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RECIPROCITY AND THE STATE
A LIBERAL THEORY OF LEGITIMACY

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Abstract

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Under which circumstances is the state morally allowed to enact and uphold laws by the use of force against its citizens? This is the problem of legitimacy. In this thesis I develop and defend a theory of legitimacy based on reciprocity. The fundamental idea is that we should aim to establish a state which can be accepted by all reasonable people. Reasonable people are those who abide by the idea of reciprocity. I defend this theory, which I call the reciprocal theory of legitimacy, against rival theories, and argue that reasonable people can hold incompatible ideas about legitimacy. This means that we should not expect any state to be accepted by all reasonable people, and thus to be fully legitimate. The implications of this conclusion have not been fully explored in previous work. Drawing on a distinction proposed by A. John Simmons, I claim that while the state may not be legitimate, it may still be justified, since it is better for existing states to continue to function, rather than to cease to exist. This means that the fact that the state cannot be legitimate does not mean that the state should be abolished. Instead, I argue that we should aim to maximise legitimacy by identifying and removing particularly pressing causes of illegitimacy. In the final chapter, I identify some areas where political action may increase legitimacy: public reason, political participation, welfare, and trust.

Keywords: legitimacy, justification, reciprocity, reasonableness, John Rawls, public reason, authority, trust

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Introduction

The problem of legitimacy, loosely described, is intuitive enough. The state enacts laws and other regulations and exercises force in order to carry them through. Anyone who disobeys those laws is threatened with the use of force and the pain of sanctions of various kinds. In our ordinary lives, exercising force in order to make others obey us seems in most cases to be morally wrong. Why is the state then morally allowed to do this, if indeed it is? How, in other words, can the state be legitimate?

I will begin Chapter 1 by *constructing* the concept of legitimacy. I will do so by viewing legitimacy as a specific case of a more general concept, *reciprocity*. A reciprocal relationship is one where we perform certain actions on the expectation that others will perform certain actions in return. By entering into society with others, and by cooperating with others to our mutual advantage, we acquire a duty to make sure that the benefits of that cooperation are distributed in a fair manner.

The presence of the state changes the nature of our social cooperation. The state uses force to uphold rules that govern our interaction with each other. Those who exercise power via the institutions of the state have a duty to make sure that this power is exercised in accordance with the idea of reciprocity. I draw upon a distinction, proposed by A. John Simmons, between *justification* and *legitimacy*. A state is justified when it is better that it continue to exist than that it cease to exist. A state is legitimate when it has the right to enact and uphold regulations by the use of force against its citizens. I associate the concept of legitimacy with reciprocity: a state is legitimate if those who exercise power via the state do so in accordance with reciprocity. The question then is what is required for this to be the case.

The fundamental idea, which I call *the reciprocal theory of legitimacy*, is that the state is legitimate only if it exercises its power on terms that are accepted by all reasonable people. A reasonable person is someone who abides by the norms of reciprocity. I will first argue that the reciprocal theory follows from reciprocity: since we would accept nothing less than that the state be acceptable to us, we have a duty to make sure that others can accept it too. However, I then present some objections which show that the argument must be revised. Firstly, our duty to accommodate the beliefs of others can only extend as far as is compatible with our own beliefs about legitimacy. Secondly, this duty is not directly derived from the fact that other people hold reasonable beliefs about legitimacy. If such beliefs are erroneous, they cannot give rise to claims on us. Rather, our duty to legitimise the state to others must come from our belief that being at home in the world, and being able to accept the social and political institutions that shape our lives, is a thing of very great value, and one which we must be willing to assure for others if we are to claim it for ourselves.

In Chapters 2 and 3, I will address some of the significant body of literature on legitimacy available. I will especially compare the reciprocal theory with less demanding theories of legitimacy – theories that hold that it is comparatively easier for the state to be legitimate. I will try to show that these alternative approaches to the reciprocal theory are flawed. Chapter 2 will focus on the theories of David Estlund and Gerald Gaus, while Chapter 3 I will first consider deliberative democracy, before looking at the theories of Brian Barry, Anna Stilz and Allen Buchanan.

If my defence of the reciprocal theory is successful, I hope to have established a very important conclusion, an idea so far undertheorised in the literature: that there can be

reasonable disagreement on legitimacy. In Chapter 4, I explore the bounds of such disagreement. I do so by taking two theories of legitimacy, a Rawlsian and a libertarian one, and I show that they are mutually incompatible, and that they are both reasonable. In other words, someone can always reasonably reject the legitimacy of *any* state.

This conclusion is not as worrying as it seems at first glance. In Chapter 5 I return to Simmons's distinction between justification and legitimacy, and I argue that the state is justified even if it is not fully legitimate. I also argue that the task of the state should be as far as possible to identify and remove causes of illegitimacy – an impossible task to achieve in full, but not because of that a meaningless one.

I devote Chapter 6 to a discussion of what the state can actually do to carry out the task of maximising legitimacy. This is obviously a huge topic, and maybe one which is better pursued by other academic disciplines or in the public debate. I do, however, allow myself to identify some areas where it seems plausible that one might be able to improve the legitimacy of society.

These areas fall under four general headings. The first one concerns the use and limits of public reason. The second concerns equal influence and community and minority rights. The third concerns the welfare state. The fourth area concerns trust, a concept which has so far been underutilised in much contemporary political philosophy. Because any political programme to increase legitimacy must base itself in the opinions and values found within the society in question, it is very difficult to prescribe any general solutions for how to increase legitimacy. I make some tentative suggestions, but I am obviously aware that much more need to be said.

I will now add some comments that are important to keep in mind when reading this thesis. A primary subject of my thesis will be the possibility of *reasonable disagreement* about legitimacy. I will use the term “reasonable” in a specific, technical sense, which almost certainly differs from how it is used in ordinary language. “Reasonable” is here used as a moral term, denoting an idea or belief system compatible with reciprocity. A reasonable person is someone who holds reasonable beliefs, and towards whom we thus have a duty to legitimise the state. This use of the term reasonable is primarily inspired by John Rawls, whose concept of the reasonable is similarly moralised.

When discussing the concept of reasonable disagreement in political philosophy, a conventional starting point is John Rawls' *Political Liberalism*. According to Rawls, modern societies are characterised by the fact of reasonable pluralism: people can reasonably hold a multitude of doctrines about the good.

My concept of the reasonable will play the same role as Rawls's concept, since my theory of legitimacy shares a structural similarity with his political philosophy: it is the role of the state to accommodate the reasonable disagreement that exists within certain spheres of society, by providing institutions that not just respect that disagreement and allow it to continue, but which also rest upon motivations that are independent from or at least not at odds with any of the various reasonably disagreeing doctrines. Thus, determining the scope of reasonable disagreement becomes an important issue.

The second comment is that this thesis focuses on the legitimacy of an individual, isolated state, instead of the global political system as a whole. This is a regrettable limitation, but it

has not been possible to find the space to address the legitimacy of international political institutions, or indeed the potential legitimacy of other social institutions. The theoretical framework that I will develop in this thesis easily lends itself to being applied on a global scale, but such an application will not take place here. I will, however, make some brief comments on this issue in the Summary, where I discuss possible directions for future studies.

The third comment is that the conclusion that there cannot be a legitimate state may seem highly counterintuitive to some. I think there are two reasons why this conclusion is not as counterintuitive as it may seem. The first is that the reciprocal theory does not require any reasonable person to change her views about when she ought to accept the state's exercise of power over her. Any fears that we might have to reject a state which we today regard as legitimate are unfounded. What the reciprocal theory *does* suggest is that we take note of alternative positions, that we try to be responsive to other people's beliefs about when *they* would be able to accept the state, and that we do our best to accommodate such beliefs. The second reason is that the state may be justified even if it is not legitimate. The implications of claiming that the state cannot be legitimate have not always been fully worked out. Since many theorists have intended to show that the state *can* be legitimate (and have, in their own minds, succeeded in doing so), they have not had to address the question of what happens if it cannot. I devote the two last chapters of this thesis to a discussion of what we should do once we have established that no state can be fully legitimate. The conclusion, as I have said, is not that we should abolish the state, but that we should strive to make the state as legitimate as we can. This conclusion does not strike me as being terribly revolutionary or counterintuitive.

Chapter 1. The Reciprocal Theory of Legitimacy

1.1 Introduction

In this chapter I intend to set forth a liberal theory of legitimacy based on reciprocity. I will begin the chapter by introducing the concept of reciprocity (section 1.2), where I will distinguish between two different senses of reciprocity: one traditional sense, used in game theory and evolutionary theory, and a moral sense, as used by John Rawls and other theorists of legitimacy. I will then argue that when we enter into reciprocal relationships we acquire certain duties of reciprocity against others.

I will then use moral reciprocity as the basis for a theory of legitimacy: the *reciprocal theory of legitimacy* (section 1.3). I will start by introducing a distinction between *justification* and *legitimacy*, before arguing that the presence of a state affects our duties of reciprocity: the presence of universally valid, coercively enforced rules puts us in a different situation from before. If we are to fulfil our duty of legitimacy we must try to arrange the political institutions in such a way that all reasonable people consider them to be legitimate. I will then discuss some objections to the reciprocal theory, which will cause me to modify the theory somewhat (section 1.4).

I will move on to relate the concept of legitimacy, which has to do with the state's right to enforce laws, to the concept of *authority*, which has to do with the citizens' duty to obey the laws, and I will briefly discuss what the reciprocal theory has to say about obeying the law (section 1.5). I will then make some remarks about how reciprocity relates to the concept of reasonableness (section 1.6), and the concept of consent (section 1.7), before summarising (section 1.8).

1.2 The Concept of Reciprocity

The concept of reciprocity can be used in somewhat different senses. In the traditional sense of the word, Amy and Brian stand in a reciprocal relationship if Amy does something which benefits Brian on the condition or expectation that Brian does something that benefits Amy, and vice versa. Hence Amy and Brian stand in a reciprocal relationship if Amy scratches Brian's back on the expectation that Brian will scratch Amy's back.¹ There is an extensive body of literature exploring the emergence and rationality of this form of reciprocal cooperation and how it can be applied to political philosophy, such as by Robert Axelrod² and Ken Binmore,³ but it is not something which I will engage with further in this work.

Another sense of the word reciprocity is that Amy and Brian stand in a reciprocal relationship if they cooperate for mutual gain on terms that they both consider to be fair. We may call this idea *moral reciprocity*, and this is the sense in which I will be using the term "reciprocity" for the remainder of this work. Moral reciprocity lies, as John Rawls puts it, "between the idea of impartiality, which is altruistic (being moved by the general good), and the idea of mutual

¹ The benefits exchanged between two parties do not have to be identical for the parties to find themselves in a reciprocal relationship in the traditional sense.

² Robert Axelrod (1984), *The Evolution of Cooperation*, New York: Basic Books.

