peace as subsuming social justice is easily abused because it can easily be used to legitimize war in the name of peace. William Maley writes: '[The] problem with [Galtung's and others'] notions of positive peace is thus not that they are utopian, but rather that they can accommodate the use of direct violence and coercion as means to achieving "peace".'[22] But as stated, this is not convincing. All notions of peace, even those that do not subsume justice, can be used to justify war in order to achieve peace. My own conception of peace can do so as well. As Hugo Grotius says: '[w]ar is undertaken for the Sake of Peace.'[23] Certainly, a notion of peace that subsumes justice could more easily and more frequently be used to recommend war. And in fact Galtung is quite aware of the dialectic between what he calls negative and positive peace.[24] He sets the goal of 'peace by peaceful means,'[25] although this is, of course, hard to realize given that violence is so hard to avoid on his account.[26] But, in principle, there is nothing self-contradictory about a conception of peace that can be used to justify war.[27] In any case, the possibility of abuse seems hardly decisive on the question of how to conceptualize peace.

The third and most important reason not to accept a conception of peace that subsumes justice is that it would disable us to conceptualize important conflicts that we face in the real world. Nigel Biggar gives two examples where peace and retributive justice are in conflict.[28] In the Good Friday Agreement, Irish paramilitaries (or terrorists) were set free—which arguably was against retributive justice—in a modus vivendi arrangement with the IRA. In South Africa, after the apartheid regime, the Truth and Reconciliation Commission granted amnesty to people who were guilty of acts of torture and murder if only they confessed their crimes in public. Again this looks like a compromise on retributive justice for the sake of

[21] Berlin 1958/1969.

[22] Maley 1985: 590.

[23] Grotius 1625/2005: 133 (book 1 ch. 1 para. 1).

[24] Galtung 1969: 183–186.

[25] Galtung 1996, 1980: 139–149.

[26] See Brock 2002/2006: 101.

[27] As Brock seems to think (2002/2006: 100–101, 108, see 1990/1995: 325–326).

[28] Biggar 2002: 175–178.

peace.[29] Depending on one's views on social or distributive justice, one can easily construe conflict between peace and distributive justice as well. If one is a relatively strict egalitarian who thinks that an equal division of goods is what justice demands, one might still be willing to trade off justice for peace, when necessary, because other people falsely believe that they deserve having more because they work hard or that they simply have rightful titles to their property. If one is a relatively strict libertarian who thinks that justice basically means respecting property rights in one's body and one's justly acquired external goods, then again one might be willing to trade off justice for peace, when this is necessary to appease the unions, for example. One can also construct examples where corrective justice and peace are in conflict. In certain situations, one may refrain from making full reparations as a correction for past injustice in order to keep the peace. Avishai Margalit therefore rightly states that there is 'a deep tension between peace and justice.'[30] Of course, one may try to redescribe these conflicts in other terms, but it seems most natural and straightforward to acknowledge them as conflicts between peace and justice. For that reason, one should not conceptualize peace as subsuming justice and accept the claim that one can realize peace without realizing justice, or at least without fully realizing justice.

Risking Peace for Justice and the Idea of a Just Peace

The tension between peace and justice is so strong that, in international conflicts and in deeply divided societies, one makes it harder to achieve peace by trying too hard to realize justice. When people in a civil war disagree on the demands of justice, then to impose the allegedly correct view of justice is quite unlikely to bring peace. It seems much more plausible that all groups will have to accept what they regard an injustice *in order* to achieve peace. To aim at justice might make peace more difficult

[29] Biggar argues that the tension between justice and peace is less significant because criminal justice is mainly about vindicating the victim (2002: 168–173). I cannot discuss this claim here.

[30] Margalit 2010: 7.

to accomplish, so that we might end up without justice *and* without peace. Chandran Kukathas writes:

> If there is any plausible route to peace [in a conflict like that between Israel and the Palestinians], it must surely involve most parties' recognizing and accepting that they will not obtain justice in the sense of receiving the full measure of what they regard as their due, but being willing to take less than justice in the interests of peace.[31]

Likewise, after a war, to impose a peace treaty only with an eye on justice may not be wise if one wants stable peace, as Jossi Beilin argues, citing Versailles as an example.[32]

Sometimes, of course, one may indeed risk peace in order to attain justice. That is what happens in 'just wars.' But one does so, of course, in order to *also* attain peace in the end. Thus Rawls writes that the 'aim of war is a just peace.'[33] There are three caveats, though. First, the promise of peace, or even the promise of a just peace, is neither necessary nor sufficient to justify going to war.[34] One has to follow the rules of *jus ad bellum*. Second, one has to use appropriate means. Just wars have to be fought according to the rules of *jus in bello*. Third, one has to know when to end a war and hence one often has to stop before a perfectly just peace is attainable. Just wars should not become crusades[35] and the goal should not be a 'peace of the cemeteries.'[36] These caveats notwithstanding, a justly fought war certainly aims at a more just peace.

The notion of a 'just peace' has recently been discussed among political scientists and peace researchers.[37] Most straightforwardly, a 'just peace' could simply be seen as the state of affairs where both peace and justice

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[31] Kukathas 2006: 21, see also Horton 2006: 143, Hoffmann 2006: 14–15, Roberts 2006: 58–59, Allan 2006: 116–117.

[32] Beilin 2006: 140–141.

[33] Rawls 1971: 379.

[34] As von Platz 2015 argues against May 2012.

[35] Walzer 1977: ch. 7.

[36] The notion is from Kant 1795/2006: 317, 320 (Ak. 8:343, 8:347).

[37] It is also a guiding idea in ecumenical Christian peace ethics (Strub 2010).

are realized. It is peace *plus* justice.[38] Some theorists rightly worry, though, that aiming at justice can be dangerous and undermine peace, when there is disagreement about justice, and they remind us that too many wars are fought for justice.[39] This explains why they seem to find the notion of a 'just peace' attractive and repulsive at the same time. And it translates into halfhearted endorsements of the notion of 'just peace,' whereby the meaning of 'justice' gets downgraded as much as possible. So it is said that peace can indeed be just or unjust, but that a 'just peace' is not 'prescriptive' because there are many conceptions of justice[40] or that justice is 'what parties decree it is.'[41] This makes the notion of a 'just peace' void, because 'justice' adds nothing to the notion of peace: every peace becomes a just peace. For the same reason—the danger of aiming at justice in light of disagreement about justice—others claim that the term 'just peace' is redundant.[42] Beilin writes:

> Peace can only be defined as such if it is not unjust. It is an agreement that does no more wrong than right, and one in which the wrongs done are within the acceptable framework of the times. […] [Since] there is no greater justice than peace, when peace is unjust there is no reconciliation, and if there is no reconciliation there is no peace. Logically, if peace brings forth reconciliation and prevents the loss of lives and possessions, it is just by definition.[43]

This seems wrong. One can have reconciliation as well as prevention of loss of lives and possessions without having justice, or at least without having full justice. Reconciliation can arguably require that some past injustices are not justly dealt with, as we saw in the IRA and South

[38] Allan 2006: 115. Allan develops an 'ethical scale' that ranks states of the world from eradication of humankind, genocide, war, no war, just war, stable peace, just peace, positive peace to agape-paradise (2006: 92). The ranking is a little obscure, though. For example, it is unclear why a 'just war' is supposed to always be better than 'no war.' A lot will depend on whether the just war is successful and leads to a stable or even just peace, how many lives are lost in the war, etc. It will also depend on how morally bad$_1$ the state of no-war is.

[39] Roberts 2006: 58.

[40] Roberts 2006: 56–57.

[41] Allan 2006: 117.

[42] Beilin 2006: 130.

[43] Beilin 2006: 147.

Africa cases. Beilin may well be right that one (often) may not go to war and take young lives in order to get a more just peace,[44] but this does not change the fact that peace and justice are not the same, that there can either be peace without justice or peace with justice. The latter can adequately be called a 'just peace.'

I should mention, though, that 'reconciliation' is itself a contested concept. Some, like Daniel Philpott, employ a conception of reconciliation as the 'restoration of right relationship' and *identify* reconciliation and restorative justice (what I called corrective justice).[45] Philpott argues that reconciliation requires healing the wounds of past injustices by different measures: building socially just institutions, acknowledgment, reparations, punishment, apology, and forgiveness.[46] This certainly is a promising account of 'just peace,' but I would hesitate to subsume all these things under 'reconciliation.' Nothing much depends on this here, though. The important point is that peace does not require justice. If reconciliation is identified with corrective justice, then peace does not require reconciliation as well. It is the idea of a *just* peace that requires corrective justice and reconciliation, so understood.

Is Peace Axiologically Parasitic on Justice?

Still some will find my view of justice and peace as two separate and sometimes conflicting values troublesome. Rainer Forst has argued that peace and justice are not distinct and conflicting values. It may sometimes look as if they were, but, properly understood, these are conflicts *within* the realm of justice, conflicts 'in the *same* normative register.'[47] He explains:

> [T]he principle of justice grounds and at the same time qualifies the value of peace. In itself, peace is not a free-standing value; only forms of peace that are guided by considerations of justice are seen as desirable. The peace imposed

[44] Beilin 2006: 148.

[45] Philpott 2012: 5, 48–49, 53.

[46] Philpott 2012: 4, 56.

[47] Forst 2013: 71, 87.

> on a society by a benevolent dictator is thus of no great value, but it is better than a peace imposed by a cruel dictator.[48]

But what does it mean that only forms of peace 'that are guided by considerations of justice' are desirable? I do not deny that peace, or modus vivendi arrangements, can be more or less just, and of course their justness is one important factor that determines the moral standing of a modus vivendi.[49] Thus, I agree with Forst when he says that justice is 'a principle by means of which we judge peace—and determine what kind of peace we should strive for.'[50] In that sense, making peace and accepting modus vivendi arrangements should indeed be guided by considerations of justice. But this does neither mean that they should *only* be guided by considerations of justice—other values like prosperity or public justification matter, too—nor does it undermine the claim that peace is a distinct value of its own. Forst is of course also right that a just peace is better than an unjust (or not fully just) peace, and that a peace imposed by a benevolent dictator is better than a peace imposed by a cruel dictator, but, again, this does not show that peace is not a distinct value of its own.

So what is Forst's argument against seeing peace as a distinct value? He claims that peace in the end simply is a concern of justice. He thinks that justice requires, first of all, to respect every person's 'right to justification' and that '[p]ractices of justice are based on certain justifications,' which requires 'practices of justification' that are accepted as adequate by the relevant subjects.[51] When this is what justice requires, then peace can be conceived as a concern of justice:

> Peace, then, is the word for an important form of non-domination that overcomes threats and the exercise of violence. […] [T]o demand peace is to demand re-entry into the space of mutual justifications. In this respect, justice and peace are related practices of justification and relations of peace

[48] Forst 2013: 74. He emphasizes that peace is not a principle, but a value. I cannot debate this here, but at least it looks natural to call justice a 'value,' too.

[49] Wendt 2016b.

[50] Forst 2013: 71, see 2013: 86.

[51] Forst 2013: 79–82.

> will, if they are minimally fair, provide the basis for the development of further relations of justice.[52]

Thus Forst claims that peace is a concern of justice and hence not a distinct value of its own. It is axiologically parasitic on justice, as one could say.

In reply, I concede that peace and justice overlap and are, in several ways, interrelated. First, violence often involves the violation of basic moral rights, and so the absence of violence (i.e. peace) tends to mean that some respect for these rights is realized. And this is, indeed, a matter of justice, too. But basic moral rights are only a small part of what is usually discussed under the heading of 'justice.' Distributive justice, for example, is not encompassed. One could say that peace tends to secure 'minimal justice.'[53] As a side note, 'minimal justice' seems to come relatively close to what libertarians regard as full justice, but of course there can be modus vivendi arrangements that lead to stable non-violence but are unjust from a libertarian point of view. The main difference is that property rights in external resources do not have the same status in minimal justice as in libertarian justice; taxation need not undermine peace (see Chap. 6).[54]

Second, because peace is based on modus vivendi arrangements, and because modus vivendi arrangements have to meet some minimal moral requirements (see Chap. 6), peace will again have to secure minimal justice, and so again there is an overlap between the values of peace and justice.

Third, I can agree with Forst that peace is a precondition for justice. One cannot realize justice without having peace. (An objection to this claim is that peace quite obviously is no precondition for 'just wars.' In reply, I would deny that 'just wars' realize justice in any meaningful sense. Just wars are simply morally justified wars). But that peace is a precondition for justice does not imply that peace is *only* a concern of justice, or that peace has *only* instrumental value as a precondition for

[52] Forst 2013: 82. In a similar spirit, Buchanan says that 'justice largely subsumes peace' (2004: 79).

[53] In a similar vein, Walzer observes that there is a minimal meaning of 'justice' (1994: 1–2, 5–6), while 'distributive justice' is part of 'thick morality' (1994: ch. 2).

[54] See also Wendt 2012.

realizing justice. In the previous chapter, I argued that peace has specific and non-specific instrumental value because of being a precondition for realizing all other values, for the pursuit of almost any personal projects, for economic growth, and for a sense of security. It would be extravagant to claim that all these things are again only instrumentally valuable for realizing justice. Peace therefore has instrumental value not only as a precondition for justice, but also as a precondition for many other things—and hence it has value independent of justice. Moreover, peace can also be considered an intrinsic value. As such it again has value independent of justice. For those reasons, peace is a value of its own. It is not axiologically parasitic on justice.

Realizing Justice as Necessary for Achieving Stable Peace?

The best strategy to argue for some close connection between peace and justice is to claim that peace based on modus vivendi arrangements can never be stable enough. This is to concede that peace indeed does not subsume justice conceptually, and that peace and justice are distinct values. It means to claim that—as an empirical fact—realizing justice is necessary to get sufficiently stable peace. This seems to be the view of Ernst-Otto Czempiel. Sometimes he apparently lets peace subsume justice conceptually, for example when he describes peace as the 'process pattern of the international system by which there is declining violence and increasing distributive justice.'[55] But basically he is clear that peace is to be conceived as the absence of war or, more accurately, a 'system status where conflicts between states are no longer settled by military violence, but by non-violent processes.'[56] This comes at least close to the notion of peace as developed here, except that Czempiel focuses on war, not violence, and mentions no moral constraints on what counts as a modus vivendi. Yet he makes clear that realizing peace necessitates the

[55] Czempiel 1986: 47, transl. FW.

[56] Czempiel 2002/2006: 85, transl. FW. He also says that peace consists in 'abstaining from violence in the enforcement of claims' (1988/1995: 168, transl. FW; see also 1986: 35–36).

realization of certain social policies, without thereby embracing a notion of 'positive peace.'[57] If these social policies mean realizing social justice, then realizing social justice is necessary for achieving stable peace. Isaiah, in the Old Testament (32:17), would then be right to see peace as the 'fruit of justice.' Immanuel Kant agrees with Isaiah when he writes: 'Seek ye first the kingdom of pure practical reason and its *justice*, and your end (the blessings of perpetual peace) will come to you of itself.'[58] Claiming that justice is necessary for realizing (sufficiently stable) peace is, I think, more plausible than conceiving peace as conceptually subsuming justice.[59]

What Czempiel claims here may remind some of John Rawls's idea of an overlapping consensus on justice that is supposed to provide stability 'for the right reasons.' But although Rawls often says that it is an overlapping consensus on justice, what he has in mind is, in the end, an overlapping consensus to accept a principle of public justification (as I will argue). Hence I postpone my discussion of Rawls's overlapping consensus to the chapter on Rawls and public justification (Chap. 11).

What is the reply to Czempiel? Is realizing justice necessary for achieving stable peace? First, one may concede, for the sake of the argument, that a just peace will usually be *more* stable than an unjust peace, but point out that peace need not be maximally stable. This could be enough to undermine the claim that realizing justice is necessary to achieve sufficiently stable peace.

Second, many other factors are relevant for the stability of institutional arrangements, not only their justice. A democratic culture, economic development and economic interdependence, community ties, and intelligently designed modus vivendi arrangements with checks and balances, all these things matter a lot for stability (see also Chap. 11).

Third, justice may be a factor that contributes to the stability of an institutional arrangement, *but only* when the parties—all parties—acknowledge that the arrangement is just. A just peace is not more stable

[57] Czempiel 2002/2006: 91.

[58] Kant 1795/2006: 344–345 (Ak. 8:378). See also Höffe 1989: 24–25, Senghaas 1995: 201, van der Linden 2001.

[59] Brock agrees (2002/2006: 101, 103).

than an unjust peace when it is not recognized as such by some relevant group. A consensus on what arrangements would constitute a just peace is often hard to get. Hence, the stability of a modus vivendi is the best we can get in most conflictual situations.

Fourth, modus vivendi arrangements can be accepted for moral reasons, as we have seen, and this can increase the stability of a modus vivendi. But the extent to which stability is increased will depend on the *kind* of moral reasons that motivate people to accept the modus vivendi. I claimed that peace is both intrinsically valuable and has non-specific and specific instrumental value for (almost) everyone. Admittedly, when people have only pragmatic moral reasons to accept a modus vivendi, they still have a temptation to try to renegotiate when the distribution of power changes. The modus vivendi is only seen as an instrument, and when the distribution of power changes they might lose loyalty. Yet because it is always risky to try to renegotiate and might undermine trust, to acknowledge pragmatic moral reasons to accept a modus vivendi nonetheless increases its stability. Moreover, I will argue that public justification often provides *principled* moral reasons to accept modus vivendi arrangements. When people accept a modus vivendi for principled moral reasons, then they can value the modus vivendi non-instrumentally. This will strengthen their loyalty toward the modus vivendi arrangement and hence increase its stability to a considerable extent.[60] But admittedly, even when modus vivendi arrangements are accepted for principled moral reasons, their stability will in part depend on how far away they are from what the parties regard as morally best (on the first level of moral evaluation).[61] This, it seems, is unavoidable.

[60] Wall 2013a: 488–490, 494–496, 2003: 246. He is not perfectly clear whether he wants to argue that modus vivendi arrangements ('constitutional settlements') *are* non-instrumentally valuable or that people can come to *regard* them as non-instrumentally valuable while they are in fact instrumentally valuable (whereby regarding them as non-instrumentally valuable is necessary for the success of the arrangement).

[61] Wall 2013a: 490.

Summary

Peace does not conceptually subsume justice; there is just peace and there is unjust peace. Peace is also not a mere precondition for realizing justice, but a value of its own. Neither is realizing justice necessary for achieving sufficiently stable peace.

9

Peace and Non-interference

In this chapter, I discuss another conception of peace that is more demanding than the one I developed earlier: Chandran Kukathas's conception of peace. I start by outlining some of his background views on the tasks of political philosophy.[1]

Kukathas's Liberal Archipelago

Chandran Kukathas claims that all humans have one basic interest, which is to live according to conscience, understood simply as the desire to act rightly.[2] The basic task of political philosophy, as Kukathas sees it, is to figure out how, in a world of moral pluralism, everyone could be enabled to live according to conscience. His answer is that we need a 'free society,' that is, a society that is neither ordered according to a particular conception of the good life nor ordered according to a particular conception

[1] The argument in this chapter is based on Wendt 2013.

[2] Kukathas 2003: 47–73. While Chap. 7 employed some Hobbesian ideas, this chapter deals with an account that has roots in Pierre Bayle (1686/2005).

F. Wendt, *Compromise, Peace and Public Justification*,
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of justice (which is, needless to say, quite provocative). The basic idea is nicely summed up in the following quote:

> If we accept that acting rightly is fundamentally important to human beings, that this concern to act rightly should be respected, and that humans differ on the question of what right conduct, including justice, requires, the task of a political philosophy is to explain how we should deal with the fact of different or conflicting understandings of right conduct. What cannot count as a good answer to this question, however, is one which presents a particular theory of justice as a moral conception which should command universal assent (or around which a consensus could emerge); for, ex hypothesi, it is the absence of consensus on moral fundamentals which is the problem. Indeed, an answer of this kind will, in the end, compel many people to live by standards they cannot accept, and, so, fail to respect their desire to live rightly.[3]

A free society upholds freedom of association. Freedom of association means that every individual should be free to associate with other individuals on the basis of voluntary consent. Every individual should also be free to dissociate from others if he or she can no longer live with them in good conscience. But freely associated groups should be allowed to live according to their conscience, to run their internal affairs as they see fit. Kukathas's vision of the free society is illustrated with his picture of a 'liberal archipelago,' a number of freely constituted islands with their own moral jurisdictions. Internally, these freely associated islands have their independent moral jurisdictions and are allowed to live according to their conceptions of the good life and their conceptions of justice. Every island therefore is to be tolerated by outsiders even when those outsiders think the island's practices are repugnant, wrong, or unjust. A truly liberal society tolerates even straightforwardly illiberal groups in its midst, according to Kukathas.[4]

Now what is the role of peace? Kukathas thinks that the only task of the state is to uphold peace in the archipelago: 'The state should not be concerned about anything except order or peace. It cannot accomplish

[3] Kukathas 2003: 76.

[4] Kukathas 2003: 24–25.

any more.'[5] Unfortunately, Kukathas is not very clear on what he means by peace. But it seems plausible that peace is realized, according to his theory, when we have stable non-violent relations between 'islands' that have their own moral jurisdictions in internal affairs. It is realized when everyone can live according to conscience including one's idea of justice without external interference. One can call Kukathas's conception of peace 'ambitious peace.' It will become clear in what way this notion of peace is much more ambitious than the one outlined so far.

Only in passing I would like to note a difficulty in attempts to give the idea of the liberal archipelago some more concrete shape. The problem is that groups are usually not homogeneous units, but consist of different sub-groups. These sub-groups, and in the end individuals, should also be allowed to live according to conscience, one might think. And indeed, Kukathas claims that every individual is to have an exit option: every person must be allowed to leave the island where he is born or to which he has emigrated. Of course, every exit has its costs, and those who want to leave will have to bear these costs. So far so good. The decisive question is whether even threats of violence or actual violence by one's co-islanders are thought to be simply morally neutral 'costs' to be taken into account by the person willing to emigrate. If they are, then there is no such thing as an intra-group violation of peace. This is not very plausible: just as inter-group relations should be peaceful, so should intra-group relations be peaceful if every person is to live according to conscience. Nonetheless, for Kukathas, only inter-group violence and peace seem to be adequate concerns for the state, not intra-group violence and peace.[6] He has some arguments for this asymmetry, in the first instance the dangers of concentrated power: to legitimize the state to interfere with an association's inner affairs would give the state too much power. But conceptually, there is intra-group peace just as there is inter-group peace. And one might be tempted to think that, if it is the proper task of the state to aim at inter-group peace, then it must also be its proper task to aim at intra-group peace.

[5] Kukathas 2003: 252.

[6] Kukathas 2003: 147, 213, 1997: 70–71. Relatedly, see Barry's criticism of Kukathas's account (2001: 141–146) and Kukathas's reply (2003: 140–147).

Note that Kukathas's asymmetrical treatment of inter-group violence and inner-group violence marks the main difference between his theory and a justice-based libertarianism as advocated by Robert Nozick, for example.[7] Nozick paints the picture of a libertarian minimal state as an experimentation field for utopia.[8] Libertarian property rights allow people to freely associate and form communities of any kind. Illiberal communities, as long as they are voluntarily formed, are of course permissible. The difference to Kukathas's archipelago lies in Kukathas's stance on non-interference with inner-group violence.[9]

Peace Beyond Modus Vivendi

Now what is important to see is that Kukathas's vision of peace is not the conception of peace as based on modus vivendi arrangements, that is, the conception of peace I sketched earlier. The reason is that the radical non-interference with every group's internal affairs that Kukathas envisages will not be realized by modus vivendi arrangements. When modus vivendi arrangements are established, powerful groups that are keen to see their own way of life spread will usually be able to impose some aspects of their ways of life on a weaker group and thus fail to let them live according to their conscience, even concerning internal affairs. Imagine a powerful group committed to Pagan values and a small, not-so-powerful group of Christians. Both have an interest in peaceful coexistence, but under the given distribution of power, the Pagan group is able to achieve a modus vivendi that requires Christians to incorporate certain Pagan customs in their worship or to teach their children some Pagan beliefs, for example. To be sure, both sides will have to make some

[7] Nozick 1974.

[8] Nozick 1974: part three. For Kukathas's take on part three of *Anarchy*, *State*, *and Utopia* see Kukathas 2011.

[9] Kukathas confirms this when he distinguishes a 'Federation of Liberty' and a 'Union of Liberty' as two interpretations of libertarianism. In the former, the state does not interfere when groups keep their members in their group by force (2009: 3–4). In the latter, the state does interfere (2009: 6). Kukathas favors the Federation of Liberty because he thinks it is too dangerous to let the state define laws that specify a particular understanding of liberty (2009: 9–12). For a critique see Narveson 2009.

concessions, but the Christians have to make concessions regarding their internal affairs as well. The simple point is: modus vivendi arrangements usually do not give every group full autonomy in internal affairs. For example, under some (Muslim) Mughal emperors, neither Muslims nor Hindus were allowed to eat either pork or beef. This might have been wise, but it is not the tolerance of the liberal archipelago. In the liberal archipelago, Muslims would have to tolerate the Hindu consumption of pork, and Hindus would have to tolerate the Muslim consumption of beef. I conclude that if peace is only realized when everybody is free to live according to conscience, then peace cannot be thought to rest on modus vivendi arrangements. Having modus vivendi arrangements is far from sufficient for realizing radical non-interference with every group's internal moral affairs.

True, every modus vivendi will give every party *some* space to settle its own affairs in its own way—but only some space. It is true that toleration is 'of critical importance in a world in which people disagree; particularly, in a world in which people disagree about questions of social justice.'[10] But this toleration is not the radical non-interference of the liberal archipelago. In Kukathas's conception, peace is not based on a modus vivendi.

Interestingly, when Kukathas speaks about compromises in his book, he mostly has the internal structure of the islands in mind. He writes:

> The archipelago […] is not without its points of stability, since not everyone is willing to move to find the perfect place, or even the best of all possible places. Those points are compromises, as people acquiesce in arrangements they are prepared to countenance because unwilling to bear the costs of doing otherwise.[11]

Why not let the terms of the whole archipelago be established as a compromise on modus vivendi arrangements?[12] Why fix that every island has

[10] Kukathas 2003: 120.

[11] Kukathas 2003: 261.

[12] In an earlier paper, I emphasized that Kukathas's conception of peace is not based on a compromise (2013). That is true, but I would now emphasize that neither are modus vivendi arrangements necessarily based on a compromise (see Chap. 6).

to have its own moral jurisdiction in all internal affairs? The answer, again, is that this is the way to enable everyone to live according to conscience. And it is only then that we realize true peace, according to Kukathas.

Peace and Moral Consensus

Now recall that Crowder argued, against Gray's grounding of modus vivendi in value pluralism, that peace is just one value among many and cannot claim a special place within a theory of value pluralism (Chap. 7). The answer was that peace is indeed special, but the reason had not much to do with value pluralism. What is special about peace is that it is feasible without moral consensus, because peace has non-specific and specific instrumental value for (almost) everyone. It does not presuppose a moral consensus because it rests on modus vivendi arrangements that need not be accepted for moral reasons. It can be accepted for reasons of self-interest. This, I think, is something attractive about peace, something one should not want to give up. But because Kukathas's ambitious conception of peace does not rest on modus vivendi arrangements, this answer to Crowder is not available to him. It presupposes a consensus that non-interference is the appropriate way to go.

Kukathas admits that there is some consensus presupposed in his theory: 'Political society, if it is a free society, embodies agreement. Yet this is not agreement on substantive truths about matters of justice, but, rather, agreement to abide by norms which tolerate disagreement.'[13] It is a consensus that all moralities should be allowed to coexist and be left internal authority free from external interference. This, Kukathas could claim, is indeed some consensus, but not a *moral* consensus because it is just a consensus to have *no* substantial moral consensus and to therefore let everyone go one's own way. Is this move convincing? Whether a consensus to abide by norms which tolerate moral disagreement is a 'moral consensus' depends on what we mean by 'moral consensus.' There are three accounts of what makes a consensus a moral consensus:

[13] Kukathas 2003: 100, see also 2003: 19, 73, 76, 106, 131, Gray 2000: 5.

(1) A consensus is a moral consensus if it is a consensus concerning morality.
(2) A consensus is a moral consensus if it is an agreement in which all parties are moved by moral reasons.
(3) A consensus is a moral consensus if it is an agreement on the truth of a moral proposition.

The consensus to abide by norms which tolerate moral disagreement is obviously a moral consensus in sense (1). It is a consensus on how to deal with moral disagreements, and it is therefore a consensus concerning morality. It is also a moral consensus in the sense (2). If some parties were moved by prudential reasons, then we would probably not get norms of non-interference with all internal affairs, but a compromise where disparities of power lead to some interference in some group's internal affairs. If the parties come to a consensus not to interfere with all internal affairs of other groups, then they will have to be moved by moral reasons. The moral reasons behind this consensus might well be the reasons provided by Kukathas's theory: the importance of living according to conscience combined with accepting the contingent fact of moral pluralism. Some parties might also have other moral reasons to accept the vision of peace as mutual non-interference. Then there is not a consensus on the moral reasons why one should accept Kukathas's vision of peace, but a convergence on this vision for different moral reasons. And thus there is a moral consensus in sense (2). The consensus is also a moral consensus in the sense (3). The parties apparently disagree on many substantive moral propositions, but the idea that we should abide by norms which tolerate moral disagreement is itself a moral proposition. Kukathas thinks it is not, because we do not have an 'agreement that,' but an 'agreement to.' It is an agreement on what to do, not an agreement that a proposition is true.[14] In the case in question, we have nothing more but an agreement *to* abide by norms which tolerate moral disagreement. But I do not think that Kukathas's explanation is convincing: the parties must also agree that abiding by norms which tolerate moral disagreement is the right thing to do in such a situation. After all, each party will have moral reasons to

[14] Kukathas 2003: 99–100.

agree to abide by norms which tolerate disagreement, and thus, every party will accept the proposition that the right thing to do is to abide by norms which tolerate disagreement. Of course, it is a moral proposition about what to do in light of the fact of substantive moral disagreements. I call this a 'second-order moral consensus.' But it still *is* a moral consensus. So we have a moral consensus in all three possible meanings of this expression. And a consensus to abide by norms which tolerate moral disagreement is no more likely to be realized than any consensus on substantive principles of justice.

