

## ABSTRACT

Title of Dissertation:           A MORAL CONTRACTUALIST DEFENSE OF  
POLITICAL OBLIGATION

David B. Lefkowitz, Doctor of Philosophy, 2003

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Do citizens of any modern state have a general duty to acknowledge its authority to determine for them, for action guiding purposes, whether certain kinds of conduct are morally permissible, required, or forbidden? That is, is there a duty to obey the law? Moral Contractualism, I contend, entails that citizens of a liberal democratic state have such a duty.

Treating others morally often requires agents to act collectively, but even agents who accept the moral necessity of collective action will sometimes disagree over the specification of the ends to be achieved, and the means for doing so. I argue that a liberal democratic state (and only such a state) can justifiably claim the authority to resolve such disagreements, which it does mainly by enacting and applying laws. Obedience to democratic laws expresses respect for others' autonomy.

In defending these claims, particular attention is paid to the problem posed by disagreement over the design of democratic decision procedures, conflicts between

democratically enacted laws and individual rights, and conflicts of rights. Civil disobedience, conscientious objection, and over-inclusive laws are also addressed.

A MORAL CONTRACTUALIST DEFENSE OF POLITICAL OBLIGATION

by

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Thesis submitted to the Faculty of the Graduate School of the  
University of Maryland, College Park in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy  
2003

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## ACKNOWLEDGEMENTS

When I defended my dissertation proposal, the discussion herein was offered only as the first half of my project, with a second part devoted to a defense of mandatory national service and periodic participation in various political institutions. To my own relief, and no doubt to the relief of my committee members as well, that second part must await future research. I mention this fact because it illustrates a great service that my committee members have done for me, but that may not be evident in the dissertation itself: they have displayed great patience, foresight, and a delicate guidance in granting me the space to explore a number of philosophical topics, while at the same time helping me to (eventually) focus my research and writing on a more narrow debate.

None has devoted more time to the exercise of these virtues than has my dissertation director, Bill Galston. Already a man who wears many hats, Bill generously agreed to add another when I asked to work with him. Those who have had the pleasure of having Bill comment on their work surely know his aptitude for succinctly stating what is at issue, and for clearly identifying the ways in which one might approach it. On several occasions I entered a meeting with Bill with my head full of jumbled ideas, only to emerge an hour or two later with a clear picture of what I needed to do, and how I should go about it. Moreover, as a theorist interested in straddling the border between political science and philosophy, I could ask for no better example of how to do so than that provided by Bill.

At every research university there are rumors of horrific dissertation committees, whose members refuse to devote any time or effort to students whose

work they are not supervising. My experience, I can gladly report, has been the exact opposite, and I owe each of my committee members a debt of gratitude for their help and encouragement.

Despite leaving for a position at the University of Miami, Michael Slote kindly agreed to remain a member of my committee. Though we rarely agree, discussions with Michael never fail to provide me with fresh insight into ethics and political philosophy.

To my great fortune, Chris Morris arrived at Maryland just as I began to work in earnest on my dissertation. Chris's impact on my research was immediate; a single comment of his on the relevance of authority led to an important re-conceptualization of this project.

From my first day in the University of Maryland philosophy program, Judy Lichtenberg has been a wonderful mentor and friend. Judy has probably read more of my work than anyone else, and I have benefited greatly from her comments, and even more from her belief that I could succeed as a philosopher.

I have learned a great deal as well from Sam Kerstein, whose attention to detail and argumentation I hope one day to approximate. As someone closer to my own position on the path to a career in philosophy, Sam has been an invaluable mentor and source of encouragement.

Finally, I wish to offer my thanks to Steve Elkin, for many enjoyable methodological rows, and for spending more time with philosophers than he might otherwise have chosen to spend.

Conversations with a number of my fellow graduate students has helped make this dissertation clearer, and hopefully more convincing, than it otherwise would have been. I wish to thank Craig Derksen for many lunchtime conversations on fairness and authority, Scott James for his thoughts on Scanlon and Moral Contractualism, Cory Briggs and Josh Kassner for sharing their knowledge of law and legal practice, and Chip Hamilton for discussion of the nature of rights.

The completion of a dissertation is the final step in a long apprenticeship. It seems appropriate, therefore, that I recognize here the many people from whom I have learned so much about how to be a philosopher, a teacher, and an academic. Let me begin by thanking Carl Wellman and Larry May, both for their direction when I was just beginning the study of philosophy, and for their continued support. Sue Dwyer and Paul Pietroski have offered much sage advice over pizza and beer; Ray Martin has done likewise during many a round of golf. My thanks as well to Peter Carruthers for career advice, and for help finding funding, and to Allen Stairs for answers to innumerable questions regarding teaching and the intricacies of university administration.

During my time at Maryland I have had the opportunity to learn from, and work with, all of the members of the Institute for Philosophy and Public Policy, and I wish to express my gratitude to them. I also wish to thank Stephen Braude for hiring me as an adjunct instructor at the University of Maryland, Baltimore County, and to the members of the philosophy department there for treating me as an equal. Finally, it is sometimes claimed that children learn as much from other children as they do from their parents or teachers. An analogous claim might well be made for my

philosophical education. I have learned as much from my fellow graduate students as I have from my many fine professors, and I thank them for all the times they have explained a new idea to me, or given me critical feedback on my papers.

Joyce and Lewis Schiller have been a constant source of encouragement and insight into the inner workings of academia, for which I thank them. Most parents would probably react with trepidation to their daughter marrying a philosophy graduate student, but my in-laws Mark and Marilyn Wetterhahn have always been loving and supportive. So too have my parents, Paul and Janice Lefkowitz. My love of learning is surely the result in part of my upbringing, as are the discipline, dedication, compassion, and humor without which I would likely have not seen this project through. Their expression of pride and admiration for my achievements brings me great joy, and though I am certain their happiness is wholly centered on my success, that success owes much to their hard work.

Last, but not least, I offer my profound thanks to my wife Alli. Life with a graduate student can be an emotional (and financial) roller-coaster, but she has ridden it with grace, compassion, and not a little humor. Her love is a source of certainty that even Cartesian skepticism cannot threaten, and without it this apprenticeship might never have been completed. Now, let's see if she's ready to put me through law school . . .

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## Chapter 1: Introduction

It is sometimes said, and more often assumed, that citizens of at least some modern states have a certain kind of moral reason for action that non-citizens do not have, namely the justified demands that the state, or their fellow citizens, may make of them. That is, the status of citizenship in a particular state is alleged to confer upon an agent not only certain political rights, such as a right to vote in that state's elections, but also certain political obligations.

Discussions of the moral requirements that individuals bear specifically in virtue of their citizenship often focus on the existence of a general duty to obey the law, or more exactly, a general duty to obey the state's directives, including not only laws but also court orders, administrative decisions, and so on. More precisely, the question is whether in virtue of their citizenship in a modern state, individuals have a general, at least *prima facie*, duty to acknowledge the state's moral authority, or right, to settle for them which actions are permissible, which ones are required, and which ones are forbidden, for action-guiding purposes and within the scope of the state's justified authority.<sup>1</sup> The idea that (at least some) states exercise this kind of authority is often referred to under the rubric of a citizen's "surrender of judgment" to the state.

It may well be that a general duty to obey the state's directives does not exhaust the moral requirements of citizenship. Citizens may owe one another a duty to create certain kinds of laws, as well as a duty to obey the ones that already exist (and that are laws a state is morally justified in enacting and enforcing). Or perhaps

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<sup>1</sup> I shall sometimes refer to an action's being morally required, permissible, or forbidden as its moral status.

citizens owe one another things that cannot be legislated, such as concern for one another's well-being that goes beyond mere conformity to legal requirements. Some theorists, and many ordinary citizens, also claim that citizenship requires a certain degree of partiality toward one's fellow citizens, which may include anything from giving them priority in one's fulfillment of various duties owed to all moral agents as such, to treating them in certain ways that one does not owe to non-citizens at all.<sup>2</sup> Though I shall occasionally touch on these other alleged duties of citizenship, I focus primarily on the duty to obey the state's directives. My reason for doing so is that all those who consider the problem of political obligation agree that if citizens have *any* duties in virtue of their status as such, then they have a duty to obey the law. Given the many criticisms that even this most minimal of political obligations has faced, it is enough to try and establish its existence, and to leave debates over the existence of other moral requirements of citizenship for another time. Henceforth, then, I shall understand the phrase 'political obligation' to refer (at least) to the duty to obey the state's directives.

I have spoken thus far of a duty to obey the state's directives being owed to the state and/or its citizens. But the topic of political obligation predates the existence of the modern state, as well as the notion of citizenship associated with it. The common thread that unites all discussions of political obligation from Plato to the present is how to account for the moral authority a political entity is alleged to have over its subjects. Though the task philosophers have set themselves remains the same, answers to the question "why type of political entity has a justified claim to authority?" have varied over the centuries. A divine monarch, Hobbes's

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<sup>2</sup> See Scheffler 2001, 51-53, for discussion.

Leviathan, a senate or council made up of propertied aristocrats, various conceptions of the demos, and some combination of two or more of these elements, as for example, in the English Constitution of 1689, have all been defended during earlier periods in the history of Western Civilization as political entities to whom their subjects owe obedience. Yet most contemporary theorists, including many of those whose arguments I shall address herein understand the citizens of a modern state as the ultimate source of the justifiable moral authority the political community has over its members (if it has any authority at all). The state is to be understood as artificial, a set of intentionally designed institutions via which citizens collectively exercise their authority by direct participation and/or by the delegation of responsibility and authority to agents (or trustees) occupying certain institutional roles. When I speak of a citizen's duty to obey the state's directives, then, this should be understood as a duty he owes to agents (or trustees) of the citizenry at large.<sup>3</sup>

Strictly speaking, the problem of political obligation might be understood as the question of what justifies the state's claim to authority over those within its jurisdiction. If we assume for the moment that existing positive claims to jurisdiction are morally justified, this is likely to include both non-citizen residents and non-resident citizens, at least with respect to certain bodies of law. For the sake of discussion, I focus herein only on the obligations of citizens, usually with the tacit assumption that those citizens reside within the boundaries of their state. This leaves

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<sup>3</sup> A serves as B's agent if he acts or exercises a power in B's name, and under B's control. A serves as B's trustee if he acts or exercises a power in B's interest, but not under B's control (i.e. as a trustee, A may act contrary to B's assessment of what is in his interest). For discussion of this and finer distinctions found in the law, see McMahon 1994, 47-49.

open the possibility that non-citizen residents may also have political obligations to the state in which they reside, though as will become clear in chapter six, my explanation for why citizens have political obligations will not account for why non-citizen residents have them.

A successful defense of the view that citizens of at least some modern states have a general, *prima facie*, duty to obey the state's directives would be significant for a number of reasons. First and foremost among these is that all modern states claim to exercise such authority, and assert that citizens have a duty to acknowledge the state's claim. On the assumption that for most people the moral status of an action is an important and often decisive consideration when they deliberate in particular cases about what it is that they ought to do, determining whether the citizens of at least some modern states really have a general duty to obey the law is of great practical importance. Second, a justification for a general duty to obey the law may also have important consequences for the propriety of certain judgments of praise and blame. In a recent discussion of political obligation, William Edmundson recalls the shame he felt upon being chastised for crossing an empty street in the face of a Don't Walk signal (Edmundson 1998, 28-29). If his feeling of shame was appropriate, then given the apparent harmlessness of the action itself, a plausible explanation for Edmundson's feeling is his belief that he violated a general duty to obey the law. A third reason to examine the topic of political obligation is that it may play an important role in justifying the state's use of coercion against its subjects, either through the direct application of physical force, or the threat thereof (Green 2002, 515). Even if some examples of state coercion can be justified without

a successful defense of political obligation, such a defense may extend the range of cases in which the state may justly coerce its subjects. Of course, it does not follow necessarily from an action's being morally obligatory that the state is justified in coercing people to do that action. Yet if there is a general duty to obey the law, it would be quite surprising if such a duty did not provide part of a justification for the state's use of coercion to see to it that people fulfill that duty.

In listing these three reasons why the topic of political obligation, and the notion of political authority that accompanies it, ought to be of interest to political philosophers and ordinary citizens alike, I do not mean to claim that *only* a successful defense of political obligation will be able to account for why we ought to obey particular laws, why it may be appropriate to feel guilty when we fail to do so, or why (and when) the state is justified in the use of coercion. Though the theory of political obligation I defend plays a role in answering these questions, for the moment I only wish to motivate the discussion by indicating some of the central questions in moral and political theory that may be affected by the success or failure of such a project.

Identifying certain tasks for moral and political theory, and then offering an account of political obligation as at least a necessary, if not sufficient, tool for the completion of those tasks is not the only way to motivate interest in the topic at hand. One might begin instead with the defense of a general moral theory, and then demonstrate that such a theory generates among other things an account of political obligation.<sup>4</sup> For even if an account of political obligation is not necessary to address the tasks identified in the previous paragraphs, it may still be the case that citizens

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<sup>4</sup>Allen Buchanan appears to adopt such an approach. See Buchanan 2002.

owe one another certain kinds of conduct in virtue of their membership in the polity. So for example, I shall argue for a general duty to obey the state's directives on the basis of Thomas Scanlon's Reasonable Rejection Moral Contractualism. If this theory correctly captures the nature of that part of morality concerned with what, as moral agents, we owe to each other, and if my argument for political obligation on the basis of this theory succeeds, then there is good reason to accept the claim that citizens have a duty to obey the state's directives, even if the truth of such a claim is not necessary to justify, say, the state's use of coercion.

The remainder of this chapter proceeds as follows. Section II contains a description in general terms of the position commonly referred to as philosophical anarchism, which holds that no existing state, nor one that has ever existed or is likely to exist in the foreseeable future, has the kind of authority necessary to generate a correlative duty of obedience to the law for most of its citizens. Philosophical anarchism, as it has been developed over the past twenty-five years, is a position that ought to be taken seriously, and much of the discussion in this thesis is best viewed as a response to it. At the very least, philosophical anarchists have clarified the nature of the task a defender of political obligation must complete, and the criteria against which the success of attempts to do so must be measured. So for example, in section III I draw a distinction often elided prior to the powerful arguments of contemporary philosophical anarchists, namely that between a merely legitimate state and one with political authority over its citizens.<sup>5</sup> The morally

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<sup>5</sup> Unfortunately, there is no widely shared understanding of the meaning or reference of certain key terms in this debate, including words such as 'legitimacy' and 'authority'. What specifically I shall mean by them is indicated below, and the understanding of these terms employed by various prominent figures in the literature on political obligation is indicated in the footnotes.

significant difference between two such states is elaborated in terms of Wesley Hohfeld's typology of rights, and both are distinguished from a state that has no right to act in a certain way, but where it is nevertheless better in some sense that it does so. Section IV contains a statement of the criteria that any successful account of political obligation must meet, and an explanation of why this is so. Section V consists in a typology of different approaches to the defense of political obligation. I suggest that they can be categorized on the basis of two features: an account of how an agent may come to have a duty to the state, and the kind of reason or values to which the account appeals. Finally, I conclude in section VI with a chapter-by-chapter guide to the remainder of the dissertation.

## II

Beginning in the second half of the twentieth century, an increasing number of political philosophers have challenged the view that any existing state, or indeed, any state that has ever existed or that seems likely to exist in the foreseeable future, has the authority to issue directives that its subjects are morally bound to follow *simply because the state has issued them*. Philosophical anarchists, as those who take this position are known, call into question the thesis that citizens of even a just state have a duty to obey the laws of that state simply in virtue of their membership in it.<sup>6</sup> A few philosophical anarchists claim that a proper understanding of a being's status as an autonomous moral agent is inconsistent with a political community's claim to authority over him (Wolff 1998). Many more, however, adopt the strategy

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<sup>6</sup> Whereas anarchists oppose the very existence of the state, and often defend a moral imperative to eliminate it, philosophical anarchists argue against a duty to obey the state's directives, but not necessarily that the state ought not to exist, or that individuals ought to seek its demise. See Simmons 2001, 104.

of argument by elimination. Through careful analysis of the various arguments that have been made in defense of political obligation, these philosophical anarchists attempt to demonstrate for each account that it either fails to provide the right kind of reason for obedience to the state's directives, or that while it could serve as the basis for political obligations, no existing state meets the conditions specified by that account as necessary and sufficient for the state to have the kind of political authority to which a duty to obey the law correlates (M.B.E. Smith 1998; Simmons 1979, 2001; Raz 1979, 1986; Green 1988; Morris 1998). The conclusion philosophical anarchists draw is that since no account successfully demonstrates that existing states have the authority to settle for their subjects which actions are permissible, required, or forbidden, it follows that there is currently no reason to believe that individuals have a duty to obey the directives issued by the state of which they are citizens, simply because the state issues them.

Philosophical anarchists have made clear, however, that even if few subjects of a modern state have a duty to obey the law simply because it is the law, they often have other reasons to behave in the ways the law would have them behave. For example, prudence will often dictate acting in the ways the law requires one to act. This is so not simply because the state may use coercion (justifiably or unjustifiably) against one if one fails to adhere to its directives, but also because on many occasions particular laws will require conduct that is in one's own self-interest. This is especially true when laws are used to solve problems of coordination and cooperation. Consider, too, that there will often be moral reasons to do that which the law requires. For instance, all moral agents have an independent moral reason to

comply with a law that requires them to refrain from murder; independent, that is, from a moral duty to obey the state. In addition to laws that merely codify and publicize already existing moral duties, a state's enactment and enforcement of laws may also produce circumstances in which it becomes possible to fulfill natural duties that depend on collective action.<sup>7</sup> Finally, there may also be a natural duty to support just institutions, or at least to refrain from deliberately or negligently undermining them, that on occasion may even require a person to comply with a moderately unjust directive issued by an agent of a relatively just state.

The existence of such reasons to comply with particular laws does not entail that there is no general duty to obey the law, for it is possible that the moral necessity of acting in a certain way is over-determined. So for example, the fact that a natural duty all individuals have in virtue of being moral agents prohibits them from doing a particular action does not rule out an individual's having an additional reason, in virtue of his citizenship, to refrain from that action. This is so even if both the natural duty and the requirements of citizenship each provide a sufficient reason to forbear from the action in question. Of course, the case for the moral requirements of citizenship will be more interesting, not to mention convincing, if we can show that the moral requirements of citizenship sometimes provide an obligation to do something that, in the absence of such requirements, would be morally optional, rather than required.

Given the strategy of elimination practiced by most philosophical anarchists, together with their acknowledgment that in some (or even many) cases individuals

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<sup>7</sup> A natural duty is one an agent has simply in virtue of being a certain way, e.g. in virtue of being rational, or being created by God. For further discussion, see section IV of this chapter.

will have independent moral reasons to comply with particular laws, philosophical anarchism is a position best attacked by the defense of an account of political obligation. Its usefulness lies in the clarification it brings to the project of justifying the claim that certain moral requirements attach specifically to the status of citizenship. Therefore, while I do not devote a chapter specifically to the discussion of philosophical anarchism, the views of its defenders inform the arguments throughout this dissertation.

### III

The topic of political authority and political obligation must be distinguished from that of state legitimacy, or the justification of a state's use of coercion to enforce its judgments as to what morality requires (and perhaps morally neutral laws as well).<sup>8</sup> Both a legitimate state and one with political authority may be said to have a right to rule, but the difference in the *kind* of right these states have has important normative consequences for those subject to them. I shall draw on the typology of rights first introduced in the legal context by Wesley Hohfeld in order to illustrate this difference, and so clarify the distinction between political authority and political legitimacy.<sup>9</sup>

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<sup>8</sup> My concern here is with legitimacy in the *de jure* sense, or as a justificatory concept, rather than with legitimacy in the *de facto* sense, or as a claim about the citizens of a given state *believing*, rightly or wrongly, that their state is justified in enacting and enforcing laws (McMahon 1994, 26-7).

<sup>9</sup> Buchanan defines legitimacy as being "morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws" (Buchanan 2002, 689-90). As will become clear below, the sense in which a merely legitimate state can be said to make and apply laws is not the usual sense in which most people understand contemporary states to make and apply laws, nor does it accurately capture the understanding the state (or its agents) have of what is they do when they make and apply laws. It is for this reason that the focus of my stipulative definition of legitimacy focuses on being morally justified in the *enforcement* of laws.

Hohfeld identifies four different kinds of rights: claim-rights, liberty-rights, power-rights (or powers), and immunity-rights (or immunities) (Hohfeld 1919, for discussion see Wellman 1978; Jones 1994, 12-25). A has a claim right against B if and only if B has a duty to A. For example, I have a claim-right against all other persons that they not murder me, and all other persons have a correlative duty to refrain from doing so. An agent has a liberty-right to do X if and only if he does not have a duty to refrain from doing X. Liberty-rights are sometimes referred to as permissions because so long as an agent has no duty to refrain from doing X, he is permitted (though not required) to do X. Both claim-rights and liberty-rights refer to *actions*. My claim-right to not be murdered entails a restriction on the actions that others are permitted to do, and my liberty right to meet a friend for lunch entails that I am morally permitted or authorized to act in a certain manner. This contrasts with a power-right (or simply a power), which refers to an authorization to modify in some way the rights and duties incumbent upon one or more agents. Just as “a legal power is usually defined as the legal ability to change a legal relation” (Jones 1994, 22), so too a moral power-right involves the moral ability to change the rights and duties that characterize a moral relationship. So for example, the owner of a book has a power-right to sell or lend it, and should he lend the book to a friend on a promise to have the book returned within the week, he may choose to waive that privilege to its prompt return. Immunities consist in the absence of a power-right; A enjoys an immunity-right against B if and only if B lacks the power to modify the rights and duties A has.

Each type of Hohfeldian right has a logical correlative. Claim-rights correlate with duties, liberty-rights with no-rights (i.e. others having no right to my not doing the action I am at liberty to do), powers with liabilities, and immunities with disabilities. The duties that correlate with claim-rights may be either positive or negative; the former require some sort of action from those who have the duty, while the latter only require that those with the duty refrain from a certain kind of action. Importantly, commonly mentioned rights, such as a right to property or to free speech, are often composed of clusters of Hohfeldian rights. My property right in my bicycle, for example, involves a claim-right against others that they not use my bicycle without my permission, a power-right to grant or withhold this permission, a liberty-right to ride my bicycle in the park should I choose to do so, and an immunity from the Chinese government extinguishing these rights.

Time, now, to apply Hohfeld's typology to the distinction between legitimacy and authority. A legitimate state, I stipulated, is one that is justified in the use of coercion to enforce its judgments as to what morality requires (at least with respect to certain spheres or kinds of conduct). In Hohfeldian terms, a legitimate state has (1) a liberty-right to coercively enforce the law, in that it does not violate any one else's rights (be they claim-rights, liberty-rights, powers, or immunities) when it uses force, or the threat thereof, to compel or pressure people to act in certain ways, and (2) a negative claim-right against others that they not interfere with its doing so.<sup>10</sup> The latter right is especially important, for if the state simply had a liberty-right to enforce the law (or to try and enforce the law), this would not entail that it would be

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<sup>10</sup> In addition to the use of coercion, a legitimate state may also be at liberty to build roads, buildings, military bases, etc.

justified in objecting to any other agent's attempt to enforce his or her judgment as to what morality requires.<sup>11</sup> Modern states, however, claim an *exclusive* permission to coerce (or threaten to coerce) their subjects in order to ensure (or make quite likely) that they conduct themselves in certain ways. A liberty-right will be exclusive, however, only if it is protected, as Hart puts it, by certain claim-rights (Hart 1982, 171). In this case, the state's liberty-right to coercively enforce its directives is protected by a claim-right against others, including vigilante citizens, non-citizens, and other states, that they not interfere with the state's exercise of those actions it is at liberty to do. Morally speaking, they may not hinder a policeman in his imposition of the law on an individual (assuming that the methods he uses to enforce the law are within the bounds of the state's liberty-right), nor may they damage those things the state constructs.<sup>12</sup>

I have spoken thus far only of a legitimate state's liberty-right to enforce the law, or its understanding of morality's requirements, but what of its right to publicly announce this understanding, or in other words, to enact laws? While a legitimate state must surely be permitted to do so, it is crucial to understand exactly what it does when it enacts a law, as this is the key distinction between political legitimacy and political authority. When a merely legitimate state enacts a law, it attempts to inform those subject to it (i.e. those with respect to whom it has a liberty-right to use coercion to bring about certain kinds of conduct) of the state's future activities, so

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<sup>11</sup> For a nice illustration of this point, see Jones 1994, 18-19

<sup>12</sup> A common approach in the recent literature on state legitimacy is to argue that individuals have no right to the state's *not* coercively enforcing its own assessment of what morality requires, rather than by deriving a justification for the state's doing so via the citizenry granting it a liberty-right to do so (see Copp 1999; Buchanan 2002). Further arguments are then given to address issues such as why one group or state, rather than another, has a justified claim to the exclusive exercise of the liberty-right in question (see Waldron 1998, which draws on Nozick 1974).

that the subjects will have the information they need to avoid interfering with the state's enforcement of the law. However, the state's enactment of a law, its judgment that morality requires a certain action or inaction from those subject to it, does not itself provide the subjects with a reason to *comply* with the law. Rather, while in some cases non-interference with the state's enforcement of the law will simply amount to compliance with it, in other cases this may not be so. A driver who encounters a stop sign in the middle of the desert, with no other car for miles around, is unlikely to interfere with the state's enforcement of the law should he fail to stop. The question of the overlap between non-interference and compliance is a matter of some dispute (see Christiano 1999; Edmundson 1998), but it is important to notice the conceptual distinction between an agent's doing X because his doing X is the only option left after those actions that will violate the state's liberty-right are ruled out, and an agent's doing X because the state has a power-right to settle for its citizens what it is that they ought to do. Only in a state with a justified claim to political authority over its citizens will it be the case that agents have a duty to comply with the state's directives *because they are the state's directives*. For only a state with political authority is empowered (or has a power-right) to determine for its citizens the rights and duties they have.<sup>13</sup> In a merely legitimate state, a citizen's fulfillment of his duty of non-interference may at times require that he act in the manner he would act *if* he had a duty to comply with the state's directives, but he will not so act *because* he has such a duty.

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<sup>13</sup> Hart (1982) and Raz (1979, 18-19) also argue for an analysis of authority in terms of a normative power to change the reasons for action (or inaction) had by those subject to the authority.

This point is a subtle one, and so bears repeating. Suppose a state enacts a law that requires catalytic converters on all cars. Do I have a duty to modify my car accordingly? It depends on whether the state has a *power right* to enact laws (i.e. has political authority) or merely a *liberty-right* to do so (i.e. is merely legitimate). If it has a power-right to enact a law that requires all citizens to put catalytic converters on their cars, then it follows from the mere enactment of the law that I have a duty to do so. This is because how I modify my car is subject in certain respects to decisions made by the state – the state is empowered (or has the authority) to make these decisions, and I lack an immunity from the state’s authority as regards these decisions. But if the state is merely at liberty to enact laws and to enforce them, then it may broadcast its intention to punish those who do not put catalytic converters on their cars, and it may follow through on this intention, but it does not follow that the mere enactment of a law (i.e. the state’s saying “do X”) provides me with a reason to put a catalytic converter on my car. I may do so because I fear being punished by the state, or because I would prefer to have a catalytic converter on my car so long as I am assured that enough others will also do so, and the threat of state punishment creates this assurance. But in neither of these cases will I comply with the law simply because it is the law.<sup>14</sup>

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<sup>14</sup> There is another sense of authority in which a mechanic is an authority with respect to any modifications I make to my car, namely that my mechanic’s telling me that I ought to make some change C to my car is itself a reason for me make change C. However, the mechanic lacks moral authority (of which political authority is one species) over me, in that I have no moral duty to make change C because he tells me to do so. My mechanic has neither a claim-right nor a power-right against me with respect to the modifications I make to my car (assuming I have not granted either of these to him).

Raz has sought to defend the notion of authority illustrated by the mechanic’s authority as the only notion of authority, so that the state’s claim to authority is no different in kind from the mechanic’s claim to authority (Raz 1979, 1986). (In chapter six, I discuss Raz’s notion of authority and the conclusions that follow for the authority of the state in greater detail). Recently, however, a

The description of political authority in terms of a Hohfeldian power-right may strike some readers as mistaken. If subjects of a given state have a duty to obey that state's laws, then surely it must be the case that the state has a claim-right against them, for on the Hohfeldian analysis, only claim-rights correlate with duties. Moreover, many laws require some sort of action or forbearance from action on the part of those subject to them. But as stated earlier, only claim-rights and liberty-rights have to do with action or inaction, while powers and immunities refer to the normative capacity to alter the rights and duties that characterize (or structure) a particular relationship. Careful reflection, however, reveals that power-rights play a more fundamental role in an account of political authority than do claim-rights, for it is a state's power-rights that enable it to create and/or modify claim-rights. A state can be empowered to create new claim-rights, either for itself, or for its citizens, and it may also be empowered to serve as an agent or trustee for those it rules. In the latter case, though the state's exercise of a power-right is not the source of the citizenry's claim-rights, it exercises in their name or interests the power to modify the claim-rights in question and the duties correlative to them. In short, the duties (actions or refraining from actions) correlative to the claim-rights established by various laws need not be owed to the state. What subjects do owe the state, however, is recognition of its power-right, or authority, to determine the rights and duties that structure their relationships to one another, to the state, to non-citizens, and in some

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number of theorists have questioned whether this correctly captures the notion of authority involved in the state's claim to authority. Buchanan, for example, distinguishes between political authority (understood roughly as I define it) and authoritativeness, where X's being authoritative means that X's saying "do X" is a compelling reason (though not a morally obligatory one) to do X. (Buchanan 2002, 691-2). Scott Shapiro distinguishes two functions of authority: mediating between persons and reasons, as the mechanic does, and arbitrating between rival parties, as I shall argue the state does. For further elaboration of this distinction, and the suggestion that liberals have traditionally understood political authority in terms of arbitrating between rival parties, see Shapiro 2002, 431-434.

cases to animals, the environment, and legal entities such as corporations. There is a sense, then, in which a state with political authority has a claim to its subjects' obedience, even if in Hohfeldian terms the correlative to the state's authority is a liability, and not a duty.

There is some temptation, I think, to hold that the "laws" enacted by a merely legitimate state are not really laws at all, that laws are by definition directives issued by an agent with a moral power-right, or authority, over a group of people. We should distinguish, however, between questions concerning positive law, which are matters of social fact, and law's normative significance. I shall assume that we all have an intuitive understanding of what passes for a positive law, at least in Western liberal-democracies. My concern in this thesis is to demonstrate that the positive laws of at least some contemporary states (or states not very different from them) ought to be treated as directives issued by an agent empowered to settle for others what their rights and duties are, and not merely as attempts by the state to inform its subjects as to how it intends to exercise its liberty-right to coercively enforce certain types of conduct.<sup>15</sup>

Note, finally, that a state may lack both legitimacy and authority, as I have defined them here, and yet it may still be a good thing that it does some of the things that contemporary states do. As A. John Simmons puts the point,

Some illegitimate states may thus be justified by reference to the good that they do, which is just to say that they merit our support, and thus

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<sup>15</sup> Hart, for example, distinguishes between legal positivism as an answer to the question of what counts as a law (or what might be called descriptive positivism), and the question of whether there is any moral reason to obey a directive because it has the status of law. Confusingly, the term positivism is also sometimes used to describe the normative claim that officials should not (and should not need to) draw on moral considerations when interpreting (descriptively positive) laws. See Waldron 1999b, 166-168, for discussion.

we have moral reason to provide it. But saying that some states merit support is not at all the same as saying that they have a right to direct and coerce us, which we are bound to honor (Simmons 2001, 156).

It may seem odd to claim that a state can be justified by reference to the good that it does, presumably at least in part by enacting and enforcing law, if it lacks even a liberty-right to do so. But surely it is the case that a benevolent but unjustifiably paternalistic state does more good for its citizens than does a malevolent state, even if it lacks the liberty-right to act in many of the paternalistic ways that it does. We might say, then, that it is morally better that the paternalistic state should exist than that the malevolent one should do so, and thereby avoid the potential confusion invited by the term ‘justified’. Yet whatever term we use, it is crucial that we distinguish conceptually between a state that does good for (and by) its people, and one that has a liberty-right to (try and) do so. For it would beg the question to settle by definition that a state’s doing good entails that it has a liberty-right to so act. A voluntarist such as Simmons would object that this rules out by fiat a philosophical anarchist’s position like his own, one where in at least some cases where the state coerces its citizens to act in certain ways, the state’s right to do so can arise only as a result of an agent’s voluntarily granting it.<sup>16</sup> Surely we grant that in the case of a non-state actor, one agent’s coercing a second agent in a way that benefits the latter does not necessarily (or perhaps ever) entail that the first agent has a liberty-right to coerce the second. If so, then it is difficult to see why we would, or should, accept such a conclusion in the case of the state *simply as a matter of definition*. Whether

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<sup>16</sup> A voluntarist is someone who contends that the duty to obey the law arises only as a result of an agent’s freely and knowingly acquiring it. For further discussion, see section IV of this chapter.

such a conclusion follows as a theoretical conclusion is a different question, but one that must be settled by argumentation, rather than stipulation or assertion.<sup>17</sup>

#### IV

The careful analyses of philosophical anarchists have helped to identify five criteria that any successful account of political obligation must meet. (1) The state's exercise of its authority via the issuance of a directive must provide a moral reason for action; the state's directives must be authoritative, meaning that they provide (2) a content-independent and (3) preemptive reason for action; (4) the scope of the state's authority must be general and universal; and (5) a justification must be given for the particularity of political obligations.<sup>18</sup> Together these criteria make explicit what is involved in the idea that individuals have certain moral duties in virtue of

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<sup>17</sup> Matters are further complicated by the fact that Simmons lumps together under the heading of legitimacy what I have labeled legitimacy and political authority. Simmons is a voluntarist with respect to political obligations, and as a conceptual matter, it seems quite possible that an agent might consent to a state's having a liberty-right to enforce the law without consenting to the state's having a power-right to settle for him what it is that morality requires of him (at least in certain spheres of conduct). That is, it is possible to consent to mere legitimacy without consenting to political authority. As a *conceptual* matter, it may also be possible to consent to political authority without consenting to legitimacy. Raz, for example, suggests that the state's being able to effectively enforce its directives as a condition of its having political authority follows from a consideration of the justification for political authority, not from a conceptual analysis of authority itself (Raz 1979, 8-9; 1986, 56). Given his understanding of authority, Raz has a specific reason to make such a claim (see discussion in footnote 12, above). However, if we follow Shapiro in distinguishing between an authority as one who mediates between reasons and persons, as the mechanic does, and an authority as one who arbitrates between rival parties, as I shall argue the state does, then we may wish to conclude that effectively enforcing one's directives is conceptually necessary for having political authority.

<sup>18</sup> I assume throughout this dissertation that if an agent has a moral duty to obey the law, then he has a moral (as opposed to a prudential) reason to do that which the law would have him do. This is to assume one kind of internalism about reasons: the denial that an agent can be under an all-things-considered moral duty to  $\phi$  and yet fail to have a reason to  $\phi$ . This position should not be confused with another analysis of reasons often referred to as internalism, namely the claim that a consideration counts as a reason for an agent only insofar as he could come to be motivated by that reason given what Bernard Williams calls his subjective motivational set (see Williams 1981, 101-13, for discussion).

their status as citizens in some suitably specified state.<sup>19</sup> An explanation of why this is so, and exactly what these criteria consist in, is the purpose of this section.

Obviously, if there is to be a moral duty to obey the law, then the state's authority to settle for its subjects what they ought to do must provide citizens with a moral, and not simply prudential, reason to obey the state's directives. This is not to say that what motivates individuals in any or all cases where obedience to the law is at stake must be their belief that they have a moral duty to obey the state's directives. Rather, the claim is only that even in the absence of any prudential reasons to comply with the state's demands, the moral duty to acknowledge the state's authority over one provides a reason (though perhaps only a *prima facie* one) to obey the state's directives.

Political obligation, or at least the duty to obey the state's directives, follows from the state's justifiable claim to authority. The state exercises its authority to settle for its citizens the rights and duties that characterize their relationship to one another *qua* citizens, to non-resident non-citizens, etc., via the issuance of directives, and those subject to the state's authority must treat these directives as a special kind of reason for action (or inaction). Let us call these directives authoritative. The second and third criteria for a successful account of political obligation comprise an analysis of what it is for a directive to be authoritative, and what distinguishes such directives (commands or orders) from other kinds of reasons for action, or in what way authoritative directives provide a special kind of reason for action (or inaction). Joseph Raz argues that an authoritative directive is a content-independent and preemptive reason for action (or inaction), and I shall follow him here (Raz 1979, 3-

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<sup>19</sup> These five criteria are suggested by Green (1988).

33; 1986, 23-69).<sup>20</sup> Any account of political obligation that cannot demonstrate that the state's directives are content-independent and preemptive necessarily fails to show that the state has political authority, and so that its citizens owe it a duty of obedience.

A reason for action, such as some act X being required by law, is content-independent if and only if it is a reason to do X because someone has said "do X" with the intention that their having made such a statement count as a reason to do X.<sup>21</sup> A content-dependent reason for action, in contrast, is a reason for action insofar as it correctly encodes a feature of the world that is relevant to an agent's deliberation in a particular case. That it is raining outside is a content-dependent reason for action, whereas commands, orders, warnings, threats, requests, and advice are all examples of content-independent reasons for action. When a lifeguard warns me not to dive into the pool, for example, his warning functions as a content-independent reason for me to refrain from doing so because the warning itself is offered as a sufficient reason for me to not dive into the pool, apart from any other reasons there may be that count in favor or against such an action. Raz argues in the case of authority, and it seems right to extend this point to all content-independent reasons for action, that they count as reasons for action only because they reflect the

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<sup>20</sup> Raz describes his discussion as an analysis of authority, but I follow Buchanan in referring to it as an analysis of authoritativeness (a term Raz also uses at times). One reason to do so is to avoid potential confusions between an *analysis* of authority, or what it is for an agent's directives to be authoritative, and a *justification* for authority, or under what conditions a person has a compelling reason, or even a moral duty, to treat the directives issued by a particular agent as authoritative. Though I accept Raz's analysis of authority (or what I call authoritativeness), I offer an alternative justification to the one he defends for a suitably specified state's political authority. (To add to the confusion, a state's having political authority on the grounds I defend is consistent with it having authority on the grounds that Raz defends).

<sup>21</sup> The term 'content-independent' comes from Hart 1982. For discussion, see Green 1988, 29-56, Raz 1986, 35, and McMahon, 27-28.

action one ought to do on the balance of reasons. Thus the warning that I should not dive into the pool reflects, or as Raz puts it, depends on, an assessment of which action the balance of reasons favors (Raz 1986, 41). Content-independent reasons, however, are assessments by one agent regarding the action the balance of reasons favors for some other agent. The statement “you should not dive into the pool” is offered as another person’s assessment of what it would be rational for me to do, whereas the statement “the pool is very shallow” provides me with a content-dependent reason for action; the statement is a reason for action because of its content, in this case what it tells me about the world, and not because it is uttered by a certain person with the intention that his utterance be understood as a warning.

Like warnings, authoritative directives are content-independent reasons for action (or inaction). When A issues a command or order to B, he intends that his having commanded B to do X should have the consequence that B reasons that he ought to do X because A told him that he should do X. A’s saying “Do not do X” is B’s reason not to do X, and this is true even if A says “Do not do dive into the pool; it is shallow,” so long as A has authority over B. In the latter statement, A shares with B one of the content-dependent reasons on the basis of which A decided to command B not to dive into the pool, but for B, A’s having told him not to do so is by itself a sufficient reason for him not to do so. Likewise the subjects of a political entity with a justifiable claim to political authority have a moral reason to comply with that entity’s directives that does not depend on the content of those directives. In evaluating whether in virtue of one’s citizenship one is morally required to comply with a given law, one may consider whether the state has the moral authority

to demand one's compliance with laws regulating the type of action in question, but one may not act on a consideration of the moral status of the action required by law itself (Raz 1979, 24). Of course, the moral status of the action itself may also provide a moral reason to do what the law requires, as in the case of a law prohibiting murder, but this reason for action is distinct from the reason that one has to comply with the law because it is a directive issued by one's state.

The content-independence of a duty to obey the state's directives should be distinguished from claims regarding the scope of a state's justified moral authority. Some appeal to morality must be made in order to determine the areas of conduct in which a state may justifiably rule. Should a state attempt to exercise authority beyond the domain in which it is entitled (and perhaps required) to do so, there is no duty incumbent upon those it rules to obey the state's directives (though there may sometimes be prudential reasons to comply). Content-independence, then, does not require citizens of a state with political authority to ignore the content of particular laws, for the content of a given law may require conduct beyond that which the state is justified in demanding. Rather, all that content-independence requires is that within the scope of the state's authority, the issuance of a directive by the state provides an agent with a reason for action independent of the "nature and merits" of the action the state directs him to do (or not do) (Green 1988, 225).

In the previous paragraphs I have discussed the statement "Do not dive into the pool; it is shallow" as both a warning and as a command. What distinguishes the two cases is the way in which the statement functions in an agent's practical reasoning. When uttered as a warning, the statement in question leaves the person to

whom the warning is addressed free to act on his own assessment of which action the balance of reasons favors. That is, he is free to disregard the warning. When uttered as a command, however, the person to whom the statement is addressed is denied this freedom. While he may judge that the balance of reasons favors diving into the pool, he is barred from acting on this judgment. Raz labels the kind of reason that bars an agent from acting on his own assessment of what the balance of reasons requires a preemptive reason.

Preemptive reasons exclude acting on certain other kinds of reasons, and take the place of those reasons in an agent's deliberation. So for example, if I have authority over you and say "Do not dive into the pool; it is shallow," then the function my utterance serves is to exclude your acting on certain reasons, such as whether diving into the pool will refresh you, or a calculation of the likelihood that you will hurt yourself, and to replace those reasons with a content-independent reason for action, namely my commanding you to not dive into the pool. Note that the preemptive reason plays two roles here; it is a second-order reason not to act on certain first-order reasons (e.g. the pool looks refreshing), and it is a first-order reason to not do a specific action.<sup>22</sup> The first-order reasons preempted by the command are those the command reflects, or depends on; that is, the first-order reasons I considered (or more weakly, ought to have considered) in determining whether to command you to refrain from diving into the pool. Raz argues that it would be irrational to submit to or recognize an authority but to not treat its directives as barring one from appealing to the reasons the directive is meant to

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<sup>22</sup> Second-order reasons are reasons to act or not act on the basis of first-order reasons.

reflect or depend on in order to justify one's actions. To illustrate this point, he says of parties that have submitted their dispute to an arbitrator that they have

handed over to him the task of evaluating those reasons [relevant to the issue they dispute]. If they do not then deny them as possible bases for their own action they defeat the very point and purpose of the arbitration (Raz 1986, 42. See also Shapiro 2002, 404).

Note, however, that there may be first-order reasons that are relevant to your deliberation but that are not excluded by my command. If so, then you ought to include these first-order reasons, together with my command (which, recall, serves as a first-order reason for action as well as excluding certain other first-order reasons) in your deliberation as you seek to determine which course of action the balance of reasons favors (Raz 1979, 22).<sup>23</sup>

Of course, if I do not have authority over you (with respect to certain spheres of conduct), then my utterance will fail to be a preemptive reason for action (or inaction), even should it be content-independent. It seems clear, though, that if the duty to obey the state's directives is not preemptive, then the fact that a given action is required, forbidden, or permitted by law will not play the role in a moral agent's practical reasoning that it has usually been thought to play. The state's directives might still be taken as reasons for belief, evidence that citizens ought to do those actions the law describes if they wish to act morally, or as noted in the discussion of a merely legitimate state, as warnings regarding the kinds of conduct to which the state will respond coercively.<sup>24</sup> But in neither case would citizens be barred from

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<sup>23</sup> A number of legal theorists and philosophers have sought to challenge Raz's analysis of authoritative directives as preemptive reasons, and to suggest alternative analyses, but I shall not consider their arguments here. See Hurd 1999; see also Shapiro 2002 for a summary of some of these objections.

<sup>24</sup> For an argument against authoritative utterances as reasons for belief, see Raz 1986, 28-31.

acting on their own assessment of the balance of reasons. When the state issues a directive, however, it has usually been thought to be preemptive, and it is due to this feature of authoritative directives that those subject to a political authority may be said to surrender their judgment to it.<sup>25</sup>

The most important consequence of authoritative directives being preemptive reasons for action is that agents may on occasion find themselves acting contrary to what the balance of first-order reasons favors. Suppose that in the absence of a command to do X, the balance of reasons would favor an agent's not doing X. The existence of a command to do X does not change the balance of reasons, and so there is a sense in which an agent would be right in complaining that she ought not to do X. However, as a preemptive reason, authoritative directives forbid an agent from acting on her own assessment of what the balance of reasons requires, even if her assessment is correct. Whether she is rational to accept the authority, or more generally whether she ought to do so, depends on the justification for that authority, and is the subject of this dissertation. For now, I note only that if a justification for political obligation is to succeed, it will have to demonstrate that the directives issued by the state are content-independent and preemptive, or in other words, authoritative.<sup>26</sup>

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<sup>25</sup> McMahon speaks instead of a surrender of will (McMahon 1994, 30). On the one hand, this way of speaking may more clearly indicate that individuals subordinate to an authority retain the freedom to form their own beliefs about what the right action in a given situation is, though they lack the freedom to act on those beliefs. On the other hand, an agent who obeys an authority's command still wills his action (i.e. acts for a reason), albeit a reason other than his own assessment of what he ought to do.

<sup>26</sup> A state's issuing authoritative directives is consistent with an agent's reflecting upon the content of a particular law, judging on the basis of the content that the law does not apply in his particular case, and so choosing to act contrary to what the law requires. If the agent's judgment is correct, then his doing so will not be a violation of the law, since the law will simply not apply to his case. However, the state retains the right to judge whether that agent correctly assessed the applicability of the law in his particular case. See chapter 7, section 2, for further discussion of this point.

The fourth and fifth criteria for a successful account of political obligation, generality and universality, and particularity, have to do with the distinctive authority of the state as traditionally conceived, and its implication for political obligation. It is usually claimed, by modern states as well as most defenders of political obligation, that the duty to obey the state's directives must be a general and universal one. The duty is general if it applies to all of the directives issued by a state within the scope of its justifiable political authority. Generality appears to follow from the state's authoritative directives being content-independent; if the reason to comply with the directives is that they were issued by a state with authority over one, then it follows that one has a duty to obey all the directives issued by that state, within the scope of its authority (Green 1988, 229). Political obligation must also be universal, in the sense that it binds all those subject to the state's authority, and does so equally in that the reasons excluded by an authoritative directive for one citizen in a certain type of situation are the same reasons excluded by the directive for all other citizens in the same type of situation (and similarly for non-excluded reasons).<sup>27</sup> While some philosophical anarchists, such as Simmons, argue that most citizens of modern states never have duties in virtue of the state's authority, others, such as Raz, argue that while some citizens, some of the time, have such duties, none have them with respect to every law, in every case to which that law claims to apply. It may be that the requirement of universality can be weakened slightly, so that any account that shows

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<sup>27</sup> Christopher McMahon suggests that the strength of a given authority can be measured in terms of its robustness and its reach. An authority's robustness is "a function of the variety of situations in which there would be sufficient reason for B to comply with any directives issued by A within the scope of its implied authority," while its reach is "a function of the percentage of the members of the group to whom a directive within the scope of A's implied authority is addressed on that occasion who have sufficient reason to comply with it" (McMahon 1994, 85-6). In McMahon's terms, then, the state's authority over its citizens is fully robust and its reach total.

most people who enjoy the legal status of citizenship in a state to also have a moral duty (or duties) of citizenship as well will count as a successful defense of political obligation.<sup>28</sup> But any account that seriously weakens this requirement, such as one that requires election to a state office, will fail to provide a satisfactory account of political obligation.

The fifth criterion that any moral duty of citizenship must meet is what Simmons labels the requirement of particularity (Simmons 1979, 31-35). To be a citizen is to be a citizen of a particular state, and so a successful account of political obligation will need to explain why an individual must acknowledge the authority of his or her particular state, and not just any or all just states.<sup>29</sup> This entails that the property in virtue of which an individual owes a duty of obedience to a given state cannot be a property that is shared with other states. Otherwise there will be no justification for why an individual owes a duty of obedience to one of these states, but not to the others. The claim here is not that there can be no duty that is owed to more than one state; the duty to refrain from deliberately or negligently undermining a just state, if it exists, is such a duty. However, such a duty will not bind agents in virtue of their membership in any particular state, and this is exactly what a political obligation must do if it is to be one that agents have in virtue of their citizenship.

There is a second kind of particularity problem that Simmons does not discuss, but that is of special concern for those like myself who argue for political

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<sup>28</sup> Klosko advances such a claim; see Klosko 1992.

<sup>29</sup> In certain situations, such as those of tourists in a foreign country, an individual can come to be under the authority of a state in which she is not a citizen with respect to particular types of conduct. These duties are not had in virtue of an agent's citizenship, however, and it is with duties of this type that I am concerned here. Still, it is worth noting that as the example of foreign tourists suggests, it is possible that different individuals may come to have a duty of obedience to a given state in different ways, and that the scope of the state's authority may vary depending on how a given individual comes to be subject to it.

obligation by appeal to duties grounded in moral agents' status as such. This is the problem of explaining why the state of which an agent is a member ought to operate with the particular jurisdictional boundaries for membership (usually territorial ones) that it does. Whereas Simmons complains that natural duty accounts cannot justify an agent having obligations to the state in which he enjoys the legal status of citizen simply because he was born there (or to parents who enjoy that legal status), the cosmopolitan asks why we should grant the historically contingent and often morally arbitrary legal boundaries between states a place in our evaluation of the moral duties incumbent upon us.

In sum, a successful account of political obligation must demonstrate that (1) citizens have a *moral* reason to obey the state's directives; that the duty to obey the state's directives provides (2) a content-independent and (3) preemptive reason for action, or in other words that the state's directives are authoritative; (4) that the duty of obedience is general and universal; and finally (5) that the duty is owed to the particular state of which an agent is a citizen (and only to that state).

## V

Despite the arguments of philosophical anarchists such as Simmons, Smith, Raz, Green, and Morris, many political philosophers, political scientists, and legal theorists continue to attempt a defense of political obligation, including at least a general duty to obey the state's directives. Therefore, before I proceed to elaborate and defend my own account of political obligation, I propose to criticize some other recent attempts to defend the idea that certain moral requirements bind agents in virtue of their citizenship.

To better highlight the crucial differences that distinguish different approaches to the justification of the state's claim to obedience, I classify them in the following typology. Particular views are grouped together on the basis of two features: first, an account of how citizens come to have duties of citizenship, and second, the kind of reasons or values to which the account appeals.

To take the first of these two features, citizens can come to be under moral requirements to act in certain ways either by acquiring obligations to do so, or in virtue of a natural duty. An agent can acquire an obligation either by the performance of certain kinds of actions, or if it is the case that he would perform a certain kind of action if the circumstances, but not the agent's preferences (or ranking of reasons for action), were different.<sup>30</sup> Note, too, that successfully acquiring an obligation will usually require uptake on the part of the person to whom the action is addressed (i.e. that others understand his intentions in performing that act). Whereas acquired obligations are the result of an agent's *doing* something (including forming a certain preference ordering), natural duties are the result of an agent's *being* a certain way, or the member of a class defined in terms of possession of a particular feature. Among the features in virtue of which it has been suggested that agents have natural duties are: being a rational agent, having a conception of the good (life), being subject to God's commands, being a parent, being the occupier of an institutional role, or being a member of a particular community. In the following discussion I shall use the terms 'obligation' and 'duty' interchangeably, and use the

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<sup>30</sup> An agent who meets the later condition can be said to will the existence of a certain state of affairs, or to endorse its existence, even though his doing so is not necessary for that state of affairs to obtain. I discuss this point at greater length in chapter 2, section IV.

adjectives ‘acquired’ and ‘natural’ only when the question of how an agent comes to have a moral requirement is relevant.<sup>31</sup>

Turning now to the second feature in terms of which I construct my typology, accounts of the moral requirements of citizenship can appeal to either agent-relative reasons and/or values, or to agent-neutral reasons and/or values. Nagel defines an agent-relative reason or value as any one that, in its general form, includes an essential reference to that person for whom it is a reason or a value (Nagel 1991, 40; see also Parfit 1984, 143). An agent-neutral reason or value, on the other hand, includes no such reference. Put another way, agent-neutral reasons are necessarily reasons for everyone (every agent capable of acting for reasons), while agent-relative reasons are reasons for someone, but not necessarily for everyone. So for example, the disvalue of pain provides all rational agents with a (defeasible) agent-neutral reason to minimize painful experiences. The value of my friendship with my wife, in contrast, provides me with an agent-relative reason to promote her happiness; I should do so because she is *my* wife, and promoting her happiness is constitutive of what it is to be her friend. Of course, insofar as the existence of friendships contribute to the overall value of a given state of affairs (a claim that I am not certain even makes sense), I may also have an agent-neutral reason to promote my wife’s happiness, and thereby promote the existence of friendships.<sup>32</sup>

The chart below groups together various attempts to justify the state’s claim to authority over its citizens, and hence the moral requirements of citizenship,

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<sup>31</sup> The interchangeable use of ‘duty’ and ‘obligation’ now appears to be common practice, though both Hart and Rawls restrict the term ‘obligation’ to acquired obligations, and ‘duty’ to natural duties.

<sup>32</sup> It may be, however, that I could not successfully achieve the end of promoting the existence of friendships if I acted (solely) for the purpose of doing so.

according to how agents come to be under these requirements, and the kind of value or reasons involved in them. An asterisk next to a view indicates that I shall not discuss that view in any detail in this dissertation.

**Table 1: Typology of proposed justifications for political obligation**

	Acquired Obligations	Natural Duties
Agent-Relative Reasons and Values	<u>Voluntarist Accounts</u> Consent Theories Principle of Fair Play	<u>Relational Duty Accounts</u> Civic Friendship Liberal Nationalism Communitarian Natural Law* Ethic of Care*
Agent-Neutral Reasons and Values		Moral Contractualism Moral Intuitionism (or Rossian Pluralism)*

Before I turn to an outline of the arguments to come, I need to comment on two absences from the above typology.

The first of these is the absence of any theories in the acquired obligation agent-neutral box. The explanation for it follows directly from the understanding of acquired obligations and agent-neutrality I set out above. An agent comes to have an acquired obligation only through the exercise of his or her agency. It follows that all acquired obligations will include an essential reference to the person for whom the obligation is a reason for action. For example, if I promise to bring you a copy of *Theory of Justice*, then the reason I have to bring you the book is that *I* promised to do so. It is true that there is also an agent-neutral moral reason (or principle) involved here, namely the principle that everyone has a prima facie duty to keep his or her promises. But it is not this principle that provides me with a reason to bring you the book; rather, it is my having made a promise to you to bring you the book

that is my reason for doing so. After all, I might accept the principle that everyone has a prima facie duty to keep his or her promises, and yet if I have not made anyone any promises, that principle will not provide me with a reason to do anything.

Even if we wish to say that the agent-neutral principle regarding promise keeping is a necessary component of a full statement of the reason I have to bring you the book, it is also the case that my having promised to bring you the book is a necessary component of such a statement. Remember, however, that an agent-neutral reason for action is one that does not include an essential reference to the person for whom it is a reason. Since any full statement of an acquired obligation as a reason for action will essentially include a reference to the particular person who, via some particular action, acquired the obligation in question, acquired obligation accounts of the moral requirements of citizenship will necessarily provide agent-relative reasons for action. This will still be the case even if I acquire the (qualitatively) same obligation to each and every person, or if I make a promise to one person to do something for all human beings. In both cases my reason for action would still include an essential reference to my act of promising, and so be an agent-relative reason for action.

Also absent from the above typology are any Consequentialist arguments for political obligation. These arguments include not only Utilitarian views, but also Consequentialist theories such as Amartya Sen's, in which the consequences include respect for rights as well as concern for well-being (Sen 1982). I leave out a discussion of such views because, by their very nature, they will not provide the kind of reason necessary for a duty to obey the state's directives. The only duty a

Consequentialist theory can generate is a duty to maximize the specified consequences, and it is surely not the case that this duty will always coincide with a general duty to obey the state's directives. This is so even for Sen's theory, at least so long as the state's right to rule is not among the rights for which moral agents should seek to maximize respect. Even if the actions required by a duty to maximize consequences C and the duty to obey the state's directives overlapped perfectly, it would still not be the case that moral agents ought to obey the state's directives because the state has a claim to their obedience. Yet it is just such a claim that is necessary in order to establish that individuals have a moral duty in virtue of their citizenship. This last difficulty confronts not only act-Consequentialists, but also rule ones as well. The reason to obey the law is not because it is the law, but rather because acting in accordance with the rule "always obey the law" is the best way to maximize the desired consequences (happiness, respect for rights, etc.).

Of course, some forms of self-effacing Consequentialism might be able to justify agents confronting the world *as if* they had a general duty to obey the state's directives.<sup>33</sup> Alternatively, Consequentialism might justify the development of certain attitudes, such as patriotism, that might lead individuals to act as if they had a general duty to obey the state's directives. But neither of these accounts would establish that (at least some) moral agents actually have such a duty. Still, there are many sophisticated Consequentialist moral theories, and perhaps some of them could avoid the initial difficulties that any such theory must face in an attempt to defend obligations of citizenship. But since to my knowledge no Consequentialist has

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<sup>33</sup> A self-effacing Consequentialist theory is one in which agents do best in Consequentialist terms by not employing Consequentialist reasoning. For discussion of self-effacing Consequentialist theories, see Parfit 1984; Hare 1981.

recently attempted to do so, I shall not concern myself with such arguments in the discussion that follows.<sup>34</sup>

## VI

The discussion of political obligation contained herein begins in Part I with a critical evaluation of both acquired obligation agent-relative and natural duty agent-relative accounts of political obligation. I argue in chapter two that while various acquired obligation agent-relative accounts can in principle justify the claim that in virtue of their citizenship, members of at least some modern states (or states not radically different from them) have a general obligation to obey the state's directives, most citizens of these states fail to meet the conditions necessary to acquire such an obligation. I touch briefly on consent theories of political obligation, before focusing for the remainder of the chapter on fair-play accounts, and in particular, the arguments George Klosko has recently advanced in defense of one such account.

In chapter three I consider a number of natural duty agent-relative justifications for a general duty to obey the state's directives. I label such justifications relational duty accounts of political obligation because they all assert that an agent has certain duties simply in virtue of being a participant in a specific kind of relationship, and that it is some intrinsic feature of the relationship itself (and not, say, the contribution the relationship makes to maximizing utility) that is the source of the duties agents have in virtue of their participation in it. The duty does not depend on one's having voluntarily become a participant in the relationship, so the duty is a natural one, but it is also agent-relative, in that being a participant in a

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<sup>34</sup> For discussion of political obligation from a Consequentialist perspective, see Sartorius 1975; Hare 1976, and Goodin 1995.

relationship is a matter of one's particular life-history, and not one's status as a moral agent.

After distinguishing between two types of relational duty accounts of political obligation, identity accounts and non-instrumental value accounts, I argue that neither one provides a sound basis for political obligation in a modern state. The identity account fails to demonstrate that it follows from either identity or identification alone that one has *any* duties, including duties of citizenship. The non-instrumental value account appears more promising. However, I contend that its defenders do not show that it is the *value* of the relationship that justifies the duties constitutive of it, rather than both the non-instrumental value and the duties having some other source, such as the motive of care or respect, or the duty to treat all moral agents in certain ways. In addition, while participation in various relationships, including that of citizenship in the state, may contribute non-instrumentally to the value and meaning of a person's life, there is no reason to think that a life in which citizenship does not make such a contribution will fail to be a worthwhile, or a fully human, one. Thus agents will not necessarily act wrongly or irrationally if they fail to treat their relationship to their fellow citizens as non-instrumentally valuable. For such agents, however, the non-instrumental value relational duty account does not entail that they have any political obligations, including a duty to obey the state's directives.

Part II of the dissertation consists of a defense of a natural duty agent-neutral account of political obligation constructed on the basis of the version of Moral Contractualism defended by Thomas Scanlon. Chapter four begins accordingly with

a brief description of those parts of Scanlon's moral theory, which I label Reasonable Rejection Moral Contractualism (RRMC), that are relevant to the topic under consideration here.<sup>35</sup> If correct, RRMC entails that all moral agents have certain natural duties to treat all other moral agents in ways that the latter could not reasonably reject. Or, viewed instead from the perspective of what an agent is owed by others, there are certain ways of being treated that all moral agents can demand from all other moral agents, on the grounds that it would be reasonable to reject not being treated in these ways. I refer to these ways of being treated as an agent's basic moral rights. An agent's natural duties logically correlate to other agents' basic moral rights.

In order to fulfill these duties, and so to respect others' rights, it will sometimes be necessary for moral agents to coordinate their actions, and/or to cooperate with one another. Many modern states, I suggest, consist in part of institutions designed to achieve the coordination and/or cooperation necessary for securing basic moral rights (or, if not necessary, then at least more conducive to the attainment of such a state of affairs than the likely alternatives). For convenience, I refer to such institutions as morally necessary C-institutions. Given that all moral agents have a natural duty to see to it that all other moral agents enjoy their basic moral rights, and that this will sometimes require the operation of C-institutions, it follows that all moral agents have a natural duty to see to it that existing C-institutions continue to operate, to improve their operation when it is sub-optimal,

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<sup>35</sup> Thomas Nagel also defends an account of morality that assigns a central place to the notion of reasonable rejection, though he sometimes draws significantly different conclusions from those arrived at by Scanlon (see Nagel 1991). Other theorists who assign reasonableness a prominent place in their arguments include Rawls and Joshua Cohen. For the most part, however, I shall draw on Scanlon's arguments.

and to create them when they do not yet exist.<sup>36</sup> Though this duty may appear to be quite demanding, I argue that its defense on the basis of RRMC places limits on what it requires.