³ Ken Binmore (1994), *Game Theory and the Social Contract, Vol 1: Playing Fair*, Cambridge, Mass.: The MIT Press; (1998), *Game Theory and the Social Contract, Vol 2: Just Playing*, Cambridge, Mass.: The MIT Press.

advantage understood as everyone's being advantaged with respect to each person's present or expected future situation as things are".⁴ Mutual advantage is a form of cooperation where both parties benefit from it compared to not cooperating at all. While both parties gain from the cooperation, however, these gains may be unfairly distributed, and the parties may negotiate the terms of cooperation without being motivated by fairness. Impartiality, on the other hand, means that one person benefits another without considering who is being benefitted. Someone who pulls a drowning child out of a pond without expecting any benefit in return does so as an act of impartiality, or altruism.⁵

If we are in a reciprocal relationship, we typically have a duty to reciprocate towards others. If I freely accept a favour from you, where it is clear that you did me that favour on the expectation that I would return it, then I have a duty to return it. In such straightforward cases, fairness simply requires of us that we do to others what they have done to us, unless there are overriding reasons why we may choose not to do so.

Reciprocal relationships can be more complex than this. One still fairly simple case is that of an asymmetrically reciprocal face-to-face relationship, such as that between a manager and an employee or between a teacher and a student. Here, both participants benefit from the relationship, but they have to do different things in order to make it work. Also, the good which is being created may be different for each agent: the student receives education, while the teacher receives the good of being an effective teacher. In more complex cases, where we cooperate with people whom we never meet, and where it is unclear who is benefitting whom and in what way, the nature of reciprocation changes. Instead of giving benefits to others directly, reciprocation may involve contributing to the establishment and maintenance of institutions that distribute gains in certain ways.⁶ Furthermore, when successful cooperation requires coordination and the adoption of a complex system of rules, this also requires that decisions concerning the forms of that cooperation are made according to a *fair procedure*, and hence that those who participate in that cooperation are willing to propose and act according to terms for such a procedure that they consider to be fair.

Let me add two remarks. The first is that relationships based on love, friendship, or community are in many cases difficult to analyse as reciprocal relationships. These are obviously of great value to us, but when we act on them, we do not always ask whether we benefit from them. There are situations where such questions seem misplaced: while we expect to be supported by our friends in difficult times, we do not support them when they are in difficulties just because we expect them to help us in return, but we support them because they are our friends. (If it turns out that they fail to support us in return, then maybe they weren't our friends after all.) The stronger our emotional ties to others, the less likely we are to think of our relationships in terms of mutual benefit. As Binmore and others have put it: we internalise, to a greater or lesser degree, the preferences of our loved ones and make them our own. Their gain is our gain, and their hurt is our hurt.⁷

⁴ John Rawls (2005), *Political Liberalism*, New York: Columbia University Press, pp. 16-17.

⁵ Here I use impartiality in Rawls's sense. Brian Barry, on the other hand, uses impartiality in a similar way to reciprocity. See Brian Barry (1995), *A Treatise on Social Justice: Vol. 2, Justice as Impartiality*, Oxford: Clarendon Press.

⁶ There are of course intermediary cases. Reciprocal cooperation may involve indirect exchange even when few people are involved, and it may involve simple chains of exchange even when many people are involved.

⁷ Binmore, *Game Theory and the Social Contract, Vol. 1*, p. 286 f.

Such strong relations are not without interest when we consider society-wide cooperation, but they will still mainly be left to the side in what follows. One does not know all the people in one's society, and one cannot love people one does not know (at least not in the same sense as one loves those closest to oneself). Nonetheless, feelings of solidarity or community may have a strong role to play. They may cause us to change our view of what fair terms would be like, since we become concerned to a greater extent with the well-being of other members of the community, and they may sometimes also make us believe that we should cooperate on fair terms with people towards whom we actually do not have such a duty, simply because they belong to our community.

The second remark is that forming a reciprocal relationship isn't necessarily always a matter which we can decide on as we want. We may have a duty to establish relationships, both simpler and more complex ones, in order to handle other duties that we may have. I will assume that people have some form of duty of assistance to relieve the suffering of others, at least if it can be done at no or slight cost. We may have a duty to cooperate with others in order to discharge that duty. I will not make further mention of this duty in this chapter, but I will invoke it later on when necessary – see in particular Chapter 5.

1.3 The Reciprocal Theory of Legitimacy

In this thesis I will follow the distinction introduced by A. John Simmons, between *justification* and *legitimacy*. To say that a state is justified means, according to Simmons, that that state “is on balance morally permissible (or ideal) and that it is rationally preferable to all feasible nonstate alternatives”.⁸

To say that the state is legitimate, on the other hand, is to say that the state has the “exclusive right to impose new duties on subjects by initiating legally binding directives, to have those directives obeyed, and to coerce noncompliers”.⁹

I will accept the general idea behind this distinction, but not every detail: in particular, I do not believe that a legitimate state always has the right to have its directives obeyed – a topic to which I will return in section 1.5. In order to find out why the distinction between justification and legitimacy is so congenial, we must explore the connection between reciprocity, justification and legitimacy.

In order to see this connection, let us engage in a thought experiment. Imagine a society where there is no state. By a state we understand an institution that initiates and enforces directives and exercises a monopoly of force over the area under its control.¹⁰ In that society, there is nonetheless extensive and complex cooperation between its members. Resources are mined or farmed, goods are manufactured, bought and sold, and people are employed by individuals or companies to carry out certain functions.¹¹

⁸ A. John Simmons (1999), “Justification and Legitimacy”, *Ethics* vol. 109, no. 4, July 1999, p. 742.

⁹ Simmons, “Justification and Legitimacy”, p. 752.

¹⁰ By a “monopoly of force” I do not mean that only officers of the state are allowed to use force, but that ultimate authorisation to use force rests with the state. The right given in most legal systems to individuals to use a certain amount of force in self-defence is compatible with the idea of a monopoly of force, since the authorisation to use force in self-defence is given by the state.

¹¹ While this sounds like a description of a capitalist economic system, my account is compatible with a number of different economic systems, as long as they involve indirect chains of exchange.

In this society cooperation is reciprocal. What this means is that people, or at least some of them, take themselves to engage in production for the benefit of others, on the expectation that others will benefit them in return. If this is known to others, and they freely accept the benefits produced, they enter into a reciprocal relationship. If Amy produces things for the benefit of Brian, on the expectation that Brian will produce things which will benefit Amy in return, and Brian freely accepts what Amy offers, in the full knowledge of her expectations, then he has normally entered into a reciprocal relationship with her.

Now, one could imagine society as simply a large cluster of simple reciprocal relationships: the miner works in the mine on the expectation that he will get paid, and the mining company pays the miner on the expectation that he will work, and so on. But I do not believe that this is how such a society functions. It seems to me that our expectations on the behaviour of others cover a huge range of people, including people whom we will never meet. The miner expects the mining company to pay him, but further expects the mining company to get paid by its buyers, and so on. Such expectations are crucial to our actions: if we did not expect the general commercial system to work, society would soon break down. And it is natural to describe such general expectations in terms of *norms* of behaviour: we expect people in our society, including those we have never met, to behave in certain ways.

We can distinguish between predictive and normative expectations. I may expect it to be sunny today, but I cannot seriously blame the weather if it rains today: the weather system is not an agent that can be praised or blamed. But in the case of reciprocity, my expectations are not merely predictive. If I perform a favour for another on the expectation that he will do me a favour in return, and it turns out that he does not (without offering a credible excuse), then I feel wronged. Similarly, the predictive expectations that underlie complex cooperation are transformed into moral expectations.

In this way, those who voluntarily participate in complex social cooperation soon acquire duties of reciprocity to their fellow members of society. We may say that they acquire a duty to make sure that the gain from their cooperation is distributed fairly. With this I do not mean to imply that the duty must encompass some definitive distribution, specifying for each member of society how much she is to receive. A fair distribution may be, as I said above, simply that which results from a fair procedure.

However, achieving a fair distribution is in all likelihood very difficult to do on a purely voluntary basis. There will be disagreements on exactly which rules should be applied, how the rules should be applied in individual cases, and how people who fail to obey the rules should be sanctioned. Such disagreements may be all but impossible to overcome on a voluntary basis even for people who are motivated to do so. The problem is compounded by the issue of trust: reciprocity is conditioned on the expectation that other parties share the commitment to doing a fair share of their work, but it may be extremely difficult to verify this commitment – especially if certain members of society in fact are free-riders who do not reciprocate.¹²

The presence of the state can help to overcome such problems. A well-functioning state adopts and enforces rules for how social cooperation is to be structured, and if the enforcement is sufficiently successful, members of society can fulfil their share of the

¹² I return to the issue of trust in 6.5.

cooperative scheme in sufficient confidence that others are doing their share too. The state thus makes people do what they otherwise have a reason to do, and is thus morally permissible, and since this is very difficult to achieve without a state, it is also preferable to all feasible non-state alternatives. Hence, by Simmons' definition, the state is justified.¹³ For this argument, I have to assume that the state only exercises its power over people who all participate in a scheme of cooperation, and that the benefits from that cooperation are greater for all people than having no state at all in the society where they live. Otherwise, while the state may be justified on balance, it is not certain that it could be established in a morally permissible manner.

The presence of the state means that the structure of our social cooperation is radically transformed. Previously in our thought experiment, people had been cooperating voluntarily, guided both by their self-interest and by their ideas of fairness. Now the state decides common rules of behaviour, which it coercively imposes on them. We have managed to show the connection between reciprocity and justification. But this does not guarantee that the state is also legitimate: we have not yet shown what it takes for the state to acquire the right to impose duties on its subjects and coerce noncompliers.

The answer is the following. In a legitimate state, *the power of the state should be exercised only on terms that all reasonable members of society would accept*. Someone is reasonable when she fulfils her duties of reciprocity towards others.¹⁴ I will call this the *reciprocal theory of legitimacy*.

I will now present an argument for the reciprocal theory which I will call the *simple duty argument*. The simple duty argument runs like this: if we are to regard the state as having the moral authority to exercise its power over us, we would ask of the state that it be constituted in a certain manner. The idea is that we believe that only states organised in a certain manner can have the right to enforce their laws against us. Typically, we reject totalitarian and autocratic states as illegitimate, for instance.

Suppose I have what we can call a *doctrine of legitimacy*. This doctrine specifies under what circumstances I would accept a state's exercise of power over me. By "accept" I do not merely mean believing that it is better that the state exists than that it does not. If so, there is little distinction between justification and legitimacy. Nor does it mean supporting all the things that the state does. Rather, it expresses the idea that while one might disagree with what the state does, one does not question its right to do it, and one takes that fact to give one reasons to act in certain ways with regards to the state's directives.¹⁵

Some states come out as illegitimate, and others as legitimate, according to this doctrine. A presumably common example of a doctrine of legitimacy is one according to which the state's exercise of power is acceptable to someone if the state is a liberal democracy, and not acceptable if the state is not. We may assume that in societies such as ours, doctrines of

¹³ The brief account here ignores many important questions about justification. I return to the question of justification at greater length in 5.1. Let me also say that I don't believe that either the account I present here or in 5.1 need be the only justification available.