Hence, with Kukathas's conception of peace, peace indeed becomes one value among others, nothing special because feasible without moral consensus. If peace is supposed to be something feasible without moral consensus, then we cannot embrace Kukathas's conception of ambitious peace. In fact, peace as conceived here gives us weighty moral reasons to agree to less than what we regard as the morally best arrangement (on the first level of moral evaluation), and the realization of Kukathas's conception of ambitious peace is a first-level view about what is morally best. Hence, if Kukathas's moral outlook is right—and I want to stay neutral regarding what the correct political morality on the first level is—then peace as conceived here gives us moral reason to make compromise that fall short of realizing ambitious peace.

Reconciling Two Conceptions of Peace?

In an earlier article, I argued that Kukathas's ambitious peace and what I called 'ordinary peace' (i.e. more or less the notion of peace defended earlier) could form one 'ideal of peace' with an internal division of labor between the two notions.[15] I now think this was misguided. But let me explain how I thought the 'division of labor' among the two conceptions of peace was supposed to work. Modus vivendi arrangements can take different forms. Mutual concessions might be of the kind sketched in the Mughal emperor example. In the Mughal emperor example, both parties agree to accept some internal regulations that please the other

[15] Wendt 2013: 588–589.

party. But mutual concessions can also be of another kind: both parties can forswear interference with the other party's internal affairs. Ordinary peace is indifferent between the two forms of arrangements, but ambitious peace will advocate the second kind of solution wherever possible. Ambitious peace, I thought, could provide a point of view from where to critically judge the content of modus vivendi arrangements, so to say. And certainly, it *is* a point of view from where to critically judge the content of modus vivendi arrangements. But so is the point of view of justice, for example. To make more plausible that ambitious peace and ordinary peace could indeed form an ideal of peace together, I emphasized that both have the same *source* of value. Ambitious peace is valuable because it gives everyone maximum space to live according to conscience (including what conscience says about justice and all other first-order moral ideas). Ordinary peace gives everyone at least *some* space to live according to conscience. That's one reason why it is in the interest of all. Ambitious peace demands non-interference with *all* internal affairs of voluntarily associated groups, while ordinary peace will usually only concede *some* non-interference. But not only ordinary peace, but also justice, for example, will give everyone at least some space to live according to conscience. Hence, one should reject ambitious peace as a conception of peace. There is no special connection between peace as based on modus vivendi arrangements and Kukathas's ambitious interpretation of peace, and they cannot be reconciled by declaring them two aspects of one ideal of peace.

Summary

Peace, in Kukathas's conception, requires a second-order moral consensus to grant every voluntarily associated group complete non-interference in all internal affairs. This is not the conception of peace we should adopt when we want a conception of peace that is feasible without moral consensus, something that allows us to live together in the face of moral disagreement.

Part III

Public Justification

10

Public Justification: The Basic Idea

In contrast to peace, public justification is a value that is probably unknown to most persons outside academic political philosophy. Yet in contemporary political philosophy, public justification has become a central idea and 'public reason liberalism' an important school. Like peace, public justification is a moral value on the second level of moral evaluation. It provides moral reasons to make compromises, as I will argue later (Chap. 14). For now, I would like to get clear on what public justification is and why it should be considered a value at all.

The core idea of public justification is well-described as 'multi-perspectival acceptability.'[1] A public justification must (in some sense) be directed at specific persons with differing beliefs and evaluative standards, even though some of their beliefs and evaluative standards may be wrong or unsound. A public justification is a justification *to* the relevant persons. As John Rawls says, '[p]ublic justification is not simply valid reasoning, but argument addressed to others.'[2] In this chapter, I present some of the issues that a more precise conception of public justification

[1] Lister 2013a: 1.

[2] Rawls 1997: 594.

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has to deal with. In the next three chapters, I will discuss the source (or sources) of the value of public justification, and I will try to lay out what conceptualization of public justification is suggested by this source (or these sources).

Four Issues

The first issue that a conception of public justification has to deal with is the subject of public justification: what is it that has to be publicly justifiable? According to John Rawls, for example, only constitutional essentials and matters of basic justice have to be publicly justifiable; according to Charles Larmore and Thomas Nagel, coercive laws have to be publicly justifiable; according to Jonathan Quong and Colin Bird, all political decisions (including those that do not result in coercive state action) have to be publicly justifiable; and according to Gerald Gaus, both laws and rules of social morality have to be publicly justifiable.[3]

The second issue is the constituency of public justification. Whom do we owe a public justification? No proponent of public justification thinks that public justification requires acceptability by *all* affected parties. Some, at least psychopaths, Nazis, or terrorists from the Islamic State, stand outside the constituency of public justification. In Rawls's and Quong's account, 'reasonable' persons (i.e. persons who accept the burdens of judgment, the fact of reasonable pluralism, and the idea of society as a fair system of cooperation among free and equals) form the constituency of public justification; in Gaus's account, it is persons whose evaluative standards are 'mutually intelligible.'[4] Because the constituency cannot include everyone, public justification in the end means 'qualified acceptability.'[5]

The third issue is what standard of 'justification' is employed. Laws (or whatever is at stake) are justifiable to a person when the person has

[3] Rawls 1993/1996: 214, 2001: 91, Larmore 1990: 348–349, 1999: 607–608, Nagel 1987: 223, 1991: 159, Quong 2011: 273–287, Bird 2014, Gaus 2011a: xiv, 2.

[4] Rawls 1993/1996: 49, 54, Quong 2011: 182, Gaus 2011a: 279–283.

[5] Estlund 2008: 45.

sufficient and undefeated reason to accept them. But what does it mean to have a reason? One need not consciously 'see' a reason in order to have it.[6] Instead, on a plausible proposal, a person has a reason if she *would* see the reason under certain idealized circumstances.[7] This can be spelled out in different ways, of course. For example, according to Gaus's account, a person has a reason if she would see it after 'a respectable amount of good reasoning' and if there are no defeater reasons.[8] Because public justification means a justification to more than one person, it can be helpful to translate the justificatory problem into a deliberative problem. Instead of asking what reasons this or that person has, we ask what idealized counterparts of these persons could agree on.[9] The idealized counterparts actually perform 'a respectable amount of good reasoning,' on Gaus's account, and so actually see all the reasons that their empirical counterparts have, but sometimes do not see.

Some will want to idealize more. Some will want to idealize to the point where the members of the constituency are 'fully rational' and/or have sound evaluative standards.[10] This, though, would go too far, for two reasons. The first is that it is not a plausible interpretation of what it means for persons to 'have a reason.' Interpreting that notion requires some idealization, but only some. What reasons people have must be relative to their specific point of view including their evaluative standards. Nagel writes:

> We should not impose arrangements, institutions, or requirements on other people on grounds that they could reasonably reject (where reasonableness is not a function of the independent rightness or wrongness of the arrangements in question, but genuinely depends on the point of view of the individual in question to some extent).[11]

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[6] Gaus 2011a: 235–236.

[7] There must be a 'deliberative route' from the current beliefs and evaluative standards of the relevant persons to actual acceptance of the proposal, but this deliberative route need not actually be taken by the person (Gaus 2011a: 235–236, Williams 1979/1981).

[8] Gaus 2011a: 245, 250.

[9] Rawls 1971: 17, Gaus 2011a: 264.

[10] For that suggestion see Wall 1998: 61, 2010: 134, Gaus 2011a: 236–244.

[11] Nagel 1987: 221, see 1991: 33–34.

Second, if the members of the constituency are idealized so far that every member has sound evaluative standards and makes no mistakes in deliberation, then the idea of public justification has lost its point. Such idealized persons would of course all agree on what the morally best$_1$ arrangement would be. (For this notation, see Chap. 3.) Only the morally best$_1$ arrangement, or set of morally best$_1$ arrangements, would be publicly justified. In order for the idea of public justification to have a point, it must at least be possible that an arrangement is in fact the morally best$_1$ arrangement, but fails to be publicly justified, and it must be possible that something is publicly justified without being the morally best$_1$ arrangement.

On the other hand, some will want to idealize less. At the extreme, people are not idealized at all in a model of public justification. On that account, nothing can be justified to a person without actually being accepted as justified by that person. The distinction between acceptability and actual acceptance disappears. Steven Wall uses the term *non-subjugation* for that idea.[12] But one can argue that the idea of public justification again loses its point when it amounts to non-subjugation. In order to have a point, it must at least be possible that something is publicly justified without being actually accepted. For that reason, I will treat non-subjugation as a separate idea, not as an interpretation of public justification. I should also emphasize that aiming at non-subjugation is not the same as aiming at everyone's consent. We have non-subjugation when some arrangement is accepted by everyone, but acceptance is not the same as consent (see Chap. 2).

The fourth issue is whether justifying reasons have to be 'public reasons,' that is, reasons that are accessible to all, or whether each party can have their own justifying reasons, that is, reasons that are not accessible to others.[13] On the first account, public justification requires a 'consensus' on justifying reasons; on the second account, a 'convergence' of justifying

[12] Wall 2013a: 490–491. Gaus and Eberle call it 'populism' (Gaus 1996: 130–136, Eberle 2002: ch. 7).

[13] Arguably, reasons must at least be 'intelligible' to others (Vallier 2014: 105–107). This is not the same as claiming that the constituency of public justification is limited to persons with mutually intelligible evaluative standards.

reasons is sufficient for public justification.[14] Gaus is the most prominent defender of a convergence view. Quong—among many others—defends a consensus view.[15] Only on the convergence view can disputed religious reasons, for example, both contribute to public justification and defeat a public justification. The term 'consensus' may be misleading, because public reasons need not be actually accepted; they only need to be accessible to everyone. Nonetheless, I will sometimes refer to the view as the 'consensus view.'

Four Comments

Before coming to the discussion of the source of the value of public justification, I have four more comments. The first comment is that public justification is not identical with moral justification. A person can have moral reasons to regard arrangement *X* as the morally best$_1$ arrangement, even though *X* is not publicly justifiable. When these moral reasons are sufficiently strong and undefeated, then the person is justified in thinking that arrangement *X* would be the best$_1$ arrangement, even though *X* is not publicly justifiable.[16] That person, finally, can even be *right* that arrangement *X* would be the morally best$_1$ arrangement, even though *X* is not publicly justifiable. Yet of course, the person may also be wrong. One can be justified in thinking that p without p actually being the case. Likewise, one can be justified in thinking that *X* would be the morally best$_1$ arrangement without *X* actually being the morally best$_1$ arrangement. Following Wall, one can thus distinguish 'subjective' and 'objective' justification.[17]

[14] The distinction is from D'Agostino 1996: 30–31. One can make more fine-grained distinctions regarding the way reasons have to be accessible in a consensus view (Eberle 2002: 252–286, Vallier 2014: 104–111).

[15] Gaus 2010a: 25–26, 2011a: 283–287, Quong 2011: 261–273.

[16] It is a 'correctness-based' justification (Wall 2002: 386, see also 2010: 126–127, 133, 136–137). In a similar vein, Eberle distinguishes between 'rational' and 'public' justification (2002: 61–66). In contrast to this, Gaus sometimes suggests that all moral justification requires public justification (1996: 129, 2003b: 143–145), and he says that partial (i.e. non-public) reasons 'are not moral reasons' (2003b: 154). But he also says that 'many of our moral beliefs that are personally justified are not publicly justified' (1996: 11), although he would certainly deny that such moral beliefs could translate into valid intersubjective moral demands (1996: 120–122).

[17] Wall 1998: 101–103.

Being subjectively justified means being justified in believing something, being objectively justified means being subjectively justified and actually being right. Because one can be justified without being right (i.e. merely subjectively justified), it is possible that person *A* is justified in believing that arrangement *X* would be the best$_1$ arrangement, while person *B* is justified in believing that arrangement *Y* would be the best$_1$ arrangement. Only one of them can be right and hence objectively justified about what the best$_1$ arrangement would be. In any case, it is important to bear in mind that public justification is to be distinguished from moral justification. Moral justification aims at correctness or truth (when it succeeds, one is objectively justified)[18]; public justification aims at acceptability from different perspectives, which includes perspectives that involve wrong beliefs and unsound evaluative standards.

What proponents of public justification often claim, though, is that there is *some* realm where public justification is strictly necessary for moral justification. For example, Gaus concedes that we always have to reason from the 'first-person standpoint,' yet he insists that, from the first-person standpoint, we have to regard public justification as necessary for the legitimacy of authoritative demands in social morality.[19] The moral justification of certain things—social morality, coercion, laws, constitutional essentials—is taken to be essentially public or intersubjective. When this is claimed, then one advances a 'principle of public justification' for a certain realm. Such a principle basically works like a trump over other moral considerations. But because public justification is not identical with moral justification we certainly need an argument for making public justification a strict principle in that sense. In the next chapters, while searching for the source (or sources) of the value of public justification, I will also discuss whether a source provides reasons to make public justification a strict principle. As most proponents of public justification regard it as a strict principle, defenses of public justification are often considered as flawed when they fail to show that public justification has to be conceived as a principle. As I am not committed to defending a principle of public justification, but to finding the source of the value

[18] Wall 2002: 386.

[19] Gaus 2011a: 225–226, 228–229. On the first-person standpoint see Wall 2010: 136–140.

of public justification, I can see such attempts to defend a principle of public justification in a different light: it will be sufficient if they can explain why public justification should be considered a value. They need not show that public justification should be considered a strict principle. To anticipate, I will argue that public justification should indeed not be made a strict principle. It should be considered as one moral value among others, a value that provides moral reasons in the moral justification of laws (or whatever the subject of public justification is), but that does not trump all other moral reasons that come up in moral justification.[20]

The second comment is that I will only discuss public justification as a value, a value that is realized when laws (or whatever is considered the subject of public justification) have the property of being publicly justifiable. I will ask why we should consider that property valuable and thus consider public justification as a value. I do not presuppose, defend, or reject any moral duties with regard to public justification. There is quite some disagreement about the moral duties that we should accept along with the ideal of public justification. According to Rawls, for example, judges, legislators, and citizens have a 'duty of civility' to provide public reasons and base their decisions upon public reasons in certain circumstances.[21] Public reasons, of course, only have a place in the consensus model of public justification. In a convergence model, there is no distinction between public and non-public reasons: all reasons can both contribute and defeat a public justification. Accordingly, adherents of a convergence model of public justification like Gaus and Kevin Vallier argue against moral duties of restraint like Rawls's duty of civility, at least with regard to citizens.[22] Other moral duties are compatible with both consensus and convergence models. Two are most important: the moral duty to pursue public justification before making relevant political decisions, and the moral duty not to support not publicly justifiable laws (or whatever is considered the subject of public justification). Rawls's duty of civility is arguably supposed to encompass both of these moral duties

[20] Some critics of public reason liberalism agree that public justification is at least one value among others (Raz 1998: 51, Wall 2010: 137, 2013a: 488, Enoch 2015: 138–140).

[21] Rawls 1993/1996: 215, 217, 220, 1997: 767–769. For discussion of the distinction between public and non-public reasons see Greenawalt 1995: chs. 3–4, 2007.

[22] Gaus 2010a, Vallier 2014: ch. 6.

as well. Christopher Eberle, on the other hand, argues that citizens have a moral duty to pursue public justification, but not a moral duty to refrain from supporting publicly unjustified laws, when they have a 'rational justification' (i.e. a sound moral justification) for their position and when the pursuit of public justification failed.[23] Yet public justification as a value, on the one hand, and the moral duties to provide public reasons and base one's decisions on public reasons, to pursue public justification, and not to support not publicly justifiable laws (or whatever is at stake), on the other hand, are often not discussed separately in the literature, in particular in debates about why we should accept a principle of public justification. For example, when a principle of respect is cited as a reason to accept a principle of public justification, it is sometimes suggested that we express respect in pursuing public justification. But public justification as a value need not be actively pursued. I want to know whether there is anything valuable about the property of public justifiability per se, not about pursuing public justification. For that reason, I will have to try to rephrase or replace such arguments in the following chapters, when discussing the source (or sources) of the value of public justification.

The third comment is that Andrew Lister has drawn a distinction that crosscuts the first and the fourth issue (the issue what the subject of public justification is, and the issue whether justifying reasons have to be public reasons or not). He asks whether the requirement of public justification is to be applied directly to coercive state action or to reasons for political decisions.[24] When applied to reasons for political decisions, then not passing the test of public justification does not lead to political inaction, but merely to an exclusion of reasons.[25] Now applying the demand of public justification to reasons for political decisions in the end just means that reasons for political decisions have to be public reasons. Hence, to apply the requirement of public justification to reasons for political decisions is just another way of saying that it is political decisions that have to be publicly justifiable (first issue), and that the justifying reasons have to be public reasons (fourth issue).

[23] Eberle 2002: 10, 68–71, chs. 4–6.

[24] Lister 2013a: 1–2.

[25] Lister 2013a: 15, 19–20.

The fourth comment is that, as indicated in the introduction, one can accept public justification as a value (and even as a strict principle in the above sense) without endorsing contractualism or contractarianism. Contractualist and contractarian ideas have been used for many different purposes in the history of ideas. In the classical social contract theories, we find contractualist or contractarian theories of political authority.[26] Rawls and others have proposed contractualist or contractarian theories of justice[27]; still others have proposed contractualist or contractarian theories of interpersonal morality.[28] Of course, one can read Rawls's 'original position' from *A Theory of Justice* as a prototype of a model of public justification. But the original position is the core part of a theory of justice. In this book, I regard public justification as a value of its own, distinct from justice. As will become clear in the next chapter, Rawls does as well (at least in his late writings). I want to stay neutral on what justice is and what interpersonal morality in general is. What I say is compatible with contractualist and contractarian accounts of justice and interpersonal morality, but also with all other accounts of justice and interpersonal morality (I will get back to this point in Chap. 14).

Summary

Public justification means, basically, multi-perspectival acceptability. It requires a justification *to* the relevant parties with their different evaluative standards. A more precise conceptualization of public justification has to deal with (at least) the following four issues: (1) What is to be publicly justifiable? (2) Who is the relevant constituency of public justification? (3) How far should members of the constituency be idealized? (4) Do justifying reasons have to be public reasons? But how public justification is to be conceptualized depends on what we regard as the source of the value of public justification. To this I turn in the next chapters.

[26] Hobbes 1651/1996, Locke 1689a/1960, Rousseau 1762/1968, Kant 1793/2006.

[27] Rawls 1971, 2001: 80–134, Buchanan 1975, Barry 1995a, Gosepath 2004, among others.

[28] Gauthier 1986, Scanlon 1998, Stemmer 2000, Darwall 2006, among others.

11

Rawls, Stability and Public Justification

In this and next chapters, I explore the source (or sources) of the value of public justification. Let me start with some answers that are inspired by the most prominent proponent of public justification, John Rawls.

The Place of Public Justification in Political Liberalism

Before getting to the place of public justification in Rawls's complex political philosophy, I have to sketch the basic idea of 'political liberalism.' The basic idea of political liberalism is to present a liberal conception of justice as a purely 'political doctrine' that is compatible with a plurality of reasonable 'comprehensive doctrines' that disagree on many moral, religious, and philosophical issues. If a conception of justice is to be compatible with a diversity of reasonable comprehensive doctrines, it has to avoid taking a stance on issues that are disputed among reasonable comprehensive doctrines. A political conception of justice thus cannot rely on controversial religious, philosophical, or moral claims; instead, it is 'freestanding' and thus fits like a module into different comprehensive

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doctrines with their diverse religious, philosophical, and moral views.[1] Rawls's conception of 'justice as fairness' should be understood as such a freestanding, political conception of justice, although it was not presented that way in his *A Theory of Justice*. Rawls emphasizes that there are other political conceptions of justice, though, and that 'in any actual political society a number of differing liberal political conceptions compete with another.'[2] Rawls mentions Catholic views of the common good and Habermas's discourse ethics as political conceptions of justice, when presented in a freestanding way. He writes:

> Political liberalism, then, does not try to fix public reason once and for all in the form of one favored political conception of justice. That would not be a sensible approach. For instance, political liberalism also admits Habermas's discourse conception of legitimacy […] as well as Catholic views of the common good and solidarity when they are expressed in terms of political values.[3]

In that sense, 'political liberalism is a kind of view. It has many forms.'[4]

The main alternative to political liberalism is different versions of 'comprehensive liberalism.'[5] A comprehensive liberalism presents a conception of justice as based on controversial philosophical and moral ideas, for example by advocating a liberal view of the good life which gives autonomy pride of place. A comprehensive liberalism then becomes one comprehensive doctrine among others and does not appropriately acknowledge the 'fact of reasonable pluralism' that is the consequence of liberal institutions (because liberal institutions allow the free exercise of reason).[6]

How do we develop a freestanding, political conception of justice? According to Rawls, we have to start with intuitive ideas implicit in

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[1] Rawls 1985: 230–231, 1987: 3–4, 7–8, 1989: 240, 242, 1993/1996: 9–10, 12, 40, 2001: 182–183.

[2] Rawls 1993/1996: xlviii, see 1993/1996: xlix, 223, 226, 1997: 770, 774.

[3] Rawls 1997: 774–775.

[4] Rawls 1993/1996: 226.

[5] For example Locke 1689a/1960, Hume 1738/1978, Kant 1797/2006, Mill 1859/2002, Raz 1986, Dworkin 2011.

[6] Rawls 1993/1996: 36–37. The fact of reasonable pluralism, in turn, is explained, by the 'burdens of judgment' or 'burdens of reason' (1989: 235–238, 1993/1996: 54–58).

our political culture.[7] This need not make the theory relativistic. One can argue that starting with our political culture is part of the Rawlsian method of reflective equilibrium.[8] In any case, the deepest idea we find in our political culture is that of society as a fair system of cooperation among free and equal citizens, according to Rawls. Because a political conception of justice provides an interpretation of this idea, it is forced to be 'liberal' in a broad sense. A liberal political conception of justice fixes basic rights and freedoms for everyone and gives them a certain priority over other considerations, and, according to Rawls, it also makes sure that everyone has the opportunity to make effective use of these rights and freedoms.[9]

This, roughly, is the idea of political liberalism. How does the idea of public justification fit in? It is introduced by Rawls as a 'liberal principle of legitimacy,' which I will call 'principle of public justification,' in order to make clear that it is about public justification. (On legitimacy, see Chap. 17.) That principle says that

> our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.[10]

'Reasonably be expected to endorse' here expresses the requirement of public justification.[11] Elsewhere Rawls more clearly writes that 'the basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires.'[12]

It should be noted that only constitutional essentials have to be publicly justifiable, according to Rawls's phrasing of the principle. But because

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[7] Rawls 1985: 225, 1987: 6–7, 1989: 240, 1993/1996: 8, 13–14.

[8] Quong 2011: 155, Larmore 1990: 356.

[9] Rawls 1993/1996: xlviii, 6, 156–157, 223, 1997: 774.

[10] Rawls 1993/1996: 137, see 1993/1996: 217.

[11] Note that requiring that constitutional essentials must be 'reasonably endorsable' is weaker than requiring that they must 'not be reasonably rejectable.' On this point see Reidy 2007: 265–272. Scanlon builds a whole moral theory on the idea of reasonable rejectability (1998).

[12] Rawls 1993/1996: 224.

all exercises of political power have to be 'in accordance' with a publicly justifiable constitution, they have to be publicly justifiable at least in a derivative sense.[13] This is sometimes overlooked.

The public justification of constitutional essentials is understood in terms of a consensus model (see Chap. 10), according to Rawls: they have to be based on a political conception of justice, and political conceptions of justice provide public reasons, because they do not presuppose the acceptance of a particular comprehensive doctrine. Yet there is also a convergence element in Rawls's account: every reasonable comprehensive doctrine can find its own reasons to accept a political conception of justice, when it incorporates a political conception of justice like a module.

Elsewhere, Rawls adds that not only constitutional essentials, but also 'matters of basic justice' have to be publicly justifiable.[14] In 'justice as fairness'—Rawls's favorite political conception of justice—constitutional essentials are implementations of the first principle of justice (dealing with people's rights and freedoms), matters of basic justice concern the second principle of justice (dealing with social and economic inequalities).[15] Because matters of basic justice have to be publicly justifiable as well, at least some regular laws (not constitutional essentials) have to be directly publicly justifiable.

How do justice and the principle of public justification relate in Rawls's account? Because the principle of public justification requires the public justification of constitutional essentials and matters of basic justice, it requires that constitutional essentials and matters of basic justice conform to a political conception of justice, but not to a particular one.[16]

Recall that 'justice as fairness' is not the only political conception of justice. Constitutional essentials and matters of basic justice do not have to be in accordance with 'justice as fairness' in order to be publicly justifiable.

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[13] See Gaus 2003b: 159, 2011a: 491, 494, Weithman 2011: 312–316. Such derivative public justification is weak, though. Much more can be ruled out if laws have to be publicly justifiable themselves (Quong 2011: 280).

[14] Rawls 1993/1996: 137–138, 1997: 767.

[15] Rawls 1993/1996: 227–230.

[16] Rawls sometimes refers to 'public justification' as the situation where everyone *realizes* that there is an overlapping consensus (1993/1996: 387). This is not the sense of public justification I will use here. When he introduces the 'idea of public justification' in *Justice as Fairness*, he simply describes political conceptions of justice that fit into different comprehensive doctrines (2001: 26–27).

The principle of public justification requires that constitutional essentials and matters of basic justice conform to *a* political conception of justice. In that sense, 'legitimacy' (the principle of public justification) is 'weaker' than justice, yet 'related' to justice, as Rawls says.[17]

But why should we accept the principle of public justification? It is not evident what Rawls's answer is. In this chapter, I will now go through several answers that can be reconstructed from Rawls's work. In the chapters thereafter, two further answers will be discussed that can also be reconstructed from Rawls, but have more prominently been developed by others.

Five Rawlsian Answers

The first Rawlsian answer is that we should accept the principle of public justification (the liberal principle of legitimacy) because coercion is in special need of justification. Rawls argues that political power is always coercive[18] and, according to him, this 'raises the question of the legitimacy of the general structure of authority.'[19] But while coercion certainly is in need of justification, non-coercive acts and even omissions are sometimes in need of justification as well.[20] More importantly, while coercion certainly is in need of justification, it is not clear why it is in need of a public justification (in contrast to a moral justification that aims for correctness). The coerciveness of state action alone is not enough to motivate the principle of public justification.

The second Rawlsian answer is that the principle of public justification (the liberal principle of legitimacy) is grounded in the criterion of reciprocity.[21] Rawls says at one point that the idea of political legitimacy is 'based on' the criterion of reciprocity.[22] The criterion of reciprocity states that 'our exercise of political power is proper only when we sincerely

[17] Rawls 1993/1996: 427–428, see also Freeman 2007: 377–379, Quong 2011: 137.

[18] Rawls 1989: 242, 1993/1996: 136, 2001: 40.

[19] Rawls 1993/1996: 136.

[20] Wall 2010: 129–132.

[21] For this interpretation see Reidy 2007: 248–250, Neufeld 2010.

[22] Rawls 1997: 771.

believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions.'[23] This sounds as if the criterion of reciprocity is an addendum to the principle of public justification, requiring that we must also *believe* that the principle of public justification is met when we exercise political power. If that is the case, it is hard to see how the criterion of reciprocity could ground the principle of public justification, because it presupposes and refers to the principle of public justification.

As a side note: reciprocity is closely related to Rawls's idea of 'public reason'[24] and the already mentioned moral 'duty of civility.' The duty of civility is a moral duty that applies to judges, legislators, state officials, and, under certain circumstances, to citizens. When it applies, it requires to present and act upon reasons based on a political conception of justice. The duty does not apply when talking privately (in the 'background culture'). According to what Rawls calls the 'wide view of public reason,' citizens are always allowed to present private reasons as long as they present public reasons in due course.[25] 'Public reason' is the set of reasons that are permissible to refer to when following one's duty of civility. In other words, the content of public reason is given by the family of political conceptions of justice.[26] (Maybe the content of public reason is not *only* constituted by the family of political conceptions of justice, but also by other 'political values' besides justice: '[P]ublic reasoning […] proceeds entirely within a political conception of justice. Examples of political values include […] a more perfect union, justice, domestic tranquility, the common defense, the general welfare, and the blessings of liberty for ourselves and our posterity.'[27] Justice, here, seems to be one political value among others.) Because political conceptions of justice (and political values in general) fit into all reasonable comprehensive doctrines, the content

[23] Rawls 1993/1996: xlvi, see 1993/1996: xliv, 50, 300, 1997: 771, 2001: 6–7. On the sincerity requirement see Schwartzman 2011.

[24] A precursor of the idea is his concern with 'publicity' in *A Theory of Justice* (1971: 5, 16, 55–56, 133, 178–179). Larmore argues that publicity and public reason are both closely related to fairness, Rawls's core concern throughout (2002).

[25] Rawls 1993/1996: li–lii, 1997: 783–785, 2001: 90.

[26] Rawls 1993/1996: lii–liii, 217, 226, 241, 1997: 773–774, 2001: 92.

[27] Rawls 1997: 776. See Freeman 2007: 388–390.

of public reason are public reasons: 'Public reason […] specifies the public reasons in terms of which [particular] questions are to be politically decided.'[28] Samuel Freeman makes clear, though, that some reasons are non-public even when they are actually shared, namely reasons that are shared because all adhere to the same comprehensive doctrine: 'Saudi Arabia has no public reason in Rawls's sense.'[29] The criterion of reciprocity provides the link between the principle of public justification (the liberal principle of legitimacy) and the idea of public reason: Rawls writes that the criterion of reciprocity is 'expressed' in public reason and that '[p]ublic reasoning aims for public justification.'[30] In this chapter, though, I am not concerned with the rationale for reciprocity, the duty of civility, and the idea of public reason, but with the rationale for the principle of public justification (the liberal principle of legitimacy).

Another side note: sometimes Rawls uses 'reciprocity' in a slightly different way. He writes, for example, that a conception of justice must meet the criterion of reciprocity.[31] This, I think, is the same as saying that a conception of justice must be a political conception.

The third Rawlsian answer is that the principle of public justification (the liberal principle of legitimacy) would be chosen in the 'original position' of 'justice as fairness.'[32] Rawls suggests to 'look at the question of legitimacy from the point of view of the original position.' He writes that the principles of justice the parties in the original position would adopt 'would in effect incorporate this principle of legitimacy and would justify only institutions it would count legitimate.'[33] Larmore has argued that the principle of public justification cannot be chosen in the original

[28] Rawls 1993/1996: liii.

[29] Freeman 2007: 383. See also Greenawalt 1995: 44.

[30] Rawls 1997: 771, 786.