One problem that arises immediately, however, is that it does not follow from a duty to see to it that C-institutions continue to operate, etc. that any particular individual has a natural duty to participate in them. In many cases, the optimal operation of a morally necessary C-institution requires only general, but not universal, participation. I argue on the basis of RRMC for a natural duty of fairness that bridges the gap between an individual's duty to see to it that morally necessary C-institutions operate, and his having a duty to participate in them. Though the argument is a familiar one, I emphasize an understanding of it in terms of authority, or the question of who is morally empowered to determine how the benefits and burdens involved in the operation of morally necessary C-institutions are to be distributed. After a discussion of the differences between fair play and a natural duty of fairness, I briefly defend the claim that at least some modern states consist partly of morally necessary C-institutions. Chapter four concludes with the identification of a further problem that needs to be addressed if an account of political obligation on the basis of RRMC is to succeed. The problem is that even if the arguments in chapter four provide a reason to participate in morally necessary C-institutions, that reason is one individuals have in virtue of their status as moral agents, not as citizens of a particular state. Political obligations, however, are by definition those that bind an agent in virtue of the latter status. Some further argument must be made, then, to

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<sup>36</sup> This duty comes with the important caveat that when collective action is required to fulfill the duty and not enough others will cooperate or coordinate, the duty does not apply. For a recent discussion of this caveat, see Edmundson 2002.

defend the existence of political obligation, and in particular, a duty to obey the state's directives.

Chapters five and six contain just such an argument. The starting point for it is the likelihood that even well-intentioned agents, agents who accept RRMC and the arguments set forth in chapter four, will sometimes disagree over the design of morally necessary C-institutions. Their disputes will likely center on two areas: the best means for securing a state of affairs in which respect for basic moral rights is maximized, and the exact specification of those rights, or what exactly respect for basic moral rights involves. If there is some mechanism for resolving these disputes that will result in a state of affairs characterized by fewer rights violations than will occur in the absence of a resolution, then it is not reasonable to reject the implementation or operation of that mechanism. A state that enacts and effectively enforces laws that specify the design of morally necessary C-institutions, and clarify the ends to be pursued via those institutions (i.e. the nature of basic moral rights), is one such mechanism.

Even if the operation of a state results in fewer rights violations than would occur in its absence, this is not enough to establish that such a state has moral authority over its subjects, or that in virtue of their citizenship, citizens of such a state have a duty to obey the law. For there are likely many different forms a state may take that will meet this minimal condition, but that could still be reasonably rejected in favor of some alternative, non-utopian, design. In order for a state to have moral authority over its citizens, it is not sufficient that those subject to it not be able to reasonably reject its enforcement of certain standards of conduct in light of

the feasible alternatives. It must also be the case that it is not reasonable for subjects to reject the state's claim to settle for them, within certain limits, what it is that they are required, forbidden, or permitted to do. The only state that can meet such a requirement, I argue, is a liberal-democratic one.

A liberal state, as I shall understand it here, is one that restricts its pursuit of the ends that justify its existence to those means that are consistent with respect for the individual rights of its subjects. Rights indicate the limits of the compromises it is reasonable for any agent, including the state, to demand of people regarding their freedom to act on the reasons that give value and meaning to their lives. Therefore suitably motivated agents could reasonably reject the authority of any state that did not eschew as a matter of principle the deliberate or negligent violation of individual rights. This restriction extends even to cases where it is plausible to believe that by violating the rights of a few, the state could prevent rights violations for the many. Such a stance may strike some as counter-intuitive, but the explication of a Contractualist account of rights shows it to be consistent with many people's intuitions in cases where the number of right violations is sometimes thought to play a key role in moral deliberation. Such an account also provides attractive solutions to the potential difficulties for a theory of rights posed by apparent conflicts between rights, as well as the wrong involved in the imposition of certain types and degrees of risk.

In addition to being liberal, I argue in chapter six that a state must include a democratic element if it is to enjoy political authority. This democratic element must consist at least in action in accordance with the principle "one person, one vote" with

respect to certain decisions reached by the state (which decisions I leave open for the moment). I defend the necessity of democracy for political authority in two ways. First, I argue that there will not be any moral agent or group of moral agents whose claim to moral expertise cannot be reasonably rejected (at least with respect to some issues). If so, then it is reasonable to reject any mechanism for settling disputes over the design of morally necessary C-institutions that gives any individual a greater opportunity to implement the design he believes to be morally correct than that enjoyed by others who ought to participate in that C-institution. I then argue that among the decision-making mechanisms that meet this condition, democracy is preferable to drawing lots.

The second argument I offer to buttress the assertion that a justifiable claim to political authority requires a state to make at least some of its decisions democratically is that such a conclusion follows from the moral necessity of respect for individuals' exercise of their capacity for moral judgment. Moral agents enjoy their status as such in virtue of two qualities – the capacity to lead a worthwhile way of life and the capacity to act only on principles that suitably motivated moral agents could not reasonably reject.<sup>37</sup> Whereas respect for the former capacity is in principle consistent with non-democratic governance, so long as the state secures basic moral rights, respect for the latter requires that each individual have the opportunity to exercise a direct voice (and not merely indirect influence) in at least some of the decisions regarding what morality requires of him (and others). Of course, conflicts between respect for the two capacities that make a creature a moral agent may well

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<sup>37</sup> This claim is similar to Rawls's analysis of moral personhood in terms of a capacity for a sense of justice and a capacity for a conception of the good (Rawls 1993, 19).

arise, and so it may be that at times the state ought to employ a non-democratic decision-procedure if it substantially improves respect for basic moral rights, while at other times it will be necessary to permit a greater chance of rights violations as an outcome of a democratic procedure that recognizes each individual's exercise of his or her capacity for moral judgment.

A significant difficulty remains, however. For the problem that leads to the need for a democratic decision-procedure in the first place, namely disagreements over institutional design, arises again with respect to the design of the democratic decision-procedures themselves. For example, even well-intentioned moral agents may disagree as to how direct or representative the democratic institutions of the state ought to be; that is, what design for these institutions it would not be reasonable to reject. Appeal to some further decision-procedure is clearly no help, as the problem will simply recur there as well. Instead, I suggest that so long as the design of the decision-procedure is (1) provisional, in the sense that there exists a process for changing it that is both democratic and liberal; (2) the process is recognized as a component of the existing decision-procedure; and (3) the process for changing the design of the decision-procedure can be used to revise itself, then those whose form of participation in morally necessary C-institutions is decided by such a procedure cannot reasonably reject its authority over them (assuming the other necessary conditions are met).

In chapter seven I argue that the Moral Contractualist account of political obligation developed in chapters four through six meets the criteria for success described in section III of this chapter. I focus in particular on the strategies

available to a defender of a Moral Contractualist account to address cases in which an agent believes, and has good reason to believe, that what the state requires him to do is not what morality requires him to do. These include a review of the wrong an agent commits when he violates the law because he judges it to be morally inaccurate, a nuanced account of an agent's duty with respect to over-inclusive laws, and a discussion of civil disobedience and conscientious objection. The chapter concludes with a discussion of particularity. A Moral Contractualist account meets Simmons's version of the particularity requirement easily enough, but the cosmopolitan's concern with particularity poses a more difficult challenge. I concede that the argument I offer in defense of political obligation likely entails a moral imperative (or at least a prima facie moral reason) to modify existing jurisdictional boundaries, but I argue that even within its existing boundaries an effective liberal-democratic state (as I describe it) enjoys the moral authority to settle for its citizens the form their participation in morally necessary C-institutions must take, and that therefore citizens of such states have a duty to participate in the manner specified by its laws.

## Chapter 2: Acquired obligation (or voluntarist) accounts of political obligation

Throughout the Middle Ages, the dominant theoretical justification for political and moral authority involved an appeal to God's will. One of the primary causes for the rejection of this model was the development of an increasingly sophisticated commercial society, and so it is no coincidence that those who wished to reject the divine right account of political authority offered the paradigmatically market norm of a contract in its place. God, these social contract theorists claimed, does not grant the state political authority; rather, the citizens (or subjects) voluntarily grant the state authority over them, and so acquire a duty of obedience to it.

In this chapter I examine two different voluntarist, or acquired obligation, approaches to political obligation. I begin in section II with a description and refutation of the view that citizens come to have a duty of obedience to the state by freely and knowingly consenting to acquire such a duty. To my knowledge, no contemporary theorist defends political obligation on the basis of either express or tacit consent, and therefore my discussion of such views is rather brief. Instead, I devote most of this chapter to a consideration of a voluntarist account that does enjoy significant support, namely one that grounds the duties of citizenship in the principle of fair play. In section III, I describe the principle of fair play and discuss a few of the reasons why the principle has appealed to many as a basis for political obligations. In addition, as part of an explanation for why we ought to accept the principle of fair play, I give an account of what makes violations of that principle wrong. Section IV consists in a consideration of the objections to fair play raised by Robert Nozick, while in section V I evaluate A. John Simmons's attempt to revise the principle so that it

avoids Nozick's criticisms. I believe that Simmons revisions are successful, but that as he points out, the revised principle of fair play is unlikely to show that most citizens of a modern state have political obligations. In section VI I consider a second proposed revision to the principle of fair play offered by George Klosko. After spending some time clarifying the work done by different elements of Klosko's account of fair play, I proceed in section VII to criticize the view on two grounds. First, Klosko's version of fair play is not a voluntarist, or acquired obligation, account of political obligation, and second, even when understood in non-voluntarist terms, Klosko's fair play argument still does not show that citizens have an obligation to obey the law that correlates to the state's exercise of moral authority over them.

## II

Though almost all contemporary political philosophers and theorists agree that consent theory fails to provide a successful account of political obligation for most citizens of a modern state, the venerable history of consent accounts warrants a brief review of the reasons for this widespread conclusion. I begin with an examination of the nature of consent, the conditions necessary for an act to count as consent, and the difference between express (or explicit) consent and tacit (or implicit) consent. In a modern state it will often be the case that few, if any, of the conditions necessary for citizens to consent to the authority of the state will obtain, at least for a majority of the citizenry. Furthermore, the acquisition of political obligations via an act of consent depends on the existence of some entity that has the authority to settle disputes over what counts as consent. Consent alone, then, will not provide a justification for the state's authority.

To consent to someone's doing X is to authorize that person to do X. Consent is a kind of speech-act; in saying "I consent to your doing X," I not only perform the locutionary act of making sounds, forming a grammatical sentence, and saying something meaningful, I also perform the illocutionary act of authorizing you to do X (Austin 1962). The normative structure of our relationship is thus changed by my act of consent, in that my authorization grants you a right, and imposes on me a correlative duty (or duties). Importantly, my act of consent may authorize you to do some action, or in Hohfeldian terms, grant you a liberty-right to do X, and/or I may authorize you to determine what it is that I ought to do, that is, grant you a Hohfeldian power-right over me. For example, if I consent to your leaving class early, then I grant you a liberty-right (or permission) to do so, and I acquire a correlative duty not to interfere with your exit. If I consent to the class's determining whether the final exam will be taken in class or at home, then I consent to the class's having the power to settle for me the kind of exam that I will give. Consequently I have a duty to comply with the class's decision as to the form of the exam (and probably a duty to refrain from interfering with the class's exercise of their power-right). Our main concern here is with the states having a power-right (or set of power-rights) over those within its jurisdiction. What is at issue is whether the claim that modern states have authority, or a power-right, over their subjects can be justified by appeal to the notion of consent.

The moral bindingness of consent depends on their being some further moral principle that entails a duty to fulfill those duties that one acquires by an act of consent. In order to avoid an infinite regress, that further moral principle cannot be

one that is voluntarily incurred. What exactly that further principle is need not detain us here. Note, too, that one cannot acquire a duty to do *anything*; consenting to join with a group of criminals who intend to murder someone cannot generate a duty to commit murder.<sup>1</sup>

Whether a particular utterance or action (or silence or inaction) counts as an act of consent is a matter of convention, but the conditions necessary for a conventional act to be a genuine case of consent, and hence to generate a duty, appear to be universal.<sup>2</sup> First, an agent must know to what he consents. The specification of this requirement is likely to be vague, and often a matter of convention, but an intuitive grasp of the notion will suffice (Horton 1992, 28). An agent who fails to draw an obvious inference as to what her consenting to another agent's doing X entails may not appeal to her ignorance to claim that she did not really consent, while a person who is misled about what she consents to may justifiably advance such a claim. Second, an agent must intend her action or utterance to be an instance of consent; that is, she must deliberately perform that act for the purpose of authorizing another to do X (and so acquiring some obligation to that person) (Simmons 1979, 64; Horton 1992, 28; Flathman 1972, 220; Morris 1998, 157). The reason for the performance of a given conventional (speech)-act is the acquisition of an obligation, but the reason for the acquisition of the obligation need not be, and usually is not, merely coming to have the obligation, but rather some further end the attainment of which is facilitated by the

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<sup>1</sup> As Simmons points out, it is the immorality of the act in question that limits the obligations one can acquire, and not the vicious character of the persons to whom one consents to join in the undertaking (Simmons 1979, 78). I return to this point in the following chapter.

<sup>2</sup> This is not to deny that there will be disagreements over whether a particular instance of consent meets a universal condition. For example, two parties, or two societies, may disagree over whether a person knew what he was consenting to, or more often, whether he could reasonably have been expected to know the consequences of his consenting.

acquisition of the obligation. So for example, my desire to have a clean car may motivate me to consent to your borrowing it on the condition that you wash it and return it to me by a specified time. The reason I consent to your borrowing my car is my desire to have my car washed without having to do it myself, but my reason for performing some conventional (speech)-act that indicates my consent is that by doing so I should acquire an obligation to let you borrow my car (and, as I state below, that you should recognize my (speech)-act as having this consequence). The requirement that consensual obligations be acquired deliberately entails that an agent who performs an act that conventionally signifies consent to others doing X, but who non-culpably fails to recognize that her action has this conventional meaning, does not in fact authorize others to do X (Simmons 1979, 70). Moreover, in most cases agents may “cancel” the conventional meaning of an action or utterance that typically signifies consent by clearly indicating that they do not intend for this particular performance to have that implication.<sup>3</sup> Third, an agent must successfully communicate his intention to authorize another to do X to the agent in question. Doing so requires both that the consenting agent make reasonably clear that he is consenting, and to what exactly he is consenting, as well as an understanding of these actions (or uptake) on the part of the agent to whom consent is being given (Simmons 1979, 65; Horton 1992, 29). Fourth, the act of consent must be voluntary, meaning that it must be non-coerced and against a background of reasonable options. Options will be reasonable if the cost to an agent of an option other than that of consent is not too high; it may also be necessary for an

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<sup>3</sup> Exceptions to this rule assume the existence of an authority that settles when an agent may “cancel” the conventional implication of an act or utterance. For example, the state may deny those subject to its authority the right to cancel the conventional meaning of marriage vows uttered in a legal or religious setting.

agent to have more than two options. As these vague descriptions indicate, voluntariness is like knowledge in that while there will be some cases that are clearly voluntary or non-voluntary, there are also likely to be some where agents may reasonably disagree as to whether the condition is met. A fifth, and final, condition on an action qualifying as consent is that it be a personal performance, or else performed by an agent (in the legal sense) or trustee, i.e. a person who is authorized to act for another. In the absence of such authorization, no one can consent for another.

Several factors account for the attraction of consent accounts of political obligation. First and foremost is the clear compatibility between such an account and a commitment to man's (and woman's) natural freedom or liberty. A commitment to the priority of individual liberty over well-being serves as an important normative barrier to the state's paternalistic interference in the lives of its citizens, and coheres well with the implication of consent theory that the permissibility of state actions that limit liberty must be justified to those whose liberty is at stake. Second, since an agent who consents to the state's rule can be said to authorize the state's actions, consent theory renders political obligation consistent with the state's respect for its citizens' autonomy, or self-determination.<sup>4</sup> Third, consent theory has the additional benefit of "rendering political obligations intelligible in terms which, if not transparent to the understanding, would at least identify it as belonging to that familiar category of moral obligations of which promises are paradigmatic" (Horton 1992, 26; see also Simmons 1979, 70). Fourth, a consent account appears to easily satisfy the five criteria for a successful account of political obligation identified in the previous chapter. Consent

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<sup>4</sup> This last point is more contentious than it may seem, as becomes clear in the case of a person's voluntarily enslaving himself. For discussion of this point, see Simmons on inalienable rights (Simmons 1979, 66-67), and May 1998.

to another agent's having a power-right over one entails that one ought to treat that agent's directives (within the scope of his power-right to issue them) as content-independent and preemptive. Moreover, consent provides a clear explanation for the particularity of political obligations; a citizen owes a duty of obedience to his particular state because he has consented to obey the laws of that state, and not any other.<sup>5</sup> To these four reasons may be added the historical pedigree of consent theory, since its defense by many of the greatest philosophers in the Western tradition surely contributes to its initial appeal.

For all the attractiveness of consent theory, however, it is quite apparent that most citizens of modern states have never expressly consented to the authority of those states. Even immigrants who recite oaths of allegiance upon becoming citizens of a state may fail to meet the knowledge and/or voluntariness conditions, while those who simply find themselves citizens of a given state through an accident of birth rarely even have the opportunity to consent to the authority of the state that rules them. Most theorists have therefore sought to identify as a form of *tacit* consent to the state's authority some activity undertaken by most or all citizens of modern states. For example, Locke identifies residence (or continued residence beyond the age of consent) as a form of tacit consent through which citizens of a (just) state acquire a duty of obedience to it. Tacit consent differs from express consent only in the form of its expression; whereas express consent requires some action or utterance, tacit consent requires inaction or silence. Contemporary writers stress that the *only*

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<sup>5</sup> The existence of dual citizenship complicates this story slightly, though however conflicts between the demands of the two states of which an agent is a citizen might be worked out, it remains the case that on a consent account of political obligation the agent would not have a duty of obedience to any of the states to whom he has not consented to obey.

difference between tacit consent and express consent is in the means of its expression; there is no difference between the two in either the conditions that must be met for an act to count as consent, or in the normative force of such an act (Horton 1992, 29; Simmons 1979, 80). Simmons identifies a number of criteria that must be met for inaction or silence to count as implicit consent, but I shall not discuss them here, as all can be understood as specifications in the context of tacit consent of the above conditions for any type of consent. And, as I shall now demonstrate, residence (or continued residence) fails to meet several of these conditions, and therefore cannot be defended as a form of consent.

Recall that in order for an act to count as consent, it must be done with the intention that the act be one through which an agent authorizes another to do X, and acquires some correlative obligation (either a duty of non-interference with the other's doing X or a duty to comply with the other's commands). Yet a few dedicated social contract theorists aside, citizens of modern states do not reside, or continue to reside, in a state with the intention that the state should understand their doing so to be a sign of consent (M.B.E. Smith 1998, 85). This is so even if it is the case that many people believe (truly or falsely) that in virtue of their residence they have a duty to obey the state. That is, there are two questions we might put to citizens of a modern state: (1) Do you believe that in virtue of residence within the territory of this state you have a duty to obey the state's directives? And (2) have you ever intended your residence within the territory of this state to serve as a sign of your consent to the state's authority, in the same way that your nodding yes when I ask to borrow your car is a sign of your consent to my doing so? Many citizens may answer the first question in

the affirmative, but they are unlikely to have even conceived of residence as a form of consent to the state before the second question is put to them. Few of them are likely to have even considered the question of what justifies the state's claim to authority in the first place, and so will have never been motivated to implicitly consent to it.

Moreover, as Hume famously points out, many people are not in any position to freely consent to the state's rule, as the conditions for the voluntary performance of such an act are often not met.

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the domination of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her (Hume 1953, 51).

As Horton points out, even for those who do not face barriers to emigration such as ignorance of other languages and lack of portable wealth, the types of states from which they can choose may be quite limited, in that they are either similar in most respects to the state in which they already reside, or they are states in which residence entails such risks to the enjoyment of basic moral rights that emigration to them cannot be conceived of as a reasonable option (Horton 1992, 32). The strict controls on immigration that most contemporary states impose serve only to reinforce the claim that the options for emigration are often quite limited, even for those who have the wherewithal to try it. In addition, there appears to be no real option for those who do not wish to be subject to any state at all. In sum, a person who continues to reside in the state of her birth will usually do so simply because she has no other reasonable option from which to choose. If so, then her continued residence cannot be taken as

tacit consent to that state's authority over her. Note, too, that this criticism applies as well to putative cases of express consent to a state's authority.

Residence is not the only action that has been identified as signifying consent to the state's rule; other candidates that have been defended include an agent's appeal to the protection of the law and participation in genuinely democratic elections. Though both of these alternatives suffer defects of their own, I shall not discuss them here.<sup>6</sup> Instead, I shall focus on a difficulty for tacit consent theories of political obligation indicated by the mere defense of these alternatives to residence as signifying consent to the state's authority. The difficulty is that in the absence of a clear and widely (unanimously?) accepted convention as to what qualifies as consent to the state's authority, someone must have the authority to determine for all what actions (or inactions) serve this purpose. Yet it seems that an agent could have this authority only if others consented to his having it, which simply brings us back to the problem with which we began, namely justifying someone's authority to settle for all what counts as consent (though in this case it is consent to the authority to establish what counts as consent). In short, it does not seem that a consent account of political obligation can get started in the absence of agreement on the conventional expression of consent to the state's rule, and such agreement cannot come about in the absence of an authority that determines what those conventions are (Buchanan 2002, 700-702).

In response to this criticism, a defender of the consent theory of political obligation might argue that the conventions governing consent simply arise naturally through the daily interactions of human beings. So for example, conventions

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<sup>6</sup> For objections to the claim that appeal to the protection of the law and participation in genuinely democratic elections count as consent to the state's authority, see M.B.E. Smith 1998, and Horton 1992, 36-38.

governing when reciprocity is called for, and what form it must take, may come to govern the behavior of a group of friends without any conscious effort on their part to establish such rules. Yet at some point in time they may all recognize those conventions as a common standard for the appraisal of each other's behavior. Perhaps a similar story might be told regarding the conventions that signify consent to the state's authority. Such a response goes only so far, however, for it provides no way to address disputes over whether a particular act counts as consent. Clearly the state cannot have this authority, for the consent theorist will grant the state authority only over those who consent to it, and what is at issue here is whether or not in doing some act A, an individual did consent to the state's rule. The same claim applies to disputes over the scope of the authority to which an agent consents; even at a time where liberal-democratic capitalism appears ascendant the world over, there are still significant differences of opinion as to what the extent of the state's authority ought to be. In the absence of "at least a rough conception of the scope of the exercise of political power that is consented to . . . any gesture they [agents] might make would not succeed in indicating just what it is they are consenting to nor hence any assurance that they are consenting to the same thing" (Buchanan 2002, 701). The latter is particularly problematic if an agent's consent is conditional on others consenting to grant the state the same authority that he does, a condition that some philosophers defend as rationally mandatory. Finally, an analogy to conventions that arise to govern the behavior of a group of friends may be inappropriate for conventions that govern large numbers of people and an activity as complex as the state's governance. It is much more likely in the latter case that the knowledge condition – that an agent

know what it is that he consents to – will not be met.<sup>7</sup> The upshot of these arguments, then, is that consent theory alone cannot provide a justification for political obligation because someone must already possess the authority to determine what is to count as an act of consent.

Even if the various problems with consent theories of political obligation identified above are addressed, however, it will not necessarily follow that citizens of a modern state will have a duty of obedience to that state. For as Simmons points out, “even if a man is born into a *perfect* state, he remains free not to assume those bonds of obedience and support which would make him a member of the political community” (Simmons 1979, 69). Nor does there appear to be any way to explain why an agent must consent to the state’s authority; to refuse to do so may be irrational in certain circumstances, but it is not clear that it is immoral to act irrationally so long as one does not violate anyone else’s rights in doing so. And if there is a moral duty to consent to the authority of the state under certain circumstances, then it is unclear whether consent contributes anything to the generation of a duty to obey the state; instead, the duty may simply follow directly from whatever moral reason there is to consent to the state’s authority. For example, it seems unnecessary to add the intermediary step of consent if I ought to consent to the state’s authority because doing so is the best way for me to fulfill a natural duty to see to it that all enjoy their basic moral rights. The natural duty alone (assuming such a duty exists) appears sufficient to account for the duty to obey the state, as I shall argue in the second half of this dissertation. Simmons’s point is an important one, for the reaction of some to the

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<sup>7</sup> For discussion of just some of the issues that would need to be settled in order for saying “aye” in an assembly to count as consent, see Buchanan 2002, 700.

above criticisms of a consent account of political obligation has been to focus on the ways in which state institutions must be altered in order to create the conditions necessary for agents to consent to the state's authority. The suggested changes usually involve some form of radically participatory democracy, and the practical barriers to instituting such a system of political rule aside, we must acknowledge in light of Simmons's observation the possibility that even in a participatory democracy many agents might refuse to consent to the state's rule, and so have no duty of obedience to it.<sup>8</sup>

Attempts to defend a tacit consent account of political obligation have often shaded into what is now known as a fair-play account, but it is important to recognize that these two voluntarist justifications for duties of citizenship are logically distinct. Whereas a consent account requires an agent to do some act with the intention of acquiring an obligation (and correlatively, of authorizing another to do X), this is not so for fair-play accounts, where all that is required is that an agent prefer the net benefits provided by a cooperative scheme to going without them.<sup>9</sup> Though both consent and fair-play depend on an agent's doing something (including forming a certain preference ordering) in order to acquire an obligation, fair-play does not require an agent to do that action *for the purpose of* acquiring an obligation. Though the difference may seem small, it is not insignificant, for as we shall see, a fair play account avoids the objections to tacit consent accounts set out here.

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<sup>8</sup> For an argument that political obligation requires radically participatory democracy, see Pateman 1979.

<sup>9</sup> Net benefits are the benefits received from the cooperative scheme's operation minus the cost to an agent of his contribution to the operation of the cooperative scheme.

Before we turn to an examination of fair-play as a justification for political obligation, it is important to state clearly what has and has not been established with respect to consent accounts. None of the criticisms discussed here demonstrate that consent could not provide an account of political obligation. Rather, they simply point out that such an account does not entail that most citizens of contemporary states have any duties in virtue of their citizenship, and that barring a radical transformation in the design of the state (and perhaps even the world), this is likely to be the case in the future.

### III

During the past few decades, a number of philosophers and political theorists have attempted to defend the existence of political obligations by appeal to the principle of fair play (Hart 1967, Rawls 1964, Arneson 1982, Luban 1988, Klosko 1992, Dagger 1997). As stated initially by H.L.A. Hart, this principle holds that “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to similar submission from those who have benefited by their submission” (Hart 1967, 185). Though a number of philosophers have quibbled with certain details of Hart’s formulation of the principle of fair play, such as whether the joint enterprise (or cooperative scheme) must be conducted according to rules, the main idea remains the same. The four key elements of Hart’s version of the principle of fair play are (1) that the benefit is produced jointly, or via a cooperative scheme; (2) that participation in the cooperative scheme requires restrictions on the liberty of those who participate; (3) that those who restrict their liberty in order to (jointly) produce the benefit have a

right to a similar restriction from all who benefit from the scheme's operation; and therefore (4) that there is a correlative obligation on all those who benefit to likewise restrict their liberty. The restrictions on a person's liberty will involve limitations on the actions he can perform, including in some cases limits on the control he exercises over the allocation of his time. Moreover, the principle of fair play can be used to justify mandatory contributions of resources where that is necessary for the operation of the cooperative scheme. Thus if we are justified in conceiving of a moderately just state as a cooperative scheme, then the principle of fair play may serve to justify citizen's obligations to obey laws that limit their liberty, allocate time for activities such as voting and national service (military or non-military), and require them to pay taxes (at least for some of the goods that the state provides).

The intuitive attractiveness of the principle of fair play can be easily demonstrated by consideration of an example. Suppose that a village is threatened by rising flood waters, and that those who live there can protect themselves and their property from harm only by constructing a sandbag levy. Unless the villagers cooperate with one another, the levy will not be built in time to prevent the village from being flooded; if they do cooperate, then the village will be saved, as will all those who live in it. It seems intuitively correct to say that if all of the other villagers are cooperating to erect the levy, and if I will benefit from their doing so (because I will not drown in the floodwaters, or have my house destroyed), then I am morally required to contribute my fair share to this project as well. To receive the benefit of my neighbors limiting their liberty, in this case their choosing to set aside their other

projects in order to build the levy, while not incurring the same loss of liberty myself, seems to be a paradigm case of treating others unfairly.

The principle of fair play applies to any kind of cooperative scheme that requires restrictions on the liberty of those who participate in it in order to produce the desired benefit, though given our focus on political obligation, we shall focus only on the state, understood as a cooperative scheme.<sup>10</sup> Cooperative schemes can produce two kinds of benefits: excludable and non-excludable. An excludable benefit is one where it is possible for those who participate in the cooperative scheme to limit access to the benefit so that only those who contribute to the operation of the scheme receive it. A non-excludable benefit, on the other hand, is one where it is impossible (or at least extremely difficult and costly) to limit receipt of the benefit only to those who contribute to the operation of the scheme.<sup>11</sup> Public goods are paradigm examples of non-excludable benefits, and indeed it is the provision of public goods such as law and order, defense against external threats, public health, and protection from pollution, drought, and other environmental threats that defenders of political obligation on the basis of fair play often identify as the relevant benefits. Some also add the satisfaction of basic bodily needs (Klosko 1998, 198). Violations of the principle of fair play are much more likely in the case of non-excludable benefits than excludable ones. Those who fail to contribute to a cooperative scheme that provides an excludable benefit can simply be denied the benefit, but this is not the case for non-excludable benefits. And

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<sup>10</sup> A. John Simmons has criticized the view that the state can be thought of as a cooperative enterprise (Simmons 1979, 140-141; 2001, 38-42 ). However I shall assume here that the understanding of the state as a cooperative enterprise is correct, even if not a complete account of the nature of actual states (that is, even if modern states are more than simply cooperative schemes for the provision of public goods).

<sup>11</sup> The question of how great a burden participants of a cooperative scheme are required to bear in an effort to make the benefit they produce an excludable one is an interesting one that I set aside here.

insofar as many public goods require the cooperation of large numbers of people for their production, thereby making free-riding attractive, we might naturally expect the state to play a role in their production.

An account of political obligation grounded in the principle of fair play is appealing for a number of reasons. First, it provides a straightforward account of the particularity of political obligations, or why it is that citizens have obligations to one another in virtue of their shared citizenship. The suggestion that via their membership in the state citizens are engaged with one another in a cooperative enterprise the purpose of which is to provide them all with certain benefits is at least a plausible suggestion, even should closer inspection of this claim raise questions about its veracity.<sup>12</sup> Thus fair play can account for the belief that it is my being a citizen, i.e. a participant in the cooperative scheme that is the state, that serves as the basis for certain moral obligations. Moreover, it can also account for the belief that these obligations are owed to my fellow citizens (at least), for they are participants in the same cooperative scheme. This claim is consistent with a democratic conception of the people as the ultimate source of political authority, with the state as a mechanism for the exercise of this authority, and holders of offices within the state as agents of the citizenry.

Second, fair play can account for the state's authority over its subjects. Recall the third key element of Hart's formulation of the principle of fair play: those who restrict their liberty in order to (jointly) produce a benefit have a right against all others who benefit from this restriction that they too restrict their liberty. If we are

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<sup>12</sup> Leslie Green argues that the principle of fair play cannot meet the criterion of particularity (Green 2002, 531).

justified in conceiving of the state as a cooperative scheme citizens participate in by restricting their liberty in order to produce some benefit, then it follows from the principle of fair play that the citizenry has a right to the participation of all those who benefit. This will include, at least, all those who are recognized as citizens by a moderately just modern state.<sup>13</sup> It remains to be shown that the state, or citizenry, have a right to settle for each individual what counts as doing their fair share, or in other words, to issue preemptive and content-independent directives that those with a fair-play obligation must obey. I briefly examine Klosko's treatment of this issue later in this chapter, and discuss it at greater length in chapter six.

Third, the appeal to fair play avoids the criticisms raised against consent theory as a basis for political obligation in a modern state. As I noted in the previous section, consent theory requires that an individual undertake some activity, such as continued residence in a state, for the purpose of acquiring a duty to obey the state. With fair play, no such intention is necessary. So long as an individual benefits from the state's existence, where the state is understood as a cooperative scheme in which members restrict their liberty in order to produce that benefit, the individual has a fair-play duty to likewise restrict his liberty (obey the law, pay taxes, etc.). A fair-play account of political obligation may also avoid Hume's objection to consent theories, at least if it is merely the receipt of *some* benefit, and not *maximal* benefit, that entails an

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<sup>13</sup> Three additional classes of people further complicate this picture. First, there are non-citizen residents, who would seem to receive many of the same benefits from the state as citizens do, and so have the same fair play obligations that citizens have. This suggests that the class of those bound by fair play obligations to contribute to the operation of the state will not overlap perfectly with the class of citizens of that state. The same is true for non-resident, non-citizens, who receive certain benefits from a state, such as the benefits some Canadians receive from the United State's regulation of pollution. The third case is that of non-resident citizens, who are often thought to have obligations to the state of which they are citizens, and yet who may not receive any (or many) of the benefits provided by the state. I leave aside these complications for now (but see Mason 2000).

obligation of fair-play. Whether one has reasonable options from which to choose may be irrelevant to the generation of fair play obligations; so long as one does benefit from others' restricting their liberty, one has an obligation to do so as well.<sup>14</sup> Finally, since the acquisition of a fair-play obligation does not depend on the performance of any action, at least with respect to non-excludable goods, a fair-play account of political obligation avoids the problem of identifying those conventional actions (or inactions) that signify an agent's intention to acquire a duty to obey the state.

A crucial, but often overlooked, feature of the principle of fair play is that it addresses two distinct questions: (1) who is morally required to contribute to the operation of a particular cooperative scheme, and (2) what form must their contribution take? Hart's answer to the first question is that those who benefit from a cooperative scheme's operation have an obligation to contribute to it. His answer to the second question is that all those who have an obligation to contribute (or participate) should do so in the same manner (or as he puts it, all should restrict their liberty in a like manner). As will become clear, the issue of fairness, at least in the sense in which a free-rider is said to act unfairly, arises only in the context of answers to the second question. That is, claims regarding fairness address the distribution of burdens and benefits involved in the operation of a cooperative scheme; they say nothing about whether a given individual has an obligation to participate in a cooperative scheme, and so counts as a potential bearer of (some of) the burdens necessary for its existence.

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<sup>14</sup> Simmons and Klosko dispute whether the benefit supplied by the cooperative scheme must simply be greater than the actual costs the agent bears, or whether it must be the case that there is no alternative mechanism that could provide the agent with the same benefit but at a lower cost (to him). As we shall see, it is not necessary to resolve this question in order to determine whether an agent has an obligation of fair play to participate in a given cooperative scheme.

The assertion that complaints regarding fairness address only the distribution of burdens and benefits involved in the operation of a cooperative scheme may strike the reader as counter-intuitive. Therefore, in anticipation of the more detailed discussion in chapter four, I will take a moment to expand on this claim. Consider the example offered above of agents who cooperate to build a sandbag levy to prevent their village from being destroyed by a flood. It seems intuitively appropriate to complain that a resident of the village who does not contribute to this project acts unfairly, meaning that he ought to have contributed his fair share to the building of the wall, where the ought is one of moral obligation or duty. Note, however, that there are two, conceptually distinct, components of this claim: first that the villager in question had an obligation or duty to contribute, and secondly, that he ought to have contributed an equal amount to that contributed by others who also had an obligation to contribute, and from whom he differs in no morally relevant respect.<sup>15</sup> Note, first, that it is not only conceptually possible, but often actually the case, that people contribute to cooperative schemes when they have a duty to do so, but that they fail to contribute their fair share. So for example, a healthy young villager whose contribution consists only of filling five sandbags cannot be accused of shirking his obligation to contribute, but he can be accused of not contributing his fair share.

Moreover, it is important to note the different ways in which a person can be wronged by an agent who fails to contribute his fair share to a cooperative scheme. If non-contribution entails that the cooperative scheme fails to produce the benefit at which it aims, then the non-contributor wrongs those who have a claim to the

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<sup>15</sup> I discuss this last condition later in this chapter.

benefit.<sup>16</sup> However, not every case of non-contribution to a cooperative scheme has such an effect, and when it does not, the non-contributor cannot be said to have wronged those who have a claim to the benefit in question.<sup>17</sup> However, he may still wrong those who do contribute to the cooperative scheme, for at least intuitively it seems that they have a justifiable complaint against him. If so, the justification for their complaint appears to be of a deontological variety, meaning that the rightness or wrongness of an individual's action does not depend on the consequences of his action, but rather on the conformity of his behavior with (a moral principle that establishes) the rights, obligations, and duties of individuals. These rights, obligations, and duties (and, if there is one, the moral principle that establishes them) reflect the moral equality of individuals. A person who free-rides (i.e. fails to contribute his fair share) implicitly denies a specific form of moral equality, namely moral equality in distribution of burdens and benefits involved in the operation of a cooperative scheme in which he and others are morally required to participate.<sup>18</sup>

When non-contribution has no morally significant effect on the operation of a cooperative scheme, the failure to contribute will constitute a denial of the sort of moral equality described in the previous sentence, but not a violation of the moral

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<sup>16</sup> Note that many public goods can be provided in varying degrees, so that non-contribution can entail a cooperative scheme's failure to produce the required degree, or amount, of the benefit in question, though some degree or amount of the benefit is still produced despite the non-contribution.

<sup>17</sup> Of course, it may be that the claim is not only to the enjoyment of a certain benefit, but also to its production by certain people. This will be the case where the nature of the benefit in question includes an essential reference to the person who provides the good, as in the case of parental concern. I discuss the possibility of justifying political obligation by appeal to the special relationship between citizens of the same state in the next chapter. But intuitively, at least, it is difficult to see why the value of the benefits of concern here, namely non-excludable public goods, depend on who contributes to the provision of those goods.

<sup>18</sup> I argue in chapter four that this understanding of the wrong committed by a free-rider ought to be replaced by one in which the free-rider acts wrongly because he implicitly denies the equal claim of other participants in the scheme to the authority to determine what the distribution of burdens and benefits ought to be.

equality reflected in a right to the benefit for which the operation of the cooperative scheme is necessary (if there is such a right). The distinction between the two types of wrongs a non-contributor may commit often goes unnoted because those who have a claim to the benefit the cooperative scheme aims to produce are the very same people who participate in that cooperative scheme, and so who have a claim to other participants doing their fair share in the scheme's operation. This appears to be the case in the flood example, and is also clearly assumed by Hart in his formulation of the principle of fair play.

The focus in the remainder of this chapter will be almost entirely on Hart's claim that receipt of benefits from a cooperative scheme provides a sufficient justification for an obligation to contribute to (or participate in) it. As the discussion unfolds, two important points should be kept in mind. First, the rejection of the claim that benefit to the individual entails an obligation to contribute does not entail a rejection of the claim that the burdens involved in the operation of a cooperative scheme should be distributed fairly among those who have an obligation or duty to participate in it, whatever the source of those obligations or duties is. Second, as initially conceived by Hart and Rawls, the principle of fair play provides an *acquired obligation, or voluntarist*, answer to the question of who has a duty to contribute to a particular cooperative scheme. In his attempt to defend the principle of fair play from its critics, Klosko ultimately abandons this feature of it, or so I argue in the last section of this chapter.

## IV

In a series of characteristically amusing examples, Robert Nozick demonstrates that as formulated originally by Hart, the principle of fair play is too broad (Nozick 1974, 90-95). For instance, Nozick asks you to consider a case in which a number of people in your neighborhood join in a cooperative scheme to operate a public announcement system that broadcasts music and news throughout the neighborhood. If everyone in the neighborhood participates in the scheme, then each person will have to sacrifice one day a year to operate the PA system. On the 134<sup>th</sup> day since the operation of the PA system began, those who initiated the cooperative scheme (and those who have participated in it since) show up at your door and inform you that you are required to operate the PA system that day. Their justification is that since you have benefited from the PA system (and Nozick assumes that you have done so), you are now obligated by the principle of fair play to do your share in providing that benefit to all. Nozick contends that you are under no such obligation, though it might be nice of you to do so, and intuitively most people would agree with him.<sup>19</sup> Yet the principle of fair play, as Hart formulates it, does seem to entail that you are under a fair play obligation in this case. It appears necessary, then, to reformulate the principle of fair play so that it does not generate obligations in cases where, intuitively, we do not believe that such obligations exist.

We can begin this reformulation by identifying those aspects of the PA system case that make it troublesome. Nozick, and later Simmons, identify three such

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<sup>19</sup> We might add that you are not friends with any of your neighbors, and thereby avoid the intuition that one should contribute to the operation of the PA system that is grounded in obligations of friendship, or what it is to be a (good) friend. Such obligations, if they exist, are not based in fair play, not least because taking benefit to oneself as the (sole) reason for action is incompatible with most people's understanding of friendship.

aspects. First, it is not enough that an individual should receive a benefit from the participation of others in a cooperative scheme that requires restrictions on liberty; it must also be the case that the benefit provided by the scheme to the individual outweighs the cost to that individual of the restrictions on his liberty. That is, the cooperative scheme must provide one with a net benefit. Thus even if you do enjoy the music played over the PA system, the cost of spending one day operating it may be such that you would prefer to go without the PA system rather than give up some of your liberty (or the activities you would pursue if you were not operating the PA system).

Second, intuitively it seems that a person who listens to the PA system only occasionally should not be required to spend as much time operating it as someone who listens to it every day. This problem is easily avoided, however, for the demands of fair play need not be the same for all those who participate in a given cooperative scheme; rather, an individual's contribution to the operation of the scheme should be proportionate to the benefit he receives from the scheme's operation. The difference in the obligations the aforementioned two people will have is not unfair, for it reflects a morally relevant distinction between them, namely the degree to which each individual benefits from the operation of the cooperative scheme.<sup>20</sup>

The third conclusion that Nozick draws from the PA system case is that the principle of fair play is fundamentally flawed because it allows those who organize a

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<sup>20</sup> Some writers have suggested that making fair-play obligations proportional to the benefit received entails that a fair-play account of political obligation cannot meet the requirement that the duty to obey the law be general and universal (i.e. apply to all citizens in all cases). It is not clear that this is so, however, for the proportionality of benefit and cost might be reflected in the law itself. For example, a graduated tax might be justified on the grounds that those who pay higher taxes receive a greater benefit from the state's existence, in that they have more to lose in its absence. Since I conclude that many citizens of modern states fail to meet the conditions necessary for the acquisition of a fair play obligation to obey the state, I shall not pursue this dispute further here.

cooperative scheme to simply impose the benefits of that scheme upon anyone, and then demand that those persons contribute to the operation of the scheme in return for the benefits they have received. And indeed this does appear to be the case in the PA system story; as a resident of the neighborhood in which the PA system is put into operation, the benefits are simply thrust upon you by those who institute the scheme, and so too, it would seem, is a fair play obligation to participate in the operation of it. There is a ready explanation for many people's intuitions that, if placed in this situation, they would not take themselves to be so obligated. The problem with Nozick's PA system story is that those who initiate the cooperative scheme exercise arbitrary control over the liberty of those they impose the benefits and corresponding obligations upon. Yet individual liberty, and particularly freedom from the arbitrary imposition of constraints upon the individual by others, is generally regarded as fundamentally valuable.<sup>21</sup> Surely respect for individual liberty is more important than is the enjoyment provided by the music played over the PA system. If so, then if the principle of fair play is to be a genuine moral principle capable of generating obligations, it must be limited in some way so that it is consistent with the proper recognition of the fundamental value of liberty.<sup>22</sup>

While Nozick's first two objections merely indicate the need to modify the understanding of benefits and corresponding obligations in Hart's formulation of the fair play principle, Nozick's third objection provides a more fundamental challenge to

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<sup>21</sup> This is not to say that individual liberty is pre-eminently valuable, such that conflicts between liberty and other values must always be resolved in favor of liberty. There may be other values (or conditions) that are fundamentally valuable as well. Libertarians treat liberty as pre-eminently valuable; many defenders of various accounts of welfare liberalism and positive liberty treat liberty as fundamentally valuable, but not pre-eminently valuable.

<sup>22</sup> Of course, what counts as the "proper recognition of the fundamental value of liberty" is a matter of deep dispute, as we shall see.

it. Nozick's third criticism disputes the claim that benefit to the individual, however understood, can serve as the basis for that person having an obligation. So whereas Nozick's first objection alone would only entail that the benefit provided by a cooperative scheme must outweigh the cost of participation in that scheme in order for a person to have an obligation to participate, his third objection rests on the claim that the value of liberty is such that a person cannot become obligated to participate even if the benefit provided outweighs the burden imposed. Liberty has this value for Nozick because of its connection with autonomy, and the role autonomy plays in Nozick's account of moral personhood (Nozick 1974, 33). For Nozick, obligations can only be acquired by the exercise of autonomous choice (though people will also have natural duties that correspond to the natural rights Nozick defends).

If we take seriously Nozick's concern that fair play obligations respect individual liberty, then it may appear that the principle of fair play must either be rejected, or reinterpreted in a way that reduces it to a principle of consent. Obligations acquired by consent are consistent with respect for the fundamental value of liberty as Nozick conceives of it because they arise as the result of an individual's own choice. But any restriction on liberty that does not arise via consent (or from other's natural rights) will necessarily conflict with individual liberty, for a person will have his freedom constrained by the will of another.<sup>23</sup> Yet Nozick's criticisms have not dissuaded a number of political philosophers and theorists from attempting to defend

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<sup>23</sup> Technically, a natural rights theorist that adopts a Lockean approach as Nozick does will claim that natural rights do not limit individual liberty, but only license, and license is not something to which persons are entitled. Note too that natural duties and or rights are not restrictions on action that have their basis in another agent's will (or at least they are grounded only in the formal capacity to will, and not in any particular willing).

new variations of Hart's version of the principle of fair play, and I turn now to a consideration of two such attempts.

## V

One proposed modification to Hart's version of the principle of fair play, initially advanced by Rawls and later defended by A. John Simmons, states that the principle of fair play generates an obligation only for those who *accept* the benefits provided by the participation of a number of individuals in a cooperative scheme. Crucially, not everyone who *receives* a benefit provided by a cooperative scheme necessarily *accepts* that benefit. For in order to accept a benefit, a person must either try to get the benefit, or if it is a non-excludable benefit and so one that he cannot avoid receiving, he must receive the benefit willingly and knowingly. Since a person's trying to get benefits is of interest only in the case of excludable goods, and we are primarily concerned with non-excludable goods, let us focus on the idea of a person willingly and knowingly receiving a benefit. To do so, Simmons claims, an individual must not have that benefit forced upon him against his will, he must think that the benefits are worth the price he pays for them (by participating in the cooperative scheme), and he must know that the benefits are provided as a result of others' decisions to restrict their liberty by participating in the cooperative scheme (Simmons 1979, 132). In other words, such a person must have a preference structure (or a ranking of reasons for action) such that he would contribute to the operation of a cooperative scheme providing this good if he had to do so, say if the good in question could be made an excludable one.<sup>24</sup> He prefers that all should contribute to the

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<sup>24</sup> Note that his having such a preference structure requires that he know that the benefit in question is produced by a cooperative scheme.

provision of this good, supplied in the way it is and so with the burden that accompanies it, to his going without the good. So in Nozick's PA system example, I may receive the benefit of music playing but not accept it if I do not think the benefit worth the cost, or if I non-culpably but mistakenly believe that the people who operate the PA system do so as a charitable undertaking.

Acceptance of benefits is not the same thing as implicit consent. For an action to be one of implicit consent, it must be the case that the person who acts does so with the intention that others should understand his action as an instance of consenting. But a person who accepts the benefits of a cooperative scheme need not perform any action with such an intention in order to acquire a fair play obligation. He must simply have the appropriate preference structure. So long as he does, he will have a fair play obligation to contribute to the operation of the scheme even if he explicitly states that his actions should not be taken as evidence of his consent to participate in the scheme (i.e. even if he has no obligation based in consent).

Note, too, that adding an acceptance of benefits clause allows Simmons to avoid Nozick's third objection to the principle of fair play, namely that it fails to recognize the fundamental value of liberty, which in turn reflects the fundamental value of autonomy. The acceptance of benefits is consistent with the idea that no person should have his liberty constrained by the will of another, as a person comes to have a fair play obligation only if he forms a certain preference, namely that he prefers to receive the benefit and contribute his share to the scheme's operation, rather than go without the benefit at all. It is this (perhaps extended) sense of willing the existence of

a cooperative scheme that (the agent believes) provides him with a benefit that warrants treating the principle of fair play as an account of acquired obligation.<sup>25</sup>

There is good reason, then, to think that the principle of fair play is a genuine moral principle, and that it differs from consent as a ground for obligations. But as Simmons demonstrates, the principle of fair play binds only those who accept the benefits of a cooperative scheme, not those who merely receive those benefits. The question we must ask, then, is whether most, or even many, citizens of a modern state such as the U.S. accept the benefits provided by the state.

This is an empirical question to which, so far as I know, no one has presented conclusive evidence either way.<sup>26</sup> But even Klosko, who defends a fair play account of political obligation, notes, “empirical research has demonstrated that most individuals – certainly most Americans - are poorly informed about and have undeveloped understandings of political matters” (Klosko 1991, 179-180). And Simmons suggests several reasons for thinking that many U.S. citizens do not accept, in the required sense, the benefits provided by the state. First, he claims, “many citizens barely notice (and seem disinclined to think about) the benefits they receive” (Simmons 1979, 139). This may well be true in the case of public health policies, regulations concerning the use of water, laws regulating pollution, and so on. Moreover, even in cases where citizens are aware of the benefits that result from

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<sup>25</sup> The notion of willing the existence of a cooperative scheme that already exists can be understood along similar lines to the notion of endorsing the existence of a first-order desire that is prominent in certain discussions of free-will and moral responsibility.

<sup>26</sup> Two related points for which empirical arguments have been made are Americans’ beliefs in the duty to obey the law (conducted by Tom Tyler, and criticized by Leslie Green, (Green 1998)), and the impact of people’s beliefs regarding the fairness of the distribution of burdens and benefits within a cooperative scheme on the force of the obligation to do one’s share (Klosko 1992). Note that the empirical question that concerns us here is not people’s beliefs regarding fair play, but rather their beliefs regarding the benefits they receive from the state.

widespread compliance with these policies, they may be unaware that these beneficial results are the product of a cooperative enterprise. A U.S. citizen reading about a cholera outbreak in India may appreciate the fact that he is unlikely to suffer such a harm, but not recognize that this is because of the participation of most Americans in a cooperative scheme regulating behavior in order to ensure public health. A person who receives the benefits of a cooperative scheme but is either unaware that he does so, or unaware that the benefit is the result of the cooperative scheme, fails to have the requisite knowledge to qualify as accepting the benefits of that scheme. Or at least this is true if he is not culpable for his ignorance, a point I return to below.

Second, Simmons suggests that many citizens,

faced with high taxes, with military service which may involve fighting in foreign “police actions” or with unreasonably restrictive laws governing private pleasures, believe that the benefits received from government are not worth the price they are forced to pay. While such beliefs may be false, they seem nonetheless incompatible with the acceptance of the open [non-excludable] benefits of government (Simmons 1979, 139).

The second sentence in this quote is more important than the first. For the exact reasons why people believe that the burdens involved in contributing to the operation of the state (in its present form) are irrelevant, as is the truth of their beliefs. All that matters is that a person does not accept the benefits, delivered as they are at the cost imposed by the state, so long as he thinks the burden involved to be greater than the benefit.

The question of benefits and burdens is further complicated by the fact that citizens are often not permitted by the state to contribute only to those cooperative

schemes (or aspects of a cooperative scheme) that they believe to be worth the cost. I shall leave this complication aside here.

Third, Simmons doubts whether most people regard the payment of taxes to the state as a contribution to the operation of a cooperative scheme. Rather, they regard the government as something like a company from whom citizens purchase certain goods, albeit a company that in many cases exercises monopoly power and the use of coercion to compel people to buy its products. It would not be surprising if many people did think this way about the government, or at least certain aspects of it, especially since private companies often provide the same or similar services. This is the case with physical security (at least with that provided by police forces), certain kinds of environmental goods, and schools. And though this may be beyond the level of economic awareness possessed by most citizens, insofar as the state is correctly understood as a mechanism for addressing market failures, taxes for public goods may very well be correctly understood in terms of payment to a provider, rather than a contribution to a collective enterprise. But regardless of the reason why people view the payment of taxes as the purchase of goods, they will not recognize the benefits they receive as the product of a cooperative scheme, and so they will not accept the benefits in the requisite sense.

George Klosko claims to prove Simmons's empirical prediction regarding the attitudes of taxpayers false. He states that

if individuals believed that governmental services were purchased through the payment of taxes, then the key consideration in their attitudes toward their taxes would be their perception of the relationship between price paid and services received. However, individuals' greatest complaint about the federal income tax is

generally about its lack of fairness, rather than that its rates are too high (Klosko 1991, 183).

Klosko cites several empirical studies to support this latter claim. However, his conditional assertion regarding the key consideration in people's attitudes towards taxes strikes me as open to challenge. Even if individuals' greatest complaint regarding federal income tax is with the lack of fairness, this does not entail that they do not regard public goods as being purchased from the government. After all, while I may be unhappy with the price I have to pay for a certain good (which is the attitude Klosko suggests we should see if Simmons's hypothesis is correct), I may be even more unhappy if I think that someone is getting the same good at a better price. Indeed, there is some empirical evidence that shows people may prefer equity (or at least something closer to equity) even when this leaves both parties worse off than they would be with an inequitable distribution (Zizzo and Oswald, 2002; see also discussion in Rice 1998, 24-33). In other words, people's first concern may be that others do not make out better than they do, before they turn their attention to the question of whether the benefits they receive are worth the price they pay. Thus the empirical evidence Klosko cites regarding taxpayers' attitudes does not show Simmons's claim to be false (though I have also not shown it to be true). If an individual does not believe the benefits provided by the state are worth the price he pays, or that his taxes are a contribution to a cooperative scheme, then he will not count as accepting benefits from the state in the sense necessary for the principle of fair play to apply.

On the basis of the three empirical predictions described above, Simmons concludes that the need to limit the principle of fair play as Hart formulates it with the

“acceptance of benefits” caveat entails that it will not provide an account of the obligations citizens of modern (moderately just) states are alleged to have in virtue of their citizenship.<sup>27</sup> It is true that since Simmons provides no empirical support for his claims, he has no advantage over his opponent. But given that people are to be coerced into acting in certain ways on the basis of claims regarding their political obligations, together with the usual liberal antipathy to coercive invasions of individual liberty, it may be more important for the defender of the view that most citizens accept the benefits provided by the state to provide empirical support for his claim than it is for Simmons to provide empirical support for his claims.

## VI

George Klosko has recently developed an alternative approach to limiting the principle of fair play (Klosko 1991; 1998). Like Simmons, he recognizes that some restriction on the scope of the principle is necessary in order to avoid the kind of counter-intuitive cases described by Nozick. Nozick’s examples are problematic, Klosko argues, because the benefits produced by the cooperative schemes in them are of trivial value, and it is this feature that leads us to reject the application of the principle of fair play to them. On the basis of this observation, Klosko argues that the principle of fair play should be understood to generate obligations only in cases where the cooperative scheme meets three conditions. First, the benefits provided by the scheme must be worth the recipients’ efforts in providing them; second, the benefits

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<sup>27</sup> Rawls does think that fair play can account for political obligations in the case of those who accept a position in the government (Rawls 1971, 116). However, political philosophers who defend political obligations (or citizenship obligations) seek to justify obligations for most, if not all citizens, and not only those who hold political office.

must be presumptively beneficial; and third, the benefits and burdens of the scheme must be fairly distributed among those who participate in it.

Klosko's first condition for the application of the principle of fair play, that the benefits supplied by the cooperative scheme must be worth the recipients' efforts in providing them, recognizes Nozick's insight that for some people, some of the time, the cost imposed by a cooperative scheme may outweigh the benefits the scheme provides to them. Surely such people should not be required to contribute to the operation of this scheme, even if the benefit the scheme provides is non-excludable, and so one these people will receive even if they do not contribute. After all, it is not their fault that the good in question is non-excludable, and they would be willing to go without it if the good could somehow be made an excludable one.

The second condition, that the benefits produced by the cooperative scheme must be presumptively beneficial, is clearly intended to rule out the trivial benefits provided by the schemes in Nozick's examples. Yet presumptive benefits are more than simply non-trivial. Klosko describes them as indispensable goods, "necessary for an acceptable life for all members of the community." Presumptive benefits, Klosko writes, can be understood in the same terms Rawls uses to describe primary goods: "goods it is supposed that all members of the community want, whatever else they want, regardless of what their rational plans are in detail" (Klosko 1991, 39; see also Rawls 1971).

Klosko emphasizes that he does not ground political obligations in hypothetical consent. That is, his claim is not that a person has a fair-play obligation in the case of presumptive benefits because he *would* consent to participate in the

scheme that provides those benefits. This is an important point, for as it is commonly noted, hypothetical consent does not generate actual moral obligations in the way that actual consent does (see, for example, Dworkin 1975). That this must be true is illustrated easily enough. A professor who is approached by a student claiming that the professor would agree in a hypothetical bargaining situation to give the student an extension on her assignment is not thereby obligated to do so. Of course, if the professor is already committed to treating her students justly, then the student may use the hypothetical contract method to illustrate what justice requires. So too Klosko uses the idea of universal agreement in a hypothetical bargaining situation only to identify those goods for which we can presume all would be willing to pay, so that we can in turn identify those cases where an individual's refusal to contribute to the scheme that provides a particular benefit will almost certainly count as a violation of fair play (at least as Klosko understands it). Consent in the hypothetical situation is merely an epistemological tool, or heuristic device, while the principle of fair play, and in particular the receipt of benefits that are worth their cost, is what generates an obligation.

In most cases, Klosko writes, "there is a strong presumption that individuals should decide for themselves whether they will be forced to make sacrifices or have their liberty curtailed" (Klosko 1998, 195). However, Klosko contends that in the case of presumptive benefits, the usual presumption in favor of the individual's deciding whether to accept the benefit provided by a cooperative scheme, and so also the attendant obligations, is reversed. Since the benefits are, by definition, indispensable for all human beings, no rational human would decide to forgo them. Furthermore, a

good's being presumptively beneficial also implies that a person will (or should) be willing to pay a very high cost in order to receive the good rather than go without it. Therefore presumptive benefits will almost always be worth their cost to the individuals who participate in the cooperative scheme that provides them; that is, Klosko's first condition will almost always be met in the case of presumptive benefits. On the basis of these claims, Klosko concludes that participants in a cooperative scheme that provides non-excludable presumptive benefits need not defer to each individual's evaluation of whether or not the benefits provided by the scheme are worth the cost of participation. Rather, they are justified in assuming that all who receive the benefits receive something that is worth its cost. In the case of presumptive benefits, Klosko states, the burden of proof lies with the individual who wishes to show that he could obtain the benefit in question by some other means.<sup>28</sup> This contrasts with Simmons's assumption, and Klosko's too in the case of non-presumptive benefits, that the burden of proof rests with those who would restrict an individual's liberty by imposing an obligation upon him, and perhaps use coercion to see that he fulfills it.

Jonathan Wolfe has suggested that Klosko's first two conditions are repetitive, and that only the first condition is necessary, so long as we understand that the principle of fair play is to be restricted to public goods (Wolfe 1995).<sup>29</sup> Wolfe interprets the condition that the benefit must be worth the recipients' efforts in providing it in the following terms: "obligations are generated for an individual only if

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<sup>28</sup> Since presumptive benefits are, by definition, indispensable, we need not consider the possibility that an individual can go without them.

<sup>29</sup> Presumably an agent can reject having a non-public (and in particular, excludable) good or benefit, and a concomitant obligation to contribute to its production, imposed upon him because those who are currently cooperating to produce the good need not share it with him.

an individual receives a *net* benefit according to his or her subjective scale of valuation” (Wolfe 1995, 96). A subjective scale of valuation is not equivalent to what a person thinks would be to his benefit, for individuals may not be very good at calculating whether a given benefit is in fact a net benefit, or indeed at even recognizing that the good in question is a benefit at all. Rather, a subjective scale of valuation is subjective in the sense that it records the status of alleged benefits for that *particular* individual. Talk of a subjective scale of valuation leaves open the possibility that there may be no good that produces a net benefit for all people, as Klosko asserts with the notion of presumptive benefits. There is, then, no need to add the presumptive benefits condition in order to identify the conditions under which a person acquires an obligation of fair play, for it is just these benefits, if any, that will produce a net benefit according to most individuals subjective scale of valuation.