¹⁴ See 1.6.

¹⁵ By "accept" I don't mean that someone has signed a document in which she declares her acceptance of the terms of cooperation in question. Rather, I simply mean that the terms match the person's doctrine of legitimacy.

legitimacy typically focus on features of the formal institutions of the state, instead of being based around personalities or approval by religious authorities, for instance.¹⁶

Further suppose that others also have doctrines of legitimacy, and that at least one of them is incompatible with mine.¹⁷ Which one is then to be given precedence, mine or the other? The way I see it there are four different approaches one could take.

The first one is the *slave approach*: I recognise that your doctrine of legitimacy takes precedence. In other words, the state is to be organised in a way which is acceptable to you, and it does not matter whether it is acceptable to me. This seems to be a very peculiar attitude, under ordinary circumstances.

The second is the *master approach*: I believe that my doctrine of legitimacy should take precedence and that if your doctrine conflicts with mine, then it carries no weight. In other words, I believe that those who control the state have a duty to exercise their power over me on terms that I can accept, but I don't believe that they have a duty to exercise their power over you on terms that you can accept.

The third is the *agonistic approach*: I do not expect you to recognise that I have a claim to having the state organised in a way acceptable to me, nor do I recognise such a claim on your behalf. In other words, I accept that the state should be organised in a way that favours the stronger, and that whoever is the weaker among us has no claim.

The fourth is the *reciprocal approach*: we recognise both our claim and the other's, and we recognise that we have a duty to do as much as we can to satisfy both of them.

Our beliefs about which approach to take in a situation like this are contained in what I will call a *theory of legitimacy*.¹⁸ There is nothing to stop someone, let's call her Jenny, from letting her doctrine of legitimacy be influenced by her theory of legitimacy, but this is not required. The distinction between theory and doctrine is important, since many people may have a doctrine of legitimacy, in some loose sense of the word (perhaps only articulated as a shout of "Enough is enough!" when their grievances grow impossible to contain), but they do not have to have a fully worked out theory of legitimacy.

While one important benefit of having a state is that we gain the security needed to maintain complex schemes of cooperation and make sure that the gains from such cooperation are distributed in a fair manner, someone who exercises the power of the state cannot ground her authority merely on this. For a society with a state to be a fair scheme of cooperation, it must not just effect a fair distribution of the gains and burdens of that cooperation, but also function according to a fair procedure.

¹⁶ This assumption is not necessary for my argument, but it will simplify things greatly in the rest of the thesis.

¹⁷ By "incompatible" I do not merely mean that another doctrine specifies different terms from mine. If I accept the state's power only on the condition that I will be permitted to own a blue car, and you accept the state's power only on the condition that you will be permitted to own a red car, we request different things, but we can each get what we want. But if I demand that all cars in society be blue, and you demand that they all be red, then at least one of us must be disappointed. In this way our doctrines are incompatible.

¹⁸ I intend the concept of a theory of legitimacy to be open, and to contain whatever one normally associates with having a theory about something. When we hold beliefs about what the concept of legitimacy means, or when we develop ideas about legitimacy that approach the issue in a completely different way from mine, such beliefs can still be summarised as a theory of "legitimacy". In other words, unlike the concept of a doctrine of legitimacy, it is not intended to be a term of art.

As Thomas Nagel says,¹⁹ a person can be in two different positions with regards to the state's exercise of power: she can be a subject of that power, and she can be one of those who hold that power. To exemplify: in a democracy, citizens are typically both subject to the state's power and co-wielders of it, while in an absolute monarchy the sovereign holds absolute legislative power, but is not himself bound by the laws, while the people are bound by the laws but hold no power.

If the state is to be a reciprocal relationship between citizens, rather than merely being a vehicle for the oppression of some by others, its citizens must be placed in this dual role of subjects and rulers. The question is then which duties reciprocity puts on the citizens as rulers, and correspondingly which claims the citizens can make as subjects.

If Jenny is a reciprocating citizen of the state, she must be willing to propose terms of cooperation to others citizens which she sincerely believes are fair. Included in such terms is a proposal for a fair procedure, which is to say a proposal for how the state is to be organised in a fair way. It is almost platitudinous that Jenny must propose that the state be organised in a way that is compatible with her own doctrine of legitimacy. How could we expect someone to regard a state's exercise of power over her on terms she could not accept as fair?²⁰

But Jenny must also propose terms that others could accept, in order to carry out her duty of reciprocity. How could it be fair to propose that the power of the state should be exercised on terms that I could accept, but not on terms that you could accept? If Jenny proposes terms that others reasonably do not accept, then the reciprocal relationship will break down: either it will be abolished by the withdrawal of the other party, or it will be upheld by force. Upholding that relationship by force may be *justified*, but it is not *legitimate* if the person who rejects these terms is herself a reciprocating member of society. Further, if Jenny proposes terms that even she does not believe that others could accept, she fails to reciprocate at all: she is not just mistaken about what reciprocity requires, she has not seriously tried to carry out her duty of reciprocity.²¹

But why couldn't the agonistic approach also be reciprocal? After all, the parties are situated equally with respect to their rights and duties. No one believes that other persons ought to perform some benefit for her which she is not obliged to perform for them.

The answer is that we seem to be very far from the idea of a reciprocal relationship, or any kind of desirable or worthwhile relationship, if we regard our coexistence as a battle between opposing wills, where the stronger gets to dictate the terms. A reciprocal relationship is an endeavour aiming at mutual advantage, while the agonistic approach results only in the advantage of the winning side.

¹⁹ Thomas Nagel (2005), "The Problem of Global Justice", *Philosophy and Public Affairs*, vol. 33, issue 2, March 2005, pp. 113-147.

²⁰ There may certainly be times when we are grudgingly forced to acquiesce in terms that we couldn't accept, because nothing better is to be had. But we don't think it's fair that we have to do so, and this is not how I intend the term "accept" to be interpreted when used in its present context.

²¹ We may also say that there are certain circumstances where the very terms proposed are so unreasonable that someone who proposes them is unreasonable even if she acts on good intentions. Someone *ought* to know, for instance, that she could not expect another person to accept being made into her slave as fair terms of cooperation. See 1.4.

The same would seem to hold for the master approach: we simply aren't in a reciprocal relationship if I believe that you should obey whatever terms I find acceptable, while I have no such duty to obey your terms.

1.4 Modifying the Reciprocal Theory

In the preceding section I presented an argument in favour of the reciprocal theory which I called the simple duty argument. The name was chosen because the argument simply states that the reciprocal theory follows from the duties of reciprocity we have towards one another. I will now consider four objections to the theory, and in doing so I will have to modify the simple duty argument. The argument for our duties of legitimacy turns out to be less simple than first thought.

1.4.1 The Counterargument from Truth

The first objection has to do with *truth*. The reciprocal theory is committed to the idea that a theory of legitimacy can be false but that it can still give rise to valid claims on other people. I will first show why the reciprocal theory is committed to this idea, then why this might be a problem, and finally how the reciprocal theory must be understood in order to make sure that this isn't a problem.

The reciprocal theory places great stress on the concept of a *doctrine* of legitimacy. But doctrines of legitimacy can be derived from theories of legitimacy. I will not give a full answer to the question of what it takes for a doctrine of legitimacy to be false. However, since it must be possible for *theories* of legitimacy to be true or false, if doctrines of legitimacy are derived from false theories of legitimacy, then these doctrines are also false.

The objection is that the reciprocal theory undermines itself by claiming to be true but still granting other theories validity, through their derivation into reasonable doctrines. In other words: if a doctrine of legitimacy is false, why should we recognise its claims about how the state ought to be organised?

One could respond that there is nothing particularly strange about this. For instance, a religious doctrine typically takes itself to be true, and other religious doctrines to be wrong. Nonetheless, mainstream religious doctrines tolerate the practitioners of other religions, and commit themselves to protecting freedom of worship for all. Just because you believe that you are correct doesn't mean that you must believe that this gives you a right to do anything you like against those who disagree with you.

But this response doesn't work. In the religious case, the standard for correct action is internal to the religion in question. Every religion believes that its own followers are to be protected in their religious exercise. But the reason why, say, mainstream Christians respect the religious freedom of Muslims is not because Islam says that Muslims should have the right to free exercise of religion, but because Christianity does.

But on the reciprocal theory, it seems as if the mere fact that someone holds a reasonable doctrine of legitimacy gives that person a claim to having the institutions of the state arranged in a manner acceptable to her, even if that doctrine of legitimacy happens to be false. After all, the reciprocal theory holds that the power of the state should be exercised only on terms

that all reasonable members of society would accept. The question is how people can have a claim to having the institutions of the state arranged in a way that they can accept, even if their doctrines of legitimacy are false.

If we consider an ordinary case where several parties cooperate to produce and distribute some good, it doesn't appear as if an incorrect claim about fairness has any value. Suppose all parties are situated equally in all relevant respects and contribute equally to the production of some good. Then it seems as if the only fair criterion of division is for the good to be divided equally between the parties (when what constitutes an equal division is easy to determine and when no extraneous considerations have any bearing). This also seems to be the only reasonable position one could take.²²

If the structure of the cooperation and the situation of the parties is more complex, however, there is scope for reasonable disagreement about how the good is to be distributed. For instance, there might be disagreement about what constitutes an equal contribution. Someone may have contributed as much as any other but expended more of an effort, since that person may have been young, old, or disabled. To what extent should this count in the distribution? We have all experienced situations where such considerations have been judged differently, and where people have reasonably been of different minds. But it does not seem as if an incorrect claim is valid just because it is reasonable.

If we apply this to legitimacy, it could be argued that there are circumstances under which someone simply *ought* to accept the state's exercise of power over her, even though she doesn't feel that she can accept it. Under certain circumstances, the state simply fulfils whatever duties it has towards its citizens, regardless of whether the citizens themselves consider this to be the case. For example, there are certain grounds that simply cannot be used to reject the legitimacy of political institutions, namely those that must fail a reciprocity test, such as holding some people in slavery. In other words, there are terms that no one reasonably could reject. That cooperation should not involve slavery is one such term.

But to fully see the problem for the reciprocal theory, we need to think of the idea of "terms that no one reasonably could reject" as having three different levels. A term T fulfils the no reasonable rejection criterion at the *first level* if no one reasonably can hold a doctrine of legitimacy where not-T is a *necessary* condition for legitimacy. As an example, no one could reasonably believe that only states that legalised slavery could be legitimate. Hence, the abolition of slavery fulfils the no reasonable rejection criterion at the first level.