[31] Rawls 1993/1996: xlix, 1997: 774. He also writes that the liberal principle of legitimacy requires the belief 'that the reasons we would offer for our political actions […] are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons' (1997: 771). Here the liberal principle of legitimacy seems indistinguishable from the criterion of reciprocity. On Rawls's different usages of 'reciprocity' see Freeman 2007: 374–376.

[32] For this interpretation, see Weithman 2011: 313, 319, May 2009: 146–149.

[33] Rawls 1993/1996: 137 n. 5. He also writes (1993/1996: 225–226, see 2001: 89): '[T]he guidelines of public reason and the principles of justice have essentially the same grounds. They are companion parts of one agreement.' It should be noted, though, that the guidelines of public reason and the liberal principle of legitimacy are of course not identical.

position because it plays a decisive role in the justification of the setup of the original position: the original position reflects a commitment to reasonableness and fairness and, because reasonableness is explained as in part a commitment to public justification, public justification is part of the justification of the original position.[34] I am skeptical that one should read Rawls this way, although I cannot discuss the issue any further here. But there is a different, more straightforward argument against the third Rawlsian answer: Rawls acknowledges that the principle of public justification allows coercion in the name of other political conceptions of justice besides 'justice as fairness.' If that is so, it has to have a moral justification that is independent from 'justice as fairness' and therefore cannot be grounded in the original position of 'justice as fairness.'[35]

The fourth Rawlsian answer is to see the principle of public justification (the liberal principle of legitimacy) as grounded in fairness or, more specifically, in the idea of society as a fair system of cooperation among free and equal persons. This, of course, is the same intuitive idea that we need, according to Rawls, for developing political conceptions of justice. According to Jonathan Quong,

> we begin with certain fairly substantive commitments—to the idea of persons as free and equal, to a view of society as a fair system of social cooperation, and to the fact of reasonable pluralism—and these commitments lead us to understand that a certain subset of our moral rules must meet the test of public reason if they are to have normative authority over those whom they purport to bind.[36]

But how exactly are these substantive commitments related to the principle of public justification?

One possibility is that accepting the principle of public justification (as well as the criterion of reciprocity, the idea of public reason, and the duty of civility) just *is* a requirement of fairness among free and equals,

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[34] Larmore 1999: 609–610.

[35] Neufeld argues, accordingly, that Rawls sees the original position as a mere *optional* justification of the principle of public justification (the liberal principle of legitimacy) (2010). See also Freeman 2004: 2027–2028.

[36] Quong 2012: 56.

given the fact of reasonable pluralism. But, as Simon May points out, '[w]hether the criterion of reciprocity best expresses the value of fair social and political cooperation between free and equal citizens is a difficult issue about which sincere and reasonable people disagree.'[37] In response one can argue that, while constitutional essentials have to be publicly justifiable, it is not evident that the principle of public justification has to be publicly justifiable as well.[38] Hence it *could* be based on the value of fair cooperation among free and equals, even if this were not a publicly justifiable interpretation of fairness.

One may argue, though, that this response is only partly convincing. From within the Rawlsian approach, it would nonetheless be odd to regard the principle of public justification as an expression of fairness, because it is conceptions of justice that give expression to the value of fairness. Rawls's own conception of justice is famously *called* 'justice as fairness.' But, on the other hand, the idea of fairness may not only be central for developing a conception of justice. It may also be a concern of its own. (I, for one, wrote about the idea of 'fair compromises' in Chap. 5 without thereby presupposing a full-fleshed theory of justice.) So one may still insist that the principle of public justification is a requirement of fairness among free and equals, given the fact of reasonable pluralism.

But I do not think that there is a plausible fairness-based argument for public justification. Fairness is often applied to distributional issues. But the public justification principle is not about a distributional issue. It does not seem 'unfair' in a distributional sense to let the exercise of political power be based on a liberal comprehensive doctrine (as if this would leave others with less than a fair share of the pie of power exercises). Of course, fairness is not always applied to distributional issues. A criticism can be 'unfair' because misrepresenting the other side's position, and an accusation can be 'unfair' because misrepresenting the facts. But this sense of fairness does not seem to help to vindicate a principle of public justification as well.

[37] May 2009: 144.

[38] Gaus 2011a: 226, 1996: 175–178. For arguments why the principle of public justification has to be publicly justifiable, see Wall 2002, 2010: 139, Estlund 2008: 53–61, Enoch 2013: 170–173.

The fifth Rawlsian answer is that disagreement on justice can explain why we should care about public justification. According to this answer, the principle of public justification is not so much a requirement of fairness, but a requirement of justice that applies under circumstances of reasonable disagreement about the best interpretation of the basic intuitive idea of society as a fair system of cooperation among free and equals, that is, under circumstances of disagreement about the best political conception of justice. This is, basically, what Jonathan Quong argues.[39] When the fact of reasonable pluralism is accepted, then we also have to accept the fact of reasonable disagreement about justice, and so we cannot demand that a particular political conception of justice has to be implemented in society. But because, according to Quong, we start with a commitment to the idea of society as a fair system of cooperation among free and equal persons, we have to make sure that the exercise of political power is based on *some* political conception of justice (i.e. an interpretation of the idea of society as a system of fair cooperation among free and equals)—and this is precisely what the principle of public justification requires. This justification of the principle of public justification looks plausible, from within the political liberal project. When we are committed to the project of political liberalism, then the principle of public justification is justified because it makes sure that the exercise of power rests on a political conception of justice.

The question, then, becomes why we should get committed to the project of political liberalism. Why should we get committed to the claim that constitutional essentials and matters of basic justice (or all political decisions) have to be based on a political conception of justice? Why not rely on the 'full light of reason and truth' instead?[40] Rawls writes that a 'reasonable judgment of the political conception must still be confirmed as true, or right, by the comprehensive doctrine.'[41] Accordingly, Quong argues that a political liberal should see it as the task of comprehensive doctrines to ultimately find the right reasons to accept the political liberal

[39] Quong 2013: 274, see also 2011: 131–135 (where he also ties this to a 'natural duty of justice').
[40] Raz 1990: 31.
[41] Rawls 1997: 801, see also 1993/1996: 128–129.

project. Political liberalism 'passes the buck' to reasonable citizens.[42] This seems fair enough, but then we have no argument to engage with, when asking about the source of the value of public justification (or the principle of public justification).

A Better Rawlsian Answer: Stability

A sixth Rawlsian answer is that adhering to the principle of public justification (the liberal principle of legitimacy) is necessary for having a *stable* society under conditions of reasonable pluralism. Stability is a main concern in both Rawls's *A Theory of Justice* and *Political Liberalism*. In fact, it was stability considerations that formed the main motive to make the transition from the one to the other. Stability concerns come in at three points. First of all, in 'justice as fairness,' the parties in the original position care about the stability of the chosen conception of justice and hence recognize the 'strains of commitment.' They do not want to choose a conception of justice that they cannot endorse after the veil of ignorance has been lifted.[43] Next there are stability concerns on a 'second stage,' that is, *after* 'justice as fairness' has been chosen in the original position.[44] At this second stage, there are another two stability concerns.[45] First, Rawls wants to show that 'justice as fairness' is stable in the sense that a society ordered by 'justice as fairness' would generate its own support: it must be shown that people who grow up under just institutions would acquire a sufficiently strong sense of justice, so that they generally comply with those institutions. Rawls thus tries to show how 'justice as fairness' fits

[42] Quong 2011: 226–242, 2013: 274–275. Because political liberalism 'passes the buck,' it is not based on skepticism (Nagel 1987: 227–231, Rawls 1987: 12–13, 1993/1996: 62–63, 150, Larmore 1994: 79, Quong 2011: 243–254; but see also Barry 1995a: 168–173, 1995b: 902–903, Wenar 1995: 41–48, Wall 1998: 91–94, McCabe 2000: 320–324, Huster 2002: 86–88).

[43] Rawls 1971: 145, 177, 454, 2001: 103, 128.

[44] On the 'two stages' of exposition, see Rawls 1989: 234, 252–253, 1993/1996: 64, 133–134, 140–141, 2001: 181. Rawls sometimes confusingly suggests that both stages are situated in the original position (1989: 251). But indeed the first stability concern of the second stage is in the end identical with the concern about the strains of commitment that persons have in the original position.

[45] Rawls 1993/1996: 141, 2001: 181.

with a reasonable moral psychology.[46] Second, Rawls wants to show that a political conception could become the focus of an 'overlapping consensus,' which is supposed to contribute to stability as well.[47]

In *A Theory of Justice*, Rawls had a different stability concern on the second stage. He wanted to show that 'justice as fairness' is congruent with people's good, and thereby relied on certain ideas about the good life.[48] Later he came to think that this conception of the good life could not be expected to be shared by everyone in a well-ordered liberal society. He writes that the 'account of stability in part III of *Theory* is not consistent with the view as a whole.'[49] It made 'justice as fairness' look like a comprehensive doctrine, while the liberal institutions advocated by 'justice as fairness' would generate a pluralism of reasonable comprehensive doctrines (the 'fact of reasonable pluralism'). Hence 'justice as fairness' had to be transformed into a political conception and the overlapping consensus had to replace the demonstration of congruence of justice and the good.[50]

Rawls often says that the overlapping consensus is supposed to be a consensus on a political conception of justice.[51] Recall, though, that he also emphasizes that 'justice as fairness' is only one among many political conceptions of justice, and that there will always be a competition among several political conceptions of justice. The overlapping consensus, then, can only be understood as a consensus to adhere to *a* conception of justice from within the family of political conceptions of justice. This is often overlooked by both friends and critics of Rawls.[52] This consensus, I assume, also implies a consensus that the exercise of political power

[46] Rawls 1971: 455, 498–501, 2001: 181, 195–197.

[47] Rawls 1993/1996: 134, 141, 144. Freeman argues that Rawls's reasoning about an overlapping consensus is a continuation of his reasoning about moral psychology, because it is a hypothesis about the kinds of conceptions of the good that will be fostered in a well-ordered society (2007: 366–367).

[48] Rawls 1971: 513–514, 567–577.

[49] Rawls 1993/1996: xvii–xviii, see 1993/1996: xliii, 1989: 248–249, 2001: 186–187.

[50] On the transition, see Freeman 2007 and Weithman 2011.

[51] For example, Rawls 1993/1996: 134.

[52] Sleat, for example, writes that the 'dominant Rawlsian idea that persons can reach a consensus on principles of justice flies in the face of our lived experience of the political' (2010: 491). Other examples are Waldron 1999: 163, Kersting 2006: 94–95. In my reading of Rawls, he does not assume or aim at agreement on justice at all (as is acknowledged in Sleat 2013: 73–74, 2015: 239–243, Waldron 1999: 153).

has to be in accordance with constitutional essentials that are based on a political conception of justice. It is, then, a consensus on the principle of public justification. If an overlapping consensus on the principle of public justification contributes to stability, this might also show that stability is a source of the value of public justification.

As a side note: Rawls suggests that the overlapping consensus also plays a *justificatory* role for a political conception of justice: it is required for the 'full justification' of a political conception of justice.[53] But this leads to a dilemma.[54] An overlapping consensus among *reasonable* comprehensive doctrines seems to lack a point, because all the justificatory work seems to be done by the conception of reasonableness. 'Reasonable comprehensive doctrines' are at least sometimes understood as doctrines affirmed by 'reasonable citizens,'[55] and 'reasonable citizens' are conceived as persons who accept the burdens of judgment, the fact of reasonable pluralism, and the idea of society as a fair system of cooperation among free and equal citizens, and are thus prepared to offer fair terms of cooperation 'according to what they consider the most reasonable conception of political justice.'[56] If, on the other hand, the overlapping consensus is broadened to include unreasonable comprehensive doctrines,[57] the validity of a conception of justice becomes implausibly dependent on the views and goodwill of illiberal people.[58] Moreover, as Rawls came to accept, there will never be an overlapping consensus on a particular conception of justice, but at best a consensus to endorse some political conception of justice from within the family of political conceptions of justice. One should thus deny that the overlapping consensus plays a justificatory role.

Now, Rawls does not simply claim that an overlapping consensus contributes to stability. He claims that it secures stability 'for the right reasons,' while a 'mere' modus vivendi does not provide stability

[53] Rawls 1993/1996: 386–387.

[54] For this dilemma see Quong 2011: 166–169.

[55] Rawls 1993/1996: 36, but see also 59.

[56] Rawls 1997: 770, see 1993/1996: xliv, 49, 54, 81. On Rawls's many different usages of 'reasonable,' see Wenar 1995: 34–38, Freeman 2007: 345–351, Nussbaum 2011: 22–33.

[57] As proposed in Cohen 1993: 273–274, Freeman 2007: 349–350.

[58] See also Habermas 1995: 123–126, 1996/1998.

for the right reasons.[59] The 'rightness' and 'wrongness' lies in the forces that secure stability.[60] There is stability for the wrong reasons when an arrangement is stable just because people are afraid of sanctions, for example.[61] There is stability for the right reasons when people are morally motivated to adhere to an arrangement.[62] Why does Rawls consider moral reasons 'right' reasons? Rawls has, I think, two arguments. The first is simply that acceptance for moral reasons increases stability *more* than acceptance for non-moral reasons. The problem with a modus vivendi, as Rawls sees it—which is a very narrow view of modus vivendi, as we have seen (Chap. 6)—is that because moral motivation is lacking, the parties adhere to an arrangement only as long as they have to. When the distribution of power changes, the stronger parties will want to renegotiate.[63] When citizens are morally motivated, in contrast, then none of the groups will withdraw their support 'should the relative strength of their view in society increase and eventually become dominant.'[64] The second argument is that only an overlapping consensus can provide us with some sort of 'community' in a pluralist society.[65] Of course, being a community can again contribute to stability in the ordinary sense, but it is also a concern of its own. The community foundation for the principle of public justification will be discussed later, so I will ignore this argument here. An overlapping consensus, then, leads to stability for the right reasons because it is morally motivated and therefore leads to *more* stability than acceptance that is not morally motivated.

The question, then, is simply whether an overlapping consensus (on the principle of public justification) increases stability. The answer is quite plausibly 'yes.' It may be debatable *how much* an overlapping consensus can contribute to stability, and how realistic it is, but it seems hard

[59] Rawls 1993/1996: xxxix, xlii–xliii, 142–143, 145, 147, see 1987: 11.

[60] Rawls 1989: 242, 1993/1996: 142, 2001: 185.

[61] Rawls 1993/1996: 143, 2001: 186.

[62] He writes that we have the right kind of stability when 'the reasons from which citizens act include those given by the account of justice they affirm' (1993/1996: xlii, see 1993/1996: 142–143, 147, 2001: 195). In addition, the object of the agreement is moral, but I will neglect this point here.

[63] Rawls 1993/1996: 147–148, 2001: 195.

[64] Rawls 1987: 11, 1993/1996: 148, see 1993/1996: 149, 2001: 195.

[65] See Rawls 1993/1996: 202, 146–147, 2001: 199–200.

to deny that an overlapping consensus, if it were realized, would contribute to a society's stability, at least when it is an overlapping consensus that includes large parts of the citizenry. It is trickier to show how this proves that stability is a source of the value of public justification. An argument could go like this:

(1) An overlapping consensus on the principle of public justification helps to secure stable peace.
(2) Stable peace has intrinsic as well as instrumental value.
(3) Therefore, an overlapping consensus on the principle of public justification has instrumental value.
(4) Therefore, public justification has instrumental value.

Quite clearly, this argument is unsound because (4) does not follow. If an overlapping consensus on a principle of public justification secures stable peace, then this proves the instrumental value of an overlapping consensus on a principle of public justification, but it does not thereby prove the instrumental value of public justification itself. Some other argument is needed. I find the following promising:

(1) The public justification of constitutional essentials makes it likely that they get accepted by most citizens.
(2) Wide acceptance of constitutional essentials helps to secure stable peace.
(3) Stable peace has intrinsic as well as instrumental value.
(4) Therefore, the public justification of constitutional essentials has instrumental value.

I think this argument is sound and plausible. It is here formulated with regard to constitutional essentials, but it can easily be amended to include coercive laws, moral rules, or other alleged subjects of public justification. Premise (2) is a claim not about public justification, but about non-subjugation, that is, actual acceptance. I do not think anyone would deny that wide acceptance of constitutional essentials helps to secure stable peace. The premise one could take issue with is premise (1): does public justification really make it more likely to achieve actual acceptance?

I think it quite clearly does. When constitutional essentials are publicly justifiable, then this means that everyone has sufficient reason to accept them, and while having sufficient reason to accept them is certainly not sufficient for achieving actual acceptance, it would be odd to claim that it does not make it more likely to achieve actual acceptance. Not publicly justifiable constitutional essentials will certainly make it harder to get widely accepted.

A Principle of Public Justification?

Are these stability considerations sufficient to make public justification a *principle* in the sense explained in Chap. 10? Can they show that morally justifying constitutional essentials (or whatever is considered the proper subject of public justification) *requires* public justification?

Proponents of a principle of public justification sometimes suggest that they can. Gerald Gaus argues at one point that it is dangerous to look at social morality and laws from the perspective of what one regards as moral truth. It leads to power replacing justified authority, because everyone will claim to know the moral truth. We therefore have to bracket controversial convictions about moral truth in the realm of social morality and laws. He sees this as the lesson from the religious wars of the sixteenth and seventeenth centuries.[66]

But, first of all, this argument is not about public justification as a value, but about people pursuing public justification. What is dangerous, according to the argument, is not constitutional essentials (laws, moral rules) that are not publicly justifiable, what is dangerous is people not accepting and pursuing the value of public justification. This is somewhat surprising because Gaus advocates a convergence view of public justification and argues against moral duties of restraint for citizens (including moral duties to pursue public justification). Kevin Vallier, also an advocate of the convergence view, accordingly denies that duties of restraint

[66] Gaus 2011a: 231–232, see 2014: 569. See also Hobbes 1651/1996: 28 (ch. 5 para. 3). This is not Gaus's main rationale for endorsing a principle of public justification (see Chap. 13).

would serve stable peace:[67] 'Religious conflict can be dangerous, but no empirical evidence demonstrates that restraint helps to prevent it.'[68] To the contrary, restraint can lead to resentment and alienation from politics and hence undermine stability.[69] As mentioned, other moral duties are compatible with a convergence model: the duty to pursue public justification and the duty not to support not publicly justifiable laws. But Gaus and Vallier are skeptical about such duties as well, at least when applied to citizens. They rely on institutional mechanisms, not on moral duties, to make sure to get publicly justifiable constitutional essentials (laws, moral rules). Therefore, I think that Gaus's argument does not fit his own account of the duties people have with regard to public justification. But more importantly, it is not an argument about public justification, but about people's acceptance and pursuit of the value of public justification.

What is needed is an argument from stability considerations to a principle of public justification, not to moral duties to accept or pursue public justification or to not support not publicly justifiable constitutional essentials (laws, moral rules). I have already conceded that both an overlapping consensus on a principle of public justification and public justification itself, as realized when constitutional essentials (laws, moral rules) are publicly justifiable, can help secure stable peace. But it is a much stronger claim to say that therefore public justification is a value that trumps all other moral considerations. If public justification is made a value that trumps all other moral considerations, then publicly unjustifiable constitutional essentials (laws, moral rules) are never morally justified. I do not think this stronger claim is plausible, and, in particular, I do not think it can be based on stability considerations. First of all, stability is a gradual notion, and we certainly do not have to maximize stability. It is doubtful that public justification is necessary to achieve 'reasonably' stable peace, even if it were necessary for maximizing stability. Second, it is doubtful that having *some* not publicly justifiable laws, moral rules, or even constitutional essentials diminishes stability to a considerable extent. Third, public justification is only one factor among many other

[67] Vallier 2014: 72–75. See also Eberle 2002: ch. 6.

[68] Vallier 2014: 73.

[69] Vallier 2014: 75.

factors that contribute to stable peace, and arguably it is not the most important one. The idea of 'democratic peace' claims that democracies are less likely to engage in war with each other.[70] The idea of 'capitalist peace' claims that economically developed and interdependent countries (i.e. countries allowing relatively free markets) are less likely to engage in war with each other.[71] Sophisticated modus vivendi arrangements and checks and balances will of course be highly important for stability. Scott Hershovitz points us at the American constitution with its checks and balances that make it practically impossible for some group to dominate others.[72] All these things contribute to stable peace, and arguably to a greater degree than public justification or an overlapping consensus on public justification. Of course community ties will be relevant for stability as well, but community ties need not be based on an overlapping consensus. Claudia Mills argues that a common history of living together is much more important than shared principles, Bernard Dauenhauer points out how a shared religion as well as linguistic and cultural heritages can increase stability, and Joseph Raz suggests that 'affective and symbolic elements may well be the crucial cement of society.'[73] Thus, while stability considerations are a source of the value of public justification, they are insufficient to establish public justification as a principle that could never be outweighed by other moral considerations.

Conceptualizing Public Justification

So far this chapter has explored Rawlsian answers to the question about the sources of the value of public justification. The answer we found is that public justification is valuable because it contributes to stability. The next question is how public justification should be conceptualized, if stability is its rationale. Recall the four issues from Chap. 10: (1) What is to be publicly justifiable? (2) Who is the relevant constituency

[70] Kant 1795/2006, Doyle 1983, Russett 1993, Ray 1995. On 'decent peace' (including non-democratic but decent peoples) see Riker 2009, Förster 2014.

[71] Smith 1776/2003, Weede 2005, Gartzke 2007, McDonald 2007.

[72] Hershovitz 2000: 224–225. See Hamilton, Madison and Jay 1788/1987, esp. No. 51.

[73] Mills 2000: 192, 194, 197–203, Dauenhauer 2000: 212, Raz 1990: 30–31.

of public justification? (3) How far should members of the constituency be idealized? (4) Do justifying reasons have to be public reasons? I will sketch the answers that look most plausible, although I cannot go into detailed arguments here.

Regarding the first issue, if the rationale for public justification is stability, then arguably the most important thing is that constitutional essentials are publicly justifiable; but the public justification of laws and moral rules can certainly help as well. All institutions that regulate terms of interaction and are in that sense relevant for the maintenance of peace are a proper subject of public justification, if the source of the value of public justification is its contribution to stable peace.

Regarding the second issue, if the rationale for public justification is stability, then the constituency of the public should be as wide as possible. One of the odd things about Rawls's theory is that an overlapping consensus among *the reasonable* does not help much with stability, at least in societies that have a good amount of unreasonable people.[74] It is unreasonable people that are usually a threat to stable peace, not reasonable people. Hence the constituency should contain virtually everyone, if possible. On the other hand, of course there are other means to keep the peace with regard to a small number of Nazis or militant Muslim fundamentalists. The value of public justification cannot and need not do the job alone. So not everyone need be included. Still, the constituency of public justification should be as wide as possible, it seems safe to say, if stability is the rationale for public justification.

Regarding the third issue, we should idealize as little as possible. In fact, in my argument I presented public justification as a means to non-subjugation. Non-subjugation, recall, involves no idealization at all, and hence does not make a distinction between acceptability and acceptance. Public justification is instrumentally valuable for achieving stable peace just because public justification increases the likelihood of actual acceptance, that is, of non-subjugation. It is the tendency for acceptable

[74] Horton 2006: 163. On political liberalism and unreasonable people see also Friedman 2000, Kersting 2006: 93–100, Quong 2011: ch. 10. Of course, Rawls's concern is with stability for the right reasons. But sometimes his concern seems to be stability per se, for example when he writes that 'an enduring and secure democratic regime […] must be willingly and freely supported by at least a substantial majority of its politically active citizens' (Rawls 1989: 235, 1993/1996: 38).

laws to also get accepted by many. But the further we idealize the constituency of public justification, the less strong that tendency. Hence if stability is the rationale for public justification, we should interpret persons' 'having reasons' in a way that requires as little idealization of real persons as possible.

Fourth, stability concerns do not seem to speak against allowing a convergence of justifying reasons. Quite the contrary: citizens may appreciate that all the reasons they have actually count for and against laws, not just the reasons they share with other citizens. This may well have stabilizing effects. I should emphasize that allowing all reasons in public justification does not imply that people have no moral duties with regard to public justification. They may, for example, have moral duties to pursue public justification. They may even have moral duties of restraint, for example not to base decisions on religious reasons in certain circumstances and not to employ religious reasons in public, if there is some rationale for such a duty that is independent from the value of public justification.[75] But if stability is the rationale for public justification, public justification should be conceptualized as allowing a convergence of justifying reasons.

Summary

We have not found a Rawlsian reason to accept a *principle* of public justification. But we found that public justification has instrumental value because it is contributing to stable peace. This rationale for public justification suggests a conception of public justification that applies to constitutional essentials, laws, and moral rules, that makes the constituency as wide as possible, that idealizes as little as possible, and that allows a convergence of justifying reasons.

[75] For example, in considerations about the separation of church and state and more basic democratic principles (Audi 2011).

12

Respect and Public Justification

Charles Larmore argues that political liberalism must be based on a substantive moral foundation—it cannot completely 'pass the buck' to comprehensive doctrines. This moral foundation, he argues, is to be found in a moral requirement of respect for persons.[1] Other proponents of public justification agree.[2] Rawls also suggests a respect foundation when he writes: 'If free and equal persons are to cooperate politically on a basis of mutual respect, we must justify our use of corporate and coercive political power, where those essentials matters are at stake, in the light of public reason.'[3]

[1] Larmore 1999: 607–608, 610.

[2] Macedo 1990: 47, Nagel 1991: 159, Neufeld 2005: 284–287, Boettcher 2007: 230–233, Gaus 2011a: 17, 19, Nussbaum 2011: 18–20, Vallier 2014: 31–33. Gaus, although sometimes referring to respect, in effect advances a community-based justification for the principle of public justification (see Chap. 13).

[3] Rawls 2001: 91.

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Respect for Persons and Public Justification

What does it mean to respect persons? Stephen Darwall has helpfully distinguished between 'recognition respect' and 'appraisal respect.'[4] Appraisal respect, as the name indicates, consists in a certain attitude of positive appraisal. One can have appraisal respect for a tennis player (as an excellent tennis player) or for a person (as a person with a good character).[5] Recognition respect, in contrast, consists 'in a disposition to weigh appropriately in one's deliberations some feature of the thing in question and to act accordingly.'[6] Respecting persons in the sense of recognition respect, then, means taking the fact that someone is a person appropriately into account in one's deliberations.[7] When a principle of public justification is grounded in respect for persons, respect must certainly be understood as recognition respect.

What it means to adequately take the fact that someone is a person into account in one's deliberations has to be determined by a substantial moral theory that specifies what is due to persons. What is due to persons is, it seems, mainly determined by their basic moral rights, like the right not to be murdered. So is it 'disrespectful' to murder someone? This sounds odd because it is too weak. Murder is wrong not because it is disrespectful, but because it is a serious violation of a basic moral right of persons. What is 'disrespectful' is not to do things that we owe persons, but that we owe them not as a matter of their basic moral rights. (Things are more complicated if you think that persons have a basic moral right against being treated disrespectfully.[8] If people have such a right, then we should say that what is 'disrespectful' is not to do things that we owe persons, but that we owe them not as a matter of other basic moral rights besides the right against being treated disrespectfully.) The most intuitive example for disrespectful treatment probably is (wrongful) discrimination. When discriminating against Jews or blacks or women, one disrespects them,

[4] Darwall 1977, see also 2006: ch. 6.

[5] Darwall 1977: 41–43.

[6] Darwall 1977: 38–39.

[7] Darwall 1977: 38, 45.

[8] If people are said to have a 'right to justification' which underlies all human rights (Forst 2010), then this right will also be violated by disrespectful treatment.

but arguably one does not violate their basic moral rights in doing so (except the moral right not to be treated disrespectfully, of course, if there is such a right). Indeed, it is disrespect and humiliation that makes discrimination wrongful, according to the most plausible account of what constitutes wrongful discrimination.[9] Another example: having to prove to state officials that one has no talents or is otherwise undesirable in the labor market, in order to get welfare benefits, can be considered humiliating and disrespectful without being a violation of basic moral rights.[10] Treating persons disrespectfully, then, means not adequately taking the fact that they are persons into account in one's deliberations and hence not giving them their due, whereby their due is something that is not the content of their moral rights (besides the moral right against being treated disrespectfully, if there is such a right).

The idea, then, is that we owe people public justifications as a matter of respect. Before assessing this idea, let me mention a basic worry about the approach. The worry is that a respect-based foundation of the principle of public justification looks incoherent with political liberalism. There is reasonable disagreement about the proper interpretation of respect for persons, and, more specifically, there is reasonable disagreement whether respect for persons requires public justification; hence, if political liberalism is not to become a comprehensive liberalism, it should avoid relying on a sectarian interpretation of respect.[11] Larmore's answer is that the idea of respect for persons is not part of a comprehensive doctrine, but a 'minimal moral' conception that is, as such, compatible with all reasonable comprehensive doctrines.[12] Political liberalism unavoidably must rest on some moral claims that are assumed to be 'correct.'[13] I think this is a plausible answer from within a Rawlsian political liberal framework. Yet my own answer is that I do not want to assess the foundations of Rawlsian political liberalism, but the sources of the value of public justification; thus

[9] Hellman 2008: 24–33.

[10] Wolff 2010: 343.

[11] Wall 2002: 390–391, Quong 2013: 272.

[12] Larmore 1999: 623–624, see also 1990: 353–354, 1994: 61, 1999: 600, 605, 608.

[13] Quong 2011: 2, 56, 159, 313, Neufeld 2005: 287. Thus Raz is right that public reason liberalism cannot be epistemically abstinent (1990: 14–15). See for discussion of Raz's argument Bird 1996, Freeman 2007: 355–360, Estlund 2008: 61–64, Quong 2011: 226–229.

I am not committed to Rawlsian categories like the distinction between comprehensive doctrines and political conceptions. Neither are public reason liberals like Gaus.[14] And so I put this worry to the side.

Why should taking the fact that someone is a person adequately into account require public justification? Larmore's answer is that persons are capable of reasoning and acting in accordance with reasons; coercing persons without providing reasons that are from their point of view understandable as sufficient justifying reasons does not engage their reason and is therefore disrespectful. He writes:

> [C]onsider the basic fact that persons are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a rule of conduct solely by the threat of force, we shall be treating persons merely as means, as objects of coercion, and not also as ends, engaging directly their distinctive capacity as persons. […] Thus, to respect another person as an end is to require that coercive or political principles be as justifiable to that person as they presumably are to us.[15]

Hence the basic idea, to repeat, is that coercion without public justification is disrespectful because not engaging people's reason.