Yet presumptive benefits are not the only ones that may provide a net benefit. There may also be benefits that are non-trivial, in the sense that they contribute greatly to the value of a particular way of life, or are even essential to the living of it, and the provision of these benefits may require a cooperative scheme. It is true that insofar as the benefit in question is essential to the living of a *particular* way of life, and not the living of any acceptable life whatever the particular ends of the person who leads it, the benefit will not be presumptively beneficial.<sup>30</sup> But then this makes no difference

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<sup>30</sup> Interestingly, Wolfe’s claim regarding the conditions under which an agent acquires a fair play obligation leaves open the following possibility. Suppose that what counts as a valuable life to me has some structure, but also leaves a fair amount under-determined. Someone might provide me with some non-excludable benefit that is a net benefit on my subjective scale of valuation, and so impose an obligation upon me, but in doing so narrow the options I have open to me for determining in the future the specific direction my life will go. If I think it important that I determine the direction in which my life proceed – if that is part of what constitutes the valuable way of life I am leading – then this is a reason to resist the view that any non-excludable benefit that is a net benefit to me creates an obligation for me. Of course, we might just say that the obligation that comes with a putative benefit, and thereby

as to whether the benefit gives rise to a fair play obligation. Why, then, does Klosko focus on presumptive benefits rather than non-trivial (net) benefits, which would seem to be the more natural inference from the observation that Nozick's examples work because they involve trivial benefits?

I suggest that the presumptive benefits condition, and the burden of proof it entails, are best understood as a claim about when participants in a cooperative scheme are justified in coercing someone into contributing to the scheme's operation. Consider, first, the issue of the burden of proof. Questions regarding the burden of proof concern how we should structure the process by which we reach a judgment with respect to a particular issue. Therefore what the particular issue is, and what purpose the judgment we reach is to serve, play a crucial role in determining how we assign the burden of proof. So for example, when we say that in a criminal trial the burden of proof is on the prosecutor, we mean that the person accused of a crime need not establish his innocence, but only demonstrate that the prosecutor has not shown him to be guilty. A finding of not-guilty does not entail that the accused is innocent. The role of the burden of proof in a criminal trial, then, is not connected with ascertaining the truth, but rather with limiting the potential for mistaken convictions. It is the consequences of a guilty verdict, the protection of the individual from abuse by political office holders and others of the state's power, and so on, that justifies placing the burden of proof in a criminal trial on the prosecutor. Likewise, I suggest that Klosko's appeal to the burden of proof in his discussion of political obligation should not be understood as playing a role in establishing whether or not a person does

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limits one's freedom, simply entails that the putative benefit is not really a benefit. And, as Judy Lichtenberg has suggested to me, we might make a similar argument to resist Nozick's examples.

in fact have the obligation in question. Instead, the notion of a burden of proof should be understood to play a practical role necessitated by the limits on our abilities to discover the truth. To claim that an individual bears the burden of proof, then, is to argue that there is a justification for structuring our political and coercive institutions in certain ways rather than others, namely that we have good reason to assume in cases where presumptive benefits are at stake that individuals do, in fact, receive a net benefit from the state and so have a fair play obligation to participate in it (i.e. obey the law). The practical role played by the burden of proof is easily lost when we consider that the reason for appealing to presumptive benefits as a justification for placing the burden of proof on individuals, rather than the state, is that such benefits are among the ones most likely to provide a net benefit to any individual.

It seems safe to assume that because of limits on our ability to discover the truth, ideal justice will not be attained. Though talk of a burden of proof entails that in some cases the burden can be met, the difficulty of doing so will sometimes result in less than perfect justice. That is, it will not be the case that all and only those with fair play obligations are in fact coerced into fulfilling their obligations if they do not do so freely. How, then, do we determine which of the following two injustices to accept? If we assume that all citizens do receive a net benefit from their participation in the state, and so place the burden of proof on individuals to show that this assumption is mistaken in their case, then we are likely to unjustly coerce “independents,” those who could acquire the benefit in question at a lower cost by some alternative mechanism, into contributing to the state’s provision of the benefit. On the other hand, if we place the burden of proof on the state to show that each citizen receives a net benefit from

the operation of the state, then we are likely to permit some individuals to free ride by falsely claiming to be independents.

One response here might be to argue that the sheer number of people who are wronged will be much higher if we place the burden of proof on the state rather than on individuals. For every free-rider treats all those who participate in the cooperative scheme unfairly, whereas coercing a person to contribute to a cooperative scheme when he has no fair play obligation to do so treats only that individual wrongly. Wolfe clearly suggests such a justification for placing the burden of proof on the individual, rather than the state, and I suspect that Klosko would also endorse this view (Wolfe 1995, 99). For the argument to succeed, however, it must be the case that there will be relatively few independents. Perhaps not surprisingly, then, Klosko has recently argued that for many public goods, there will be almost no independents (Klosko 2001).<sup>31</sup>

Now that we see why Klosko thinks we are justified in placing the burden of proof on individuals to show that they do not have a fair play obligation to contribute to the operation of the state (by obeying its laws), we can see one reason why Klosko focuses on presumptive benefits and not non-trivial ones. Recall that presumptive benefits, as Klosko defines them, are ones that all people need whatever their specific life plans, and so there are likely to be few independents, particularly those who can go without the benefit. Thus the number of people treated unfairly will be small, even if an occasional genuine independent is coerced into obeying the law. But in the case

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<sup>31</sup> The dispute between Klosko and Simmons over whether the benefit supplied by the cooperative scheme must simply be greater than the actual costs the agent bears, or whether it must be the case that there is no alternative mechanism that could provide the agent with the same benefit but at a lower cost, is relevant here.

of non-trivial but non-presumptive benefits, there are likely to be a significant number of people who would prefer to go without the benefit, at least given its cost. If these people are coerced into participating in the scheme that produces such a benefit, the number of people who are treated unfairly by participants in the scheme (i.e. the state) may be quite large. For this reason, it is better to confine those cases in which the state assumes that citizens have a fair play obligation to obey the law to ones in which almost all citizens are sure to receive a net benefit, that is to say, to cases where the state provides presumptive benefits.

There may be a second reason to limit placing the burden of proof on individuals to cases where presumptive benefits are at stake. In a modern liberal state populated by people with various conflicting visions of the good life, coercion must be limited to those ends that all human beings have, regardless of the particular way of life they lead. Alternatively, and perhaps more modestly, coercion might be limited to those ends that all citizens share as the result of an overlapping consensus among the particular lives that they lead. These claims stand in need of justification, however, and it may be that their justification rests on the kind of argument for placing the burden of proof on individuals when presumptive benefits are at stake that I discussed in the previous paragraph. Whatever the justification for Klosko's assignment of the burden of proof, it is important to recognize that a person who benefits from a cooperative scheme's production of a non-trivial, non-presumptive benefit will still have a fair play obligation to participate in the scheme, even if the state will rarely, if ever, be justified in coercing this person into fulfilling his obligation.<sup>32</sup>

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<sup>32</sup> Consider – as a Jew, I benefit from the efforts of Jewish organizations to fight anti-Semitism in the United States. The benefits are not only those I receive from laws prohibiting discrimination, but also

Strictly speaking, Wolfe is right in disregarding the presumptive benefits condition when it comes to describing those cases in which the principle of fair play generates obligations. But given the desire of Klosko, Wolfe, and many other defenders of the principle of fair play, to use it to account for *political* obligations, and the assumption by all that such obligations are closely connected with justifying the state's use of coercion, the presumptive benefits condition is clearly a crucial part of Klosko's argument.

Given that presumptive benefits are indispensable, it would seem that a person will have a fair play obligation to contribute to the operation of a cooperative scheme that provides him with those benefits, even if others receive a far greater benefit from the scheme, and/or if the cost to others of participating in the scheme is far less than it is for this individual. Yet this may strike many people as unjust or unfair; recall Nozick's contention that a person who listens only occasionally to the PA system should not have to make the same contribution to its operation as does someone who listens to the PA system every day. In order to avoid this injustice, Klosko places a third condition on when the principle of fair play correctly applies, namely that the costs and benefits involved in the cooperative scheme should be distributed fairly.

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the vigilant enforcement of those laws (including watching groups and individuals who might be tempted to break them), interacting with fewer people who are anti-Semitic (out of ignorance or mistaken beliefs), and in general feeling safe to express my identity as a Jew. These benefits do not appear to be excludable, nor do they seem trivial. It seems, then, that I might have a fair play obligation to contribute to these Jewish organizations, for there is surely some contribution they could require of me that would be worth the benefits I receive. Why, then, can't these organizations use coercive methods to ensure that I fulfill my obligation? There are at least two reasons why we might think that coercion is not justifiable in this case. First, it may be that being under an obligation to contribute is a necessary, but not a sufficient condition, for others to act justly when they coerce me into contributing. The question, then, is what is this sufficient condition – on the basis of our intuitions, we should expect it in the case of certain obligations to obey the state, but not this non-state entity. Second, this may be further evidence that benefit to an individual is never a ground for obligation, or at least nothing more than a debt of gratitude.

Insofar as there is no morally relevant distinction between two individuals who receive the benefits of a cooperative scheme, those two individuals should make the same contribution to the operation of that scheme. For it is unjust to treat differently two people who are the same in morally relevant respects, and it is also unjust to treat two people who are different in some morally relevant respect as if they were the same.<sup>33</sup> One acts unfairly if one acts in a way that meets either of these two descriptions.

As Klosko recognizes, specifying what qualifies as a fair distribution of benefits and burdens is a difficult task. In a modern state there is likely to be disagreement over both the substantive demands of justice and the design of just decision procedures. Ultimately, Klosko writes, citizens of a modern state will need to accept what he calls the precedence rule. Whenever an individual's own beliefs regarding the just distribution of benefits and burdens conflicts with the understanding of justice reached by a social decision procedure that is tolerably fair, that individual must act on the understanding of justice reached by the social decision procedure. A tolerably fair social decision procedure is one that, at a minimum, takes each person's views into consideration. Klosko also adds that the understanding of justice reached by the social decision procedure must be among the set of reasonably fair principles of distribution, those for which "powerful arguments can be (and have been) developed" (Klosko 1991, 71). If these conditions are met, then the understanding of justice reached by the social decision procedure, and not his own beliefs concerning the demands of justice, is the one on which an agent ought to act. This is not to say that the individual must accept that the social decision procedure gives a true account of

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<sup>33</sup> As I noted earlier, given that the grounds for a person being under a fair play obligation to contribute to a cooperative scheme is the receipt of benefits from it, a difference in the benefits two individuals receive from that scheme is a morally relevant distinction.

what justice demands, and that his own belief is mistaken. Rather, he must accept the precedence rule as a moral principle that should guide his action in cases where he disagrees with other participants in a cooperative scheme regarding what qualifies as a just distribution of the benefits and burdens produced by that scheme's operation. In short, acceptance of the precedence rule is what establishes the preemptive and content-independent nature of the state's directives. Whereas the principle of fair play establishes a duty to one's fellow citizens to participate in the cooperative scheme that is the state, it is by appeal to the precedence rule that Klosko justifies the state's authority to settle for individual citizens the form that their participation must take (i.e. what their fair share is).

For Klosko, a person will only have a fair play obligation to contribute to a cooperative scheme if the benefits provided by that scheme are worth the cost, presumptively beneficial, and the benefits and burdens of the scheme are distributed fairly. The precedence rule is necessary to resolve the practical question of what is to count as a fair distribution when there is reasonable disagreement over the answer to this question. But what is the moral justification for an agent's obligation to accept the precedence rule? If there is no such (acquired) obligation or (natural) duty, then agents will not act wrongly if they correctly judge the distribution of benefits and burdens involved in the operation of the state (understood as a cooperative scheme) to be unfair. This is a crucial question, with implications for the very notion of what it is to treat others unfairly, and I discuss it at length in chapters four, six, and seven. I shall set it aside here, however, because Klosko discusses it in the context of answering the second of the two questions the principle of fair play purports to answer

– how should the burdens and benefits involved in the operation of a cooperative scheme be distributed amongst those who have an obligation to participate in it? For now, I wish to focus on a few problems with Klosko’s claim that receipt of a presumptive benefit, which is almost surely worth its cost, suffices to generate a fair play obligation to contribute to the scheme that produces that benefit.<sup>34</sup>

In sum, Klosko argues that individuals have a fair play obligation to contribute to the operation of a cooperative scheme that provides them with a benefit when the benefit is greater than the cost, the benefit in question is a presumptive benefit, and the distribution of benefits and burdens among those who participate in the cooperative scheme is not (grossly) unfair. I have argued that each of these three conditions serves a different function. The first, and only the first, provides an account of what generates fair play obligations. The second identifies those benefits that will almost always meet the first condition, and so provides support for the assumption that all citizens have a fair play obligation to contribute to the operation of the state (i.e. obey the law). This in turn justifies designing coercive institutions that place the burden of

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<sup>34</sup> Even if it is morally wrong for the burdens and benefits involved in the operation of a cooperative scheme to be distributed unfairly, it may not follow (as Klosko claims) that agents have no obligation to contribute to that scheme’s operation. The intuition that one need not contribute to a cooperative scheme if others who are morally the same are permitted to contribute less, or make the same contribution but benefit more, may be stronger when the basis of the obligation is benefit to oneself, rather than, say, the obligation to see that all those who need food have it. For example, if the content (but not the fact) of my obligation is determined by what I would agree to do in a suitably specified hypothetical bargaining situation, then others’ non-contribution may not absolve me of my obligation. Whether this is so depends upon whether actual reciprocation is necessary in order for me to have those duties that I would agree to in a hypothetical bargaining scenario. Alternatively, if my obligation is a straightforwardly Consequentialist one, I may even have an obligation to contribute more when other, morally similar individuals, fail to do so, at least if this is necessary for the cooperative scheme to produce (more of) the desired consequences. Peter Singer’s arguments in “Famine, Affluence, and Morality” are a good example of this kind of reasoning (Singer 1972). The limiting case for both the hypothetical Contractualist and the Consequentialist is where not enough people will contribute for the cooperative scheme to achieve its purpose. In this case I may have no obligation to contribute, though I may still be under an obligation to do what I can to bring about a state of affairs in which the cooperative scheme can function effectively (see Strang 1970; Goodin 1985).

proof on the individual to show that he does not, in fact, receive a net benefit from the existence and operation of the state, and that therefore fair play does not provide a basis for the state's claim to authority over him, or a correlative obligation on his part to obey the state. The third condition addresses the question of how the burdens and benefits involved in the operation of a cooperative scheme are to be distributed amongst those who are morally required to participate in that scheme.

## VII

Having clarified Klosko's fair play account of political obligations, I now wish to make two criticisms of it. First, in his attempt to defend the principle of fair play against Nozick's criticisms, Klosko alters the principle so that it is no longer a voluntarist account, or what is the same, an explanation for how it is that agents acquire obligations to contribute to particular cooperative schemes. Even if such a change is unproblematic, it is important nonetheless to make it explicit, since most theorists have treated the principle as an account of acquired obligation. Unfortunately for Klosko, his treatment of the fair play principle as a non-voluntarist source of moral requirements, or what I have labeled natural duties, *is* problematic, as my second criticism makes clear. For it is still the case that on Klosko's understanding of the principle of fair play, an agent is under an obligation to contribute to a cooperative scheme if it provides *him* with an indispensable benefit. Yet Klosko does not even attempt to demonstrate that individuals have a natural moral duty to promote their own well-being and/or rationality. I conclude, therefore, that Klosko fails to show that those who receive an indispensable benefit from a cooperative scheme have a natural duty to contribute to its operation. It follows from

this conclusion that an agent's receiving indispensable benefits from a cooperative scheme does not entail that when he fails to contribute to that scheme's operation, he treats those who do contribute unfairly.

In his discussion of Simmons's "acceptance of benefits" caveat to the principle of fair play, Klosko remarks several times that he does not see why an individual's mental state is relevant to determining whether that individual has a fair play obligation (Klosko 1991, 50-52). The answer, as should now be clear, is that the principle of fair play can only be an acquired obligation account of political obligation if the existence of the obligation depends on the obligated agent's will. Still, while the principle of fair play has traditionally been understood in voluntarist terms, it is not obvious that it must be so understood. Consider, then, an alternative understanding of that principle, which I take to be Klosko's: a person violates the principle of fair play if he fails to contribute to a cooperative scheme that provides him with a net benefit, and where the benefits in question are indispensable.<sup>35</sup> So understood, the fair play principle identifies a natural duty incumbent upon agents as a result of their *being* a certain way, rather than their doing something. Whether a person violates the fair play principle depends not on the agent's beliefs or preferences, but rather on the factual question of whether the agent receives indispensable benefits that are worth his effort to provide from that scheme. If they are, then the agent is morally required to contribute to that scheme's operation.

While Klosko abandons the condition that agents accept the benefits of a cooperative scheme in order for them to be under a fair play obligation, he remains

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<sup>35</sup> Might it be the case that more than one cooperative scheme provides an agent with an indispensable benefit, and that participation in any one of those schemes (but not all of them at the same time) would provide the agent with a net benefit? I leave aside this complication.

committed to the view that net benefit to the individual, at least in the case of indispensable goods, suffices to generate a natural duty on the part of that individual to contribute to the scheme's operation. Recall that as Klosko defines them, indispensable benefits are those goods that are necessary for the living of any way of life, whatever its particular details. Suppose that we accept Klosko's contention that many indispensable benefits can be produced only by the operation of the cooperative schemes (partly) constitutive of the modern state. All that follows from this is that an individual may act imprudently, and perhaps even irrationally, if he acts on the mistaken belief that he can do without the benefits in question, or that he can obtain these benefits by some other means than participation in the state.<sup>36</sup> To show that such an agent also acts immorally, Klosko would have to demonstrate that agents have a moral duty to promote their own well-being and or rationality, yet he makes no attempt to do so. While Kant may argue that it is immoral for a person to act imprudently or irrationally, many contemporary philosophers, especially those of a liberal persuasion, would not agree.<sup>37</sup> In the absence of any moral obligation to act prudentially, benefit to the individual can serve only as the basis for a Hobbesian mutual advantage account of quasi-moral norms. Such an account, however, cannot show that citizens have an obligation to obey the law when not doing so is to their

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<sup>36</sup> Of course, he will not necessarily act imprudently, at least so long as enough others contribute to the state's operation so that the non-contributor is still able to enjoy the benefits he falsely believes he could do without, or obtain elsewhere. Even in this case Hobbes would still accuse the non-contributor of acting imprudently, since it is a matter of luck that the agent is not harmed by his poor choice, and luck ought not to color our judgments of rationality or morality. "When a man does a thing which, notwithstanding anything can be foreseen and reckoned on, tends to his own destruction, however some accident which he could not expect, arriving, may turn it to his benefit, yet such events do not make it reasonably or wisely done (Hobbes 1994, 91).

<sup>37</sup> But see Slote (1992; 2001) for a virtue-ethical argument in defense of self-concern.

advantage.<sup>38</sup> That is, it fails to provide a general obligation to obey the law, or to assign the state any moral authority.<sup>39</sup>

Moreover, insofar as an agent does not have a natural duty to contribute to a cooperative scheme of the sort in question, he does not treat those who do participate unfairly when he fails to bear part of the burden for producing the indispensable benefit the scheme provides him. Those who do participate in a cooperative scheme can justifiably complain that a particular agent is not doing his fair share only if that agent has a natural duty or acquired obligation to contribute to the scheme's operation. And we have as yet no reason to believe that an individual who merely receives an indispensable benefit from a cooperative scheme has such a duty, nor unless he accepts the benefits, an acquired obligation to contribute.<sup>40</sup>

Suppose we agree that the principle of fair play generates obligations only if the benefits produced by a cooperative scheme are accepted (in the sense required for the acquisition of a fair play obligation), and that any rational and fully informed agent *would* accept these benefits because they are indispensable and worth his effort to provide. Might it be the case that agents in at least some modern states who have not accepted, or who refuse to accept, the benefits provided by the state are culpable for their ignorance or for their obstinacy? Even if we suppose they are, this would not entail that such individuals do have fair play obligations to contribute to the operation of the state. Someone may be blameworthy for a failure to consent to another's use of his book, if he has no plans to use it and the other person would benefit from not

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<sup>38</sup> David Gauthier might argue otherwise, though he admits that "there is a problem lurking in the step from having reason to make the commitment to having reason to honor it" (Gauthier 1995, 25).

<sup>39</sup> Note, too, that such an approach is unlikely to mandate acceptance of the precedence rule.

<sup>40</sup> Simmons emphasizes this point (Simmons 2001, 31).

having to buy the book himself. But it does not follow from the fact that it would be virtuous of a person to consent to another's use of his book that he actually consents, and should be treated as if he did. Moreover, if there is no moral duty to promote one's own well-being and or rationality, then those who do not accept the benefits of the state due to ignorance or obstinacy will at most be rationally criticizable, not morally blameworthy.

In any case, there are reasons to doubt that all of the mistaken beliefs had by citizens regarding the state's provision of public goods are ones for which they are culpable; indeed, the opposite is more likely to be true. Culpable ignorance usually requires that a person be given an adequate opportunity to become informed regarding the relevant information. This would seem to entail that those who impose fair play obligations on a person take steps to ensure that the individual is informed regarding the nature and importance of the benefits he receives, and perhaps also that there is no alternative mechanism that can provide the benefit in question at the same, or a lower, cost. The reasons Simmons gives for doubting whether people accept the benefits of the state in the manner required to generate fair play obligations provide some reason to think that modern states have not been very successful in educating their citizens in these ways, and so citizens should not be culpable for their mistaken preference structure.<sup>41</sup> But second, and perhaps more importantly, there is a fair amount of disagreement among academics and political leaders alike regarding the ability of alternatives to the state to provide various presumptive benefits. Moreover, these questions are very complex and require the kind of specialized knowledge that most

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<sup>41</sup> Interestingly, if there is an independent moral justification for compelling citizens to participate in venues that result in their being exposed to the relevant information, they might then come to have fair play obligations.

citizens are unlikely to have. Against this backdrop, it would seem wrong or unjust to fault ordinary citizens for having mistaken beliefs regarding the need for the state to provide certain benefits.

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It is time to take stock of the conclusions we have reached in this chapter. As it stands, Simmons appears to give the correct account of the principle of fair play as a principle of *acquired* obligation. Acceptance of benefits thus appears to be a necessary condition for obligations of fair play, and the evidence that most citizens of a modern state such as the U.S. accept benefits is at best inconclusive. Without the requisite preference structure, however, citizens will not have a fair play obligation to comply with directives issued by their state (within the scope of that state's justified moral authority). As in the case of consent, the argument here is not that citizens of a modern state could never have a duty to obey that state as a result of the principle of fair play, but only that as a matter of fact, it is unlikely that many of them currently do have such a duty on the basis of that principle.

Klosko may be right to move in the direction of a natural duty to contribute one's fair share to the operation of the collective scheme that is the state; indeed, I shall adopt such an approach in the second half of this dissertation, albeit one grounded in moral duties owed to others, rather than oneself. But because he retains the fair play commitment to benefit to the individual as a necessary condition for the requirement that one contribute, and fails to demonstrate that agents are morally required to act prudentially, Klosko fails to provide a sound basis for the existence of such a duty. Thus even though he denies that agents must accept the benefits of a

cooperative scheme in order to acquire an obligation to contribute to its operation, Klosko still fails to establish that citizens of a modern state have any moral duties in virtues of their status as such. In short, the principle of fair play seems to fare no better than consent in providing a moral foundation for a duty of obedience to the state. Time, then, to consider non-voluntarist approaches to the moral requirements of citizenship, beginning in the next chapter with several examples of what I refer to as relational duty accounts of political obligation.

### Chapter 3: Relational duty accounts of political obligation

In this chapter I consider a number of what I shall call relational duty justifications for political obligation, and in particular, a general duty to obey the state's directives.<sup>1</sup> I group these approaches together on the basis of four features that they have in common.

First, they all defend the claim that certain relationships are partially constituted by various duties (and the fulfillment thereof) that participants in those relationships owe to one another. That is, certain duties (though not necessarily the same duties) are an essential component of such relationships, such that in their absence the relationship fails to obtain. To be friends with someone, for example, partly consists in owing that person certain duties above and beyond those that are owed to all moral agents in virtue of their status as such, and vice versa. Anyone who claims to be friends with someone else, but denies that he has any duties to that person apart from those he owes to all moral agents, simply fails to understand what it is to be a friend. The same is alleged to be true of family members, co-nationals, and fellow citizens, to mention only a few examples that figure prominently in recent discussions of relational duties.

Second, all of the views I discuss assert that an agent may come to have certain duties to other moral agents without ever doing anything to acquire them (in the broad sense of "doing" that includes forming the preference structure necessary to acquire obligations of fair-play). Such duties differ from those owed to particular other persons in light of one's making a promise to them, explicitly consenting to a request

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<sup>1</sup> Following Dworkin (1986), most philosophers refer to relational duty accounts under the rubric of associative duties. I offer my own terminology as more suggestive of the foundations for moral duties on such accounts.

by them, or freely and knowingly accepting the benefits made available by their participation in a cooperative scheme. Note, too, that relational duties are almost always defended as “special” ones, in that they are duties one owes only to particular others with whom one has certain kinds of relationships, and not universally to all moral agents in virtue of their status as such.

Third, the theories I consider herein also share a methodological approach to elaborating and defending their accounts of political obligation. At some point in their argument, all of these theorists draw an analogy between citizenship and relationships that are often thought to be less controversial as independent sources of required action, such as friendship or family membership.<sup>2</sup> The purpose of these analogies is not to show that the two relationships are the same in all morally relevant respects, as was once claimed regarding the relationship a father was thought to have to his wife and children and the relationship a king was thought to have to his subjects. Rather, the purpose is to highlight some feature of the private relationship, such as its non-voluntary nature, as part of an attempt to demonstrate that the relationship between citizens also has this feature (or at least to generate intuitive support for such a claim).

Even if we accept that certain duties are constitutive of friendship, filial relationships, and perhaps citizenship as well, and that people need not voluntarily enter such relationships in order to be under the duties that are partially constitutive of them, we still need an account of what justifies these duties. That is, one may accept the claim that certain types of human activities require certain actions from those who participate in them, and yet question whether people are morally justified in doing those activities, or whether it is a good thing that they do them. So for example, while

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<sup>2</sup> Though see Simmons critique of filial obligations (Simmons 2001, 49-56).

it is true that if an agent is to play baseball then he must hit the ball with a bat, run the bases, and so on, we may also ask whether playing baseball is morally permissible or required, or whether doing so is a necessary or possible component of a worthwhile life. The same is true of relational duties; that one must do X, Y, and Z if one is to be a friend, a parent, or a fellow citizen is not yet a response to the question of whether (and why) being a friend, a parent, or a fellow citizen is morally permissible or required, or whether (and why) it is a necessary or possible component of a valuable and meaningful way of life.

One response to the justification question is to offer a reductionist account of relational duties that either explains them as manifestations of some universal moral principle or, when this is not possible, denies the reality of such duties. So for example, a utilitarian might account for duties of friendship by appeal to the contribution that the fulfillment of such duties make to overall utility. Likewise a voluntarist might argue that relationships or roles give rise to duties only when a person freely and knowingly enters into them. In both cases, the justification for relational duties is external to the relationship itself, and the duties can be reduced to specifications of some more general moral principle, such as one that requires a person to act such that he always maximizes utility, or one that requires him to fulfill those obligations he deliberately incurs. In contrast to these reductionist accounts of relational duties, all of the views I discuss below share a commitment to the claim that the duties generated by certain relationships do not stand in need of external justification. That is, the fourth similarity among them is that they all reject reductionism with respect to relational duties. Instead, the relationships themselves

are alleged to serve as an independent source of moral requirements, with the justification for the duties partially constitutive of them involving an appeal to some feature of the relationships themselves, rather than the contribution such relationships make to overall utility, respect for basic moral rights, or respect for autonomous choice.<sup>3</sup>

Non-reductionist approaches to relational duties can be divided into two categories: those that justify such duties by appeal to the role membership in certain relationships plays in constituting a person's identity, and those that do so by appeal to the non-instrumental value of participating in such relationships. Theorists who adopt the first approach claim that it follows necessarily from a person's being who she is, such as being so-and-so's child, together with it being essential to the parent-child relationship that it consists in part of certain duties participants owe to one another, that she has those duties to her parent. In addition to Communitarians such as Alasdair MacIntyre (1982; 1982-83), Michael Sandel (1982), and John Horton (1992), the identity account is also defended by Liberal Nationalists such as Yael Tamir (1993). Defenders of the second approach, in contrast, argue that certain relationships generate duties because they are non-instrumentally valuable relationships, or what is the same, because there is a reason to value them non-instrumentally. To non-instrumentally value something is to value it as an end in itself, or for its own sake. To value a relationship as an end in itself, then, is to value the existence and continuation of that relationship, or perhaps more accurately, the activities and

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<sup>3</sup> I leave open the possibility that different relationships may be a source of moral requirements in virtue of different features. See Scheffler 2001, 50; Mason 1997, 439. Note, too, that non-reductionists with respect to relational duties need not deny the possibility that a person's action may be morally overdetermined, in that there may be both a relational duty and a natural duty to do some act A.

experiences that constitute it, independent of its use as a means to some further end. Among those who defend such a view are Andrew Mason (1997; 2000) and Samuel Scheffler (2001).<sup>4</sup>

In sum, relational duties are ones that agents have in virtue of their participation in certain kinds of relationships that are partially constituted by various duties, and in which the justification for these duties depends on some non-instrumental feature of the relationship itself - either its value or its being a component of a person's identity. But what is it for two or more people to have a relationship with one another? It is important to distinguish the concept of a relationship from the concept of a class: all living human beings with brown eyes make up a class, but they do not have a relationship to one another in the sense that interests us here. Scheffler suggests that "only socially salient connections among people count as 'relations' or 'relationships'" (Scheffler, 102), and I shall follow him here.<sup>5</sup> This criterion does entail the possibility of a certain amount of variation between different societies as to what counts as a relationship, though it is not clear that this should trouble us. Note, too, that our concern here is only with a rough characterization of the concept of a relationship; social salience is not being appealed to as a justification for relational duties. In any case, our concern here will be with phenomena that clearly qualify as relationships, such as those of citizenship, friendship, family, nationality, co-religionist, and member of a club or organization.

In the remainder of this chapter, I examine the arguments in support of the identity account and the non-instrumental value account of relational duties. I argue

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<sup>4</sup> A recent extension by Nancy Hirschmann of the Ethics of Care to justify political obligation includes aspects of both the identity and non-instrumental value accounts of relational duties (1992).

<sup>5</sup> For an interesting distinction between institutional roles and social roles, see Hardimon 1994.

that neither one successfully demonstrates that for *any* socially salient relationship, it is some feature of the relationship itself that justifies the duties constitutive of it. If so, then it follows quite obviously that no relational duty account can justify political obligations.

## II

Perhaps the most prominent defender of the identity account of relational duties is Alasdair MacIntyre. A central thread in MacIntyre's Communitarian ethics is his criticism of universal morality for the estrangement it requires of moral agents from the particular, historically situated, roles that are alleged to be constitutive of a person's identity. These roles are positions in various relationships with other agents, and it is the local normative structures of these relationships, and not universal moral principles grounded in non-relational properties such as autonomy or sentience, that provide the appropriate standard for the moral assessment of an agent's conduct. MacIntyre makes explicit the alleged necessity of both the connection between roles in various relationships and an agent's identity, and the connection between identity and moral justification, when he writes that "the rational justification of my political duties, obligations, and loyalties is that, were I to divest myself of them by ignoring or flouting them, I should be divesting myself of a part of myself, I should be losing a crucial part of my identity" (MacIntyre 1982-83, quoted in Simmons 2001, p.261).

Michael Sandel appears to endorse a similar claim when he states that

we cannot regard ourselves as independent in this way [as the unencumbered selves Sandel believes necessarily entailed by liberal theory, or at least the liberal theory of John Rawls] without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are – as members of this family or community

or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic. Allegiances such as these . . . go beyond the obligations I voluntarily incur and the ‘natural duties I owe to human beings as such.’ They allow that to some I owe more than justice requires or even permits . . . in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am (Sandel 1982, 179. I take this quotation from Buchanan 1989, p.873).

Some defenders of nationalism also adopt the identity account of relational duties. So for example, Yael Tamir argues that “deep and important obligations flow from identity and relatedness” (Tamir 1993, 99).<sup>6</sup>

Suppose that citizenship in a modern state is among the relationships that are constitutive of a person’s identity, and that these relationships are partially constituted by the fulfillment of certain duties that are owed to a person’s fellow citizens. How do we determine the content of these citizenship duties? The usual response is that citizenship duties are those that contribute to the flourishing of the polity, or the life that citizens lead with one another. Foremost among these duties is a general duty to obey the law. As John Horton writes, laws “characteristically define the terms of association within a polity. Concern for the interests and welfare of the polity is a concern for these terms of association” (Horton 1992, 165). To obey the law, then, is to express concern for the interests and welfare of the polity, though on occasion this concern might require civil disobedience.<sup>7</sup> Defenders of the identity account of relational duties also make much of people’s sense of identification with their role, and one way in which identification with the role of citizenship is often expressed is

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<sup>6</sup> See also David Miller (1995) for a liberal-nationalist defense of the identity account of relational duties.

<sup>7</sup> Many theorists argue that civil disobedience is consistent with political obligation and a general duty to obey the state’s directives, insofar as those who commit such acts do not contest the state’s authority to judge them, and punish them for their acts. See further, chapter 7.

through fidelity to law. As we shall see, however, there are difficulties with both the argument from identification with a role as support for the identity account of relational duties, and with the notion that identification with the polity leads necessarily to a *general* and *universal* duty to obey the state's directives.<sup>8</sup>

Assume for the moment that the identity account provides a successful justification for at least some relational duties. One objection sometimes raised to an account of citizenship duties as one kind of relational duty is that the duties constitutive of friendship, filial relationships, and so on, are only vaguely specifiable by those who have them and those to whom they are owed. Duties of citizenship, on the other hand, are known with precision – as for example, in the case of what the duty to obey the law (or the state's directives) requires of one (Simmons 2001, 271). Such an argument strikes me as unpersuasive, however. First, in many traditional communities the duties that attach to roles such as family member, friend, neighbor, and so on are specified with a great deal of precision. This is so, for example, in many developing-world villages where modernity has yet to become a pervasive influence, as well as in certain religious communities in the developed-world, such as those of the Amish, certain sects of Orthodox Jews, and Confucian communities in China and Korea. Second, even in communities that are not governed by explicit rules and a hierarchical authority, there is often agreement in a wide range of cases with regard to what a friend, a family member, or a neighbor ought to do. On the other hand, with respect to the duty to obey the law, in some cases there will be disagreement as to whether one ought to obey a particular law in a given case, or when civil disobedience

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<sup>8</sup> Christopher Wellman identifies, but does not develop, several concerns with the capacity of a relational duty account of political obligation to generate a duty to obey the law. See Wellman 1997, fn. 6.

is appropriate or even required. Consider, too, that though most defenders of political obligation will acknowledge a general duty of obedience to the state's authority, there is disagreement over what other duties citizenship might entail, such as a duty to vote, to participate regularly in deliberative political institutions, to perform some kind of service for one's polity, and so on. It is not clear, then, how wide the disparity is between duties of friendship and duties of citizenship with respect to the precision with which those duties can be identified. Finally, as I noted in the above discussion of the similarities among relational duty accounts, contemporary defenders of such accounts do not appeal to familial relationships or friendship as a complete model of citizenship, but rather to call attention to *some* characteristic that both (or all) of the relationships are alleged to share. There is no obvious reason, then, why defenders of a relational account of citizenship cannot simply assert that one difference between familial duties and citizenship duties is the specificity that they can be given in abstraction from actual cases. The importance of the law's impartial application and the inability of those with legislative authority in a large state to consider the specifics of each case might contribute to an explanation for this difference.

A better approach to criticizing relational duty accounts of political obligation is to undermine the very idea that it is a feature of the relationship itself that justifies the duties constitutive of it. The first step to doing so is to examine the arguments for and against the identity account of relational duties. But before I do so, it is important to distinguish the identity account of relational duties from two other views with which it may easily be confused. The first such view holds that whatever the basis for certain duties incumbent upon a person may be, in many cases local social norms play

a necessary role in specifying the content of those duties. So for example, one might argue that a person has certain duties that attach to a role, such as that of a doctor, only if that person voluntarily (freely and knowingly) accepts that role. Many of the duties that attach to that role, however, are not susceptible to acceptance or rejection by the individuals who voluntarily enter the role, but are instead determined by formal and/or informal social practices and norms. To reject the identity account of relational duties does not require that one reject the claim that at least some of the duties that attach to certain roles, or positions occupied by participants in certain kinds of relationships, are to be specified in this way.<sup>9</sup> Likewise what exactly loyalty to one's friends requires will vary depending on one's societal or cultural background, or even conventions specific to one's group of friends.

A second position that may easily be confused with the view that a person's role-constituted identity serves as the foundation for (at least some of) a person's duties is one that grounds such duties in the motives and/or ends that are usually associated with ideal versions of certain relationships. For example, a contemporary Western ideal account of family relationships will likely include as a necessary element that family members love and care for one another.<sup>10</sup> It is important to distinguish (a) the claim that it is the value of the ideal relationship (or something approximating it), or the motives of care and love, that give rise to certain filial duties, from (b) the claim that it is simply in virtue of *being* a member of a family that one has

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<sup>9</sup> For further discussion of this point, see Green 1990; Hardimon 1994; and Selznick 1992.

<sup>10</sup> The fact that ideals of family relationships vary among different cultures and times may buttress the view that social norms and practices determine the content of many duties that attach to roles, discussed in the previous paragraph.

certain duties to other family members. It is the latter claim with which we are presently concerned.

One way to defend the identity account of relational duties is to simply assert its truth as a metaphysical claim. Yet this claim can be countered with the assertion that even if theorists such as MacIntyre and Sandel may be right to think that such “constitutive attachments” are essential to a person’s being the *kind* of person she is, they are not essential to her *being the person* she is. The distinction is an important one because if a person’s roles were essential to her being the person she is, then it would be metaphysically impossible for her to rid herself of these encumbrances (as Sandel refers to them) and yet remain the same person. But if a person’s roles are only essential to her being the kind of person she is, then a person who intentionally or unintentionally opts out of a certain role may change the kind of person she is, but she will persist through this change as the (numerically) same person.<sup>11</sup> Such a possibility might undermine the defense of political obligation as a kind of relational duty, if large numbers of citizens (in the legal sense) of many modern states were to either intentionally or unintentionally opt out of the role of citizen, in the identity constituting sense. Of course, the claim that roles constitute the kind of person someone is, but not the person herself, is not so much a criticism of the Communitarian or Liberal Nationalist’s claim as it is the assertion of a counter-claim. We must consider, then, what reasons there are for thinking that a person’s

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<sup>11</sup> One may unintentionally opt out of a role by simply failing to do those things constitutive of occupying that role, or ceasing to hold beliefs necessary for the occupation of it, but without ever doing so for the purpose of exiting from the role. Failing to keep in contact with a friend is an example of the former, while losing one’s belief in a religious creed and institution would be an example of the latter.

constitutive attachments are essential to her being the person she is, rather than this suggested alternative.

One such reason is the alleged incoherence or unintelligibility of a person's opting out of a certain role. But as Simmons points out, the mere unintelligibility to a person of his not occupying a certain role does not suffice to justify his fulfilling the duties that attach to that role. "A person who believed himself to be Napoleon could not intelligibly deny his obligation to, say, lead the French army, but this would not show that this person in fact had a moral obligation to lead the French army" (Simmons 2001, 263). This example also illustrates that mere identification with a role, no matter how strong, does not suffice to justify the claim that one is under certain moral obligations.<sup>12</sup> This is true not only of delusions that depend at least in part on mental defects, but also in the case of socially induced false beliefs. For example, lower rank members of a caste system may identify with the roles they occupy, and so the socially determined duties that attach to those roles, and yet they may be mistaken in their belief that such roles are morally justified and generate duties. A similar explanation may apply as well to feelings of pride, shame, and guilt with respect to the actions undertaken by members of one's family, friends, or community.<sup>13</sup> Consider, too, that a person may mistakenly believe that he is a member of a certain community, and yet in fact fail to meet the community's standards for who

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<sup>12</sup> Tamir appears to argue for relational (or associative duties) on the basis of an agent's identification with a particular group or community. "These obligations are generated by social associations that induce among their members feelings of membership and belonging, as well as the belief that the preservation of their society is a worthy endeavor" (Tamir 1993,130).

<sup>13</sup> Horton, for example, argues for the identity account by appeal to such feelings (Horton 1992, 152-54).

counts as a member. Such a person, it seems, will believe that he has certain duties in virtue of membership in the community when in fact he does not.

Christopher Wellman points out that a person's patriotic identification with his or her state is often largely the result of the state's manipulation and/or indoctrination, and he states "it would be perverse to suppose that citizens are obligated to State X only because X manipulated its citizens into identifying with fellow X-ians" (Wellman 1997, 198). It is not clear, however, that how one came to identify with one's fellow citizens matters, so long as one is able to critically evaluate that identification, and in light of that evaluation, to cease to so identify.<sup>14</sup> Many of our oldest friends are likely to be the result of manipulation by our parents, who first scheduled our "play dates" with other children with whom we did not ourselves choose to associate. How we came to be friends seems unimportant, however; what is important is that we are now friends, and that we can choose to exit from the relationship. The same appears true of affiliations with a religious group, or a particular religious community (e.g. members of the particular place of worship we attended as children). In short, what matters is not whether one was manipulated into one's identification with a group, but rather whether one's ongoing identification with that group is the result of an ongoing process of manipulation and indoctrination. In many contemporary liberal-democracies, patriotism, like religious belief, may first be inculcated in children via manipulation and indoctrination, but its continuation is usually subject to individual

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<sup>14</sup> Without going into any detail, let us stipulate that being able to critically evaluate one's identification with a group (or as a member of group) requires certain critical thinking skills, knowledge, and the opportunities to question or evaluate one's commitments.

control.<sup>15</sup> Of course, once we admit that citizens' identification with one another or the state is subject to critical evaluation, we will need to identify the reasons why an agent might choose to continue or cease to identify with her compatriots. But then it will be these reasons, such as the contribution that such identification makes to the value and meaning of her life, or the role it plays in motivating her to fulfill certain natural duties, that will justify her political obligations, rather than her identification with her fellow citizens.

In addition to arguing on the basis of subjective phenomena such as the unintelligibility of not occupying a role and self-identification as a member of a family, a nation, and so on, defenders of the identity account also point to the practice of calling attention to one's participation in a certain relationship as a sufficient justification for one's actions. For example, John Horton writes that an explanation for why one could not attend a party that coincided with one's parent's silver wedding anniversary

would most likely involve spelling out what is involved in familial relations, at least as understood within a particular conception of family life, rather than referring to any general moral principle. Such obligations 'derive' from membership of a family and it is in terms of what this means that they have to be understood (Horton 1992, 148).<sup>16</sup>

Yet the idea of spelling out what is involved in a particular conception of family life is fully consistent with such duties having their basis in general moral principles, or a motive such as that of mutual care or concern, or the non-instrumental value, rather

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<sup>15</sup> I do not mean to suggest that it is easy to cease to identify with those one has been manipulated or indoctrinated to view as fellow group members. But vestigial psychological reactions, such as an intentionally lapsed Catholic's guilt at having sex for pleasure, should not be taken as indicative of existent obligations.

<sup>16</sup> Likewise Scheffler writes: "non-reductionists are impressed by the fact that we often cite our relationships to people rather than particular interactions with them [i.e. having acquired obligations to them] as the source of our special responsibilities" (Scheffler 2001, 100).

than mere existence, of family relationships. On the one hand, then, Horton's appeal to the practice of justification by appeal to one's role does not clearly favor the identity account over its rivals. On the other hand, certain historical conceptions of membership in a family entail that a man's daughters have the status of property, and that children may be beaten as a means to educating them. Assuming Horton wishes to condemn these practices, he will need to appeal to some conception of morality other than that of the relational duties incumbent upon family members. Once he does so, however, he cannot claim that a full justification for a person's conduct will require only that he spell out what is involved in a particular conception of family relations. There is some reason to think, then, that an appeal to one's position in a socially salient relationship suffices as a justification for one's action only against a background of agreement on more basic moral considerations.

Thus far, then, there appears to be no reason to accept the claim that a person's identity alone, whether as a parent, a friend, or a citizen, provides a justification for certain duties alleged to be incumbent upon that person. Is there any reason to reject such an account? One argument for this conclusion holds that the identity account entails that members of a racist community - one in which the social norms that were definitive of members' duties required them to treat people with dark skins as morally inferior to those with light skins - are morally required to commit racist acts (see Buchanan 1989; Mason 1997). That is, if membership in a community of racists is constitutive of a person's identity, and the local practices that specify what it is to be a member of that community require various racist actions on the part of members, then the defender of the identity account appears committed to holding that such actions are

morally required. Such an example surely provides a *reductio ad absurdum* of the identity account of relational duties.

There are at least two ways in which a defender of the identity account might attempt to accommodate the racist community counter-argument. First, he might argue that universal morality places constraints on the kinds of relational duties that participation in a particular relationship generates (Horton 1992, 156-157). Thus insofar as a community's racist norms conflict with the demands of universal morality, those norms fail to impose any genuine requirements on members. Such a position is consistent with the view that local normative practices that do not conflict with universal morality are independent sources of moral requirements; that is, that the demands they make of people in virtue of their participation in certain relationships are not simply specifications of universal moral principles for application in a particular context. Yet as I noted earlier, many theorists will acknowledge that local social norms can, and often do, play a critical role in specifying the content of universal moral principles, what acting on a certain motive consists in, and/or what counts as flourishing together. Once we grant this claim, it is not clear what evidence there will be to support the Communitarian or Liberal Nationalist's claim that local normative practices constitutive of a person's role, and so his identity, independently generate moral requirements.<sup>17</sup>

A second response to the racist community counter-argument is to hold that membership in such a community does entail a genuine moral requirement to commit various racist acts, but that this moral requirement is merely *prima facie*, and will

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<sup>17</sup> Simmons claims that "the best commonsense test case for the normative independence thesis would be that of a practice that was perfectly morally neutral under assessment by external moral principles" and then claims that he cannot identify such a case (Simmons 2001, 269).

almost always be overridden or trumped by some requirement of universal morality. So for example, though a member of a racist community has a relational duty to join with other members of his community in beating an “uppity” black person, this relational duty is trumped by a duty of universal morality to refrain from deliberately or negligently inflicting bodily harm on another moral agent (except in cases of self-defense). The argument in favor of this second response depends on an appeal to people’s experience of a conflict between loyalty to fellow members of a community, or friends and family, and various natural duties they owe to all moral agents as such. The existence of a prima facie relational duty to do something that universal morality forbids can account for the feeling that one has let one’s friends or fellow members down (though one was right to do so), and perhaps for a duty to apologize and/or to make reparations for having done so. The logic here is similar to that in the case of a person who justifiably violates a promise to meet you at a certain time because he is called upon to render emergency assistance to a stranger. The moral duty to render assistance (when the cost to oneself is minimal) trumps the duty to keep one’s promises. But the existence of the latter still has important consequences for moral behavior, for it entails that you are owed an apology and an explanation for the other person’s tardiness. The first response to the racist community counter-argument cannot account for a felt need to offer an apology or to make reparations, since on that view, a conflict with the requirements of universal morality simply entails that no relational duty ever exists.

The existence of a relational duty to commit a racist act that is trumped by universal morality sounds rather strange. How can anyone have a moral duty to do

something that is immoral?<sup>18</sup> The analogy to the need to apologize in the case of justifiably violating a promise fails at this point. In the promising case, there are at least some circumstances in which doing the promised act is morally required, but in the racist community case, the required act is never even morally permissible, let alone required.

Yet perhaps we should not be so quick to reject the second response to the racist community counter-argument, as another case may illustrate. Tamir asks her readers to consider whether a student who knows that his best friend cheated on an important exam ought to inform the teacher of this (Tamir 1993, 102). Regardless of the action we conclude that the student ought to take, Tamir believes that most readers will agree with her that no matter what the student does, there is a moral loss – a failure either to do one’s duty to inform the relevant authority in cases of cheating, or to display loyalty to one’s friend. Unlike the racist community case, in the cheating best-friend case the notion that individuals have prima facie duties to their friends, even if those are sometimes trumped by natural duties, may strike the reader as plausible. Note, however, that we can grant Tamir’s claim – that partial duties of loyalty constitutive of various kinds of relationships will sometimes override impartial ones – without accepting the identity account as the correct analysis of what justifies relational duties. Indeed, what seems to be doing the work of generating the intuition that there is a relational duty in the cheating best-friend case is not the mere fact of the friendship itself. Rather, it is more likely our belief that friendship is a non-instrumentally valuable relationship that adherence to universal morality may

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<sup>18</sup> Does this require that one deny the existence of moral tragedies? I think not. Moral tragedies arise when one cannot do all that morality requires of one; they do not require that one act immorally. The coherence of this position may depend on a distinction between act and omission, however.

undermine in this case, or that this case illustrates an irreducible conflict between the morally fundamental motives of care and justice (or respect). Consider in light of this suggestion that in many liberal societies, people who are estranged from their (former) friends, parents, or co-religionists, such that being a participant in the relationship adds no value to their lives, and there is no care or concern for one another on the part of participants, are not thought to have duties of loyalty to them. To appreciate this point, it is important to distinguish it from the claim that someone ought to act *as if* they had certain relational duties. This claim is often made in the hope that a person's acting as if he has certain relational duties will create the value that such relationships often have, value that is often thought to be an important component of a worthwhile life.

On the one hand, while the racist community counter-argument demonstrates that relational duties will sometimes be limited by impartial natural duties, it does not show that the claim to derive such duties from the contribution certain roles play in constituting one's identity produces a *reductio ad absurdum*. On the other hand, reflection on cases where we are intuitively willing to grant the existence of *prima facie* relational duties suggests that they arise only in cases where the relationship is a valuable one, or where the actions constitutive of the relationship are done from a motive such as love or care. In the absence of any successful argument for the claim that simply being a participant in some relationship suffices to justify one's fulfilling the duties that partially constitute it, it seems plausible to conclude that if any non-reductionist account of relational duties can convince, it will be a non-instrumental value account.

### III

Andrew Mason argues that it is the non-instrumental value of the relationship citizens' bear to one another, rather than the agent's status as a citizen being a component of his identity, that justifies the duties constitutive of that relationship. He begins his argument for this conclusion with an analysis of friendship and the duties constitutive of it. The justification for such duties lies in the non-instrumental value of friendship, Mason claims, and he then proceeds to argue that an argument of the same form can be made to justify political obligations. After a brief description of this argument, and the advantages it has over the identity account of relational duties, I maintain that it too ought to be rejected. Turning first to Mason's analysis of friendship, I argue that even if friendship, family relationships, and so on, are non-instrumentally valuable relationships, the justification for the duties that partially constitute them rests on their being motivated by (and expressive of) care or concern, and not the status of the relationship as an end in itself. Though Mason himself does not argue for duties of citizenship on the basis of care or concern among citizens, others have, and so I consider such a possibility. Citizens of modern states, I contend, rarely act from concern for their fellow citizens, nor must they do so, on pain of either acting immorally or failing to undertake an activity that is necessary for the living of a worthwhile life.

Turning then to Mason's claim that citizenship is non-instrumentally valuable because it involves the recognition of equal status in a collective body that exercises significant control over the conditions of existence for all, once more I argue that the non-instrumental value of the relationship itself is not the source of the duties that

partially constitute (or ought to constitute) being a citizen. Instead, I suggest that it is the moral requirement to treat others justly, a duty owed to them in virtue of their status as moral agents, which accounts for the duties of citizenship. Treating others justly may require recognition of the sort Mason describes, and such recognition may be an end in itself, but it is so in the sense that recognition is part of what it is to be treated morally, and being treated morally is an end in itself. Whatever provides a justification for treating people morally, then, and not the non-instrumental value of doing so, will be what justifies duties of citizenship. Moreover, even if we grant that the non-instrumental value of citizenship justifies the duties constitutive of it, Mason fails to demonstrate that individuals must participate in such a relationship (or treat it as a non-instrumentally valuable one), or else act immorally or fail to live a worthwhile life. Without doing so, however, he cannot show that the relational duty account of political obligation he defends provides a secure foundation for a general and universal duty to obey the state's directives (i.e. one that holds for all laws and for all citizens).

Drawing on arguments by Joseph Raz, Mason makes three claims about friendship: (1) it is non-instrumentally valuable; (2) to be friends with someone just is to be under certain obligations to them, and these obligations are justified by the moral good of the friendship; and (3) these duties are internally related to, or constitutive of, the good of friendship (Mason 1997, 439). Friendship is non-instrumentally valuable, then, because having friends is an end people appropriately seek for itself, and not merely a means to some other end, such as happiness or popularity. But in virtue of what is friendship non-instrumentally valuable? Mason claims it is so because "it

involves the expression of mutual concern; it allots a central role to altruistic emotions such as sympathy and compassion, and a willingness to give oneself to another” (Mason 1997, 440). The claim that friendship consists in certain duties to one’s friends (and vice versa) is a familiar one, but what is new is the claim that these duties are to be justified by appeal to the moral value or good of friendship. An agent does not owe duties to his friends because being their friend is part of his identity, but rather because his friendship with them is non-instrumentally valuable. Samuel Scheffler gives a similar justification for relational duties. He writes,

if I have a special valued relationship with someone, and if the value I attach to the relationship is not purely instrumental in character . . . then I regard the person with whom I have the relationship as capable of making additional claims on me, beyond those that people in general can make. For to attach non-instrumental value to my relationship with a particular person just is, in part, to see that person as a source of special claims in virtue of the relationship between us (Scheffler 2001, 100).

Like the identity account, the non-instrumental value account is a non-reductionist view of relational duties, in that the justification for the duties participants in certain relationships have to one another rests on a feature of the relationship itself, and not some further end to which the relationship is a means.

Mason suggests that duties of citizenship can be justified in the same manner that duties of friendship are justified, namely by appeal to the non-instrumental value of the relationship citizens bear to one another. Citizenship has non-instrumental value, Mason claims, “because in virtue of being a citizen a person is a member of a collective body in which they enjoy equal status with its other members and are thereby provided with recognition” (Mason 1997, 442). It is unclear whether membership in any collective body that accords its members equal status and

recognition counts as non-instrumentally valuable, or whether it is specifically a collective body that governs (some aspect of) the lives of its members that is relevant to the non-instrumental value of membership. However, I shall assume that it is because the collective body (i.e. the state) “exercises significant control over its members conditions of existence” and is one in which members have “opportunities to participate directly and indirectly in the formation of . . . laws and policies” that the recognition of members’ equal status is non-instrumentally valuable (Mason 1997, 442). Like friendship, citizenship consists in certain duties that one has to one’s fellow citizens (and vice versa), and also like friendship, those duties are justified by the non-instrumental value of the relationship. The duties of citizenship are internally related to the good of the relationship, in that the fulfillment of these duties partially constitutes its non-instrumental value.

Mason is primarily concerned to justify a duty to participate fully in public life and partiality toward one’s fellow citizens, understood to include at least giving priority to the needs of fellow citizens over the needs of outsiders, other things being equal (Mason 1997, 428). Though he writes in a footnote that he will not discuss a general duty to obey the state’s directives, he does assert that some of what he says is relevant to it (Mason 1997, 428). It is easy to see how a general duty of obedience could be justified by appeal to the non-instrumental value of citizenship, given Mason’s analysis of it. The recognition of others as having an equal status in the collective body that enacts and enforces laws surely involves obedience to those laws, or more generally, obedience to that collective body’s directives. To put oneself

above the law seems to be nothing less than a denial of one's equal status with others in the collective body.

A non-instrumental value account of relational duties avoids a number of the objections raised earlier to identity accounts. For instance, a non-instrumental value account does not tie the existence of a relational duty to a person's beliefs regarding his occupation of a role or its value in order to generate duties. If the relationship is not a non-instrumentally valuable one, or the person is not in fact a participant in it, then he does not have any of the relational duties constitutive of that role, even if he believes that he does. Similarly, a person may deny that he has any duties in virtue of being (say) a citizen of a given polity, but if citizenship in that polity is non-instrumentally valuable, then he has certain political obligations, regardless of what he believes. Consider, too, that for those who think that members of a racist community do owe another duties of assistance in the commission of racist acts, the non-instrumental value justification for relational duties will also be attractive. The non-instrumental value of the friendship between two racists, for example, gives rise to a duty to "provide comfort and support when needed," though this duty is trumped by the duty to refrain from racist acts (440, 445). Yet despite these advantages over identity accounts, Mason's non-instrumental value account of relational duties also ultimately fails to convince, for reasons I shall now consider.

Mason argues that friendship is non-instrumentally valuable because it involves mutual concern and acts done from altruism and compassion. Yet if friendship simply consists in caring activities – those that aim at the cared for person's flourishing (in some respect) – then to say that friendship is non-instrumentally

valuable is simply to say that caring is non-instrumentally valuable. I suggest, then, that it is the motive of care or concern that is the source of the duties that are constitutive of friendship; it is this motive and what acting from it involves that justifies the duties of friendship, and not the non-instrumental value of friendship.<sup>19</sup> Simply being cared for may be a valuable end in itself, in addition to being instrumentally valuable for its contribution to self-esteem or self-respect, to a person's development of faculties and skills, and so forth. But the requirement that one do those acts that are constitutive of caring for one's friend follow from their being what caring requires, not because those actions constitute a non-instrumentally valuable relationship.

A similar explanation can be given for the duties constitutive of relationships between members of a nation, co-religionists, an extended family, or members of a union or club, except that particularized care must be replaced with a more general concern. What is essential to these relationships is that those who participate in them have as a goal the flourishing of other participants, and not simply securing the conditions necessary for any person to lead a flourishing life. We might say that such relationships require care or concern, and not simply respect or recognition.

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<sup>19</sup> Both care and concern aim at the flourishing (in some respect) of the person who is their object. Care appears to require a greater degree of emotional involvement, interaction, and interdependence than does concern (see Selznick 1992). Though this rough distinction is one that would probably find widespread acceptance among contemporary moral philosophers, it is by no means beyond challenge. See, for example, Slote 2001.

Some might object to the notion that care gives rise to duties. The same point can be made, however, if we follow Scheffler and speak instead of presumptively decisive reasons for action, understood as reasons that can be outweighed, but in the absence of other reasons that do so, present themselves as considerations upon which a person must act (Scheffler 2001, 100). In speaking of relational duties, I do not mean to commit myself to the Kantian claim that the moral worth of fulfilling them depends on their being done from the motive of duty.

It may also be essential to relationships based in care or concern that at least some of that flourishing be shared; that is, that the flourishing be constituted in part by some joint activity. This requirement is compatible with relationships in which not all participants personally interact with one another. For example, many people believe that it is an important part of the value and meaning of their participation in religious rituals that their co-religionists are participating in the same ritual, even if there is no personal interaction between all members of the religious community. On this point, then, the analysis of relational duties in terms of care or concern is compatible with the claims of “imagined community” defenders, including Mason, and contrasts with the claim that associative duties require “emotional bonds that presuppose that each member of the group has personal acquaintance of all others” (Dworkin 1986, 196. On imagined communities, see Anderson 1991; Mason 2000, 40).<sup>20</sup>

An explanation of relational duties that grounds them in the motives of care or concern can account for many observations that have been made about such duties. For instance, a large and diverse set of relationships has been identified as giving rise to relational duties. Scheffler lists immediate and extended family, friends, neighbors; members of the same community, nation, or clan; colleagues, co-workers and fellow union-members; classmates, compatriots, and comrades; members of the same religion, racial or ethnic group, and members of the same team, gang, or club, as people to whom individuals are sometimes alleged to have relational duties (Scheffler 2001, 50). What all of these relationships have in common is that, in at least some circumstances, they can be characterized as ones where participants are motivated by

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<sup>20</sup> The claim here is that *relationships* based in care or concern may require that the flourishing at which participants aim is at least partially a matter of flourishing together. It may be possible to care or be concerned for another outside the context of a socially salient relationship.

care or concern for one another, or seek one another's flourishing, and this flourishing is characterized at least in part as flourishing together. This account can also explain why it is that not all parent-child relationships involve relational duties; though biology and social norms may entail that one is so-and-so's child, if one's parent fails to care for one (or vice versa), then no relational duties obtain. Likewise if a person does not have any concern for his co-religionists (qua co-religionists), then he will not have any relational duties to them. At the same time, insofar as the activities and experiences constitutive of caring or having concern for participants in some relationship are potentially instrumentally and/or non-instrumentally valuable components of a worthwhile life, there will often be a reason for people to care about those with whom they participate in certain socially salient relationships. This can explain why "we may be inclined to suppose that [mere] membership in a group of this kind always gives rise to such duties, and we may disapprove of group members who fail to acknowledge their duties as we see them" (Scheffler 2001, 51). The enormous contribution that her relationship to her co-religionists makes to the value of a mother's life, together with her desire that her children should lead valuable lives, may sometimes explain her disapproval of her children's decision not to identify with that (or even any) religious community. Finally, because what it is to care or act from concern will often be context-sensitive and culturally determined, an account of relational duties in terms of these motives can accommodate the vagueness and cultural relativity that is often said to characterize them.