A term T fulfils the no reasonable rejection criterion at the *second level* if no one reasonably can hold a doctrine of legitimacy where T is *not* a *necessary* condition. Could someone reasonably believe that the abolition of slavery was not a necessary condition for legitimacy, and so that a state legitimately could decide to institute slavery if it wanted? This, too, seems hard to imagine, and so the abolition of slavery also fulfils the no reasonable rejection criterion at the second level.

A term T fulfils the no reasonable rejection criterion at the *third level* if no one reasonably can hold a doctrine of legitimacy where T is not a *necessary and sufficient* condition. Could someone reasonably believe that a state, *even though* it had abolished slavery, could be

²² While it would not be unreasonable to abstain from a part of one's own share out of charity, it is hard to see *why* one would wish to do this, given that all parties are equally situated and no extraneous considerations have any bearing.

illegitimate for other reasons? This seems much more plausible, and so the abolition of slavery does not fulfil the no reasonable rejection criterion at the third level.

If there are terms that could not reasonably be rejected at the third level, doctrines that fulfilled those terms would give their holders certain claims against the state: the doctrines fulfil the necessary and sufficient conditions for legitimacy. The reciprocal theory admits that some terms could not be reasonably rejected at the first and second level. I will leave the question of whether there are third-level terms open for now.²³ No matter what the answer to that question is, it seems as if the reciprocal theory must be indifferent to it. Any reasonable doctrine has a claim on the state. It is thus the conditions for reasonableness, not legitimacy, that we seek. But why are these claims valid?

We cannot appeal merely to the fact that these doctrines are reasonable. Instead, the respect for other persons' doctrines of legitimacy must come from within the reciprocal theory itself. The value I would like to focus on is the realisation that to subject an unwilling reasonable person to coercion constitutes a violation of that person which we should aim to avoid. We are asked to imagine what would happen if we would be subject to coercion by others on grounds that we could not accept. Suppose that those grounds in some objective sense were fair. It seems difficult to imagine that we could know that those grounds were fair without at the same time accepting the exercise of power over us – in other words, if we refuse to accept the exercise of power over us, we must reject the grounds on which that power is exercised as unfair.

One can think of the reciprocal theory as an idea about what reciprocity requires of us, if we adopt a certain rule for decision-making in the face of uncertainty. Suppose we hold a doctrine of legitimacy, which specifies certain circumstances under which we would be willing to accept the state's exercise of power over us. Since we hold that doctrine, we plainly believe it to be fair. If we are committed to some ideal of reciprocity, we believe that our doctrine is consistent with that ideal. But now it turns out that we are mistaken: the doctrine makes us refuse to accept the power of the state in certain circumstances where we ought to have accepted it.

If what we had been concerned with would have been a question of science, we could have delegated our judgement to experts, who would have judged in our stead. But we cannot do this with morality. What we can do is to present our proposed terms of cooperation to others and listen to what they have to say. But if our beliefs survive such deliberation, the question is what we would wish, looking at the situation from the outside, where we know that we are mistaken. Do we want to have power imposed on us that we cannot accept, or do we want to reject that power, even though we know that we are in the wrong when doing so?

Let us turn the situation on its head. Suppose we exercise power over another person, who reasonably but wrongly rejects our exercise of power over her. Suppose that we somehow happen to know that the terms on which we exercise power are fair, and that she is in the wrong in rejecting them.

Now let us consider these two situations put together. Reciprocity would, it seems to me, require that each party is situated symmetrically – no matter which solution we choose, the

²³ In Chapter 4 I will argue that mutually incompatible doctrines of legitimacy can still be reasonable. This seems to imply that there are no sets of conditions that are both necessary and sufficient for legitimacy.

recommendations it gives ought to be the same no matter who exercises power or who is subject to it. Then we have two alternatives. The first alternative is that terms of cooperation can be imposed on subjects if they are fair, even if the subjects reasonably will refuse to accept them. The second alternative, the reciprocal theory, is that terms of cooperation cannot be imposed on subjects if they are reasonably rejected, even if they are fair.

The value of cooperation on fair terms is obviously great. Accepting the reciprocal theory threatens to introduce an element of unfairness into the world. People will be permitted to reject fair terms of cooperation if they can do so reasonably, and such rejection will carry moral weight: it ought to stop those exercising power from doing so on those terms against those subjects.

However, someone can only be reasonable in rejecting proposed terms of cooperation if she accepts the value of reciprocity and acts in the spirit of it. This sets an important limit to the amount of unfairness that someone's rejection of proposed terms of cooperation can bring about. This has been illustrated by the above discussion: certain terms of cooperation, for example that slavery should be permitted, are simply beyond the pale. They are incompatible with the idea of reciprocity.²⁴

The reciprocal theory appeals to a value which is more diffuse but nonetheless also more important. It is the value of being at home in the world, of being able to live with and identify oneself with those institutions that govern one's life, and to feel that others regard one as an end in oneself, and not merely as a means. Someone who is subject to a power she cannot accept feels alienated, she regards herself as a tool for other people's purposes, she feels envy towards those of her fellow citizens who can accept that power, and resentment towards those who wield it. She looks upon her situation in the world as tragic: she has fulfilled all her duties towards other people, but nonetheless she finds herself the helpless subject of a sovereign power acting on norms alien to her.

The central idea is thus that if we want to avoid this situation, and if we thus dare to say that the subjective experience of legitimacy is of higher value than a small amount of unfairness, we must choose the reciprocal theory. We cannot have it both ways: if we want the state to be organised only on terms that we can accept (as long as we do so reasonably), we must will that the state be organised on terms that others reasonably accept as well.

1.4.2 The Counterargument from Schizophrenia

The second objection is what I will call the *counterargument from schizophrenia*. There seems to be a problem with the reciprocal theory in that someone would have to recognise and work towards bringing about several potentially incompatible claims at the same time: both those made by her own doctrine of legitimacy and those made by other reasonable doctrines. There is nothing inherently inconsistent in working towards a society which all reasonable people, both oneself and others, believe to be legitimate. This is the same kind of task as making sure that all people are equipped with some form of good, such as health, education

²⁴ While I have chosen an extreme example for illustrative purposes, I do not doubt that other, more stringent limits can be set. I will not attempt to make any kind of detailed exploration of the limits of reasonable disagreement on legitimacy: I will return to the question at length in Chapter 4, but there I will only seek to prove that mutually incompatible doctrines of legitimacy can be reasonable. I will not draw up any exhaustive list of the necessary conditions for a reasonable doctrine of legitimacy.

and so on. The difference is that in the case of legitimacy, people might hold mutually incompatible expectations, and that these actually affect the legitimacy of the society in question. In this case, someone would both be entitled to work towards the realisation of an institution I which follows from her doctrine of legitimacy, and have a duty towards others to work towards the realisation of not-I, which follows from their doctrines of legitimacy. This seems inconsistent and it seems to provide each subject with conflicting motivations.²⁵

This conflict is resolved by saying that each person must act *as far as possible* to accommodate the claims of others as can be done without jeopardising one's own claims. This means that other people's claims may be less than fully satisfied, since the state continues to be organised in a manner which is unacceptable to them. Even if people have done as much as they can to accommodate the claims of others, we still find ourselves in an unsatisfactory situation, and it should be recognised as such. But if the alternative is that other persons' beliefs would have to take precedence over one's own (compare the slave approach), then this would seriously call into question the very ability of each citizen to form and act upon beliefs about legitimacy, which would both be psychologically implausible (for it would suppose that people could completely set aside their beliefs in order to accommodate others') and risk descending into indeterminacy (for how do we decide *who* is to change their opinion to suit others?).²⁶

1.4.3 The Reasonable Acceptance Objection

The third and final objection is what I will call the *reasonable acceptance objection*. The reasonable acceptance objection is this: someone cannot be reasonable if she proposes terms that she does not expect other reasonable people to accept. The argument for this objection proceeds from the simple duty argument. The simple duty argument stated that someone who expected the state to be arranged in a manner acceptable to her would have to make sure that the state was acceptable to others. Now remember that a reasonable person is someone who fulfils her duties in reciprocal relationships. If the state is a reciprocal relationship, and if we have a duty of legitimacy towards others to make sure that the state is acceptable to them, then someone who does not fulfil this duty is not a reasonable person. It would then seem as if someone who did not even *try* to fulfil her duty of legitimacy would also be unreasonable.

If this objection is correct, then given that there is a substantial amount of disagreement about legitimacy in society, it seems that we have three options that are all problematic. The first option is to deny that there is substantial scope for reasonable disagreement about legitimacy. Then reasonable people can be confident that other reasonable people will accept their proposed terms. The second option is to admit that there is substantial scope for reasonable disagreement about legitimacy, and accept that this means that many people are unreasonable,

²⁵ The problem is of course not just psychological but logical, and follows from the maxim of "ought implies can": we cannot realise several incompatible states of affairs at the same time, and so this cannot be a duty of ours. Furthermore, independently of ought implies can, there is a problem of indeterminacy: how do we know which reasonable doctrine to implement?

²⁶ One alternative would be to argue that people shouldn't change their views about legitimacy, but they should still work to realise the doctrine of legitimacy embraced by most people. This argument would stem from the fact that we typically expect people to make sure that the will of the majority is being carried out, even though people may disagree with it. But the reason why this expectation is warranted must surely be that a democratically made decision is legitimate. Applying this idea to legitimacy is not only in danger of begging the question (for if I believe that the doctrine embraced by the majority isn't legitimate, why should I work to realise it?), it also doesn't eliminate the underlying problem, namely that I will still believe that the state is illegitimate.

since they propose terms that they know that others will not be able to accept. The third option is to expect people somehow to disregard the fact that there is reasonable disagreement: if people in spite of the evidence expect others to accept their terms, then at least they have acted in good faith, and qualify as reasonable. But it seems problematic to wish for people to disregard available facts.

To escape from this trilemma, we need to refute the reasonable acceptance objection. In other words, we cannot expect of a reasonable person that she propose terms which she knows or expects that others will reasonably accept. The modification of the reciprocal theory which I presented above when I responded to the argument from truth, that each person has a duty to implement reasonable terms proposed by others *as far as possible*, seems to get us out of trouble. Someone is now reasonable even though she does not expect her proposed terms to be accepted by others, provided that she has done enough to accommodate the terms proposed by others.

But this still means that a reasonable person must be willing to work as far as possible to reconcile her views with others. A reasonable person would thus still be someone who in most significant respects accepts the reciprocal theory of legitimacy or something like it. This seems to be a worrying conclusion. As I said in the introduction, the problem of legitimacy is how the state can have the moral right to exercise power over its citizens. In the liberal tradition, the underlying assumption is that the state owes its citizens some form of explanation as to why it has that right. If it turns out that the state only owes such an explanation to very few, it seems like the problem of legitimacy to a large extent has been defined away.