Is that convincing? It may be disrespectful to coerce persons without sufficient moral justification—but is it disrespectful to coerce them without a *public* justification? Joseph Raz writes:

> Respecting people as rational self-directing agents does not require desisting from following true beliefs which those people dispute. The suggestion that it does have this implication confuses respect for people, because they have rational powers, with respecting their currently held views. That people have rational powers means that they are not stuck with the views they have at any given time, that they can examine and revise them. We are considering the response to the fact that they have false beliefs. Given that they are rational we expect them to examine and revise such beliefs, and if we have any duties in this matter it is to encourage such reexamination.[16]

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[14] For a critique of the distinction between comprehensive and political liberalisms, see Gaus 2004.

[15] Larmore 1999: 607–608, see Eberle 2002: 87–88, 94. For Kant's notion of respecting persons as ends in themselves, see esp. Kant 1785/2006: 83 (Ak. 4:433).

[16] Raz 1998: 43, see Galston 1991: 109, Wall 1998: 79–82, 85–87, Arneson 2014: 541.

Of course, if one is justified in believing that some law would be just, then the fact that others disagree is no sufficient reason to stop believing that the law would be just. The question is whether the fact that others disagree is a reason not to enforce the law coercively (and hence to also not enact it in the first place). Yet recall that public justification does not mean actual acceptance, but acceptability. Hence more precisely, the question is whether the fact that *even idealized* others disagree is a reason not to enforce the law coercively (and to not enact it). In other words, the question is whether the fact that a law is not publicly justifiable is a reason not to enforce the law coercively (and to not enact it). This need not mean that it is a decisive reason. The question is whether it is at least *a* reason not to enforce (and not to enact) it.

I think it is clear that it is: if respecting persons means respecting their faculty of reason, then this surely does not imply respecting all their current beliefs,[17] but it does imply that it matters whether we coerce them with reasons that in light of *their* evaluative standards do not justify the coercion. It seems indeed disrespectful not to care about whether our reasons for coercing can be understood as justifying reasons from their point of view. This is a very weak claim. And I should emphasize that it leaves open what this caring amounts to, whether it amounts to having moral duties, for example. The weak claim simply is that respecting people's faculty of reason implies caring about whether our reasons for coercion can be understood as justifying reasons from their point of view. This is sufficient to show that respect is a source of the value of public justification.

There is a second argument to this conclusion: the faculty of reason is not the only feature of persons that we have to adequately take into account in our deliberations, if we are to respect persons. Another feature of persons that is to be respected is their concern to live according to the dictates of their conscience, that is, to have their integrity respected.[18] Acting in accordance with conscience is not identical with acting autonomously or acting in accordance with reason, if the latter require some rational distance from and rational reflection about one's values, projects, and commitments.[19] Kevin Vallier regards integrity as a foundational

[17] Nussbaum 2011: 33.

[18] Kukathas 2003: 42–56.

[19] Kukathas 2003: 57–62.

value of public reason liberalism.[20] Not publicly justifiable coercive laws undermine the integrity of those to whom they are not publicly justifiable. Hence to coercively enforce not publicly justifiable laws means disrespecting the integrity of persons. Again, this leaves open what moral duties we have with regard to public justification. But it is sufficient to show that respecting people's integrity implies caring about public justification, and hence that respect for persons is a source of the value of public justification.

One may argue that the two arguments do not show that public justification is a value, but that caring about public justification is valuable (because being an expression of respect for persons). Yet I think it is the other way around. Caring for the public justification of coercion can only be valuable and an expression of respect because not publicly justifiable coercive laws are disrespectful. If that is true, indeed respect can be seen as a source of the value of public justification.

Publicly justifiable coercive laws are not an *instrument* to express respect, they *are* or *constitute* an expression of respect, just like not publicly justifiable coercive laws constitute an expression of disrespect. In Ian Carter's terminology, public justification thus has 'constitutive value'[21]: something has constitutive value when it is a constitutive part of something intrinsically valuable.[22] Expressing respect for persons is arguably intrinsically valuable, and public justification constitutes such respect. The public justification of coercive laws, therefore, has constitutive value.

The respect-based arguments for the value of public justification can then be summarized as follows:

(1) Respecting persons means respecting their reason and their integrity.
(2) Respecting a person's reason and integrity requires caring about whether the reasons to coerce that person can be understood as such from that person's point of view.

[20] Vallier 2014: 85–90. Freeman writes that 'respecting others as persons and as citizens involves allowing them to non-coercively decide their values and (within limits of justice) act on their chosen ways of life' (2004: 2042). Boettcher claims that an 'essential aspect of respect for persons is the acknowledgment of the aims, projects, and values of other persons, [...] whatever their ultimate source, and that such aims, projects, and values are central to each person's identity and self-understanding' (2007: 228, see also 2007: 230–233, Freeman 2007: 330, 343–344, 411).

[21] Carter 1999: 55.

[22] Carter 1999: 36, 54.

(3) Therefore, respecting a person's reason and integrity requires caring about the public justification of coercion.
(4) Therefore, caring about the public justification of coercion is an expression of respect for persons.
(5) If caring about the public justification of coercion is an expression of respect for persons, then having publicly justifiable coercive laws constitutes an expression of respect for persons.
(6) Expressing respect for persons is intrinsically valuable.
(7) Therefore, the public justification of coercive laws and moral rules has constitutive value.

A Principle of Public Justification?

Is this argument from respect sufficient to ground a principle of public justification that trumps all other moral considerations in the realm of coercive laws? Is public justification strictly required for the moral justification of coercive laws? I do not see how it could be. Respecting persons is important, but sometimes justice and other first level moral values are more important. Sometimes justice may require a law that is not publicly justifiable, and although this law may indeed have to be considered disrespectful because not being publicly justifiable, it is not evident that it is never morally justifiable. Also, sometimes a law may not be publicly justifiable and hence disrespectful even though its purpose is to prevent a greater number of instances of the same disrespect. It is again not evident that such a law could never be morally justified.[23] In other words, I see no reason to assume that the moral requirement to show respect for persons should always trump other moral considerations, and so I also see no reason that public justification should always trump other moral considerations.

Micah Lott has provided an additional argument to that conclusion. While conceding that it is an expression of respect to care for or pursue public justification, he argues that there are many more important other ways to express respect for persons: one expresses respect for persons

[23] Wall 1998: 86–87, Lister 2013a: 72, 2013b: 324–325.

by respecting their moral rights, for example their right to free speech. (I argued earlier that respecting people's rights should not count as an expression of respect for persons, but I accept it here for the sake of the argument.) Because one can express respect in many different ways, he argues, it is insignificant if one sometimes supports a not publicly justifiable and thus disrespectful law, when one is justified in thinking the law to be morally justified.[24] This can be taken to be an additional argument why the respect foundation is not sufficient to ground a strict principle of public justification.

James Boettcher is unimpressed. He replies:

> First, by analogy, one could mount a similarly questionable defense of any single rights violation or other form of disrespect, such as racial insensitivity or prejudice, by observing that the offending citizen respects his or her compatriots in a host of other ways. Second, requirements of public reason are internally connected to respect for the rights of others. Public reason should govern the very deliberative process through which citizens together work through their disagreements about how an abstract system of basic rights unfolds and takes shape in law and policy.[25]

Boettcher's second point presupposes a close connection between moral rights and justice, on the one hand, and public justification, on the other hand. This is a connection that I do not want to rely on here. I want to leave open whether there are moral rights that persons have 'qua persons' without any test of public justifiability.

Boettcher's first point is that expressing respect is not a threshold matter. The requirement of respect is not to show sufficient respect for persons, but to show respect for persons, full stop. To press this point, he suggests an analogy with rights violations that are, of course, not a threshold matter. One is not morally permitted to murder one person as long as one does not murder sufficiently many others. This is because the moral prohibition against murder is not a prohibition against murdering too many, but a prohibition against murder. But this does not show that the moral requirement to show respect for persons' works the same way. Maybe that

[24] Lott 2006: 87–89.

[25] Boettcher 2012: 170.

requirement is different. Maybe it is indeed a requirement to show sufficient respect, thereby allowing for some instances of disrespect. In this regard, the requirement to show respect may be more similar to the requirement to contribute to charity. One need not pursue every opportunity to show respect for persons, just like one need not give as much as possible to charity, even though one indeed ought to express respect for persons and give to charity. Boettcher argues that this is implausible, because it could also sanction racial insensitivity and prejudice, that is, other forms of disrespect besides supporting a not publicly justifiable law. And indeed it seems implausible that respect for persons would allow for some racial insensitivity and prejudice as long as one shows sufficient respect for persons elsewhere. Hence the requirement of respect for persons is not like the requirement to give to charity, but indeed like the requirement not to murder people. It is not a requirement to meet some threshold of respect. A reply one could give to Boettcher is that there are no instances where racial insensitivity and prejudice are morally justifiable, while there can be instances where coercive laws are morally justified but not publicly justified. But this does not show that respect is a threshold matter, but that the moral requirement to show respect can be outweighed by other moral considerations. And this was my original argument against making public justification a strict principle.

Two Objections Against the Argument from Respect

Before discussing how public justification should be conceptualized, if respect is its rationale, I would like to discuss two objections to the sketched respect foundation of public justification. The first objection is that, while respecting persons implies caring for public justification, it does not imply that supporting a not publicly justifiable law is always disrespectful. This is Christopher Eberle's position. He argues that respect for persons requires, first of all, to make sure that coercive laws have an adequate rational justification (i.e. a moral justification) and to withhold support for laws that lack such justification.[26] Respect for persons also

[26] Eberle 2002: 88–94.

requires to engage in dialog with one's fellow citizens, to communicate the rationale for a law and to listen to what they have to say.[27] Eberle also thinks that respect for persons requires to pursue public justification, that is, to attempt 'to articulate a rationale for the coercive laws he supports that will be convincing to his compatriots.'[28] So he agrees that respect for persons implies caring for public justification. But he denies that respect requires to not support not publicly justifiable laws, at least when these laws have a sound moral foundation and an attempt for public justification was made (and failed).[29] Nothing in my argument depends on a rejection of that claim, because I relied on the weak claim that respect for persons implies caring for public justification. And on this point I am in agreement with Eberle. But although it is not important to my argument, I would deny that imposing not publicly justifiable laws sometimes is not disrespectful. What I would say is that it is sometimes morally justified to impose not publicly justifiable laws, but that is because the disrespect expressed in not publicly justifiable laws is outweighed by other moral considerations (e.g. having to do with justice).

The second objection is that publicly justifiable coercion often does not feel very different from not publicly justifiable coercion. In particular, it often does not feel less disrespectful. The reason is that, obviously, there are different versions of the principle of public justification, and there is reasonable disagreement about which one is the right one. A consequence is that sometimes coercive laws may be publicly justifiable according to one version of the principle of public justification (version 1), but not according to another version of the principle of public justification (version 2).[30] Hence from the perspective of someone who does not endorse version 1, but version 2, coercively enforcing a law that is publicly justifiable according to version 1 does not feel different—and in particular not less disrespectful—than coercively enforcing a law that is

[27] Eberle 2002: 95–97, 102–103.

[28] Eberle 2002: 95, see 2002: 97–102.

[29] Eberle 2002: 113, ch. 5. Citizens ought to 'pursue,' but not to actually 'provide' a public justification (2002: 118–119). A similar position is defended by Lott 2006 and Ebbels-Duggan 2010. Even Boettcher, although defending stringent moral duties to pursue public justification, not to support not publicly justifiable laws, and to present and make decisions based upon public reasons, concedes that these moral duties can be overridden in rare cases (2007: 233, 2012: 168–170).

[30] Wall 2013b, 2013a: 491–493, Enoch 2013: 174–175.

not publicly justifiable according to version 1. How forceful the objection is depends on whether an interpretation of public justification has to be publicly justifiable itself. I cannot discuss this issue here. I tend to think that a conception of public justification must simply correctly model what it means to have sufficient reason, and need not be publicly justifiable itself. If that is so, then it is indeed irrelevant whether coercion that is publicly justifiable according to version 1 does not feel different from coercion that is not publicly justifiable according to version 1, from the perspective of someone who does not endorse version 1, but version 2, for example. What matters is not whether coercion feels disrespectful, but whether it *is* disrespectful, and if version 1 is the right interpretation of public justification, then coercion that is publicly justifiable according to version 1 is not disrespectful.

Conceptualizing Public Justification

But how should public justification be conceptualized if it is based on respect for persons? Let me go through the four different issues that were distinguished in Chap. 10. The four issues are: (1) What is to be publicly justifiable? (2) Who is the relevant constituency of public justification? (3) How far should members of the constituency be idealized? (4) Do justifying reasons have to be public reasons?

First, the subject of public justification. What should be publicly justifiable, if respect is the rationale for public justification? Larmore, as seen, focuses on coercive laws because it is coercion without public justification that is disrespectful. In the discussion so far I have adopted this view. One could add that moral rules, insofar as they are coercive, also are a proper subject of public justification, if public justification is a matter of respect. Quong thinks that the focus on coercion speaks against the respect foundation. He imagines a society where laws need not coercively be enforced because people voluntarily comply with them out of a sense of justice, and he claims that certainly laws are nonetheless in need of public justification in that society.[31] Larmore could reply, though, that

[31] Quong 2013: 272–273.

this is question-begging. If the proper rationale for public justification is respect for persons, then indeed laws that need not be coercively enforced may not be in need of public justification. Moreover, coercive laws are coercive even when they need not actually be coercively enforced, but when they come with a threat to coercion. Not publicly justifiable coercive laws are disrespectful even when they need not actually be enforced.

The second issue concerns the constituency of public justification. Every account of public justification that has been proposed excludes some people from the constituency of public justification. The question is whether only Nazis, terrorists from the Islamic State and psychopaths have to be excluded or whether even more reasonable and good-willed people are to be excluded, and what the argument for the exclusion could be. There are at least two ways to argue for the exclusion of some people from the constituency of public justification, from the perspective of the respect-based foundation of public justification.

First, one could argue that respect is only owed to reasonable persons (in some interpretation of 'reasonable') and that therefore public justification is only owed to reasonable persons. But it is doubtful that respect—understood as recognition respect, not appraisal respect—is only owed to reasonable persons. It is owed to *persons*, and Nazis and psychopaths *are* persons. If public justification is a requirement of respect for persons, then we owe public justification to all persons. Of course, because Nazis do not see all the reasons they have and sometimes have strangely incompatible beliefs about Jews, for example, some things can be justified to moderately idealized counterparts of real Nazis.[32] But still, it seems, Nazis have to stay members of the constituency of public justification, if respect is owed to persons.

A second way to argue for a restriction of the constituency is to concede that we owe respect to all persons, but that this need not find expression in publicly justifiable laws with regard to persons who want to violate other people's basic moral rights. The notion of moral rights had to be invoked to get a grip on the notion of compromise and modus vivendi as well. As in those cases, the notion of basic moral rights should be as uncontroversial as possible. It should be the set of basic rights that basically protect

[32] Van Schoelandt 2015: 1035. See also Hare 1981: ch. 10.

people's physical integrity. These rights are arguably acknowledged almost everywhere. Hence one could argue that, although one owes respect to all persons, it is not disrespectful to coercively prevent people from violating other people's basic moral rights, even if the coercion is not justifiable to those who want to violate other people's moral rights. Laws that protect people's basic moral rights must of course be publicly justifiable, but they need not be justifiable to those who want to violate those moral rights. In one version of this idea those who want to violate other people's basic moral rights are permanently excluded from the constituency of public justification. In a second version of this idea those who want to violate other people's basic moral rights stay in the constituency, but are excluded when laws or moral rules that concern those basic rights are at stake. All this presupposes, of course, that people have basic moral rights as a matter of justice antecedent to public justification.

I think the second way to argue for the exclusion of some people from the constituency of public justification is basically convincing (or at least promising). It is an advantage that it does not seem to exclude very many people, and certainly no good-willed cooperative people. It thereby avoids a worry about more exclusive restrictions of the constituency of public justification. If the constituency of public justification becomes too exclusive, this makes public justification look like a cheat: the idea suggests being 'neutral' and accommodating many different perspectives, but in the end it turns out to be restricted to a sect of liberals.[33] Accordingly, Gaus argues that Quong's public reason liberalism is 'sectarian' because the constituency in Quong's account consists of 'reasonable' persons who accept the basic Rawlsian ideas (society as a fair system of cooperation among free and equals, etc.).[34] This worry does not apply, or at least not with great force, when the constituency is restricted to people who respect other people's basic moral rights.

The third issue is idealization. On the one hand, respect is owed to real persons—their capacity of reason and their integrity—so idealization should leave real persons 'intact' and not idealize all differences

[33] Friedman 2000, Talisse 2005: 55–63, Weinstock 2006.

[34] Gaus 2012: 9–11. Van Schoelandt argues that this make the idea of public justification superfluous in Quong's theory (2015: 1040). Quong replies that some sectarianism is unavoidable, as even Gaus limits the constituency of public justification (2012: 52, 2014: 552).

between persons away.[35] As I said above, respecting a person surely does not imply respecting all their current beliefs, but it does imply that it matters whether we coerce them with reasons that in light of *their* evaluative standards do not justify the coercion. On the other hand, respecting persons does not mean to deny the difference between acceptability and actual acceptance. It does not look disrespectful to enforce coercive laws that people have sufficient reason to accept, even when they do not in fact accept them.[36] Therefore, people should simply be idealized as far as necessary to adequately model what it means to have sufficient reason to accept something. Broadly speaking, the respect foundation seems to speak in favor of moderate idealization, an idealization somewhere in the middle between no idealization and maximal idealization.

Fourth, the issue of public reasons. If only public reasons can both contribute to a public justification and defeat a public justification, then some reasons that (e.g.) religious people deeply care about do not count against the public justification of a law or moral rule. If we are to respect persons, then we want to engage their reason and to leave their integrity intact, and to exclude some of the reasons they have, just because they are not accessible to others, does not look respectful. Jeffrey Stout writes: 'Real respect for others takes seriously the distinctive point of view *each* other occupies. It is respect for individuality, for difference.'[37] Hence if the rationale for public justification is respect, then a convergence model seems more adequate.

But this is controversial, of course, and I cannot enter the debate at sufficient depth here. Boettcher argues that the respect foundation of public justification speaks in favor of a consensus model. He thinks it is disrespectful if citizens have to understand other citizens' non-public standpoint in order to understand why a public justification failed.[38] Yet I do not see why this is disrespectful. First of all, in order to have publicly justifiable coercive laws it is not necessary that everyone understands

[35] Gaus 2011a: 233–235, Vallier 2014: 155–158. But see Wall 2016.

[36] Eberle argues in favor of non-subjugation (or 'populism') (2002: 100–101).

[37] Stout 2004: 73, see Wolterstorff 1997, Gaus 2010a: 26, Vallier 2011, 2014: 111–130. One can also draw upon recognition theories as advocated by Honneth 1992/1996 and Taylor 1994 to argue for a convergence model; for critical discussion see Boettcher 2007: 238–243.

[38] Boettcher 2012: 168, see also 2007: 232.

why they are publicly justifiable. Nobody is required to try to understand other people's non-public standpoint. Second, even if it were required, it does not look disrespectful to ask people to try to understand other people's point of view.

Larmore has a slightly different argument. He argues that publicity is needed for an expression of mutual respect, and public reasons are needed if we want a public justification that can be public in the literal sense: something everyone can know about and understand.[39] But, first, while there may be value to publicity, it is unclear how publicity could be necessary to express respect for persons. Respect can be expressed without being understood by everyone. Second, while it may be harder to understand why a law is publicly justifiable, if a convergence of reasons is allowed, this does not mean that it is impossible to understand why a law is publicly justifiable. So even if publicity is desirable, this cannot be a decisive reason to endorse the consensus model instead of the convergence model.

Summary

Although the requirement of respect for persons is not sufficient to ground a strict principle of public justification, it is a source of the value of public justification. Public justification has constitutive moral value because constituting an expression of respect for persons. The respect rationale for public justification suggests a conception of public justification that applies to coercion, that sets some moderate limits on the constituency of public justification, that idealizes the constituency moderately, and that allows a convergence of justifying reasons.

[39] Larmore 2002: 377.

13

Community and Public Justification

One can read Rawls as claiming that public justification secures stability for the 'right reasons' because it leads to some sort of community in pluralist societies. He sometimes suggests that adhering to the principle of public justification and the criterion of reciprocity leads to 'civic friendship,'[1] and he refers to the overlapping consensus as the 'deepest and most reasonable basis of social unity.'[2]

But what is meant by civic friendship and social unity? Rawls makes clear that it cannot be a community that shares a comprehensive doctrine.[3] Another sense of 'community' is a community where members have affective bonds, based on a shared culture, language, and history. For example, David Miller regards a nation as a community that is 'constituted by shared belief and mutual commitment, extended in history, active in character, connected to a particular territory, and marked off from other communities by its distinct public culture.'[4] But quite clearly public justification has nothing to contribute to realizing that sort of community. There are,

[1] Rawls 1993/1996: li, 1997: 771, 786.

[2] Rawls 1993/1996: 391, see also 1993/1996: 134, 202, 1985: 249.

[3] Rawls 1993/1996: 42, 146, 2001: 200.

[4] Miller 1995: 27, see Raz 1990: 30.

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I think, three interpretations of community to which public justification could possibly contribute: (1) community as mutual trust, (2) community as shared ends, (3) community as mutual moral accountability.

Community as Mutual Trust

First, community as mutual trust. Quite obviously, it is not public justification as such that could by itself constitute a community of mutual trust, but a shared *commitment* to public justification. Such a commitment, Andrew Lister argues, changes the character of the relationship among citizens to a relationship of 'civic friendship.'[5] By being committed to public justification, citizens have a commitment to refrain from imposing laws (or whatever the subject of public justification is taken to be) on each other that are inacceptable to some. It can be assumed that people do not want to live under laws that are inacceptable to them, and a commitment to public justification can assure them that they do not have to fear that they will have to live under such laws in the future.[6] Hence, a commitment to public justification could help to build a community of mutual trust. A community of mutual trust will make the society more stable, but it is also a concern of its own.

But of course, the commitment to public justification can only help when it is adequately visible in public. How such a commitment can be expressed depends on whether we employ a convergence or a consensus model of public justification. A problem with the convergence model is that there is not much citizens can do to show their commitment to public justification. All they can do is refrain from supporting not publicly justifiable laws.[7] Because, on a convergence view, there is no distinction between public and non-public reasons—all reasons can both contribute to and defeat a public justification—there is no room to

[5] Lister 2013a: 106, 115, 116. He sometimes calls it a 'relationship of mutual respect,' which, in contrast to 'respect for persons,' is relational (2013a: 116, 121–124). For a discussion of Lister's account, see Billingham 2016.

[6] Lister 2013a: 115.

[7] See also Lister 2013a: 110–115, 132–133.

show a commitment to public justification by restricting oneself to the use of public reasons in public debate.

Now take the consensus model. Lister argues that it is the exclusion of non-public reasons that makes civic friendship or political community possible.[8] The decisive advantage of the consensus model is that it allows a straightforward expression of a commitment to public justification by allowing a distinction between public and non-public reasons. In a consensus model, only public reasons can both contribute to and defeat a public justification. Hence, only the consensus model allows for Rawls's ideas of public reason and a moral duty of civility (Chap. 11). Recall that the content of public reason is constituted by the family of political conceptions of justice. Hence public reason provides public reasons. The duty of civility requires to provide public reasons and base one's decisions on public reasons in certain circumstances and regarding the subject of public justification (i.e. constitutional essentials and matters of basic justice, according to Rawls).[9] According to Rawls's 'wide view' one may always present private reasons in public, as long as one presents public reasons in due course. One might be tempted to think, though, that the commitment to public justification could be even clearer expressed if one were required to not present private reasons at all (in situations where the duty of civility applies).[10]

But all that does not show that public justification is to be considered a value. It is not the state of affairs of having publicly justifiable laws (or whatever is the proper subject of public justification) that leads to a community of mutual trust, but the shared *commitment* to public justification. It is the *commitment* to public justification that has instrumental value because contributing to mutual trust. (Lister will prefer to say that

[8] Lister 2013a: 105–106, 109, 116, 120. On why we care about reasons for decisions and not just the decisions themselves, see Macedo 2010, Lister 2013a: 110–115.

[9] Lister makes clear that the duty of civility is a conditional duty, that is, a duty that one has only if others follow their duty as well (2013a: 121–124).

[10] In contrast, Weithman argues that the 'wide view' is sufficient to solve the mutual assurance problem and to thereby build a community of mutual trust (2011: 329–331). He argues that mutual assurance makes the existence of an overlapping consensus common knowledge (2011: 327–335). Others argue that public reason does not work well as a mechanism of mutual assurance at all (Gaus 2011b and Thrasher and Vallier 2015). For a recent discussion, see Klosko 2015a, Weithman 2015 and Klosko 2015b. See also Hadfield and Macedo 2012.

it has *constitutive* value because it is constituting a community by changing the relationship between citizens.)[11] That a commitment to public justification has value does not show that public justification itself has value.

Now one may argue that the commitment to public justification can only have value—be it instrumental value, be it constitutive value—if public justification is valuable. And that is true. The idea that citizens have to be assured that others care about public justification presupposes that there is some value to public justification. Why else should they want to be assured that others are committed to it? But the value of public justification cannot itself consist in providing assurance and mutual trust. The sources of its value must lie elsewhere—and we found two already: stability and respect. For that reason, community as mutual trust cannot be considered a source of the value of public justification.

It is of course interesting to ask what follows if a public commitment to public justification would indeed help to build mutual trust. I said that both the stability and the respect rationale for public justification speak in favor of a convergence model of public justification, while a public commitment to public justification can best be expressed by relying on a consensus model. But it seems odd to ask citizens to show a commitment to the consensus model of public justification (by providing public reasons etc.), while public justification is actually valuable in the convergence version of it. I think it is more plausible that citizens should publicly show a commitment to public justification in the version that actually has value (the convergence model), even if it is easier to publicly show a commitment to public justification in the consensus model. Another question is whether the trust rationale for showing a commitment to public justification leads to moral duties. If showing a commitment to public justification helps building trust, then citizens may well have a moral duty to publicly show their commitment. Interestingly, Lister concedes that moral values like justice could sometimes be morally more important than community.[12] He argues that this does not undermine his account because community is possible when some laws are not publicly justifiable. The community may simply be less deep and less stable. This is true, and it shows, as far

[11] See Lister 2013a: 106–107.

[12] Lister 2013a: 109–110, 128–129.

as I can see, that the alleged moral duty to show a commitment to public justification could at least be outweighed. It also suggests that we should not accept a principle of public justification, because justice can not only be more important than showing a commitment to public justification, but also more important than public justification itself.

Community as Shared Ends

I come to the second version of community, community as shared ends. Rawls says that citizens, though not sharing a comprehensive doctrine, do have some 'final ends in common' when they realize an overlapping consensus.[13] This end is to live in a society whose basic structure is publicly justifiable because ordered according to a political conception of justice. In a pluralist society, where citizens are divided over religious and philosophical questions, over the good life, and over justice (i.e. what the most reasonable political conception of justice is), this seems to be the last shareable end.

Although, is it? Even in pluralist societies, a shared commitment to some nationalist agenda could still constitute a community of shared ends and is certainly much more common than a shared commitment to public justification. But maybe a community of shared ends is not valuable if the shared end is not to realize a moral value. Maybe, then, public justification is the only moral value that could function as a shared end in pluralist societies. On the other hand, *peace* also is a plausible candidate for a shareable end in pluralist societies. Hence while it is true that public justification is a shareable end in pluralist societies, it is not the only shareable end in pluralist societies. Moreover, shareable is not shared. While peace arguably is a value that is in fact acknowledged by many people, public justification is an unknown value to many, and highly disputed both in its meaning and its weight among those who know it, that is, among political philosophers. Peace therefore is a much more plausible candidate for being a shared end in pluralist societies.

[13] Rawls 1993/1996: 202, 146–147, 2001: 199–200. He now accepts the term 'community' when it is to mean having final ends with high priority in common (2001: 200).

More basically, one may reject the view that having shared ends within a society would even be desirable. As Friedrich Hayek remarks, this view rests on the 'erroneous belief that [...] a common scale of ends is necessary for the integration of the individual activities into an order, and a necessary condition for peace.'[14]One can realize peace and an order that allows mutually advantageous cooperation because peace and cooperation are in the interest of almost everyone. It is not necessary that everyone is thereby *committed* to the value of peace. One just needs working modus vivendi arrangements and working rules for mutually advantageous cooperation. In reply, though, one may insist that having the shared end to realize some moral value would be desirable, even if not necessary for achieving peace and mutually advantageous cooperation. It would be desirable because it would be constituting a community.

But be that as it may. Let us assume for the sake of the argument that public justification could become a shared end, and that having a community of shared ends would indeed be valuable and desirable. Could the value of having a community of shared ends then be considered a source of the value of public justification? I think not. It is not public justification itself that would constitute a community, but a shared *commitment* of everyone to the idea of public justification. A shared commitment to some other moral value, peace for example, would serve the same purpose: it would constitute a community of shared ends. Hence it is not public justification that has constitutive value because realizing a community of shared ends, but a shared commitment to *something* like, for example, peace or public justification. To have a community of shared ends can therefore not be considered a source of the value of public justification.

In reply, a defender of the community as shared ends rationale may argue that only a shared commitment to public justification is appropriate for liberal democratic societies, not a shared commitment to something else. But in doing so he would have to provide some *other* rationale for public justification, not one based on community (as shared ends). The value of having a shared commitment to public justification cannot explain the value of public justification. At best it is the other way around:

[14] Hayek 1976/1982: 111, see 1976/1982: 3.

the value of public justification may explain why a shared commitment to public justification is valuable. Hence the source of the value of public justification must lie elsewhere.

Community as Mutual Moral Accountability (Gaus)

I come to the third version of community: community as mutual moral accountability. This sort of community plays a major role in Gerald Gaus's account of public justification. Gaus tries to show that, on reflection, a commitment to a principle of public justification is internal to our everyday practice of morality.[15] Reactive attitudes, that is, moral emotions like indignation, are an essential part of that practice.[16] We blame others and feel indignation when they do not do what they are morally required to do. Now when a person cannot understand why her action was morally wrong, then we do not blame her for what she did and we do not think the moral emotion of indignation is appropriate.[17] We do not hold the person morally accountable. This is also why, for example, we do not blame little children, animals, or psychopaths for what they do, and it is why we do not make moral demands on them.[18]Gaus concludes that when we hold people morally accountable for what they do, we presuppose that they have sufficient and undefeated reasons to accept the moral rule that applies to their action. He thus claims that we presuppose the following principle in our moral practice: 'A moral prescription is appropriately addressed to Betty only if she is capable of caring for a moral rule even when it does not promote her wants, ends or goals and she has sufficient reasons to endorse the relevant rule.'[19] It is easy to see that the second part of this principle is a principle of public justification.