It is quite plausible, then, to think of relational duties as those that arise from mutual caring or concern for those who participate with one another in a socially

salient relationship. The justification for the duties constitutive of these relationships follows from their being what it is to care, or to be concerned for, another's flourishing. Though the fulfillment of these duties may be non-instrumentally valuable, this is so because caring is non-instrumentally valuable, and not because the relationships in which caring occurs are non-instrumentally valuable. If this claim is correct, then it will not suffice for Mason to argue that citizenship has non-instrumental value in order to show that relational duties attach to the role of citizen. Instead, he must identify the motive that citizens must have if the socially salient relationship of citizenship they occupy is to be one that involves relational duties.<sup>21</sup>

Though Mason does not argue for political obligation on the basis of citizens caring or being concerned for one another, such a claim has been defended by others, and so it is worth taking a moment to consider it.<sup>22</sup> Citizens will be concerned for one another, in the sense defined earlier, if they are committed to promoting the flourishing (in some respect) of their fellow citizens, and not simply securing for them the conditions necessary for doing so.<sup>23</sup> Such a vision of citizenship is often part of what motivates Communitarian and Civic Republican accounts of citizenship. Yet despite occasional moments when citizens of modern states do seek one another's flourishing, or to flourish together, most citizens of modern liberal states understand

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<sup>21</sup> Strictly speaking, my argument thus far does not show that the non-instrumental value of certain relationships is not a sufficient justification for the duties constitutive of those relationships. It does not necessarily follow, then, that the non-instrumental value of citizenship could not justify certain duties, independent of any disposition or virtue that motivates citizens in their interaction with one another. What I hope to have done, however, is to call into question whether there is any reason to think that in the case of friendship it is the non-instrumental value of the relationship, rather than the motive of care, that justifies certain actions be required of friends. If I have succeeded in this task, then there will be as yet no reason to think that non-instrumental value is itself a source of relational duties.

<sup>22</sup> See, for example, Hirschmann 1992.

<sup>23</sup> Note that partiality toward one's fellow citizens in the effort to secure basic moral rights for all is not necessarily an instance of concern for one's fellow citizens.

the role of the state to be only the securing of the conditions necessary for flourishing.<sup>24</sup> A feature of classical civic republics as much as modern states is that much political activity is made up of competition between different factions and special interest groups, rather than the pursuit of the public good. And, as Wellman notes, “the multicultural and multinational nature of states often leads to citizens harboring antipathy, rather than sympathy, towards each other” (Wellman 1997, 189). I conclude, therefore, that if concern is necessary for a non-instrumentally valuable relationship to be one in which citizens have certain relational duties to one another, then few citizens of modern states have any duties of citizenship.

Of course, even if most citizens of modern polities do not have concern for one another, it may still be the case that they ought to do so, either because it is morally (or ethically) required, or because it is a necessary component of a fully human or flourishing life. While it may be that being cared for is essential (or close to it) for human development, such that parents have a moral duty to care for their children or to find someone to do so (with the state perhaps having a duty to take on this task when parents do not), it is doubtful that the concern of one’s fellow citizens has nearly the same importance for human development. It may be that political institutions designed to secure the conditions for human flourishing better achieve this goal when those who participate in them are motivated by concern for one another. But this is an instrumental, and contingent, justification for promoting concern for one’s fellow citizens; the justification depends not on the moral necessity of such concern, but rather on the moral necessity of securing for all certain forms of treatment that they

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<sup>24</sup> Different states, and different groups within a state, disagree as to what these conditions consist in, of course.

merit simply in virtue of their moral agency. Concern for one's fellow citizens may be praiseworthy, at least if it does not lead to the total neglect of non-citizens, but is not morally (or ethically) required.

Nor does there appear to be a strong case for the claim that citizenship, in the sense of a relationship that includes mutual concern for one another's flourishing (in some respect), is a necessary component of any worthwhile way of life. I do not mean to deny that such citizenship *can* be a component of such a life, but only that it *must* be. Nor do I wish to deny that certain activities typical of citizenship in many modern states, such as voting, jury duty, or military service, can be among the activities that as ends in themselves contribute to the value and meaning of a person's life. Once again, they may be, but they need not be. If citizenship is not a necessary project for the living of a worthwhile life, however, then it does not provide a sound basis for political obligation. A person may live a fully human life and yet fail to cultivate concern for her fellow citizens, and/or not view activities typical of citizenship in a modern state as ends in themselves. But without such a motive and/or end, a person will not have any relational duties to her fellow citizens, including a duty to obey the law.

Mason does not argue that citizenship is non-instrumentally valuable because citizens are motivated by mutual concern, but rather because it involves mutual recognition of one another's equal status in a collective body that exercises significant control over its member's conditions of existence. Yet the criticism I made earlier of Mason's analysis of friendship duties applies as well to his analysis of citizenship duties. Just as friendship, membership in a family, and so on, can be understood as

relationships structured by the norms constitutive of care or concern, so too the relationship of citizenship can be understood as a relationship structured by the norms of mutual recognition and respect. The actions that are done from that motive, and that are constitutive of the relationship, are non-instrumentally valuable because to do those actions simply is what it is to act from (or express) the motive in question. In all of these cases, it is the motive that is non-instrumentally valuable, not the relationship itself.

What reason is there, then, for thinking that citizens ought to act from the motive of recognizing other citizens as having equal status in the body that exercises collective governance, or at least that they should do those actions that such people would do? It may be that we have a duty to treat others justly, say, and that doing so involves participation in political entities. But if so, then the source of citizenship duties, or what justifies the claim that in virtue of being citizens moral agents must fulfill certain duties, is the moral requirement to treat others justly. This is the approach I shall defend myself. For now, the crucial point is that even if acting justly and being treated justly are non-instrumentally valuable, it is not this value that justifies duties of justice.

Mason writes that membership in a community is instrumentally valuable for many people because it is a means to self-respect or self-esteem, but that “when membership of a community depends upon some valuable achievement (rather than, say, the possession of characteristic such as ethnicity), recognizing another person as a member may be to give due acknowledgement to them for what they have done, and as such that recognition seems valuable for its own sake” (Mason 2000, 52). Yet it is

not clear why the latter recognition is non-instrumentally valuable, and the former instrumentally valuable. After all, recognition for one's achievements is likely to be a means to self-respect or self-esteem. Perhaps it is the notion of "due acknowledgment" that distinguishes instrumentally valuable from non-instrumentally valuable membership. But if so, then it seems to be the necessity of giving someone their due, and not the non-instrumental value of the relationship, that makes recognition required. This point can be applied to duties of citizenship, if recognizing one's fellow citizens as having equal status with oneself in a body charged with collective governance is entailed by the need to recognize their status as moral agents. This returns us to the point raised in the previous paragraph, namely that even if doing X (recognizing another, treating them justly, etc.) is non-instrumentally valuable, it is not the non-instrumental value of doing so that is the source of the requirement that one do X.

We saw in the case of caring relationships such as that of friendship that it does not follow from a relationship's being non-instrumentally valuable that it is a relationship people must have with others, either because it is morally required or because it is a necessary component of a worthwhile life. Might the same be true of citizenship? Perhaps recognizing the equal status of one's fellow citizens is praiseworthy, but is it morally required? Likewise, recognition as having equal status may be a possible component of a worthwhile life, but is it a necessary one? If it turns out that being a citizen is morally required, say because participation in political institutions is necessary to secure morally obligatory ends, then the duties of citizenship will be justified by appeal to general moral principles, not the non-

instrumental value of the relationship among citizens. Mason need not deny this point, for he is not committed to citizenship's non-instrumental value being the only justification that can be given for political obligation. Yet the non-instrumental value seems a relatively weak justification for duties of citizenship; though joining with others to lobby and vote for passage of a policy providing a certain amount of health care for all may be valuable as an end in itself, its value seems substantially less than the value of the state of affairs to which that political activity is a means, namely one in which all enjoy access to health care.

Perhaps recognizing other participants in a political entity as equals, and being so recognized oneself, is a necessary component for the living of any good life. Though such a position would be consonant with Mason's acknowledgment that his conception of citizenship is in the Civic Republican vein, he does not explicitly defend it (Mason 1997, 444). Nor does there appear to be any evidence that one cannot lead a worthwhile life in the absence of recognition by one's fellow citizens (if this is distinct from their respecting one's basic moral rights), or indeed, in the absence of citizenship itself. Joining with others to lobby and vote for a law may be valuable as an end in itself (i.e. independent of its contribution to securing the end in question), but surely doing so is not a necessary component of a valuable and meaningful life. Of course, citizenship and equal recognition by one's fellow citizens will often be *instrumentally* valuable for the contribution it makes to one's ability to lead that way of life one finds worthwhile. But it is likely that many people would happily give up their roles as citizens, or participation in political entities, if they thought that they could be secure in living the way of life they value without them.

In sum, my objections to Mason's relational duty account of political obligation are as follows. First, Mason fails to demonstrate that it is the non-instrumental value of the relationship of citizenship itself, rather than (a) the motive of recognition or respect for others as having equal status as moral agents, or (b) the status of one's fellow citizens as moral agents, that serves to justify the duties constitutive of citizenship. Even if mutual recognition among citizens is non-instrumentally valuable, it is the moral necessity of treating others justly that provides the justificatory foundation for such conduct. Second, it does not follow from a relationship's being non-instrumentally valuable that individuals must participate in it. If Mason argues for the necessity of occupying the role of citizenship on instrumental grounds, then the justification for political obligation will depend on an appeal to some external moral basis, rather than on a feature of the relationship itself. Nor does an argument for citizenship on the basis of its being necessary for a fully human life appear persuasive. But without some argument for why individuals must occupy the role of citizen (in the moral sense involving recognition, and not merely the legal sense), the non-instrumental value of citizenship will not provide a secure foundation for political obligation. Any individual who does not wish to include citizenship (in the non-instrumentally valuable sense) among his projects will not have any relational duties of citizenship, and any moral argument for why he must include citizenship in this sense among his projects will justify the duties of citizenship on the basis of that moral argument, and not the non-instrumental value of the relationship.

Given that Mason begins his argument for the non-instrumental value of citizenship with a consideration of Raz's analysis of friendship, it is interesting to note

the conclusion that Raz himself draws from the analogy between citizenship and friendship. An agent may develop a sense of belonging to the political entity of which he is a member, and in virtue of doing so, he may have certain duties to it. To believe that one belongs to a group, or to identify with it, is to believe that one stands in a certain relationship to others constituted by certain duties, just as to believe that one is a friend is to believe that one stands in a certain relationship to another constituted by certain duties. Yet Raz claims that no agent is morally required to develop loyalty to his or her state, just as no agent is morally required to develop any friendships (Raz 1998, 173). Moreover, even if an agent is loyal to his state, it does not follow that a general duty of obedience to the state's directives is the only, or the best, way to express that loyalty. Respect for law, as Raz calls the expression of loyalty to, and identification with, the state via obedience to law, may be manifested with regard to some laws but not others. In sum, Raz concludes that loyalty to the state is not morally required, that the expression of such loyalty when it exists need not take the form of respect for law, and finally that respect for law need not include a *general* duty of obedience to the state's directives.<sup>25</sup>

One objection to relational duty accounts of political obligation that I have raised against both the identity and the non-instrumental value accounts is that neither one by itself demonstrates the necessity of occupying the role of citizen. Without doing so, however, neither can provide a secure foundation for a general duty to obey the state's directives; at best, they justify a position like the one for which Raz argues. Defenders of both accounts have sought to defuse this criticism, however. Horton, for example, considers the possibility that some of those who enjoy the legal status of

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<sup>25</sup> For discussion of these points, see Raz 1979; 1984.

citizenship will fail to have the thoughts and feelings necessary for membership in a political community, and in light of which they have certain duties to their fellow members. He responds that whatever such people may say, “to participate fully and actively in the political life of a community; to conscientiously observe the rules and standards of the community; and generally, over a sustained period of time, consistently to behave in ways indistinguishable from those recognized as appropriate for a member of the political community; but then to deny that one acknowledges any political obligations lacks conviction” (Horton 1992, 160). This argument is unpersuasive for a number of reasons. First, apart from the bit about *conscientiously* observing rules, a person might well display the rest of the behavior Horton describes while being motivated by a combination of natural duty and prudence. Second, the empirical evidence demonstrating that most people are motivated to act in these ways by a sense of political obligation is ambiguous at best (see Green 1998). Third, people may continue to act habitually even when they recognize that the original justification for their behavior no longer applies, either because the time and energy that it would take to modify their habits is not thought to be worthwhile, or because certain deeply instilled beliefs and dispositions cannot be fully eradicated. Therefore we should not be too quick to conclude from the philosophical anarchist’s behavior that his denial of a duty to obey the law is a sham.

I have argued in this chapter that neither the identity account nor the non-instrumental value account of relational duties demonstrates that duties constitutive of certain socially salient relationships can be justified by appeal to some feature of the relationships themselves. With respect to identity accounts, there is no reason to

believe that it follows merely from a person's being a friend, a family member, or a citizen, that one has certain duties. At the very least, the duties constitutive of those relationships depend on the value of the activities and experiences that make them up. This insight provides a promising start for Mason's non-instrumental value account of relational duties. However, I suggest that in the case of friendship and many other socially salient relationships, the justification for relational duties depends on their being motivated by care or concern, rather than their being components of a non-instrumentally valuable relationship. With a few periodic exceptions, it seems unlikely that most citizens of modern states conceive of citizenship in terms of care or concern for their fellow citizens; more importantly, it is not clear that they ought to do so, either in order to act morally or to live a worthwhile way of life. As for the non-instrumental value of citizenship, understood in terms of mutual recognition, mandatory participation in such a relationship seems justifiable only if it is necessary to secure morally obligatory ends. But then it is the account of such ends, including an account of why the achievement of such ends requires a process that accords recognition to each participant in a collective body charged with governance, that justifies the duties of citizenship. It is to such an account that I now turn in the second half of this thesis.

## Interlude

Thus far I have argued that neither voluntarist accounts nor relational duty accounts successfully demonstrate that citizens of at least some contemporary states have political obligations. In the remainder of this thesis, I argue in defense of a natural duty approach to political obligation, specifically one that draws on the Moral Contractualist theory developed by T. M. Scanlon (1982; 1998; 2002a; 2002b). The argument proceeds in three parts. In chapter four, I set out the foundations for a Moral Contractualist account of political obligation, including a brief sketch of Scanlon's theory, the use of that theory to generate an account of basic moral rights and their correlative duties, and a natural duty of fairness to join with others in collective action when necessary to ensure that all enjoy their basic moral rights. Many modern states, I contend, can be plausibly understood to consist partly in institutions through which individuals join with one another in collective actions of this type. In chapters five and six I consider the implications of such a duty of fairness in circumstances where there is deep disagreement over the specification of basic moral rights and how best to secure them. I conclude that in such circumstances, an effective liberal-democratic state has a morally justified claim to issue authoritative directives that settle these disagreements (for action-guiding purposes). In other words, such a state has the authority or power-right to specify the design of morally necessary cooperative and/or coordinative institutions, and its citizens have a correlative duty to obey the directives the state issues for this purpose. My defense of a Moral Contractualist account of political obligation concludes in chapter seven with the refutation of several objections raised by philosophical

anarchists, objections intended to demonstrate the incompatibility of a natural duty account with one or another of the criteria for a successful account of political obligation set out in chapter one.

## Chapter 4: Moral Contractualist foundations for political obligation

According to Scanlon, Moral Contractualism “holds that an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement” (Scanlon 1998, 153). Determining the specific moral duties that all moral agents owe to one another, then, is a matter of identifying principles for the general regulation of behavior that people who were moved to find such principles could not reasonably reject. I begin in section II with a brief explication of Scanlon’s account of what I shall call Reasonable Rejection Moral Contractualism (RRMC). Though such a discussion takes us some distance from the primary aim of this thesis, it is necessary given the fundamental role that the idea of reasonable rejection plays in the defense of the state’s authority, and so political obligation, that I offer below.

On the basis of RRMC, I argue in section III that (1) all moral agents have duties to treat all other moral agents in certain ways, (2) that all moral agents have certain basic moral rights that correlate to these duties, and that (3) respect for these rights will often require moral agents to coordinate their actions and/or to cooperate with one another, or as I put it, participate in C-institutions that are practically and morally necessary. The practical necessity of such institutions follows from the fact that the state of affairs produced (or constituted) by the operation of these C-institutions is extremely unlikely to occur in their absence. Given their practical necessity, these C-institutions are morally necessary because all moral agents as such

have a natural duty to see to it that the outcomes such institutions produce (or constitute) obtain.

These arguments bring us back to a problem we confronted in the earlier discussion of fair play, namely that in many cases universal participation in a given C-institution will not be necessary for that institution to work at an optimal level, that is, at a level above which additional participants make no difference to the C-institution's ability to produce the outcome at which it aims. If such surplus participation cases occur regularly (as I suggest they do), then it will often be the case that a natural duty to "see to" the operation of those C-institutions practically necessary for the securing of every agent's basic moral rights does not by itself entail a natural duty on the part of each and every agent to *participate* in morally necessary C-institutions.

I argue in section IV for a natural duty of fairness that serves to bridge the gap between the duty to see to it that morally necessary C-institutions operate optimally, and the duty to participate in them. My argument proceeds once more from a consideration of the wrong committed by the free rider. The free rider's immorality consists in his wrongful usurpation of the collective authority to determine the allocation of benefits and burdens involved in a C-institution's operation. This authority rightfully rests with all those who are morally required to participate in a given C-institution, but when a person free rides, he unilaterally imposes his preferred allocation on the others who participate. In doing so he must will a collective action, but he lacks the moral authority to do so. The claim to such authority, implicit in the act of free riding, can be reasonably rejected by moral agents committed to acting only on principles that other, similarly motivated, agents could not reasonably reject. I

conclude this section with a brief discussion of the differences between an acquired obligation of fair play and a natural duty of fairness.

A natural duty of fairness to participate in morally necessary C-institutions provides the initial step in a RRMC defense of political obligation. I take the next step in section V, where I argue that at least some modern states can be plausibly thought to consist partly of morally necessary C-institutions. Together, these two claims entail that agents have a natural duty of fairness to obey those laws that specify the design of morally necessary C-institutions. This argument remains incomplete, however, for it fails to describe what fairness requires in circumstances where there are deep disagreements over what the law ought to be. I take up this problem in the next chapter.

## II

In his book *What We Owe to Each Other*, Scanlon argues for the view that “an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement” (Scanlon 1998, 153).<sup>1</sup> Scanlon does more than simply defend this claim as the “most general characterization of” the content of morality.<sup>2</sup> He also offers it as an analysis of the property of

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<sup>1</sup> Scanlon also writes that “an act is wrong if and only if any principle that permitted it would be one that could reasonably be rejected by people . . . who were moved to find principles for the general regulation of behavior that others, similarly motivated, could not reasonably reject” (Scanlon 1998, 4).

<sup>2</sup> More precisely, Scanlon’s concern is to characterize the morality of what we owe to each other, which he takes to be a unified subject matter and the primary referent of claims about right and wrong. However, Scanlon acknowledges a broader sense of morality that encompasses the normative demands of special relationships such as those between parents and their children, or between friends, as well as appropriate responses to the impersonal value of natural objects or great works of art. The impersonal value of such objects is the value they have independent of their contribution to the value and meaning of people’s lives. (Note that an art-object’s contribution to the value and meaning of one or more person’s lives follows at least in part from their being valuable, and not simply from their being valued).

wrongness, and argues that an act's being wrong, understood in the above terms, provides a reason that independent of any other reasons, desires, or emotions, can suffice to motivate moral behavior. Since the issues under examination in this thesis concern only the characterization of morality, specifically the duties (if any) that citizenship in a modern state entails, I shall for the most part set aside these meta-ethical and motivational issues, and focus on Scanlon's explication of how we ought to use RRMC to determine what we owe to each other.<sup>3</sup>

What does it mean to say of a set of principles for the general regulation of behavior that no one could reasonably reject it as a basis for informed, unforced general agreement? To answer this question, we must understand what Scanlon means by 'reasonably reject' and 'principles for the general regulation of behavior'.

Following Rawls, Scanlon claims that normal adult human beings are both rational and reasonable, where these describe two basic features of their personalities. To say that they are basic is to say that a proper analysis will not show either of these two aspects of human personality to be reducible to the other, or to any other feature of human personality.<sup>4</sup> Rationality refers to the power an agent has to organize his own life; a task that includes the evaluation of his ends as well as the means to them.

In other words, to be rational is to form and act on a conception of the good life (or at

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<sup>3</sup> Insofar as the success of my argument depends on Scanlon's meta-ethical and motivational arguments, their failure would of course entail the failure of my own argument. Scanlon's meta-ethical argument strikes me as correct; his motivational argument, on the other hand, is more worrisome. I believe it can be defended, however, if only by showing that no rival theory has a better account of moral motivation, though I shall not do so here. Alternatively, it may be possible to buttress Scanlon's motivational argument by drawing on some of the psychological literature on empathy, an approach Michael Slote has recently explored in his defense of virtue ethics. Finally, it is always worth bearing in mind that our willingness to adopt a view is a matter of our overall assessment of it. The strength of our conviction that RRMC correctly characterizes our duties to one another may outweigh any qualms we have regarding its meta-ethical and motivational implications.

<sup>4</sup> The claim that the reasonable is ultimately reducible to the rational, or that morality is ultimately reducible to calculations of rational self-interest, is what distinguishes interest-based social contract theories from right-based social contract theories. See Freeman 1990.

least to be capable of doing so). Reasonableness refers to the power an agent has to organize his life with others on terms that those others cannot reject insofar as they too are reasonable. A person is reasonable if and only if he is committed to limiting pursuit of what he takes to be the good life when and as necessary to accommodate others who are also rational and reasonable, that is, who also pursue a conception of the good life but are committed to limiting that pursuit in order to accommodate others with the same two basic commitments. A reasonable person seeks such an accommodation for its own sake; that is, for the sake of treating people in ways that they cannot reject insofar as they are reasonable, and not because, for example, doing so will better conduce to his realization of the good life than would any alternative. The concept of reasonableness, then, is a morally-laden one, at least in the sense that it consists in a disposition to act in certain ways that may in principle diverge from what it would be rational to do (i.e. that conduce less to the realization of the good life than would some alternative action). Thus reasonableness is not simply the power to organize one's life with others, for merely rational agents can often accomplish this task. It is instead (1) the disposition to place constraints on rational action, even when doing so entails that one will be less successful than one might otherwise be in leading what one takes to be a (or the) good life, in order to achieve a shared understanding of the terms for social interaction among likeminded people, and (2) the disposition to do so because achieving and acting on this shared understanding is a non-instrumentally valuable end for all normal adult human beings as such.

Unfortunately for the sake of clarity, the term 'reasonable' has a second meaning in everyday language (indeed, some might argue that this is the only meaning

of the word ‘reasonable’ in everyday language). Contributing even more to the confusion over what it is reasonable to reject is the fact that this second sense of ‘reasonable’ contrasts with a second meaning for the term ‘rational’. Let us begin, therefore, by defining **substantive rationality** as the power to organize one’s life, or to form and act on a conception of the good. Likewise let us define **substantive, or moral, reasonableness** as the power to organize one’s life with others on terms that they cannot reject insofar as they are reasonable, or as Rawls puts it, to form and act on a sense of justice. Next, following Scanlon, let us define a **cognitively rational** belief or action as what it would be (most) rational to believe or do, an idea that is in turn characterized in terms of an ideal rational agent.<sup>5</sup> An ideal rational agent possesses “(1) full information about [his] situation and the consequences of possible lines of action, (2) awareness of the full range of reasons that apply to someone in that situation, and (3) flawless reasoning about what these reasons support” (Scanlon 1998, 32). Thus the definition of the (most) rational thing to do is “the course of action that is best supported by all the relevant reasons given a full and accurate account of the agent’s actual situation” (Scanlon 1998, 32), and similarly for the (most) rational thing to believe. A **cognitively reasonable** belief or action, on the other hand, is a judgment about what to believe or do made “relative to a specified body of information and a specified range of reasons, both of which may be less than complete” (Scanlon 1998, 32). The crucial difference between a cognitively rational belief and a cognitively reasonable one is that the latter is a judgment made under conditions of less than full information and/or awareness of the full range of reasons that apply to someone in that

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<sup>5</sup> This definition of cognitively rational may include an extra intermediary step, but I leave it in so as to mirror Scanlon’s discussion of (what I call) cognitive rationality.

situation, and/or with less than perfect reasoning. In other words, reasonable judgments (about what to believe or what to do) are those made in circumstances characterized by what Rawls labels the burdens of judgment.

The burdens of judgment are the source of reasonable disagreement, or put the other way around, reasonable disagreements are those that are intelligible in light of the burdens of judgment (Waldron 1999b, 163). Among the burdens of judgment that Rawls mentions are:

1. The complexity of empirical evidence, and conflicts between different pieces of empirical evidence, both of which render an overall assessment of what the evidence supports difficult to reach.
2. Disagreements over the weight to be assigned different considerations, even when there is agreement as to which considerations are relevant to the issue at hand.
3. The vagueness and indeterminacy of our concepts (apart, presumably, from those concepts that figure in a formal language, such as logic or (perhaps) physics), which entails that “we must rely on judgment and interpretation (and on judgments about interpretations) within some range (not sharply specifiable) where reasonable persons may differ” (Rawls 1993, 56).
4. The formative effects that our past experiences have had on what we are inclined to see as a relevant consideration for a given issue, and the weight we assign it relative to other considerations.

These first four burdens of judgment apply to both theoretical and practical reason; to judgments in physics or biology, for example, as well as to judgments about what

morality or prudence requires of one in a particular case. Rawls also mentions two further burdens of judgment that apply specifically to normative questions. These are:

5. The irreducible plurality of normative considerations that make it difficult to reach an overall assessment of what ought to be done in a given case.
6. The impossibility of accommodating all of the values [valuable ways of life?] there are in a single set of social institutions, which entails that choices must be made as to which values are to be accommodated, and to what degree (i.e. to what degree will social institutions encourage or discourage attempts to realize certain values, or valuable ways of life) (Rawls 1993, 56-7).<sup>6</sup>

Rawls states explicitly that this list of the burdens of judgment should not be understood as complete, but these considerations do seem to offer a good (reasonable?) explanation for the experience many people have of reasonable disagreement; that is, the experience of believing that another's judgment on a given issue is incorrect, but at the same time "seeing" or understanding how that person could draw the conclusion that he does.

Thus far I have spoken of cognitively reasonable judgments about what to believe or do, but we can also judge *people* to be cognitively reasonable or unreasonable. For example, we may say of a Creationist that he is an unreasonable person, meaning that given the aim of identifying the origins of life on Earth (and in particular, human beings), a Creationist fails to draw a reasonable conclusion from the relevant evidence. Such a person's failure to reject divine creation in favor of the theory of evolution is not intelligible in terms of the burdens of judgment. More

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<sup>6</sup> See also Nagel's description of reasoning under the burdens of judgment (Nagel 1987, 318), which I quote in chapter seven.

generally, cognitively unreasonable people “are unyielding people. They persist with their views or intentions in the face of evidence” (Raz 1998, 34). It is important to note, however, that the cognitive reasonableness of a person’s judgment is relative to some less than complete body of information and reasons. Thus it is possible to think that, for a person raised in a deeply religious community with little or no knowledge of modern science, it is reasonable to conclude that Creationism is the correct account of the origins of life on Earth, while also thinking that it is unreasonable for another person, one who has had ample exposure to modern science, to reach that conclusion. Also, as Joseph Raz points out, we sometimes employ a sense of ‘reasonable belief’ that abstracts from any particular believer, and refers instead to the conclusions that the experts (or some implied reference group for the sort of judgments with which we are concerned) would draw on the basis of the evidence available to them (Raz 1998, 34). It is because we use the term ‘reasonable’ to refer both to a particular person’s belief, and what the experts (or some implied reference group) believe, that we can judge a person to be reasonable in believing what he does, while at the same time judging his belief to be unreasonable.<sup>7</sup>

It is possible, therefore, for a morally reasonable person to hold a cognitively unreasonable belief, or to act in a cognitively unreasonable manner, which creates an ambiguity in the claim that a person’s believing X, or doing Y, could be reasonably rejected. This claim might mean that an agent’s doing Y is not an action that is authorized by any set of principles for the general regulation of behavior that agents could not reject, insofar as they are morally reasonable. Alternatively, it might mean

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<sup>7</sup> Raz restricts the phrase ‘reasonable’ to talk of what the relevant experts would conclude on the basis of available evidence. When speaking of what a particular individual concludes on the basis of the evidence available to him, Raz speaks of the *rationality* of this agent’s beliefs.

that an agent's conclusion that he ought to do X is not warranted by the relevant considerations, even allowing for the possibility that because of the burdens of judgment, the notion of being warranted by the evidence is somewhat loose. In what follows, I shall seek as best I can to make clear what sense of 'reasonable' I mean when I claim that a certain principle or action could be reasonably rejected.

We must distinguish between (1) cognitively *rational* and morally reasonable agents and (2) cognitively *reasonable* and morally reasonable agents. The former are **ideal moral agents** in that they are free from the burdens of judgment, and so when considering whether a proposed principle should be rejected in favor of an alternative one, they will not err because they are ignorant of some relevant piece of empirical information (say what exactly the formative effects of a given institution are), nor will they fail to recognize a relevant reason. In addition, such agents are free from bias and prejudice, and therefore their judgment regarding the relative weight of various reasons for and against proposed principles will not be influenced by irrelevant and/or unjustifiable considerations (e.g. the belief that black people are not substantively rational, or that their power to form and act on a conception of the good is less important than this same power in white people, and so deserves less accommodation). The true, or correct, account of the morality of what moral agents owe to each other as such, consists in the principles for the general regulation of behavior that could not be rejected by substantively and cognitively rational, and morally reasonable, agents. The claim that an action is wrong, therefore, just is the claim that its performance under the circumstances is not authorized by any set of principles for the general regulation of behavior that such agents could not reject.

Actual people, of course, are not cognitively rational; rather, we are cognitively reasonable. Rarely, if ever, will we know all of the reasons relevant to the assessment of potential principles for the general regulation of behavior, or be completely unbiased in our assessment of these reasons. But this does not entail that RRMC is of no use as a practical guide to moral conduct. People who wish to act morally must make a conscientious effort to act only on principles that ideal moral agents could not reasonably reject. Since this requires that agents view their actions (and the principles that justify them) from the perspective of others who are affected by them, a good faith effort must be made to appreciate the agent-relative values and reasons had by those their actions will affect, and to appreciate them as those others do. I shall label those actual agents who seek to employ the RRMC methodology in order to determine how they ought to act **well-intentioned moral agents**. Of course, judgments made by well-intentioned moral agents about the permissibility of acting on certain agent-relative reasons, or the exact contours of agent-neutral reasons, are subject to revision in light of new knowledge and understanding. But in this respect RRMC seems no different than other moral theories (and perhaps even all types of knowledge). The Utilitarian, for example, can give an ideal account of morality, but for practical purposes, he can only advance provisional judgments as to what rules or actions best maximize utility.

The circumstances in which we live are characterized by the burdens of judgment, among other things. What we wish to know, then, is what principles for the general regulation of behavior in such circumstances ideal moral agents could not reject? In the remainder of this dissertation I argue that among the principles for the

general regulation of social interaction between cognitively and morally reasonable persons is a principle requiring obedience to the laws issued by a suitably specified state, within the scope of that state's justifiable authority.

Before we turn to an analysis of how morally reasonable agents determine that a principle ought to be rejected, let us examine Scanlon's account of principles.

Scanlon understands principles as

general conclusions about the status of various kinds of reasons for action. So understood, principles may rule out some actions by ruling out the reasons on which they would be based, but they also leave wide room for interpretation (Scanlon 1998, 199).

Moral principles, then, have several defining features. First, they are general statements of reasons for action, and therefore to evaluate a principle is to evaluate the reasons an agent might give to justify his action (past, present, or future). Second, moral principles are what Joseph Raz calls preemptive reasons for action (Raz 1979, 17, 22-23). As noted in chapter one, preemptive reasons include an exclusionary element; they exclude at least some other kinds of reasons, most notably self-regarding ones though sometimes other agent-relative reasons as well, from consideration in an agent's deliberation. Understood as preemptive reasons, moral principles also provide a first-order reason for action, namely that doing X is treating others in ways that they could not reasonably reject.<sup>8</sup> Third, moral principles leave room for interpretation and therefore acting only on principles that ideal moral agents could not reasonably reject

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<sup>8</sup> Scanlon does not claim that this reason is the one that always motivates moral behavior, or (so far as I know) even that it should. (Contrast with Kant's views of moral worth and acting from the motive of duty). Rather, the wrong-making properties of an action, such as the harm it will cause another, will often suffice to motivate a person to refrain from that action. On the distinction between the property of wrongness, or an action's being a violation of principles for the general regulation of behavior that ideal moral agents could not reasonably reject, and various wrong-making properties, or those properties encoded in the reasons given by ideal moral agents for rejecting a proposed principle, see chapter five.

requires the exercise of judgment, and not mere rule-following (Scanlon 1998, 199-202).

Much more could be said about principles and the role they play in moral justification and moral motivation, but I shall not do so here. Instead, let us consider the process by which morally reasonable agents determine that a particular principle could be rejected in favor of an alternative principle.<sup>9</sup> When we evaluate a principle in order to determine whether it could be reasonably rejected, “what is presupposed first and foremost is the aim of finding principles that others who share this aim could not reasonably reject” (Scanlon 1998, 192). This is presupposed because, by their (our) very nature, morally reasonable agents are committed to acting only on principles that others could not reject, insofar as they are morally reasonable. The evaluation of any particular principle also involves taking a number of other reasons as given, at least for the purposes of determining the acceptability or rejectability of the principle in question. These reasons may include both agent-relative and agent-neutral reasons that provide reasons for and against rejecting that principle, or what Scanlon calls objections to permission and objections to prohibition. Agent-relative reasons, recall, are reasons an agent has only insofar as he or she occupies a particular historically embedded standpoint, while agent-neutral reasons are reasons that everybody has, regardless of the standpoint they occupy. As Parfit puts the point, agent-relative

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<sup>9</sup> It is important to note that cognitively rational (i.e. ideal) and cognitively reasonable (i.e. actual) agents both employ the same method to determine what principles for the general regulation of behavior could not be rejected. The difference between them is how well they do in applying this method; cognitively reasonable agents, for example, may fail to recognize a relevant reason, or to give some piece of information the proper weight relative to some other piece of information. Of course, there are no cognitively rational agents who actually deliberate about what principles for the general regulation of behavior they could not reasonably reject. Rather, this is an ideal that actual agents strive to emulate in their deliberation about what principles for the general regulation of behavior they could not reasonably reject.

reasons are reasons that an agent *may* have, while agent-neutral reasons are reasons that all agents have necessarily (Parfit 1984, 143). In light of both kinds of reasons, a substantive judgment must be reached as to the reasonableness of that principle, and so the actions that it would permit, require, or forbid. This substantive judgment is “a judgment about the suitability of [a] certain principle to serve as the basis of mutual recognition and accommodation” (Scanlon 1998, 194). Thus to say that a suitably motivated moral agent could reject a principle is to say that rejecting the principle in favor of some alternative one would better express mutual recognition and accommodation than would its acceptance. It would do so, for instance, because it would place fewer restrictions on agents’ pursuit of agent-relative value (or perhaps better, his conception of the good), better recognize the priority of some agent-relative values over others, or be more consistent with other agent-neutral reasons, i.e. principles that have also been submitted to this kind of evaluation. This last reason for rejecting a principle has its basis in Scanlon’s claim that the nature of moral justification on a RRMC approach is holistic. Though a certain understanding of agent-neutral and agent-relative reasons may be taken as given for the purpose of evaluating some proposed principle, all reasons for action are in principle subject to modification in light of a re-evaluation against a background of other, provisionally fixed, reasons.<sup>10</sup>

Like rationality, reasonableness does not itself provide a reason to do (or to refrain from doing) any particular action; rather, it regulates the reasons an agent has

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<sup>10</sup> Scanlon’s holism, and the notion that all reasons for action are only provisionally fixed, may provide a response to those who worry that the method of reasonable rejection requires a person to test all possible principles that would permit a given act in order to determine whether that act can be reasonably rejected. See Pogge (2001) for discussion of this worry, and suggestions for how it might be addressed.

for action. Particular reasons for action have two sources: first, the agent-relative values and reasons of particular agents, and second, agent-neutral values and reasons had by all moral agents as such. Something having agent-relative value, say a person's friendship with his wife, provides him with a reason (or reasons) to do those actions he takes to be constitutive of his friendship with her. But this person's acting on the agent-relative reasons he has may lead to, indeed often will lead to, conflict with others acting on the agent-relative reasons that they have. When this occurs, the agent's commitment to acting only on principles that others could not reasonably reject will lead him to seek out a principle that places the least constraint on his acting on the agent-relative reasons that he has, but that is also acceptable to other agents who wish to place the least constraint on their acting on the agent-relative reasons that they have. Such a principle provides an agent-neutral reason for action, albeit one whose exact contours are in principle revisable in light of as yet unrecognized conflicts with agent-relative or other agent-neutral reasons for action (a point I expand on at length in the following chapter).

A common criticism of Scanlon's account of what we owe to each other is that the notion of reasonable rejectability and contracting agents is a spare wheel, unnecessary for an account of wrongness.<sup>11</sup> For the reasons that ideal moral agents appeal to when they reject a proposed principle already appear to be moral ones; for example, the claim that a principle permitting you to do X will cause me bodily harm. But then the notions of reasonable rejection and the social contract will be at best a helpful epistemological mechanism for identifying what is required by the balance of

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<sup>11</sup> Philosophers who have raised this objection include McGinn 1999 and Pettit 1999a. For an excellent response to these critics from which the argument developed here draws, see Ridge 2001.

reasons in particular cases. And Scanlon's meta-ethical claim – that the property of wrongness simply is being an action not authorized by principles for the general regulation of behavior that ideal moral agents could not reasonably reject – will be false. Moreover, should Scanlon *not* treat the reasons ideal moral agents appeal to as moral reasons, then it is unclear how their reasonably rejecting a principle permitting a certain type of conduct will count as a *moral* reason not to conduct oneself in that manner.

In fact, this criticism rests on a failure to grasp Scanlon's account of RRMC. On that account, the reasons that ideal moral agents offer as considerations that count in favor of or against proposed principles are agent-relative reasons. So for example, that your doing X will cause *me* bodily harm is a reason that *I* have for rejecting a principle that permits you to do X, presumably because of its effects on my well-being and ability to lead a life that I find valuable and meaningful.<sup>12</sup> This is not yet a moral reason to refrain from doing X, nor is it an agent-neutral reason (as are all moral reasons that constitute the morality of what we owe to each other). Rather, if there are no (agent-relative) considerations in favor of a principle permitting you to do X (and thereby cause me a certain harm) that are stronger than the considerations I offer in opposition to that principle, then it will be reasonable to reject that principle.<sup>13</sup> It is the reasonable rejectability of the principle on the basis of a consideration of agent-

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<sup>12</sup> More accurately, this is an objection raised from a particular standpoint that can be occupied by many different persons, not just a complaint had by one, and only one, individual. I discuss this further below.

<sup>13</sup> Thus RRMC is sometimes referred to as the complaint model of wrongness (a term apparently coined by Derek Parfit), since it holds that the reasonable rejectability of a proposed principle turns on the strength of the complaint raised against it in comparison to the strength of the complaints raised against rival principles.

relative reasons for and against it that provides an agent-neutral moral reason for you not to do X.

But did I not claim earlier that morally reasonable agents could appeal to agent-neutral reasons as a reason to reject a proposed principle? I did, but there is no contradiction here. For all agent-neutral reasons are conclusions about the moral status of certain types of conduct justified by appeal to agent-relative reasons alone. The appeal to an agent-neutral reason as a consideration in favor of or against a principle for the general regulation of behavior can be thought of as a way of calling attention to previously reached resolutions (though perhaps provisional ones) regarding conflicts between different agent-relative reasons. The discussion of fairness in section IV of this chapter provides an excellent example of this point. For now, the important point is that at bottom all of the considerations to which ideal moral agents appeal when they seek principles for the general regulation of behavior are agent-relative ones.<sup>14</sup>

How is it, then, that the agent-neutral reasons that arise out of RRMC count as *moral* reasons for action, if the reasons on the basis of which these principles are justified are not themselves moral reasons?<sup>15</sup> The answer is that moral reasons for action just are those principles agreed to by suitably motivated agents, namely those with a commitment to acting only on principles that others, similarly motivated, could

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<sup>14</sup> One reader has suggested that this argument – that conclusions about the moral status of certain types of conduct are ultimately justified by appeal to agent-relative reasons alone – is not argued for, and ad hoc. My purpose here, however, is not to argue for the correctness of this view, but only to counter the argument that Scanlon's account of RRMC should be rejected because it *must* either assume that certain reasons are moral ones independently, in some sense, of how they would be viewed by ideal morally reasonable agents, or otherwise that the evaluation of reasons by such agents fails to produce moral reasons for action. I am describing a third alternative, but I am only concerned to argue for its possibility, not its correctness.

<sup>15</sup> Note that agent-relative reasons that are moral in the broad sense, such as reasons stemming from the nature of various special relationships, do figure in the deliberation of ideal moral agents.

not reasonably reject.<sup>16</sup> It is because the “product” of the RRMC “procedure” arises out of the agreements agents with this commitment must make that Scanlon’s Contractualism provides agent-neutral reasons for action, specifically, the morality of what we owe to each other.<sup>17</sup> Thus the notions of reasonable rejection and of a contract are not mere epistemological devices for discovering moral reasons, but are instead constitutive of the very concept of wrongness.

Unlike other theories that assign a prominent place to the notion of a contract, RRMC holds that the morality of what we owe to each other is not correctly conceived of as arising from self-interested bargaining under certain specified conditions, but rather in terms of negotiations between agents committed to acting only on principles that other agents could not reject, insofar as they are morally reasonable.<sup>18</sup> Such a

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<sup>16</sup> Scanlon acknowledges that such a characterization of morality invites a charge of circularity (Scanlon 1998, 194), for it appears to amount to the claim that the morality of what we owe to each other consists in the agreements that must be struck among agents who are moral. Adams and Pogge, among others, voice their concern with this apparent circularity (Adams 2001, 565-68; Pogge 2001, 120). However, insofar as Scanlon’s argument is intended as a characterization of the content of morality, it is not clear how much we should be bothered by his building moral content into the very structure of Contractualism. After all, we may still learn much about the content of our current moral beliefs by conceiving of them in the way RRMC would have us do. It is true, however, that having built morality in to the very structure of Contractualism, Scanlon cannot use his account of morality to convince the rational amoralist that he is rationally compelled to act morally. But he does not seek to do so, appealing instead to his own experience of the phenomenology of interaction with others, particularly the need to feel that he can justify his actions to them (though they may unreasonably reject his justification), in order to address the moral skeptic.

<sup>17</sup> I use the scare quotes to indicate that that RRMC does not require an actual process in order to produce a certain outcome or conclusion. Note, too, that X’s being something that cannot be reasonably rejected entails that a suitably motivated moral agent *must* accept X, not merely that he or she *could* accept it (Nagel 1991, 36).

<sup>18</sup> It is important to note, however, Scanlon’s explicit admission that he is not criticizing accounts like Rawls’ that combine a substantive concept of rationality with certain restrictions on bargaining. Rather, Scanlon appears to view Rawls’ principles of justice as lower level ones subsumed within the most abstract characterization of morality, which employs the term ‘reasonable’ rather than ‘rational’. Rawls discussion of the principles of justice is more determinate than Scanlon’s most general characterization of morality, but important claims – such as claims about responsibility for talents and the products of talents, or claims about substantive rationality (a maximin strategy, rather than a guaranteed minimum strategy) – are not themselves justified by being picked by agents in the OP. They stand in need of justification, which would presumably be a matter of their not being rejectable by ideal moral agents. For discussion of this point, see Scanlon 1998, 242-247.

commitment entails that moral agents evaluate proposed principles from the standpoint of other agents, not only their own. That is, they must view a principle – the actions it would permit, require, or forbear – in light of others’ agent-relative reasons, and determine from that perspective what the burdens and benefits imposed by that principle would be. A principle whose benefits somewhat outweigh its burdens from one perspective may be one whose burdens far outweigh its benefits from a different perspective. For RRMC, the moral point of view is an interpersonal perspective, or the view from everywhere, not the impersonal view from nowhere, or the view of a benevolent God.

In contrast to the mutually disinterested agents in Rawls’s original position, agents that seek to act on principles that others, similarly motivated, could not reasonably reject must recognize one another by adopting each other’s standpoint. Note, however, that while the adoption of another’s standpoint as required by RRMC does entail that A must see the value and meaning of B’s life from B’s perspective, A need not see it as a valuable and meaningful way of life for him, or indeed for B (when viewed from A’s standpoint). A must value B (as opposed to the way of life B leads) at least in the minimal sense that A recognizes B as rational, or capable of leading a valuable and meaningful life, and so ensure that he enjoys those conditions necessary for the pursuit of the way of life he seeks. However, A need not ensure that B’s pursuit is successful, or that he enjoys any particular kind of human flourishing. Such

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Also, Scanlon prefers to characterize morality in terms of what morally reasonable agents could not reject, rather than what substantively rational agents in suitably specified circumstances could not reject, because the former, but not the latter, captures the stance or attitude that we as moral agents (or at least Scanlon) take(s) to others. As he puts it, “our thinking about right and wrong is structured by a different kind of motivation [then, for example, agents in Rawls’ original position]...[one] that gives us a direct reason to be concerned with other people’s points of view; not because we might, for all we know, actually *be* them, or because we might occupy their position in some other possible world, but in order to find principles that they, as well as we, have reason to accept” (Scanlon 1998, 191).

moral requirements may be entailed by other relationships, such as that of lover, friend, neighbor, co-religionist, benefactor, or humanitarian, but not by a Moral Contractualist theory of what all moral agents owe to all other moral agents as such.

The idea of reasonable rejection is nothing other than an attempt to spell out in greater detail what is involved in respect for a moral agent's autonomy. To act only on principles that others could not reasonably reject, to constrain in this manner the pursuit of the agent-relative values that make one's life worthwhile, simply is to recognize other agents as self-governing, that is, as creatures whose actions can be justifiably limited only in ways that they themselves would limit it to express their respect of other agents' autonomy (if they were reasonable).<sup>19</sup> As Scanlon puts the point, "by accepting the requirement that they [rational and reasonable creatures] should be treated only in ways allowed by principles that they could not reasonably reject, we acknowledge their status as self-governing beings, not just things that can be harmed or benefited" (Scanlon 1998, 183). Note, however, that to be autonomous in

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<sup>19</sup> This sentence may suggest the following misunderstanding of Scanlon's position: justification for one's action is owed only to well-intentioned moral agents, or those who make a conscientious effort to live according to the RRMC account of morality. As Pogge points out, "Scanlon should characterize CCM [Contractualist Moral Motivation] persons as being concerned to avoid the possibility of reasonable rejection *by anyone* and then count a conceivable rejection as reasonable if and only if it is consistent with the aim of finding principles for the general regulation of behavior that no one could reasonably reject" (Pogge 2001, 123). I believe this is Scanlon's position (and it is certainly the one I adopt here): this seems to follow from the claim that ideal moral agents must adopt the standpoints of various people who will be affected by the rejection or acceptance of a particular principle in order to determine whether it can be reasonably rejected for some alternative principle.

Contrast this with the following claim made by Gutmann and Thompson with respect to their conception of deliberative democracy: "From a deliberative perspective, a citizen offers reasons that can be accepted by others who are similarly motivated to find reasons that can be accepted by others... a deliberative perspective does not address people who reject the aim of finding fair terms for social cooperation; it cannot reach those who refuse to press their public claims in terms accessible to their fellow citizens" (Gutmann and Thompson 1996, 53; 55). This quote suggests that an agent owes no justification for his conduct to those who do not accept the need to justify their own conduct by appeal to public reasons. I am not sure that Gutmann and Thompson intend such a claim, or only that their conception of deliberative democracy does not require *actual* justification to people who refuse to employ public reasons to justify their demands, a claim with which Scanlon and I would agree. I thank Bill Galston for bringing this specific quote to my attention.

this sense does not require an agent to choose the way of life she lives, to self-create, or to be independent of others. Conceptions of autonomy characterized in these ways represent particular ideals of human flourishing, but RRMC remains neutral with respect to a wide variety of particular thick conceptions of the good life, or more precisely, those conceptions of the good life that remain open to agents committed to acting only on principles that ideal moral agents could not reasonably reject.

RRMC requires moral agents to adopt the standpoints of those their actions will impinge upon. But what exactly is involved in the idea of adopting another's standpoint? Surely a person cannot be expected to become someone else – to literally see the value and meaning of that person's life as he sees it, in all its particularity. Rather, the value and meaning of people's lives must be put in general terms, as reasons for action that could apply to a certain class of people. Scanlon calls such reasons generic reasons, and he defines them as ones that "people have in virtue of their situation, characterized in general terms, and such things as their aims and capabilities and the conditions in which they are placed" (204). The conceptualization of one's reasons for action in general terms is a necessary entailment of an agent's commitment to acting on reasons that others, similarly motivated, could not reasonably reject. That is, an agent's commitment to justifying his actions to others will lead him to formulate his reasons for action in terms that are accessible and acceptable to them, or what are sometimes called public reasons.<sup>20</sup> This is not to say

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<sup>20</sup> As Joshua Cohen writes of an idealized deliberative setting, "it will not do simply to advance reasons that one takes to be true or compelling: such considerations may be rejected by others who are themselves reasonable. One must instead find reasons that are compelling to others, acknowledging those others as equals, aware that they have alternative reasonable commitments, and knowing something about the kinds of commitments that they are likely to have" (Cohen 1997, 414). Cohen's conception of deliberative democracy differs from Scanlon's account of RRMC in certain respects, most importantly in that Cohen aims only to give an account of democratic legitimacy (which he

that the moral status of my action depends on others' acceptance of my justification, for they may not be reasonable to reject it. Ultimately the description of an agent's standpoint (or the generic reasons upon which he wishes to act) is itself subject to the test of reasonable rejection. In a modern state characterized by religious diversity, for instance, a principle restricting the freedom of worship and religious education can be reasonably rejected because it prevents people from practicing their religion, but not because it prevents people from doing something they want to do. The latter reason is too general; occupiers of many different standpoints could object to others acting on that principle insofar as it would condone actions that would likely prevent them from doing what they want to do. Nor could a principle restricting the freedom of worship of a particular religion be justified by appeal to its being the true faith, for it would be reasonable for those who do not share that faith to reject this claim. That a restriction on freedom of worship would prevent people from practicing what they believe to be the true religion, together with the recognition that the practice of a particular religion is of great importance to the value and meaning of many people's lives, provides a reason that, as Nagel puts it, "has a chance of being accepted by all parties as a true description of what is going on, and being accorded the same kind of impersonal value by all parties concerned" (Nagel 1987, 310).<sup>21</sup>

As we turn in the next section to a more precise characterization of what is involved in treating agents in ways that they could not reject insofar as they are

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understands to include both the authorization (or liberty-right) to exercise state power and the possession of authority), while Scanlon is concerned with the more general task of characterizing the morality of what we owe to each other. Still, both assign a central place to the notion of justification to others on the basis of reasons that those others can accept (or in Scanlon's case, cannot reasonable reject).

<sup>21</sup> I take this example, though not the analysis, from Nagel.

morally reasonable, it is important to remember that any statement of, or reference to, a moral principle will be a shorthand way of referring to the agreement reached by agents who are committed to (a) acting on the agent-relative reasons that give their lives value and meaning, and (b) modifying these reasons, or at least the actions that they justify, when necessary for mutual accommodation. Insofar as there are likely many potential conflicts between agents acting on agent-relative reasons, the possibility of appealing to a moral principle, a right, a duty, and so forth, will often be a valuable time saver, place fewer demands on cognition, etc. This should not distract us from the deeper truth, however, that moral principles, rights claims, etc., are incomplete generalizations, sufficient in many but not all cases for resolving the question of whether a particular action is one that could be reasonably rejected. When hard cases arise, principles can still play a role in judgments about whether a particular action can be reasonably rejected by calling our attention to considerations that are likely to be relevant.<sup>22</sup> As we shall see, both the likelihood of disputes over the exact specification of moral principles, rights, and duties, and the necessity of recognizing others capacity to pass judgment on these matters, play key roles in a RRMC justification of political obligation.<sup>23</sup>

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<sup>22</sup> Scanlon acknowledges, however, that he has given insufficient guidance as to how competing considerations are to be weighed against one another, and more interestingly, doubts that such a task is possible at the level of abstract moral theory. See Scanlon 1998, 218; see also Pogge 2001, 140.

<sup>23</sup> In his thorough critical analysis of Scanlon's attempt to use RRMC to characterize the content of morality, Pogge focuses on the apparent disjunction between Scanlon's ideal moral theory and a moral theory best-suited to the current conditions occupied by human beings. For example, whether proposed moral principles are evaluated under the assumption of full-compliance, or only partial-compliance, will likely have an effect on which principles are reasonably rejected. Pogge then suggests a political interpretation of Contractualism that "would focus not on *hypothetical* standpoints affording *generic* rejection grounds in *fictional* social worlds, but on the *actual* standpoints and rejection grounds of *real* people in the world *here and now*. This interpretation directs us then not toward a theoretical task of figuring out what principles would be best, but toward an eminently practical, political task of establishing the *best reachable* principles in the world as it is through actual agreement with the people around us" (Pogge 2001, 136). It is not clear that Pogge takes these two tasks to be incompatible;

### III

The method of reasonable rejection can be used to establish the specific duties that all moral agents owe to all other moral agents, or what is the same, to characterize in greater detail the kinds of treatment that it would be reasonable for ideal moral agents to reject. Though Scanlon does not say so, I contend that a moral agent's natural duties to refrain from treating others in various ways that they could reasonably reject correlate with the rights of those others to not be treated in those ways.<sup>24</sup> Talk of both duties and rights is merely a shorthand way of referring to moral principles for the general regulation of behavior that no one could reasonably reject, not a reference to foundational values that are incorporated, already morally-laden, into the process of determining what principles can be reasonably rejected.<sup>25</sup>

Though it follows naturally from the idea of reasonable rejection that duties are prohibitions on certain sorts of behavior, this does not entail that the only duties moral agents have will be duties of non-interference, or that people have only negative moral

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rather, he urges us to focus our attention on the latter, rather than the former. The purpose of this dissertation is to connect these two tasks by drawing out the implications of RRMC for a non-ideal situation in which there are deep disagreements over what exactly moral agents owe to one another as such, and how best to ensure that all are treated in ways that they could not reasonably reject.

<sup>24</sup> It may be conceptually possible for a person to be owed a certain type of treatment, but not to have a claim-right to it, in which case it might be misleading to describe the morality of what we owe to each other in terms of rights. Note, however, that while a requirement to treat X in a certain way is consistent with the duty to treat X in that way being owed to some third party (such as God), Scanlon clearly believes that the *duty* and not just the way of being treated, is owed to the moral agent affected (or potentially affected) by one's conduct. Imperfect duties (such as a duty of charity) seem the most likely candidate for ways of being treated that are owed to others but to which those others do not have a claim, though it is unclear how Scanlon would account for such duties, particularly given his commitment to the Individualist Restriction (which I discuss in the following chapter). I suggest one way of doing so in the next chapter, but this turns on my account of rights as claims against certain levels of risk of harm being imposed on one, an account with roots in Scanlon's arguments but that cannot be attributed to him. It is also important to remember that imperfect duties may have their source in various thick conceptions of the good life, even if no such duties are owed merely as a result of an individual being a moral agent.

<sup>25</sup> Thus we need not be deterred from discussing RRMC in terms of rights by distinctions Kamm draws between certain types of rights theories and Scanlon's moral theory, all of which hinge on the priority of rights to agreement or justification (Kamm 2002, 334).

rights. To use a familiar example, it would be reasonable for a drowning person to reject a passerby's decision not to intervene because doing so would ruin his shoes, assuming that intervention poses no other cost or risk to the passerby.<sup>26</sup> Likewise a person might reasonably reject others leaving him to suffer the harms of inadequate nutrition, including perhaps death, in circumstances where those others could ensure him adequate nutrition without unduly restricting their ability to act on the agent-relative reasons that give their lives value and meaning. There is nothing, then, in the form of reasonable rejection as the method for identifying the rights that all moral agents enjoy that rules out some of them being positive rights, and so the correlative duties requiring action, and not merely forbearance. Nor, as a matter of substantive argument, does it strike me as likely that all moral agents will be entitled only to the forbearance of others from certain kinds of interference in their pursuit of agent-relative values. For example, it seems extremely unlikely that in every instance where the right to adequate nutrition might be claimed, the action necessary to respect that right would require such limitations on those with the correlative duty that it would be reasonable for them to reject the claim as a serious threat to their abilities to lead valuable and meaningful lives.

I shall not take the time here to argue at length for a particular list of rights that all moral agents, as such, possess, or of their correlative duties. To give the reader the flavor of what such an argument would look like, though, I offer the following sketch of a defense of the right to be free from deliberately or negligently inflicted bodily

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<sup>26</sup> There may be *some* story that could be told about the passerby and his shoes such that it would be reasonable for him to reject the drowning person's demand that he be saved. If so, this simply highlights the earlier claim that moral principles, rights, and duties should be thought of as generalizations, not absolute rules that hold in all possible situations.

harm. The infliction of bodily harm will usually interfere with an agent's ability to act on many of the agent-relative reasons that he has, because the pain he suffers distracts him or otherwise makes it difficult or impossible to act on those reasons, and/or because the harm involves some kind of disability that prevents him from successfully acting on an agent-relative reason, as an injury to a person's arm might prevent him from playing baseball. And of course the experience of pain often involved in suffering bodily harm is a loss of well-being to which an agent may point as a reason to reject a principle that would allow the deliberate or negligent infliction of such harm. Ideal moral agents, recognizing the extent to which actions that cause bodily harm can interfere with an agent's realization of the way of life that has value and meaning to him, would agree in general to limit their own pursuit of the activities that make up the lives they lead so as to refrain from deliberately or negligently causing others bodily harm (i.e. they could not reasonably reject principles for the general regulation of behavior that had this implication). Of course, agents may choose in certain circumstances to waive this right, or at least permit certain kinds of actions that would normally count as a violation of it, say when they decide to play football. Moreover, as with all moral rights, a general right to freedom from deliberately or negligently inflicted bodily harm is not an absolute right. Identifying the scope of the right, that is, those reasons for action it rules out and those that it does not, is to be determined by the same kind of reflection that generates the right in the first place, namely an assessment of the reasons (agent-neutral and agent-relative) for and against a principle that would permit, or even require, the deliberate infliction of bodily harm. As will become clear in the following chapters, the question of whose assessment

ought to guide an agent's actions, particularly in cases of disagreement over the scope of a particular right, is central to a RRMC account of political obligation.

Other moral rights that can probably be defended by appeal to the idea of reasonable rejection include a right not to be murdered, some form of property rights and so a right not to have one's justly held possessions stolen, a right to freedom of religious belief and practice, a right to freedom of speech, a right to freedom of assembly, a right to adequate nutrition, and a right to basic health care. These rights are basic moral rights, by which I mean that they are rights that all moral agents have simply in virtue of being moral agents. Moral agents may also enjoy certain rights that are justified by the role they play in ensuring the just and effective operation of institutions designed to secure basic moral rights. This kind of instrumental justification for rights may also provide additional reasons for ideal moral agents to recognize basic moral rights, such as the right to free speech, the right to freedom of assembly, and perhaps also property rights.

An agent's rights can be violated as the result of an individual's action (or in some cases, inaction), as well as by the collective action (or inaction) of a number of individuals, acting simultaneously, sequentially, or both. The right to freedom from deliberately or negligently inflicted bodily harm provides examples of both sorts of violation. Should you punch me in the absence of any provocation, and sometimes even in that case, then you violate my right to be free from deliberately inflicted bodily harm. Likewise should I suffer an injury as a result of your gross negligence in the operation of a motor vehicle, my right has been violated. But in some cases your violating my right may depend on the actions of others as well. So for example, you

may cause me no harm should you be the only one to dump a small amount of toxic waste into the river from which I draw my drinking water. However, should enough other people also dump a small amount of toxic waste into the river, then I will surely suffer some bodily harm. Even if you not deliberately set out to harm me by dumping toxic waste in the river, if you knew, or could reasonably be expected to know, that enough other people might dump waste in the river as well, and that this would result in a violation of my right, then you may share in the responsibility for it. Whether you do in fact bear some responsibility for the harm I suffer will depend on whether you could have taken steps to participate with others in a cooperative scheme designed to ensure that the total amount of toxic waste dumped in the river was not enough to cause me harm.<sup>27</sup>

It follows from these two ways in which a moral agent can violate another's basic moral rights that avoiding such violations will require agents both to forbear from those actions that, by themselves, are sufficient to cause a right violation, and also to forbear from those actions that, together with the actions of other agents, are sufficient to cause a right violation.<sup>28</sup> In the latter kind of case, agents will need to act together to avoid violating others' basic moral rights (and in some cases, contributing to the violation of their own rights), either by coordinating their actions, or by

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<sup>27</sup> More accurately, an acceptable amount of waste will also need to take into account the costs of other methods of disposing of the waste, the importance of those activities that generate the waste for helping to secure other moral rights and for the pursuit of various agent-relative values (projects, commitments, etc.), and so on. I discuss the determination of when a state of affairs that can be realized to different degrees counts as a right violation in the appendix to this chapter.

<sup>28</sup> This last claim comes with an important caveat, namely that if not enough others will also forbear from the action in question to prevent the right violation (and the likelihood of the agents being able to change this, now or in the future, is very small), then he has no duty to refrain from that action. This caveat has important implications for the duty to create morally necessary coordination or cooperative institutions where none currently exist, but I shall set this issue aside for now, and concentrate only on accounting for the moral requirement to participate in existing C-institutions.

cooperating with one another, or both. Such C-institutions, as I shall call them, are practically necessary for securing basic moral rights, in that it is either impossible or extremely unlikely that all will enjoy their rights in the absence of such institutions. Since the goals of these institutions are one's that all agents have a moral duty to see realized, the practical necessity of certain C-institutions entails that such institutions are also morally necessary.