So which kinds of terms, then, is a reasonable person expected to put forward? The answer is that it has to do with the grounds for rejection. One way of putting it is that Jenny's terms are unreasonable if the only reasons why people would accept them are morally wrong, which is to say that one *could not* accept them for the right reasons. If Jenny proposes that society be divided into estates, with the estate of the nobility dominating the other estates, this might be accepted by the putative noblemen for reasons of economic self-interest and the lust for power, but those are not reasons that are consistent with the idea of reciprocity. In other words, reasonable disagreement with reasonable terms is always for *the right reasons*: otherwise either the terms or the disagreement will be unreasonable.

If these conditions are all met, Jenny can propose these terms and still be a member of the reciprocating community, even though other people reasonably disagree with her terms. She still has a duty to work as far possible for a state that is organised in such a way that other reasonable people accept it as legitimate. Only under those circumstances is reciprocity genuinely achieved. But Jenny can still be reasonable, even if she should fail in that duty.

1.4.4 The Counterargument from External Rule

I have argued that the kind of reciprocal relationship that can give rise to a duty of legitimacy is a relationship between members of society. In a non-state society, there are no rulers or subjects. It is only when a state arises that citizens may become rulers, subjects, or both. One way to look at the problem of legitimacy is to regard it as the question of under which circumstances citizens may make themselves into rulers, ie under which circumstances they are allowed to exercise power over other citizens, either directly or through chosen delegates.

Those who would put themselves in a position of power over others, without at the same time being ready to submit to the will of those other citizens, fail to carry out their duty of reciprocity to others, because they do not distribute the gains from social cooperation according to a fair procedure. This duty becomes more pressing for those who have greater opportunities to influence political decision-making, such as members of the government and the legislature, but the duty is held by one member of society towards the others, not by the ruler (*qua* ruler) towards her subjects.

This duty also holds in hypothetical cases where the rulers are not members of the society they govern. For such a case to pose a challenge to the reciprocal theory, we have to assume that the rulers don't in any way benefit from their rule: otherwise, they would benefit from the results of social cooperation in such a way as to make them members of the society they govern. We must also assume that they are not mere agents of people who are members of the society, since otherwise the latter are the real rulers. However, we must assume that they have some notion of society: if they are not members of the society they govern, they are members of some other society. or they are at least aware of how societies function. We then ask them to imagine what it would be like to live under some other person's power, and they must conclude that if they are to be able to demand that such a power be acceptable to them, they must treat the persons under their own rule on the same terms.²⁷

However, this indicates that our duty of legitimacy is more fundamental than my argument in 1.3 perhaps implied. We do not have to actually participate in society together with another in order for a duty of legitimacy to arise against that person. It is merely enough to know that since, *if we were* under that person's rule, we would expect that rule to be exercised on terms that we would accept, for us to realise that we have a duty to reciprocate in turn by exercising force against that person on terms that she could accept. There is nothing at all peculiar in this thought experiment: a fundamental feature of reciprocity is our ability to imagine *what it would be like* if we were in another person's shoes, no matter how remote the possibility that we may ever be.

1.5 The Concept of Legitimacy and Obedience to the Law

What I have done in the preceding sections is to *derive* the concept of legitimacy from reciprocity. What I want to do now is to briefly comment on how the reciprocal theory's understanding of the concept of legitimacy relates to that found in other theories.

Several thinkers have distinguished the concepts of *enforcement* and *obedience*. With enforcement I mean the right of the state to enact and enforce laws against its citizens. With obedience I mean the duty citizens have to obey the laws. Different theories of legitimacy relate the concept of legitimacy to the concepts of enforcement and obedience in different ways. To Simmons, to take one example, legitimacy is both of these concepts: a legitimate state has the right to enforce the law, but also a right to expect citizens to obey it. To others,

²⁷ We could of course imagine rulers who have no notion of society at all, or even of other persons beyond their immediate band: they live on their own as hunter-gatherers, and every day they go to a computer terminal somewhere in the forest and type in orders at random, which will then be obeyed by the officers of the state as divine commands. Such rulers would not be under a duty of reciprocity, since they would have no idea of what they were doing, and the society would be a victim of bizarre and accidental circumstances that would leave little hope for legitimacy.

such as Allen Buchanan, legitimacy means enforcement only.²⁸ I did not begin this thesis by setting out a definition of legitimacy relating it to these concepts, as might have been expected. The reason was that I wanted to *derive* the concept of legitimacy from reciprocity – or more precisely to derive the concept of a *duty of legitimacy* from the concept of a duty of reciprocity.

To me, the philosophical question which most stands out as being in need of an answer is how the state can be allowed to use force to enforce laws against citizens living in the state, while it seems plainly wrong for individuals to use force to enforce their rules against others, whether or not people are living in a state or in the state of nature. But our duties of reciprocity may also bear on the question of whether we should obey the law or not. It is thus not possible to claim that these two aspects are fully independent of each other.

I claimed that a legitimate state does not have an expectation that its citizens should obey the law, at least not at all times and in all situations. However, as I mentioned above, Simmons has argued that a legitimate state does indeed have such an expectation, and that obedience to the law is part of the concept of legitimacy. I want to show why I think this belief is mistaken, and in doing so I want to see what a legitimate state in fact can expect of its citizens with respect to obedience.

One argument against Simmons' belief that citizens of a legitimate state have an absolute duty to obey the law is of course that such a duty can be overridden by other duties. Suppose my child is ill and needs to go to hospital. There is no time to wait for an ambulance, and in order to get to the hospital in time, I need to break the speed limits, which are determined by the laws of a legitimate state, and which, let us suppose, are absolute (i.e. I am not able to use my emergency as a defence in a court of law). It seems as if my duty of care towards my child overrides my duty to obey the laws of the state. Such examples can be multiplied, and I believe they show that while a duty to obey the law must be strong, it cannot be absolute.

This shows that we do not have an absolute duty to obey the law, but it does not show that we don't have some kind of duty to obey the law. It is possible to sketch an argument from reciprocity for a duty to obey the law. Since reciprocity involves a willingness to propose *and abide by* fair terms of social cooperation, and since we fulfil our duty of legitimacy by setting up political institutions with the right to issue commands, someone who fulfils a duty of legitimacy (being a form of a duty of reciprocity) must thereby be obliged to obey these commands. One could design the laws so that they did not punish disobedience in certain cases if this was felt to be justified, but one could not break the laws themselves.

This argument sounds plausible, but it misunderstands what it means to seek fair terms of cooperation. It is certainly true that the very search for fair terms of cooperation sets limits on what we can do to others. We cannot kill or harm other people whom we regard as our partners in cooperation, for instance. However, the commands issued by a legitimate state may sometimes conflict with our own conscience. There is no contradiction in regarding a state as legitimate, which is to say that it is justified in enforcing its commands, and at the same time regarding compliance with those commands as impossible to reconcile with one's own conscience. This is how many of those who practice civil disobedience typically feel. And if it is recognised that such clashes between conscience and law can take place for most people, fair terms of cooperation may potentially involve giving people the moral permission

²⁸ Allen Buchanan (2002), "Political Legitimacy and Democracy", *Ethics*, vol. 112, July 2002, p. 689 f.

to break the law, as long as they accept their punishment and do not harm other people. If that is the case, we do not regard people who commit such acts of civil disobedience as having failed to fulfil their duties of reciprocity.

In other words, the reciprocal theory does not present firm guidelines on exactly under which circumstances the law must be obeyed or not, beyond the idea that certain actions in and of themselves are incompatible with reciprocity, such as launching unprovoked attacks on others. Nonetheless, I believe that reciprocity would favour a view according to which laws are to be obeyed unless there are very strong reasons not to do so. Effectively enforced laws allow us to predict people's behaviour within the areas that they regulate, and this predictability would be lost if people were to be allowed (whether legally or morally) to break the laws. It is only when the concerns are truly pressing, or when the potential disruption to others will be slight, that people can be morally allowed to break the laws.

1.6 The Concept of Reasonableness

The principle of legitimacy presented in this thesis is that “the power of the state should be exercised only on terms that all reciprocating members of society would accept”. This in itself does not sound particularly innovative: it is very similar to formulations found in various forms of Rawlsian political liberalism, to take one example. The new thing so far is that the reciprocal theory tries to connect legitimacy more strongly and explicitly to reciprocity than Rawls and other theorists have done. While the relationship between legitimacy and reciprocity has been hinted at by Rawls and Nagel, it has not been made quite as explicit as this.

The reciprocal theory makes frequent use of the concept of reasonableness, and is in this respect similar to Rawls's political liberalism. It is a distinctive feature of the reciprocal theory that it tries to derive the concept of reasonableness from reciprocity. This makes reasonableness mainly a moral rather than an epistemological concept. According to the reciprocal theory, a reasonable person simply is someone towards whom we have a duty of reciprocity, or at least someone who has not yet forfeited her claim to being treated in accordance with reciprocity.²⁹ An unreasonable person is someone who has forfeited that claim, by displaying an unwillingness to abide by the norms of reciprocity.

While reasonableness is regarded as primarily a moral concept, there is an epistemic limit placed on reasonableness: someone must have the capacity to engage in reciprocal relationships with others, which requires certain cognitive capacities, such as a sense of fairness and a capacity to understand and respect the expectations of others. But the reciprocal theory is otherwise adamant that we do not have the right to act against others in ways which we would not ourselves accept being acted against, no matter the epistemic capacities of the other person(s) in question.³⁰

²⁹ We do not have duties of reciprocity to people with whom we are unable to engage in reciprocal relationships, such as the Australian Aboriginals before the European discovery. Nonetheless, such people have done nothing to deserve being regarded as unreasonable. In the eyes of others, reasonableness is thus something one loses rather than acquires.

³⁰ This is different from the position taken by, among others, Gerald Gaus. For further discussion of this issue, see section 2.3.

It might be argued that viewing the reasonable as something deriving solely from reciprocity conflicts with how we ordinarily view the concept. In response, I want to say first of all that I use the concept of the reasonable in a very distinct sense, namely as a way of determining to whom we have a duty of justification.³¹ The concept may be used in a different sense in other areas, such as in ordinary or legal language. Secondly, the important thing is not whether my use of the reasonable corresponds with the ordinary use of the concept, but rather the *role* it plays in a theory of legitimacy. If a conception of the reasonable proves to be closer to our ordinary language use of the term, but renders the concept unsuitable to use in a theory of legitimacy (for instance because it is too restrictive), then we should use a different concept. I believe that the way I use the concept of the reasonable is sufficiently close to how it has been used by previous theorists of legitimacy (not least, of course, Rawls) that I can keep the label without causing too much confusion.

1.7 Reciprocity, Acceptance and Consent

While I have based the distinction between justification and legitimacy on Simmons' consent-based view of legitimacy, and while I have argued that a legitimate state is one that can be accepted by all reasonable people, I would claim that the reciprocal theory is not to be understood as a consent theory in the traditional sense. This is so for the following reasons.