[15] Hence Gaus does not look for what he calls an 'external' foundation of the principle of public justification (2011a: 226).

[16] Gaus 2011a: chs. 11–12. He refers to Strawson 1962.

[17] Gaus 2011a: 184, 258.

[18] Gaus 2011a: 210.

[19] Gaus 2011a: 222. He calls it the 'principle of moral autonomy.'

When a moral rule is not justifiable to a person, then we cannot blame that person for not acting in accordance with that rule, and it would be inappropriate to feel indignation.

I think this is basically convincing (although I cannot provide a deeper discussion here). Community as mutual moral accountability can be considered a source of the value of public justification. Public justification is a value because having publicly justifiable moral rules is necessary for a community of mutual moral accountability. As in the case of the respect rationale, public justification has constitutive value, as the public justification of moral rules is constitutive for a community of mutual moral accountability. The argument, then, is simple:

(1) We cannot hold a person accountable for not following a moral rule if she does not have sufficient reason to endorse the moral rule.
(2) Therefore, moral rules have to be publicly justifiable with regard to everyone within a community of mutual moral accountability.
(3) Therefore, the public justification of moral rules is constitutive of a community of mutual moral accountability.
(4) A community of mutual moral accountability is intrinsically valuable.
(5) Therefore, public justification has constitutive value.

This is not an argument Gaus explicitly gives, to be sure. He does not talk about the intrinsic value of having a community of mutual moral accountability. But some argument like this must be presumed, I think, in order to make conceivable why some presumptions about moral accountability in our moral practice could ground the value of public justification. I should also make clear that Gaus does not talk about public justification as a value (among other values). He takes it as a strict principle. I thus turn now to the question whether a concern with having a community of mutual moral accountability could ground a principle of public justification, that is, make public justification a strict requirement for the moral justification of the rules of social morality.

A Principle of Public Justification?

David Enoch (and others) argue that Gaus fails to acknowledge the distinction between conditions for wrongness and conditions for blameworthiness and responsibility:

> Showing that Alf is not blameworthy for failing to teach his daughter to read in no way shows that it is not wrong of him to teach her to read […]. He may be acting wrongly, but with an excuse. This would explain why we don't (and shouldn't) have the reactive attitudes toward him (if this is indeed the case), without negating the wrongness judgment.[20]

While the conditions for moral accountability may require the public justification of the relevant moral rules, the conditions for moral wrongness do not require the public justification of the relevant moral rules. And, for that reason, it may sometimes be morally justified to enforce moral rules coercively because it would be morally wrong to not follow them, even though we may not be in the position to hold everyone morally accountable for not following them.

Gaus, of course, thinks that this disentangling of wrongdoing, on the one hand, and our moral emotions and judgments about blameworthiness, on the other hand, is problematic.[21] And, without a doubt, Gaus is right that it is a worry if we have to enforce moral rules while not being able to hold everyone morally accountable if not following these rules. But this can hardly be taken to establish the claim that the value of having a community of mutual moral accountability need not be balanced against other moral considerations (and in that sense Enoch is right). Sometimes other values like justice, for example, indeed are more important than having everyone included in a community of mutual accountability. This means that public justification cannot be a strict requirement. Having and enforcing a moral rule that promotes justice can sometimes be morally justified even though it means that some people have to be excluded from the community of mutual moral accountability (because the moral

[20] Enoch 2013: 163, see Eberle 2002: 133, Wall 2010: 144, May 2013: 561.

[21] Gaus 2011a: 230.

rule is not justifiable to them). That is why Nazis or Islamist terrorists cannot be included in the constituency of public justification.

Moreover, arguably someone can stay a member of the community of mutual moral accountability even though *some* moral rules are not justifiable to him. Even though one may not be in a position to hold a person accountable with regard to some moral rules sometimes (and hence to blame him if not following the rules), this person can still be considered a member of the community of mutual moral accountability as long as he can still be held morally accountable with regard to the great majority of moral rules. Community is not the kind of thing that could require strictness in public justification.

Some readers may think that my argument against making public justification a strict principle misconceives the point of the project of public reason liberalism. Gaus emphasizes that his work (as well as the work of Rawls) is very different from what moral philosophy traditionally does. He is not concerned with uncovering 'moral truth,' but with finding a self-sustaining 'moral constitution,' that is, a 'shared moral framework *all can live with* in a social world where our understandings of moral truth clash.'[22] He asks why we should be interested in such a constitution, and his answer is:

> From our subjective, participant, experience, we find ourselves committed to a web of moral practices and reactive attitudes. We expect certain actions as things we can demand of others, even strangers: we experience resentment and indignation when we see that we or others are treated in violation of our shared morality; we blame, we criticize, we punish […]. But […] we can step back, and look at the moral enterprise from an objective point of view. From this objective point of view, the regulation of social relations through this sort of moral practice is one of the foundations of human social life. No human society has been able to exist without one; societies with weak or ineffective frameworks are characterized by serious social dysfunctions such as lack of trust between strangers and endemic conflict. A shared moral framework is perhaps the distinctive human achievement, which allows a deeply social and cooperative existence among creatures who are not related by kinship or a common view of the world in which they live.[23]

[22] Gaus 2014: 564, see 2013. He refers to Rawls 1980.

[23] Gaus 2014: 565.

But what exactly is the achievement of a 'moral constitution,' according to Gaus? Is stable peace the achievement? Then we get back to the argument from Chap. 11. There I pointed out that while public justification will surely contribute to stable peace, many other factors seem more important for achieving it. Or is the achievement to have a community of mutual moral accountability? I agree that having such community is valuable and an achievement. But acknowledging the value and importance of having a community of mutual moral accountability does not mean to completely set aside any concern for 'moral truth' or—as I would put it—any concern for moral values besides public justification. For that reason, I do not see how a community-based argument could ground a principle of public justification that makes public justification a strictly necessary requirement for the moral justification of the rules of social morality. But, to repeat, indeed the value of having a community of mutual moral accountability is an important source of the value of public justification.

Conceptualizing Public Justification

If moral community as mutual accountability is the source of the value of public justification, how should public justification be conceptualized? Recall the four issues from Chap. 10: (1) What is to be publicly justifiable? (2) Who is the relevant constituency of public justification? (3) How far should members of the constituency be idealized? (4) Do justifying reasons have to be public reasons?

I start with the first issue, the subject of public justification. So far, I said that moral rules are to be publicly justifiable, because they are referred to when blaming others in our moral practice. Yet the most prominent proponent of this approach to public justification, Gerald Gaus, has a more complicated position on the subject of public justification. He is clear that, most basically, it is claims to moral authority that are to be publicly justifiable. He writes:

> [T]his book is motivated by one central concern: can the authority of social morality be reconciled with our status as free and equal moral persons in a

> world characterized by deep and pervasive yet reasonable disagreements about the standards by which to evaluate the justification of claims to moral authority.[24] […] Because we recognize other moral persons as free and equal, having authority […] to interpret their own moral obligations for themselves, our claims to have standing to command that they comply with our view of the demands of morality appears to manifest disrespect for them as equal interpreters of morality.[25]

But although he is clear that claims to moral authority have to be publicly justifiable, he often works with a principle of public justification that applies to coercion.[26]I will now discuss how these three things—public justification of moral rules, public justification of moral authority, and public justification of coercion—are supposed to relate. There is a more official line of argument in Gaus's work (I call it the 'first reading'), and one he less explicitly relies on sometimes (I call it the 'second reading').

I start with the first reading. Gaus argues that there is an 'order of justification' and that some things have to be settled before other things are considered.[27] Both a presumption in favor of liberty and a non-absolute abstract right against coercion (sometimes called a 'right to natural liberty') are publicly justifiable on a first stage, according to Gaus. They would be agreed on by the idealized counterparts of the constituency of public justification (he calls them 'members of the public').[28] The presumption in favor of liberty and the abstract right against coercion set the bar for the derivative subject of public justification: coercion. Finally, then, on the first reading, moral rules are in need of public justification because their enforcement is coercive.[29] Their public justification is needed to outweigh

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[24] Gaus 2011a: xv.

[25] Gaus 2011a: 17. Earlier, he claimed that the making of 'genuine moral demands on others' requires public justification (1996: 129, see 1996: 121).

[26] For example, in Gaus 2003b: 142–145, 2010a: 21, 2010c: 244.

[27] Gaus 2010c: 244, 2011a: 275, 387, 510–511.

[28] Gaus 2011a: 341, 350, 483, 486, see 1990: 381–386, 1996: 162–166, 2010b: 189–190. He also writes that we have a blameless liberty until claims to interpersonal moral authority are justified (2011a: 321). Blameless liberty is the 'default' (2011a: 319). Sometimes, he does not take the presumption in favor of liberty as itself publicly justified, but simply as a plausible starting point (e.g. 2003b: 139–141, 2010c: 238–242).

[29] See, with regard to legal coercion, Gaus 2011a: 479–481.

the presumption in favor of liberty and the right against coercion that are already publicly justified on an earlier stage.

Yet what is unclear about this idea is why members of the public would even consider things like a presumption in favor of liberty or an abstract right against coercion. Members of the public are idealized counterparts of real persons. They actually do a respectable amount of good reasoning and thus see the reasons that their real counterparts have, but sometimes not actually acknowledge. We ask what members of the public would endorse or agree on when we ask whether something is publicly justifiable to real people. The question of justification is thereby translated into a deliberative model. But this means that we have to know in advance what the subject of public justification is: we feed the deliberative model with our questions, so to speak. The members of the public have no life of their own, and they cannot change the subject of public justification. So what questions should we feed the model with? Gaus, to repeat, says that it is, most basically, claims to moral authority that have to be publicly justifiable. It is not abstract rights. Now one may argue that claims to moral authority are sometimes based on abstract rights and thus abstract rights need be publicly justifiable as well, if claims to moral authority need be publicly justifiable. But actually Gaus does not seem to think that claims to moral authority are based on abstract rights, as abstract rights are too abstract and have to be translated into more concrete moral rules before being able to ground claims to moral authority. He writes: '[W]hile appeals to such abstract rights provide a ground for censure, they are not sufficient for the sort of specified moral claims that an ongoing order of public reason requires.'[30] The first reading, then, is not convincing because there is no rationale for letting abstract rights be the subject of public justification, if the basic subject of public justification are claims to moral authority. At least Gaus would have to show how and why abstract rights are referred to in claims to moral authority, in order to make them a proper subject of public justification.

[30] Gaus 2011a: 429, see also 2011a: 180–181, 272, 369. Being realized as part of a 'positive' social morality is a necessary (but not sufficient) condition for claiming the status of being an authoritative moral rule (2011a: 164, 263, see 2009: 127–129).

The second reading is that moral rules are in need of public justification because they *are accompanied* by claims to moral authority. As Gaus says, moral rules 'identify relations of mutual authority.'[31] It is the very point of moral rules that they can be referred to when people make moral demands on each other and thereby make claims to moral authority. When one person says to another that she morally ought not to do something, she usually refers to a moral rule that prohibits doing it. This connects the demand to publicly justify moral rules and the demand to publicly justify claims to moral authority. It also nicely shows how the requirement to publicly justify moral rules and claims to moral authority relates to the community rationale for public justification: in our moral practice, we not only blame persons with reference to moral rules, we thereby make claims to moral authority.

A first objection against the second reading is that one does not make any claims to 'moral authority' in any reasonable sense, when one makes moral demands on others with reference to moral rules. Enoch writes:

> [W]hen I tell Alf 'You should teach your daughter to read!' it is just not about me at all. The normative force—what Gaus misleadingly calls authority, I think—comes from the content of what I said, not from the fact that I said it. […] Coercing Alf for the reason that I believe so-and-so is, I agree, objectionably authoritarian […]. But coercing him for the reason that so-and-so—at least if it is true that so-and-so (as it is in the example of teaching his daughter to read)—is not authoritarian at all.[32]

Gaus is, of course, aware of this objection. He replies:

> You may insist that you are not demanding that I submit to *your* authority but only to the *authority of morality*. […] [But] morality does not fax its demands down from above; you are asserting your interpretation of the demands of morality as that which should be followed by me over my own interpretation.[33]

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[31] Gaus 2011a: 171.

[32] Enoch 2013: 159–160.

[33] Gaus 2011a: 11, see 2003b: 144, 2009: 112, 2014: 573. In the same spirit, Rawls writes (1993/1996: 61): 'Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are

And in that sense, it seems that people indeed make claims to authority when they make moral demands on each other in the name of moral rules. They claim to know better what is morally right and they claim that others have to defer to their judgment.

Simon May, though, argues that Gaus wrongly claims that making moral demands involves claims to deference.[34] Instead, he proposes to analyze moral demands as ultimatums, that is, as threats to impose moral sanctions.[35] But even if moral demands are better understood as ultimatums, that is, as threats to impose moral sanctions, this confirms that moral demands involve claims to moral authority, in a certain sense. Recall that Gaus thinks of moral authority as having 'standing to command others to comply with one's view of the demands of morality.' In Hohfeldian[36] terms, this standing arguably is constituted by a bundle of rights that entails at least a liberty-right to demand and enforce compliance with a moral rule. If that is so, and if moral demands are understood as threats to impose moral sanctions, then making moral demands indeed involves making claims to moral authority, understood as the liberty-right to demand and enforce compliance with a moral rule (whatever that means in detail). This is not to say that all moral disputes or all moral judgments involve claims to moral authority in this sense. Sometimes one simply disagrees about what is morally right.[37] But moral *demands* come with claims to moral authority, so understood.

How does coercion fit into the picture of the second reading? Coercion is to be publicly justifiable insofar as it is the exercise of moral authority, understood as including the liberty-right to demand and enforce compliance with a moral rule. One can see the public justification of coercion as an indirect public justification of moral authority.

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their beliefs. But this is a claim that all equally could make, it is also a claim that cannot be made good by anyone to citizens generally. So, when we make such claims others, who are themselves reasonable, must count us unreasonable.' See also Nagel 1987: 230–231.

[34] May 2013: 556–558.

[35] May 2013: 558–559.

[36] Hohfeld 1913–1917/2001.

[37] Lister 2013b: 322–323

Gaus later extends his approach from moral to political authority.[38] Yet this extension is not easy, as there are stronger claims to authority in politics, namely the claim to have the liberty-right to *enact* certain kinds of laws and to have the power to thereby impose duties. I will later discuss political authority or state legitimacy in its relation to public justification (Chap. 17). But setting political authority aside, the need to publicly justify claims to *moral* authority can also show why *laws* are in need of public justification—insofar as claims to moral authority are sometimes made with reference to laws (and 'constitutional essentials') instead of moral rules. Our moral practice, including the practice of blaming others, extends into the political realm.

Now there is a second objection to the second reading. Certainly one can use coercion without reference to moral rules or laws and thus without making any claims to moral authority. One can rely on brute force. Thus on the second reading, not all instances of coercion are in need of public justification. This has recently been pointed out by friends of Gaus's account. Chad Van Schoelandt writes: 'Of course, our coercively backed laws are often moralized, requiring interpersonal justification to vindicate their implicit claims to authority. Such justification is not directly required for non-moralized laws.'[39] Kevin Vallier agrees that 'if we wish to coerce without moral authority, we may not need to publicly justify that coercion.'[40] And Gaus himself might agree implicitly in saying that 'the Basic Principle of Public Justification specifies conditions for moral authority, not moral permissibility.'[41] Yet it looks worrisome that one could avoid the requirement of public justification simply by not referring to moral rules and instead relying on brute force. It looks worrisome because it seems to imply that one may use coercion however one likes, as long as one simply avoids referring to moral rules or laws and making claims to moral authority. This is indeed suggested by Gaus when he says that we have a 'blameless liberty to act as we see fit' with regard to psychopaths and others 'who fail to achieve moral personhood.'[42] It is also

[38] Gaus 2011a: 460–470.

[39] Van Schoelandt 2015: 1043 n. 45.

[40] Vallier 2014: 41 n. 61.

[41] Gaus 2014: 573.

[42] Gaus 2011a: 463.

suggested in his reply to an objection to his account: Quong argues that Gaus's account cannot secure intuitively acceptable outcomes, as we may end up lacking moral authority to stop a religious fanatic from killing infidels.[43] Gaus replies that we may use coercion to stop the fanatic without making claims to moral authority.[44] That we could do whatever we like as long as we avoid making claims to moral authority has been taken as a reductio ad absurdum of Gaus's account of public justification.[45]

But from the claim that we can avoid the requirement of public justification by coercing people without reference to moral rules or laws and hence without making claims to moral authority, it does not follow that we have a blameless liberty to act as we see fit when coercing others without making claims to moral authority. One should accept that the value of having a community of mutual moral accountability is only one value among others. Accordingly, public justification also is just one value among others. So of course, we sometimes may use coercion without public justification. But we do not have a blameless liberty to use coercion as we see fit. Other moral values may apply. These values will often prohibit relying on force, and sometimes they will justify relying on force, for example if necessary to protect someone's moral rights.

I conclude that the two objections against the second reading can be rebutted. If the rationale for public justification is the value of having a community of mutual moral accountability, then, most basically, claims to moral authority and, derivatively, moral rules and laws (and constitutional essentials) are the proper subject of public justification.

This was a long discussion of the first issue, that is, the proper subject of public justification. I now come to the second issue: how wide should the constituency of public justification be, if the rationale for public justification is moral community? Certainly we wish to have a moral community with as many people in our society as possible, so the constituency should be as broad as possible, although of course it need not include Nazis, psychopaths, and so on.[46] But there is also a price to be paid for having a broad community of mutual moral accountability, as

[43] Quong 2014: 547–549.

[44] Gaus 2014: 571–574.

[45] Enoch 2013: 170.

[46] Gaus 2014: 566, 2011a: 282–283.

Gaus concedes: it reduces the scope of what is publicly justifiable. This is a problem, at least when it undermines the very function of a social morality (which basically is to coordinate cooperation, according to Gaus).[47] In Gaus's account, the constituency only excludes people with unintelligible evaluative standards recall (see Chap. 10). In any case, it seems, the constituency of public justification should be as broad as possible, if the rationale for public justification is having a community of mutual moral accountability.

The third issue is how far members of the constituency should be idealized, if community as mutual moral accountability is the rationale for public justification. The answer is the same as in the last chapter: if moral community is the rationale for public justification, then members of the constituency should be idealized as far as necessary to adequately model what it means to have sufficient and undefeated reasons. This will probably be a 'moderate' idealization.

Fourth, do justifying reasons have to be public reasons, when moral community is the rationale for public justification? The answer is clearly 'no.' Moral accountability depends on what reasons are accessible to a person, and there is no rationale for excluding reasons just because they are not accessible to others. Accordingly, there is no reason to discriminate between public and non-public reasons. A public justification requires that everyone has sufficient and undefeated reasons to accept moral rules (etc.), but these reasons can be different reasons for different persons. They do not have to be accessible to everyone. The moral community rationale for public justification speaks in favor of a convergence model.

Summary

Community as mutual trust and community as shared ends are not a source of the value of public justification. A community of mutual moral accountability, though, is indeed constituted by publicly justifiable moral rules, and so public justification has constitutive value. This rationale for public justification suggests a conception of public justification that

[47] Gaus 2011a: 282.

applies to moral rules and laws (and constitutional essentials), that makes the constituency as wide as possible, that idealizes moderately, and that allows a convergence of justifying reasons. Because moral community is not the only value to consider in the moral justification of coercive laws or moral rules, this rationale for public justification is again not sufficient to ground a principle of public justification that would serve as a strictly necessary requirement for the moral justification of coercive laws and moral rules.

Part IV

Compromising for Peace and Public Justification

14

Peace and Public Justification as Second-Level Values

In Parts II and III, I introduced the ideas of peace and public justification. In this chapter, I substantiate the claim that peace and public justification are values on the second level and not on the first level of moral evaluation: they provide us with moral reasons to make compromises. I also discuss whether these reasons are principled or pragmatic moral reasons, I discuss Simon May's argument against principled moral reasons to compromise in politics, and I say a few words on other second-level values besides peace and public justification. Although peace and public justification may also provide moral reasons to make non-moral compromises, I will focus on moral compromises.

Applying the Test: Public Justification and Peace as Second-Level Values

Are peace and public justification really values on the second level of moral evaluation? Do they provide moral reasons to make compromises? Some will have doubts in particular with regard to public justification, as major proponents of public justification deny any connection between

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public justification and compromising.[1] And they are right that public justification itself has nothing to do with compromising. To show that an arrangement is publicly justifiable simply means presenting supporting reasons that are sufficient and undefeated from the point of view of the parties, and these reasons can be of many different kinds. I would argue, though, that to present such reasons *can* involve showing that the arrangement is a rational or fair compromise. But this is not the point I want to make in this chapter. What I want to argue in this chapter is that when a person accepts the moral value of public justification and agrees to some arrangement because it is publicly justifiable, then that person accepts the arrangement as a moral second-best and thus makes a moral compromise for moral reasons.[2] Using the notation from Chap. 3, she accepts an arrangement that is not the morally best$_1$ arrangement, but the morally best$_2$ arrangement or, more probably, one of the morally acceptable$_2$ arrangements. Because it is not the morally best$_1$ arrangement, it involves making a moral compromise. It is a moral second-best from the point of view of the first level of moral evaluation even when the person endorses the moral value of public justification, and even when she agrees to the arrangement *because* she endorses the moral value of public justification on the second level of moral evaluation. When both parties to a compromise accept the arrangement because they adhere to public justification, then we have what Amy Gutmann and Dennis Thompson call a 'deliberative disagreement': 'A deliberative disagreement is one in which citizens continue to disagree about basic moral principles even though they seek a resolution that is mutually justifiable.'[3]

Now some will argue that the moral value of public justification is in fact located at the first level of moral evaluation, not at the second level. It does not generate reasons to make a compromise regarding what one thinks the morally best$_1$ arrangement would be, but reasons to correct one's first-level view on what the morally best$_1$ arrangement would be. Luckily, there is an easy way to test whether some arrangement is

[1] Rawls 1993/1996: 39, 141–142, 171, Gaus 2011a: 276, 406, 505–506.

[2] A connection between public justification (or public reason) and compromising is also drawn in Bohman 1995, Bellamy 1999: 99–100, Lister 2007, 2013a: 117–118, McCabe 2010: 133. See also Sher 1981: 369.

[3] Gutmann and Thompson 1996: 73.

accepted as a second-best. Recall the test for whether someone is making a compromise from Chap. 3:

A person *A* makes a compromise in agreeing to an arrangement *X*, if and only if:

(1) *A* and at least one other person *B* both agree to *X*,
(2) *A* would persuade everyone affected of a different mutually advantageous arrangement *Y*, if she could do so at no costs, and
(3) conventions allow to bargain over the arrangement.

Let us consider a case where a person—I call her Anna—agrees to an arrangement *X* because she endorses the moral value of public justification. Public justification, in other words, is the decisive reason for her advocating *X*. (Conditions (1) and (3) are given, let us assume.) Bracketing the issue of public justification, Anna would prefer to see arrangement *Y* implemented. What we would like to know, then, is whether she regards *X* as the morally best$_1$ arrangement or as the morally best$_2$ arrangement. The question to be asked, accordingly, is whether she would persuade everyone else to agree to *Y*, if she could do so at no costs. (We can assume that *Y* is a mutually advantageous agreement as well.) The answer, I think, is 'yes.' She would persuade the others to agree to arrangement *Y*, not to agree to arrangement *X*, because *Y would also be publicly justifiable* if everyone could be persuaded of *Y*: when everyone is persuaded of *Y*, then everyone has sufficient reason to accept *Y*, and that means that *Y* is publicly justifiable. Because this is so, there would be no point in persuading everyone of *X*: recall that Anna prefers *Y* to *X* and agrees to arrangement *X* only because of *X*'s public justifiability. She otherwise prefers *Y* to *X*. If *Y* were publicly justifiable as well, because everyone could be persuaded of *Y*, then there would be no reason for Anna to advocate *X*. This shows that Anna accepts arrangement *X* as a moral second-best, when she advocates it because of her endorsement of the moral value of public justification. And this shows that public justification is a second-level moral value, providing reasons to compromise on what would be morally best$_1$.

A side note: Andrew Lister has proposed a revisionist reading of Rawls, according to which citizens cannot be fully reconciled to reasonable

pluralism and thus accept public reason as a moral compromise.[4] Rawls, of course, denies that people should accept public reason as a compromise. But he speaks of a 'political compromise' and hence neglects the possibility of making a compromise for moral reasons.[5] Rawls also writes: '[W]e do not look to the comprehensive doctrines that in fact exist and then draw up a political conception that strikes some kind of balance of forces between them.'[6] Here he neglects the possibility of making what Daniel Weinstock calls a 'substitutive compromise,' where public reason is not regarded as some sort of middle ground between two positions, but as a substitute for what the adherents of comprehensive doctrines would want in the absence of disagreement.[7] So I think Lister is right: it is at least conceivable that public reason could itself be the subject of a compromise. Yet all this is irrelevant to my argument here. My argument is not about whether citizens accept public reason (or the value of public justification) as a compromise, but whether they agree to some arrangement as a compromise when they accept it because of the value of public justification.

What about peace? Let us apply the test again. This time, Anna agrees to arrangement *X* because it expectably helps to realize peace (it is a promising modus vivendi arrangement). Bracketing the issue of peace, Anna would prefer arrangement *Y* to arrangement *X*. What we want to know, again, is whether she regards *X* as the morally best$_1$ arrangement or as the morally best$_2$ arrangement. The question to be asked, therefore, is whether she would persuade everyone affected to agree to *Y*, if she could do so at no costs. (We can, again, assume that *Y* is a mutually advantageous agreement as well.) The answer, I think, is 'yes.' She would persuade everyone of arrangement *Y*, not arrangement *X*. If everyone would be persuaded of *Y*, then *Y* has a good chance of being a workable modus

[4] Lister 2007. In his book, Lister is a bit more cautious, saying that accepting public reason need not involve a compromise when the reason for acceptance is respect for persons (2013a: 117–118). Because he grounds public reason in the value of political community, though, he still thinks that accepting public reason involves making a compromise.

[5] Rawls 1993/1996: 171.

[6] Rawls 1993/1996: 39, see 1993/1996: 141–142.

[7] Weinstock 2013: 540. Relatedly, Carens and Besson distinguish between distributive and integrative compromises (Carens 1979: 126–127, Besson 2003: 215–216).

vivendi arrangement as well, and hence there would be no point in persuading everyone of *X*, if Anna otherwise prefers *Y* to *X*. This shows that she accepts arrangement *X* is a second-best, when she agrees to it because of her endorsement of the value of peace. And this shows that peace is a second-level moral value.

Let me briefly look at a less abstract example. John Locke writes: 'No peace and security […] can ever be established or preserved amongst men so long as this opinion prevails, that dominion is founded in grace, and that religion is to be propagated by force of arms.'[8] In this argument for toleration, the presupposed first-best arrangement is that everyone lives by the rules of the true religion. If everyone could be persuaded of the true religion, this would be great. But given that there is disagreement on what the true religion is, the value of peace provides moral reasons to refrain from trying to impose the rules of the true religion on everyone. Toleration is a second-best arrangement. Peace hence works as a second-level value in this argument for religious toleration.

But maybe peace does not *always* work as a second-level value. There may be cases where Anna has to assume that *Y* would not be a working modus vivendi arrangement even if everyone could be persuaded to agree to install it. This may be unlikely, but still it can happen, if *Y* is in some ways insensitive to important conflicts of interests among the parties and thus predictably leads not to a containment of these conflicts, but to new fights. If that is so, Anna may indeed not want to persuade everyone of *Y*, even though she prefers *Y* to *X* when bracketing the issue of peace. Peace, then, may sometimes work as a first-level value, informing one's position about what arrangement would be morally best$_1$. But, to repeat, peace works as a first-level value only in the rare case where an arrangement would undermine peace even though everyone agrees that it would be the best arrangement. Hence I think it is safe to say that peace will work as a second-level moral value in the overwhelming majority of cases. It then provides reasons to compromise on what is morally best$_1$.

I do not claim that peace and public justification are the only moral values on the second level of moral evaluation. I have earlier referred to friendship as a value that provides reasons to compromise (Chap. 5).

[8] Locke 1689b/2010: 23.

But the main subject of the book is political morality, and friendship might not be highly relevant to political morality. Probably the most plausible additional candidates for second-level moral values that are relevant for political morality are democracy, non-subjugation, and community (understood as 'civic friendship'). I focused on peace and public justification simply because I was particularly interested in them.

A few words on democracy. Democracy is, on the one hand, an institutional arrangement that is part of what many people regard as the morally best$_1$ arrangements. Thomas Christiano, for example, defends democracy as realizing public equality, which he takes to be the core principle of social justice and which also grounds liberal rights.[9] Democracy can also be seen as an institutional arrangement that is not part of the morally best$_1$ arrangements, but the outcome of a compromise, maybe a 'fair' compromise.[10] But arguably democracy is not only an institutional arrangement, but also a value. No matter whether one defends democratic institutions as a first-best or a second-best, accepting or supporting particular democratic *decisions* will often mean accepting or supporting a moral second-best. And the value of democracy may be regarded as a value that gives one moral reason to do so. It could be regarded as a value that gives politicians moral reasons to make compromises within democratic institutions. But this is a topic for some other occasion.[11]

What If Justice and Public Justification Are Not Distinct?

I have assumed that public justification is a value *distinct* from justice. An arrangement can be unjust, or not fully just, and at the same time publicly justifiable, and an arrangement can also be just and at the same time not publicly justifiable. Public justification is quite clearly distinct from justice in Gerald Gaus's account (see Chaps. 10 and 13), because

[9] Christiano 2008.

[10] On democracy as a fair compromise, see Singer 1974: 32, Waldron 1999: 114. For an argument against justifying democracy as a fair compromise, see Christiano 1996: 48–53.

[11] See also Carens 1979: 132–139, Talisse 2013, Weinstock 2013.

Gaus allows a pluralism of moral standards including standards of justice among the 'members of the public' to whom moral rules and laws must be justifiable.[12] Some of the members of the public are classical liberals, others are egalitarians and so forth. And he writes: '[W]hen engaging in collective justification about a common framework for living, we have reason to endorse common rules even when they do not align with our convictions about what is optimal.'[13] I should concede, though, that Gaus is less clear whether one of the members of the public could be *right* about justice.[14] I should also concede that he sometimes seems to suggest that justice is whatever is publicly justifiable.[15] Nonetheless, in the big picture public justification is quite clearly distinct from justice, on his account.