We now confront a familiar problem, however. For in many cases, universal participation in a morally necessary C-institution will not be necessary for that institution to operate optimally. But whenever universal participation in a given C-institution would result in a surplus of participants, it will not follow from the natural duty to see to it that the C-institution functions optimally that any single individual has a duty to participate in that C-institution. That is, we confront a gap between the general claim that all moral agents have a duty to see to it that all enjoy their basic moral rights, and the more specific claim that a particular agent has a duty to participate in a particular C-institution, where the participation of enough, but not all, moral agents in that institution is practically necessary to secure the greatest respect for rights it is reasonable to demand. In fact, the question of whom, if anyone, is to be exempt from participation is just one aspect of a more general question that needs to be answered, even in many cases where universal participation is necessary to achieve optimal results. That question is how are we to distribute the benefits and burdens involved in the operation of a morally necessary C-institution? The answer may strike us as obvious: the distribution must be a fair one. But what does it mean to say that the distribution must be fair? As I shall demonstrate in the next section, claims

regarding fairness or unfairness are not fundamentally claims about the distribution of burdens and benefits involved in the operation of a C-institution, but rather claims about who has the moral authority to determine what that distribution should be.

#### IV

As with the earlier discussion of fair play, it is helpful to think of fairness as the moral requirement that free riders violate, and which accounts for the wrongness of their action. Suppose that we have a case of surplus participation, so that John's defection from a certain C-institution makes no difference in the degree to which that institution realizes the goal for which it was designed and implemented. Those who continue to participate in the institution might accuse John of taking advantage of them, for it is only their participation in the C-institution that makes it possible for John to defect, while at the same time receiving the benefit of that institution's operation. John might point out to the participants that his defection does not impose any greater burden on them than they would bear if he, too, participated. That this is so follows from the C-institution having a surplus of participants. Since John's defection leaves the participants no worse off than they would otherwise be, and John may use the time and resources he saves by not participating to further either his own personal projects, the personal projects of others, or even securing basic moral rights other than those the C-institution aims to secure, why should the participants object? It seems that the participants' complaints that they are being taken advantage of simply reflect a self-centered, jealous, concern that no one should be any better off than they are.

The participants have a ready response, however. For the sense in which John takes advantage of them is not a matter of the benefits he receives; John would still act wrongly even if he totally wasted the time and resources he accrued because he did not contribute to the cooperative scheme. Rather, John takes advantage of those who participate by his unilateral assumption of the moral authority to determine who should be permitted to defect from a C-institution that has a surplus of participants. By choosing not to participate, John unilaterally replaces the existing design of the institution with a different one, namely one that requires participation from all (or enough of) the others who ought to participate in the institution, but not him. Since all moral agents have a duty to see to it that morally necessary C-institutions function optimally, and on the assumption that John is a moral agent, John cannot claim to not be among the potential participants in this C-institution. That is, while there may be a morally permissible design for that C-institution that would exempt John from participation, he cannot claim to have never been a part of the pool from which participants are to be drawn. Insofar as John attempts to defend his defection by appeal to the surplus participation in the C-institution, what he must will is not simply that he should not participate, but also that enough others should participate so that the C-institution fulfills its purpose. What John wills, then, is a collective action. But what justifies him in exercising this authority over those agents who must continue to participate in the institution? Would it be reasonable for the other participants in this institution to reject John's unilateral exercise of the authority to determine the design of the C-institution? If the answer is yes, then John's defection from this C-institution

will be immoral, even if it is the case that his doing so will not detract from the C-institution's optimal performance.

There are two reasons why ideal moral agents could reasonably reject John's unilateral assumption of the authority to modify the existing design of a morally necessary C-institution. First, one might argue as Scanlon does, that the unfairness involved in free riding rests on one person's partial principle – that he should receive the benefits of a cooperative scheme without bearing any of the burden involved in its operation - being “given precedence over others’ similar reasons, without justification. This is what makes such a choice arbitrary, and makes the principle rejectable” (Scanlon 1998, 212). The idea here is that every agent in a cooperative scheme with surplus participants has a similar agent-relative reason to prefer his being able to free ride, while (enough) others participate. That agent-relative reason consists in the contribution to an agent's pursuit of those projects, commitments, etc., that make his life valuable and meaningful to him, that he gains as a result of free riding. Each participant in a C-institution, however, can appeal to this agent-relative reason as a reason to reject another's acting on it, and given his commitment to viewing the situation from other's standpoints as well, he will recognize that others also act reasonably in rejecting his acting on that reason (since it would deny them the opportunity to do so). But while it does not seem reasonable to privilege one's acting on an agent-relative reason over others acting on similar agent-relative reasons, it also seems unreasonable to have a surplus of participants in a C-institution *if there is some way for distributing the benefits of there being a surplus that no one can reasonably reject*. Remember that ideal moral agents will seek to place the least constraint on

their acting for agent-relative reasons that is consistent with mutual recognition for other, similarly motivated, agents. Therefore, in cases where it is impossible to accommodate each person acting on the agent-relative reasons he has for wanting to be exempt from a cooperative scheme, each person has an agent-relative reason to want a process of allocating exemptions that gives him the same chance of obtaining that exemption enjoyed by the other agents in the cooperative scheme. Where there is agreement on the design of the C-institution and the specifics of the goal at which it aims, a mechanism like drawing lots may suffice. But as we shall see, when disagreement over these matters arises, an equal chance may take the form of an equal say in a process designed to settle such disputes, such as an equal vote in a democratic election.

The above argument establishes an agent-neutral principle of fairness on the basis of agent-relative reasons and an agent's commitment to acting only on principles that ideal moral agents could not reasonably reject. The autonomy of other agents is recognized via individuals limiting their pursuit of agent-relative values by principles that could not be reasonably rejected; in this case, that the benefits and burdens of a cooperative scheme be distributed fairly, i.e. by some process of allocation that no one could reasonably reject. But in addition to the reasonableness of rejecting any one agent's partial principle being given precedence over others without any justification, the conception of free riding as the unjustified exercise of authority over others also indicates a second basis for objecting to it, namely the importance of self-respect, or the recognition of oneself as an autonomous being. The free rider, I claimed earlier, wills a collective action, and in unilaterally assuming the authority to do so, he denies

the other participants status as autonomous agents.<sup>29</sup> The importance for many people of their being recognized as autonomous agents, independent of any further consequences that follow from this recognition, provides a second reason why the free rider's unilateral assumption of authority can be reasonably rejected.

All of this talk of a free rider's usurping the collective's authority to determine the distribution of burdens and benefits involved in the operation of a C-institution may sound inapt.<sup>30</sup> For a free rider does not change the design of an institution; he merely fails to follow one or more of the rules adherence to which is required of participants in it. Following Rawls, however, we should note that institutions are not only abstract systems of rules, but also concrete objects constituted by "the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules" (Rawls 1971, 55). It is in the latter sense of an institution that free riding counts as the usurpation of authority and the modification of an institution's design.

The reason it is wrong for the free rider to violate the rules of a morally necessary C-institution cannot be that he receives a benefit that is denied to (all of) the other participants in the institution, as Klosko would have it (Klosko 1991). For there may be a fair process for allocating benefits among a group of individuals in cases

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<sup>29</sup> Recall that to be treated as an autonomous agent is to be treated only in ways that ideal moral agents could not reasonably reject, and I have just argued that suitably motivated moral agents could reasonably reject any participant in a morally necessary C-institution unilaterally exercising the authority to determine the design of that C-institution. It does not matter, therefore, that each participant can will a similar collective action that the actual free-rider wills (the only difference being the particular person who is to forgo contributing to the C-institution), for in doing so each would be failing to treat the other participants as autonomous beings.

<sup>30</sup> But see Scott Shapiro's claim that by disobeying a democratically elected authority under conditions of meaningful freedom, "subject are unilaterally, and hence unreasonably, setting the terms and direction of social cooperation" (Shapiro 2002, 435). See also the discussion in chapter seven, section one.

where not all members of the group will be able to receive the benefit. Rather, the wrong consists in the process by which a free rider comes to be among those who receive a benefit that all cannot receive, namely his self-assumption of the authority to determine who should receive such benefits. It is important to note both that this authority is self-assumed, for it is possible that the collective might authorize some individual to exercise such authority, and that the recipient of benefits need not be the same person who assumes this authority. A person might grant others an exemption from participation in a C-institution, but continue to participate himself, and it seems appropriate to say that such a person acts unfairly. “Why should he get to exercise this power, and not I?” other participants might object.<sup>31</sup>

Let us take stock of the argument thus far. I began with the claim that all moral agents have natural duties to treat all other moral agents in certain ways; specifically, to respect their basic moral rights. Often respect for others’ basic moral rights will require moral agents to coordinate their actions and to engage in cooperative behavior; that is, to participate in morally necessary C-institutions. However, in many of these cases, universal participation will not be necessary, and therefore in such cases it does not follow directly from the duty to respect others basic moral rights that an individual agent has a duty to participate in a particular morally necessary C-institution. The defense of a natural duty of fairness enables us to bridge this gap. While it may be the case that it would be better if *someone* were exempt from a morally necessary C-institution with a surplus of participants, no individual participant has the moral authority to unilaterally determine who should receive that

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<sup>31</sup> But is it necessarily the case that to deny an authority’s directives is to assert one’s own authority? Perhaps not; I may deny the state’s authority whenever it conflicts with the Church’s authority (or vice versa), without asserting my own authority.

exemption. This follows from the fact that those whose participation makes such an exemption possible would be reasonable to reject any particular individual's unilateral exercise of such authority.

Like other duties generated by specifying the ways of being treated that ideal moral agents could reasonably reject, the natural duty of fairness is a prohibition. It is not, essentially, a statement of what one must do, but rather a statement of what one must not do, an exclusionary reason that rules out acting on certain agent-relative reasons (those an agent would act on if he did not have to participate in the C-institution).

To say that the distribution of burdens and benefits involved in the operation of a morally necessary C-institution must be fair, then, is to say that the actual process for determining their allocation must be one that no suitably motivated moral agent could reasonably reject. A distribution may also be substantively fair in cases where no intentional process determines the allocation, but the distribution is one that *would* result from the operation of a process that no participant could reasonably reject.<sup>32</sup> A person's claim that a given C-institution treats him unfairly, then, is simply a shorthand way of claiming that a given distribution of burdens and benefits is either the result of a process that could be reasonably rejected, or that it is not an outcome that would result from any process that could not be reasonably rejected. The crucial point is that claims regarding fairness are not most basically claims about the

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<sup>32</sup> Thus the distribution of burdens and benefits in a C-institution may be fair or unfair even if it is the result of convention or some spontaneous division of labor, rather than a formal procedure for collectively determining an allocation. Note that this treats procedural fairness as the primary sense of fairness, with substantive fairness derivative from it (though not requiring an actual fair procedure).

distribution of burdens and benefits, but rather about who exercises the moral authority to determine what that distribution should be.

Strictly speaking, then, an agent's having a natural duty of fairness (or indeed, an acquired obligation of fair play) to participate in a given C-institution will not always entail his making a contribution to the operation of that institution. For there may be a fair procedure (i.e. a process that ideal moral agents could not reasonably reject) for determining the design of the C-institution in question that, when put into operation, exempts (or would exempt) an agent from participation. At other times (or in other cases), a fair allocation will require relevantly similar participants to "contribute an equal share," with the relevant similarity depending on the (aims of the) C-institution in question. In some cases, there will be only a single relevant similarity, such that participation will require the same conduct from all, as in the case of most traffic laws. In other cases, there may be a number of different levels and forms of participation, reflecting relevant dissimilarities among participants, as, say, in a system of progressive taxation to fund morally necessary C-institutions.

The account of fairness I offer here enables those who object to free riders in cases of surplus participation to avoid the criticism that their complaints simply express a jealous resolution to ensure that no one should be better off than they are. The problem with free riding is not the fact that someone is exempted from participation when not all can be, for participants may well agree that insofar as it is possible to make some better off without increasing the burden on others or making the violation of basic moral rights more likely, this is a goal they should pursue. Rather, their objection is to the process by which it is determined who should be

exempted, and the content of their objection is that such a process could be reasonably rejected. Participants can object to the free rider, then, even in cases where he simply wastes the time, energy, and resources he would have used to participate, and so gains no benefit at all.

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It is possible to understand the very idea of reasonable rejectability in terms of collective authority, with each individual recognizing others as having the authority to reject his acting on certain principles, and so there is a sense in which any act that can be reasonably rejected will be unfair. But I propose to treat unfairness in a narrower sense, namely the wrong involved in the unilateral exercise of authority to determine the design of a C-institution, and particularly the distribution of benefits and burdens among those to whom the institution applies.

Understood in this narrow sense, we have two principles that give rise to claims of fairness or unfairness. The first is the voluntarist principle of fair play, which applies to morally optional C-institutions, and the second is a natural duty of fairness, which applies to morally necessary C-institutions. A C-institution is morally optional if ideal moral agents *could* reasonably reject a principle that required them to constrain their acting on agent-relative reasons when these conflicted with their participation in that C-institution. Conversely, a C-institution is morally necessary if ideal moral agents *could not* reasonably reject the demand that they constrain their acting on agent-relative reasons in order to secure the state of affairs produced or constituted by their participation in that institution.

Though the moral wrong involved in violating the principle of fair play and the natural duty of fairness is the same, namely the usurping of the collective authority to determine the design of a C-institution held by all those who participate, or ought to participate, in that institution, the difference between these two moral requirements turns on the way in which the collective comes to have its authority over the individual. When the goal of the C-institution is morally optional, participants in it come have authority over an individual only if he acquires an obligation to them; that is, only if he voluntarily becomes a participant. Hence the necessity of an agent's belief that he receives a net benefit from the operation of the C-institution for the generation of a fair play obligation. In the absence of such a belief, the agent will not have the requisite preference structure (or ordering of reasons) to acquire a fair play obligation. In the case of a natural duty of fairness, however, an agent need not *do* anything to become subject to the collective authority of a C-institution. Nor do his beliefs regarding the best design of a C-institution determine whether in fact that agent has a duty to participate in the C-institution. For his participation is not a matter of choice, but instead simply follows from his being a moral agent, and the need for moral agents to participate in C-institutions in order to respect others' basic moral rights. The moral requirement of fairness is the same in both cases, but it is a natural one only when the C-institution is one that produces (or constitutes) morally necessary outcomes.

Given that one of the main difficulties with acquired obligation accounts of political obligation is the likelihood that many citizens of modern states have failed to acquire any obligation to the state or their fellow citizens, the ability of a natural duty

approach to explain the moral requirement to comply with many state institutions without any appeal to citizens having done something makes it very attractive.

Moreover, unlike Klosko's understanding of the principle of fair play, a natural duty approach such as the one I defend here entails that moral agents are morally required to participate in C-institutions necessary to secure basic moral rights even if (some of) their own rights would not be threatened in the absence of such institutions.

Defenders of fair play accounts will sometimes admit that their account of political obligations will need to be supplemented by other moral principles, such as a principle of beneficence, to justify C-institutions such as those that provide health care or food for those who lack the resources to acquire these goods on their own (see for example Klosko 1991). A natural duty approach to political obligation, on the other hand, can offer a single justification for the duty to participate in all those institutions necessary to ensure that all enjoy their basic moral rights.

The distinction between morally optional and morally necessary C-institutions entails a further distinction the importance of which will become clear shortly. In the case of morally optional C-institutions, the possibility that the institution might collapse in the absence of some formal decision procedure for settling disputes over the allocation of benefits and burdens among participants does not entail that agents are morally required to set up such a procedure. They may have self-interested reasons for doing so, particularly if their judgment of the worth of the institution (to them) includes the opportunity to participate in a formal decision procedure for settling such disputes. The recent demands by the Catholic laity in the United States for their inclusion in Church decision-making might be an example of the latter kind

of reason. But insofar as the C-institution's operation is morally optional, its collapse as a result of the inability to settle such disputes will not result in anyone's being treated immorally, i.e. in a way that a suitably motivated moral agent could reasonably reject (see Simmons 2001, 31). The same is not true of morally necessary C-institutions, though, and insofar as disputes over the design of C-institutions are quite likely, and a variety of methods for resolving such disputes will result in fewer rights violations than would occur in their absence, moral agents have a duty to set up and maintain a formal decision procedure for settling them. That is, it would not be reasonable for a suitably motivated moral agent to reject the creation or existence of such a procedure. As will become clear in the following chapter, this claim is crucial to my defense of political obligation.

## V

What, then, do the arguments of this chapter imply with respect to the question of political obligation? Not surprisingly, I suggest that at least some modern states can be understood to consist in part of morally necessary C-institutions. For example, a state such as the U.S. provides protection for many of its subjects' basic rights against both internal and external threats (though in practice that protection varies among U.S. citizens). Its ability to do so depends partly on the contribution that each citizen makes to this undertaking. Contributions include not only the payment of taxes, but also assistance in the enforcement of the law, as in the case of providing information to the police, as well as military service and serving on juries. Many modern states also protect basic moral rights by enacting and enforcing traffic laws to solve coordination problems, and regulatory schemes to ensure cooperation on matters such

as pollution, public health, and providing minimum standards of health care and nutrition.<sup>33</sup> And, as Jeremy Waldron points out, “securing the conditions for the operation of a market economy, or providing a basis for dispute resolution, will founder unless people act in concert, following rules, participating in practices, and establishing institutions” (Waldron 1999b, 102). Moreover, as Klosko argues, the efficient and effective provision of these goods provides an indirect justification for other activities undertaken by most modern states, such as building and maintaining roads, or ensuring that all receive education relevant to their health (such as lessons in how to avoid contracting AIDS) (Klosko 1991, chapter four). All of these outcomes are moral collective goods. They are morally required outcomes that can only be secured via participation in C-institutions. No individual acting alone, and in many cases, no small group of agents, will suffice to ensure that all enjoy their basic moral rights.<sup>34</sup>

Joseph Raz has objected to the attempt to defend a general and universal duty to obey the law on the basis of the need for coordination and/or cooperation because there are laws that appear to have no connection to collective action, but which any minimally just legal system will surely include, such as laws prohibiting murder and rape. Upon reflection, however, it is not clear that such laws have no connection to collective action. For among other things, laws enable a group of people to reach a

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<sup>33</sup> That U.S. institutions sometimes fail to adequately protect individuals against the violation of their rights should not distract us from the fact that the U.S. does operate institutions specifically designed to address the lack of medical care and food among some of its citizens.

<sup>34</sup> Many moral collective goods will therefore pose problems of collective action. My concern here, however, is with establishing what people have moral reason to do, and not what it is rationally self-interested or prudential for them to do. Still, insofar as people will sometimes fail to be (sufficiently) motivated by the moral reasons they have to participate in morally necessary C-institutions, the design of such institutions will need to take into account the insights of those who study collective action problems. I return to this point in the next chapter.

shared understanding, at least for action guiding purposes, with respect to what counts as rape or murder. In the absence of such a shared understanding, conflicts would likely abound as different individuals acted on the basis of their own beliefs with respect to these matters. In an argument that anticipates the one I develop in the following chapters, Jeremy Waldron writes

consider aspects of the law of rape which are complex and controversial: for example, statutory rape, marital rape, homosexual rape, the bases (if any) on which consent is to be inferred, mistakes as to consent, etc. Reasonable people differ on matters like these. Yet each may have an interest – of the sort represented in a PC [Battle of the Sexes Game] – in sharing with others in society a common scheme of rape law that deals unequivocally with these matters, a scheme which sets a specific age of consent, which states whether mistakes have to be reasonable in order to be exculpatory, and so on. Each may prefer that these matters be settled even in a way that he opposes, if the alternative is no rape law at all (with everyone who has a view enforcing it as best he can), or a law confined only to those cases where it is uncontroversial in the community that a wrong has been committed” (Waldron 1999b, 105).

In short, if citizens of a given state are to act collectively in order to secure basic moral rights for all, then they will need to agree on a common understanding of what morality require, and this is itself a collective action (McMahon 1994, 133).<sup>35</sup>

The defense of a natural duty of fairness to participate in morally necessary C-institutions, together with the claim that at least some modern states can be plausibly thought to consist partly of such institutions, provide the initial steps in a RRMC

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<sup>35</sup> Yet someone might object that rape (or whatever exactly counts as rape) is wrong independent of the law, while the failure to contribute to a certain C-institution will be wrong only if there is a law requiring contribution to it. Rape does differ from putting a small amount of toxic waste in a river in that, in the former case, one’s action alone is sufficient to cause harm, while that is not true in the latter case. The issue here, however, is not whether one agent can do some immoral actions by himself, while others require the actions of a number of agents. Rather, the issue is whether agents can better ensure that others are treated morally (i.e. in ways that they could not reasonably reject) by individuals acting alone or together? I contend that agents can often *only* be effective at securing basic moral rights for all if they coordinate their actions, and/or cooperate with another, and that laws (i.e. directives issued by a state that specify the design of morally necessary C-institutions) facilitate their doing so.

defense of political obligation. The argument remains incomplete however, for while it accounts for an agent's duty to participate in morally necessary C-institutions, it does not yet explain why his participation ought to take a particular form, namely the form specified by the laws that describe the end to be achieved and the means for doing so. That is, it does not follow from the arguments made in this chapter that agents have a duty to obey the state's directives, for it may be the case that the state lacks the authority to settle what the law should be – that is, the state may not be an agent of, or a means for the exercise of, the collective authority had by all those who participate in a given C-institution to determine its design. This would be the case for a state ruled by a dictator who sought only his own advantage, for example. In order for agents to have a duty to participate in morally necessary C-institutions in the way the state commands, the state's allocation of the burdens and benefits involved in the operation of a morally necessary C-institution must be one that could not be reasonably rejected. But in contemporary states this requirement poses a great challenge, for there are likely to be deep disagreements as to what exactly morality requires, and how best to realize it. The need to resolve such disputes in order to ensure that all enjoy their basic moral rights sets the stage for the argument in the next chapter that citizens of an effective liberal-democracy have a duty to obey the directives issued by their state.

## Chapter 5: Contractualism and political authority part I

While a natural duty to respect others' basic moral rights accounts for the moral obligation to participate in morally necessary C-institutions, it does not yet tell us anything about their design. What form should participation take, and what exactly are the outcomes, or ways of being treated, that C-institutions should seek to realize? Once more drawing on the method of reasonable rejection to characterize moral duties, I argue in the following chapters that when agents find themselves citizens of an effective liberal-democratic state, they have a moral duty to comply with the answers to these questions issued by that state. The justification for such a duty, I contend, rests on the moral necessity of settling disagreements over the answers to these questions, together with the claim that it would not be reasonable to reject such a state's authority to do so in comparison to the alternatives. In short, though the duty to participate in morally necessary C-institutions is one that an individual has simply in virtue of being a moral agent, the duty to participate in the manner an effective liberal-democratic state specifies is one a person has in virtue of his citizenship in that state.

A defense of the requirement that a state include a minimally democratic element in order for it to have political authority over its citizens is the subject of chapter six. Here I argue for two other necessary conditions for a state's having political authority: the ability to effectively enforce settlements of disputes over the ends of morality (or at least the morality of what we owe to each other) and the best means to it, and a principled commitment to respect for each and every individual's basic moral rights. The argument proceeds as follows. I describe in section II the likely causes of disputes among even well intentioned moral agents with respect to

what exactly RRMC requires of them, and how best to achieve it. Such disputes can be settled via the implementation of some decision-mechanism, or D-institution, and I argue in section III that states can plausibly be viewed as consisting partly of a D-institution that serves (or claims to serve) this purpose. In any case where the operation of a D-institution results in a state of affairs characterized by fewer and/or less significant rights violations than would occur in a state of anarchy, that D-institution is minimally justifiable. To meet this condition, however, a state will have to be capable of enforcing its settlements of disputes on practically all of those it rules. But while a D-institution's effective enforcement of its directives is a necessary condition for political authority, it is not yet sufficient; a minimally justifiable state has neither political authority over its subjects or citizens, nor a claim-right that others refrain from interfering in its enactment and enforcement of legal directives.<sup>1</sup>

The discussion of a minimally justifiable state in section IV may seem to imply that whichever state (or D-institution) maximizes respect for basic moral rights will be the one that ideal moral agents cannot reasonably reject, and in a sense this is correct. However, talk of maximizing respect for basic moral rights suggests that the rights of a few may be violated if this is necessary to ensure the rights of the many, a conclusion that I wish to reject. I contend that respect for individual rights is a second necessary condition for political authority (in addition to the ability to effectively enforce its settlements of disputes), or in other words, that only a liberal state can enjoy political authority. Sections V, VI, and VII consist in a defense of this claim, and a somewhat detailed elaboration of an RRMC account of basic moral rights

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<sup>1</sup> To deny that a minimally justifiable state has such a claim-right is to deny that it has a right to exist, as I discuss below.

intended to address two potential worries about the claim that states are constrained in the means they can use to secure such rights for all by the need to respect each individual's rights. The first of these worries is that rights often appear to conflict, thereby rendering the violation of someone's rights inevitable; the second concern is that in some cases it seems intuitively correct to sacrifice respect for the rights of a few in order to secure the rights of the many. An explication of rights in terms of RRMC shows that despite initial appearances, rights do not conflict with one another. Such an account of rights also provides an appealing solutions to cases where, intuitively, many people conclude that the numbers should or should not count, though it does so without appealing to the aggregation of harms inflicted, rights violated, or complaints voiced.

Instrumental reasoning regarding the kind of institutional design that is least likely in practice to cause and/or encourage rights violations are briefly considered in section VIII, as is the role of such reasoning in a RRMC defense of the state, and of political obligation. The chapter concludes with a consideration of the objection that any actual state is likely to violate some individual rights some of the time, and so no actual state is likely to enjoy political authority.

## II

I claimed earlier that unlike in the case of fair play obligations, the natural duty of fairness to participate in a morally necessary C-institution does not depend in any way on the judgments an agent makes regarding the best design for that institution (i.e. the one he believes will provide him with the greatest net benefit). However, the fact that many moral agents make such judgments, and that their judgments differ, is

crucial to the moral justification of the state's authority, and hence citizens' obligations to obey the law. Even if everyone agree that some C-institution is necessary to secure respect for basic moral rights, and that the distribution of burdens involved in the operation of that institution must be fair, they may still disagree over what exactly counts as a fair distribution. Their disputes are likely to center on one or both of the following two issues: (1) the exact form that each individual's participation in a morally necessary C-institution ought to take (or what is the same, what precisely the distribution of burdens and benefits involved in the operation of a C-institution ought to be); (2) the specification of the outcome to be pursued via the C-institution, or what is the same, exactly what the scope of various basic moral rights is.<sup>2</sup>

Disagreements over the exact specification of the end to be pursued by a C-institution will often arise when it comes time to determine the implications of an abstractly stated right for a particular kind of case, particularly when the case in question is a novel one. Well-intentioned agents, agents who accept that RRMC provides the correct standard for the moral evaluation of conduct and seek themselves to employ that methodology in order to identify the requirements of morality, may disagree over whether a particular understanding of a given duty unduly restricts a person's ability to act on agent-relative reasons. Even if there is unanimous agreement on the end to be secured among participants in a morally necessary C-institution, there may still be differences of opinion over the best means to achieving this end. Disputes over institutional design, for instance, may often turn on empirical disagreements as to the formative effects institutions will have on those who participate, how efficiently

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<sup>2</sup> Disputes over the *existence* of an alleged right mark the limiting case with respect to disagreements over the outcomes to be pursued via C-institutions.

the institution will operate in practice, or the likelihood of institutional malfunctions such as corruption or bureaucratic dilution of responsibility and control. There will also likely be normative disputes over how these various factors should be weighed against one another in evaluating rival institutional designs.<sup>3</sup> Moreover, in at least some cases there are likely to be a number of possible designs for a C-institution that will produce the same outcome, but that differ with respect to whom is required to participate, and what form their participation is to take. Most, if not all, agents have agent-relative reasons to pursue ends other than the securing of basic moral rights for all, and so every agent has a reason to prefer the design of a morally necessary C-institution that places the least restriction on his or her acting on agent-relative reasons while still securing basic moral rights for all. On the plausible assumption that most institutional designs will place fewer restrictions on some agents' abilities to act on agent-relative reasons than on others, this preference will often prevent unanimous agreement on a single design.

It may be that disputes of these two sorts – over means and over the specification of ends – would arise even among suitably motivated (i.e. ideal) moral agents who had access to all of the relevant empirical information, and who had an unbiased appreciation for all of the agent-neutral and agent-relative reasons for action relevant to cases of a certain kind (or perhaps relevant to a particular case). This would present us with a metaphysical problem, namely the possibility that in some cases there would be no single solution that could not be reasonably rejected. Thomas Nagel, for one, seems to think that such cases exist (see Nagel 1991), as do other defenders of value pluralism (see Galston 2002; Crowder 2002). Though Scanlon

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<sup>3</sup> For discussion of these points, see Nagel 1990, 318; Waldron 1999, 106.

does not reject such a possibility outright, he does offer a number of arguments that militate against it. Most importantly, agent-relative reasons already limit the demands of impartial morality, in that they provide a basis for the reasonable rejection of potential moral principles. Insofar as moral principles already account for, say, the value of friendship, the likelihood of irresolvable conflict between it and the morality of what we owe to each other will at least be reduced. Scanlon also argues that impartial morality places certain constraints on friendship; friends must be recognized as capable of making demands on one in virtue of being moral agents, as well as in virtue of being one's friend. The possibility is left open, therefore, that in a perfectly just or ideal society agent-relative reasons like the duties of friendship and agent-neutral reasons like respect for basic moral rights will not conflict, and so there is no metaphysical problem.<sup>4</sup> Of course, consistency under ideal conditions does not entail consistency under non-ideal circumstances; the cheating best-friend case discussed in chapter three may well raise a genuine conflict between loyalty and fairness, but it does so only on account of the best-friend's immoral act (Scanlon 1998, 160-165).<sup>5</sup> Scanlon also acknowledges that the existence of cultural diversity, or varied social meanings, entails that the specification of a particular right, or way of being treated, may vary in different social contexts. This is not to say that there is no right answer to the question of whether a principle can or cannot be reasonably rejected, but only that the answer may differ in its details depending on the social context of the agents (Scanlon 1998, Chapter 8). Finally, Scanlon claims that at some point the need to

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<sup>4</sup> I address apparently irresolvable conflicts between agent-neutral reasons for action, such as individual rights, below.

<sup>5</sup> In the cheating best-friend case, an individual who knows that his best-friend cheated on an important exam must choose whether to inform the teacher of this (Tamir 1993, 102).

create space for individuals to act on agent-relative reasons must reach its limit, that no special relationship can provide a justification for doing just anything, and that this reflects the great value moral agents place on the justifiability of their actions to others (Scanlon 1998, 166; Scanlon 2002a, 513-514). If true, then together these claims provide some reason to believe that moral disputes do not reflect fundamental metaphysical conflicts between different values.

But even if some disputes over the design of morally necessary C-institutions do reflect the metaphysical problem of fundamental value pluralism, it is at least plausible to think that others can be viewed as epistemological problems; disagreements among well-intentioned actual agents, committed to acting only on principles that suitably motivated agents could not reasonably reject, but unable to agree on what these principles are.<sup>6</sup> Surely some of the disagreements over the best means to an agreed upon end reflect empirical disputes that have a definitive answer. Likewise disputes over the distribution of burdens in cases where two or more institutional designs are thought to be equally acceptable on moral grounds are neither metaphysical nor epistemological problems, but simply a straightforward conflict of interest. More importantly, even if some disputes do reflect fundamental metaphysical conflicts, there will be various ways to try and accommodate these conflicts, and perhaps to minimize their occurrence. Yet it is unlikely that all will agree on which method of accommodation is best, or failing that, which of several methods is less bad.

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<sup>6</sup> Agreement here is not a matter of determining what, as a matter of metaphysical fact, morality requires, but rather of *identifying* what morality requires, that is, forming beliefs that accurately reflect the demands of morality. The difference is an important one, for agreement among actual agents as to what morality requires is irrelevant to what morality actually requires, that is, what ideal moral agents could not reasonably reject, but not to the actual policies implemented, and discrete actions taken, by actual agents.

Regardless of the source of moral disagreement, though, it must somehow be addressed if people are to live with one another, especially if acting on the principles they believe RRMC generates requires cooperation and/or coordination.

### III

The moral necessity of resolving disputes over the means to securing basic moral rights, and the exact specification of those rights, follows from the idea that it is wrong to act on principles that ideal moral agents could reasonably reject. Suppose there is a dispute as to which design of a morally necessary C-institution, C1 or C2, will better ensure respect for basic moral rights. Or suppose that C1 and C2 may serve equally well for this purpose, but differ with respect to who bears the burdens, and what kind of burdens, involved in their respective operation. If the result of a failure to pick either C1 or C2 is that no C-institution will be put into operation, and the operation of some C-institution is morally necessary to prevent the violation of basic moral rights, then it is not reasonable to reject some decision-procedure, or D-institution, for choosing between them. That is, ideal moral agents would not do so. This will be the case whenever the operation of that D-institution will result in fewer rights violations than would occur in its absence.<sup>7</sup> Viewed from the standpoint of the person(s) whose rights would be violated, the failure to maintain an existing D-institution that meets this condition, and to participate in the creation of one when the cost is not too high, could be reasonably rejected.

Any D-institution for settling disputes over the design of morally necessary C-institutions will need to be able to enforce its decisions on those subject to it if its

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<sup>7</sup> For a similar argument, see Rawls 1971, 354.

operation is to result in fewer rights violations than would occur in its absence.<sup>8</sup> That is, the effective settlement of such disputes requires not only that a D-institution issue settlements (or enact laws), but also that it be able to ensure their implementation. True, there may be a few cases with the structure of pure coordination games, where all that is required to meet the efficacy condition is that a D-institution's settlement be widely known. In such cases, agents are ambivalent between possible settlements, and therefore willing to comply with whatever resolution of the coordination problem with which they believe others are likely to comply. A traffic law regarding which side of the road one is to drive on is likely a case of this sort. However such cases are not really examples of disputes, insofar as no individual has a reason to prefer one settlement to another.<sup>9</sup>

Genuine disputes over the design of morally necessary C-institutions will usually take the form of non-zero sum non-cooperative games, such as the prisoner's dilemma (or more often, an iterated prisoner's dilemma), or coordination games that involve some conflict, as occurs when individuals prefer different coordination equilibriums. Waldron, for example, claims that the circumstances of politics should be understood along the lines of a coordination game with asymmetric payoffs, a type of game commonly known as the battle of the sexes. All of the participants agree that

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<sup>8</sup> At least provisionally, I shall say that someone is the subject of a D-institution if (a) that D-institution claims to settle for that person the form his participation in a morally necessary C-institution must take, including that he should participate in the C-institution governed by that D-institution; and (b) that D-institution has the ability to enforce its settlement on the individual (though it may refrain from doing so, say because it wishes to use the resources that would be required for doing so for some other purpose). To be the subject of a D-institution in this sense does not entail that the D-institution is morally justified, or that it has any moral authority vis-à-vis its subjects.

<sup>9</sup> Even in the case of traffic laws, coordination may be far from optimal in the absence of any mechanism to enforce the laws. Moreover, many traffic problems take the form of coordination games that include an element of conflict; for example, how many lanes should be devoted to traffic going in one direction versus the other, or how much time at a traffic light should be allotted to cars making a left-hand turn (in the United States) versus cars going straight.

some form of coordination is preferable to no coordination, but there are a number of possible coordination strategies they might adopt, and they rank those coordination strategies differently (Waldron 1999b, 103; McMahon 1994, 108-115. Both acknowledge their debt to Hampton, 1986). The successful resolution of both kinds of cases requires cooperation on the part of (enough) players.

While it may be possible that the mere issuance of a settlement by a D-institution will suffice to ensure the necessary cooperation in a society of angels, this is not the case for a society of human beings. Even well intentioned moral agents will sometimes give in to the temptation to defect when others cooperate, that is, to violate the settlement reached by the D-institution while others conform their behavior to it. They may do so because (1) their self-interest overpowers their commitment to acting morally, or (2) because they believe that the settlement reached by the D-institution does not accurately reflect their moral duty and that they ought to do what morality requires even if doing so requires violating the D-institution's settlement, or (3) because they believe that enough others will act as they do so that they will better achieve their ends (moral and otherwise) by not complying with the D-institution's settlement. It will not be rational for well-intentioned moral agents to participate in morally necessary C-institutions unless they enjoy a certain degree of assurance that enough others will also participate. For if enough others do not contribute to the C-institution's operation, then it may be that each individual will better fulfill his natural duties by acting in some other way than participating in that C-institution. Alternatively, if the only way for an individual to fulfill his natural duty is via collective action, but not enough others will cooperate, then there is no reason for him

to forgo acting on whatever agent-relative reasons give value and meaning to his life (and that do not directly violate others' basic moral rights). Both of these points simply reflect the adage that 'ought implies can'; an agent is not morally required to do that which it is impossible for him to do. In order to effectively settle disputes over the design of morally necessary C-institutions, then, a D-institution will need to be able to enforce its settlement on most of the people who, under that settlement, are required to participate in a given C-institution.<sup>10</sup> Only if it does so will moral agents who are willing to participate so long as enough others also do so have the assurance that they need to make compliance with the D-institution's settlement rational.

The argument for an effective D-institution being one that is able to enforce its settlements vis-à-vis the design of morally necessary C-institutions on most of the people to whom they apply repeats the familiar rational justification for the state.<sup>11</sup> It differs from rational justifications for the state such as the one Hobbes offers, however, in positing the fulfillment of moral duties, rather than the successful pursuit of self-interest, as the end to which the state is a rational means.

Two objections might be raised to the above argument for the moral necessity of D-institutions. First, someone might argue that optimal solutions to moral collective action problems will arise spontaneously, without any mechanism that deliberately aims at them. There are well known difficulties, however, with "market" solutions to collective action problems, and little evidence that apart from rather small and intimate communities, such problems can be solved in the absence of an agent that

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<sup>10</sup> More precisely, an effective state will be one where most citizens of that state *believe* that the state can enforce its settlements on them (or that the likelihood of the state doing so makes it not worthwhile to risk disobeying most laws).

<sup>11</sup> See, for example, Rawls's discussion of Hobbes's Thesis (Rawls 1971, 240).

enforces solutions to them (see Morris 1998, chapter three, for discussion). Moreover, the appeal to a kind of market mechanism seems misplaced here, insofar as markets work well only where there is respect for property rights and the enforcement of contracts. Such a state of affairs is likely to obtain, however, only in the presence of a D-institution that enacts and enforces laws regarding property rights and contracts. The anarchist might raise a second objection at this point, namely that even if *optimal* solutions to moral collective action problems will not arise spontaneously, the solutions that do occur will involve fewer rights violations than will occur under any actual (i.e. non-utopian) D-institution. This seems to be an extremely difficult claim to prove, at least without resort to the claim that individuals have certain rights whose scope is so broad that almost any state will necessarily violate them. More importantly, there is little evidence that anarchy is a stable state of affairs, so that even if it is the case that any D-institution will produce more rights violations than would occur under anarchy, as a practical matter we may be faced with choosing the least bad from among them (Morris 1998).

Still, even if we remain unconvinced that anarchy is morally superior to the operation of *any* D-institution, we should acknowledge the possibility that some D-institution's operation may lead to a greater number of rights violations than would occur in the absence of any such institution. Indeed, this has probably been true in the past, and in some places continues to be true now, to the great misfortune of many. The reasonable rejectability of any such decision procedure should be clear. The rights violations suffered by some in the absence of a C-institution, which results from the absence of a D-institution to settle disputes over its design, provides a sufficient

reason to reasonably reject not maintaining or creating a D-institution. Surely, then, it will also be reasonable to reject the operation or creation of a D-institution that results in greater rights violations than occurred previously. Or at least this is so in simple cases, say where the rights violated by the D-institution's operation are clearly greater in number and significance than those that occur under anarchy. Questions of how to factor in the number of rights violations, and how to compare the immorality involved in the violation of two different rights, will certainly complicate matters in many actual cases.

Thus far I have claimed only that a D-institution must be capable of issuing and enforcing settlements on those subject to it with respect to the design of morally necessary C-institutions, and that its operation must result in fewer rights violations than would occur in the absence of any mechanism for settling such disputes. Any D-institution that meets these conditions I shall call a minimally justifiable D-institution. A wide variety of D-institutions will likely qualify as minimally justifiable, at least on some occasion, including monarchies or dictatorships, aristocracies or other kinds of oligarchies, various forms of democracy, and combinations of these forms of government. Note, however, that all that follows from a D-institution's being minimally justifiable is that moral agents have a natural duty to refrain from undermining it if their doing so would produce a state of affairs characterized by more and/or greater rights violations. Call this duty the duty to support minimally justifiable D-institutions. This duty is not restricted only to just institutions; it is quite possible for a D-institution to be unjust in many respects and yet for its operation to be a better state of affairs than would occur in its absence (see Copp 1999). Moreover,

such a duty is one that all moral agents have, regardless of whether they are citizens (or even subjects) of the D-institution that meets this requirement (see Waldron 1998). Most importantly, the duty to support minimally justifiable D-institutions does not entail either (a) that all or even any of the D-institutions that are the object of this duty have political authority, the right to rule to which corresponds a duty of obedience on the part of citizens, or (b) that such D-institutions have a claim right that others not interfere with their attempts to enact and enforce laws, or a right to exist. Thus while all moral agents have a natural duty to support minimally justifiable D-institutions, they do not have a duty to comply with the settlements issued by those D-institutions, including the D-institution of which they are citizens. Of course, on some (and perhaps many) occasions, the duty to support minimally justifiable D-institutions will provide a contingent reason to comply with the laws of a given D-institution.

Consider first the claim regarding political authority. It may be morally better that a given D-institution issue and enforce settlements of moral disputes, and moral rights in general, in comparison with the absence of any settlement. Yet the existing D-institution may be one that could be reasonably rejected by ideal moral agents in comparison with an alternative, non-utopian (or non-ideal), design. It does not follow from it being better that X does some act A that X has a right to do A. It might be better if my neighbor mows my lawn, and yet it still is the case that he has no liberty-right to do so without my permission. Nor does it follow from it being better for me that my lawn is mowed that my neighbor has a power-right to authorize someone, including himself, to mow my lawn. Simply put, the claim here is that the consequences of an agent's actions alone do not suffice to establish either legitimacy

or moral authority, as defined in the introductory chapter, even if those consequences involve respect for basic moral rights.<sup>12</sup> That laws solve, or contribute to the solution of, collective action problems is not by itself a sufficient justification for authority, though it may make the issuer of those laws minimally justifiable. Only a D-institution that ideal moral agents could not reasonably reject for settling their disputes over the design of morally necessary C-institutions has a morally justified claim to political authority.<sup>13</sup>

Nor does a duty to refrain from undermining a minimally justifiable D-institution entail that it has a claim-right that others not interfere with its attempts to enact and enforce laws. All that follows is that one should refrain from doing so when it is likely that the outcome will be a morally worse state of affairs than the current one.<sup>14</sup> So for example, remaining purely within the constraints of the argument developed herein, it does not follow from citizens of the U.S., or the U.S. government acting as their trustee, having a duty to refrain from undermining the operation of a

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<sup>12</sup> This is the familiar shortcoming with Rawls's natural duty approach to political obligation, or more accurately, his attempt to replace duties of citizenship with a natural duty to support and comply with just institutions. Though the substantive justice of a given institution will often provide a moral reason to comply with the demands of that institution, it will not always do so, nor will the moral reason to comply depend on that institution's moral authority or a person's status as a member of it. Political obligation, and specifically the duty to obey the state's directives, must be established on the basis of something other than the substantive justice of the state. For further discussion of this point, see chapter seven, section four.

<sup>13</sup> Compare to McMahon's claim that "any individual or group that uses any kind of directive power [including the threat of punishment] to facilitate mutually beneficial cooperation by solving the assurance problem [is] a legitimate C-authority" (McMahon 1994, 107). It is odd that McMahon should make such a claim, since he adopts a Razian analysis of authority in terms of preemptive reasons. Yet the threat of punishment does not provide a preemptive reason for action, but rather a first-order reason that is added to the balance in an agent's deliberation. Nor does the existence of an individual or group that enjoys de facto authority provide an agent with a preemptive reason to obey the directives of that individual or group. Rather, the knowledge that many others will act in a certain way (the way the de facto authority directs) serves as a first-order reason that figures, along with other first-order reasons, in an agent's attempt to determine by himself what action the balance of reasons favors.

<sup>14</sup> In the absence of a claim-right to non-interference in the enactment and enforcement of laws, a state that is prevented from enacting and/or enforcing *any* laws is not thereby wronged. While some of the apparatus of the state might continue to exist, it is not clear that a *state* can exist if it cannot enact and enforce any of its directives. I suggest, therefore, that a minimally justifiable state has no right to exist.

minimally justifiable D-institution that the U.S. ought not to attack Iraq. At least this is the case so long as the likely outcome of doing so is one in which fewer rights violations will occur (in Iraq and elsewhere), and the cost of the transition is not too high. Indeed, nothing I have said so far even demonstrates that there are restrictions on the means the U.S. might use to replace the current Iraqi regime, so long as the result is greater respect for basic moral rights.

It is often asserted, however, that individual rights restrict the means that any agent, including a state, may take to realize some morally desirable end, including maximizing the number and degree to which people enjoy their rights. In the remainder of this chapter, I shall defend what I take to be the central claim voiced by such an assertion, namely that individual rights bar the state (and often other agents as well) from making certain kinds of tradeoffs between the interests of a few and the interests of many. However, as will become clear below, I shall also argue that rights do not conflict in the way the above assertion that the rights of the few may not be traded for the rights of the many may seem to imply.

#### IV

The evaluation of D-institutions thus far has relied solely on instrumental reasoning; whether the operation of a D-institution can be reasonably rejected depends on the state of affairs its operation will constitute or produce, where the state of affairs is understood in terms of respect for basic moral rights.<sup>15</sup> This should come as no

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<sup>15</sup> As I discuss toward the end of this chapter, it is reasonable rejectability that establishes whether a principle or institutional design is immoral (unjustifiable), but instrumental reasoning may be used to evaluate principles and institutional designs in order to determine whether it would be reasonable to reject them. See Buchanan 1999, 47, for a distinction between teleological (or instrumental) reasoning and Consequentialism as an account of right action. See also Gewirth 1983, 102, for a similar point. Note, too, that if two different types of liberal D-institutions serve equally well as a means to securing respect for basic moral rights, the one that enables a greater number of people to succeed (to some

surprise, since the operation of a D-institution is simply a means to an end, namely the cooperation and/or coordination necessary to secure basic moral rights, and what better way to evaluate a means than by how well it serves to achieve the end at which it aims? It seems natural, then, to continue with this form of reasoning, and to argue that the only D-institution ideal moral agents could not reasonably reject will be the one that maximizes the degree to which basic moral rights are respected, even if achieving this end sometimes requires deliberately violating the rights of the few in order to secure the rights of the many. This inference is mistaken, however. Rather, as I shall now argue, RRMC leads instead to the conclusion that the only D-institution that cannot be reasonably rejected will necessarily be a liberal one, even if it is the case that an illiberal D-institution would better maximize the overall, or total, enjoyment of basic moral rights.

A liberal D-institution, as I shall understand it, is one in which the scope of that institution's authority is constrained by individual rights. These rights indicate the limits of the compromises it is reasonable to demand that people make with respect to their freedom to act on the agent-relative reasons they have, and that give value and meaning to their lives (from their standpoint). Rights thus restrict an institution's authority both with respect to the activities for which the institution can issue morally binding authoritative prescriptions, and the means that the institution may take to achieve those ends it is permitted or required to pursue.

Yet moral agents are supposed to be motivated by the goal of seeing to it that all enjoy their basic moral rights, (i.e. that all are being treated in ways that they could

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degree) in leading the ways of life they find valuable and meaningful is to be preferred. This follows from RRMC's commitment to restricting the scope for individual's pursuit of worthwhile lives as little as possible.

not reasonably reject). Does it not follow, then, that when they consider the design of C and D-institutions that are instrumental to achieving this goal, they should be willing to accept violations of some individual's rights, including possibly their own, if this turns out to be the arrangement that produces the least amount of basic rights violations overall? The answer is no. Such a stark rejection of tradeoffs between rights will likely strike the reader as mistaken, particularly in light of the commonplace occurrence of apparent conflicts between rights. The rejection of tradeoffs between rights also appears to clash with the intuition (had not only by committed Consequentialists) that there are cases where the number of people who will suffer a certain rights violation plays an important, and sometimes decisive, role in moral deliberation. I shall address both of these concerns below, and in doing so further flesh out the notion of a right as it figures in RRMC. First, however, I shall explain why it is that RRMC entails the rejection of a C or D-institution that permits, or even requires, the violation of one individual's rights when doing so will produce fewer rights violations overall.<sup>16</sup>

Reasonable Rejection Moral Contractualism does not require one to abandon one's own standpoint for some impersonal point of view, and to determine from such a perspective what one is required to do. The perspective of a suitably motivated moral agent is not this view from nowhere, but rather the view from everywhere, that is, from the standpoint of each individual agent (or at least the standpoint of agents with various generic reasons for action). Such a perspective requires the recognition of the value of each individual life from the inside; that is, the value it has from the

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<sup>16</sup> This statement of the issue is ambiguous between several different scenarios in which rights may be traded off, and the necessary distinctions will be made below.

perspective of the person who lives it. The recognition of the value of a person's life from the inside, the mainly agent-relative reasons in terms of which he understands the value and meaning of his life, leads us to appreciate one of the fundamental starting points for moral reasoning, namely that each individual has only one life to live (see Nozick 1974, 33). At the same time, because the perspective of a suitably motivated moral agent is the view from everywhere, a suitably motivated moral agent must recognize that it is true of everyone that the life he or she leads is the only one that he or she will ever lead. In this respect, all moral agents are the same, and insofar as this fact provides one of the bases for moral argumentation, it is an argument to which all agents can equally appeal. As Nagel puts the point, RRMC rests on two basic claims: "everyone's life is equally important and everyone has his own life to lead" (Nagel 1991, 44). Talk of maximizing respect for basic moral rights can be misleading, insofar as it encourages us to adopt an impersonal view from nowhere, and so neglect the constraint that each person's having only one life to live places on what morality can require of that individual. Scanlon labels this constraint the Individualist Restriction, and it consists in the insistence that "the justifiability of a moral principle depends only on various *individuals'* reasons for objecting to that principle and alternatives to it" (Scanlon 1998, 239).

On the one hand, a suitably motivated moral agent recognizes that others have only one life to lead, the fundamental importance of which he appreciates when he views the lives they lead from their standpoint, and this limits the demands he can make of them. But on the other hand, others must recognize that he too has only one life to live, and so limit their demands on him. This is the sense in which morality

consists in mutual recognition and accommodation. The upshot of this argument is that a suitably motivated moral agent can reasonably reject a C or D-institution that would require too great a compromise of the agent-relative values that make a person's life valuable and meaningful to him or her, even if the result would be a greater number of people enjoying their basic moral rights. It would be unreasonable to demand of someone that he treat his life as having merely instrumental value – that is, that he forgo acting on the agent-relative reasons that give it value and meaning – so that others could have the opportunity to live such lives. Though C and D-institutions are instrumentally valuable, the moral agents that inhabit them cannot be treated as if they are simply instrumentally valuable. But this is just what an illiberal D-institution reserves the right to do, for it fails to acknowledge any constraints on the demands it can make of those it governs, or at least any constraints that are not contingent on empirical conclusions regarding the most effective means to securing basic moral rights for all. In short, a state that is not committed to respect for individual rights simply fails to properly appreciate the moral status of its citizens, and indeed, all moral agents.

It is important to keep in mind that on the account developed here, rights are simply shorthand ways of referring to the indefinitely many principles that structure the interactions of individuals who cannot simultaneously pursue the ways of life they find worthwhile (to the fullest extent possible), and who are committed to restricting their pursuit of worthwhile lives in order to accommodate other agents' pursuit of the lives they find worthwhile. If we do so, then it seems likely that many conflicts of rights can be worked out by specifying more clearly what the right entitles a person to,

or what is the same, exactly what duties correlate with that right. In short, apparent conflicts of rights will often be resolved (or dissolved) by further specification of the right and its correlative duties via the kind of moral reasoning employed to generate the rights in the first place, namely consideration of reasons for and against various principles for the general regulation of behavior.<sup>17</sup>

Might the resolution of conflicts of rights sometimes require the state to temporarily suspend its respect for certain rights (of certain individuals)? That is, might there be situations in which ideal moral agents could not reasonably reject the state's temporarily not respecting certain individual rights that in "normal" situations the state (and all other agents) would be required to recognize? An affirmative answer to this question strikes me as plausible. For example, it seems likely that ideal moral agents could not reasonably reject the state temporarily imposing a curfew on residents of a city struck by a major natural disaster in order to facilitate aid reaching those who need it (or, as I shall argue below, who have a right to be rescued), to prevent the right violations (and harms) likely to result from widespread looting and rioting, and so on. However, it is not clear that this example is correctly conceived as the state *suspending* respect for individual rights; perhaps instead we should conclude that using the methodology of RRMC to determine the scope of individual rights shows that in the case of natural disasters, individuals do not enjoy the right to freedom of movement that they usually have in normal situations. Of course, there

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<sup>17</sup> Similarly, Waldron suggests that certain conflicts of rights can be worked out by appeal to the "internal relation" between moral considerations, by which I understand him to mean the role that rights play in a political or moral system that has as its end something more basic than rights, such as respect for autonomy, agents' fundamental interests, or limiting one's acting on the agent-relative reasons that give one's life value and meaning in ways specified by principles that ideal moral agents could not reasonably reject. See Waldron 1989.

may be disagreements as to what counts as a sufficiently disastrous situation for individuals to lack the right to freedom of movement (or for that right to be suspended). On the assumption that in many cases general compliance with a curfew will be necessary for it to have the desired effects (e.g. speed up the movement of emergency workers and supplies), ideal moral agents will not be able to reasonably reject some decision-mechanism for settling disagreements as to when a situation is sufficiently disastrous. This brings us back to the justification for the state with which this chapter began.<sup>18</sup>

Still, it may seem that in some cases there will not be any way to dissolve the apparent conflict of rights, particularly when the rights in question involve freedom from bodily or emotional harm. At times, the state may face a choice between two policies (or actions), and whichever action the state takes, it will fail to prevent harm to one or more persons, harms people often think they have a right not to suffer. Moreover, though many people share the intuition that it is wrong to violate one person's right in order to secure enjoyment of a different, and perhaps less important, right by two other people, many people also believe that at some point the numbers do make a difference. It is in these cases that the notion of maximizing respect for rights appears to be the morally correct principle for guiding the state's conduct. Yet I have just argued that ideal moral agents can reasonably reject a state's political authority if it is not committed to respecting each individual's rights, even if by violating one

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<sup>18</sup> The discussion in later parts of this thesis will suggest responses a Moral Contractualist might make to complications the reader might suggest to the issue of a state's temporary suspension of respect for certain rights. One reader, for instance, has asked whether Lincoln's suspension of the right of habeas corpus during the American Civil War could be justified on this account. Insofar as Lincoln lacked the authority to suspend that right (the authority lying instead with Congress), I would contend that citizens of the United States (and perhaps officeholders in his administration) did not have a duty to obey Lincoln's order. Such a claim is consistent, however, with the claim that all things considered it was better that Lincoln chose to suspend the right to habeas corpus.

person's right the state could prevent many others from suffering violations of the very same right. It is incumbent upon me, then, to explain how the state is to determine what it ought to do without relying on a principle of maximizing respect for rights, preferably in a way that accommodates or plausibly explains away the intuitions identified above.

While a full discussion of these matters is beyond the scope of this paper, the importance I have assigned to the state's respect for individual rights as a necessary condition for political authority warrants a fairly detailed analysis. I begin by contrasting the understanding of moral equality expressed by the Individualist Restriction with that of any moral theory that understands moral equality in terms of equal consideration of interests (or fundamental interests).<sup>19</sup> Doing so makes clear why the Moral Contractualism I defend here rejects the aggregation of harms, or wrong-making considerations that provide reasons for objecting to proposed principles for the general regulation of behavior (i.e. an objection to permission or prohibition), as relevant to a determination of the conduct morality requires from an agent, including the state. I then identify three cases in which a principle of maximization of respect for rights may appear to be relevant to moral deliberation. In the following sections I explain what Moral Contractualism requires in each type of case, and demonstrate the consistency of the required action (or inaction) with respect for individual rights. The conclusions I reach, it is hoped, will strike many readers as reflecting their intuitive understanding of when the numbers should and should not

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<sup>19</sup> A Utilitarian will give equal consideration to the interests of every person without any restriction on the kind of interests that are to be considered, while a defender of an interest theory of rights will consider only the fundamental interests of each and every person.

count, though the arguments for these conclusions will not rely on the aggregation of harms.

The Individualist Restriction expresses an understanding of moral equality in terms of the ability to act for reasons, and in particular to restrict one's conduct to behavior that could be justified to others, insofar as they are reasonable (i.e. behavior that those others could not reasonably reject).<sup>20</sup> Such an understanding of moral equality can be contrasted with the view that each and every agent's interests (or at least every agent's fundamental interests) are to be given the same (or equal) weight in an agent's moral deliberation, or at least in the state's moral deliberation. On the latter understanding of moral equality, when an agent deliberates about what she ought to do, it is open to the deliberator, and perhaps even required of her, to consider how many people will suffer a setback to one or another of their fundamental interests, and to give this consideration some weight, and perhaps even decisive weight, in reaching a conclusion. On the understanding of moral equality expressed by the Individualist Restriction, however, an agent is barred from aggregating reasons in this manner, and deciding that she ought to take one action rather than another because *X* number of agents can claim that some fundamental interest each one has will be harmed if she fails to do a particular act. That her failure to do that act will result in harm to an agent's fundamental interest may be a decisive reason for her to do the act in question, but that *X number of agents will suffer the harm* is irrelevant. The latter is not a reason that any particular individual has for objecting to a principle that permits other agents

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<sup>20</sup> Scanlon claims that the individualist restriction is integral to Contractualist moral theory. It seems to me, however, that while acceptance of the Individualist Requirement entails a commitment to Contractualism, the opposite may not be true.

to behave in ways that will cause or permit harm to some fundamental interest(s) of hers, but only that a group of agents, as a group, have for objecting to such a principle.

The following *reductio ad absurdum* argument provides some support for the adoption of the Individualist Restriction. The failure to do so appears to entail that there is some large but finite number of individuals suffering minor temporary headaches such that if we could act either to prevent their suffering or to prevent one person's death (or, say, suffering an extended period of torture), we ought to prevent the suffering of those with headaches. Such a conclusion will likely strike most people as absurd, and provides a reason to adopt an understanding of moral equality that bars such aggregative reasoning.<sup>21</sup> The important point to note is that one individual's complaint against a principle on the grounds that it entails his suffering a minor temporary headache surely poses less of an objection to permission than does one individual's complaint against a principle that it entails his death or torture. Only the immense cacophony of complaints by a surely enormous number of people suffering minor temporary headaches could even create the impression of a justification for a requirement (or even a permission) to prevent the headaches rather than the one death or torture. This illustrates the respect in which it is only the group's complaint, rather than an individual's reason, that could serve as the basis for rejecting a principle that prohibits preventing death and torture at the cost of not preventing (a sufficiently large number of) minor temporary headaches.

Let us examine, now, the response of a Moral Contractualist committed to the Individualist Restriction to three cases that might be understood to involve conflicts of

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<sup>21</sup> Alastair Norcross, however, has recently argued that there may be analogous cases to the one discussed here where a similar tradeoff strikes us as quite permissible. Norcross 1997; 1998.

rights, and where an agent (including the state, or better, agents of the state) can act to prevent either a rights violation for the few or a rights violation for the many, but not both. Here are the three cases we shall consider:

*Firefighter's Dilemma:* An earthquake strikes San Francisco, causing an outbreak of fires throughout the city. The firefighters assigned to a single hook-and-ladder truck confront two burning buildings; in one building a single person is trapped on the fifth floor, while in the second building, two people are trapped on the fifth floor. Neither building can be accessed without the use of the truck's ladder, and there is only enough time to use the ladder to access one of the buildings before both buildings collapse. Whichever building the firemen enter, they will be able to save the person or people trapped inside.

*Lifeguard's Dilemma:* A lifeguard confronts a situation in which a single individual is drowning in the pool to his left, while to his right, a thousand people are about to enter a polluted lake that will permanently blind them (or paralyze them, or give them a disease from which it takes months to recover, etc.). Unless the lifeguard moves closer to the lake, those who are about to enter it will not hear his warning (a warning they will heed if they hear it). But if he does so, he will not be able to reach the person drowning in the pool in time to prevent his death. Likewise, if the lifeguard saves the person drowning in the pool, he will not be able to warn the thousand people about to enter the lake of the danger they face.

*Transplant Case:* You enter the hospital to visit a friend, but as you walk into the lobby you are seized by several nurses and informed by a breathless surgeon that she intends to cut you up for the purposes of distributing your organs to save five patients who will otherwise die of various organ failures.

These cases, or variations on them, will surely be familiar to the reader; let us examine a Moral Contractualist approach to them. I shall begin with the *Transplant Case* because the analysis of it will involve the introduction of a number of ideas that are crucial to the analyses of the other cases.