Simmons regards consent as something that must be publicly and explicitly given. The reason for this is that consent has to do with political obligation: someone who consents to the state thereby acquires a duty to obey the laws of the state. Consent theory can explain how we come to have a political obligation to obey the laws of the state: we must obey them because we have promised to do so. But if, like most of us, one has not promised to obey the laws of the state, one doesn't have an obligation to do so.

The reciprocal theory does not seek to challenge the idea that a citizen, by explicitly consenting to the state, may both give the state a right to tell the citizen what to do and the citizen herself a duty to obey the state. But this is not the only way in which the state may acquire a right to exercise power over its citizens. If the state exercises power over its citizens on fair terms, then that exercise of power is morally acceptable, which is to say legitimate. As I have argued, exercising power on fair terms means, as far as possible, to exercise power on terms that all reasonable people accept. But this does not require explicit consent, it merely requires acceptance, which may be expressed openly or simply through not rejecting the state.

Similarly, giving one's consent to the state is not the only way in which a citizen can acquire a duty to obey the law. One may also have a duty to obey the law because it would be unfair not to. As I argued above, this leads to a more restrictive duty of obedience than Simmons imagines, but this is also something that seems to match our intuitions about the concept of legitimacy.

But why couldn't consent be inserted at a later stage in the theory? Why wouldn't it be possible to change the formulation "the power of the state should be exercised only on terms that all reasonable members of society would accept" to "the power of the state should be exercised only on terms to which all reasonable members of society would consent"?

³¹ My use of the concept parallels David Estlund's distinction between "qualified" and "unqualified" views. See David Estlund (2008), *Democratic Authority: A Philosophical Framework*, Princeton, N.J.; Woodstock: Princeton University Press, p. 44-45.

Once again, I take it that someone who abstains from rejecting the state accepts its power, while she doesn't consent according to Simmons. But a deeper reason is that many consent-based views seem to adopt what we may call with Gaus a "baseline of non-intervention": if an intrusion into the rights of another person has not received the consent of that person, then the intrusion ought not to take place. The idea seems to be that there are specific actions that a state can undertake that are illegitimate, unless the person affected by them gives her consent. The remedy for lack of consent is to refrain from carrying out the action.

The reciprocal theory, however, is also aware of the possibility of the rejection of the state as a *system* of exercise of power. Someone may reasonably reject the state because she believes that the state, when judging by the overall distribution of rights, duties and powers in society, does not treat her fairly. Crucially, the remedy for lack of acceptance may be to shift the distribution of rights and duties so that more burdens fall upon *other* people, including the positive burden of having to carry out a certain action, such as contributing more money to the state. I am not certain that one couldn't formulate a consent theory that did not take these considerations into account, but such an account would seem to put some distance between that theory and Simmons'.

Finally, consent may in some cases be more demanding on the one who consents than acceptance is on the one who accepts. If I consent to carrying out a certain duty, I can have no cause for complaint if I later change my mind, provided that my consent was given freely and with full information of what I consented to, including the circumstances under which consent may or may not be withdrawn. However, the reciprocal theory regards it as a problem when someone is unable to accept the terms on which the power of the state is exercised, even if the person first accepted the terms but then changed her mind. This means that the terms of cooperation may have to be reformulated over time.³²

1.8 Summary

The purpose of this chapter has been to spell out the fundamentals of the reciprocal theory. I have presented the concept of reciprocity, I have shown how legitimacy can be derived from reciprocity, and I have argued that a legitimate state is one which all reasonable people can accept. I have considered some objections to the theory, and I have modified the theory where I have believed it to be appropriate. I have shown how the concept of legitimacy as it is used here relates to the concept of obedience, and I have argued that the concept of the reasonable should be derived from the concept of reciprocity.

The reciprocal theory of legitimacy is similar to other liberal theories of legitimacy in certain respects, since it shares the basic commitment that the state should be acceptable to all reasonable people. The difference is that while other theorists (such as Rawls and Nagel) mention a connection between reciprocity and legitimacy, they do not make the connection as explicit or as strong as I have done.

³² Of course, any change of position must be done on reasonable grounds: if it turns out that the terms of cooperation involved a heavier burden than the person who accepted it had expected, she must regard the burden not just as unexpectedly burdensome, but as unfairly burdensome. But this is so with all proposed terms of cooperation, whether or not they involve changes from previously proposed terms or not.

While it has seemed to me that a certain engagement with some possible objections to the reciprocal theory would have been unavoidable, I have so far excluded most alternative ideas found in the literature. This will change in the next chapter, where I will present a number of theories that all pose challenges to the reciprocal theory and try to answer those challenges.

Chapter 2. Challenges to the Reciprocal Theory I: Coherence and Epistemology

2.1 Introduction

In this chapter and the following one, I shall consider some alternatives to the reciprocal theory found in the literature. The literature on legitimacy and political authority is vast, and there is no way in which I can consider every single alternative theory. I will limit myself to some more or less recent theories within the liberal tradition that I believe pose different challenges to the reciprocal theory.

In section 2.2, I will analyse David Estlund's claims about the insularity of the reasonable as a requirement for political liberalism, I will argue that it seems to be unattractive, and I will show that the reciprocal theory is not vulnerable to it. I will also show that the reciprocal theory still should be considered a form of political liberalism.

Section 2.3 will concern Gerald Gaus's justificatory liberalism, which seeks an epistemological approach to the problem of justification. I will defend a more moralised view of the reasonable than Gaus's.

I will finish with a summary in section 2.4.

2.2 Estlund and the Insularity of the Reasonable

2.2.1 The Insularity Requirement

Theories such as Rawls's political liberalism and Brian Barry's theory of justice as impartiality regard the project of legitimacy as consisting in justifying the state to all reasonable people. Implicit in such theories is a distinction of people (or their views) into reasonable and unreasonable.

David Estlund has claimed that any view *V* that seeks to regard some views as qualified and some as disqualified for the purpose of justification must be committed to two beliefs: (1) *V* is correct (and not merely itself qualified); and (2) views that disagree with *V* are themselves disqualified. In other words, there can be no qualified disagreement on which views that are to count as qualified and not. This is the so-called *insularity requirement*.³³

Estlund argues that the insularity requirement must be accepted if political liberalism is to have any chance of working. His argument is that versions of political liberalism become self-defeating if they do not accept the insularity requirement: not only would political liberalism fail to succeed without the insularity requirement, but political liberalism may become incoherent without it. The idea is that political liberalism claims that arguments are admissible if they are acceptable to all qualified points of view. But is this doctrine itself acceptable to all

³³ David Estlund (2009), *Democratic Authority*, p. 55. By "qualified" and "unqualified" Estlund means something similar to what Rawls does when the latter speaks of "reasonable" and "unreasonable". Estlund changes the terminology because there might hypothetically be several different grounds on which we might want to disqualify a theory for the purpose of justification, and unreasonableness may only be one of them.

qualified points of view? If not, it fails its own test. That is why the insularity requirement is needed. Only by regarding alternative views as disqualified can political liberalism protect itself against incoherence.³⁴

My account is, I believe, similar enough to other forms of political liberalism that it makes sense to say that it admits some views as qualified and others as not. Reasonable doctrines of legitimacy are qualified, while unreasonable ones are disqualified.³⁵

I have no problem with accepting Estlund's charge that a theory such as the reciprocal theory of legitimacy must claim that it is a correct theory. (Others may of course disagree as to whether it in fact is the correct theory.) Further, believing that the reciprocal theory is correct does not have to be a dogmatic attitude. We can combine this belief with an awareness of our own fallibility and the strong arguments that exist in favour of other theories.

Estlund's argument in favour of the insularity requirement seems to me to be valid. The reciprocal theory of legitimacy thus has three different options: (1) accept the insularity requirement, (2) accept that the reciprocal theory is not a form of political liberalism, which means opening itself to the criticism that political liberalism levels against such forms of liberalism, or (3) reject one of the premises of Estlund's argument. I am going to go through these three alternatives in turn.

2.2.2. Rejecting the Insularity Requirement

What we must first of all remember is the distinction between a theory of legitimacy and a doctrine of legitimacy. A theory of legitimacy is a theory of the same type that I have defended so far in this dissertation: a theory about what the concept of legitimacy is and under which circumstances the state's exercise of power is legitimate. The reciprocal theory makes reference to a doctrine of legitimacy: a person's beliefs about when a state's exercise of power would be acceptable *to that person*. The reciprocal theory claims that a state is legitimate when it is accepted by the doctrines of legitimacy of all reasonable persons.

Suppose Charles believes that a state is legitimate if and only if it is regarded as such by all people. Unlike the reciprocal theory of legitimacy, Charles's theory of legitimacy does not have a reasonableness constraint. Everyone, including Nazis and theocrats, is included. Further suppose that Charles uses this *theory* of legitimacy to derive a *doctrine* of legitimacy. This causes Charles to adopt a contractualist doctrine of legitimacy, accepting the legitimacy of the state's exercise of power *over him* only if it is exercised on terms that could also be accepted by everyone else. Since there is widespread disagreement on legitimacy, the result is that there is no regime that Charles can accept.

³⁴ David Copp has argued that the insularity requirement seems to be "ad hoc" ("Reasonable Acceptability and Democratic Legitimacy: Estlund's Qualified Acceptability Requirement", *Ethics*, vol. 121, no. 2, pp. 239-269). Estlund's response is that it is not ad hoc, or at least not more ad hoc than other forms of political liberalism, since virtually all accounts of political liberalism draw some form of boundary between admissible and inadmissible views ("Reply to Copp, Gaus, Richardson, and Edmundson", *Ethics*, vol. 121, no. 2, pp. 354-389).

³⁵ The reciprocal theory believes that reciprocity is something that we owe to people, not to other views. People's views, together with their motives and actions, determine their reasonableness. Some doctrines of legitimacy are so appalling as to render their holders unreasonable. In other cases, the doctrines, while in themselves reasonable, are disqualified due to the actions committed by their holders. The distinction may in many cases be hard to draw.

If I were to accept the insularity requirement, Charles's position would carry no weight. We would not have a duty to take his rejection of the state's legitimacy into account – indeed, we would have a duty not to do so, since otherwise we would fall foul of the insularity requirement ourselves. But such an outcome does not follow from the reciprocal theory as it stands. On the reciprocal theory, the fact that Charles holds a different theory of legitimacy does not *per se* render him disqualified.