John Rawls also treats public justification and justice as distinct, although of course related (see Chap. 11): constitutional essentials, according to him, must be publicly justifiable, and they are publicly justifiable when they are based on a political conception of justice. Because Rawls's own conception of justice, 'justice as fairness,' is but one from within a large set of political conceptions of justice, public justification cannot be conceived as a requirement within justice as fairness. Public justification is thus not conceived as a demand of justice, but as a concern distinct from justice, in Rawls's political liberalism. Similarly, according to Jonathan Quong, laws are to be publicly justifiable because there is reasonable disagreement about justice.[16] Quong writes:

> But for many, if not most, political questions we should not expect reasonable people to converge on a unique solution. Instead, there will be a number of solutions, all of which are reasonably acceptable […]. All of the solutions in the set are, by virtue of being reasonably acceptable, potentially legitimate [i.e. publicly justifiable], even if only one of them is in fact just.[17]

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[12] Gaus 2011a: 2, 277–278, 445, 548.

[13] Gaus 2011a: 502–503, see 2010b: 204.

[14] As in Gaus 2011a: 445–446.

[15] Gaus 1996: 121, 2010c: 237, 239, also 2011a: 429, 446.

[16] Quong 2011: 131–135, 137, 219.

[17] Quong 2011: 137, see also 2011: 131–135, 219.

It should be noted that in Rawls's and Quong's views, an arrangement can be unjust (or not fully just) and at the same time publicly justifiable—and in that sense the two values are distinct—but an arrangement cannot be just and at the same time not publicly justifiable.

But even though public justification and justice are distinct in these prominent theories, we could of course imagine a theory that considers public justification as a demand of justice. But if public justification were a demand of justice, it would still not be a first-level value. It would not change anything in the example of Anna. If Anna agrees to arrangement *X* just because it is publicly justifiable, but otherwise prefers *Y* to *X*, then she does not consider *X*, but *Y* as the best$_1$ arrangement. She has no reason to persuade others of *X*, because *Y* would be publicly justifiable, if everyone could be persuaded of *Y*. Hence, if public justification were considered a demand of justice, this would simply make justice a (partly) second-level value. Therefore, although I think justice is distinct from public justification, what I say about public justification as a reason to compromise is compatible with regarding public justification as a demand of justice. If public justification is a demand of justice, justice simply becomes a (partly) second-level value.

What if someone regards public justification and justice as distinct, but advocates a contractualist conception of justice? This, in my reading, is Rawls's view, of course. Contractualist justice would be a first-level value, as can easily be shown. If Anna agrees to arrangement *X* because *X* realizes Rawlsian justice ('justice as fairness'), but otherwise would prefer *Y*, then she would still persuade everyone affected of *X*, if she could at no costs. If she persuaded everyone of *Y*, this *would not make Y realize* '*justice as fairness*,' and as she apparently cares about 'justice as fairness,' she would therefore not persuade everyone of *Y*. This shows that she accepts arrangement *X* as a first-best, when she accepts it because she adheres to 'justice as fairness.' (Of course, the same holds if she is not a Rawlsian, but a libertarian or luck-egalitarian, for example.) To make the contrast with public justification explicit again: if she agrees to *X* not because *X* would realize 'justice as fairness,' but because it is publicly justifiable, while she would otherwise prefer *Y* to *X*, then she would persuade everyone of *Y*, if she could at no costs, because *Y* would become publicly justifiable, if everyone were persuaded of *Y*. She thus accepts *X* as a second-best, when

she accepts it because she adheres to the value of public justification. Public justification is a second-level value, justice is a first-level value, and this is so even when contractualists are right about justice.

Principled or Pragmatic Reasons?

Do the values of peace and public justification provide us with pragmatic or with principled reasons to compromise? Take peace first. Because peace has non-specific and specific instrumental value for (almost) everyone, most people very often have non-moral pragmatic reasons to make compromises for peace. But peace not only gives rise to non-moral reasons to compromise. As peace is a moral value, peace provides *moral* reasons to accept modus vivendi arrangements, both in cases of conflicts of interests and in cases of moral conflict. In cases of moral conflict, the moral value of peace provides moral reasons to make a *moral* compromise (i.e. to accept an arrangement that is not the morally best$_1$ one). In cases of conflicts of interest, the moral value of peace provides moral reasons to make a non-moral compromise. Are the moral reasons to compromise generated by the moral value of peace pragmatic or principled? Pragmatic compromises, recall, are accepted as an instrument to attain certain goals, principled compromises are not (only) accepted as an instrument to attain certain goals, but, most prominently, to respect or honor some value. Peace quite clearly is a goal, and modus vivendi arrangements are the means to attain it. Hence the value of peace generates pragmatic moral reasons to compromise.

Now take public justification. Public justification has instrumental value because contributing to stable peace (Chap. 11). This is one reason why it is to be considered a moral value. As such it provides pragmatic moral reasons to compromise. But public justification has also constitutive value as an expression of respect for persons (Chap. 12). This is a second reason why public justification is a moral value. One honors the value of respect by not coercing people without public justification. Public justification, here, is not an instrument to reach some goal. As such, it provides principled moral reasons to compromise. Public justification also has constitutive value because being constitutive for moral community (Chap. 13). Again, public justification is not an instrument, but a value

to be honored. One honors the value of having a community of mutual moral accountability by adhering to public justification. Public justification therefore again provides principled moral reasons to compromise.

Depending on what the rationale for public justification is, it should be conceptualized differently, as we have seen. Constitutional essentials as well as laws and moral rules are the proper subject if the rationale is stability or moral community, coercion is the proper subject if the rationale is respect. The constituency should be as wide as possible, if the rationale is stability or moral community, and it should be limited to people who respect other people's basic moral rights, if the rationale is respect. Members of the constituency should be idealized as little as possible, if the rationale is stability, and they should be moderately idealized, if the rationale is respect or moral community. Public justification should allow for a convergence of justifying reasons, no matter what its rationale is.

Does all this mean that there is not one value of public justification, but three? I would not say so. It is just that public justification has different faces, depending on what rationale is at stake. When all three grounding concerns are at stake, then indeed one can say that the value of public justification comes in the shape of three closely related, but slightly different values that all go by the name of public justification.

Simon May's Argument

Simon May has argued that there are no principled reasons to compromise in politics.[18] The best reply, I think, is to present a case for principled reasons to compromise in politics—as I claim to have done here.[19] But I would like to provide a brief direct reply at least to his more specific claim that there are no principled reasons to compromise from the perspective of Rawls's political liberalism (see Chap. 11). His main argument for that claim is that

> although political liberalism involves an intrinsic sensitivity to moral disagreement, it does not involve any principled reasons for moral compromise.

[18] May 2005.

[19] For another reply, see Weinstock 2013.

> Reasonable moral pluralism has significance for the first order of political theorizing, insofar as it generates reasons for moral correction against any theory of justice articulated in terms of comprehensive values.[20]

Does this show that the Rawlsian principle of public justification (the liberal principle of legitimacy) cannot provide principled moral reasons to compromise? Take a citizen who adheres both to a non-political conception of justice and to the principle of public justification. The Rawlsian principle of public justification, recall, requires that the exercise of political power is based on a political conception of justice. Hence if a citizen does not adhere to a political conception of justice, then the Rawlsian principle of public justification can sometimes provide principled moral reasons to make compromises. It does so when the arrangement that the citizen deems $best_1$ turns out to not be publicly justifiable. True, political liberals will criticize adherents of non-political conceptions of justice on the first level of moral evaluation, but this does not show that the principle of public justification cannot provide principled moral reasons to compromise for adherents of non-political conceptions of justice.

Probably May wants to make the more modest claim that the Rawlsian principle of public justification cannot provide principled moral reasons to compromise for adherents of political conceptions of justice. This modest claim certainly looks plausible. Citizens who adhere to political conceptions of justice can regard their own conception as true, in light of their own comprehensive doctrines, and they can regard all other political and non-political conceptions of justice as false. This will inform their judgments on the first level of moral evaluation, while the principle of public justification gives them moral reasons to accept exercises of political power that are based on other political conceptions of justice. But the principle of public justification does not give them moral reasons to make compromises, because all policy proposals that are based on a political conception of justice—like, for example, on their favorite political conception of justice—are thereby also publicly justifiable. Adherents of political conceptions thus do not make proposals that are not publicly

[20] May 2005: 346.

justifiable, and so they never have to make compromises for the sake of public justification. So the modest claim seems to be correct.

But there are two objections to the modest claim. First, when adherents of political conceptions of justice make policy proposals that are *not* based on their political conception of justice, but on non-public values from their comprehensive doctrine, then the Rawlsian principle of public justification can provide them with principled moral reasons to make compromises (to agree to a second-best$_1$), if that is necessary to get to a publicly justifiable arrangement. A political liberal will point out that adherents of political conceptions of justice ought to make all first-level evaluations in terms of their political conception of justice, but this does not undermine the point that the principle of public justification can provide principled moral reasons to compromise even for adherents of political conceptions of justice. Second, I argued in Part III that public justification should allow for a convergence of justifying reasons. On a convergence model, arrangements can be publicly justifiable without being based on public reasons (and thus without being based on a political conception of justice). Likewise, arrangements can fail to be publicly justifiable when some persons have non-public defeater reasons (maybe based on a non-political conception of justice). Thus on a convergence model, adherents of political conceptions of justice can make policy proposals that are not publicly justifiable, even when their proposals are based on a political conception of justice. For that reason, adherents of political conceptions of justice can have principled moral reasons to make compromises, when agreeing to what is a second-best$_1$ from the perspective of their political conception of justice is necessary to get to a publicly justifiable arrangement. This is not an objection from the perspective of political liberalism, but it shows (again) why the value of public justification provides principled reasons to compromise. It might be worth repeating that I am not committed to the distinction between political and comprehensive conceptions of justice, and that I am not committed to the claim that citizens ought to adhere to political conceptions of justice. I stay neutral on what justice is—and true justice might well be 'non-political' from Rawls's perspective.

Summary

Public justification and peace are moral values on the second level of moral evaluation. They provide reasons to make compromises on what is morally best$_1$. Peace provides pragmatic moral reasons and pragmatic non-moral reasons to compromise on what is morally best$_1$; public justification provides both pragmatic and principled moral reasons to compromise on what is morally best$_1$.

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The Deontic Morality of Compromising

In Part I, I presented a picture of what compromises are, and I defended the conceptual possibility of having conclusive moral reasons to make moral compromises, that is, compromises in which one agrees to a morally second-best arrangement. The distinction between two levels of moral evaluation was crucial for that defense. I introduced the notions of principled and pragmatic compromises, rational compromises, fair compromises, and rotten compromises. In Parts II and III, I introduced the ideas of peace and public justification, and I explained why they should be considered moral values. In Chap. 14, I defended the claim that they are indeed moral values on the second level of moral evaluation, providing moral reasons to compromise. In the case of peace, these reasons are pragmatic reasons; in the case of public justification, these reasons can be both pragmatic and principled reasons. With this conceptual framework at hand, I will now, in a quite general way, try to articulate and partly defend some moral principles in the—not much explored—deontic morality of compromising. I call it the 'deontic' morality of compromising because it deals with the moral duties we have before a compromise is made and the moral obligations we have after a compromise is made. (On terminology: the whole book is on the 'morality of

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compromising'—most importantly on moral values that provide reasons to make compromises—but only this chapter is on the 'deontic morality of compromising.') Compromises made for peace and public justification will be used as applications of more general claims, and also function as a 'test' for these more general claims.

Although compromises can of course be made for non-moral reasons, I will here focus on compromises made for moral reasons. One should bear in mind, though, that both moral and non-moral compromises can be made for moral reasons (Chap. 2): whether a compromise is 'moral' or 'non-moral' depends on whether it involves accepting a moral second-best or accepting a second-best from the point of view of one's interests. One can accept a second-best from the point of view of one's interests for moral reasons; one then makes a non-moral compromise for moral reasons.

I should note that I will not deal with other moral duties people have with regard to peace and public justification. I earlier mentioned duties to pursue public justification, to support only publicly justifiable laws, and to provide public reasons in public, for example. But these duties are not the subject of this chapter. The chapter is about duties and obligations in and after making compromises. I will also not say much about moral guidelines on how moral values can most acceptably be compromised. Ronald Dworkin, for example, argues against 'checkerboard solutions' (the so-called internal compromises) that undermine the integrity of a value.[1] What he has in mind are arbitrary distinctions in an arrangement: one should not allow abortion only for women who were born in winter, for example, or make arbitrary tax exemptions for particular groups. Guidelines like this seem compelling, but I cannot deal with them here.

Moral Duties in Bargaining

I start with the moral duties people have before a compromise is made. Consider a moral compromise made for moral reasons. The scenario, then, is as follows. All parties have their own views about what the morally

[1] Dworkin 1986: 178–184, see also Besson 2003.

best$_1$ arrangement or the morally best$_1$ arrangements would be. (For this notation, see Chap. 3.) Of course, all parties also have a view about what the second- and third-best$_1$ arrangement or arrangements would be. They have a ranking of options. Because facing a situation of disagreement about what would be morally best$_1$, the parties also consider second-level moral values and hence develop a view about what the morally best$_2$ arrangement or arrangements would be (the 'all things considered morally best' arrangement or arrangements). And of course the parties also develop a view about what the second- and third-best$_2$ arrangement would be, in light of all relevant first- and second-level values. They have a ranking of options. Some arrangements will look so bad, in light of all relevant first- and second-level values, that they are inacceptable$_2$. The parties prefer not getting to a compromise at all than getting to a compromise on one of these inacceptable$_2$ arrangements. All other arrangements form the set of acceptable$_2$ arrangements. What this set contains will of course differ from party to party. Note that some of the parties will be justified in their views, some will not. The model politician from the introduction of course has sound views about what the morally best$_1$ and morally best$_2$ arrangements and the set of morally acceptable$_2$ arrangements would be—and the deontic morality of compromising applies to the model politician's point of view. All rankings being fixed, the bargaining process begins. None of the parties will get what she considers the morally best$_1$ arrangements. (I ignore the possibility that *one* party could get her first-best$_1$ option.) In that sense, every party will have to make a moral compromise. Because there is disagreement about what is morally best$_1$, the morally best$_1$ arrangement cannot be installed. Given the fact of disagreement about what is morally best$_1$, of course none of the parties even *wants* to get what it regards as the morally best$_1$ arrangement. Second-level moral values matter, under circumstances of disagreement about what is morally best$_1$. Second-level moral values, together with first-level moral values, determine which arrangement is morally best$_2$, that is, all things considered morally best. But not only will none of the parties get what it considers the morally best$_1$ option. Usually, neither will any of the parties get what it considers the morally best$_2$ option as well, because there will be disagreement about what is morally best$_2$. All parties will have to agree to an arrangement that all find morally acceptable$_2$.

Deliberative democrats may argue that the persons in my scenario should not compromise, but find a moral consensus through a proper deliberative moral discourse. Like Jürgen Habermas, they may say that 'bargaining first becomes permissible and necessary when only particular—and no generalizable—interests are involved, something that again can be tested only in moral discourses.'[2] It may indeed be desirable to find a moral consensus, but I here presuppose a scenario where this is impossible. Maybe the parties tried hard but were unable to find a moral consensus, or maybe they were not even able to have a proper deliberative discourse. In any case, one should assume that in our scenario, compromising is the only way to find an agreement.

In a non-moral compromise made for moral reasons, the scenario is slightly different. The parties have a ranking of the arrangements from the point of view of their interests. They then consider second-level moral values that provide them with reasons to agree to an arrangement that falls short of being best from the point of view of their interests. When we make an analogous distinction between two levels in the evaluation of arrangements from the point of view of one's interests, then they determine the best$_2$, second-best$_2$, third-best$_2$ arrangement, and so on, in light of their interests and second-level moral values. And they determine a range of options that they should be willing to accept: the set of acceptable$_2$ arrangements. Then the bargaining process begins and neither party will get her best$_1$ option. But neither does any party *want* its best$_1$ option (at least if caring for second-level values). Not only will none of the parties get what it considers the best$_1$ option. Usually, neither will any of the parties get what it considers the best$_2$ option as well. The parties will have to agree on an arrangement that all find acceptable$_2$.

These are the situations we are dealing with. Earlier (Chap. 2) I rejected the claim that parties to a compromise must have a cooperative mindset. Now I would like to formulate some moral principles in the deontic morality of compromising that specify the conditions when the model politician morally ought to have a cooperative mindset. A cooperative mindset may include different things: a willingness to trust the other parties (as long as one does not become aware of reasons to distrust the other parties), an attitude of tolerance or acceptance of the other parties' interests, and the belief

[2] Habermas 1992/1996: 167.

that the other parties' interests are legitimate.[3] But for the sake of simplicity, I will presuppose a narrower conception of a cooperative mindset. Having a cooperative mindset, as I would like to understand it, means a willingness not to fully exploit one's threat advantage in order to come as close as possible to what one regards as the (morally) best$_2$ arrangement. Having a cooperative mindset thus means a willingness to accept an irrational compromise; it amounts to a willingness to aim at a fair compromise instead, or something close to a fair compromise. Recall that a compromise is fair when the outcome is fair. I do not deny that bargaining procedures and the initial bargaining position can be fair or unfair as well. But fair bargaining procedures are simply the procedures that tend to produce a fair outcome. So if the parties ought to care about a fair compromise, they ought to care about fair procedures as well. I want to leave open whether they have to care about the fairness of the initial bargaining position as well. This will probably depend on the situation and on the causes for the unfairness of the initial bargaining situation.

Take a non-moral compromise made for principled moral reasons first. If two friends disagree on which movie to watch, then they have principled moral reasons to compromise, due to the value of friendship. It seems plausible that they have, in the process of getting to a (non-moral) compromise, a moral duty not to fully exploit their bargaining power. They morally ought to embrace a cooperative mindset, because driving a hard bargain seems incompatible with friendship.

Now consider a moral compromise made for principled moral reason. Think of the camping trip example with vegetarian and non-vegetarian friends (Chap. 5). Again the friends have principled moral reasons to compromise due to the value of friendship, and again it is plausible that they have a moral duty to embrace a cooperative mindset in the process of getting to a (moral) compromise. Again, driving a hard bargain seems incompatible with friendship. Hence, I propose the following two principles in the deontic morality of compromising:

(P1) If a person has conclusive principled moral reasons to make a *non-moral* compromise, then she has a moral duty to embrace a cooperative mindset.

[3] Because these things are harder to realize in moral conflicts, it is a generally good advice to try to focus on 'interests, not positions' in bargaining (Fisher and Ury 1981).

(P2) If a person has conclusive principled moral reasons to make a *moral* compromise, then she has a moral duty to embrace a cooperative mindset.

One could object that the notion of 'moral duty' is out of place here. Maybe it is, more weakly, morally laudable to embrace a cooperative mindset, without this amounting to a moral duty. But the difference between the two expressions seems to lie mainly in the relative moral urgency: something being a moral duty sounds more urgent than something being morally laudable. (Urgency is not the same as stringency. The easier a duty can be outweighed, the less stringent it is. The worse it is, morally speaking, to not follow a duty, the more urgent it is.) Yet I do not want to suggest that all moral duties are on a par in terms of urgency. It is of course morally worse to violate the moral duty not to kill persons than to violate the moral duty to embrace a cooperative mindset when having principled reasons to compromise. But this does not mean that the notion of 'moral duty' is out of place in the latter case. I should also emphasize that people may well have a moral right to do wrong, that is, a moral right not to be interfered when violating some moral duties. Hence, even though one sometimes has a moral duty to embrace a cooperative mindset, this does not imply that any kinds of sanctions would be appropriate for not fulfilling one's moral duty.

What if one has merely pragmatic reasons to compromise? Let us start with a non-moral compromise again, this time a non-moral compromise made for non-moral reasons. When one buys a used car from a private person, for example, one has only pragmatic non-moral reasons to make a compromise regarding the price, and one indeed may fully exploit one's bargaining power. One is allowed to go for the *rational* compromise (or for an even better deal, if possible). One has no moral duty to embrace a cooperative mindset. To be sure, one is morally allowed to embrace a cooperative mindset and to care about the fairness of the compromise.[4] But one does not have a moral duty. Of course this does not imply that one may cheat and deceive. If one cheats and deceives, one is no longer getting at a compromise at all (Chap. 4). The same holds when one has pragmatic *moral* reasons to make a non-moral compromise (if this happens at all).

[4] See Jones and O'Flynn 2013: 121.

Now take a moral compromise made for pragmatic moral reasons. If one indeed is justified in believing that one is right about what is morally right (imagine the model politician), then it seems even clearer that one does not have a moral duty to embrace a cooperative mindset. One may fully exploit one's bargaining power, as realizing what is morally right seems more important than realizing one's non-moral goals. If that is right, then we have:

(P3) If a person has conclusive pragmatic moral reasons to make a *non-moral* compromise, then she has no moral duty to embrace a cooperative mindset.
(P4) If a person has conclusive pragmatic moral reasons to make a *moral* compromise, then she has no moral duty to embrace a cooperative mindset.

What is also relevant for the moral duties a person has in the bargaining process is whether the arrangement the other parties to a compromise aim at comes reasonably close to the morally $best_1$ arrangement. In other words, it is relevant whether we may have to agree to a rotten compromise or not. To be sure, it can be morally justifiable to make a rotten compromise. An arrangement can be morally very bad_1, but still lie within the range of morally $acceptable_2$ arrangements, all things considered. But of course a morally very bad_1 arrangement will be worse than other arrangements within the set of morally $acceptable_2$ arrangements. And this must be relevant for one's duties in the bargaining process. It seems clear that when the other parties aim at an arrangement that is morally very bad_1, then one ought not to employ a cooperative mindset. One morally ought to exploit one's bargaining power in order to come to an arrangement that is reasonably close to what the morally $best_2$ arrangement within the set of morally $acceptable_2$ arrangements would be. Hence, I propose:

(P5) A person has a moral duty not to embrace a cooperative mindset if the other party to a moral compromise aims at an arrangement that is morally very bad_1.

(P5) can obviously conflict with (P2) and (P4). For that reason, all three moral duties have to be regarded as pro tanto moral duties. Sometimes

(P5) will be weightier than (P2) or (P4). One then has an all things considered moral duty not to embrace a cooperative mindset, even though one has pragmatic or even principled moral reasons to make a moral compromise. Maybe surprisingly, it can thus be morally wrong to aim at a fair compromise.[5]

Moral Duties in Bargaining for Peace and Public Justification

Let me now take a closer look at moral compromises made for peace and public justification. I start with peace. Because peace provides pragmatic reasons to compromise, principles (P4) and (P5) are relevant:

> (P4) If a person has conclusive pragmatic moral reasons to make a moral compromise, then she has no moral duty to embrace a cooperative mindset.
> (P5) A person has a moral duty not to embrace a cooperative mindset if the other party to a moral compromise aims at an arrangement that is morally very bad_1.

If (P4) holds, then one is never morally required to employ a cooperative mindset when making a moral compromise for peace alone—and not for principled moral reasons as well. This, I think, is plausible. One has no reason to concede more than necessary in order to get as close as possible to the morally $best_2$ modus vivendi from within the range of morally $acceptable_2$ modus vivendi arrangements, that is, from within the range of all modus vivendi arrangements that both promise to realize stable peace and are acceptable in light of first-level values. One may fully exploit one's bargaining power and aim at a rational compromise. (Even exploiting one's bargaining power in a way that undermines genuine consent may be morally permissible, under certain circumstances, but then the outcome no longer is a 'compromise,' as we saw in Chap. 4.)

[5] Jones and O'Flynn suggest that the notion of a fair compromise may not even apply in moral conflicts (2013: 122): the idea of fair compromise, they write, 'applies much more readily to conflicts of interest or preference than to conflicts of principle.'

When (P5) applies, one even has a moral *duty* not to embrace a cooperative mindset. Again I think this is plausible. When dealing with terrorists or cruel dictators, it can indeed be morally wrong not to try to get as close as possible to the morally best$_2$ modus vivendi arrangement from within the range of morally acceptable$_2$ arrangements, as one might otherwise end up with a morally very bad$_1$ arrangement. It would be morally wrong to try to get a fair compromise and to concede more than necessary for that purpose. One ought to try to get the best deal one can get.

In the introduction to this book, I imagined a model politician in a commission that is about to design a constitutional reform for a country that went through a civil war. One topic is a reform of the electoral system. If the other parties to the compromise are morally corrupt political leaders, then one simply ought to try to get the morally best$_2$ electoral system that is compatible with securing stable peace. There is no reason to concede more than necessary to the other parties who, for example, might try to establish an electoral system that systematically discriminates against a certain ethnic or religious group. If what they aim at is morally very bad$_1$, it is indeed morally wrong to concede more than necessary and to not fully exploit one's bargaining power.

Generally speaking, it matters how good an envisaged modus vivendi is, from the perspective of the first level of moral evaluation. John Horton seems to disagree, when he writes that a political theory of modus vivendi

> does not imply that political arrangements must meet any preconceived, philosophically favoured standards of fairness or justice. On pretty much every contemporary account of justice we have never had a just state, or one that even comes close; and human history and experience should surely lead us to believe that we never will. Rather, modus vivendi is about seeking to avoid the kinds of evils that render practically impossible any worthwhile life.[6]

But when we have only pragmatic moral reasons to compromise in order to establish a modus vivendi and secure peace, then we always may and sometimes ought to try to get a modus vivendi that is as good$_2$ as

[6] Horton 2010: 439.

possible (within the range of morally acceptable$_2$ arrangements). And of course thinking about justice, fairness, and other moral values is relevant to determine what the morally best$_1$ and best$_2$ arrangements within the range of morally acceptable$_2$ arrangements would be. Horton is of course right to emphasize the value and importance of modus vivendi arrangements, but this does not render theorizing justice, fairness, and other moral values unimportant. One can certainly disagree *how* theorizing justice should be done. But theorizing modus vivendi arrangements is not an alternative to theorizing justice. Justice and other moral values give us perspectives to *evaluate* different available modus vivendi arrangements. Not every modus vivendi is as good as any other. I argue elsewhere that three factors determine the relative *moral standing* of modus vivendi arrangements: how close they come to the morally best$_1$ arrangement, whether they are publicly justifiable, and how stable they are.[7]

I now come to public justification. As seen, public justification provides both pragmatic and principled moral reasons to compromise. When the only rationale for public justification is stability, then it provides only pragmatic moral reasons. It provides another means for peace, in other words, and so it is not surprising that the same principles in the deontic morality of compromising apply. More interesting is the case where public justification provides principled moral reasons to compromise, namely when the rationale of respect and/or moral community applies. Principles (P2) and (P5) are relevant, then.

> (P2) If a person has conclusive principled moral reasons to make a moral compromise, then she has a moral duty to embrace a cooperative mindset.
> (P5) A person has a moral duty not to embrace a cooperative mindset if the other party to a moral compromise aims at an arrangement that is morally very bad$_1$.

If (P2) holds, then one has a moral duty to embrace a cooperative mindset and hence to concede more than necessary in order to get to something like a fair compromise, when making a moral compromise for principled

[7] Wendt 2016b. Of course, public justification also applies to other things besides modus vivendi arrangements, but as modus vivendi arrangements are constituted by some set of laws, moral rules, or institutions, they are also capable of being either publicly justifiable or not.

moral reasons provided by the moral value of public justification. One may not aim at a rational compromise.

Take the model politician who bargains over a tax reform. Assume she is justified in thinking that a certain package of tax laws would be the most just and indeed the morally best$_1$ one, even though that package is not publicly justifiable. Assume also that she is justified in thinking that tax laws should be publicly justifiable, as a requirement of both respect and moral community, and that the value of public justification determines a range of morally acceptable$_2$ options (together with first-level values). In that situation, she should embrace a cooperative mindset and not drive a hard bargain. She should make sure to get to something like a fair compromise and not aim at a rational one. This seems plausible due to the respect and community rationale for public justification.

Yet this is only plausible when the other parties to the compromise—that is, the fellow politicians—are themselves members of the constituency of public justification. If the fellow politicians are not owed respect through public justification, or are not to be included in the community of mutual moral accountability, then they do not seem to deserve a fair compromise. Principle (P2) should better be reformulated, for that reason:

> (P2*) If a person has conclusive principled moral reasons to make a moral compromise, then she has a moral duty to embrace a cooperative mindset, except if she does *not* have conclusive principled moral reasons to make a moral compromise *with the other parties* to the compromise.

How could principle (P5) apply to compromises made for public justification (when public justification provides principled moral reasons)? Often people who aim at morally very bad$_1$ arrangements are not included in the constituency of public justification. (P5) can nonetheless apply to principled compromises made for public justification, when the value of public justification is relevant for the subject matter of the compromise, but some of the other parties to the compromise—the fellow politicians—are not included in the constituency of public justification. In other words, (P5) tends to apply precisely when (P2*) does not apply.

Take the tax reform example again. Tax laws should be publicly justifiable, and therefore our model politicians should not aim to establish the morally best$_1$ tax laws, if it turns out that the morally best$_1$ tax laws are not publicly justifiable. (At least this is so when the value of public justification is stringent enough not to be outweighed by first-level moral values.) But when the fellow politicians aim at morally very bad$_1$ tax laws, for example deeply unjust ones, then our model politicians ought not to embrace a cooperative mindset. She ought to fully exploit her bargaining power in order to come as close as possible to the morally best$_2$ tax laws within the range of morally acceptable$_2$ tax laws (i.e. the publicly justifiable ones that are also acceptable in light of first-level moral values).

Moral Obligations After a Compromise Was Made

I now come to the second topic in the deontic morality of compromising: the moral obligations persons have after a compromise was made. Compromises come in the form of contracts, promises or tacit consent, and such consent generates moral obligations (Chap. 2).[8] Because this is so, one has a moral obligation to stick to the terms of a compromise one has agreed to. Both principled and pragmatic compromises generate moral obligations to stick to their terms. Equally, moral and non-moral compromises, rational and irrational compromises, and fair and unfair (even exploitatively unfair) compromises generate moral obligations to stick to their terms. What counts is that the parties agree to the compromise. Hence, we have the following principle:

> (P6) All valid compromises generate moral obligations for the parties to stick to the terms of the compromise.