## V

One way to view the *Transplant Case* is as a choice between one person's life and five people's lives. An aggregative principle, say one that requires agents to act so as to minimize harms, or (what may not be the same) to maximize respect for rights, entails that the larger number must be saved, at least in a case like this one where the interest or right that is at stake is the same for all of the agents involved (namely continued existence). Most people reject killing one person in order to provide organs for five others, however, and not simply on the grounds that a Utilitarian might offer, such as the claim that overall happiness, well-being, etc. is better secured by providing individuals with assurance that their lives will not be taken whenever doing so would provide organs to prevent five other deaths. Rather, those who object to the conclusion entailed by the adoption of an aggregative principle in the *Transplant Case* often do so on the grounds that among the duties that correlate with an individual's right to life is a duty on others not to kill a person whose life would otherwise (i.e. apart from the actions of those others) not be at risk just so that his organs can be distributed to others who will die without them. The right to life does *not* correlate with a duty on others to do *anything* that one can do in order to prevent someone from dying. To this objection is often added a second account of why it would be wrong to kill one person in order to distribute his organs to five others, namely that there is a morally important difference between acts, including killing a person for his organs, and omissions, including failing to do all that one might in order to prevent someone from dying from one or another organ failure.

Moral Contractualism, however, cannot simply help itself to these common-sense intuitions about the scope of individual rights and the distinction between act and omission. Or at least it cannot do so if it wishes to maintain that an act's being wrong (having the property of wrongness) is the *result* of its being reasonable for ideal moral agents to reject any principle that authorizes that act, rather than a datum established prior to, and independently of, RRMC.<sup>22</sup> Rather, it must provide an account of them that derives from the methodology of considering what principles for the general regulation of behavior ideal moral agents could not reasonably reject.

Consider, first, the scope of individual rights, or the specific duties that correlate to them. Some argue that all rights are negative, such that one fulfills all of the duties correlative to others' rights if one forbears from certain actions (Nozick 1974). There is good reason to be skeptical that many rights correlates only with duties of forbearance or non-interference, however.<sup>23</sup> In any case, I committed myself in the previous chapter to the claim that moral agents have duties to see to it that all

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<sup>22</sup> Remember that in evaluating alternative principles for the general regulation of (some aspect of) behavior, ideal moral agents - agents committed to constraining their pursuit of the ways of life they find worthwhile in order to accommodate others with the same goals (living a worthwhile life and accommodating others with that goal) – consider only agent-relative reasons for rejecting principles and agent-neutral reasons for rejecting principles that themselves reflect agent-relative reasons (as in the case of fairness). The commitment to accommodating others pursuit of the ways of life they find worthwhile is not a reason given for rejecting a principle, but rather the attitude regulative of the process by which different agent-relative and agent-neutral reasons for prohibition and permission are compared in order to reach a judgment as to whether a given principle for the general regulation of behavior can be reasonably rejected.

Richard Miller has suggested that Scanlon forgo this commitment to wrongness being a product of reasonable rejection, what Miller calls the claim of constitutive priority, in favor of a moral sensitivity (or intuitionist) model of Contractualist Morality. This model would recognize certain features of the world as having moral import prior to considerations of reasonable rejectability, but which could be appealed to as reasons for or against rejecting a given principle. These features of the world (irreducible to claims about reasonable rejectability) apparently include a number-sensitive principle of wrongness, so that Miller concludes in the *Lifeguard's Dilemma* that “if the person in danger of drowning while thousands across the inlet are in danger of blinding were appropriately sensitive to others' complaints, as well as appropriately assertive of her own, she could not reject the number-sensitive principles that could victimize her as valid principles of obligation” (Miller 2002, 198).

<sup>23</sup> See Shue 1980, Ch. 2, and Holmes and Sunstein 1999, Ch. 1.

are treated in ways that they could not reasonably reject, a claim that clearly entails a requirement on agents to *do* certain things, as well as to forbear from certain (other) actions. Among the rights, or ways of being treated, that I suggested ideal moral agents could not reasonably reject, was a right to basic health care. Could those who are in need of the organs reasonably reject a principle permitting the healthy individual who enters the hospital to keep his organs, and so claim that their right to basic health care includes a right to organ transplants, at least in situations where the outcome would be that more individuals would live than would die?

In order to defend a negative answer to this question, the Moral Contractualist must distinguish between those ways of being treated to which all agents are entitled (or have a right) in virtue of being moral agents, and those ways of being treated that would benefit them, but to which they are not entitled (or to which they do not have a right). I suggest that we can do so by understanding individual rights as constraints on action intended to reduce the likelihood below a certain threshold, but short of absolute certainty, of suffering particular kinds of harms that one is at risk of suffering.<sup>24</sup> This seems a plausible way to understand Scanlon's claim that "the probability of a form of conduct that will cause harm can be relevant not as a factor diminishing the "complaint" of the affected parties (discounting the harm by the likelihood of their suffering it), but rather as an indicator of the care that the agent has to take to avoid causing harm" (Scanlon 1998, 209).<sup>25</sup> To respect someone's right to

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<sup>24</sup> Compare to Thomson, who suggests that while we have duties not to impose certain risks of harm on others, those others do not have a claim-(right) to our not doing so. Thomson 1990, 242-247. For further discussion (different in some respects) of rights as claims regarding the degree of risk one agent can impose on another, see McCarthy 1997.

<sup>25</sup> For an objection to understanding the probability of suffering a harm in terms of discounting the harm by the likelihood of its occurrence, see Reibetanz 1998.

be free from some harm X is *not* to commit oneself to making whatever sacrifice is necessary in order to see to it that harm X does not befall that person. Such a principle could be reasonably rejected because it would encroach too far on a person's ability to lead the way of life he or she finds valuable and meaningful.<sup>26</sup> Now, so long as agents, individually and collectively via various institutions including the state, take sufficient steps to ensure that the probability of one's suffering a particular kind of harm is below a certain threshold, then even if one suffers the harm in question this will not constitute a violation of one's right by those agents. That is, it will not be the case that one will have a claim not to suffer the harm in question (in the way one suffers it), for one only has a claim to others restricting their behavior so as to make the *probability* of suffering the harm fall below a certain threshold. If this analysis of what it is to have a right is correct, then we could distinguish those cases where a person has a right to our restricting our behavior in order to ensure that he does not suffer from a certain harm to his health (say malnutrition), from those cases (perhaps including the transplant case) where a person needs to be saved from a certain harm to his health, but does not have a right to anyone's saving him.

Note that on this understanding of individual rights, the imposition of a risk is not itself a *harm*, though if the risk is above a certain threshold it does count as a *wrong*, the violation of an agent's right. Following Scanlon once more, we can distinguish the property of wrongness had by acts that violate rights (or principles that ideal moral agents could not reasonably reject) from the properties that make an act

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<sup>26</sup> "Our idea of "reasonable precautions" defines the level of care that we think can be demanded: a principle that demanded more than this would be too confining, and could reasonably be rejected on that ground" (Scanlon 1998, 209). Note that the reasonable precautions need not be limited to those that lower the probability of a risk being realized, but might also include measures to ameliorate the harm that occurs when the risk is realized. I discuss this point below.

wrong (Scanlon 1998, 391).<sup>27</sup> An act will have the property of wrongness if it imposes a degree of risk of suffering some harm on a person that could be reasonably rejected. But the reason for rejecting a principle that permits the imposition of such a degree of risk is the harm itself (in the case of pain, for example, the experiential bad of the pain plus the barriers the experience of pain imposes to acting on various agent-relative reasons had by the individual who suffers it). Suppose that when I punch you I violate your right to be free from deliberately inflicted bodily harm. My imposing a risk on you of suffering harm does not seem a good explanation for the violation; it is my harming you, not the imposition of a risk of harm, which explains the violation. I contend, however, that when you punch me you act in a way such that the likelihood of my suffering a certain harm is over a certain threshold (far over, since the likelihood of the harm is one hundred percent), and so I (or more accurately, a suitably motivated moral agent occupying the standpoint I occupy) could reasonably reject your punching me. It is in virtue of the reasonable rejection that the action is wrong, but it is in virtue of the harm (pain and interference with acting on agent-relative reasons) that the action can be reasonably rejected. The harm is the property that makes the action wrong (i.e. that makes it reasonable to reject a principle permitting

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<sup>27</sup> One reason for drawing this distinction is that it would provide an account of what unifies judgments of wrongness, though the properties that make acts wrong are diverse. At the same time, however, this strategy results in a distinction between the morality of what we owe to each other and a broader sense of wrong (or what Scanlon labels acting inhumanely) that includes, for example, inappropriate conduct toward animals, the environment, and great works of art, apart from consideration of the importance they have for other persons. Kamm criticizes the distinction between the property of wrongness and wrong-making properties on the grounds that respect for others as persons is more plausibly conceived of as requiring attention to the reasons that they have for not wanting to be treated in a certain way, rather than (merely) on their not wanting to be treated in that way (Kamm 2002, 331-3). It seems to me, however, that this is exactly what RRMC requires, since an objection to a principle that permits some behavior rests on the reasons for and against that principle and alternatives to it.

the action in question), but the property of wrongness had by the action is it's being reasonably rejectable.

To be wronged, then, is distinct from being harmed. Though one can be wronged in virtue of being harmed, this is not a necessary condition. A person can be wronged if another unduly places him at risk, even though that risk is not realized, and so the person not harmed.<sup>28</sup> And, as argued in the previous chapter, one can be wronged because one is treated unfairly, even if one is not harmed by the unfair treatment. Conversely, not every case of being harmed will be an instance of being wronged. So for example, though the failure of my liver will certainly harm me, such an occurrence may not involve anyone's wronging me. Should I suffer from malnutrition, however, then I may not only be harmed but also wronged, even if my malnutrition is not the result of any particular person's intentionally seeking to deprive me of food. As this comment suggests, Moral Contractualism as interpreted here does not treat the distinction between act and omission as a morally basic one. Rather, the notion of ways of being treated that ideal moral agents could not reasonably reject is basic, and actual agents may fall afoul of that standard both by their actions and by their omissions.

It is not the case, then, that an agent has a claim to others constraining their behavior *whenever* this would prevent or reduce some harm to that agent; there is no right to be saved.<sup>29</sup> However, it is important to distinguish between a right to be saved, and what I shall call a right to be rescued. One likely component of principles permitting the imposition of risks of harm on others that ideal moral agents cannot

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<sup>28</sup> For examples of such cases, see Nagel's discussion of moral luck, Nagel 1979.

<sup>29</sup> For a reductio ad absurdum argument against a right to be saved, see Thomson 1990, 161-63.

reasonably reject will be a requirement that when the risk is realized (i.e. when someone suffers the harm in question), certain efforts be made to ameliorate the harm. This duty to ameliorate the harm after the risk of suffering it has been realized correlates with a right to rescue. So for example, the people trapped in the burning buildings in the *Firefighter's Dilemma* may have a right to be rescued, insofar as it is a condition on the permissibility of the risky activities involved in the use of tall buildings, electricity, etc., in a region known to be earthquake prone, that certain efforts be made to ameliorate the harms people suffer when those risks are realized. Other examples might include a condition on the operation of motor vehicles at the speeds permitted on highways in the United States, namely that when crashes do occur, medical evacuation helicopters be used in an attempt to ameliorate the harm suffered by those involved in the crash. Those whose abilities to act on agent-relative reasons are hindered while the highway is closed for the helicopter landing, and by the duty to pay taxes to fund such a program, could not reasonably reject the way they are treated, since it is the price for their being permitted to undertake the risky activity of operating a motor vehicle at high speeds (and/or benefiting from others doing so). But while the right to rescue may correlate with a duty to set aside the resources necessary for the operation of a medivac helicopter, it may not entail a duty to kill and distribute the organs of a person who would otherwise suffer no harm, when doing so will make it possible to prevent five people's deaths. Finally, the notion of a right to rescue might also explain why the state acts rightly when it devotes a large sum of money to rescuing ten trapped coal miners, even though it could allocate that same sum of money to safety measures that would prevent fatal harms to fifty coal miners in the

future. It is a condition on the non-reasonable rejectability of coal-mining from the standpoint of those who will carry it out that if they become trapped in the mine, a serious effort will be made to rescue them.<sup>30</sup>

The duties that correlate to a right to rescue are conceptually distinct from a duty to aid (or a duty to save) because the latter does not necessarily correlate with any right on the person in need of the aid. Note, too, that a right to be rescued is distinct from a right to compensation for the harms one suffers. The purpose of the latter right is to rectify the harm one has received, while the purpose of the former right is to reduce the harm as it occurs; also, the agent against whom the right-claim is leveled may differ in some cases with respect to these two rights. Like the right to be rescued, the right to compensation for the realization of a risk may be a condition on the non-reasonable rejectability of a principle that permits agents to conduct themselves in ways that expose others to the risk of harm.

We have now a formal analysis of the scope of individual rights, or the limits of the ways of being treated to which moral agents as such are entitled. Integral to this formal analysis of individual rights is the notion that there is a threshold below which the risk of suffering some harm as a result of another individual's failure to constrain his behavior in some way does not count as a violation of a right (i.e. as being treated in a way that could be reasonably rejected). If we are to give a substantive analysis of particular rights, though, we must have an idea of how we are to go about setting this threshold; that is, how do we determine how much one individual must constrain his behavior in order to reduce the risk to others of suffering various kinds of harms, and

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<sup>30</sup> This account provides a justification for a kind of partiality for present lives over future lives. I have benefited from discussion of this case with Michael Slote.

conversely how much risk must others bear in order to accommodate an agent acting on the agent-relative reasons that give his life value and meaning? We do so by comparing the objections to prohibition and objections to permission that might be made from various standpoints with respect to alternative principles for the general regulation of behavior, where those principles differ with respect to the risks agents are allowed to impose on others (and the risks they must permit others to impose on them). One agent's complaint regarding the risk threshold for suffering a certain kind of harm as the result of another's actions must be evaluated against another's complaint to an alternative principle that sets the threshold higher or lower. Both agents' complaints (or more accurately, complaints from both standpoints) will likely refer to the burdens life under a given principle would impose on an agent's ability to act on the agent-relative reasons that give his life value and meaning (and perhaps in some cases to agent-neutral reasons like fairness as well).

In carrying out such evaluations, several points must be kept in mind. First, the costs and benefits imposed by the general acceptance of alternative principles for the regulation of a certain activity are to be compared over an agent's lifetime (see Reibetanz 1998, 300). Just as morality (or at least the morality of what we owe to each other) is conceived to be equally binding on all agents at a time, so too it must be understood as equally binding on one agent across time.<sup>31</sup> This entails, of course, that it binds all agents equally at all times. Second, principles for the general regulation of behavior are to be evaluated as a set, not individually, a claim that follows from

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<sup>31</sup> Young children, and even adolescents may have excuses for immoral actions that are not available to adults. Also, the fulfillment of certain moral duties will depend on an agent's abilities and circumstances, with children rarely if ever having the necessary abilities or occupying the necessary circumstances for certain duties. In these cases, children would be justified in failing to do certain actions that adults are required to do.

Scanlon's holism (discussed in chapter four). Though we may focus our attention at any particular time on only one or two of the principles in the set, their not being reasonably rejectable is contingent on the justifiability of the set as a whole.<sup>32</sup> This condition is crucial to the non-reasonable rejectability of various principles. Even if there are a few risks that all agents are likely to conclude are worth accepting (i.e. the cost of further reducing the likelihood of those risks, in terms of constraints on the pursuit of valuable and meaningful lives, is too high), for most types of risky behavior there will not be such unanimity. In these latter cases, ideal moral agents are likely to reach compromises where each agent accepts a higher likelihood of suffering some harm as the result of a given activity than she would prefer, but does so on the condition that others also accept a higher likelihood of suffering a different harm to which they would prefer not to be exposed.<sup>33</sup>

The third feature of a Moral Contractualist evaluation of principles permitting or forbidding risky behavior (or at least a Moral Contractualism committed to the Individualist Restriction) is that the risks must be justified to each individual, or to each generic standpoint. Intrapersonal aggregation of the benefits and costs to one person over her lifespan is permissible, but interpersonal aggregation of the costs and

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<sup>32</sup> Pogge also concludes that Scanlon is concerned with the non-reasonable rejectability of a set of principles, though he contends that Scanlon fails to say whether the other principles that are to be held fixed when evaluating a principle are those principles that are currently accepted in an agent's social environment or the agent's best guess as to the principles contained within the set of non-reasonably rejectable principles. See Pogge 2001, 134.

<sup>33</sup> Writing in an explicitly Kantian vein, and relying on rationality and mutual advantage rather than reasonableness, Charles Fried presents an argument parallel to the one presented here: "Impositions of all sorts on other persons are morally justified because any rational person would agree to permit such impositions upon himself as a price for his freedom of action, provided that the imposition he was permitting to others assured him the maximum degree of freedom compatible with universal laws to impose upon others in the pursuit of his own ends. If a person knows that he and all other persons would accept for themselves in the pursuit of their own ends a certain degree and kind of risk of death in particular circumstances, then it is rational to assume that those persons would allow others to impose that degree of risk of death upon them when the others are engaged upon those certain ends. In this way each person's impositions on others in the pursuit of those ends would be justified" (Fried 1970, 186).

benefits to a group of individuals (at a time or over time) plays no role in the evaluation of principles regulating risky behavior. The reasoning here is the same as employed in the justification of the Individualist Restriction above; a small reduction in the risk to a large number of people of suffering a given harm does not justify the imposition of a large (near certain) risk of suffering that harm on a few.<sup>34</sup> The important point is that the risks need to be non-reasonably rejectable from the standpoint of the individual who incurs the risk. But this raises the question of what standpoint in her life the individual ought to adopt in determining whether the risks she bears are worth the freedom she has to act on the agent-relative reasons that give her life value and meaning, but that impose risks of harm on her and on others. On the one hand, conducting such an evaluation from the end of one's life would be preferable, since one would know exactly all the costs and benefits one incurred living under a given set of principles, and could then calculate whether one could have reasonably rejected that set of principles in favor of some alternative set. (Keep in mind that one would have to occupy many other after-death generic standpoints, since the principles we seek are those that could not be reasonably rejected by agents who have different reasons for finding their lives valuable and meaningful). But such an evaluation is obviously impossible (and even if it were possible, it would be pointless). A prospective view seems better, particularly if we keep in mind that moral principles are provisional and subject to revision as, for example, hidden biases are recognized, or new agent-relative reasons for finding value and meaning in one's life are discovered.

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<sup>34</sup> That is not to say that there is no non-reasonably rejectable principle that justifies such an outcome, but only that its justification does not rest on a consideration of the number of people facing the risk.

As I noted earlier, Scanlon believes that at some point the requirement on an agent to refrain from those kinds of behaviors that impose a certain probability of suffering harm on others can become too confining. When this point is reached is to be determined via a process of intrapersonal aggregation - comparing the loss from a particular standpoint of not being able to do some risky activity with the benefit from that standpoint of not having others impose that risk, and others as well, on one – and evaluating rival principles from various standpoints. Unfortunately, Scanlon does not put the point as strongly as he might, labeling as “inconveniences” the sacrifices agents make if it they are not permitted to impose a certain level of risk on others. Both Kamm and Norcross rightly question whether mere inconveniences, aggregated intrapersonally, could provide a stronger complaint than that voiced by a person who realizes the risk of some serious or fatal harm (Kamm 2002, 35; Norcross 2002, 312). Yet, for example, a ban on construction because it imposes a certain risk of harm on those who pass by, would not be a mere inconvenience, but rather a pervasive and severe constraint on the ways of life open to all, including those who are harmed in construction accidents. If we then consider all of the other activities that impose a similar degree of risk, or that are made possible only by such activities, then it seems likely that the rejection of principles permitting such activities will leave agents free to do hardly anything at all. Such a conclusion hardly seems reasonable, as it surely fails to take seriously enough the complaints made from the standpoints of agents who will not be permitted to undertake any of the activities that make their lives valuable and meaningful.

The case of a child who suffers a grave or even fatal harm as the result of a principle permitting some kind of risky behavior seems to pose the greatest challenge to the non-reasonable rejectability of such principles (see Nozick 1974, 77). For surely the benefits such a child enjoys in virtue of various risky behaviors being permitted does not outweigh the loss he suffers when his life is so short. The first point to note in response to the complaint of a child who dies young is that it likely holds a certain amount of truth; certain types of behavior that impose risks of grave or fatal harm on children may well be reasonably rejectable, even if there are agent-relative reasons to value those types of behavior. The second point to consider is that in assessing principles that permit risky behavior, we must evaluate them from the standpoint of those who will lead lives of varying lengths, lives whose value and meaning is constituted by acting on various agent-relative reasons, as well as the standpoint of the child who dies young. It seems to me that a person's complaint that he will have to live a life in which he is prohibited from doing many of those activities that give a life value and meaning can outweigh a complaint by someone that if those activities are allowed, he will die young. But this conclusion depends on it being the case that lives constituted by projects that are valuable and meaningful for those who live them can sometimes defeat claims to mere existence. Such a conclusion does not strike me as implausible, since many people have been willing to risk their lives (continued existence) in order to lead the ways of life they found valuable; for example, ones in which they were not ruled tyrannically, or could seek to make great art. I conclude, therefore, that ideal moral agents could not reasonably reject *all*

principles permitting risky activities under which a certain number of children would die young.<sup>35</sup>

A similar argument can be made to justify a duty to participate in the military defense of one's country and fellow citizens. Given that modern wars almost always result in the death of at least a few combatants, and often many more, a very strong complaint against such a duty is likely to be made from the standpoint of the soldier who dies while serving his country. Yet so long as the following conditions are met, it is not clear that the complaint voiced from this standpoint should triumph over the complaints from other standpoints with respect to a world in which such a duty does not exist. First, there must be a certain probability of a state's successfully winning the war (or at least not losing it) if citizens of that state are to have a duty to fight it. Hopeless wars, such as the one Holland faced when Nazi Germany invaded it in 1940, need not be fought (though some may choose to fight them) (see Klosko 1992, 55). Second, the duty to serve is restricted to just wars in defense of one's country and fellow citizens, or in other words, to just wars where the threat to respect for citizens' basic moral rights and collective self-governance (the importance of which is discussed in the following chapter) is great.<sup>36</sup> Note that this condition on a duty of

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<sup>35</sup> As Nozick points out, it would be nearly impossible to justify the imposition of a risk of death on children by appeal to a principle of mutual advantage (such as the principle of fair play), since the child-who-dies-young will receive almost no benefit at all from such an arrangement. The Moral Contractualist argument, however, does not depend on the actual benefits to any particular individual of permitting certain kinds of risky conduct, but rather a consideration from multiple standpoints of the possibilities open to individuals for leading valuable and meaningful lives under alternative sets of principles for the general regulation of behavior. Only if mere existence enjoys lexical priority over every other consideration will it be possible to reasonably reject any set of principles that permits behavior with a certain probability of causing death to a child.

<sup>36</sup> Conducting a war in such circumstances is similar to regulating the amount of toxic waste that can be dumped in a river; both are collective action problems agents must confront as they seek to treat all other agents in ways that they could not reasonably reject. Unlike in the case of pollution, however, the collective action problem posed by a military attack on the state can sometimes be resolved without recourse to claims about duty, the passage of laws, and their enforcement. Rather, patriotism, the fact

military service leaves open the possibility that there have been (and will be) just wars in which citizens of one or more of the states justly at war do not have a duty to fight in it. Volunteer soldiers, sailors, and airmen could fight such wars, even though they would have no duty to enlist for military service. That a state may lack such volunteers does not show this position to be incoherent; it merely points out that like other agents, states may sometimes have a right to do something that they lack the resources or ability to do. More intriguingly, it may also entail that certain just wars of secession (or perhaps even wars of conglomeration) will be ones in which one or more parties to the conflict is not justified in imposing a duty of military service on anyone.<sup>37</sup>

The duty of citizens to participate in the military defense of their country and fellow citizens depends not only on the war being a just one, not hopeless, and necessary for the protection of basic moral rights and democratic governance, but also on the way in which the war is fought. Thus a third necessary condition for citizens to have a duty of military service is that the risks involved in combat be distributed in a fair manner (i.e. in a way that ideal moral agents could not reasonably reject). A draft law like the one initially instituted by the Union during the American Civil War, which allowed wealthy men to buy their way out of military service, fails to meet such

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that defectors (or free-riders) are easily identifiable, admiration for those who (voluntarily) serve, the vividness of the threat, and the inability of certain segments of the population to avoid the harms in question by private means (in contrast, say, with the employment of private security forces), all provide incentives for agents to voluntarily join in the armed defense of the state and its citizens.

<sup>37</sup> These arguments also suggest that conscription can be justified if necessary to fight wars for the protection of non-citizens' basic moral rights, and their exercise of collective self-governance. I do not find such an in principle implication troublesome, and not simply because there will often be pragmatic reasons to refrain from instituting a draft in order to fight, say, wars of humanitarian intervention. It may be possible, and morally permissible, to fight such wars relying only on volunteer armies. After all, police officers face greater risks than do average citizens when it comes to securing respect for basic moral rights, but it is not clear that they are being treated unfairly because of this. For further (though still far from complete) discussion of cosmopolitanism and the challenge it poses to a Moral Contractualist defense of political obligation, see chapter seven.

a standard. Exemptions for those enrolled in institutions of higher education during the Vietnam War probably fails to meet this condition as well, at least on the assumption that such enrollment reflected economic class distinctions that ought to have been irrelevant for the purposes of fighting a war that was ostensibly necessary to protect the basic moral rights of all.

A fourth condition on a principle requiring military service in defense of one's country and fellow citizens is that those agents of the state to whom obedience is owed directly, as in the case of soldiers owing obedience to the officers that command them, exercise their specific authority in ways consistent with principles that could not be reasonably rejected by ideal moral agents. The principles restricting the demands that officers can place on those they command will include not only the prohibition of commands to attack civilians, torture enemy prisoners, and so on, but also limits on the circumstances in which soldiers can be ordered to bear a great risk of harm or death. In short, soldier's lives should not be expended lightly. However, when there is reason to think that an action will expose soldiers to great risk of harm or death, but that if taken the action has a certain probability of successfully contributing to overall victory, then soldiers will not be justified in disobeying orders to take that action. Or at least this is so if there is reason to think that if the soldiers in question do not risk their lives in such a situation, more of their fellow soldiers will die later.<sup>38</sup> Identifying when a situation meets this condition is obviously difficult, particularly since it

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<sup>38</sup> This argument also entails that there is a threshold for the probability of success in the conduct of a military exercise that must be met if soldiers are to have a duty to carry it out. Missions in which this threshold is not met are "suicide missions," and their conduct requires volunteers. Other missions may involve an equally high likelihood of death or serious harm, but not count as suicide missions in this sense, so long as the probability of their success in making a contribution to victory is sufficiently high. Rearguard actions that forestall the destruction of a larger military force may qualify as missions of this type.

depends on a counterfactual comparison that can never be carried out. But the same is true of many policy decisions states make, and indeed, of the choices individuals make. Given the difficulty involved in assessing the necessity of a certain military action for overall victory at the lowest cost in lives lost, disagreements are likely to be rife, and mistakes will happen. Still, since successful modern warfare requires the coordination and cooperation of thousands and even millions of people, the conduct of a just war provides a prime example of a situation in which morality itself requires obedience to authority.

I conclude, therefore, that a moral agent's rights to life and liberty do not entail the impermissibility of conscription for a just war in defense of his fellow citizens and/or the state. Nor does it bar the state and its agents from commanding a person to expose himself (or herself) to a great risk of harm or death when (a) there is a certain probability that his doing so will contribute to eventual victory (or at least prevent defeat), and (b) he has come to be among the set of agents who are commanded to risk their lives via a fair process, one that ideal moral agents could not reasonably reject.<sup>39</sup>

Though I have elaborated several considerations that must guide the deliberation of suitably motivated (and so also well-intentioned) moral agents as they

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<sup>39</sup> For an argument that mirrors in certain respects the one sketched here, see Gewirth 1983. As a philosophical anarchist, Simmons of course denies that most citizens of modern states have a duty to obey a law requiring them to serve in their state's armed forces. However, he argues that "even if citizens have no obligation to serve, certain kinds of social and military emergencies may still make conscription morally justifiable; even if citizens have a moral right not to be conscripted, they may be justifiably conscripted" (Simmons 2001, 61). As an elucidation of this point, Simmons states "rights may sometimes be legitimately infringed. I do not act wrongly in taking your car without permission (and so violating your property rights) or failing to deliver the product I sold you (violating your contractual rights), if these acts and omissions are necessary to save someone from great and unmerited harm" (Simmons 2001, 60-61). It is not clear whether there is any significant difference in this case between Simmons claim that an agent does not act wrongly, though he violates certain rights, and the claim that in such a situation, the scope of a person's property right in her car does not exclude its use by others (and so consequently if others use it to save someone from great and unmerited harm, they do not violate the car owner's property right).

seek to determine the substantive content of various rights, namely the risk threshold for suffering various harms above which agents can demand that they not be exposed, these considerations leave us far short of an algorithm for specifying the content of rights. Doing so requires extensive deliberation using the methodology of RRMC that I shall not undertake here. I strongly suspect, however, that the full set of principles for the general regulation of behavior would not include a right to health care correlative to which was a duty to sacrifice oneself whenever doing so was necessary in order to prevent the death of five people who were in need of organ transplants. Yet a principle requiring agents with two healthy kidneys to give one up when there is a need for it, and the risks involved in the removal procedure are below a certain threshold, may be one that ideal moral agents could not reasonably reject.<sup>40</sup> Not surprisingly, I also suggest that there is likely to be widespread disagreement even among well-intentioned moral agents as to where exactly the risk threshold definitive of various rights ought to be set. Insofar as respect for the rights in question is better secured by universal (or near universal) adherence to a single conclusion on such issues than by permitting each to act in accordance with his or her own understanding, ideal moral agents cannot reasonably reject the existence of a state that imposes it. And if that state meets several conditions, including respect for individual rights, then its citizens will have a moral duty to obey settlements issued by that state.

## VI

Suppose that, as argued above, agents have a right to rescue when the risk of harm involved in certain types of behavior is realized, and that their right to rescue correlates to a duty on the state to take certain steps to ameliorate the harm in

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<sup>40</sup> Compare to Fried's discussion of this case (Fried 1970, 203ff).

question.<sup>41</sup> If so, then the *Firefighter's Dilemma* apparently presents a case of conflicting rights where the conflict cannot be resolved (or dissolved) by recourse to further clarification of the rights in question via the methodology of RRMC.<sup>42</sup> Given my earlier claims that the justification for the state rests on the role it plays in enabling individual moral agents to fulfill their natural duties to respect other agents' basic moral rights, it is important that the case be viewed as an apparent conflict of rights, rather than as a conflict between two groups of people who need to be saved. But be it a case of respecting rights or fulfilling a non-correlative duty to save, many people's intuitions in cases like the *Firefighter's Dilemma* is that the right thing for the firemen to do is to save two people rather than one.

One possible justification for this conclusion, and perhaps intuitively the most obvious one, is that in cases like the *Firefighter's Dilemma* we should add up the number of lives to be saved, and then save the larger group because in doing so we will save more lives. But Scanlon argues that while the Moral Contractualist agrees with the intuition as to what the right thing to do is, in cases like the one under consideration the reason why that action is right does not depend on aggregating the

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<sup>41</sup> For the sake of discussion, I am simplifying the duties involved here. They will likely include duties on citizens to pressure legislators and administrators to set aside the funds necessary to fulfill the duty to ameliorate harm, and a duty to pay the taxes necessary to generate these funds; duties on the legislators and administrators to figure out how best to allocate resources for preventing risky behavior from causing harm, and to ameliorate the harm that occurs when the risk is realized, and of course to settle differences of opinion as to how much risk it is permissible to impose on others; and duties on the agents who are charged with carrying out the rescue missions to do so, to train properly for their mission, etc.

<sup>42</sup> But perhaps an arsonist started the fires, and he is one of the people who are trapped in the buildings. Scanlon does suggest that responsibility for a state of affairs will sometimes figure in our evaluation of what we owe to each other (Scanlon 1998, 196). A particularly interesting case would be one where the arsonist is one of the two people trapped in a building; that is, a case where there is one innocent person in each building, but a guilty person accompanies one of those innocent people. I shall leave aside such complications here.

number of lives that will be saved.<sup>43</sup> Rather, the reason to save two people instead of one is that the second person in the burning building with two people in it could reasonably reject a principle permitting or requiring the firemen to save the one person in the building next door. He could do so on the grounds that such a principle failed to give his life equal importance to the lives of the others in the situation. Such a principle treats the situation described in the example as no different from a situation in which there is only one person trapped in each building; that is, as if the second person in the actual situation does not exist, and so makes no difference to what the right action is (Scanlon 1998, 232-233).<sup>44</sup> But surely a person can reasonably reject a principle for the general regulation of behavior that treats him as if he does not exist. Note, too, that the one person trapped alone in a burning building cannot make the same complaint when the firemen save the two from the building next door. One possible explanation for this is that his complaint is taken into account, but it is canceled out by the complaint of one person from the building next door, leaving only the second person in that building's complaint to determine which action by the firemen could be reasonably rejected. Yet the notion that one person's complaint is cancelled out by another's may sound like a surreptitious way of sneaking in a principle of aggregation, for the numbers still seem to count.<sup>45</sup> Perhaps a better explanation, then, is to note that the complaint made by the second person in the burning building is not that if the firemen do not choose to enter this building, then

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<sup>43</sup> As Scanlon himself notes, the argument he develops owes much to the writings of F. M. Kamm on this topic. See Kamm 1993a, 1993b. For Kamm's thoughts on Scanlon's treatment of aggregation (some of which I discuss below), see Kamm 2002.

<sup>44</sup> Scanlon suggests that in a case where two people's lives are at stake, some fair procedure such as the tossing of coin to determine who should be saved could not be reasonably rejected. Scanlon 1998, 196.

<sup>45</sup> For a discussion that seems to have this flavor, see Otsuka 2000; Kumar 2001.

two people will die, whereas only one person will die if they do not choose to enter the other building. Rather, his complaint includes only a reference to the firefighters taking his presence into account, and evaluating the principle against its rival (the principle that it is permissible or required to save the one rather than the two) from his standpoint.

It has been suggested by some that Scanlon's argument for determining what ought to be done in cases like the *Firefighter's Dilemma* (and also the *Lifeguard's Dilemma*) proceeds by pairwise comparison: the complaints of each individual who will suffer harm if some act A is done is compared against the complaints of each individual who will suffer harm if act A is not done (Reibetanz 1998, 300. The notion of a pairwise comparison is taken from Nagel 1991, 67-68). This method appears to clearly explain why it would be wrong to forgo preventing a death (or extended period of torture) even if one could prevent a large number of people from suffering minor temporary headaches (or, in Scanlon's example described below, missing fifteen minutes of a World Cup soccer game). When compared pairwise, one individual's suffering a headache pales in significance to the loss of a person who dies (or experiences an extended period of torture). But pairwise comparison also seems too strong a requirement, for in the *Firefighter's Dilemma* it entails a tie between preventing one death and preventing two people's deaths. This is so because when compared pairwise, the complaints of neither of the two people trapped in the same building will be any stronger than the complaint of the person trapped in a burning building by himself. All of these individuals will complain that they will die if they are not rescued. However, Scanlon's argument for breaking this tie in favor of the two

(or more generally, the many) does not depend on a pairwise comparison of complaints regarding the harms individuals will suffer if a certain course of action is not taken. Rather, it depends on the introduction of a different kind of complaint, one that involves a demand that one's existence be recognized in the relevant agents' moral deliberations (in this case, those of the firefighters). Pairwise comparison may be a helpful way of determining the relevance of different harms to one another, a concept I shall examine shortly.<sup>46</sup> But it is not to be applied directly to choice situations like those in the *Firefighter's Dilemma* in order to determine which course of action is morally obligatory.

F. M. Kamm, whose own approach to addressing issues of aggregation has a number of affinities to Scanlon's, suggests a useful addendum to Scanlon's argument that extends its application to situations where the firefighters face a choice between (a) rushing to a scene like the one described above, i.e. a case of choosing between two people and one, and (b) rushing to a scene with two burning buildings, but with three people in one building and only one in the other (Kamm 2002, 348). Assuming once again that the firefighters can only enter one building, but that they will save everyone in that building, then surely the right action will be for the firefighters to choose (b), and then to enter the building with three people. Of course, we need to explain why this is the right action without aggregating the number of lives saved or complaints against a principle that would permit the firefighters not to enter a certain

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<sup>46</sup> Both Nagel and Kamm would accept such a claim, I believe. Thomson's High-Threshold Thesis – I may not kick [harm] A unless there is at least one person, B, for whom I would thereby provide an increment of good of a size such that, if only B gained only that amount of good, his gaining it would by itself make it permissible for me to kick [harm] A – also appears to be an example of using pairwise comparison to determine relevancy between harms. Thomson understands 'good' here to be 'good for a person'. See Thomson 1990, 168.

building. Kamm suggests that we can apply the same reasoning Scanlon uses in the original *Firefighters Dilemma* example to this one as well. In (a) we have one person whose complaint is not cancelled out by another person in that scenario, while in (b) we have two people whose complaints are not cancelled out by another person in that scenario.<sup>47</sup> If the firefighters act on a principle that permits or requires them to rush to scene (a), then one of the two people who had a non-cancelled complaint in (b) can complain that the firefighters adopt a principle that fails to recognize his existence. For they act on a principle that treats their choice situation as no different than one in which they can choose to rush to two different scenes, in both of which there is only one person with a non-cancelled complaint. With this addendum, the Moral Contractualist can account for why the seriousness of a wrong increases if one saves the few rather than the many as the size of the larger group increases relative to the smaller one. As Kamm writes, “How serious a wrong would occur in a particular case, x, becomes a function of how many intervening cases of increasingly unbalanced choices x would dominate if we had to decide which to prevent first” (Kamm 2002, 348).

Despite initial appearances, then, the *Firefighter’s Dilemma* is not an example of a genuine conflict of rights (i.e. one irresolvable on the basis of RRMC). Clarifying the issue of when the numbers count is a matter of clarifying the scope of an agent’s rights (in this case a right to be rescued). If the Moral Contractualist analysis of how to adjudicate between the claims of the few and the many, where all are at risk of suffering the same type of harm, is correct, then the one individual by himself in the

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<sup>47</sup> Note that the complaint in question is not that one will lose one’s life, but rather that one’s presence is not being recognized (that is, the case is being treated in the same way it would be treated if there was only one person trapped in each burning building).

burning building does not have a right to be rescued when two other people can be rescued instead, and it is impossible to rescue all three. He does, however, have a right to be rescued if he is the only one trapped in a burning building, as well as a right to a fair process being used to determine who should be rescued if there is one person trapped in each building (and if there is time to go through that process).

## VII

The most troublesome case for a Moral Contractualist who wishes to deny that the aggregation of harms, or wrong-making properties referred to by agents' complaints, sometimes plays a role in determining whether a principle can be reasonably rejected is a case like the *Lifeguard's Dilemma*.<sup>48</sup> Such a case raises questions about the comparison of two different kinds of harms, where one harm is a lesser one than the other (i.e. the totality of the experience of pain and the interference with an agent's acting on the agent-relative reasons he has is less of an evil or burden for one of the harms than it is for the other). It seems quite clear that when the choice is between preventing one harm or the other, where only one person will experience whichever harm we do not prevent, we ought to prevent the greater harm.<sup>49</sup> Yet many people cannot help but feel that when enough people will suffer the lesser harm, as in the *Lifeguard's Dilemma*, then the correct course of action is to prevent the lesser harms, rather than the greater one. Such a conclusion seems to follow easily enough if we assign an aggregative principle a role in moral deliberation, but it is not clear what a Moral Contractualist committed to the Individualist Restriction ought to say about

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<sup>48</sup> The reader may have some doubts as to whether there is a conflict of rights in this scenario, rather than a conflict between two duties to save neither of which correlates to a claim on the part of those who are in need of assistance. But surely some variation on this story, or on the *Firefighter's Dilemma*, can be told that presents us with the necessary type of conflict.

<sup>49</sup> I am assuming here that there are no special relationships among any of the agents.

such a case. The problem is further complicated when we consider cases of tradeoffs between an enormous number of people suffering minor temporary headaches and one person suffering death (or extended torture), a case in which I suspect many people would deny the permissibility of preventing the lesser harm, no matter how many people experience it.<sup>50</sup>

One way to try and capture the intuitive answers to these three types of cases is with the idea of a harm's relevance to other harms (Scanlon 1998, 239). Two harms are relevant to one another if they are to be treated as equally bad for the purpose of evaluating principles using the methodology of RRMC (or have the same degree of moral seriousness, as Scanlon puts it (Scanlon 1998, 239)), even though the harms are not in fact the same. In other words, Harm A may be treated as equally bad to Harm B, in the sense that it provides a complaint of the same strength against a principle that would permit the infliction of either harm, though there is a difference between Harm's A and B with respect to their impact on an agent's well-being. So for example, becoming a quadriplegic may be relevant to death, while suffering a headache is irrelevant to both of those harms. Since relevant harms are to be treated as equally bad, in a case where one person could be saved from death, or two people could be saved from becoming quadriplegics, only a principle requiring agents to save the two over the one could not be reasonably rejected. The number of people whose

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<sup>50</sup> Another case of this sort is Scanlon's *Jones and the World Cup*. "Suppose that Jones has suffered an accident in the transmitter room of a television station. Electrical equipment has fallen on his arm, and we cannot rescue him without turning off the transmitter for fifteen minutes. A World Cup match is in progress, watched by many people, and it will not be over for an hour. Jones's injury will not get any worse if we wait, but his hand has been mashed and he is receiving extremely painful shocks. Should we rescue him now or wait until the match is over? Does the right thing to do depend on how many people are watching?" (Scanlon 1998, 235).

headaches could be prevented, however, need not be taken into account, since suffering a headache is not a relevant harm.

There are several potential difficulties with the notion of a relevant harm, the most pressing of which is its implicit denial of the transitivity of “is a worse harm than” (Norcross 2002). It seems plausible to conceive of harms as lying along a single scale. Suppose, then, that we conceive of the harms relevant to any particular harm along that scale as those just above and those just below it. Harm F, a harm somewhere in the middle of the scale, will be relevant to harm E, but not to harm D; harm E, however, is relevant to harm D. But if we understand relevance as ‘is to be treated as equally bad for the purposes of evaluating principles using the methodology of RRMC’, then it follows that  $F=E$ ,  $E=D$ , and so  $F=D$ . In short, unless we deny transitivity, then all harms will be relevant to all other harms. To deny transitivity, however, is to divide up the continuous scale of harms into distinct categories, with harms outside a given category not being relevant to harms inside that category (and vice versa). The problem with such an approach is that if the scale of harms is in fact continuous, there will be two harms that differ very little from each other (say only enough to be perceptibly distinct), but that are not relevant to each other because one is inside a given category, while the other is outside that category. There does not appear to be any way to group harms together into categories of relevance that avoids the imposition of an apparently arbitrary boundary.

It is not clear, however, how much this implication should bother us. It may simply be the case that there is a certain degree of indeterminacy in translating harms into wrongs (i.e. being treated in ways that could be reasonably rejected). This

indeterminacy does not entail that the boundary marking off a category of relevant harms from irrelevant ones can be drawn anywhere. Rather, there are likely to be clear-cut cases, such as headaches not being relevant to death, that permits us to at least narrow the region along the scale of harms where the border marking relevance is to be drawn. Though harms may rest along a continuous scale, wrongs may be step-goods. That there will often be disagreements as to where exactly an arbitrary boundary on relevant harms is to be set need not deter us from pursuing such a solution; indeed, it provides yet another starting point for an argument in support of instituting some decision-mechanism to settle such disputes.<sup>51</sup>

Situations in which an agent must choose between preventing one of three possible harms present a further challenge, however. Suppose that an agent can prevent one of three harms A, B, and C, and that A is relevant to B, B is relevant to C, but C is not relevant to A. Suppose further that more people will suffer harm B than will suffer harm A, and that more people will suffer harm C than will suffer harm B. We appear, then, to confront a circular ordering (Pogge 2001, 139): between preventing A and preventing B, I ought to prevent B; but between preventing B and C I ought to prevent C; but between preventing C and A I ought to prevent A. Even though fewer people will suffer harm A than harm C, C is not relevant to A; in a situation where I can prevent A, I am barred from considering the fact that one or

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<sup>51</sup> This argument may entail that there is no metaphysically correct answer as to where to draw the boundaries between relevant harms. Perhaps the most that can be said is that where exactly the boundary is to be set should be determined by a fair procedure; if ideal moral agents could not reasonably reject such a solution, then the metaphysically correct answer would be whatever the outcome of that fair procedure was. Insofar as the procedure admits of several different outcomes, then perhaps any of these would count as a metaphysically correct answer (that is, there would be more than one boundary that no one could reasonably reject). Alternatively, the actual outcome of the procedure (when and if it is performed) would count as the (only) metaphysically correct answer, even though it is at least logically possible that the metaphysically correct answer could have been different (if the actual outcome of the procedure had been different).

more persons will suffer harm C. Yet the scenario just described is one where I *can* prevent A, but in which I ought to prevent B rather than A; but if I am going to prevent B, then should I not take into account C's occurrence (since B is relevant to C)? Kamm contends that in a case of this type the correct action is to prevent harm B, though if our choices were only between preventing harms B and C, the correct action would be to prevent harm C (Kamm 2002, 353). On the one hand, it seems strange to hold that the possibility of preventing harm A entails that we should give no consideration to preventing harm C, *even though the correct action is not to prevent harm A*. On the other hand, perhaps the possibility of preventing harm A acts as a kind of exclusionary reason; its presence forbids or prevents us from considering certain other reasons for action (such as the possibility of harm C). Because B is a relevant harm to A, it is not excluded by the possibility of preventing A, and so the complaints of those who do (or will) suffer harm B must be considered. This does not seem an implausible way of conceiving of the role the possibility of preventing a death plays with respect to preventing any number of headaches.<sup>52</sup>

It is important to keep in mind that X's suffering a certain harm is not the only kind of reason that is to be taken into consideration when evaluating principles that authorize or prohibit the action that causes X's harm. For example, assume that we

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<sup>52</sup> Kamm points out a further caveat that must be added to this analysis. In cases where there is a tie between relevant harms, say a case in which one can prevent the death of one person or another, but not both, a lesser harm that would not otherwise be relevant may become relevant. So for example, if one can prevent one person's death, or a different person's death and a third person's suffering an injury that requires months of painful rehabilitation, one must choose the latter course of action, rather than (say) flip a coin to choose between them (Kamm 2002, 347-8). But Kamm also denies that just any harm can become relevant in cases like this; that one's action will prevent a third person's suffering a sore-throat is not a relevant harm for the purposes of breaking a tie between two people who face death, and where one can prevent the death of only one of them (Kamm 2002, 349).

For the suggestion, and rejection, of an alternative solution to problems like the one examined in this paragraph, see Norcross 2002, 308-9.

can prevent Tom from suffering some harm A, or we can prevent Betty from suffering some harm B, but not both. Suppose, further, that harm B is not relevant to harm A. Finally, suppose that Tom's suffering harm A is the result of an activity to which he freely consented, while Betty's is simply the result of her being a member of a society in which all members bear a certain risk of realizing harm B. It may be that ideal moral agents could not reasonably reject a principle requiring us to prevent harm B to Betty rather than harm A to Tom, because Tom's exposure to risk A was avoidable (and so the result of a personal choice), while Betty's exposure to harm B was not. As this example illustrates, relevance establishes an ordering among harms, but considerations other than well-being can result in a duty to prevent a significantly lesser harm.

Note, too, that the notion of relevant harms has been developed here specifically in order to adjudicate between apparent conflicts of the right to be rescued (and also of the duty to save). Though in this context the duty to prevent a given harm can be thought of as lexically prior to the duty to prevent harms that are irrelevant to it, this kind of ranking need not (and almost certainly will not) hold with respect to decisions regarding which risks to prevent, and the allocation of resources necessary to respond to claims for rescue when they are made. When ideal moral agents seek principles for the general regulation of behavior that reduce the risk of being harmed in certain ways, they consider not only the severity of the harm but the likelihood of an individual's suffering it. Such agents would surely reject a set of principles that required, say, the allocation of resources up to the point where any further allocation would make no difference in order to prevent (or ameliorate) harm A, before any

resources could be allocated to prevent (or ameliorate) harm B. For if they did not, they would be required to reduce the likelihood of someone suffering harm A from .000001% to .0000009%, rather than reducing the likelihood of suffering harm B from 10% to .1%. Intuitively, however, there does not seem to be any harm A such that people are willing to risk any probability of exposure to other harms in order to reduce by even a minute amount the risk that they will suffer harm A. Recognition of this point is crucial, for otherwise the claim that the prevention of headaches, or even broken legs, are not relevant to the prevention of death would suggest that a just state should concentrate all of its resources on reducing the risk of death, and nothing on the prevention or treatment of headaches or broken legs. Such a conclusion is surely absurd, and fortunately it is not one that Moral Contractualism entails.<sup>53</sup>

Much more could be said about the Moral Contractualist analysis of the three types of cases considered here. The arguments presented in this and the previous section, however, should suffice to illustrate and provide an initial defense of the position RRMC takes to apparently irresolvable conflicts between rights, and cases where intuitively the numbers of people suffering a rights violation is thought to be a relevant consideration. Put briefly, RRMC requires agents to prevent a harm to the larger of two groups only when the harms are the same or relevant to one another (i.e. equally bad for the purpose of evaluating principles using the methodology of RRMC). In all other cases where an agent can prevent only one of two harms (and where he has a duty to do so), and where considerations of well-being are the only relevant ones, the morality of what we owe to each other requires that an agent prevent

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<sup>53</sup> On this point, see also Richard Miller's discussion of giving priority to the neediest in some, but not all, cases (Miller 2002, 198-99).

the more serious harm, regardless of how many people will suffer the less serious harm.

### VIII

The argument that the state must respect individual rights if it is to enjoy political authority over its citizens has relied thus far upon an analysis of proper moral reasoning from the perspective of RRMC. But ideal moral agents (and so also well-intentioned ones) may also appeal to empirical considerations regarding potential sources of rights violating conduct as reasons to reject one possible design for a D-institution in favor of another. For example, the best way to secure basic moral rights may well be to design D-institutions in ways that limit the likelihood of (or opportunities for) abuse, even if such barriers also entail that on occasion a D-institution will fail to adopt a course of action that considered abstractly might not be reasonably rejectable. As this argument indicates, though the necessity of recognizing that each individual has only one life to live provides a sufficient justification for ideal moral agents to reasonably reject any illiberal D-institution, there are also likely to be instrumental reasons for doing so. If we take modern states as examples of D-institutions, there appears to be a fair amount of empirical evidence that liberal D-institutions lead in practice to a greater respect for basic moral rights, both with regard to their own citizens and to non-citizens, than do any alternative D-institutions, or the absence of any such institution.

It is important to keep in mind a crucial distinction with respect to when one may appeal to a particular kind of reason to justify one's actions. Ideal moral agents may consider instrumental reasons for and against particular principles and institutions

in the process of identifying whether that principle or institution is one that could be reasonably rejected. However, it is the fact that ideal moral agents could not reasonably reject a given principle or institutional design that generates the duty to act in accordance with that principle or the authoritative settlements of that institution. This contrasts with a Rule-Consequentialist approach, where the justification for adherence to moral principles, or to general legal directives, is that such behavior is the best means to realizing the sought after state of affairs.

The need to consider how D-institutions work in practice, informed by empirical observation and study, leads to another challenge to the claim that respect for basic moral rights is a necessary condition for a D-institution's having the moral authority to settle disputes over the design of morally necessary C-institutions. It is a near-certainty that any D-institution will occasionally violate one or more of the rights of at least some of the people it governs. If a D-institution's moral authority depends on its not violating basic moral rights, then it seems that no D-institution will ever have a justified claim to settle moral disputes over the form that citizens' participation in morally necessary C-institutions ought to take. It would be unreasonable to demand such perfection, however. All that is necessary is that a D-institution be *committed* to recognizing individual rights, and that this commitment should manifest itself in both the kinds of reasoning employed by those who occupy positions within the institution, and in the very design of the institution itself, as for example in the construction of various checks and balances on the authority of various state office-holders. Whatever rights violations do occur should be the result of mistakes or other unintended but non-negligent consequences that follow from a

D-institution's design, and not the result of deliberate decisions reached via (or by) that D-institution. The imprecision of this requirement may leave the reader uncomfortable, but I can think of no algorithm for specifying how great a D-institution's failure to respect individual rights must be before it would be reasonable to reject its moral authority to settle disputes over the design of morally necessary C-institutions. All that we can do is fall back on the notion of reasonable rejection itself, and ask how much care in avoiding the violation of basic moral rights it is reasonable to demand of a D-institution, and how much imperfection an individual should be willing to accept before it would be reasonable for him to reject it. The likelihood that a D-institution will violate individual rights at least occasionally also points to the need for an account of civil disobedience and conscientious objection, a task I undertake in chapter seven.

## Chapter 6: Contractualism and political authority part II

Thus far I have argued that in order for a D-institution to have the moral authority to settle disputes over the design of morally necessary C-institutions, it must be able to do so effectively, and it must do so in a way that manifests a principled commitment to respect for individual rights. In this chapter I argue for a third necessary condition, namely that the procedure by which decisions are made include a democratic element. A democratic element, as I shall understand it, involves at the very least the principle of one person, one vote, though for the moment I leave open the question of exactly what decisions are to be reached in this way.

I begin in section II with an argument against epistocracy, or the rule of moral experts.<sup>1</sup> If, as I argue, disagreement over who counts as a moral expert is reasonable, then we ought to select a decision-procedure that treats each participant in a given D-institution equally, rather than grant some greater authority than others because the former are believed by some to be more likely to issue morally correct directives. I consider two such procedures in section III, a fair lottery and majority rule vote, and argue that ideal moral agents could reasonably reject the former in favor of the latter. Section IV contains a second argument in support of the claim that only a D-institution that includes a democratic element has a claim to authority that cannot be reasonably rejected, namely that the inclusion of a democratic element is necessary in order to recognize each participant's capacity for moral judgment, one of the two features in virtue of which a creature has the status of moral agent (the other being the capacity to form and act on a conception of the good). In section V, I consider the possibility of

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<sup>1</sup> I take the term 'epistocracy' from Estlund 2001.

disagreement over the design of a democratic D-institution, and argue that so long as a D-institution meets certain minimal conditions it qualifies as sufficiently democratic. Finally, the discussion of democracy concludes in section VI with a rebuttal of Jeremy Waldron's claim that only a purely democratic state, one that does not include a non-democratic element such as judicial review, enjoys political authority over its citizens.

## II

A seductive, but ultimately under-developed, argument for the necessary inclusion of a democratic element in any D-institution with moral authority goes as follows. The earlier argument for a natural duty of fairness established that individual moral agents as such do not have the moral authority to impose on others their favored design for a morally necessary C-institution. Morally necessary C-institutions involve collective action, and it is only collectively that moral agents have the authority to determine what form their participation in such institutions must take.<sup>2</sup> It appears to be a simple step from the exercise of collective authority to democracy. Yet one cannot move directly from the claim that only the collective has authority to the claim that it must exercise that authority democratically. Rather, all that is necessary is that the decision procedure employed by a given D-institution be one that ideal moral agents could not reasonably reject for the exercise of collective authority. What must be considered, then, are the reasons for and against various kinds of decision mechanisms. It is possible that the exercise of collective authority works best when those mechanisms have a non-democratic form, and if so, then ideal moral agents will

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<sup>2</sup> Or, as I elaborate at length in the present chapter, each participant in a morally necessary C-institution has an equal claim to the authority to determine the design of that C-institution. When all acknowledge the equal authority of other participants to determine the design of a given C-institution, the result is a collective determination of that design.

reject democratic decision mechanisms in favor of non-democratic ones that are more effective from the standpoint of matching, or at least approximating, the principles and judgments that fully informed ideal moral agents could not reasonably reject.

I have argued that the state, conceived of as a D-institution and morally necessary C-institutions, is instrumentally valuable because it facilitates collective action aimed at securing basic moral rights. Given this instrumental justification, it would seem that the only decision procedure that ideal moral agents could not reasonably reject is whichever one best realizes the goals that justify the state's existence.<sup>3</sup> It would not be reasonable, then, for ideal moral agents to reject the principle 'whoever correctly identifies what morality requires should have the moral authority to determine for all what it is that we should do.' Indeed, in a more general form, such a principle appears to be the one that justifies any individual's recognizing another as an authority with respect to some issue, whether for purposes of action or of belief formation. If A is more likely to form a correct belief, or perform a correct action (understood in prudential or moral terms), by doing what B tells him to do rather than attempting to figure out for himself what the balance of reasons favors, then A ought to treat B's directives as authoritative - content-independent and preemptive reasons for belief or action. Joseph Raz labels such an argument the Normal Justification Thesis, "normal" because it seems to capture how we justify subordinating ourselves to various authorities on an every day basis (Raz 1986, 53). When applied to the issue of settling disputes over the design of morally necessary C-

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<sup>3</sup> So for example, Raz writes "a natural way to proceed [in the face of moral disagreement] is to assume that the enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of the time and place, most likely to enforce them well, with the fewest adverse side-effects" (Raz 1998, 45).

institutions, the normal justification thesis leaves open the possibility of a non-democratic D-institution, such as the rule of a philosopher-king, being the one that ideal moral agents could not reasonably reject. Just as we ought to seek out and obey the directives of an expert mechanic when we have trouble with our cars, so too we ought to seek out and obey the directives of an expert moralist when we have trouble determining the exact scope of various basic moral rights, and so how to adjudicate between them when they appear to conflict.<sup>4</sup>

Yet when there are moral disagreements among those who acknowledge that they must act collectively in order to secure basic moral rights for all, so too there will usually be disagreement over who counts as a moral expert, and so who is qualified to issue an authoritative settlement with respect to the moral issue in dispute. An analysis of how expert authorities are identified makes clear why this is so.<sup>5</sup> People judge a particular agent to be an expert with respect to some subject S by reasoning inductively from their past experience with that agent, such as their later verifying as true her empirical claims about some aspect of the world, or their achieving the results they desire by following her instructions. In both of these examples, the criteria for determining whether the normal justification thesis shows an agent to be an expert with respect to S are external; those who seek to determine whether the agent in question should be acknowledged as an expert need not have any knowledge of S in order to reach a conclusion. So for example, I may identify a person as an expert car

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<sup>4</sup> As I noted in chapter five, section I, not all disagreements over the design of morally necessary C-institutions will be the result of moral disagreements (such as the exact scope of a particular moral right). Disputes regarding the best means to securing some basic moral right the characterization of which is agreed upon may turn on non-moral issues such as the environmental impact of rival policies, or the psychological effects of opposing institutional designs. I address the place of non-moral expertise in the democratic selection of an institutional design below.

<sup>5</sup> Here I follow McMahan's discussion of the justification for expert authority. (McMahan 1994, 86-95).

mechanic because he is able to repair a number of cars from which I have removed different parts, making them once more operational, even though I have no knowledge of what these parts do, or of how cars work. However, not all subjects are such that those who are experts with respect to them can be identified by appeal to external criteria. In some cases the criterion is an internal one, meaning that a person must have a certain degree of competence with respect to the subject in order to judge another person to be an expert. That is, there is no evidence of expertise that can be identified by someone who does not himself have a certain degree of knowledge and/or experience with respect to the subject in question. Moral expertise, McMahan argues, is a subject with an internal criterion of expertise, and it is because of this that in a pluralist political community, there will be no individual or group acknowledged by all, or even almost all, members of that community as a moral expert(s).

There is no external standard comparable to reliable prediction [in the sciences] by which moral experts can be identified. The identification of such experts depends on perceived fittingness and, especially, on the presentation of compelling arguments. But the presentation of arguments can establish expertise only for those who find them persuasive. It is simply not the case that there are some people who can present moral arguments that everyone finds compelling . . . [Moreover], judgments identifying moral experts are conditioned by judgments about what is right. It is by doing something that we perceive to be right in a particular case, or presenting arguments that convince us that something is right, that certain individuals win acknowledgement as moral experts. Where there is disagreement about what is right, then, there will be disagreement about who the moral experts are. The obstacle to moral authority is not [necessarily] the non-existence of moral knowledge, but the existence of moral disagreement (McMahan 1994, 94-5).

Moral expertise can be established either through convincing arguments or by demonstration (i.e. right action). But the situation we confront is one where people disagree about which arguments are convincing and which actions are right; if they did

not, then there would be no need for a D-institution in order to institute morally necessary C-institutions.<sup>6</sup> Of course, some part of a given political community may be able to identify an individual whom they believe to be a moral authority (though interestingly the usual example of such a group, namely religious believers, do not necessarily do so because they have been convinced by the expert's arguments or witnessed his or her acting rightly). Still, as David Estlund argues,

many citizens, or even all citizens, might think that there are some individuals or groups that are epistemically better than democratic procedures. But unless some individual or group could be accepted as more reliable by all reasonable citizens, the admission of procedure independent standards [such as the principles that ideal moral agents with full information could not reasonably reject], and the admission that there are experts, does not permit the move to epistocracy [rule by experts] (Estlund 2001, 13).<sup>7</sup>

Crucially, if the arguments of Rawls, Nagel, and others concerning the burdens of judgment are correct, then those who reach different conclusions regarding the persuasiveness of moral arguments will not act unreasonably or irrationally when they do so. The burdens of judgment, the reader will recall, include a variety of factors that account for cognitively reasonable disagreement; i.e. circumstances in which “it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion” (Rawls 1993, 58). In light of the burdens of judgment, even those who are reasonable in the moral sense may disagree over the specific characterization of morality, and in light of such disagreement, over any particular individual's or group's claim to moral authority.

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<sup>6</sup> For further explanation of this point, see McMahon 1994, 149.

<sup>7</sup> I indicate what counts as procedure independent standards on the account I defend here. I do not mean to imply that Estlund is committed to this understanding of procedure independent standards.