The question is then whether the insularity requirement should be added to the reciprocal theory of legitimacy or not. We have to investigate the possible effects of accepting or rejecting the insularity requirement before we decide whether to accept it or not. I will argue that accepting the insularity requirement seems unattractive. As Estlund stresses,³⁶ the views that the insularity requirement disqualifies are only those that rely on the mistaken view in question. It is not the person but the argument which is disqualified, and only those arguments that rely on the mistaken assumption are disqualified. The person is perfectly able to present admissible arguments in other areas. This, in my eyes, makes it seem at first glance somewhat less unattractive. The pettier the disagreement, it seems, the less the chance that someone will be disqualified. A good example of a technical disagreement is the disagreement between, on the one hand, Kelly & McPherson³⁷ and, on the other hand, Quong,³⁸ concerning the admissibility of people who hold unreasonable comprehensive views of the good but reasonable political doctrines, where the former think that they should be recognised as reasonable, and the latter thinks they should not. If one of these views is correct and the other is not, one of these views will itself be disqualified, which means that the persons who hold that view will have to refrain from relying upon it if they want their view to carry weight in justification. But if the argument in question is only rarely relied upon, the disagreement does not have to have great practical consequences. However, in an area such as legitimacy, where the concept of public justification plays such an important role, it can be presumed that quite a lot of the disagreement will hinge on different opinions about which views are admissible.

Because of this, I do find the consequences of Estlund's argument to be worrying. I believe that if it is applied to the reciprocal theory of legitimacy, it privileges egoism and narrow-mindedness: the most easily admissible doctrines of legitimacy will be those that, within the scope of the reasonable, rely as little on assumptions about admissibility towards others as possible.

This idea requires some elucidation. Implicit in the concept of reciprocity as I have defined it is a certain commitment to universalisability. For our proffered terms of cooperation to be fair, it must be possible for others, suitably situated, to accept them for the right reasons. This does not, I believe, require someone who puts forward the terms to have a well-developed theory of legitimacy. If it would be the case that it did, then most people could not be expected to be able to propose fair terms of cooperation, since most people have not had the opportunity to develop such a theory, and this conclusion seems to contradict common sense. Now, as long as proffered terms of cooperation do not rely on a theory of legitimacy that makes assumptions about admissibility, the insularity requirement carries no force. People propose terms that will work to their own advantage, tempered by some idea of fairness, but they do not make any potentially rivalling judgements about admissibility.

³⁶ David Estlund, personal communication.

³⁷ Erin Kelly and Lionel McPherson (2001), "On tolerating the unreasonable", *Journal of Political Philosophy*, Vol. 9, No. 1, pp. 38–55.

³⁸ Jonathan Quong (2004), "The Rights of Unreasonable Citizens", *Journal of Political Philosophy* Vol. 12, No. 3, pp. 314–335.

But as soon as people start to bind their own demands to those of others, as soon as people start to think the thought “While I, personally, would accept such-and-such terms of cooperation, I recognise that many other people won’t. To me, the state is only legitimate if it could be accepted by a certain set of people. Hence, I have to tailor my expectations to match others’,” they make reference to a theory of legitimacy other than the reciprocal theory, and risk falling foul of the insularity requirement. Hence, the insularity requirement when applied to the reciprocal theory of legitimacy carries with it a structural bias that not just seems arbitrary but even dangerous. Those views end up being disqualified that most strongly adhere to cosmopolitan, universalist ideals, tying one person’s fate to others’. And it is important to note that these views are most likely to get disqualified when the disagreement is the sharpest, when they try to bring new voices and new concerns into the discussion.

We can take an example to see why this is the case. Children are not reciprocal agents in my sense of the word. Below a certain age, they lack a fully developed sense of fairness. The reciprocal theory of legitimacy nonetheless assumes that children’s interests are provided for, for several reasons. One is that we must assume it to be a natural fact that most humans beings, especially but not only parents, care about children and want them to do well, and so would not propose or accept terms of cooperation that posed a significant harm to children’s interests. Another reason is that we have a duty of assistance, which includes assisting those who cannot support themselves, and so terms of cooperation that did not satisfy this duty would be unreasonable.

A rivaling theory of legitimacy, let’s call it the *children’s rights theory of legitimacy*, would include hypothetical representatives of children in the justificatory community. On such a theory, the exercise of political power would only be legitimate if it could not be reasonably rejected by members of the justificatory community, including the hypothetical representatives of children. That is another way of building in a concern for children’s interests. While I hope that the reciprocal theory of legitimacy in practice will protect children as well as any other plausible theory of legitimacy will, it may well be that the children’s rights theory of legitimacy is more hard-wired to protect children: the protection is so to speak more in-built, it occurs at a deeper level of the theory. To me, that seems like a highly attractive feature of the theory, and we do not regard its adherents as ideological enemies, even if we choose to accept a different theory of legitimacy ourselves.

However, since it relies on a different assumption about to whom the state ought to be justified, the insularity requirement would force us to declare the theory inadmissible. We are forced to ignore the demands of its adherents, since they rely on a mistaken assumption.³⁹ “It would have been better,” we are forced to say, “if you had not constructed a theory of legitimacy that includes the interests of others, but only stuck with a narrower and more self-

³⁹ It is important to note that this in fact is the case: when someone proposes terms of cooperation, we need to check the person’s motivation to find what is driving that person to propose the terms she does. If it is merely narrow self-interest without any concern for others, she can be dismissed as unreasonable, for example. In this case, those who hold the children’s rights theory of legitimacy can give a fairly detailed account of the reasons they have for proposing their particular terms. If someone is proposing terms to regulate such a complex system of cooperation as a society, the chances that the ultimate justification will be fairly deep increase. While we can imagine that certain individual terms could be proposed regardless of which theory of legitimacy someone has, the justification for the entire bundle may go fairly deep down. In other words, I do not believe that we can escape by saying that there may be no need to appeal to a theory of legitimacy, since there can be an overlapping consensus on the individual parts.

interested theory. Then we might have listened to you.” Again, this seems not just arbitrary but morally repulsive.

I take a large part of Estlund’s motivation for the insularity requirement to be that he is worried that the project of political liberalism is doomed without it. But we must ask ourselves what such a failure would entail. A failure to consider the place that the concept of legitimacy has in a broader theory of the moral status of political power leads to the conclusion that legitimacy must be rescued at any cost, since without it there is no hope whatsoever. But if we accept the distinction between justification and legitimacy, and if we regard the liberal state as robustly justified even if it is less than fully legitimate, the cost of failure is not that high.

The price of accepting the insularity requirement thus seems to be high, while the gain is lower than expected. The high cost of the insularity requirement lies not mainly in its practical consequences, though these might be significant as well, as much as in its moral price: we are forced to tell people with whom we respectfully disagree, and for whose beliefs we have respect and even admiration, that we are not going to consider their arguments in the discussion of how to organise society in a legitimate fashion, not so much because we consider them to be wrong (because deep down we consider everyone who has a genuine disagreement with us to be wrong, even if their views are admissible), but rather due to an arbitrary structural feature, namely that they disagree with us over who is to count as qualified. If this is the price we have to pay to save political liberalism, we may wonder whether political liberalism is worth saving.

2.2.3 Is the Reciprocal Theory a Form of Political Liberalism?

I said that faced with Estlund’s argument, the reciprocal theory had three options. The first option, to accept the insularity requirement, seems closed. The remaining two options were option (2), to accept that the reciprocal theory is not a form of political liberalism, and option (3), to deny one of the premises of Estlund’s argument.

I’m going to argue that the reciprocal theory is a form of political liberalism, by denying one of the premises of Estlund’s argument, namely his characterisation of political liberalism as a theory which claims that arguments are admissible if they are acceptable to all qualified points of view. In other words, I’m going to reject (2) by accepting (3). Specifically, I think that Estlund’s characterisation of political liberalism is too stringent. What is important here is not the mere appropriation of a title, “political liberalism”, but acquiring the advantages which political liberalism is supposed to have over other forms of liberalism.

What separates political liberalism from other forms of liberalism is that it is not comprehensive. It does not rely on controversial assumptions about the good. As Rawls writes, “political liberalism applies the principle of toleration to philosophy itself”.⁴⁰ Estlund’s version of political liberalism, however, rescues the criterion of qualified acceptance at the cost of the principle of toleration, since it refuses to regard other reasonable views about legitimacy as qualified.⁴¹

⁴⁰ Rawls, *Political Liberalism*, p. 10.

⁴¹ It is not entirely clear what Rawls actually means by “the principle of toleration”. If the principle of toleration simply means not basing a philosophical theory on a comprehensive doctrine, then Estlund’s insularity requirement does not violate the principle of toleration. But if it means having a commitment to respecting as

Estlund argues that political liberalism must accept the insularity requirement if it is to pass a self-application test. But there seems to be no reason why the reciprocal theory should be inadmissible by its own light. The reciprocal theory admits that it is controversial. But it can still be put forward in good faith by members of society seeking to fulfil their duties of reciprocity to others, and thus it is a reasonable, and hence qualified, theory.

The test which the reciprocal theory applies to doctrines of legitimacy to see if they are admissible is not the same test that Estlund applies. The reciprocal theory asks of a doctrine of legitimacy: “Can it be put forward in good faith as terms of cooperation by someone seeking to fulfil her duty of reciprocity?” According to Estlund, political liberalism instead asks of a view: “Is it acceptable to all qualified points of view?”

The reciprocal theory readily grants that there are people who may reasonably reject it. It will thus not be accepted by all qualified points of view. What Estlund may say then is that the reciprocal theory simply isn't a form of political liberalism. I beg to disagree.

The distinction between doctrine and legitimacy and the use of two different criteria of reciprocity, one for legitimacy and the other for reasonableness, are some things that set the reciprocal theory apart from other forms of political liberalism. Nevertheless it is, I would argue, a form of political liberalism. The reciprocal theory tries to find a state which all people reasonably could accept. This project is essentially the same as Rawls's. It does not rely on any controversial assumptions of the good, and it seeks to limit the justificatory value that appeals to such assumptions can have.⁴² It tries to accommodate the reasonable pluralism and disagreement on important matters that it identifies in society, and it believes that the fact that such pluralism exists has important consequences for legitimacy and justification. While its justificatory structure is somewhat different, it is nonetheless a theory in the same spirit.

Nonetheless, the reciprocal theory regards the problem which political liberalism tries to solve in a different light from Rawls. According to Rawls, existing forms of liberalism were too controversial, since they built on comprehensive doctrines of the good. People could reasonably disagree with Mill's idea of autonomy as the good life, or Kant's theory of the person. The problem with reasonable disagreement on comprehensive doctrines of the good was to be solved by constructing a theory of legitimacy that didn't make any such assumptions at all. The building blocks from which Rawls's politically liberal theory of legitimacy was to be constructed were ones which would not be controversial to reasonable people.

In retrospect, we can see that even Rawls's political liberalism has been the subject of a significant debate, where all or most of its assumptions have been challenged. I cannot consider to which degree such challenges succeed, but it seems to me that they show that Rawls's foundations were more controversial than he believed. In the face of such controversy, political liberalism can either continue to search for new foundations that aren't controversial, or it can dismiss the challengers as unreasonable, or it can regard the idea of political liberalism in a new light.

valid at least some alternative views within some area of philosophical inquiry, then the insularity requirement violates the principle of toleration.

⁴² See 4.3.4.