But *some* compromises do *not* generate moral obligations. Such compromises can be called 'invalid compromises.' By 'invalid compromises' I do

[8] Scanlon has revived the debate on why and how promises ground obligations (1998: ch. 7). See also Deigh 2002, Kolodny and Wallace 2003, Southwood and Friedrich 2009.

not mean compromises that were involuntary or based on violations of moral rights (or threats thereof). I argued (Chap. 4) that these should not be called compromises at all because they were not genuinely agreed to. But there are compromises that are genuinely agreed to and thus are compromises, but do not generate moral obligations to stick to the terms of the compromise. Take an example: a leader of a gang of criminals makes a deal with somebody, call her *A*, who wants to be included in the gang. The two agree to the arrangement that *A* shall kill person *B* and in return will be accepted in the gang. This is a compromise for *A*, because she prefers being accepted in the gang without having to kill anybody. Does *A* have a moral obligation to stick to the terms of the compromise, that is, to kill *B*? There are two possible answers: the first is that the first person indeed has a moral obligation to kill *B*, but that this obligation is overridden by other, weightier moral considerations, namely *B*'s quite stringent moral right against being killed. The second possible answer is that *A* does not have a moral obligation to kill *B*, although she agreed to kill *B* in a compromise. I think the second answer is far more plausible. If we accepted the first answer, then *A* would be obligated to compensate the gang leader for not killing *B*, and it seems that she does not have any such obligation.[9] Does the gang leader have a moral obligation to accept *A* in the gang (if *A* indeed kills *B*)? It seems not, although accepting somebody in the gang might not in itself be morally impermissible. Either the compromise generates obligations for all parties to stick to the terms of the compromise or for none. So in the example, we do have a compromise—because it was genuinely agreed to by the parties—but a compromise that does not generate obligations. It is an invalid compromise.

One might think that the according principle is simply that a compromise which establishes a morally very bad_1 arrangement—in other words a rotten compromise—is invalid and does not generate moral obligations to stick to its terms. But this would be too simple. If it was not *foreseeable* that the content of the compromise would be morally very bad_1, then it *does* generate moral obligations. It does not generate an obligation to stick to its terms, but an obligation to compensate the other persons for not sticking to its terms. An example—borrowed from Judith Jarvis

[9] Thomson 1990: 314.

Thomson—is a compromise where one party agrees to get the other party a special edition of G.E. Moore's *Principia Ethica*, but finds out that the only way to do so would be to steal the book from person *B*.[10] Thus, I propose the following principle:

> (P7) If a compromise is unforeseeably rotten, then the compromise is invalid, but does generate a moral obligation to compensate the other parties for not sticking to its terms.

But at least all foreseeably rotten compromises are invalid and do not generate any moral obligations? Again this would be too simple. Sometimes a person has conclusive moral reasons to make a rotten compromise. A morally very bad_1 arrangement can still be among the morally $acceptable_2$ arrangements, and so be morally justified to make, all things considered. In this case, I am inclined to say that the person indeed has a moral obligation to stick to the terms of the compromise. But it seems plausible that the moral obligation is *less stringent* than the moral obligations compromises normally generate. The stringency of a moral obligation or moral duty can be measured by how much is needed to override the duty or obligation.[11] The less stringent it is, the easier it is outweighed by other moral considerations. *One* such opposing moral consideration is, of course, that sticking to a morally very bad_1 arrangement is morally bad_1. Hence, something like the following principles in the deontic morality of compromising look compelling:

> (P8) If a person *has no* conclusive principled or pragmatic moral reasons to make a foreseeably rotten compromise, then the compromise is *invalid* and does not generate any moral obligations.
> (P9) If a person *has* conclusive principled or pragmatic moral reasons to make a foreseeably rotten compromise, then the compromise is *valid* and does generate a moral obligation to stick to its terms, although a particularly weak one.

[10] Thomson 1990: 314–315.

[11] Thomson 1990: 153–158, Sinnott-Armstrong 2009: 439.

Other factors that influence the stringency of the moral obligation generated by compromises are the fairness of the initial bargaining position, the fairness of the bargaining procedures, and the fairness of the outcome (i.e. of the compromise itself). But they do so only when the compromise *should* have been fair. As we have seen, this is not always the case: parties have to care about the fairness of a compromise just in case that they have principled moral reasons to compromise. I propose:

> (P10) If a compromise should have been fair, but was not, then the obligation to stick to its terms is weaker than usual (for the party that got less than a fair deal).

One may be tempted to think that there should also be a principle saying that if a compromise should have been based on fair procedures, but was not, then the obligation to stick to its terms is weaker. But I am skeptical that one should adopt such a principle. One should care about fair procedures as a means to fair outcomes. When the procedure was unfair, but the outcome was fair, then the unfairness of the procedure should not matter much for one's obligations. When the procedure was unfair and the outcome was unfair as well, or when the unfair procedure caused the outcome to be unfair, then it is the unfairness of the outcome that weakens one's obligation to stick to the terms of the compromise.

Things get complicated when a compromise was fair, but only relative to an unfair bargaining position. I do not think that general principles can be formulated for that case, as too much depends on the circumstances of the situation, for example on the causes for the unfairness of the initial bargaining position. But there certainly are situations where the unfairness of the initial bargaining situation weakens the obligation to stick to the terms the compromise.

I should emphasize that the stringency of a moral obligation generated by compromises also varies with factors that are not specific to compromises, but are relevant to all kinds of obligations generated by consent. One factor in determining the stringency of a moral obligation is certainly the amount of harm done in violating the obligation.[12] Another

[12] Thomson 1990: 154, Sinnott-Armstrong 2009.

factor in determining the stringency of a moral obligation generated through consent may be the moral weight of the trust a person placed in the person who agreed to the compromise.[13]

Moral Obligations After a Compromise Was Made for Peace or Public Justification

Let me now apply these principles to compromises made for peace and public justification. Take principle (P10) first:

> (P10) If a compromise should have been fair, but was not, then the obligation to stick to its terms is weaker than usual (for the party that got less than a fair deal).

(P10) can only apply when public justification is at stake, because peace does not generate principled reasons to compromise and hence no requirement to care about fairness (as we have seen earlier in this chapter). More precisely, it applies when public justification is constitutive of respect or a community of mutual moral accountability. In such cases, the parties ought to establish a fair compromise. If they fail to do so, the obligation to stick to its terms is weaker than usual, at least for the party that had to accept less than a fair compromise. This result is plausible, I think.

Now take principle (P9):

> (P9) If a person has conclusive principled or pragmatic moral reasons to make a foreseeably rotten compromise, then the compromise is valid and does generate a moral obligation to stick to its terms, although a particularly weak one.

(P9) will rarely apply to compromises that are made for public justification, because publicly justifiable arrangements will most often be reasonably $good_1$. Arrangements that are established in rotten compromises are usu-

[13] Gill 2012: 508.

ally not publicly justifiable. But (P9) can be relevant for compromises made for peace. It will apply in many cases where a compromise for peace is made with cruel dictators or terrorists. When dealing with a cruel dictator, a compromise made for peace will often have to be rotten, that is, morally very bad_1. Often one has pragmatic moral reasons to stick to the terms of a modus vivendi arrangement that is based on a rotten compromise, simply in order to uphold peace. According to (P9), one also has a moral obligation to stick to the terms of the modus vivendi because one agreed to it, although that obligation is particularly weak and can relatively easily be overridden when the peace can be upheld without sticking to the morally bad_1 terms in question.

As a side note: a compromise for peace with a cruel dictator may sometimes not be able to establish an arrangement that meets the minimal moral requirements needed for a modus vivendi. In that case, the compromise was not a compromise made for peace, but for something weaker, like 'coming closer to peace.'

Besides closeness to the morally $best_1$ arrangement (or the 'rottenness' of a compromise), stability matters as well. Recall that peace can be more and less stable. Because it would be odd to ask for the maximization of stability, there can be a trade-off between the stability of peace and other moral values. Sometimes one might come closer to the morally $best_1$ arrangement when accepting a somewhat less stable peace. And vice versa. While Chandran Kukathas suggests that peace is the only value that should matter in politics, John Gray and John Horton acknowledge that peace cannot be the only value that matters.[14] Horton writes:

> [Peace] and security are matters of degree, and clearly the aim in politics is not necessarily, nor indeed usually, to maximize peace and security, even if it is generally also to ensure that some unspecified level of stable social order is maintained. It will often be thought appropriate, therefore, to trade off some amount of security against other values, and people will often disagree in how they think that calculation is to be made. This is a further reason why it is wrong to think of peace and security as some kind of supergoods.[15]

[14] Kukathas 2003: 252, Gray 2000: 7, Horton 2010: 444.

[15] Horton 2010: 444. I disagree, though, that peace itself is a matter of degree (see Chap. 6).

Nonetheless, having a highly stable modus vivendi is a greater achievement than having a not so stable modus vivendi, other things being equal. This should also affect the moral obligations one has to stick to the terms of a modus vivendi, just like the rottenness of a compromise, that is, its closeness to the morally best$_1$ arrangement(s), affects the moral obligations one has to stick to its terms.

When not only peace but also public justification is at stake, then it is an achievement when a modus vivendi is publicly justifiable. Besides closeness to the morally best$_1$ and stability, public justifiability can then be a third virtue of modus vivendi arrangements. And this should also matter for the stringency for the obligation to stick to its terms. So I propose:

> (P11) If a modus vivendi involves a rotten compromise, then the moral obligation to stick to its terms is less stringent than if it would not involve a rotten compromise.
> (P12) If a modus vivendi is not reasonably stable, then the moral obligation to stick to its terms is less stringent than if it were reasonably stable.
> (P13) If a modus vivendi is not publicly justifiable (even though the value of public justification is at stake), then the moral obligation to stick to its terms is less stringent than if it were publicly justifiable.

Note that (P11) is simply an application of (P9) to modus vivendi arrangements.

Of course not only modus vivendi arrangements can be a subject of public justification. All kinds of laws and moral rules can be the proper subject of public justification. Generalizing (P13), we get:

> (P14) If an arrangement is not publicly justifiable (even though the value of public justification is at stake), then the moral obligation to stick to its terms is less stringent than if it were publicly justifiable.

It should be noted that (P11), (P12), (P13), and (P14) apply to the politicians who make the compromises. It does not apply to people who have to live by the arrangements, yet have not agreed to anything and thus have not imposed any moral obligations upon themselves.

The (more or less stringent) moral obligation to stick to the terms of a modus vivendi arrangement is not a moral obligation not to try to reform

the arrangement. There can be good reasons to try to reform or to renegotiate, in particular when the balance of power shifts. One might hope to get closer to the morally best$_1$ modus vivendi arrangement, to get a more stable modus vivendi arrangement, or to get a publicly justifiable modus vivendi arrangement. On the other hand, peace is a great good and renegotiating is always a dangerous and risky business. It can also undermine trust. Often, risking a working modus vivendi might not be worth it. But plausibly the rottenness of the compromise underlying a modus vivendi, the relative instability of a modus vivendi, and (sometimes) the failure to be publicly justifiable, make it morally desirable to change its terms in the direction of a morally better$_1$, a more stable, or a publicly justifiable modus vivendi. Hence, one may take a greater risk in trying to reform or renegotiate such modus vivendi arrangements:

(P15) If a modus vivendi involves a rotten compromise, then one may take a greater risk in trying to reform or renegotiate its terms.
(P16) If a modus vivendi is not reasonably stable, then one may take a greater risk in trying to reform or renegotiate its terms.
(P17) If a modus vivendi is not publicly justifiable (although the value of public justification is at stake), then one may take a greater risk in trying to reform or renegotiate its terms.

Generalizing (P17) for cases where a compromise is not made for peace, but for public justification, that is, for compromises on laws or moral rules that do not have the purpose of securing peace, we get:

(P18) If an arrangement is not publicly justifiable (although the value of public justification is at stake), then one may take a greater risk in trying to reform or renegotiate its terms.

Summary

In this chapter, I made some first explorations in the deontic morality of compromising. I proposed and partly defended some principles regarding people's moral duties in the process before a compromise is made, and some principles regarding people's moral obligations after a compromise

was made. Applied to compromises made for peace and public justification, the following results are worth repeating: because peace generates only pragmatic moral reasons to compromise, one never has a moral duty to embrace a cooperative mindset in a compromise made for peace (or for public justification as an instrument for stable peace). One may fully exploit one's bargaining power. When the rationale for public justification is respect and/or moral community, in contrast, then one has a moral duty to embrace a cooperative mindset in order to get to something like a fair compromise. One may not fully exploit one's bargaining power. If a modus vivendi is based on a rotten compromise, is not reasonably stable, or is not publicly justifiable (although the value of public justification is at stake), then the moral obligation to stick to its terms is weaker than usual and one may take a greater risk in trying to reform or renegotiate its terms.

16

Compromise and Liberal Institutions

Peace and public justification provide moral reasons to make compromises in politics. In this chapter, I discuss what the content of compromises made for peace and public justification will most likely be. More precisely, I ask whether compromising for peace and public justification tends to establish (a particular kind of) liberal institutions, or whether (a particular kind of) liberal institutions can be conceived as the content of a (hypothetical) moral compromise made for peace or public justification. To answer this question, we should first ask what institutions are required for realizing the values of public justification and peace. I start with public justification.

Public Justification and Liberal Institutions: Rawls

It is highly plausible, and, I think, undisputed, that public justification rules out straightforwardly illiberal institutions. Constitutions that do not grant citizens certain basic rights and freedoms will not be publicly justifiable, at least not in our times. Likewise, constitutions that do not

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establish some sort of democratic government will not be publicly justifiable. It is doubtful, though, whether political philosophy can settle much more in an a priori way. Among other things, public reason liberals disagree about the proper amount of state interference with the economy and private property. John Rawls and most public reason liberals tend to think that the principle of public justification vindicates redistributive and interventionist liberal egalitarian institutions (more precisely, Rawls advocates what he calls 'property-owning democracy'[1]), while Gerald Gaus argues that the principle of public justification vindicates less redistributive and less interventionist classical liberal institutions. I will suggest that the value of public justification probably cannot be used to vindicate either liberal egalitarian or classical liberal institutions.

Take Rawls first. It is important to see that Rawls justifies property-owning democracy as an application of 'justice as fairness,' not as an application of the principle of public justification (the liberal principle of legitimacy). He makes clear that there is a plurality of political conceptions of justice, that constitutional essentials have to be in accordance with a political conception of justice, and that 'justice as fairness' is but one example for a political conception of justice (see Chap. 11). So the principle of public justification—which requires that constitutional essentials are based on a political conception of justice—cannot by itself vindicate anything as determinate as property-owning democracy. Rawls probably thinks that all political conceptions of justice are like 'justice as fairness' in having liberal egalitarian implications, broadly understood, on the institutional level.[2] But this can, of course, be disputed. It can even be disputed that 'justice as fairness' itself has to be implemented by liberal egalitarian institutions.[3] In any case, a first point is that, in Rawls's system, the principle of public justification does not by itself have many implications on the institutional level. It is political conceptions of justice that have more determinate implications on the institutional level.

Should one be worried about the lack of determinate institutional implications of a Rawlsian principle of public justification? Some have

[1] Rawls 2001: 135–176.

[2] See Rawls 1999: 49–51, 1993/1996: lviii, xxxvii-lxii, Freeman 2001, 2007: 394–396.

[3] Schmidtz 2006: 57, 167, 193–194, Brennan 2007, Tomasi 2012.

objected to Rawlsian public reason that it is 'incomplete.'[4] Recall that public reason is the set of ideas that one has to rely on when acting upon one's duty of civility. This set of ideas is constituted by the family of political conceptions of justice, that is, the same family of conceptions that constitutional essentials have to be based on in order to be publicly justifiable. That public reason is incomplete can mean three different things: (1) That people can reasonably disagree how some issue should be resolved, although all rely on public reason. (2) That people can sometimes fail to come to a determinate answer on how to settle some issue, although they rely on public reason, because the relevant considerations in public reason are incomparable or incommensurable, or because the ordering and weights of different considerations are indeterminate. The problem here is basically intrapersonal, not interpersonal. (3) That people can sometimes fail to come to an answer on how to settle some issue, although they rely on public reason, because public reason simply does not speak on the issue. The first kind of incompleteness is sometimes called 'inconclusiveness'; the second kind is sometimes called 'indeterminacy.'[5] We can call the third kind 'under-determinacy.'

Inconclusiveness, though, is not a problem. It is to be expected because a plurality of political conceptions of justice is permitted in Rawlsian public reason.[6] Depending on which political conception of justice one prefers, one can come to different conclusions on political issues. Rawls argues that political conceptions of justice should be complete, not that public reason should be complete.[7] This is sometimes overlooked.[8] What is to be done, when public reason is inconclusive and the debate is over, is to rely on democratic procedures, in the end on votes.[9]

So the problem must be indeterminacy or under-determinacy. Why should these be considered problems? David Reidy argues that the indeterminacy and under-determinacy of public reason shows that people

[4] Greenawalt 1988, de Marneffe 1994, Reidy 2000, Horton 2003.

[5] Gaus 1996: 151–158, Schwartzman 2004: 193–198, Quong 2011: 286–287.

[6] Rawls 1993/1996: liii-lvi, 1997: 797, Larmore 2002: 387–388, Freeman 2004: 2055–2057, 2007: 406–410, Schwartzman 2004: 199–202, Quong 2011: 285–287.

[7] Rawls 1997: 777, 798.

[8] For example, Bohman 1995: 260, 1996: 80.

[9] Rawls 1993/1996: lv-lvi, 241, 1997: 777, 798, Williams 2000: 210, Larmore 2002: 387–388.

need comprehensive doctrines to come to decisions on political issues.[10] Some political conceptions of justice leave open how political values are to be ordered (indeterminacy), and issues like the moral status of animals cannot be decided with recourse to a political conception of justice at all (under-determinacy). If comprehensive doctrines are indeed needed, then this is an objection to a Rawlsian duty of civility, even in its 'wide view' (see Chap. 11). Rawls insists that political conceptions of justice should be complete, so he hopes that the problem of indeterminacy does not come up (because each citizens adhering to a particular political conception of justice will be able to come to determinate answers on political issues). But even if Reidy is right and public reason is indeterminate sometimes, there is still no reason to rely on comprehensive doctrines. One can still use democratic procedures and base one's vote on public reasons, even if thereby making a somewhat arbitrary decision.[11] What if public reason is under-determined? Some argue that political conceptions of justice are not under-determined with regard to environmental issues or the moral status of animals.[12] But if public reason should really be completely silent on an issue, it indeed would become impossible to base a decision on public reasons. One then may have to rely on one's comprehensive doctrine. But this does not mean that one has to abandon the idea of public reason as an ideal and the duty of civility as a duty that applies whenever it is *possible* to rely on public reason (and public reasons).

Thus, public reason may indeed sometimes be incomplete (inconclusive, indeterminate, and under-determinate), but this is not a problem for the Rawlsian account of public reason. Yet it shows that one cannot expect much a priori implications of public reason with regard to institutional arrangements. This supports my earlier conclusion that the Rawlsian principle of public justification (the liberal principle of legitimacy) cannot a priori determine what kind of liberal institutions a society ought to have.

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[10] Reidy 2000: 63–71.

[11] Rawls 1997: 798, Williams 2000: 210–211, Schwartzman 2004: 209–214, Hinsch 2010: 44–46. True, there may be disagreement about the proper kind of democratic procedures as well. Bohman calls this 'deep conflict' (1995: 253–254, 257, 264–265; see also Horton 2003: 13–14). One may then indeed have to make moral compromises in determining arbitration methods (Bohman 1995: 263, 267–270, 1996: 84, 90–104).

[12] Bell 2002, Quong 2011: 283–285.

Of course, public reason and the principle of public justification are not the same. But public reason consists in the family of political conceptions of justice, and the principle of public justification requires constitutional essentials and matters of basic justice to be publicly justifiable, hence based on a political conception of justice; thus, if public reason is incomplete and does not deliver determinate prescriptions, the principle of public justification cannot be expected to deliver determinate prescriptions as well.

Public Justification and Liberal Institutions: Gaus

The most elaborate attempt to show that a principle of public justification at least *tends* to lead to a particular sort of liberal institutions has been provided by Gerald Gaus. In Gaus's version of public reason liberalism, the deliberative model of public justification explicitly allows members of the public (the moderately idealized counterparts of the real persons that build the constituency of public justification) to adhere to different conceptions of justice. So when Gaus claims that the principle of public justification vindicates classical liberal institutions, that is, a small state and a market economy with only little redistribution and intervention, then this is really meant as a vindication by the principle of public justification, not by a principle of justice.

I mentioned earlier that Gaus regards abstract rights as a proper subject of public justification (Chap. 13). He invites us to start with an 'abstract justification' where the pluralism of evaluative standards among the members of the public is suppressed.[13] What members of the public have in common in this setting is, according to Gaus, that they see themselves as agents. He tries to show that all members of the public would therefore accept a presumption in favor of liberty, as well as abstract rights against coercion and deception and a right to liberty of conscience.[14] Gaus thinks that these negative 'rights of agency'—in contrast to positive welfare rights[15]—will be accepted by members of the public even after

[13] Gaus 2011a: 336.

[14] Gaus 2011a: 341, 349, 354.

[15] Gaus 2011a: 363.

reintroducing the pluralism of their evaluative standards. They are thus 'fully justified.' Second, because members of the public are aware of the pluralism of their evaluative standards, they would agree on a 'partition of moral space'[16] through some system of private property rights and rights to privacy.[17] To indicate their purpose, Gaus calls this kind of rights 'jurisdictional rights.' Both rights of agency and jurisdictional rights are fully publicly justified, but they are too abstract for actual moral and political orders. They have to be concretized to the level of moral rules and laws to be able to work.[18] And there are many ways to concretize them. On the level of moral rules and laws, the deliberative efforts of the members of the public do not lead to one determinate result. Instead there will usually be an 'eligible set' of acceptable proposals for concrete rules and laws. An eligible set consists of proposals that all members of the public prefer to having no rules or laws at all with regard to the respective subject.[19] But members of the public can differ in their ranking of the proposals in the eligible set.

Now why should this model lead to classical liberal institutions? When evaluating proposals for laws, members of the public weigh a law's utility against its coercion costs.[20] Of course there is disagreement about how coercive a law is.[21] Members of the public with classical liberal convictions—who tend to find laws highly coercive and the costs of coercion quickly to exceed the benefits of a law—will be very influential: they will find many laws to be worse than the no-law alternative and thus push many laws out of the eligible set.[22] Concerning redistributive laws, some members of the public will hold that higher taxes means more coercion and, again, for that reason, highly redistributive laws will drop out of the eligible set.[23] Recall that we already have an abstract justification of

[16] Gaus 2011a: 372–373, see also 1996: 199–201, 2007: 111, 2009: 119–121.

[17] Gaus 2011a: 377, 381, see 2007: 104–106, 116–117; on the ineligibility of socialism, see 2010c: 250–258, 2011a: 511–521.

[18] Gaus 2011a: 369.

[19] Gaus 2011a: 322. Chan calls this the argument from higher-order unanimity (2000: 22–23).

[20] Gaus 2011a: 500–501, 2010c: 261.

[21] Gaus 2011a: 503–504, 2010b: 204–205, 2010c: 268–269.

[22] Gaus 2011a: 501, 504–505, 521, 2010c: 269.

[23] Gaus 2011a: 522–527.

(some system of) property rights, according to Gaus, so the meaning of 'coercion' can become more expansive.[24] Not all laws can be pushed out of the eligible set, though. The model does not lead to anarchy. Laws that protect people's agency rights and jurisdictional rights cannot be pushed out of the eligible set, because these rights are already publicly justified and some coercive state measures are necessary to protect them. No one can claim to prefer no laws to these rights-protecting laws.[25] This means that there is a tendency for public justification to establish classical liberal institutions.

There are many ways to take issue with Gaus's argument. Most basically, I have already argued (Chap. 13) that there is no proper rationale for applying the deliberative model of public justification to abstract rights. One can also raise doubts about employing an 'abstract justification' that idealizes the constituency more than moderately. If the deliberative model is a model for the principle of public justification, and if 'having a reason' is best modeled by moderately idealizing the members of the constituency, then we should not idealize them more than moderately.

But let us accept, for the sake of the argument, that abstract rights are the first thing to be publicly justified. Three other worries about the alleged classical liberal tilt of public justification have been spelled out by Andrew Lister. Let me briefly summarize them. One worry is that arguably not only negative rights of agency and jurisdictional rights are publicly justifiable. If people really care about their agency, in the abstract model of public justification, then moderate specifications of a positive abstract right to assistance should be publicly justifiable as well, as Lister argues.[26] If that is so, redistributive laws could have the same standing as other rights-protecting laws, because members of the public want to protect all publicly justified abstract rights and redistributive laws protect people's positive abstract right to assistance.

Next, Lister argues that some members of the public could hold that less redistributive laws lead to *more* coercion than strongly redistributive laws, because the strict protection of private property rights can reasonably

[24] Gaus 2011a: 351, 2010c: 244, 259–260.

[25] Gaus 2011a: 506–508, 2010c: 272–273.

[26] Lister 2013a: 76–78, 2013b: 323–324.

be considered coercive. So there seems to be a balance: classical liberal members of the public find highly redistributive laws too coercive; liberal egalitarian liberals find mildly redistributive laws too coercive. If that is so, there is no tilt against enacting highly redistributive laws and in favor of enacting mildly redistributive laws.[27]

Finally, Lister points out that what is publicly justifiable depends on how laws are 'bundled' or 'aggregated.' If members of the public consider laws one by one, there will very often be some members of the public who have a defeater reason against accepting a law. But if members of the public judge bundles of laws, things look different: it will be harder to reject a bundle as being worse than having no laws at all.[28] What is needed, then, is some non-arbitrary criterion for bundling laws.[29] Lister articulates the idea of 'maximal feasible disaggregation.'[30] But of course there is reasonable disagreement about what can feasibly be disaggregated.[31] A solution is to employ the following principle: 'So long as anyone reasonably finds themselves unable to rank policies independently, we must apply the idealized unanimity criterion at the aggregated level.'[32] This view is also accepted by Gaus. Gaus points out that the fact that a system of private property rights is already publicly justified cannot be taken to show that no redistribution can be publicly justified, because some members of the public will want to evaluate specific systems of private property together with redistributive measures, bundled into one big scheme.[33] More generally, he argues that 'justificatory dependent' issues have to be dealt with at once.[34] This may seem to give a lot of power to liberal egalitarian members of the public, as they may find very many issues justificatory dependent. But Gaus has an argument why members

[27] Lister 2013b: 325–326. Vallier agrees that the coercion necessary for defending strong property rights may be a defeater reason for non-libertarians (2014: 137). Boettcher argues that members of the public could reject laws that are not considerably redistributive because of considerations about 'structural coercion' (2015: 202–204).

[28] See Gaus 2010b: 198, Vallier 2014: 138.

[29] Lister 2010: 156–159, 2013a: 87–90.

[30] Lister 2010: 158–159, 2013a: 93–95.

[31] Lister 2013a: 99–101.

[32] Lister 2013a: 95.

[33] Gaus 2011a: 521–522, 2010c: 261.

[34] Gaus 2011a: 495–497, 2010b: 198–200.

of the public will not want too big bundles of laws (or what he calls 'holist specifications'): members of the public aim for 'justificatory stability.'[35] If bundles get big, a change in some people's evaluation of one law will affect many other laws, namely the other laws in the bundle. Yet I am not sure how much the concern with justificatory stability really shows. It may speak against literally holist bundles, such that public justification applies to 'classical liberal institutions' versus 'liberal egalitarian institutions,' but it may still allow for mid-size bundles, when citizens really think that the laws in the bundle are justificatory dependent. Laws concerning health care could be bundled, as could laws concerning education, and so on. I think it is an open question what will be considered justificatory dependent and what not. Gaus agrees that '[n]o theory of political justification will provide an algorithm for determining precisely what our disagreements are about and to what extent they are dependent on each other.'[36] If that is so, then we have a further reason to be skeptical about there being a classical liberal tilt in the idea of public justification.

I conclude that, as things stand, there is a good case that public justification rules out straightforwardly illiberal institutions, but it is hard to say anything more specific a priori. It is doubtful that either liberal egalitarian institutions or classical liberal institutions are ruled out. It is also doubtful that policies based on perfectionist values can never pass the test of public justification, for example.[37] The value of public justification will usually rule out some proposals, but leave a wide array of proposals on the table. Often democratic decision procedures will have to be used to pick one from a set of available publicly justifiable arrangements.

If that is so, compromises made for public justification cannot be said to have the tendency to establish liberal egalitarian or classical liberal institutions or some other more specific institutions. What they establish will depend on the contingencies of the situation. Of course, only rarely will a compromise be made on grand institutional designs (like classical liberal

[35] Gaus 2010b: 199.

[36] Gaus 2010b: 199.

[37] Sher 1997, Caney 1998, Chan 2000, Bratu 2014: ch. 4. In contrast to many Rawlsians, Gaus does not rule out the possibility that some perfectionist reasons could pass the test of public justification (2003b: 155). For a defense of the claim that public justification excludes perfectionist reasons, but not justice-based reasons, see Quong 2011: ch. 7.

vs. liberal egalitarian institutions). Most compromises in politics are on much smaller issues: on pieces of legislation. Usually a compromise made for public justification will be a compromise where one's moral first-best$_1$ arrangement is not publicly justifiable and where one therefore is willing to accept one from a wide range of publicly justifiable alternatives. (For the notation 'first-best$_1$,' see Chap. 3.) The point of the value of public justification is more to *exclude* some arrangements as not publicly justifiable, not to determine specific arrangements as publicly justifiable. If one wants to argue for a more specific set of liberal institutions, one better employs a liberal theory of justice, not the value of public justification.

Peace and Liberal Institutions

I now come to the second topic of this chapter: can liberal institutions be conceived as the content of a moral compromise made for *peace*? David McCabe defends a 'modus vivendi liberalism' that regards liberal institutions as the subject of a compromise:

> [Modus vivendi liberalism] suggests that agreement to liberal terms might thus emerge as a compromise among citizens who recognize the value of ordered political life but realize that the political vision recommended by their distinct normative frameworks cannot be achieved.[38]

This sounds as if liberal institutions, according to McCabe, were agreed to as a compromise made for peace. All parties, even illiberal ones, understand that they cannot impose their vision of justice and the good life on others, but at least they want to have the freedom to live by their vision of justice and the good life themselves, so they agree to liberal institutions as a second-best. Liberal institutions, then, are modus vivendi arrangements. They secure peace.