It is important to be clear on exactly what is being denied here. In a contemporary, pluralist, state, no individual or group can establish its status as a moral authority vis-à-vis all of the members of that state in the way that the justification for other types of authority normally proceeds. Nor, given the explanation for why this is so, namely that the criterion for expertise with respect to the demands of morality is internal, and what this entails for attempts to arrive at a consensus as to who is an expert, is there reason to think that anyone will be acknowledged as a moral authority in the foreseeable future. What I have not claimed, however, is that all agents are equal in their ability to formulate moral arguments or to make moral judgments; some are surely better at it than are others. If it were possible to identify these people, we might grant them greater say in our decision making procedures than we would to ordinary people, say through some system of plural voting. But the same problem that prevents us from identifying a moral expert also prevents us from identifying a class of agents who possess above average, but less than expert, moral knowledge and judgment. It may still be possible, however, to harness the knowledge and judgment of such people, without according them the status of experts. One way to do so is to foster public debate, in which those with relevant knowledge and experience can share it with others, not as authoritative directives, but rather as advice to be considered when casting a vote for the purposes of reaching some collective decision.<sup>8</sup>

Decisions regarding the best design for a given morally necessary C-institution will often rest on the answers to complicated non-moral questions as well as moral ones, and it may at times be possible to rely on non-moral experts to answer these

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<sup>8</sup> As Raz points out, advice can be treated as authoritative (i.e. as providing a preemptive and content-independent reason for action or belief) (Raz 1979, 21). However, it need not be treated this way in order to count as the giving of advice.

questions. That is, the rejection of moral expertise does not entail that there will be no place for other types of expertise in a decision procedure that ideal moral agents could not reasonably reject. Yet disagreements among non-moral experts (within the area of their non-moral expertise) also should not be played down; in some cases these disagreements may need to be settled by a decision procedure such as a majority rule vote, though in some such cases it may be appropriate to restrict those who can vote to the class of people with a certain degree of relevant expertise.<sup>9</sup> At the same time, it must be noted that the disagreements between non-moral experts will often have moral implications, or indeed *be* moral disagreements though they are presented as (and may even be believed to be) non-moral ones.

Finally, the claim that members of a political community do not act unreasonably when they fail to acknowledge some individual or group as moral experts does not imply the rejection of representative democracy. Representatives are not necessarily moral experts (if anything they are likely to be fund-raising experts and/or experts at political maneuvering), nor are they necessarily chosen because they are perceived to be moral experts. The same is true of those who hold decision-making offices in various administrative bureaus. Citizens of a given state (understood to consist partly in a D-institution and morally necessary C-institutions) may prefer a division of labor in which a few are chosen to work full time on issues concerning the design of morally necessary C-institutions, while the citizens at large consider these issues only periodically. When they do so, however, while it would be

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<sup>9</sup> Professional guilds such as the American Bar Association or the American Medical Association may provide examples where some non-moral issues are to be decided by experts, though obviously one might challenge whether there are any decisions to be made in the fields of law or medicine that do not have moral implications.

rational, wise, and perhaps even morally correct to give serious consideration to the arguments presented by those who hold political offices (elected or administrative), or who wish to do so, citizens need not treat those arguments or their conclusions as authoritative.

### III

If there is no individual or group whose claim to moral expertise and authority cannot be reasonably rejected from one or another generic standpoint in that community, and yet it is necessary for those who make up the political community to act collectively in order to secure the basic moral rights of all, then the only alternative appears to be a decision-procedure that grants each and every member of the community equal authority to determine the form their collective action will take. The reason for this is that in circumstances where it would be reasonable to reject some individual's or group's claim to moral expertise, ideal moral agents could reasonably reject any participant's exercising greater authority in determining the design of a morally necessary C-institution than that exercised by any other participant. The claim here mirrors the earlier discussion of the natural duty of fairness. Each person has two agent-relative reasons to prefer the design of a D-institution that makes it more likely that his beliefs regarding the design of morally necessary C-institutions will be the ones that are implemented.<sup>10</sup> First, on the assumption that the agent in question wishes to act morally, then he must believe that implementing his preferred design for morally necessary C-institutions will best realize a world in which all enjoy their basic moral rights. If he did not have this belief, then assuming that he wishes to

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<sup>10</sup> Ideally, that decision-procedure will be a dictatorship, even if it allows for public deliberation and the delegation of authority.

act morally, he would adopt a different view of how the agents in question (including himself) ought to design the C-institutions in which they are morally required to participate. Second, each agent also has a reason to prefer living in a world in which she does not need to compromise her beliefs regarding the requirements of morality, for only in such a world will it necessarily be true that the duty to comply with a settlement issued by a D-institution will never entail that she must act contrary to her own beliefs as to what morality requires. Yet the only world in which such a state of affairs necessarily obtains is one where the agent is a dictator. Or, if a dictatorship is unrealizable, then each agent has these two reasons to prefer whatever design for a D-institution is most likely to issue directives that correspond to her moral judgments. Since both of these reasons are had by all of the potential and actual participants in a given C-institution, each one can object to others being permitted to act on these agent-relative reasons, since it implies that he is not permitted to act on the very same reasons. The only principle that cannot be reasonably rejected, then, is that each agent should have the same, or equal, authority to determine the design of the morally necessary C-institutions in which he or she participates. Only such a principle gives the same weight to each agent's desire to act on the two reasons described above.

Suppose, then, that we are looking for a decision procedure for settling disputes over the design of morally necessary C-institutions that treats equally all of those who will be affected by the decision (i.e. all those who do, or who ought to, participate in a given C-institution). There are two procedures we might employ: a fair lottery and a majority rule vote. A fair lottery works as follows: at the option proposal stage, each individual is given an equal opportunity to propose a design for a

morally necessary C-institution. Participants in the process might then discuss the various proposed options, trying to convince others to adopt their own proposal, or they might proceed directly to the decision-making stage. The decision-making stage consists in a lottery in which each person is given an equal chance of being the one who is to decide which proposed design to adopt. Only the person who wins the lottery, however, exercises any decision-making authority; all those who lose the lottery have no say in what the design will be, though each had an equal opportunity to be the one who would exercise this authority (the dictator, as it were). A majority rule vote, on the other hand, adopts the same procedures leading up to the decision-stage, but then grants each and every individual an equal vote, with the position that attracts a majority of votes being the one that is implemented.<sup>11</sup>

Both of these procedures appear to be fair ones, but only a majority rule vote assigns each and every participant equal authority. A fair lottery assigns each individual an equal *chance* of exercising authority, but only one person actually does so. It is for this reason that ideal moral agents could reasonably reject a fair lottery in favor of a majority rule vote as the procedure to be employed for settling disputes over the design of morally necessary C-institutions. There is no good reason (such as inductive evidence making it unreasonable to deny an individual's or group's claim to moral expertise) to deny a person the right to exercise authority over what he or she will do. But the same is true for all of those who are to act collectively; for each individual, there is no good reason to deny his or her exercise of this authority. Each participant, or person who ought to participate, in a given morally necessary C-

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<sup>11</sup> I assume that the options are somehow narrowed down to two, and set aside concerns about voting cycles.

institution must recognize that he has no justification for denying the other participants an equal say in what the collective is to do, but that they also have no justification for denying him a say. If they are to act collectively, however, then in the end they must all act on the same understanding of what morality requires (even if some or all of them think that the understanding is inaccurate or mistaken in certain respects). The fairest way to achieve this end consonant with each person's exercising the same (equal) authority over what the collective is to do is to assign each person an equal vote, and then to employ majority rule as the method for aggregating those votes to produce a decision.

One argument that might be offered in favor of a lottery over majority rule is that the latter is unfair in cases where there is a permanent minority (McMahon 1994, 140-3). From the standpoint of individuals in such a group, majority rule could be rejected as unfair because under it they would never have a chance of implementing their preferred designs for the morally necessary C-institutions in which they must participate. But I doubt that it is reasonable to reject a principle that grants each individual equal authority over the design of morally necessary C-institutions in favor of one that gives each a very small chance of implementing his preferred design, but that also entails that most agents will never exercise any authority at all over these matters. The vast majority of citizens, that is, will spend their entire lives in the same position vis-à-vis decisions regarding the design of morally necessary C-institutions as non-citizens and even dead people – able to contribute to the discussion of what design would be best, and so able to try and influence the views of whoever wins the lottery, but without any authority to make an actual decision. Moreover, not getting

one's way with respect to the design of C-institutions is not obviously a ground for complaint at all, particularly if one's not getting one's way merely reflects the fact that a substantial number of agents disagree with one's views regarding institutional design. One cannot complain that those others are favored over one, since each of them exercises the same authority over collective decisions that one does, specifically one vote. If there is a weighty consideration in favor of according each individual an equal vote, as I shall argue shortly that there is, then there will need to be an equally or more weighty reason to favor a procedure that prohibits all but one person from exercising the authority to determine the design of a given morally necessary C-institution.<sup>12</sup> The unhappiness or frustration that a person might feel over always being on the losing side of majority rule votes is surely not such a reason.<sup>13</sup> Of course, there are limits on what a democratic majority can demand of anyone with respect to the contribution they must make to the operation of morally necessary C-institutions, limits imposed by the requirement to respect individual rights. But within the constraints imposed by respect for individual rights, an individual who finds himself always in the minority may be unfortunate, but he is not being treated immorally.

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<sup>12</sup> Scanlon remarks that a person will always have a reason to complain about a moral principle (including the moral principle according to which decisions regarding the design of morally necessary C-institutions are to be made) that produces a sub-optimal outcome from that person's prudential standpoint (i.e. from a point of view characterized by a person's success in acting on the agent-relative reasons that make his life valuable and meaningful) (Scanlon 1998, 234). But as should be familiar from the earlier discussion of Scanlon's Moral Contractualism, an agent's ability to act on a particular agent-relative reason may be limited (and perhaps even prohibited) by the need to accommodate other agent's acting on the agent-relative reasons that make their lives valuable and meaningful. In short, those who "lose" from the implementation of a principle that distributes benefits and burdens (including decision-making authority) in a particular way always have a reason to favor a lottery, since this will at least give them a chance of winning. But that reason is the preference that they should never "lose" (i.e. never need to limit or sacrifice acting on an agent-relative reason they have in order to accommodate others doing so), and because this is an agent-relative reason that all agents have, it will rarely if ever carry any substantial weight.

<sup>13</sup> Such frustration and unhappiness might provide a reason to exit from the state constituted by the D-institution and C-institutions in question, an issue I discuss in chapter seven.

There is another possible line of justification for choosing a majority rule decision procedure over a fair lottery. McMahon suggests that both of these procedures may be equally acceptable in terms of their fairness, but considerations of welfare maximization favor majority rule (McMahon 1994, 139). When majority rule is employed as a decision procedure, it is always the case that more than half of those who vote get what they want (at least among the two options from which they can choose), while such an outcome is not guaranteed should a lottery be adopted instead. Such a procedure straightforwardly guarantees the maximal satisfaction of a certain kind of preference, namely preferences with respect to which of two options for the design of morally necessary C-institutions ought to be adopted. But it is not obvious that such a procedure will always maximize welfare; whether it does so is a function of the contribution to individual welfare made by the satisfaction of an agent's preference with respect to institutional design and the different burdens imposed by the two rival designs on participants in the C-institution. The majority may have only a slight preference for design A over design B, while the minority has a very strong preference for B over A. Or both the majority and the minority may have only a slight preference for the options they vote for in comparison to the other option, but the option that receives majority support imposes a severe loss of welfare on some participants, while the option that receives minority support would only impose a slight loss of welfare on some participants. In either case, welfare maximization will not be the result of employing majority rule.

Even if it is possible to avoid these criticisms, this will not make McMahon's argument one a defender of RRMC can adopt, for such a person does not take welfare

maximization to be a moral principle. However, it may be that majority rule's guaranteeing that more than half of those who vote are satisfied with the outcome (relative to the two options from which they could choose) provides a pragmatic consideration in favor of majority rule over a lottery. For such people are less likely to be unhappy or frustrated by the outcome of the decision procedure than are those in the minority, and so are less likely to be tempted to act contrary to it or otherwise try to undermine its implementation. A lottery, on the other hand, raises the possibility that the outcome of the decision procedure will be one that the vast majority finds inferior to at least one other option; many may find it ludicrous, or hopeless, and so on. In such circumstances, the likelihood of disobedience and deliberate efforts to undermine the operation of a C-institution with a particular design may be quite high. It appears, then, that the successful operation of a morally necessary C-institution is more likely when decisions about its design are made by majority rule rather than a lottery.<sup>14</sup> If this assertion is correct, then even if (contrary to what I argued above) ideal moral agents have no other reason to prefer majority rule to a lottery, they will have a pragmatic, instrumental, reason to choose the former over the latter.

To return to my earlier argument in favor of majority rule over a lottery, however, I claimed that only majority rule assigns each and every agent who does, or who ought to, participate in a given morally necessary C-institution equal authority in determining the design of that institution. Yet one might question the significance of this authority. After all, it might be objected, a person only *really* exercises authority

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<sup>14</sup> A determined minority may also undermine the successful operation of a given C-institution, and the recognition of such a possibility is one reason that is often given in favor of a liberal-democratic state (i.e. one where the scope of democratic authority is limited by individual rights) over a purely democratic state (i.e. one without any limits on the scope of democratic authority).

when he or she casts a tie-breaking vote; in every other case, how she casts her vote makes no difference to the outcome reached via a majority rule decision procedure. It seems, then, that majority rule is no different than a fair lottery, for in both cases there is only one scenario in which a person's judgment regarding the design of a morally necessary C-institution actually determines the form collective action takes.

This objection rests on the assumption that a person only has the authority to determine the design of a morally necessary C-institution if her judgment alone determines its design. In other words, only dictators have authority. But there is no reason to accept this assumption. For under majority rule every participant's authority is minimally decisive; that is, every agent has the power to determine what design the collective must adopt.<sup>15</sup> It is true, though, that when the collective action in question requires the participation of ten of millions of people, each of whose votes is minimally decisive, it will be a rare case indeed that an agent's vote actually is decisive. But, as Jeremy Waldron points out, the only way to change this would be to assign one agent's vote a greater weight than that had by other's votes (and at the limit, to assign one agent's vote absolute weight), and there is no justification for doing so (Waldron 1999b, 110). Unlike the losers of the lottery, then, every voter does exercise authority, indeed the greatest authority possible consistent with a like authority for all of the other participants, and this is a true and morally important fact even in cases where an individual's exercise of that authority makes no difference to the outcome of the decision procedure.<sup>16</sup>

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<sup>15</sup> I take the term 'minimally decisive' from Ackerman 1980, 287.

<sup>16</sup> Note that both the lottery and majority rule are being defended as procedures that accord moral agents respect or recognition, not (or at least not merely) in terms of the outcomes that they produce (i.e. not on merely instrumental grounds). The concern that one's vote will often make no difference at all

#### IV

Thus far I have argued negatively in defense of the claim that ideal moral agents could not reasonably reject a D-institution that included a democratic element in circumstances where (1) individuals must act collectively in order to fulfill their moral duties to treat others in ways that could not be reasonably rejected, and (2) even well-intentioned moral agents will disagree as to the exact form that collective action should take. The argument has been negative in that the defense of democracy has rested on the rejection of epistocracy, as well as arguments demonstrating that majority rule is preferable to a fair lottery. I now wish to consider a positive argument in favor of democracy, one that rests on the idea that respect for moral agents involves not only acknowledging their ability to lead valuable and meaningful lives, reflected in the need to honor their basic moral rights, but also recognition of their capacity for moral judgment. This argument proceeds as follows.

Respect for moral agents includes not only mutual accommodation aimed at permitting all agents the widest possible freedom to pursue the agent-relative values that make their lives worthwhile, but also recognition of each agent's capacity to act only on principles that could not be reasonably rejected by ideal moral agents. The first aspect of respect may require only certain substantive outcomes, such as policies that best ensure respect for basic moral rights, and so suggest that the mechanism by which D-institutions render settlements should be evaluated solely in instrumental terms. The second aspect of respect for others' status as moral agents, however, may entail the need for certain procedures on grounds other than the outcomes that they

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reflects an outcome oriented point of view, rather than one that focuses on treating each and every moral agent equally.

produce. This is so because the capacity to act only on principles that ideal moral agents could not reasonably reject includes not only passive conformity to such principles, but also the activity of deliberation aimed at formulating and testing principles, of judgment rather than mere rule-following. The recognition of each individual's exercise of moral judgment may require a D-institution that accords each one a say in at least some decisions aimed at resolving disputes over the design of morally necessary C-institutions. As Waldron puts the point,

[B]ecause A has a sense of justice, A may think of himself as having what it takes to participate in decisions where others' rights are also involved [in addition to his own]. If A is nevertheless excluded from the decision . . . A will feel slighted: he will feel that his own sense of justice has been denigrated as inadequate to the task of deciding not only something important, but something important in which he, A, has a stake as well as others (Waldron 1999b, 239).

Respect for each agent's exercise of his or her capacity for moral judgment requires that we recognize each participant (or person who ought to participate) in a morally necessary C-institution as having an equal claim to the authority to determine the design of that institution. As I argued above, the proper way to recognize this equal authority is to assign each person an equal vote to cast in favor of some proposed design (as well as an equal opportunity to propose a design, and perhaps an equal opportunity to discuss the pros and cons of the candidate designs with other participants). Assuming a choice between two designs, the one supported by the majority is to be implemented, meaning that for action guiding purposes all of the participants in that C-institution ought to treat the rules constitutive of the winning design as authoritative directives. But insofar as the argument presented here for the authority of an effective liberal-democratic state succeeds, members of the minority

should not view themselves as subject to the will of the majority. Rather, as individuals both members of the majority and of the minority are subject to a decision reached collectively by the participants in a given C-institution via a democratic decision-procedure.

Being treated in ways that I cannot reasonably reject, Scanlon writes, “is important in defining my standing as an independent person who can enter into relations with others as an equal” (Scanlon 1998, 204). Since D-institutions claim the authority to settle moral disputes for those within their jurisdiction, it is important that they be institutions into which individuals enter as equals. A democratic decision procedure reaffirms an individual’s moral standing as the equal of all the others with whom he must join in some collective action in order to ensure respect for basic moral rights. This is a particularly important point given that the D-institution is likely to be mistaken at times in its determination of what morality requires, and so require those it governs to act in ways that conflict with others’ moral standing, i.e. to treat them in ways that they could reasonably reject.

Though it might not be incoherent, it would be strange to accord normal adult human beings various basic moral rights respect for which is necessary if they are to lead what they believe to be valuable and meaningful lives, and yet to deny them the authority to determine how best to act collectively in order to secure these rights. A not uncommon explanation for why individuals ought to enjoy various basic moral rights is that these are necessary for the enjoyment of a zone of personal liberty within which individuals may judge what makes a life valuable and meaningful. But if individuals are to be trusted with the authority to determine what counts as a valuable

and meaningful life (for them), and to act on that determination, then why should they not also be trusted with the authority to determine how best to secure the conditions necessary for leading any worthwhile way of life? The question of what constitutes a good life (for a given individual) is not obviously a simpler one to answer than is the question of what constitutes a set of principles for the general regulation of behavior that ideal moral agents could not reasonably reject. Nor are questions about what makes a life valuable and meaningful clearly more important than questions concerning the conduct that is owed to others in virtue of their status as moral agents. It is unclear, then, what justification there could be for granting each individual the authority to pursue his or her conception of the good, but then withholding that authority from at least some of them when it comes to pursuing a conception of the right.<sup>17</sup> But the only method for settling disputes over conceptions of the right, and specifically the design of morally necessary C-institutions, that does not involve such a denial is one that grants each person equal authority in a procedure meant to settle these disputes, at least for action guiding purposes.<sup>18</sup>

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<sup>17</sup> Christiano suggests several reasons why we might be more willing to trust people with the authority to pursue what they believe to be a valuable and meaningful way of life than we are willing to trust them with the authority to settle disputes over the design of morally necessary C-institutions. These reasons include the claim that “people are simply less likely to devote as much time and attention to matters of politics as to matters that concern their own lives” and that “the subject matter of democratic politics is quite a bit more complex than the question of how to live one’s own life . . . [while] the relevant sources of knowledge are, in general, significantly more remote in the case of democratic decision making than in the case of liberal rights [rights that enable an agent to pursue his conception of the good]” (Christiano 2000, 535). Even if we accept these claims, they may only provide a justification for representative democracy, and not the inclusion of a non-democratic element such as judicial review in a D-institution with a justifiable claim to authority.

<sup>18</sup> The argument presented in this paragraph is similar to Waldron’s claim that rights (both liberal and democratic) are attributed to people in virtue of their “capacity to think responsibly about the moral relation between his interests and the interests of others . . . a sense of justice [in the Rawlsian sense], if you like” (Waldron 1999b, 282). It differs, however, in basing non-political (or liberal) rights on an agent’s capacity to pursue a way of life he finds valuable and meaningful, or in other words, in that agent’s possession of a conception of the good, while grounding political (or democratic) rights, including a right to equal participation in collective decision-making, on an agent’s ability to make moral judgments, or his possession of a sense of justice. I discuss this point further below.

Respect for individual judgment clearly plays a fundamental role in RRMC, for at the heart of such an understanding of morality is the idea that agents are owed justification for the ways they are treated by other agents. The notion of justification to another makes sense, however, only if that other is capable of evaluating that justification, or in other words, judging whether there is good reason for the other to act in the ways that he does. RRMC provides an account of the way in which a person who wishes to act morally ought to evaluate the conduct of others as well as his own. To accord another the status of a creature to whom justification is owed, then, is to recognize him as a creature that is capable of exercising moral judgment. Again, it would at least be odd (if not incoherent) to treat such a creature in ways that one believes could not be reasonably rejected from his standpoint, and so to recognize him as a creature capable of moral judgment, and yet deny him authority equal to one's own to settle disputes over what morality requires, at least where morality requires collective action.

Any D-institution that fails to include a democratic element will deny its subjects the opportunity to exercise their capacity for moral judgment across a wide swath of their lives, insofar as the settlements issued and enforced by a D-institution are likely to be pervasive. Yet this claim does not necessarily entail that a non-democratic decision mechanism is never morally justifiable. For there may be reasons to limit the scope of democratic decision-making in the interest of making it more likely that the settlements issued by a D-institution approximate the principles that fully informed ideal moral agents could not reasonably reject. The importance in some cases of timely decision making, or of relevant non-moral expertise, may be

examples of such reasons. Moral agents have two fundamental ends – acting morally and living lives they find worthwhile – and the recognition of the first end via participation in democratic decision-making may at times need to be limited by recognition of the second end via institutional designs aimed at securing basic moral rights, or at ensuring that the burden on individuals of fulfilling their moral duties does not become too great. So for example, if all of the decisions relevant to the design of morally necessary C-institutions that a typical liberal democratic state makes had to result from a process of direct democratic participation, most individuals would likely find that they had little or no time to act on the agent-relative reasons that make their lives worthwhile. Or, to cite a more contentious example, it may be that sheltering some of those who exercise the authority to settle disputes over the design of morally necessary C-institutions from the pressures faced by those who hold elective office helps to eliminate certain biases that would otherwise shape the decisions that are reached. It does not follow that those who hold non-elective office, as U. S. Supreme Court justices do, possess greater moral expertise than do regular citizens or their elected representatives, and that this justifies granting them the authority they exercise. Rather, the claim is only that the removal of some decision-making authority from the elective arena will reduce the influence of certain types of biases on those who settle disputes over how the citizenry is to act collectively.<sup>19</sup>

## V

Thus far I have said nothing about the kinds of decisions a D-institution ought to make democratically. Taken to the furthest extreme, recognition of each agent's

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<sup>19</sup> For further discussion of this point, see Raz 1998, 45-7, and the discussion below of Waldron's objection to judicial review.

capacity for moral judgment would seem to require a decision procedure in which all participated directly, say by casting a vote on each and every issue to be settled by the decision procedure. There are many familiar arguments against such a direct democratic decision procedure, however, and so it may be that ideal moral agents would reject it in favor of some form of representative democracy, or perhaps combine elements of both, say through a representative legislature and ballot initiatives.<sup>20</sup> As I noted above, the argument from recognition of each individual's capacity for moral judgment, even if it succeeds, does not demonstrate that all decisions reached by a D-institution must be made democratically. However, I suggest that it would not be reasonable to reject the one-person one-vote principle for decisions regarding the basic structure of the D-institution itself, i.e. the constitution. The consequences of such decisions are so far-reaching that if the above arguments support the necessity of a democratic element with respect to any decision reached via a D-institution, it will do so with respect to constitutional decisions.

Yet the fact that there are a number of different institutional designs that are all democratic, in the minimal sense of including a one-person one-vote decision mechanism for at least some matters, presents us with the following difficulty. I have claimed that suitably motivated agents could not reasonably reject abiding by the results of some D-institution that required less than unanimous agreement (among actual persons) to settle disputes over the design of morally necessary C-institutions, or an exact specification of the ends those C-institutions are to secure, so long as the D-institution is an effective liberal democratic one. Yet the same problem that led to the need for a D-institution in the first place, namely the failure of well-intentioned

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<sup>20</sup> See footnote 9 above for some reasons to favor representative democracy over direct democracy.

moral agents to agree on the principles for the general regulation of behavior that ideal moral agents could not reasonably reject, appears again at the level of specifying the design of a democratic D-institution. For example, even if we restrict the evaluation of different models of democratic D-institutions to instrumentalist considerations regarding which design maximizes respect for basic moral rights (consistent with that D-institution being a liberal one), there is likely to be little agreement on a correct answer. Some are likely to argue that a greater amount of decision-making authority should rest in direct participatory institutions, while others will defend a more representative model. Do limits on campaign spending make democratic institutions more effective, by opening up the possibility of running for political office to more citizens, or does it make democratic institutions less effective, by strengthening the re-election chances of incumbents? Consider, too, potential disagreements over federalism, such as who among progressively larger D-institutions is to have what authority. Even if we suppose that there is a single design for a democratic D-institution that ideal moral agents could not reasonably reject, so that disputes of these types do not accurately reflect a deeper metaphysical problem, they quite clearly pose the epistemological problem for actual agents of identifying what morality requires.

How are agents who wish to act only on principles that ideal moral agents could not reasonably reject to solve this problem? Obviously they cannot recur to a higher-order decision procedure to determine the design of a D-institution, for this leads to an infinite regress. But if well-intentioned agents cannot unanimously agree to grant some specific agent the authority to settle for them the disputes that create the need for such an agent in the first place, then it appears that a Moral Contractualist

approach will be unable to justify even a liberal-democratic D-institution's authority over those it governs.

It may be, though, that such agents need not identify a single design (if there is one) for a democratic D-institution that all ideal moral agents could not reasonably reject. Rather, I contend that any liberal-democratic D-institution that includes two key structural features will qualify as sufficiently democratic that it would not be reasonable to reject its authority to settle for its subjects the form that their participation in morally necessary C-institutions must take, even if one believes that certain elements of that D-institution could be reasonably rejected.

The first of these key structural features is that any settlement of a moral dispute reached by that D-institution, including the design of morally necessary C-institutions and even the design of the D-institution itself, is provisional in the sense that there is a process for changing it that is both democratic and respects individual rights. Note that a directive establishing a settlement (for action guiding purposes) of some moral dispute is provisional in the sense that it *could* be changed, but so long as it has not been changed, and it is issued by a D-institution with a justified claim to authority, those subject to the D-institution must treat that directive as authoritative. The second crucial structural feature that must characterize a D-institution if it is to count as minimally democratic is that (a) the rules for modifying the procedures by which disputes over the design of morally necessary C-institutions are to be settled include rules or norms for their own modification, (b) and those rules or norms themselves are subject to revision by those who govern themselves via participation in that D-institution. Let us call 'minimally democratic' any D-institution with these two

structural features; likewise any state constituted in part by such a D-institution is a minimally democratic one.

If it is not to be reasonably rejected, then whatever decision procedure is implemented must include a clearly defined mechanism for changing it into any of the other decision procedures within the class of liberal-democratic D-institutions; for example, from a form of participatory democracy to a form of representative democracy. This condition on moral agents granting authority to an external agent recognizes the real cost to them of participating in a D-institution that, in their judgment, is not the best means for deciding how practically necessary C-institutions are to be designed, or that fails to recognize the exercise of the capacity for moral judgment of those it governs as much as it should (say by increasing direct democratic decision-making). Those subject to the authority of a D-institution must have a real, and not merely nominal, or formal, opportunity to make use of the mechanism for causing changes to its design. However, it may be that no one could reasonably reject building in a conservative element to such a mechanism, as is the case for changes to the U.S. Constitution.<sup>21</sup> One reason to do so would be to ensure that structural changes would take place only after a great deal of consideration. Whether this is a good reason depends on the tradeoff between genuine changes for the better being delayed or not made at all, versus changes for the worst being made too quickly.

It is commonly recognized that the pronouncements of a state with political authority establish only a duty on their subjects to comply with the state's demands, but not (necessarily) a reason to believe that what the state commands one to do is

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<sup>21</sup> If the mechanism for modifying the design of a D-institution is too conservative, say requiring a nine-tenths majority among all voters in order to make any changes, then the opportunity to implement an alternative design through that mechanism will not be a real (or reasonable) one.

what morality truly requires of one. That is, a citizen of such a state should recognize that he has a duty to do what the state commands, but that he need not treat the state's having commanded him to do it as a reason to believe that, absent the state's command, doing that action would be the morally right thing to do. My suggestion here is that an agent should adopt the same attitude with respect to the procedures employed by the state of which he is a member, so long as they are minimally democratic. Such an agent ought to comply with those procedures (and only those procedures) if and when he wishes to exercise his authority to determine the design of morally necessary C-institutions or the D-institution via which that authority is exercised. However, he need not view those procedures as morally correct, nor the fact that they are being used as evidence of their correctness. Rather, he must recognize only that *some* procedure for settling disputes over morally necessary C-institutions must be in place (it would be reasonable to reject the alternative), that there will be reasonable disagreement among well-intentioned agents as to the morally correct design for that procedure, and that there are a range of procedures for settling both kinds of disputes that it would not be reasonable to reject.

In short, there are three principles agents might adopt to regulate their behavior in circumstances of deep disagreement over the design of morally necessary C-institutions. These are: (1) a principle that involves the rejection of any D-institution, with the consequence either that no morally necessary C-institution is able to operate or that disputes over its design are settled by the imposition of one group's will on another's via the exercise of coercive or economic power; (2) a principle that permits the settlement of disputes over the design of a D-institution by the exercise of such

power, and the settlement of disputes over the design of morally necessary C-institutions by that D-institution; or (3) a principle according to which disputes over the design of a D-institution are settled by democratic methods, such as periodic elections that sometimes result in legislative changes, or constitutional conventions that modify the rules for creating and modifying legislation, which in turn structure the design of morally necessary C-institutions. The first can be rejected both by those whose rights are violated as a result of a morally necessary C-institution's absence and by those who participate in a morally necessary C-institution whose design they have no voice in settling. A version of this last objection holds as well for the second alternative describe above, albeit in this case with regard to the design of the D-institution. In comparison with these alternatives, ideal moral agents could not reasonably reject the third principle. Or, in other words, agents committed to limiting their pursuit of the way of life they find valuable and meaningful in accordance with principles that other, similarly motivated, agents could not reasonably reject, *as well as* limiting their efforts to institutionalize their understanding of what those principles are in order to accommodate other, similarly motivated, agents, could not reasonably reject the third principle. Therefore an effective liberal democratic D-institution has a justified claim to the moral authority to settle for its citizens the form that their participation in morally necessary C-institutions must take, and they have a correlative general duty to obey its directives.

This conception of a minimally democratic state avoids the problem of an infinite regress because the argument for it does not depend on actual agreement on the design of democratic institutions among those who act collectively via those

institutions. At the same time, however, it provides a normative account of how people who disagree about issues of both substantive and procedural justice ought to conduct their affairs together, and does so in a way that takes both types of disagreement seriously.

## VI

Jeremy Waldron has recently argued that respect for individual moral judgment is incompatible with a D-institution that includes a non-democratic element, particularly a non-elected body, such as the U. S. Supreme Court, with the authority to strike down democratically enacted laws. A complete analysis of, and response to, his arguments is beyond the scope of this chapter. However, given the degree to which I have adopted many of Waldron's arguments in this thesis, I should at least indicate the point at which he and I part ways. Earlier I suggested that the need to respect each and every individual's exercise of the ability to make moral judgments (including judgments concerning the design of morally necessary C-institutions) does not entail that a D-institution that includes a non-democratic element, as well as a democratic one, could be reasonably rejected. The inclusion of a non-democratic element can be justified, I suggested, if the settlements produced by a D-institution of which it is a part more often match, or more closely approximate, the principles for the general regulation of conduct that ideal moral agents could not reasonably reject than do the settlements produced by purely democratic D-institutions. Waldron objects to this argument on the grounds that its success depends on their being a shared understanding of what morality requires (for my purposes, the set of principles that could not be reasonably rejected) that can be used to evaluate the correctness of the

settlements issued by a D-institution (Waldron 1999b, 294-5). But it is precisely the absence of such a shared understanding, or agreement on what morality requires, that leads to the need for a D-institution in the first place. Thus to defend a D-institution that includes a practice such as judicial review on the grounds that it more closely approximates the requirements of morality is to privilege one person's judgment over another's, or in other words, to fail to accord each individual the equal respect he or she is due in virtue of his or her capacity for moral judgment.

The difficulty with this line of reasoning is that it appears to undermine the position Waldron defends just as much as it undermines a position like my own (Christiano 2000, 521; Raz 1998, 47). Waldron argues that only a purely democratic D-institution, one in which the citizenry or their representatives settle all disputes over the design of morally necessary C-institutions via majority rule vote, has authority. No other procedure will accord each and every citizen the respect that he or she is due as a creature capable of making moral judgments. Yet it is quite possible that moral agents will disagree over (a) exactly what procedure best demonstrates respect for individual moral judgment, say with some preferring a fair lottery over majority rule, and/or (b) treating a principle of respect for individual judgment as a fundamental principle of morality, and/or (c) assigning it lexical priority over any other moral principle. But just as it would be a violation of respect for each and every individual's capacity to make moral judgments to privilege a particular contested view of substantive justice against which the decisions reached by a D-institution can be measured (as the proponent of a D-institution that includes judicial review does when he defends it on the grounds that such a decision procedure more closely approximates

what morality requires), so too it would be a violation of respect for individual moral judgment to privilege one contested view of (a) what counts as the most (and perhaps only) respectful procedure, and/or (b) what counts as the most fundamental principle of (political) morality.

Now Waldron appears to recognize the appropriateness of this objection, for he concludes that in a purely democratic state, “everything is up for grabs,” including the choice of a procedure to settle disputes over substantive moral issues (Waldron 1999b, 303). But in fact Waldron is not committed to everything being up for grabs *in a state that enjoys authority over its citizens*. For Waldron contends that only a state that treats its citizens with the respect due to them as moral agents has a justifiable claim to authority, and only a purely democratic state that makes collective decisions via process of majority rule treats its citizens respectfully.<sup>22</sup> So while it is true that in a purely democratic state citizens might choose via a majority rule procedure to adopt a different decision procedure, one that accords some participants a greater say in collective decision making than others enjoy, the result of such a choice is that the state ceases to have authority over its citizens. At bottom, then, Waldron’s own theory of democratic authority does not depend on actual agreement among the citizens of a given state over any substantive question of morality, be they issues of outcomes (such as the precise scope of a right to free speech) or issues of procedure. Rather, he offers a moral argument, that he presumably wishes to claim is true (or proper in some non-cognitivist sense), purporting to show that a state must possess certain qualities if it is to have democratic authority, regardless of the citizenry’s beliefs on this issue. But

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<sup>22</sup> Or at least only a purely democratic state will be one in which *all* citizens have a general prima facie duty to obey the law. Waldron’s account of authority is compatible with some citizens (and perhaps non-citizens as well) having such a duty on other grounds, such as consent or fair play.

then Waldron's objection to a position like the one I defend here, one that leaves open the possibility that a D-institution with authority over its participants may include a non-democratic element such as judicial review, has no force. That objection, recall, is that there is no agreement on substantive questions of morality appeal to which can be used to justify the claim that a D-institution that includes judicial review more closely approximates the requirements of morality. If Waldron's own argument for democratic authority does not depend on actual agreement, however, then there is no reason why defenders of a rival view must show that there is actual agreement on the standards they appeal to in order to make their case. Instead, like Waldron they may argue that any state that possesses certain qualities enjoys authority over its citizens, and then present a moral argument to show why a state must possess those qualities in order for its directives to be authoritative, and why those subject to such a state have a moral duty to obey its directives, regardless of their beliefs on the matter.<sup>23</sup>

This is exactly the approach I have adopted in the second part of this dissertation. The crucial disagreement between Waldron and myself is at the level of basic moral theory. Whereas Waldron claims that all rights have their basis in a principle of respect for individual moral judgment, I contend that a principle of respect for each and every individual's capacity to lead the way of life he or she finds valuable and meaningful also plays a fundamental role in the justification of basic moral rights (or, what is the same, the justification of principles for the general regulation of behavior that ideal moral agents could not reasonably reject). Respect for this second principle, I pointed out in chapters four and five, will often involve a concern for substantive outcomes. For this reason I argue that respect for basic moral rights is also

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<sup>23</sup> I have benefited from discussion of Waldron's views with Josh Kassner.

a necessary condition for political authority, a condition that Waldron's theory may not entail (at least if decisions regarding basic moral rights must be treated as authoritative so long as they are reached via a majority rule decision procedure).<sup>24</sup>

The debate between opponents and proponents of judicial review demonstrates the possibility of reasonable disagreement over the question of what D-institution is morally best, or in the language of RRMC, could not be reasonably rejected by ideal moral agents. Yet on the assumption that some form of collective action must be undertaken (for it would be reasonable to reject a state of affairs in which this did not occur in favor of a wide range of D-institutions), and given the commitment to compromise definitive of RRMC (agents who will act *only* on principles that others, similarly motivated, could not reasonably reject), it would not be reasonable to reject any from among a range of D-institutions that meet two conditions: (1) some collective decisions must be reached via a process of majority rule that expresses respect for individual moral judgment, and (2) the norms that structure political decision-making (constitutional norms) must include procedures by which those very norms may be revised, and those procedures must express respect for individual moral judgment by allotting each participant in the D-institution equal authority to determine what those constitutional norms must be. Note that like Waldron's account of democratic authority, there is a sense in which everything is up for grabs; citizens of a given state may employ a reasonable decision procedure to make changes that remove their state from among the set of states whose authority cannot be reasonably rejected. The result, then, will be a state without a claim to general and universal obedience

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<sup>24</sup> For a different argument in support of democratic authority, one that assigns a principle of respect for individual moral judgment an important, but not fundamental, place, see Christiano 1999; 2000.

from its citizens, but I see no way of denying the possibility of such a move by the citizens of a given state consistent with respect for each individual's exercise of his or her capacity for moral judgment.<sup>25</sup>

Many of those who wish to defend the authority of the state on non-instrumentalist grounds claim that citizens of a suitably specified state must obey the directives issued by that state even in many cases where they believe those directives to be inaccurate, with exceptions only for clearly and egregiously unjust laws. The view I have elaborated here simply takes the same stance to moral disputes over the morally proper design for a D-institution. Though I may judge the design of the D-institution via which many others and I settle our disputes over the design of morally necessary C-institutions to diverge in certain respects from the ideal (i.e. the design for a D-institution that ideal moral agents could not reasonably reject), if it meets the two conditions set out above I may still conclude that the actual design is not an unreasonable one, and so that I ought to obey the directives it issues.

As I mentioned in the conclusion to the discussion of respect for basic moral rights as a necessary condition for political authority, there is no algorithm that can be employed to demonstrate what degree of variance from the moral ideal suffices to undermine a state's claim to authority. The same is true for democracy. For instance, people will likely disagree over exactly what decisions, and how many decisions, must

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<sup>25</sup> As Waldron points out, we grant individuals the authority to make their own decisions about the way of life they wish to lead and how to do so (within the constraints set by the need to respect others' basic moral rights), even when those individuals make what we believe to be bad choices regarding both their ends and/or the means to them. Why should we not adopt the same attitude towards individual's authority to determine the procedures they will use to make collective decisions? A person may exercise his rights in ways that prevent his living a good life (or what he believes to be a good life), and acting collectively a group of people may exercise their rights in ways that prevent them from issuing authoritative directives. Granting a person certain liberties or powers entails accepting the possibility that they may exercise those liberties or powers badly or wrongly.

be reached by a procedure of majority rule voting for a D-institution to count as one that includes a reasonable democratic element, or at what point a supermajority requirement renders a procedure for amending the constitution one that could be reasonably rejected, and there will be no hard and fast criteria to settle whether proposed answers to these questions are reasonable or not. RRMC, in practice and in theory, rests ultimately on the judgment of individual agents. But then the same is true for an instrumentalist account of authority, such as Raz's. Raz acknowledges the possibility that agents might reject another's authority when it is blatantly obvious that the authority is mistaken. Though he claims to take no position on the propriety of doing so, it seems that the denial of such a possibility would defeat the very purpose and justification of authority as described by the normal justification thesis (Raz 1986, 61-2). Why not, then, employ the same line of argument to the justification of a liberal-democratic state's authority? If the purpose and justification for recognizing the authority of such a state is that doing so is necessary to treat others only in ways that they could not reasonably reject (through collective action aimed at securing these rights and collective action aimed at settling disputes as to how best to do so), then it will only be reasonable (and perhaps even rational) to reject the authority of a state when it either blatantly acts in ways contrary to a principled commitment to respect for basic moral rights, or it is blatantly undemocratic.

The view defended here is not that all liberal-democratic regimes will be equally just, in the sense that they are equally likely to identify or at least approximate what ideal moral agents could not reasonably reject. Some are more likely to do this than others. The point is that any minimally democratic D-institution (that is effective

and committed to respect for individual rights) will be one that has the moral authority to settle disputes over the design of morally necessary C-institutions, and therefore those subject to it have a general duty to obey its directives. Within effective liberal-democratic states, however, political theorists, politicians, and citizens will (and should) continue to engage one another in debate as part of a process for identifying which liberal-democratic institutions (and combinations thereof), and which policies and laws, best achieve the goal of a world in which no one is treated in ways that they could reasonably reject. But while the degree to which a state realizes substantive justice may be a matter of degree, the moral authority of the state requires only that certain minimum standards be met.<sup>26</sup>

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In sum, the Moral Contractualist argument for political obligations runs as follows. All moral agents have certain natural duties to see to it that all other moral agents enjoy their basic moral rights; that is, that they are treated as required by principles for the general regulation of behavior that no one could reasonably reject insofar as he was committed to the equal recognition of the agent-relative value of the life he leads, i.e. its value from his perspective, and the agent-relative value to others of the lives they lead, i.e. the value of those lives from their perspectives. The successful fulfillment of these duties will often require many agents to participate in C-institutions. But universal participation in a given C-institution is often not necessary for the realization (to the greatest degree possible) of the end at which it

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<sup>26</sup> As Estlund writes, “democratic procedures are held to be pure procedures with respect to legitimacy even while they are imperfect procedures with respect to substantive justice” (Estlund 2001, 11). By ‘legitimacy’ Estlund appears to mean what I have labeled ‘political authority,’ though he claims to leave it an open question whether his own views support political obligation (Estlund 2001, 17).

aims. The question that must be addressed, then, is who has the authority to determine the distribution of burdens involved in the operation of a morally necessary C-institution. The Moral Contractualist response I defended in chapter four claims that all moral agents have a natural duty of fairness to forbear from unilaterally exercising such authority, because the other participants could reasonably reject one's doing so, and because in doing so one fails to recognize the status of others to whom the institution applies as autonomous beings.

The inevitability of disputes over the design of morally necessary C-institutions, such as who must participate, when they must do so, and what form their participation must take, as well as disagreements regarding the specification of the ends to be secured via such institutions, entail the moral necessity of implementing a decision procedure, or D-institution, with the authority to settle such disputes. If such a D-institution is to have authority, and not merely be minimally justifiable or legitimate, then it must respect individual rights and reach its decisions via a procedure that is at least minimally democratic. Any D-institution that lacks one or more of these qualities could be reasonably rejected in favor of one that has them all, while any narrower requirements, such as more precise specifications of the rights that the state must respect, or the democratic mechanisms that it must employ, are ones over which actual agents could reasonably disagree.

Though the duty to participate in morally necessary C-institutions is one people have simply in virtue of their status as moral agents, the duty to participate in certain ways, even when one does not believe these ways of participating to be the best way to fulfill one's duty, is one that an agent has in virtue of being someone who

finds himself in a situation where he can join with others via the institutions of an effective liberal-democratic D-institution in order to exercise collective authority. It seems plausible to claim that some modern liberal democratic states can be understood to consist in (at least) morally necessary C-institutions and a legitimate D-institution for settling disputes like those discussed above. If so, then those governed by such states are morally required to obey laws specifying the form participation must take – traffic laws, pollution laws, public health laws, national defense laws, tax laws (at least for taxes that are used to operate morally necessary C-institutions), welfare laws, health care laws, and so on. In the next chapter I consider a number of objections to this conclusion, and in the process of rebutting them, demonstrate that a RRMC account of political obligation satisfies the five criteria for success identified in chapter one.

## Chapter 7: Refinements to the Contractualist defense of political obligation

A successful account of political obligation, I claimed in the introductory chapter, must meet five conditions. Clearly a RRMC defense of citizenship duties meets the first of these, namely that citizens have a moral, and not merely prudential, reason to obey the state of which they are members, at least if that state is an effective liberal-democratic one.<sup>1</sup> But can such an account satisfy the remaining four criteria? These, the reader will recall, include the requirements that political obligations, such as a duty to obey the state's directives, provide content-independent and preemptive reasons that apply both generally and universally, as well as the requirement of particularity.

The duty to obey the state's directives provides a preemptive reason for action only if it excludes certain first-order reasons from an agent's practical reasoning, namely those reasons the state's directive reflects or depends on, and only if an action's being required by law functions as a first-order reason to do that which the law requires. The fact that the state demands that one refrain from a certain action is not simply one reason to be taken into account when considering reasons for and against acting in that way. Rather, the state's command preempts one from acting on one's own assessment of the balance of reasons with respect to the action in question. To say that the state's directives provide a content-independent reason for action is to say that a subject of that state ought to comply with its commands because they are

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<sup>1</sup> Once again, the claim is not that agents must always act from the moral motive of treating others in ways that they could not reasonably reject when they obey the law. Rather, the claim is only that citizens of a liberal democratic state have a moral reason to obey the law.

issued by the state, and not because there is an independent reason, one he would have in the absence of the state's command, to do so. (Of course there may also be such a reason to do that action described in the law). Generality and universality require that political obligations hold at all times and for all those who are citizens of a state with a justified claim to moral authority over its subjects. The idea that political obligations are ones that bind members or subjects of a state (in virtue of their status as such) leads us to the final condition that any successful account of political obligation must satisfy: particularity. As explicated by many philosophical anarchists, particularity refers to the need to explain why it is that an agent has a duty to obey the particular state of which he is a member, rather than, say, the directives issued by some other state that he believes to more closely approximate what morality truly requires. In short, can a RRMC account of political obligation meet the demand for (1) a moral duty to obey the state's directives that is (2) content-independent, (3) preemptive, (4) general and universal, and (5) satisfies the need for particularity?

The answer, I believe, is a qualified affirmative. I defend this conclusion via a consideration of several criticisms that might be leveled against a RRMC account of political obligation. For the most part, these objections focus specifically on the capacity of such an account to meet the criteria described in the above paragraph, rather than criticisms of RRMC as a proper description of morality (or at least what all moral agents owe to each other), or the particular derivation of rights and duties from this moral theory that I argued for in chapters four and five. I consider in the next four sections what I take to be the most significant challenge for any account of political obligation, namely explaining how an agent can be morally required to obey the law

even when he believes, has good reason to believe, and perhaps even believes correctly, that what the law requires diverges from what morality requires. The response to this challenge developed in those sections makes clear why, and when, the laws or other directives issued by an effective liberal-democratic state ought to be taken as content-independent and preemptive reasons for action that apply generally and universally to members of that state.

In the sixth section I distinguish a voluntarist version of the demand for particularity – why must I obey the directives of the state in which, by an accident of birth, I simply find myself a citizen – from a cosmopolitan version of the demand for particularity – why must I obey the directives of a state with these particular borders? The voluntarist’s query can be answered easily enough, and in a way that is consonant with respect for autonomy, without the need to introduce a voluntarist element that would threaten to reduce a natural duty approach to that of an acquired obligation. The cosmopolitan’s challenge proves more troublesome, and meeting it requires a defender of a RRMC account of political obligation to make several concessions. In the end, however, I conclude that these concessions do not undermine the authority of an effective liberal-democracy to determine for its citizens the form that their participation in morally necessary C-institutions must take, or the citizenry’s correlative duty to obey the directives issued by the state for that purpose.

## II

It might seem obviously true that no one can ever be morally required to act contrary to morality.<sup>2</sup> Yet the existence of a duty to obey a liberal-democratic state's directives (or indeed more broadly, the directives of any authority) has often been thought to give rise to just such a requirement. Particularly in a modern state, characterized by many differences of opinion as to what morality requires, and where those who exercise the authority to settle moral disputes are often far removed from the specifics of particular cases, it seems likely that citizens will encounter situations where what the state commands them to do conflicts with their own judgment of what morality requires. The state is not infallible, and therefore even if in general the state's decisions are often more likely to be morally correct than are those of any particular individual, this will not be true on each and every occasion. It seems, then, that individuals will sometimes judge, perhaps even correctly, that obedience to the state in a particular case will entail acting immorally, or at least in ways that one is not morally required to act. Any successful account of political obligation must therefore reconcile or explain away such conflicts between the state's exercise of its authority and the demands of morality.

A defender of the claim that citizens of a liberal-democracy have a general duty to obey the state's directives must demonstrate that the failure to treat them as authoritative is in itself an immoral action, a failure to respect the moral status of the other agents with whom one acts collectively via the mechanisms of the state to ensure that all are treated in ways that they could not reasonably reject. For if the authority of

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<sup>2</sup> I am tempted to say that this statement must be true, but perhaps there are cases of so-called moral tragedies; cases in which morality requires two incompatible actions, so that the agent inevitably acts contrary to an undefeated moral reason for action.

the state depends solely on the instrumental role it plays in making it more likely that people act on the moral reasons that apply to them, independent of the state's issuing directives requiring those actions, then in any case where this condition is not met agents will have no moral duty to comply with the state's directives.<sup>3</sup> A person might admit that he always has a moral duty to treat others in ways that ideal moral agents could not reasonably reject, or what is the same, to respect their basic moral rights. But this simply entails that he should always act morally, regardless of what the law says. It is important to distinguish between moral reasons that people have to act in virtue of the state's existence, and the state's issuance of a directive as a moral reason for action. The existence of a state that effectively imposes a certain solution to a collective action problem may provide a reason to comply with that solution, in that given the existence of a certain pattern of cooperation the morally best action is to cooperate. But such a reason is distinct from the reason one has if one has a duty to comply with the state's directives because the state has the moral authority to settle for one how one ought to act. It is necessary, therefore, to explain why the treatment of others in ways that ideal moral agents could not reasonably reject requires the recognition of an effective liberal-democratic state's directives as authoritative, i.e. as content-independent and preemptive reasons for action, even when this conflicts with one's own moral judgment.

The fair exercise of authority regarding the form morally necessary collective action is to take provides one justification for obedience to an effective liberal-democratic state, even in many cases where a subject of that state judges that the

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<sup>3</sup> It is on the basis of this argument that Raz and others who accept his justification for authority defend philosophical anarchism.

directive it issues fails to accord with what morality requires, permits, or forbids. In cases where morality requires collective action, what is at issue is not simply how to act morally, but more basically, who has the authority to judge what morality requires. As I argued previously, only individuals acting collectively have the authority to render such a judgment, and therefore it would be unfair for an individual to usurp that authority by determining, for example, when morality truly requires him to contribute to the operation of a particular C-institution and when it does not.<sup>4</sup> As Scott Shapiro puts the point,

one who disagrees with the outcomes of a socially necessary, empowering, and fair procedure, and thus disregards it, acts, we might say, like a dictator: he unilaterally “dictates” the terms of social interaction to others and thereby exercises inappropriate control over the lives of his fellow citizens. It is no defense for the rebel to point out that the procedure produced an incorrect result – for whether it did or did not, it is not “up to him” to impose his own judgment on others (Shapiro 2002, 437).

Likewise Thomas Christiano writes

those citizens who skirt the democratically made law fail to acknowledge the equal right of all citizens to have a say in making laws. Those who refuse to pay taxes or who refuse to respect property laws on the grounds that these are unjust are simply affirming a superior right to that of others in determining how the shared aspects of social life ought to be arranged (Christiano 1999, 182).<sup>5</sup>

Though an agent may judge non-compliance with a particular law in a particular case to be permissible or even required, insofar as his action falls within the jurisdiction of

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<sup>4</sup> Note the restriction of collective authority to cases where collective action is morally required, as well as the constraints imposed on the policies the state may pursue by the need to respect individual rights.

<sup>5</sup> Jeremy Waldron claims that Kant presents the same argument expounded here: “The person who proposes to resist or disobey some piece of legislation is offering an affront to the very idea of right, according to Kant. For even assuming that the dissent is conscientious and based on impeccable moral arguments, it is still tantamount to turning one’s back on the idea of our *sharing* a view about right or justice around here and implementing it in the name of community. The one who proposes to resist or disobey is announcing in effect that it is better to revert to a situation in which each acts on their own judgment about justice” (Waldron 1999a, 59).

an effective liberal-democratic state, only the state has the authority to determine whether, and when, he is morally justified in acting on that judgment.

Fairness is a reason to obey the state's directives that follows from a consideration of the principles for the general regulation of behavior that ideal moral agents could not reasonably reject, at least in circumstances where there is disagreement over the distribution of burdens and benefits involved in the operation of morally necessary C-institutions. Respect for actual agents' exercise of their capacity to make moral judgments provides an additional justification for a duty of obedience. Recall that a person's status as a moral agent turns on two features: the capacity to act on agent-relative reasons that make a person's life valuable and meaningful to him or her, or substantive rationality, and the ability to act only on principles that other, suitably motivated, moral agents could not reasonably reject, or moral reasonableness. Recognition of the former entails fulfilling the various duties that correlate to an agent's basic moral rights, thereby making it possible for that agent to exercise his ability to form and act on a particular conception of the good (should he choose to do so). Likewise, respect for an agent's capacity to make moral judgments, i.e. to determine for himself what morality requires and not simply to blindly follow rules, or react instinctually to others' behavior, requires acknowledging his exercise of that capacity.<sup>6</sup> It might seem that the need to recognize individual agents' abilities to exercise moral judgment (to attempt to determine whether acting on a certain principle could be reasonably rejected) would entail that people should never follow the law simply because it is the law, but instead always judge for themselves what it is that

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<sup>6</sup> Similarly, Waldron contends that Kant "insists that we are to see others not just as objects of moral concern or respect, but as *other minds, other intellects, other agents of moral thought, coordinate and competitive with our own*" (Waldron 1999a, 61).

they ought to do. It must be recalled, however, that on the account developed here, laws (or other directives issued by the state) settle the form that *collective* action must take. Though each agent may (and indeed ought) to exercise moral judgment when considering the design of morally necessary C-institutions (say for the purpose of voting on them), only the collective has the moral authority to settle for all the form each individual's participation in morally necessary cooperative schemes must take. Where citizens' fulfillment of their moral duties requires collective action, only by acknowledging the authority of an effective liberal-democratic state through which they exercise collective authority will citizens be able to treat one another in ways that express respect for each other's capacity for moral judgment.<sup>7</sup>

But is it really necessary to respect actual agents' exercise of their capacity for moral judgment? After all, if one believes their judgments to be mistaken, then why should one act in accordance with them, rather than simply acting on the principles that one judges could not be reasonably rejected? The fact that we make our moral judgments in circumstances characterized by various burdens of judgment provides one reason to do so, for in such circumstances it is possible to draw two or more conclusions from the same body of information and range of reasons. As Nagel writes,

the idea is that in such a case there is a common reason in which both parties share, but from which they get different results because they cannot, being limited creatures, be expected to exercise it perfectly. In most significant cases reasonable belief is not strictly determined by the

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<sup>7</sup> But perhaps acknowledging others right to an equal vote suffices as a means for respecting their capacity for moral reasoning? There is something rather odd, however, and contrary to the spirit of the endeavor, in recognizing this capacity in others by granting them a right to vote if one stands ready to disregard the outcomes of the decision-procedure of which their voting is a part whenever those outcomes conflict with one's own conclusions regarding the basic moral rights that all agents ought to enjoy, or how best to secure them.

grounds that can be explicitly offered: that is why there can be reasonable disagreement – disagreement in judgment – even among those who are in general agreement about what kinds of grounds are relevant to the matter at hand, and what the evidence and arguments in the case are (Nagel 1987, 318).

Among the sources of such (cognitively) reasonable disagreement that Nagel identifies are differences in people’s experiences, testimony to which they have been exposed, and differences in the assessment of evidence and arguments.<sup>8</sup> The familiar notion of weighing evidence and arguments, and of disagreement not over the inclusion of particular arguments, relevance of evidence and so on, but rather over how to add them up, suggests that Nagel and Rawls may well identify a key feature of actual agents’ practical reasoning.<sup>9</sup>

Given the sources of disagreement in what can be reasonably concluded from the same body of information, arguments, etc., it seems arrogant for a person to commit himself to always acting on what *he* concludes RRMC requires, particularly when the action in question is a collective action.<sup>10</sup> Just as religious believers in a liberal-democratic state must acknowledge certain limitations on their ability to act on what they believe to be true, so too moral believers must also recognize such limits. In both cases, the conviction that one’s beliefs are true, even if correct, does not

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<sup>8</sup> See also the discussion of Rawls’s and the burdens of judgment in chapter four, section II. Likewise in addressing the question of why Kant believes that even a person whose will is “disciplined by the idea of universalizability” cannot unilaterally impose his conclusions regarding the precise content of morality on others, Waldron bases his answer on the claim that “the irremovable facts about individual moral reasoning are these: my universalizations are likely to differ from your universalizations; my attempt to take everyone’s point of view is likely to lead to a different conclusion from your attempt to take everyone’s point of view; the deliverances of my reasoning guided by the idea of a civil condition will not be the same as the deliverances of your reason guided by that idea” (Waldron 1999a, 56; see also Waldron 1999b, 112).

<sup>9</sup> Here Nagel writes that this feature results from the failure to reason perfectly, though it is not clear that he maintains this position in his other writings. For instance, Nagel is clearly sympathetic to value pluralists such as Galston and Crowder, who argue that the failure of reasonable deliberators to reach agreement in many cases stems directly from the plural and incommensurable nature of value itself. (Nagel 1979; Galston 2002; Crowder 2002).

<sup>10</sup> See also Shapiro’s discussion of “excessive purism.” Shapiro 2002, 439.

suffice to justify one's actions, for the truth can be trumped by the need to accommodate others who believe the truth to be something different. At the very least, if there is a procedure in place that will usually serve to rule out unreasonable conclusions, such as collective actions that require violations of basic moral rights, then an individual who wishes to act only on principles that ideal moral agents could not reasonably reject may well grant a certain presumption to the settlements issued by such a procedure. Still, such an agent might want to qualify such a procedure (that of a liberal-democratic state) in certain ways, say to accommodate particular cases where he believes the state's directives are clearly mistaken, or where the law conflicts with an agent's most deeply held moral convictions. I examine such qualifications on the state's authority below.

The point remains, however, that an agent committed to acting only on principles that others could not reasonably reject must accept that in many situations, a liberal-democratic state's assessment of what principle could not be reasonably rejected should stand in for his own, *even if he concludes that his own is not unreasonable*. This addendum is crucial, for it entails that such an agent need not be a skeptic, nor in any way doubt the truth of his personal assessment of what morality requires. Rather, such an agent displays a degree of modesty, reasonable deference, or what Rawls refers to as civility.<sup>11</sup> This modesty need not be epistemic (though the

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<sup>11</sup> I have in mind here Rawls account of civility as expounded in *Theory of Justice*, where he writes: "even with the best of intentions, their [parties at a constitutional convention] opinions of justice are bound to clash. In choosing a constitution, then, and in adopting some form of majority rule, the parties accept the risk of suffering the defects of one another's knowledge and sense of justice in order to gain the advantages of an effective legislative procedure. There is no other way to manage a democratic regime. [W]e submit our conduct to the democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system. Accepting these hardships is simply recognizing and being willing to work within the limits imposed by the circumstances of human life. In view of this, we have a natural duty of civility not to invoke the faults of social arrangements as

recognition that others draw cognitively reasonable conclusions from the same set of beliefs and reasons may inspire such modesty); rather, it arises from and expresses the commitment to acting morally, which includes respect for other's exercise of their capacity to make moral judgments. For it does seem that on many occasions it is at least as important to us that the process by which we determine how we collectively ought to act is one that we could not reasonably reject as it is that the process in fact identify the best method for realizing some morally desirable state of affairs. The reason for this, I suggest, is that the respect I show others with whom I participate in a morally necessary C-institution outweighs any disrespect I may show as the result of the law being one I think mistaken or inadequate in some respect.<sup>12</sup> The claim here is not that such a conclusion follows as a matter of logic from the description of what it is to be morally motivated, but rather a hypothesis about that aspect of human

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a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them. Without some recognition of this duty mutual trust and confidence are liable to break down" (Rawls 1971, 355).

On the view defended in this dissertation (as in *Theory of Justice*), moral agents have a duty to gain the advantages of an effective democratic procedure. It seems fair to say in light of Rawls's later writings that he would characterize the circumstances of human life in terms of (cognitively) reasonable disagreement (i.e. reasoning under various burdens of judgment), as well as the circumstances of justice. If so, then we should invoke neither the faults of social arrangements *nor others' (cognitively) reasonable disagreement as to what those social arrangements ought to be* as a too ready excuse for not complying with them. Civility, then, imposes a due acceptance of the defects of others' exercise of the capacity for moral judgment and a certain restraint in taking advantage of it (namely abstaining from private acts of disobedience, as I argue in section three of this chapter). But whereas Rawls appears to offer civility only an instrumental justification (some degree of civility is necessary for mutual trust and confidence), I claim that the need to respect others' exercise of the capacity for moral judgment (also) justifies a duty of civility, and does so on non-instrumental grounds.

Rawls offers another account of the duty of civility in *Political Liberalism*. There he describes it as being able to defend one's views on fundamental questions of justice and the basic structure of society by appeal to public reasons, being willing to listen to others when they attempt to do so, and being fair-minded "in deciding when accommodations to their views should reasonably be made" (Rawls 1993, 217). This last aspect of Rawls's later account is similar to the notion of modesty, or civility, that I elaborate in the text. Note that the *duty* of civility differs from the *virtue* of civility, understood as a character trait necessary for a well-functioning civil society (see Kymlicka 2002, 300-2).

<sup>12</sup> This is not true all of the time, of course, a fact reflected in the limitations individual rights impose on the scope of democratic authority reflects.

psychology that gives rise to the conduct and patterns of thought characteristic of morality. Such moral modesty supplements fairness as a reason to treat the directives of the state as authoritative. It also helps explain why one must submit one's judgment that a particular over-inclusive law ought not to apply in one's case to the appropriate state agents (as discussed in section III), as well the importance of practices such as civil disobedience and conscientious objection (as discussed in sections IV and V).

Political philosophers sometimes fail to pay sufficient attention to the need for state's to settle disputes over what morality requires, and not simply to facilitate the organization of people who already largely agree on such matters, and to enforce moral norms. This leads them to downgrade the importance of the moral recognition involved in democratic decision-making relative to the importance of the moral recognition involved in acting on each occasion in the manner one judges most likely to secure basic moral rights for all. But in circumstances of widespread disagreement over the form that moral collective action ought to take, one of the most important ways in which individuals can show respect for one another is to acknowledge the authority of a procedure that they could not reasonably reject to settle those disagreements for all of them. This is particularly true if we keep in mind that such a procedure already includes respect for individual rights, and so already serves to recognize each individual's fundamental value as a substantively rational and reasonable creature.

The notion that in circumstances where morality requires collective action, the need to respect others' moral judgments entails a duty of obedience to the directives of

an effective liberal-democratic state, comes close to the argument Mason makes for duties of citizenship which I discussed in chapter three. The two arguments differ, however, with respect to what each identifies as the source, or foundation, for the duty. On a RRMC account of political obligation, the duty is owed to moral agents in virtue of certain qualities they possess, while on Mason's relational account, duties of citizenship are grounded in the non-instrumental value of the relationship citizens bear to one another. While a RRMC account can recognize obedience to the state's directives as non-instrumentally valuable, constitutive of what it is to treat others in ways that they could not reasonably reject, the reason one must do these actions is that one's fellow citizens are owed that treatment in virtue of being moral agents.

A duty of obedience to the state, then, is not to be justified (primarily) on the basis of the instrumental role the state's enactment and enforcement of laws plays in securing basic moral rights.<sup>13</sup> Rather, obedience to an effective liberal-democratic state expresses respect for the other agents with whom one cooperates in order to secure basic moral rights. It does so because by treating the state's directives as authoritative one refrains from unfairly imposing one's own preferred distribution of burdens and benefits on others, and one also acknowledges other's exercise of their capacity for moral judgment, along with the possibility of reasonable disagreement. Morality itself, then, requires a citizen of a liberal-democratic state to treat the directives that state issues (within the scope of its justified authority) as preemptive and content-independent reasons for action. It may well be true, then, that no agent can be required to act immorally; however, when a citizen of an effective liberal

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<sup>13</sup> Such an argument may suffice as a justification for a state's legitimacy, however, and will surely figure in the judgment that it is morally better that a given state exist and act in the manner it does than should some alternative state of affairs obtain.

democratic state, an agent does have a duty to comply with laws that require acts *he believes* to be immoral, *unless* the state grants him the status of conscientious objector or his non-compliance is an instance of civil (or what I shall call public) disobedience.

Suppose we accept the arguments presented thus far, and therefore agree that considerations of fairness and the need to respect others' exercise of their capacity for moral judgment entail a moral duty to obey the law. Even so, these considerations do not exhaust the duties we owe to other agents. Might it be the case, then, that the moral duty to obey the law is a *prima facie* (or perhaps better, *pro tanto*) one; a genuine obligation, but one that may be defeated by some other reason for action (e.g. some other moral duty)?<sup>14</sup>

As my earlier discussion of conflicts between rights suggests, I am a bit dubious about the notion of a *prima facie* obligation, though as I said there, my disagreement with those who defend the notion may be nothing more than a linguistic dispute (or at least one with no real theoretical import). Rather than ask whether the duty to obey the law is a *prima facie* one, then, let us ask whether the duty to obey the law is a preemptive reason that (a) does not exclude *all* other first-order reasons from an agent's deliberation, and where (b) in some cases a non-excluded reason can outweigh or defeat the first-order reason for action provided by the law. We might also consider whether there might be a moral reason for action, such as a duty to respect an agent's basic moral right to adequate nutrition, that *preempts* the duty to

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<sup>14</sup> The phrase 'prima facie' suggests an epistemological distinction between merely apparent and actual duties, but the distinction theorists usually have in mind when discussing *prima facie* duties, rights, etc., is that between an obligation in light of some feature of a case and the agent's obligation in light of all the features of that case. The phrase 'pro tanto' avoids the suggestion that the theorist's concern is an epistemological one.

obey the law; that is, a reason that excludes the duty to obey the law from an agent's deliberation.

Clearly there is nothing about the nature of the reason provided by a duty to obey the law that entails that such a duty can never be outweighed or defeated. It is obviously still a moral reason for action, and so long as the duty to obey the law excludes and replaces some reasons for action, such as self-regarding ones, then it is a preemptive reason for action. Nor does the requirement of content-independence appear incompatible with the duty to obey the law being a defeasible reason for action. Support for this claim comes from our intuitive understanding of promises. That I promised you I would cook whatever you want for dinner is a content-independent and preemptive reason for me to do so. It is content-independent because my making you hamburgers does not depend on my assessment of what the balance of reasons favors, e.g. what I think would be good for your health, or what would taste best to you, but rather on what you instruct me to make. My beliefs regarding what would be good for your health, as well as self-regarding considerations such as what I would like for dinner, are excluded by my promise. However, my obligation to do as I promised may be defeated by a neighbor's need for emergency medical attention; for instance, if I am among those best situated to drive her to the hospital. As this example demonstrates, then, there is no necessary incompatibility between a duty being content-independent and preemptive, and it being defeated by another reason for action. Nor do generality and universality, or the requirement of particularity, seem relevant to the question of whether the duty to obey the law can be defeated.

Consider, however, the following argument for why the moral duty to obey the law (as had by citizens of an effective liberal democratic state) is absolute, not defeasible. The justification for a duty to obey the law involves disagreement over the form that morally necessary collective action must take. Ideal moral agents could not reject a suitably specified body having the authority to settle these disputes; that is, they could not reject having to treat the decisions of such a body as authoritative. Now, a duty is defeasible if in some cases that duty can be defeated by some other reason for action. The crucial question, however, is who has the authority to determine when the duty to obey the law is defeated by another reason for action? It seems that if individuals retain this normative power then we defeat the very purpose of having a body with political authority in the first place. For one of the central disputes that a group of individuals committed to acting collectively is likely to have concerns what kinds of reasons are sufficiently weighty to defeat a duty to contribute one's share to the operation of a morally necessary C-institution. These disputes amount to nothing more than disagreement over the design of morally necessary C-institutions, the very basis (together with the claim that collective action is morally necessary) for a duty to obey the law in the first place.

Of course, as I shall discuss in the following section, the state may recognize exceptions to particular laws; that is, cases where an individual is permitted to forgo contributing his share to the operation of a morally necessary C-institution in order to take some other action. But what if one believes that the state ought to recognize an exception to a particular law, but it does not? Presumably the claim that the duty to obey the law is defeasible entails that if one is right that the state ought to recognize an

exception, then other things being equal, one is justified in acting contrary to the law. It is when understood in this way, however, that the notion of a defeasible duty to obey the law seems incoherent; at odds with the very reasons that agents have to accept such a duty in the first place.

It is not clear to me that this line of argument provides a conclusive case against the duty to obey the law being a defeasible one. For it may be that ideal moral agents (ones committed to acting only on principles that could not be reasonably rejected for regulating behavior in circumstances characterized by, among other things, various burdens of judgment) could not reject the following two principles: (1) a principle involving a presumption in favor of obedience to an effective liberal democratic state, but no absolute duty to treat the state's directives as authoritative; and (2) a principle authorizing such a state to enforce the law (its settlements regarding what morality requires) in any case it believes that the presumption has not been met (i.e. any case where the state itself does not recognize an exception to a particular law that has been violated). Very roughly, a presumption in favor of obedience to the state provides a strong, but ultimately defeasible, reason to do what the law requires, so that only rarely would an agent be justified in disobeying the state's directives. The justification for permitting the state to enforce its own assessment of what morality requires, even in cases where the state is mistaken in doing so, rests mainly on the empirical claim that people's judgments about what morality requires are often influenced by self-regarding reasons. The threat of a penalty serves to re-weight the self-regarding reasons an agent has, thereby making it less likely that individuals will unjustifiably violate the law. The (relatively)

predictable behavior of human actors confronted with a threat of punishment for certain sorts of action will provide the assurance necessary for others to have good reason to comply with the law as well.

Or so the story goes, but I shall not seek to elaborate upon this story here. Instead, I will explore whether there are different types of non-compliance with the law that can be understood in ways that do not require a defeasible duty to obey the law. Specifically, I aim to demonstrate that in the case of over-inclusive laws, civil disobedience, and conscientious objection, the failure to comply with particular laws may be consistent with a duty to obey the Law; that is, the recognition by its citizens that *only* an effective liberal democratic state has the authority to settle for them the form that their morally necessary collective action must take, for action-guiding purposes and within the scope of the state's justified authority.

### III

Examples of over-inclusive laws provide one of the main challenges to any argument for a general duty to obey the law, as the infamous stop sign in the desert example illustrates. Suppose that while driving through the desert one comes to an intersection at which a stop sign is posted. One can see clearly that there is no on-coming traffic, indeed no one at all for miles in any direction, except for oneself. Intuitively there does not appear to be any reason to stop at this intersection, and yet if one has a general moral duty to obey the law, then one does have a reason to stop, and not just any reason but a moral obligation. The apparent absurdity of this conclusion has led many philosophers to conclude that there can be no *general* duty to obey the law – i.e. a duty to do so in every case in which the state claims the authority to

determine what one ought to do (Raz 1986, Edmundson 1998, Morris 1998, Copp 1999).

In fact, the stop sign in the desert case is only one example of a class of cases that share the following trait: the person in the choice situation has more knowledge, or better comprehension of certain information (i.e. expertise), relevant to determining what morality requires of him in that situation than does the agent that claims the authority to determine what it is that the person in the choice situation ought to do. Another common example is that of an expert pharmacologist whose knowledge of the benefits and dangers of a certain drug (in general, or with respect to a certain patient) exceeds that of those who, in virtue of their roles in exercising the state's authority, determine when, how, and for whom that drug may be administered (Raz 1986, 73-4; Morris 1998, 208). In addition to raising doubts about the generality of a duty to obey the state, cases like the desert stop sign also appear to challenge the preemptive nature of such a duty. For presumably a liberal-democratic state (and others as well) enact a law requiring individuals to stop at stop signs for a reason, namely to efficiently ensure the coordination necessary to secure people's enjoyment of various basic moral rights. But clearly if one were to act directly on that reason, rather than on the basis of a duty to obey the law, one would not stop at the desert (and deserted) intersection. Coordination requires two or more parties, yet by stipulation there is no one besides the agent within miles of the stop sign. If the state's directives are authoritative, then the dependent reasons reflected in the law (or on which the law depends) ought to be irrelevant to our determination of what to do, and we should not consider what the balance of reasons requires but instead act as the state commands. But intuitively

these reasons do appear relevant to the determination of whether one ought to comply with the law in this case, and to treat the law as a preemptive reason seems to be nothing more than rule-worship.

Over-inclusive laws are certain to be a feature of modern states, where the agent with the authority to determine what form each individual's participation in a morally necessary C-institution must take cannot address each and every choice situation those individuals face, at the time they face them. It follows, then, that if the RRMC account of political obligation is to justify duties of citizenship for members of at least some modern states (or political entities similar to them), then its defenders must either explain why an agent ought to obey a law even when he believes that the reasons for having it do not apply, or somehow demonstrate that disobedience to the law on certain occasions is consistent with the recognition of the state's authority.

Consider, first, what is involved in the judgment that a law is over-inclusive. An agent may judge a law to be over-inclusive in a particular case if he believes that, if they knew the specifics of this case, those *actual* agents with the relevant authority would not require the agent to act as the law requires. So for example, he may judge that the actual legislators with jurisdiction over the desert intersection would replace the stop sign with a yield sign if they considered how to regulate this specific intersection.<sup>15</sup> This is the kind of judgment that I will be concerned with here.

It should be noted, however, that there is a second sense in which a law might be judged to be over-inclusive, and that is if an agent claims that *ideal* moral agents,

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<sup>15</sup> I assume that the agent's reason for thinking the law over-inclusive does not turn on it being him who confronts the stop sign. Still, the law might recognize some pretty fine gradations; perhaps professional race car drivers, when driving clearly marked cars, might be granted greater discretion than would other drivers.

ones who are cognitively rational and morally reasonable, would not apply the law in question to the circumstances the agent confronts. This second sense of over-inclusive repeats the issue addressed in the previous section, namely whether a citizen of an effective liberal democratic state must obey a law that he judges to misrepresent what morality requires of him, say by forbidding him from doing what he believes to be morally permissible. I have argued that morality itself entails the duty to obey the law when one is a citizen of an effective liberal democratic state, even when one believes the law to be mistaken, and I take up the issue again in the next two sections, where I discuss civil disobedience and conscientious objection. In this section, my concern is with over-inclusive laws in the first sense; laws where the propriety of a given law is not at issue, but rather whether those who enacted the law intended it, or if better informed would have intended it, to apply to all the cases to which the law claims to speak.

There is no conceptual difficulty involved in reconciling an understanding of laws as authoritative and the judgment that a given law is over-inclusive in a particular case, and so need not be obeyed. For to judge that a given law is over-inclusive in one's case is simply to judge that the law does not apply to that case, or in other words, that if the legislature knew the specifics of this particular case, it would not require one or anyone else in the same situation to stop at the intersection. Such a judgment entails that there is no need to treat the law as authoritative, or as a content-independent and preemptive reason for action. Instead, the agent can simply consider the first-order reasons for and against the various actions he might take in the circumstances he confronts, and act on his own determination of what the balance of

reasons favors (within the constraints set by other laws that do apply to his case, of course).

Still, actual states do not give their citizens *carte blanche* to determine for themselves whether a law applies to their particular case. Rather, the state itself identifies certain exceptions to its laws, or what is the same, identifies certain cases that though they are similar in many ways to cases where a particular law applies, differ in some respect that the state recognizes as a reason for not requiring compliance with that particular law. An agent who fails to comply with a particular law because he judges correctly that his case is one the state recognizes as exceptional does not *violate* the law. Rather, the state does not require him to obey it, or in other words, the law simply does not apply to him (or any agent in relevantly similar circumstances) (Raz 1979, 24). Note, however, that the state, and only the state, enjoys the authority to determine the exceptions to a given law, *and* to determine whether or not a particular case counts as exceptional (i.e. one where the agent can offer a justification defense for his failure to comply with a particular law or laws). Individual citizens are at liberty to act contrary to a law when they believe their case to be one the state recognizes as exceptional, or would recognize as exceptional were they to become aware of the details of that case. However, citizens incur a liability to the state when they act on such a judgment, a liability to having their decisions reviewed by the state, and may perhaps be found to have erred in judging their case to be an exceptional one. Of course, it does not follow from such a judgment that the individual will be punished; the state may find his mistake excusable. But a judgment

on this matter – whether his mistaken judgment is excusable – is to be made by the state.

Such an approach is consistent with the principles for the general regulation of behavior in circumstances of reasonable disagreement over the design of morally necessary C-institutions that ideal moral agents could not reasonably reject. The alternatives appear to be either forbidding individual citizens from acting on the judgment that their case is one the state recognizes as exceptional, or granting citizens the authority to determine for themselves whether their case is exceptional. The latter approach could surely be rejected on the grounds that it would undermine the very purpose of instituting a D-institution with political authority. Individual agents will surely disagree about what the exceptions to a given law are, as well as whether a particular case qualifies as exceptional. But it is the consequences of these very disagreements, which are nothing more than disputes over the scope of basic moral rights and how best to secure them, that justifies an effective liberal democratic state's claim to authority in these matters (and so the denial of individual authority with respect to them). The former approach, on the other hand, does not adequately address the shortcomings involved in the way modern states do (and almost certainly must) exercise authority. Or at least it does so less well than does an approach that grants individuals the liberty to act on their own assessment of whether a given case is exceptional in some respect recognized by the state, but that also renders them liable to the state's assessment of whether they were right to do so.

Thus far the problem with over-inclusive laws has been treated as a consequence of a primary way in which modern states exercise their authority to settle

disputes over the design of morally necessary C-institutions (and D-institutions), namely the enactment of general laws and regulations. Due to their general form, laws and regulations are inevitably too broad, and thereby fail to recognize morally relevant distinctions. To a certain degree this shortcoming is addressed by explicitly noting exceptions to the law within the law itself. These exceptions specify the scope of the law. But other means can be, and often are, employed to address the deficiencies of general laws and regulations. These include the application of laws to particular cases in courts of law and administrative hearings, and the exercise of discretion on the part of those who are charged with the interpretation and enforcement of the law (e.g. police officers, EPA agents, etc) (Raz 1986, 100-1; Greenawalt 1989). A judge, for example, can know what members of a legislature or administrative agency often cannot know when they enact laws, namely the specifics of a particular case. Note, too, that where the assessment of a particular case calls for certain kinds of expertise in order to understand the relevance of particular facts, the court has access to such expertise, through the use of expert witnesses and amicus briefs. Hence neither the problem raised by the stop sign in the desert case, namely ignorance of relevant facts, nor the problem raised by the pharmacologist, namely lack of expertise, applies to the exercise of authority by a judge who decides a particular case.

Yet those who offer cases like the stop sign in the desert as a challenge to the existence of a general duty to obey the law may complain that the real problem posed by such cases has not been addressed. The real problem arises when the state does not recognize non-compliance with the law in a particular case as justified, but where we judge that the state *ought* to do so. Thus far all of the discussion of over-inclusive

laws has focused on exceptions the state recognizes. But must we always defer to the state's judgment, even when we think it obvious that the state ought to recognize certain cases as exceptional, or even when we think it *unreasonable* for the state to not recognize these cases as exceptional? This last way of putting the question highlights an important feature of the stop sign in the desert case: it is difficult to imagine that there could be any dispute over the form that coordination ought to take in this case. Yet I suspect that in this respect the stop sign in the desert case is a rare exception, and that in most cases where an individual judges a law to be over-inclusive, that judgment will be one over which well-intentioned agents may (cognitively) reasonably disagree.

It is also important to recognize that there may be good reasons to recognize only a few exceptions to particular laws, and to otherwise treat them as a matter of strict liability, even though finer moral distinctions between cases could be drawn. That is, even though morality may recognize that the failure to comply with a given law in a particular case is excusable, the state may have a reason not to recognize a corresponding legal excuse. Considerations of efficiency and the distribution of limited resources are often thought to provide such reasons.<sup>16</sup> It is also possible that recognizing a large number of exceptions to various laws could undermine obedience to law even in those cases to which it does apply, and perhaps even respect for law generally.<sup>17</sup> Keep in mind that citizens of an effective liberal democratic state will be able to act through the existing mechanisms for collective decision-making to modify laws in ways that they believe better approximate what morality requires; by changing the stop sign to a yield, for example. By doing so, while at the same time obeying the

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<sup>16</sup> Similar arguments could be made to justify placing the burden of proof on individuals to show that their decision to violate a particular law was justified.

<sup>17</sup> I thank Judy Lichtenberg for raising this possibility.

existing law, citizens publicly acknowledge that the design of morally necessary C-institutions are to be settled collectively.

Still, perhaps we should grant that in cases like the stop sign in the desert, and perhaps the expert pharmacologist example as well, the law should not be treated as authoritative. Even with respect to these cases, however, the state may still enjoy what I have labeled mere legitimacy; that is, the state may have a protected liberty right to enforce the laws that claim to speak to these cases. Moreover, the duty to obey the law would still apply across a vast range of cases. Importantly, the scope of the duty to obey the law would still be larger than is recognized by philosophical anarchists such as Raz and Morris, who argue that obedience to the state is only justified in those cases where an agent is more likely to act on the reasons that apply to him (independent of the law) by complying with the law than by acting on their own assessment of what the balance of reasons favors. For it seems likely that there will be cases where this condition is not met, and yet so long as it is not clearly unreasonable to comply with the law in those cases, citizens of an effective liberal democratic state will have a duty to do so.

Suppose, however, that we conclude that even in the stop sign in the desert case an agent has a duty to obey the law, meaning that either the agent must comply with the stop sign, or else incur a liability to the state's judgment as to whether non-compliance in his case was justifiable. Is such a conclusion nothing more than rule-worship? While I am sympathetic to those who might think so, I do not think such a conclusion follows. My claim is not that citizens of *any* state must obey the law because it is the law, but rather that citizens of an effective liberal democratic state,

one with a justified claim to political authority, must obey the law. In such a state, obedience to law is a matter of fairness and respect for individual judgment, or the acknowledgment that decisions regarding the design of morally necessary C-institutions must be made collectively, with each participant exercising equal authority in the decision-making process. Thus a person who obeys the law does not worship a rule; rather, she acknowledges her compatriots status as moral agents.

#### IV

Civil disobedience provides a second type of challenge (in addition to over-inclusive laws) to the existence of a general moral duty to obey the law. On the one hand, by its very nature civil disobedience appears to be the denial of the state's authority; that is, it involves a deliberate failure to treat one or more of the state's directives as authoritative. If there is a general moral duty to obey the law, then it appears that civil disobedience necessarily involves the violation of a moral duty. On the other hand, civil disobedience has a venerable place in the history and theory of liberal-democratic government, and the overall attractiveness of a political theory is likely to be greater if it can somehow accommodate such a practice. How might a political theory that includes the account of political authority and obligation defended here do so?

One possibility, mentioned earlier, is to treat the moral duty to obey the state as defeasible, one that can be overruled, outweighed, or trumped, by some other moral duty (and perhaps certain non-moral considerations as well). For example, a defeasible moral duty to obey the law might be defeated by a duty to protest unjust laws; alternatively, civil disobedience may be justified if it is the most effective means

for fulfilling a duty that defeats the duty to obey the law, such as a duty to secure basic moral rights for all.

While a defense of civil disobedience along such lines surely has much to be said in its favor, it is not the strategy for reconciling civil disobedience with a moral duty to obey the state that I shall pursue here. Instead, I shall argue that a RRMC account of the duty to obey the law shows that acts of civil disobedience, or more accurately what I shall call acts of public disobedience, do not violate the duty a citizen of an effective liberal democratic state has to obey the directives of that state. Citizens of such a state have a liberty-right to perform acts of civil (or public) disobedience, though as will become clear below, this right is an unprotected one with respect to the state.<sup>18</sup> If this argument succeeds, then it will not be necessary to treat the duty to obey the law as a defeasible one in order to accommodate acts of civil disobedience (though there may be other reasons to treat the duty to obey the law as defeasible). Furthermore, the conception of civil disobedience I offer makes clear the consistency of such a practice with the very moral arguments supporting a duty to obey the law, namely the need to exercise collective authority in a fair manner, and in a way that respects the individual moral judgment of those who are subject to the authority. With such a conception of civil disobedience, we can make sense of Rawls' claim that civil disobedience "is within the limits of fidelity to law, although it is at the outer edge thereof" (Rawls 1971, 366), while at the same time acknowledging the conceptual truth that disobedience is necessarily infidelity to one or more particular law(s), (i.e. the failure to treat one or more laws as authoritative).

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<sup>18</sup> It is, however, a protected liberty-right against non-state actors (including the agents of other states outside their state's jurisdiction).

Let us begin with a few clarifying distinctions. There are three types of changes in the state's exercise of authority that those who perform acts of civil disobedience may wish to cause. First, the purpose of an act of civil disobedience may be to challenge the way in which a state exercises authority in a given domain, but not the justifiability of the state's claim to authority in that domain. For example, civilly disobedient protests in the United States against the Vietnam War can be understood as aimed at the particular foreign policies pursued by the United States, but not at its authority to determine foreign policy. In addition, public disobedience may be aimed at a government, without being aimed at the authority of the state. Second, public disobedience may be intended to protest the state's claim to authority over a given domain of human conduct. For example, those who protest against laws prohibiting abortion may do so on the grounds that they believe reproductive decisions lie outside the scope of the state's justified authority. Conversely, those who protest *Roe v. Wade* may do so because they believe that the state's authority should include the regulation of abortions (including completely banning them). Third, and finally, public acts of disobedience may have as their aim the complete rejection of a state's claim to authority in *any* domain. Gandhi's acts of public disobedience fit in this category, as do the actions of many citizens in the former East Germany during 1989 (e.g. the daily protest marches around Leipzig's ring road that played a key role in the collapse of the East German state). Public acts of disobedience that fall into this category are rightly labeled revolutions, albeit peaceful or non-violent ones.<sup>19</sup> In what follows, I shall be

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<sup>19</sup> While I have spoken thus far of public disobedience being aimed at a state's claim to authority, it is important to note as well that such acts can be aimed at a state's claim to legitimacy. So for example, while Gandhi surely meant to challenge the United Kingdom's claim to authority over those who

concerned only with civil disobedience that has one of the first two aims identified here.

The phrase ‘civil disobedience’ is ambiguous; it can be used to distinguish non-violent acts of disobedience from violent ones, or it can be used to distinguish what I shall call public acts of disobedience from private ones. I shall treat the deliberate (or negligent) infliction of harm on people, and the deliberate (or negligent) destruction of another’s property, as paradigm cases of violent acts of disobedience; protest marches and sit-ins that block traffic or access to buildings are paradigm examples of non-violent acts of disobedience. Establishing the exact boundaries between violent and non-violent acts of disobedience is unnecessary for my main purpose here.

Public acts of disobedience have as an essential aim the communication of an agent’s beliefs regarding the form that morally necessary collective action ought to take (i.e. the design of morally necessary C-, and D-institutions), and/or the justifiable scope of collective authority. Private acts of disobedience, on the other hand, do not treat the communication of an agent’s beliefs regarding morally necessary collective action as an essential aim. Of course, a private act of disobedience *may* also serve to communicate an agent’s beliefs regarding what morality requires (of her, and perhaps others as well), but what is important is that the agent does not act as she does because she *intends* that her action should have this consequence. Rather, a person who performs a private act of disobedience does so because she believes that she must do

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resided in India (and Pakistan and Bangladesh), there is no doubt that he also meant to challenge its claim to mere legitimacy (i.e. its protected liberty right to make and enforce laws).

what she believes morality requires, regardless of what the law says, or because she will gain some self-regarding benefit by her act of disobedience.<sup>20</sup>

Public acts of disobedience, in the sense I mean here, are public in the sense that they are done with the intention of serving as a form of public address, or of address to the “public,” i.e. those who collectively exercise authority over the design of the morally necessary C-institutions through which they fulfill their natural duties to respect the basic moral rights of all. Indeed, perhaps more than any other act of political communication, public disobedience addresses the citizenry at large as well as their agents and/or trustees (i.e. those who hold offices in the state). It is not clear, however, that the essentially communicative purpose constitutive of public acts of disobedience entails that such acts may never be violent. For example, the destruction of a piece of public property may be justified, where that destruction has largely symbolic import, the destruction does not endanger others or impose an excessive cost on the state, and those who commit the act submit to the penalties for their actions imposed on them by the state. In any case, I shall focus exclusively on non-violent acts of public disobedience.

We said earlier that there is an apparent conflict between civil disobedience and a moral duty to obey the law. It is now possible to refine this opposition and so reveal the conflict to be only apparent. I contend that citizens of an effective liberal democratic state have a duty to forbear from *private* acts of disobedience, a duty that correlates to the state’s power-right to settle for its citizens the form that their participation in morally necessary C-institutions must take. However, citizens of such

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<sup>20</sup> Note that a self-regarding benefit need not be a self-interested one; it could be, for example, a benefit to one’s child or friend.

a state retain an unprotected liberty-right against the state (and a protected liberty-right against private individuals) to perform acts of *public* disobedience. That is, an effective liberal democratic state does not have a claim against its citizens that they refrain from acts of public disobedience, but neither do citizens have a claim right against the state that it refrain from interfering with their attempts to perform acts of public disobedience (as, for example, they have a claim right against the state from interfering with their performance of (most) religious ceremonies). Note that an understanding of civil disobedience in terms of an unprotected liberty-right to publicly disobey the law differs importantly from the view of certain philosophical anarchists who, while they deny that the law must always be treated as authoritative, do acknowledge that states are often justified in enforcing the law. Such theorists, including Raz and Morris and Buchanan, believe that many private acts (as well as public acts) of disobedience are justified, while on the account defended here, only public acts of disobedience are justified.

Not only must citizens of an effective liberal democratic state recognize the state's liberty right to interfere with acts of public disobedience, they also have a moral duty to accept the penalties handed out by the state, and to treat its directives in this respect as authoritative. That is, the fact that an agent's state is an effective liberal democratic one, and that it imposes a fine on him for his public disobedience, provides that agent with a preemptive reason to pay the fine. By treating the state's assignment of a penalty as an authoritative directive, an agent who performed an act of public disobedience expresses a commitment to the fair, collective, exercise of authority to determine the design of morally necessary C-institutions that, in her action, she

appears to deny. Her acceptance of a penalty for acting in ways that others are not permitted to act is a price that symbolically at least (and oftentimes actually as well) negates any personal advantage the agent gains, or might be thought to gain, from her disobedience. By treating the directive specifying that penalty as authoritative, the publicly disobedient person makes clear both the essentially communicative purpose of her action, and the strength of her belief that one or more of the state's laws, policies, or institutions fails to mirror (or at least sufficiently approximate) what morality requires.

Most acts of public disobedience aim to inspire changes in law or policy via already existing mechanisms for political change. Publicly disobedient citizens hope that their compatriots will reconsider, or consider for the first time, the arguments against a particular policy pursued by the state, and so act through the available formal and informal mechanisms to alter or revoke that policy. The exercise of authority remains in the hands of the citizens and their agents or trustees; publicly disobedient agents do not usurp that authority in the way that those who commit acts of private disobedience do. Moreover, public disobedience is generally, and I would argue properly, recognized as appropriate only after citizens have tried various legal mechanisms for contesting a law or policy, a presumption that can be overruled only in cases where the immorality of the law is so great and/or its consequences are irreversible and irreparable that the time necessary to seek legal recourse simply cannot be taken (Rawls 1971, 373). In short, despite the impression created by the deliberate violation of one or more laws, those who commit acts of public disobedience display respect for others' individual moral judgment in two ways. First,

they disobey the law only as a means for communicating their beliefs (and the strength thereof) regarding the form that morally necessary collective action ought to take, an exercise that assumes that those who are being addressed can and do make moral judgments on this issue. Second, publicly disobedient citizens remain committed to enacting changes in law or policy via persuasion, conversation, and reasoned argument, together with the existing mechanisms for producing collective decisions on the basis of individuals' judgments, rather than seeking to bypass those mechanisms in an attempt to act as they believe morality requires.

Does the understanding of public disobedience defended here entail that an effective liberal democratic state would be morally justified in always attempting to bring to an end acts of public disobedience as soon as they occurred? Yes it does, but it is not clear that this should bother us. For surely it is not the case that the state can use just any means to prevent such acts. Moreover, as with common crimes, or private acts of disobedience, there are strict limits on the state's liberty to act preemptively in order to prevent a violation of the law. But perhaps most importantly, though an effective liberal democratic state may have a right to interfere with every act of public disobedience, it is almost certainly unwise for it to exercise this right as aggressively as it could justifiably do. So long as those who perform acts of public disobedience do so in ways that make clear their commitment to fairness and respect for moral judgment, say by refraining from violence and accepting the state's enforcement of its laws, both officeholders in the state and the citizenry at large are unlikely to seek to exercise the right in question as aggressively as they might.

Earlier I claimed that an agent might perform an act of civil disobedience in order to challenge the policy pursued by the state in a given domain, but not to challenge the state's authority to determine what policy should be pursued in that domain. But how can an agent recognize the state's right to settle disputes in a given domain, but reject the exercise of that authority? Is this not to say that (a) whatever settlement the state issues in that domain is to be treated as authoritative, but (b) this particular settlement S ought not to be treated as authoritative? It is now possible to resolve this apparent paradox. To say that an agent has a duty to acknowledge the state's authority in a given domain is to say only that he is morally forbidden from committing acts of private disobedience. The agent retains, however, an unprotected liberty right to perform acts of public disobedience in order to foster dialogue over how the state is currently exercising authority in that domain. There is no contradiction, then, in an agent's claim that only the state has the authority to settle questions in domain D, and at the same time to publicly disobey the settlements issued by the state in that domain.

If successful, the arguments of this section establish the following points. First, acts of public disobedience do not involve a violation of the duty to obey the law, for an effective liberal democratic state's claim to authority correlates only with a duty on citizens to refrain from private acts of disobedience. Citizens are at liberty, however, to commit public acts of disobedience; that is, to communicate to others, through the violation of laws, their beliefs regarding the moral acceptability of the state's exercise of authority. There is no need, therefore, to treat the duty to obey the law as a defeasible one in order to account for the justifiability of disobeying the law.

However, the liberty right to perform acts of public disobedience is not a protected one, which entails that the state has no duty to forbear from interfering with, and bringing to an end, acts of public disobedience. Moreover, citizens of an effective liberal democratic state have a duty to treat as authoritative directives issued by the state specifying the penalties for public disobedience. Doing so is necessary in order to demonstrate the respect for the fair exercise of political authority that underlies the duty to obey the law, and so that appears to be denied by those who disobey it. Additionally, because public disobedience is still essentially a form of communication concerned with how political authority ought to be exercised, and not an attempt to usurp that authority, it is consistent with the duty to respect other's moral judgments. In short, insofar as public disobedience involves a concern for fairness and respect for individual moral judgment, it has the same moral foundation as does a duty to obey the law, and so it should come as no surprise that the two are fully compatible.

## V

Participation in morally necessary C-institutions pervades the lives of those who live in modern liberal democracies (and most other types of states as well). Given deep disagreement over the design of such institutions, it is likely that at least occasionally individual citizens will be required by law to act in ways that they believe to deeply conflict with what morality truly requires. Even an agent who takes seriously the requirement of fairness that authority over collective actions be exercised collectively, and in ways that respect each citizen's judgment regarding the form collective action should take, may judge a law to be so at odds with morality, or so

unreasonable, that he simply cannot comply with it. Morally speaking, what should such an agent do?

One course of action this agent might adopt is the performance of public acts of disobedience aimed at convincing those with authority, usually his fellow citizens and their agents or trustees, to adopt an alternative policy or law, one that does not conflict, or conflicts less, with what the agent believes morality requires. Yet on some, and perhaps even many occasions, an individual citizen will be unable to convince enough others of what he believes to be the state's errors to make changes even remotely likely. Does it follow, then, that such a citizen must either obey the law (of an effective liberal democratic state), or else practice hopeless acts of public disobedience? It does not, for such an agent has recourse to a third option, that of conscientious objection.

It is not immediately obvious how a political theory that includes a moral duty to obey the law can accommodate a practice such as conscientious objection. Raz claims that conscientious objection "involves showing that a person is entitled not to do what it would otherwise be his moral duty to do simply because he wrongly believes that it is wrong for him to do" (Raz 1979, 277). It may be that the practice of conscientious objection can be understood in terms of individual rights (or entitlements), but before I consider such an approach, I first wish to elaborate an understanding of conscientious objection as the offering of an excuse.

The paradigm case of conscientious objection arises when the law requires someone to act in ways that conflict with his or her deeply held moral or religious commitments. Sometimes the agent who conscientiously objects to a particular law

will do so on the grounds that the law makes it impossible for him to live the way of life he finds valuable and meaningful, while admitting that this way of life is not the only worthwhile one. More often, however, a conscientious objector claims that the law requires an action that is intolerably wrong, so that were he to comply with the law, he could no longer bear to look at himself in the mirror.<sup>21</sup> From the state's perspective, however, the agent's belief that compliance with a law would be intolerably wrong is akin to the claim the law interferes too greatly with his religious observance, or with any other aspect of the way of life that agent finds valuable and meaningful. Indeed, I suspect that some conscientious objectors might interpret their action in the same way; though they believe that it would be deeply immoral for anyone to act in the way that the law requires, the appeal for recognition by the state as a conscientious objector is a plea that *at least they* should be excused from having to comply with the law. So while an act of conscientious objection may also be an act of public disobedience, intended to communicate an agent's belief that it would be intolerably wrong for anyone to comply with a particular law (or support a particular policy), it is not essential to conscientious objection that an agent has this intention. Conscientious objection is essentially a plea for accommodation, rather than for change.

The conscientious objector recognizes the state's authority over him, its right to command some behavior from him, but he offers as an excuse for his non-compliance the blow that such behavior would inflict on his ability to lead an acceptable way of life. Though the individual may interpret "an acceptable way of

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<sup>21</sup> This is not to say that the *reason* why complying with the law would be wrong is that he would not be able to look at himself in the mirror. Rather, it is because the action is intolerably wrong that the conscientious objector would not be able to look himself in the mirror.

life” as involving adherence to the true dictates of morality, the state interprets this phrase to mean a way of life the agent finds valuable and meaningful. As the point is sometimes put, individuals may advance claims about the good life and morality that they believe to be absolute and universal truths, but an effective liberal democratic state must treat those claims as “mere” interests or preferences. Importantly, the state’s acceptance of a conscientious objector’s plea for an exemption from participation (or certain kinds of participation) in a morally necessary C-institution does not rest on a judgment of the truth of the moral or religious claim that motivates the plea. Rather, it rests on a judgment of the cost to the objector’s ability to lead the way of life he finds acceptable, *given* his belief that a certain moral or religious claim is true, and the cost to other citizens of their leading the lives they find worthwhile if the objector is excused from compliance with the law.

The conception of conscientious objection as a type of excuse is important because unlike justifications, excuses are not denials of the moral impropriety of one’s actions, but rather an assertion that one ought not to be blamed or punished for one’s actions. Though one’s non-compliance with the law may appear to express disrespect for others, namely the assertion of a right to determine the distribution of burdens and benefits involved in some collective action, the claim that one is a conscientious objector is intended to deny this appearance, just as the claim that one tripped is meant to deny the appearance of intending to inflict bodily harm on the person with whom one collides. Still, conscientious objectors should be willing to accept certain restrictions on their liberty, at least if these are necessary for the state to ensure the sincerity of a conscientious objector’s claim. A willingness to do so, like the

willingness of a civilly disobedient person to accept punishment for his violation of a law, expresses an agent's willingness to accept some burden not imposed on others in order to make up for the burden that others bear, but from which the conscientious objector wishes to be exempt. In addition, the conscientious objector demonstrates respect for individual judgment by appealing to the state for an exemption from a particular law, rather than simply abrogating to himself the authority to determine that obedience to that law is unnecessary.

Even conscientious objection has its limits, however. An effective liberal democratic state should recognize that its exercise of authority may on occasion conflict with the most deeply held beliefs of some of its subjects, and so seek to accommodate those subjects. However, this accommodation extends only to cases where the law requires that its subject's contribution to the operation of a morally necessary C-institution take a particular form. It does not include permission to treat people in ways that it would be morally reasonable for them to reject; that is, the state need not accommodate a person's commitment to violating other's basic moral rights. The acknowledgment of conscientious objectors sets no precedent for the accommodation of agent-relative reasons that require the violation of other's basic moral rights, such as a religious belief in the sacrifice of children.

Thus far I have described conscientious objection as an excuse, a plea for understanding or mercy on the part of the conscientious objector addressed to those he recognizes as having a justifiable claim to authority over him with respect to a certain sphere of conduct. But might conscientious objection be understood instead in terms of an individual right against the state? Perhaps, though I have two reservations about

doing so. First, it seems to me that a right to conscientious objection is recognized only in those cases where it would be reasonable for others to curtail their demands on an agent in order to accommodate his living the way of life he finds to be valuable and worthwhile. So for example, our willingness to recognize an agent as a conscientious objector depends on our belief that complying with the law really would make it impossible (or nearly impossible) for him to look at himself in the mirror, and that he is not just appealing for status as a conscientious objector so that he can enjoy the benefits without sharing in the burdens. But then it becomes difficult to distinguish between a right to conscientious objection and a right to religious freedom (or more broadly, freedom of conscience). Treating conscientious objection as an excuse draws such a distinction, however. For unlike in the case of a claim regarding the right to religious freedom, a conscientious objector does not deny that he is under a duty, but instead appeals to the relevant authorities to excuse him from it.

There are surely limits on the right to religious freedom (or freedom of conscience), and it is equally certain that there will be disagreement over what exactly those limits are. Addressing such disagreements is morally necessary, I have argued, and the morally justified way to do so is via the institutions of an effective liberal democratic state. Such a state already seeks to accommodate each individual's preferred way of life as much as it can, which brings us to the second reason I am inclined against an understanding of conscientious objection in terms of rights. What could justify an individual's claim that an effective liberal democratic state has a duty to accept *his* judgment regarding the scope of a given law, specifically that it should not apply to him? So far as I can see, nothing can justify such a claim, and so I

conclude that conscientious objection in an effective liberal democratic state is better treated as a plea for release from a law one has a duty to obey than as a claim-right against the state that it defer to the individual's judgment regarding what morality requires. But what if, for example, the state refuses to accept an agent's plea for conscientious objection? Well, contemporary liberal democracies already do so on occasion; for instance, denying conscientious objector status to Jehovah's Witnesses who believe that it is morally impermissible for their children to undergo blood transfusions, even when they will die without them. I do not deny that being forced to act in ways that one believes to be deeply immoral is a terrible fate. All that I deny is that it follows from such a claim that an agent has a claim-right against all other individuals, whether individually or collectively via the institutions of the state, that those individuals never compel him to act in ways that he believes to be (deeply) immoral.

## VI

If the above arguments are successful, then it remains only to show that a RRMC defense of political obligation meets the criterion of particularity in order for it to qualify as a successful account of political obligation. Borrowing loosely from some recent articles by Samuel Scheffler (Scheffler 2001), I suggest that the particularity challenge to duties of citizenship may be advanced from two distinct ethical perspectives: that of the voluntarist, and that of the cosmopolitan. The voluntarist wonders how it is that an individual can simply find himself subject to the authority of a particular state, without having done anything to acquire such an obligation. Even if moral agents have a natural duty to support just institutions, the

voluntarist points out, this will not justify any particular just state's claim to authority over its citizens, or a correlative duty to obey the directives issued by that state, rather than another one. Indeed, the natural duty to support just institutions does not entail that agents ought to treat the directives of *any* state, even a perfectly just one, as authoritative (i.e. content-independent and preemptive). However, the failure of such a duty to do either of the aforementioned tasks may actually count in its favor, for the claim that individuals may simply find themselves subject to the authority of another agent strikes some philosophers as incompatible with respect for individual autonomy, or self-determination (Wolff 1998 (see Shapiro 2002 for discussion); Simmons 1979 (see Scheffler 2001, 71-73 for discussion)). The voluntarist's understanding of particularity therefore poses two challenges to any natural duty account of political obligation, including a RRMC one. First, such an account must demonstrate that a natural duty approach can explain not only why moral agents ought to treat *some* state's directives as authoritative, but also why they ought to treat *only* the directives issued by that state of which they are citizens as authoritative, rather than those issued by some other just state. Second, a natural duty justification for the state's authority must show that an individual's non-voluntarily acquired subjugation to an authority is consistent with respect for individual autonomy.<sup>22</sup>

The second perspective from which to advance a kind of particularity argument against a RRMC account of political obligation is that of the cosmopolitan. Here, though, the issue is not why an agent has political obligations to one state rather than

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<sup>22</sup> One might also attempt to defend the view that one need not respect individual autonomy, though I know of no one who adopts such an approach. Even those who criticize the notion of autonomy defended by so-called atomistic individualists do not deny the importance of respect for autonomy, but instead seek to re-conceptualize it in ways that make it compatible with authority or duties that they believe their opponents wish to deny. See for example, Hirschmann 1989; 1992.

another, but rather how it is that a natural duty can give rise to a duty to obey a state with the particular borders that contemporary states have, namely ones that are historically contingent and in many respects morally arbitrary. Unlike the voluntarist, the cosmopolitan does not challenge the conceptual coherence of a natural duty account of political obligation, but only the applicability of such an account (or at least a RRMC one) to contemporary states, or anything remotely like them. Though this is a significant distinction between the two objections, I group them together because both focus on the seeming moral arbitrariness of birth within some set of jurisdictional boundaries to object to a natural duty approach to political obligation.

I begin with a response to the voluntarist. It may appear to be contradictory to conclude that respect for autonomy can require one to accept the authority of some other agent to determine what form one's participation in a morally necessary C-institution must take. While it would not be contradictory for an agent to *grant* someone else this authority, as this can be understood as the exercise of one's autonomy, it does seem strange to say that some agent, such as an effective liberal-democracy, can simply have authority over one independent of one's will. But insofar as such a state's claim to authority is one that an ideal moral agent could not reasonably reject, and respect for autonomy simply consists in treating people in ways ideal moral agents could not reasonably reject, there is no contradiction between individual autonomy and a liberal democratic state's claim to have authority over him independent of any willing on his part. Thus a person may simply find himself subject to the authority of a state, as do those who are born in such states.

However autonomy is defined, it will presumably not count as a violation of an agent's autonomy that he is not permitted to commit murder. Even autonomous individuals lack the authority to do certain actions. RRMC gives an account of the limits of individual authority: a suitably motivated moral agent, one who adopts the view from everywhere, will recognize from the standpoint of others that they could reasonably reject actions justified by appeal to a particular principle. This recognition, together with his commitment to acting only on principles that ideal moral agents could not reasonably reject, will lead him to reject acting on such a principle. The arguments of this chapter and the previous three purport to derive from RRMC an agent's duty of obedience to the effective liberal democratic state of which he is a citizen. If it succeeds, then just as the derivation of a prohibition on murder from RRMC does not count as a violation of an agent's autonomy, so too the derivation of a duty to obey the state from RRMC entails that such a duty does not violate an agent's autonomy.

It appears, then, that a RRMC account of political obligation provides a simple answer to the question of particularity: an individual must acknowledge the authority of the particular state in which he is born, so long as it is an effective liberal-democracy, because he has a natural duty to participate in morally necessary C-institutions, and he cannot reasonably reject the authority of a liberal-democratic state to settle for him and other members of the state the form that their participation in those institutions must take.<sup>23</sup> The situation here is really no different than that in which a person has a natural duty to save someone drowning in a shallow pool; in both

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<sup>23</sup> Waldron presents a similar argument for this conclusion (Waldron 1998, 293).

cases, when particular circumstances obtain, the agent simply finds himself with a natural duty to act in certain ways.

Though citizens need not acquire an obligation to obey the authority of the state in which they are born (so long as it is an effective liberal-democracy), that state must not prevent them from exercising a right to forgo the citizenship with which they simply find themselves. A right to exit, then, will be among the conditions any state with a justifiable claim to political authority must meet. Note, however, that the state's authority over its citizens does not depend on the cost of exit being low enough that an agent's decision to stay or leave can plausibly be thought to be voluntary, as it would have to be for a successful tacit consent argument for political obligations. The right requires only that a legitimate state forbear from erecting unreasonable barriers to exit.<sup>24</sup> Though the cost exit from a state imposes on one's ability to act on the agent-relative reasons one has may be extremely high, this need not be the result of a barrier the state imposes, but simply the result of living in a different locale. Similarly philosophical anarchists point out that a person may choose to remain within the jurisdiction of a given state because he views it as the least bad of the illegitimate states in which he might live, but that such a decision does not confer any authority upon that state. While such an objection does pose a problem for fair play and implicit consent accounts, it does not reach a RRMC defense of political obligation. On the latter view, a state has authority just if it meets certain conditions such that ideal moral agents could not reasonably reject its authority to settle disputes over the design of morally necessary C-institutions. Though an agent may prefer an alternative design

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<sup>24</sup> I pass over important questions regarding the kind of barriers to exit an effective liberal-democracy might impose, such as whether the state might demand repayment for at least some of the resources it has spent on the agent who wishes to leave.

for the C and D-institutions that together constitute the state, this preference does not provide a justification for him to deny the authority of the effective liberal-democratic state that has jurisdiction over him.

It should be noted that any account of political obligation grounded solely in the *substantive justice* of a state falls afoul of the voluntarist's particularity challenge.<sup>25</sup> So for example, the natural duty to support just institutions (assuming there is one) does not entail that an individual stands in any morally significant relationship to his own just state that he does not stand in with respect to any other just state. Of course, there may be contingent instrumental reasons for his support of just states to take the form of compliance with many of the laws of his own state rather than those of some other just state. But at times it may be that he could best fulfill his duty to support just institutions by sending the money he would pay in taxes to some other state, say one whose just institutions function more efficiently. Similarly, a person might choose to adhere to the regulations for use and production of drugs in a state other than the one that claims him as a citizen, if he believes them to be more just than the regulations of his own state. Substantive justice, then, will not suffice to explain why it is that citizens ought to treat the directives of their own state as authoritative.

A RRMC account of political obligation avoids this difficulty because the state's authority depends not merely on its substantive justice, but also on its procedural justice. Any state with a justified claim to moral authority over its subjects must secure a certain amount of substantive justice insofar as it must respect their

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<sup>25</sup> As M.B.E. Smith states, "to show that one government is better than another, or even to show that it is the best possible government, does not prove that its subjects have a *prima facie* obligation to obey its laws" (Smith 1998, 88).

basic moral rights. However, given disputes over the specification of those rights and how best to secure them, the authority of the state also depends on its meeting certain procedural standards for the settlement of such disputes, most importantly the inclusion of a democratic element in the procedure by which settlements are determined. The failure to comply with decisions reached via such procedures, I have argued, is unfair and displays a lack of respect for other's moral judgment. Agents cannot, therefore, simply choose to comply with the laws of whatever state they believe best approximates the requirements of morality, or substantive justice. Rather, they must either persuade the others with whom they participate in various morally necessary C-institutions to change the laws that structure the institution, or else leave the jurisdiction of that state (all of this on the assumption that the state is an effective liberal-democratic one). Note, too, that it is not acting according to *any* laws that were enacted in ways that were procedurally just that matters. Rather, a citizen of an effective liberal-democracy must guide his interactions with his fellow citizens, those with whom he participates in morally necessary C-institutions and who are governed by the same D-institution, in accordance with the procedurally just directives that *they* have collectively arrived at, via mechanisms for settling *their* disputes that could not be reasonably rejected.<sup>26</sup>

Turn, now, to the cosmopolitan's particularity objection: Even if we grant that agents have certain duties simply in virtue of being members of a liberal-democratic state, why should the state have the particular borders that it does? Rather than ask "why this particular state rather than an equally or more just state," we might ask

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<sup>26</sup> There is some affinity between the argument here and Waldron's distinction between insiders and outsiders with respect to an institution that administers a principle of justice. See Waldron 1998.

instead “why a state with these particular borders, rather than a global state, or different jurisdictional sizes for different kinds of collective actions instead of a one size fits all state for all morally necessary collective actions?”<sup>27</sup> The cosmopolitan’s particularity challenge may seem especially apt given that the initial steps in a RRMC defense of political obligation focus on duties that all moral agents as such owe to one another, and the need for collective action in order to fulfill these duties. Such a foundation would seem to lead naturally to a justification for a global state, or at least to the development of jurisdictional borders on instrumental grounds having to do with efficient and effective collective action, rather than the historically contingent, arbitrary, and sometimes immorally created or imposed borders of present day states. But if the borders of contemporary states cannot be morally justified, then how can it be that those who fall within the jurisdiction of a state, even an effective liberal-democratic one, have a duty of obedience to that state? For surely the citizens of a poor country could reasonably reject the current international boundaries on the grounds that alternative, non-utopian, boundaries would make it more likely that all moral agents enjoy their basic moral rights.

My response to the cosmopolitan challenge is twofold. First, I wish to acknowledge its truth. Ideally, the jurisdictional boundaries of various C and D-institutions ought to depend on calculations of efficiency and effectiveness in securing basic moral right, and so present boundaries ought to be subject to revision in light of their moral inadequacy. The result may not be a global state; the need for solidarity among those who participate in C and D-institutions to make them function as effectively and efficiently as they might, and the need for local knowledge and control,

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<sup>27</sup> For a clear development of these objections, see O’Neill 2000, 168ff.

are two reasons to think that a global state may not be the morally best method for acting collectively. Yet we may concede this point while still defending the claim that existing jurisdictional boundaries ought to be modified in various ways. Given such a concession, however, a second question must be addressed: does it follow from the truth of the cosmopolitan objection that contemporary liberal-democracies lack the authority they claim over their subjects? The argument that such a conclusion does not follow makes up the second component of my response to the cosmopolitan objection.

Surely many citizens of developing world countries could reasonably reject many citizens of developed world countries doing nothing more than paying their taxes in order to see to it that others enjoy their basic moral rights.<sup>28</sup> Or at least this is so insofar as the latter could do more than they currently do, without greatly reducing the freedom they have to act on agent-relative reasons, to ensure that those who live in third-world countries enjoy their basic moral rights. So for example, many citizens of wealthy liberal-democracies ought to lobby their political leaders to pursue policies that contribute to this end (Goodin 1985, 163-164), such as greater foreign aid in the form of expertise, debt-relief, assistance with basic medical issues such as immunizations and clean water, and lower trade-barriers on agricultural products and other goods.<sup>29</sup> Fulfillment of the natural duties that correspond to basic moral rights

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<sup>28</sup> I say “many citizens” of both developed and developing world countries because there are some in the latter who do enjoy their basic moral rights, while there are some in the former who could not dedicate any time or resources to helping those in developing world countries without sacrificing their opportunities to act on the agent-relative reasons that make their lives valuable and meaningful.

<sup>29</sup> I suspect that many people treat the claim that citizens of developed world countries ought to lobby their political leaders (and in general become more political active) as an easy out, less burdensome surely than, say, giving away a significant portion of one’s income and savings. I have not claimed that becoming politically active entails that one need not also give away part of one’s income, but more importantly, I wish to contest the claim that the latter course of action is more burdensome. After all, it

could also take a more direct form, such as service in poor parts of the world, or contributions to NGOs that seek in various ways to secure basic moral rights. Nor should the object of such action be restricted to non-citizens, at least insofar as some developed world states fail to enact the laws and policies necessary to secure the basic moral rights of their own citizens, at least as well as they might. But while it would be reasonable to reject many first-world citizens' doing no more than they currently do to secure others' basic moral rights, it would not be reasonable to demand that they violate the laws of the state in which they are citizens in order to do so. The reason is a familiar one. A person who violates the law, say one that requires the payment of taxes, asserts the authority to determine the design of a morally necessary C-institution. The other participants in the institutions funded by taxes levied on all could reasonably reject the authority exercised by the law-breaker, even if they fail to correctly identify the content of their duties to non-citizens. For remember, actual agents are certain to disagree as to what morality requires, and the scope of this disagreement extends not only to what is owed to one's fellow citizens, but to all moral agents. So long as the procedure for settling such disputes meets the minimal standards defended in the previous chapter, RRMC requires that any agent who wishes to change the policies pursued by his state with respect to non-citizens confine himself to the existing political mechanisms, civil disobedience, or conscientious objection.

Yet surely there must be some cases where the rights violations non-citizens suffer are so great, and the response of one's state so inadequate, that the duty to obey

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takes little time to write a check, but a significant amount of time, sacrifice, and effort to organize one's fellow citizens and to engage with them in on-going debates over the policies the state ought to pursue. And of course one may fail to convince others of the correctness of one's view, while the likelihood of an equivalent failure in parting with one's money is much less.

the law, to treat one's fellow citizens fairly and to respect their moral judgment, must be outweighed by the duty to secure others' basic moral rights. Perhaps it should be admitted that such circumstances may occasionally arise, but then such an objection will apply equally to all accounts of political obligation. Defenders of voluntarist accounts do not assert that political obligations always trump natural duties, nor do any but the most parochial defenders of relational duties. There may be some difference of opinion as to exactly how bad the violations of non-citizens' rights must be before the duty to prevent those violations trumps one's duties as a citizen, but I suspect that any theory will allow room for its defenders to disagree on this question.

From a practical point of view, the fact that acting effectively to secure others' basic moral rights will almost always require state action also provides a weighty reason to refrain from violating the law even when one believes that doing so would better secure the rights of non-citizens. By themselves, most individuals are powerless to effect long-term change, and NGOs are likely to provide little more than a stopgap solution to rights violations; only states can ensure the rule of law necessary for securing basic moral rights (Goodin 1985, 163). Even in cases where the duty to secure others' basic moral rights trumps one's political obligations, then, it might be prudent to obey the law, insofar as the failure to do so will likely make it more difficult to convince one's fellow citizens to alter the current policies of one's state.

## VII

As I argued in the first four sections of this chapter, the duty to obey the state's directive provides a content-independent and preemptive reason for action. A citizen of an effective liberal-democratic state must comply with the directives it issues

because the state possesses certain qualities, not because of the content of the directives it issues. The agent lacks the authority to act on his own assessment of what morality, or the balance of reasons, requires of him in a particular case. Importantly, what is surrendered is not the agent's judgment of what it would be best to do (morally or rationally), nor the ability to act on that judgment, but rather his authority to treat his own judgment as the standard for the moral evaluation of certain actions, namely those that constitute participation in morally necessary C-institutions.<sup>30</sup> Should a citizen of an effective liberal-democracy act contrary to the state's directives, within the scope of the state's justified authority, then he owes a justification to the state (or the relevant state agent) for his disobedience, and has a duty to accept the state's judgment as to the propriety of his action. Such a possibility is consistent, however, with an agent's recognizing the law requiring a particular action as a preemptive reason for action.

A RRMC account of political obligation also justifies the generality and universality of political obligation, at least in an effective liberal-democratic state. The duty of obedience applies to all those directives that the state has the authority to issue, including those that apply to cases where the individual agent is better situated to determine what morality or the balance of reasons requires than is the state. As I indicated, however, the duty to obey the state's directives does not require obedience to the law on every occasion, but only the acknowledgment of the state's authority to determine what an agent ought to do on every occasion (again, within the scope of its

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<sup>30</sup> The notion that an agent "surrenders" his judgment comes from the notion that the state's authority depends on the volition of those it rules, in the form of consent or fair play. According to RRMC, actual agents do not surrender their judgment; rather, they simply lack this authority when certain conditions are met.

justified authority). Law is an imperfect mechanism for the exercise of this authority, and so it must be supplemented in the ways described above. But to do so does not entail that one must deny the generality of the duty to obey the state's directives. As for the universality of the duty in question, it follows naturally from the universal foundation of an RRMC account of political obligation. All moral agents, in virtue of their status as such, have a duty to participate in morally necessary C-institutions, and when citizens of an effective liberal-democracy (and within its jurisdiction), to adhere to the settlements issued by such a state.

The requirement of particularity poses the greatest challenge to a RRMC account of political obligation. The voluntarist's objection – why obedience to the state I simply find myself in (i.e. the one I was born in), rather than any other – can be met easily enough. Yet a defender of the RRMC account must acknowledge the truth in the cosmopolitan's objection, namely that the particular borders of any existing state are unlikely to match those that would be drawn in an effort to most effectively and efficiently secure the basic moral rights of all. Given that it is the duties that correlate to these rights that play a foundational role in a RRMC justification for political obligation, this objection presents a serious challenge. In response, I argued that while the cosmopolitan succeeds in demonstrating the need to modify existing jurisdictional boundaries, he or she does not show that the problems with existing international boundaries entails that citizens of effective liberal-democratic states have no duties of citizenship. At best, all that follows is that the duties of citizenship will more often be overridden by the natural duties to secure basic moral rights than would occur in a world with morally superior jurisdictional boundaries.

Much work remains to be done in defense of a RRMC account of political obligation. It is my hope, however, that in light of the arguments set out in this thesis, the reader will accept the following two claims. First, *if* any account of political obligation can successfully demonstrate that citizens of at least some modern states, or states not that different from them, have duties in virtue of their citizenship, that account must adopt a Moral Contractualist, natural-duty, approach, rather than an acquired obligation or relational duty one. Second, even if the RRMC account defended here does not satisfy in all respects, there is still reason to believe that a Moral Contractualist account can overcome some of the obstacles, such as the particularity challenge, that its opponents have traditionally raised to it.

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