A first comment is that modus vivendi arrangements need not be based on a compromise (see Chap. 6). One can impose modus vivendi arrangements. And a society's basic institutions are rarely established in

[38] McCabe 2010: 133. Gaus has pursued a similar project (1990: ch. 9).

one big compromise. What McCabe has in mind, then, is probably not a real compromise, but a hypothetical compromise. He wants to justify liberal institutions by showing that they can be conceived as the content of a hypothetical compromise made for peace.

It is easy to agree that liberal institutions, broadly conceived, are a very plausible candidate for modus vivendi arrangements. Unsurprisingly, 'liberal peace' is a main approach to peace building in political science.[39] Its main focus is on 'democratization, human rights, civil society, the rule of law and economic liberalization in the form of free market reforms and development.'[40] The idea has also informed the UN's peace building missions after the end of the Cold War.[41] But McCabe has a much more specific picture in mind. Liberal institutions grant everyone basic freedoms (or even 'the broadest possible sphere of liberty'), respect the harm principle, and are not paternalistic.[42] Yet the more detailed liberal institutions are described, the less plausible it becomes that a hypothetical compromise made for peace has to establish these institutions. Sure, there can certainly be compromises made for peace that establish strictly anti-paternalistic institutions, but certainly there can also be compromises made for peace that do not.[43] There cannot be a philosophical argument demonstrating on what specific terms people have to agree on (not even hypothetically). That will have to be left to real politics.[44] At best, one can make plausible that a compromise on a modus vivendi with liberal terms, broadly conceived, will often be workable and rational to make, in particular under conditions of pluralism.

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[39] See Richmond 2005. For 'strategic peace' as a more holistic approach to peace building, see Lederach and Appleby 2010. 'Liberal peace' is not to be confused with both 'democratic peace' and 'capitalist peace' (see Chap. 11).

[40] Richmond and Franks 2009: 3.

[41] Boutros-Ghali 1992. For an assessment of recent peacemaking missions and the idea of 'liberal peace,' see Paris 2004, Doyle and Sambanis 2006.

[42] McCabe 2010: 4.

[43] Similarly, Huster argues that a modus vivendi approach cannot justify state neutrality (2002: 47–53).

[44] This is something friends of modus vivendi are happy to acknowledge, being dissatisfied with what they see as the anti-political 'legalism' of thinkers like Rawls (Gray 1995b: 122–126, 2000: 14–15, 75, Bellamy 1999: ch. 2, Newey 2001: ch. 7).

But sometimes modus vivendi arrangements are not even liberal in a broad sense. If that is so, then a hypothetical compromise made for peace cannot even be demonstrated to establish liberal institutions broadly conceived. John Gray writes:

> In political milieux which harbour a diversity of cultural traditions and identities, such as we find in most parts of the world today, the institutional forms best suited to a modus vivendi may well not be the individualist institutions of liberal civil society but rather those of political and legal pluralism, in which the fundamental units are not individuals but communities. In polities that are plural or divided, the legal recognition of different communities, and of their distinct jurisdictions, may well be mandated on the Hobbesian ground that it promotes peace.[45]

Gray not only thinks that group-sensitive policies are sometimes part of a well-working modus vivendi in pluralist societies,[46] he also thinks that significant constraints on liberty rights, for example freedom of the press, could be part of a workable modus vivendi.[47] As explained earlier, modus vivendi arrangements must satisfy certain minimal moral standards, but this does not imply that they have to be liberal. This is hard to deny, although of course one can hope that often liberal and hence morally better$_1$ modus vivendi arrangements are workable and actually established. Philosophical argument cannot demonstrate what precise shape modus vivendi arrangements are to have, not even that they must be liberal. This does not mean that liberalism is wrong, of course. Liberal justice and peace are just different values. Because this is so, liberal institutions are unfortunately neither the content of all compromises made for peace in the real world, nor the content of all hypothetical compromises made for peace.

McCabe also claims that people would agree to a compromise on a 'moderately centralized' political order.[48] He contrasts moderate centralism with the 'subsidiarity model,' according to which 'political authority is

[45] Gray 1995a: 203, see also 1995a: 123, 1998, 2000: 20. In premodern times, this is even more clearly the case (Williams 2005: 10, Sleat 2010: 487–488).

[46] It is not undisputed that granting group-rights is illiberal (Kymlicka 1995).

[47] Gray 1998: 25, see also Klosko 1994: 1892. Horton 2010: 438, 440.

[48] McCabe 2010: 143–153.

parceled out to smaller locales and jurisdictions in a manner that tolerates departures from […] liberal commitments.'[49] But when groups compromise in order to be able to live according to their views on justice and the good, then they might indeed prefer a decentralized social order.[50] They might aim at what Gaus calls a partition of moral space. McCabe thinks that subsidiarity entrenches disagreement. This may be so, but it need not be so, and it may just be what the groups prefer, when the alternative is to assimilate.[51] Again, one should be skeptical about philosophical arguments that purport to demonstrate the precise shape of modus vivendi arrangements, no matter whether these arrangements are imposed or established as a compromise (in the real-world or in some hypothetical scenario).

Modus Vivendi and Liberal Justice

Gray not only points out that well-working modus vivendi arrangements sometimes are non-liberal, he also denies that liberal institutions are a demand of justice or, more generally, the universally morally best$_1$ institutions. Background for this claim is Gray's adherence to value pluralism (see Chap. 7). Because values are plural and incommensurable, liberal values like freedom and autonomy are not privileged, according to Gray. The thin universal values that set limits to what can count as a modus vivendi (Chap. 6) do not necessitate liberal institutions: 'Universal values are compatible with many moralities, including liberalism, […] but they underdetermine them all.'[52] Illiberal institutions are thus simply shaped by an alternative and equally legitimate mixing of values.[53] Gray writes:

> Depending on their histories and circumstances, different societies will have reason to opt for different mixes even of goods without which no good life can be lived.[54] […] Sometimes *modus vivendi* is best fostered by

[49] McCabe 2010: 143.

[50] See Kukathas 2003, Parekh 2000: chs. 7–8.

[51] Like McCabe, Galston argues that some civic unity is necessary for stable peace (2002: 10, 65–66, see also Rawls 1971: 212, Parekh 2000: 196). Kukathas denies this (2003: 20, 38, 133, 178).

[52] Gray 2000: 67, see 2000: 109.

[53] Gray 1998: 24.

[54] Gray 1998: 31.

> liberal institutions. But liberal institutions are merely one variety of *modus vivendi*, not always the most legitimate. Where repressive regimes make *modus vivendi* unattainable, liberals and pluralists can march together. Where liberal institutions claim universal authority, liberals and pluralists must part company.[55]

Of course, I cannot defend liberalism as a theory of justice here. But what I think is important to see is that, with Gray, one can emphasize the importance of peace and modus vivendi arrangements, claim that there are weighty moral reasons to accept modus vivendi arrangements, concede that modus vivendi arrangements can take non-liberal forms, and yet, against Gray, stay an adherent of a liberal theory of justice. A liberal theory of justice is also compatible with value pluralism: justice, of course, is one value among others like, for example, peace. But justice provides a perspective from which to evaluate different available modus vivendi arrangements that establish peace. Justice will to a great part determine what the morally $best_1$ arrangement is. And at least when one has only pragmatic moral reasons to compromise on what one regards as morally $best_1$, one may try to achieve a modus vivendi arrangement that comes as close as possible to the morally $best_1$ arrangement, as we have seen in the chapter on the deontic morality of compromising.

As a side note: Gray's rejection of liberalism is itself half-hearted.[56] He regards the pursuit of modus vivendi as itself a liberal project: 'Modus Vivendi continues the liberal search for peaceful coexistence; but it does so by giving up the belief that one way of life, or a single type of regime, could be best for all.'[57] It is one of 'two faces' of liberalism, not the search for a universally best form of life and political regime, but the search for 'terms of peace among different ways of life.'[58] He also speaks of an 'agonistic liberalism.'[59] So it seems that, in Gray's terms, the search for modus

[55] Gray 1998: 34, see 1995b: 130.

[56] For a recent take on Gray and liberalism, see Bacon 2010.

[57] Gray 2000: 139, see 2000: 33, 137–138.

[58] Gray 2000: 2. This fits Galston's distinction between reformation- and enlightenment liberalism (2002: 24–26). For critical discussion of the distinction, see Barry 2001: 118–123.

[59] Gray 1995b.

vivendi arrangements is a liberal project, although it does not have to lead to liberal institutions and although liberal institutions are not better than other modus vivendi arrangements.

Summary

There is some plausibility to the claim that liberal institutions, broadly conceived, form well-working modus vivendi arrangements. But modus vivendi arrangements need not take the form of liberal institutions. Peace is one value; (liberal) justice is another value. A compromise made for peace need not establish liberal institutions. Similarly, one cannot determine a priori what institutions are publicly justifiable. It is certainly plausible that public justification rules out deeply illiberal institutions. Constitutions that do not grant basic liberal rights are not publicly justifiable. But if one wants to argue for a more determinate set of liberal institutions, for example classical liberal or liberal egalitarian ones, one should do so in the name of liberal justice, equality, prosperity, or other first-level values. Compromises made for public justification can lead to many different sorts of liberal institutions.

17

Compromise and Legitimacy

Could compromises help to establish the legitimacy of the state? At first sight this may look highly unintuitive. Yet some political theorists who sympathize with 'realism' suggest that compromises could substitute traditional Lockean consent in a realist consent theory of legitimacy. Another idea to connect compromises and legitimacy comes from public reason liberals: as mentioned above, Rawls and other public reason liberals see the principle of public justification as a principle of legitimacy, and so compromises made for public justification could be regarded as establishing or securing legitimacy. In this chapter, I would like to shed some light on both ideas.

Legitimacy as a Bundle of Rights

'Legitimacy' is sometimes simply used as a synonym to the generic 'justifiability' or 'permissibility' or 'acceptability.' Sometimes 'legitimate' seems to mean nothing more than 'making sense,' as when a question is said to be legitimate. But usually 'legitimacy' is associated with 'legitimate authority.' Legitimacy in that sense is, first of all, a property of states or

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governments. States or governments are 'legitimate' when they have a certain bundle of rights that constitutes their 'right to rule.' At a minimum, the right to rule comprises a Hohfeldian[1] liberty-right to enact and enforce (certain kinds of) laws.[2] Traditionally, the right to rule is conceived as also comprising a claim-right to be obeyed with corresponding duties or obligations to obey on the side of the citizens. I here assume that the state may not need a claim-right to be obeyed, but that, on the other hand, a mere liberty-right to enact (certain kinds of) laws is not sufficient.[3] In addition to moral liberties to enact and enforce (certain kinds of) laws, the state also needs moral powers to thereby impose moral and legal duties on citizens.[4] Hohfeldian powers are second-order capacities to change one's own or other people's first-order status as defined by claim-rights, liberties, and duties. Powers to change other people's first-order status correlate with a liability to have one's first-order status changed. The state needs moral powers to impose duties on citizens, because this is what the state does when it enacts laws: it imposes moral and legal duties on citizens to respect these laws.

Some philosophers distinguish between a state's legitimacy and its political authority. Usually a state is said to be legitimate when it has Hohfeldian liberty-rights to enact and enforce (certain kinds of) laws, and it is said to have political authority when it has a claim-right to be obeyed in addition.[5] As I assume that states need more than mere liberty-rights, but less than a claim-right to be obeyed, I use 'legitimacy' and 'political authority' interchangeably for states that have moral liberty-rights to enact and enforce (certain kinds of) laws and have moral powers to thereby impose duties on citizens.

[1] Hohfeld 1913–1917/2001.

[2] Wellman 1996: 212, Copp 1999: 13–16, Buchanan 2002: 695.

[3] See also Wendt 2016a: 117–121.

[4] The state's power to impose duties is acknowledged in most accounts of political authority (or legitimacy): see Copp 1999: 4–5, Simmons 1999: 746, 752, Raz 2006: 1012, Christiano 2008: 244, Estlund 2008: 143, Edmundson 2010: 180, Gaus 2011a: 465–466, Horton 2012: 135, Enoch 2014: 296.

[5] Buchanan 2002.

Legitimacy and Public Justification

Recall Rawls's liberal principle of legitimacy (which I preferred to call 'principle of public justification'). That principle states that 'our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.' Hence, while constitutional essentials are to be publicly justifiable, it is the exercise of political power that is thereby rendered legitimate.

What is meant by 'legitimacy' here? Does Rawls claim that publicly justifiable constitutional essentials give rise to the state's right to rule? I think it is more plausible that Rawls uses the term 'legitimacy' in a looser sense, basically as a synonym to 'justifiability' or 'permissibility': when constitutional essentials are publicly justifiable, then this renders the exercise of political power permissible, but it does not thereby ground the state's right to rule, understood as the set of rights spelled out above.[6]

But let us try to make sense of the claim that the public justification of constitutional essentials (or coercive laws or political decisions) could really establish state legitimacy understood as the right to rule. A non-starter is the idea that the public justification of constitutional essentials (or coercive laws or political decisions) could establish state legitimacy because it is equivalent to having hypothetical consent from everyone. It is a non-starter for two reasons. First, when constitutional essentials, coercive laws, or political decisions are the subject of public justification, then there simply is no hypothetical consent to grant the state the right to rule. There is only hypothetical consent to accept constitutional essentials, coercive laws, or political decisions. Second, hypothetical consent cannot do what real consent can do: it cannot establish a voluntary transfer of rights on the state.[7] The point of hypothetical consent (by more reasonable counterparts of real people) is to track the *reasons* which real people have to accept some arrangement. (They may in fact dissent.)

[6] Quite clearly, it is not supposed to ground the citizens' duty or obligation to support and to obey the state. This job is to be done by a 'natural duty of justice' (1971: 115).

[7] See Dworkin 1975: 17.

In that sense, 'we shift our emphasis away from the will and focus on the reasons that people might have for exercising their will in one way rather than another,'[8] as Jeremy Waldron says. And A. John Simmons rightly emphasizes that '[a]ppeals to hypothetical choice, acceptability, or reasonable nonrejectability have a very different moral basis and force than do appeals to actual choice.'[9]

What can we learn from that? If public justification is to have a chance to establish state legitimacy, then we have to do two things: we have to make state legitimacy—the state's right to rule—itself a subject of public justification (besides constitutional essentials etc.), and we have to focus on the convergence of reasons that hypothetical consent signifies (not on consent). In other words, the idea must be that the public justifiability of the state's right to rule grounds the state's right to rule. The state would have the right to rule because everyone has sufficient reason to accept its right to rule.

I cannot explore this idea of a hypothetical consent theory of state legitimacy in depth here.[10] But a hypothetical consent theory of state legitimacy has to explain how the bare fact that people have sufficient reason to accept the state's right to rule could make the state actually have the right to rule. I argue elsewhere that this form of argument is not very promising: that it would be good or nice if some person had moral powers over others is not sufficient to make her actually have moral powers over others.[11] It should also be noticed that real-world compromises in politics usually concern laws and concrete political decisions, not the creation of the state and its right to rule. Thus, real-world compromises made for public justification will be made out of a concern for the public justifiability of laws and political decisions—and this does not help to secure or establish state legitimacy.

[8] Waldron 1987: 144.

[9] Simmons 1999: 761–762. See also Gaus 2010a: 19.

[10] For a recent critical discussion, see Huemer 2013: ch. 3.

[11] Wendt 2016a: 112–115. I think moral powers pose a special problem here. For a more general discussion of this form of argument, see Enoch 2009.

Legitimacy and 'Realist Consent'

I now come to the other way to draw a connection between compromises and legitimacy. Consider a Lockean consent theory of legitimacy. In a Lockean consent theory, the legitimacy of the state is grounded in the voluntary consensual transfer of its rights from all subject to it.[12] The obvious problem with Lockean consent is that, in the real world, such consent has never been given. Citizens have not voluntarily transferred the moral power to impose duties on the state. This has of course often been pointed out. Contemporary Lockeans like A. John Simmons draw the conclusion that all existing and very probably all future states and governments are illegitimate. They lack the relevant moral powers.[13] Many theorists feel uncomfortable with a high-bar notion of legitimacy that makes one conclude that all states are illegitimate.[14] This motivates the search for a more low-bar, realist consent theory. Legitimacy, realists tend to think, should not be a more demanding concept than justice, but a less demanding one.

Thus, Enzo Rossi discusses whether 'compromise could be for realist accounts of legitimacy what consensus is for idealistic ones.'[15] In a realist conception of legitimacy, Rossi explains, compromise could be a neat substitute for the role consent plays in 'idealist' conceptions of legitimacy.[16] We would have a realist version of 'voluntarism.' In idealist consent, Rossi explains, the parties 'endorse' the terms of an agreement, while in realist consent, that is, when making compromises, they are merely 'willing to abide' by them.[17] Hence in Rossi's construal, the difference between idealist consent and realist consent as given in compromises lies in whether an agreement is accepted as a first-best or a second-best.

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[12] See Locke 1689a/1960.

[13] Being a 'philosophical anarchist,' Simmons argues that there may nonetheless be good reasons not to oppose some kinds of states. One reason not to oppose illegitimate states may be that (some kinds of) states promote justice (1996, 1999: 752–754). Elsewhere I argue that one cannot separate the questions of a state's justice and its political authority so easily (Wendt 2015): states without political authority are unjust because they have legal powers over others without having the corresponding moral powers.

[14] Horton 2012: 137–141.

[15] Rossi 2013: 558.

[16] Rossi 2013: 561.

[17] Rossi 2013: 563.

Rossi argues that the idea of a realist consent theory fails. But the reason he provides is unconvincing. He thinks that the problem is that, given our modern individualist background culture, citizens will be willing to abide only by exercises of political power that satisfy the idealist consensus standard of legitimacy. Hence, the realist–voluntarist theory of legitimacy collapses into the idealist–voluntarist theory.[18] Rossi's target is mainly Bernard Williams. Arguably, though, Williams does not defend a realist consent theory of legitimacy. He upholds a so-called basic legitimation demand that requires a justification of state power 'to each subject.'[19] This sounds less like a realist consent theory than like a realist public justification theory.[20] But let us assume, for the sake of the argument, that Williams in the end advocates some kind of a realist consent theory. Williams emphasizes that the historical and cultural circumstances determine how the basic legitimation demand can be satisfied. And he writes: 'Now and around here the [basic legitimation demand] together with the historical conditions permit only a liberal solution: other forms of answer are unacceptable.'[21] This looks like an affirmation of what Rossi sees as the problem. But much depends on what is meant by the 'liberal solution.' It may well be that only liberal institutions are acceptable as modus vivendi arrangements in large parts of the modern world (Chap. 16). But probably Williams does not mean that we moderns all adhere to an idealist consent theory of legitimacy. We quite clearly do not. And thus the realist consent theory does not collapse into an idealist one.

I see other problems with the idea of taking compromises as a realist substitute for idealist consent. Whether a compromise can work as a substitute for idealist consent depends on who is party to the compromise. I mentioned earlier that modus vivendi arrangements need not be established as a compromise, and even when modus vivendi arrangements are established as a

[18] Rossi 2013: 566–567.

[19] Williams 2005: 4. Williams's demand is supposed not to rely on an external moral standard, but to articulate a demand that is not 'prior to politics' (Williams 2005: 5). For further discussion of Williams's basic legitimation demand, see Sleat 2010, Bavister-Gould 2013, Larmore 2013, and Hall 2015. Somewhat similar to Williams, McCabe upholds a 'justificatory requirement' (2010: 5–8, 153–165).

[20] Rossi claims that some sort of voluntarism is the core attraction of both actual consent theories and hypothetical consent theories (2014, see also 2013: 560–561). But hypothetical consent is merely tracking the *reasons* people have, not their will.

[21] Williams 2005: 8.

compromise, it is almost never a compromise among all the persons who later have to live by the arrangement. It is usually a compromise among politicians. Rossi argues that the (realist) consent that is given in compromises is not given autonomously enough to transfer legitimacy.[22] But this is not the problem. The problem is that people do not (realistically) consent *at all*: they do not participate in the compromise. But when citizens are not part of the compromise, they cannot thereby transfer the right to rule to the state.

Whether a compromise can work as a substitute for idealist consent also depends on what the subject of the compromise is. Compromises in politics usually establish laws, modus vivendi arrangements, and so on. But laws and modus vivendi arrangements are not the kind of thing that could have the right to rule. Maybe Rossi's envisaged realist consent theory of legitimacy conceives legitimacy in the looser sense, as a synonym to 'justification.' But then it does not help with the state's right to rule. States and their rights are rarely established as a compromise. Maybe one could argue that one gives tacit consent to the state when making compromises on laws within the framework of the state. But as there are no conventions to regard the making of compromises within politics as consent to the state, this is hardly convincing.

In fact, Rossi's idea of realist consent is not more realistic than Lockean consent. Locke or Simmons do not ask for unanimous consent to establish the state's right to rule as a first-best solution. What matters to them is that consent is given, whether it is consent to a first-best or a second-best. Consent as given in a compromise would perfectly suit their standards. Hence, the envisaged 'realist' consent theory of legitimacy is not more low-bar than Locke's.

A more promising realist substitute for Lockean consent may be citizens' *acceptance*. Let me first explain the idea with regard to modus vivendi arrangements. While citizens usually do not agree to second-best arrangements (as partners in a compromise), they often accept them as a second-best. Maybe such acceptance is sufficient to establish legitimacy. This is suggested by John Horton. Horton says that for 'something to count as […] "a modus vivendi," it has to possess some quality of legitimacy

[22] Rossi 2010: 30–31.

for those subject to it.'[23] What could make modus vivendi arrangements legitimate? Recall that, according to Horton, modus vivendi arrangements must be 'broadly consensual,' 'broadly acceptable,' or 'agreeable.' He explains that modus vivendi arrangements have to be accepted by most people, even if 'to varying degrees reluctant, grudging and qualified.'[24] This acceptance makes the arrangements legitimate, even when it takes place against the background of power inequalities,[25] at least as long as it 'is not the product of clear, wilful, systematic and comprehensive deception by those with political power.'[26]

One may wonder how modus vivendi arrangements could appropriately be called 'legitimate,' given that they are not the kind of thing that could have the right to rule. I claimed that modus vivendi can take different forms, and some take the form of customs or moral norms. But presumably Horton here conceives modus vivendi arrangements as involving state institutions. Strictly speaking, then, it is these state institutions that can be legitimate, not modus vivendi arrangements. In a different article, Horton directly focuses on the legitimacy of the state, not of modus vivendi arrangements. And he explains that 'the role of an account of political legitimacy is to explain how it is that a state has the right or, as I shall say, the authority to govern those who are subject to it.'[27] Again acceptance plays the key role. He writes that he wants to 'restore the connection between political legitimacy and the beliefs and attitudes of those subject to it.'[28] State legitimacy, according to him, requires acceptance by a great part of the citizens. The cultural context determines what this means more specifically.[29] He also makes clear that acceptance does not 'ground' or 'justify' legitimacy, though:

[23] Horton 2010: 439, see 2010: 442–443. Wall also suggests a connection between modus vivendi arrangements (or constitutional settlements) and legitimacy (2013a).

[24] Horton 2010: 442–443, see 2006: 164.

[25] Horton 2010: 443.

[26] Horton 2010: 439. A similar requirement, called the 'critical theory principle,' can be found in Williams 2005: 6.

[27] Horton 2012: 130.

[28] Horton 2012: 141.

[29] Horton 2012: 141–145.

> I consent to, or more properly recognize or acknowledge, the state as legitimate, because it meets the salient criteria of legitimacy that are practically operative. I do not acknowledge its legitimacy because I have consented to it […]. The affirmation of legitimacy matters, but that affirmation is grounded in something other than that affirmation itself.[30]

Something other than acceptance grounds legitimacy, but it does so only because people accept the validity of that grounding. As many states are widely accepted, Horton's account of legitimacy would allow states to realistically acquire the moral powers needed for legitimacy.

The main problem with this idea is that acceptance is very different from both explicit and tacit consent (Chaps. 2 and 4). Acceptance of an arrangement does not constitute a compromise, because it is not properly intersubjective or public, but a mere private mental act or mental state. Because being a private mental act or mental state, mere acceptance cannot be morally transformative: it cannot generate new moral obligations or rights. A fortiori, then, it cannot give rise to the rights that make up legitimacy, and in particular give rise to the moral power to impose duties on citizens. Therefore, acceptance cannot work as a realist substitute for Lockean consent.

I would like to at least mention an objection one could make to my argument. One could object that acceptance should be conceived differently, not as a mere mental state, but as something also publicly observable. But as far as I can see, the account then collapses into a tacit consent theory. If it is not to collapse into a tacit consent theory, then we still lack an explanation how acceptance could be morally transformative.

I should emphasize that Horton does not *intend* his theory to be a realist substitute for Lockean consent. He would deny that we have to establish the state's right to rule in the way consent theories assume, and he would argue for the 'naturalness' of political relations including relations of authority.[31] The point I want to make is that *if* we take his theory as an attempt to

[30] Horton 2012: 142.

[31] Horton 2012: 139–140. One could also try to argue for a pragmatist approach to legitimacy that looks to the political practice of legitimation without giving up on normativity (Fossen 2013, see Habermas 1992/1996).

establish the state's right to rule by providing a realist substitute for Lockean consent, then it does not work. I discuss Horton's and Williams's realist theories of legitimacy more fully elsewhere.[32]

Summary

Legitimacy (or political authority) is a property of institutions like the state. States are legitimate when they have the right to rule, which includes the moral power to impose duties on citizens. The main claims of this chapter were largely negative: First, compromises made for public justification have not much to do with state legitimacy. Second, the idea to make compromises or acceptance realist substitutes for genuine Lockean consent does not work.

[32] Wendt 2016c.

18
Conclusion

Let me summarize the view I developed in this book. (I will focus on the 'positive' or 'constructive' parts and omit my criticisms of the claims of others.) I argued that we should distinguish two levels in the moral evaluation of institutional arrangements (Chap. 3). On the first level, one evaluates what the morally best$_1$ arrangement or arrangements would be, for example what tax laws or what electoral system would be the morally best$_1$ ones. On the second level, one reflects about what arrangements one should be willing to accept, given that others disagree about what the morally best$_1$ arrangements would be. When one comes to agree to an arrangement that is not among the morally best$_1$ ones, then one makes a moral compromise in agreeing to that arrangement. To test whether an arrangement is accepted as a first-best or as a second-best, one can ask whether it is the arrangement one would persuade all affected parties, if one could do so at no costs. With this test at hand, one can show that peace and public justification are values on the second level of moral evaluation: considerations based on these values lead one to agree to arrangements that are not among the morally best$_1$ arrangements but, of course, among the morally acceptable$_2$ arrangements (Chap. 14). When a politician agrees to some bundle of tax laws just because it is publicly

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justifiable, while otherwise preferring another bundle, or when a politician agrees to an electoral system because it will likely help to secure peace, while otherwise preferring some other electoral system, then he makes a moral compromise for moral reasons and accepts an arrangement he deems a moral second-best$_1$.

Peace should be understood as the stable absence of violence, based on modus vivendi arrangements (Chap. 6). It is a moral value both because it has specific and non-specific instrumental value for almost everyone and because it has intrinsic value (Chap. 7). Public justification means multi-perspectival acceptability. There are several sources of its value: public justification helps to secure stable peace (Chap. 11), it constitutes respect for persons (Chap. 12), and it constitutes a community of mutual moral accountability (Chap. 13).

Both peace and public justification are important moral values, but they are just two moral values among others. There are other moral values on the second level of moral evaluation—arguably democracy, non-subjugation, and community are among them—and of course, there are other moral values on the first level of moral evaluation, like most prominently justice, but also freedom, equality, autonomy, prosperity, well-being, scientific progress, cultural and environmental values, and so on. (Some of these values may not appropriately be called 'moral values,' but they certainly are values that are relevant for the moral evaluation of institutional arrangements.) The moral justification of laws or moral rules will usually have to take several of these first- and second-level values into account.

Because there is disagreement about what the morally best$_1$ laws would be (e.g. what tax laws or what electoral system would be best$_1$), politicians will almost always have to make moral compromises in enacting laws. And they should make these compromises in light of second-level moral values like peace and public justification. I have made some claims about the moral duties and obligations that politicians have in making such compromises (Chap. 15). It matters whether a politician has only pragmatic moral reasons to compromise—when the compromise is a means to attain peace—or whether she has also principled moral reasons to compromise—when the compromise is to install a publicly justifiable arrangement that constitutes an expression of respect or a community of

mutual moral accountability. When she has only pragmatic moral reasons to compromise, then she does not have a (pro tanto) moral duty to embrace a cooperative mindset. When she has principled moral reasons to compromise, she does. Of course, it also matters how an arrangement fares in terms of first-level values. When the other party to a bargaining procedure aims at a rotten compromise (a morally very bad_1 arrangement), then one has a moral duty not to embrace a cooperative mindset. And if an agreed-upon bundle of laws is highly unjust and thus morally very bad_1, then the moral obligation to stick to the terms of the compromise will be less stringent than usual.

Both peace and public justification can usually be realized in a plurality of ways (Chap. 16). For that reason, one cannot say much a priori about how compromises made for peace or public justification will look like. It seems plausible that highly illiberal laws will not be publicly justifiable in our times, but one cannot claim that compromises made for public justification will usually install any more specific kinds of liberal institutions (e.g. classical liberal institutions or 'property-owning democracy'). Public justification has more of a negative function: its point is to rule out certain things, not to determine anything specific. Compromises for peace can also take many different forms. What works as a modus vivendi will depend on the historical circumstances. Compromises made for peace will unfortunately sometimes have to invoke straightforwardly illiberal modus vivendi institutions, although of course liberal institutions, broadly conceived, are often a good candidate for working modus vivendi arrangements.

The view I sketched provides some outlines for a theory of political morality beyond justice. Of course, I hope that the view is compelling. But it is a view that is uncomfortably positioned between different traditions of political thinking, and thus might not please anyone. While realists may support my emphasis on the importance of compromises and modus vivendi arrangements, they may still find my view too moralizing. Adherents of a particular theory of justice may think that I give too much weight to public justification and that justice and peace are much more closely connected than I suggest. On the other hand, they will appreciate that I do not equate moral justification and public justification and thus reason from the 'first-person standpoint.' Public reason liberals will

object to treating public justification as merely one value among others and to what they see as authoritarian–intuitionist moral reasoning about 'moral truth.'

A map of political morality beyond justice is necessary to bring political philosophy to a more adequate picture of the values that should inform political decision-making. Yet it cannot have direct policy implications, as it does not determine what the best policies would be. Instead, it deals with moral values that provide moral reasons to agree to compromises that establish second-best policies. The proper content of these compromises is determined by all relevant first- and second-level values and the many contingencies that shape real politics.

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