The first two options are related, because the viability of the first and the attractiveness of the second both depend on one's conception of the reasonable. The reciprocal theory defends a conception of the reasonable which is more permissive than many others, since it regards reasonableness in the light of reciprocity only. That means that it is sceptical that the search for uncontroversial foundations can succeed, and it worries that dismissing the challengers of liberal foundations as unreasonable will threaten to introduce a major structural flaw into the theory, namely that we take ourselves the right to dismiss people towards whom we actually have acquired a duty of legitimacy.

I will now respond to a worry with this argument. Political liberalism, as I understand it, is the search for a certain kind of foundations on which society is to be built. The reason why foundations based on comprehensive theories of the good are unsuitable is not that they could not be accepted by all. Perhaps no foundations can be accepted by all. Nor is it that they cannot ground a legitimate state. Perhaps no foundations can ground a legitimate state. So the question which is to be asked is: if *all* foundations are contestable, what is the difference between comprehensive and non-comprehensive foundations?

The answer is that even though we recognise that most of the foundations used when theorising about legitimacy are contestable, we mustn't let this deter us from trying to solve the task of fulfilling our duties of legitimacy to others. Presenting terms of cooperation justified by reference to ideas that are not founded on comprehensive doctrines of the good is a way of doing this which ought to be acceptable to a fellow citizen: while those terms may be rejected, as may the foundations underlying them, one ought still see that they represent an attempt at finding a way to exercise the power of the state on terms that are acceptable to all. Although not accepted, they can form the basis for bargaining, compromise and deliberation.

Terms of cooperation that can only be justified by reference to comprehensive doctrines of the good, however, are of a different kind. When we disagree about them we do so at a deeper level, involving our most fundamental views about the world to a greater extent. Someone who presents such terms may act with good intentions, but she has still failed to understand what is required of her: either she has been ignorant of the actual fact of religious pluralism in society, or she has refused to believe that such pluralism can be reasonable. Either way she acts unreasonably.

In this way, the reciprocal theory seeks to uphold the most fundamental aspects of Rawlsian political liberalism, while recognising that the scope for reasonable disagreement goes further than what Rawls seems to have believed. I think I've managed to show that the reciprocal theory can accept the validity of Estlund's argument for the insularity requirement, while at the same time both rejecting the insularity requirement and maintaining the reciprocal theory's status as a form of political liberalism.

2.3 Gaus's Justificatory Liberalism

Gerald Gaus has argued that there is no principled difference between the justification of the belief that the state is legitimate and the justification of other beliefs.⁴³ He defends a "weak externalist" epistemology⁴⁴ according to which people's beliefs, in order to be rational, are

⁴³ Gerald Gaus (1996): *Justificatory Liberalism: An Essay on Epistemology and Political Theory*, New York: Oxford University Press.

⁴⁴ Gaus, *Justificatory Liberalism*, p. 32.

founded in certain fundamental, self-justifying reasons. If it is possible to show that according to people's own reasons the use of coercion to achieve a certain purpose is justified, then we are allowed to use coercion to achieve such a purpose, even if the people involved do not consent to it.⁴⁵

The striking thing about Gaus's theory is that it sticks so closely to epistemological ideas of justification. Gaus notes that many liberal theorists have underlined the importance of public justification but have abstained from presenting a theory of justification. They do so because they consider any such theory to be overly controversial. However, Gaus argues that those theorists, such as Rawls, in fact rely on a theory of justification, since they have a theory of the reasonable. But those ideas turn out to be deeply flawed as epistemologies, Gaus argues, and hence there is a need for serious theorising about moral epistemology.⁴⁶ As an example, Rawls assumes that reasonable people are more rational than they in fact are. People are prone to commit all kinds of errors and mistakes when making judgements about different matters. So we cannot assume that the beliefs of reasonable people should be taken as the gold standard of justification, because there are very few reasonable people as Rawls defines them. And this also means that we cannot take the beliefs of people in general at face value, since people are often wrong about things.⁴⁷

2.3.1 The Project of Legitimacy

Here we see what I believe to be a fundamental gap between Gaus on the one hand and most other theorists on the other hand as concerns how the project of legitimacy, or the project of political justification, is to be viewed. One could present at least four views on what the project of political justification is intended to achieve. Gaus's view of public justification as essentially a public exercise in (a certain kind of) moral epistemology is one such view.

The second view, and the most practical defence of justification one could give, is that in societies characterised by the fact of reasonable pluralism, we need to justify the political order of society to people if we want to preserve peace and stability, which is necessary for society to function, with as little reliance as possible on the exercise of brute force.

On the third view, one could imagine the search for justification as a purely theoretical exercise. Here, the question of whether people will actually accept the state that is claimed to be justified only matters to the extent that the definition of "justification" involves reference to other people's beliefs, as motivated by intra-theoretical reasons. We find a similar approach to the search for various political values in G.A. Cohen's later work.⁴⁸ For Cohen, the search for justice should be carried out regardless of whether people will accept a just regime or indeed regardless of whether a just regime is even theoretically possible to bring about. This is a very anti-practice-centred approach to political philosophy.

On a fourth view, Rawls emphasised that while political liberalism is exercised by the problem of stability, that problem was the problem of stability *for the right reasons*. By this

⁴⁵ Gaus, *Justificatory Liberalism*, p. 123.

⁴⁶ Gaus, *Justificatory Liberalism*, p. 5.

⁴⁷ Gaus, *Justificatory Liberalism*, pp. 131-133.

⁴⁸ See G. A. Cohen (2008), *Rescuing Justice and Equality*, Cambridge, Mass.: Harvard University Press.

he meant a stability that consisted of more than just coercion, but also stability that rested on more than just a *modus vivendi* between different parties.⁴⁹

The reason for wanting not just stability, but stability for the right reasons, is that the search for legitimacy is ultimately based on a commitment to reciprocity. We act wrongly towards others if we use coercion to impose a regime on them which they don't have reason – the right kind of reason – to accept, because such a society is not organised on terms which the participants consider to be fair. Here, reciprocity is a very narrow runner-up to our concern with stability: if successful wide-scale cooperation is to be possible in the first place, we need a certain amount of stability, but as soon as such cooperation is established, reciprocity comes in as a value which ought to guide our considerations about what we owe to our fellow members of society when it comes to how our cooperation is managed.

The reciprocal theory accepts this approach. A minimum requirement of reasonableness is that you have the possibility of fruitfully cooperating with others, and this would seem to require a certain capacity for logical and probabilistic thinking. As Gaus points out, a lot of people make mistakes within this area a lot of the time. Nonetheless, people are still able to maintain complex relationships of cooperation and mutual dependence. So if we design a criterion for logical and probabilistic thinking which reasonable persons must fulfil it does not have to amount to full rationality, making it less vulnerable to Gaus's critique.

2.3.2 A Practical Critique of Justificatory Liberalism

The reciprocal theory directs two types of critique against justificatory liberalism. The first kind of critique is of a practical nature: if we accept justificatory liberalism, it seems to be extremely difficult to justify anything to anyone. This is something that Gaus readily grants. A proposal must be proven “beyond reasonable doubt” in order to be justified. According to Gaus's theory, the state should otherwise observe a “baseline of non-interference”: if we cannot justify something, we should not do it. And if this has the result that very few things can be justified, then so be it. Nonetheless, Gaus argues that basic liberal ideas such as freedom of speech, tolerance and the rule of law are publicly justified beyond reasonable doubt.

That we, from within our own belief systems, should be convinced beyond reasonable doubt of the necessity of traditional liberal human rights is one thing. But remember that Gaus also wants to claim that such ideas are justified to *all* other members of society. I am much less persuaded that it is possible to publicly justify even the most basic ideas of liberal democracy to Nazis and to militant fundamentalists of various creeds. The reciprocal theory overcomes this problem by claiming that we simply do not have a duty to justify ourselves to such unreasonable people: they are not willing to recognise us (or our fellow members of society) as having a capacity to form our own correct judgements and a right to have social institutions justified to us in terms that we could reasonably accept.⁵⁰ Hence we have no duty to justify ourselves to them. But if very few things could be conclusively publicly justified, then on

⁴⁹ Rawls, *Political Liberalism*, p. 392.

⁵⁰ Of course a fundamentalist could claim that his policies, aiming at our forcible subjugation to his beliefs, were all in our interest, and thus justifiable to us, since they ultimately aimed at our salvation. This is nonetheless still unreasonable, because it denies us an ability to formulate our own good and our own life plan on such a fundamental level as to constitute a denial of our equal moral stature. We can never have a relationship with such a person on equal and reciprocating terms.

Gaus's theory we are forced to abstain from establishing institutions that could help us carry out our duties towards other cooperating and reasonable citizens, because we would otherwise violate a supposedly more basic duty of justification, which we hold towards people who are not willing to recognise that they, in turn, have any such duties to us. The perverse effect of Gaus's theory risks being that the extremists, no matter how few and how extreme they are, get to have their day, but not the vast majority of people who are actually perfectly reasonable and cooperative.⁵¹

2.3.3 A Theoretical Critique of Justificatory Liberalism

The second critique is more theoretical. The concern with public justification does not just arise out of nowhere, but it arises rather because, as fellow citizens of a state, we stand in a certain kind of reciprocal relationship to one another. It is that relationship and the duties that spring from it that make up the yardstick against which public justification is to be measured. If we adopt and apply a theory of public justification that will cause us to fail in our duties against each other, then we have acted wrongly, no matter how epistemologically sound such a theory might be. This is the primary reason why the reciprocal theory rejects justificatory liberalism.

In other words, the reciprocal theory gives a different answer from justificatory liberalism to the following question. Suppose we stand in a reciprocal relationship with someone. We happen to know that person's train of thought very well, so we know that from his point of view, he ought to be committed to organising our cooperation in a certain way, according to rules that can be enforced using coercion. Nonetheless, he refuses to acknowledge this, no matter how hard we try to argue with him. What do we owe him?⁵²

According to Gaus, it would seem as if we owe him nothing that is not prescribed by his own reasons, whether he recognises what they tell him or not. And if, in the light of his reason, we are justified in enforcing rules against him, then that is permitted.

I disagree. One important reason why we need political institutions is to manage large-scale social cooperation in a fair manner. In such cooperation, we will never get to know all the people with whom we're cooperating, and we will find it difficult to communicate messages that all people will receive. Now, suppose that we somehow happen to know that some person's fundamental reasons commit him to a certain proposition. Then, it might be possible for us to claim that we have found a certain claim to be supported by that person's reasons against his express denial, according to Gaus. If we then act on this claim, whatever it is, the person to whom it is justified will deny that we are justified in so doing. And since cooperation on a society-wide scale involves so many people, it might be very difficult for us to present our reasons for acting as we do to him. He will live a life in perplexity.

One way around this problem would be if the agent making decisions over us is someone to whom we are prepared to submit our judgements. But that is not the case. Since all involved are human beings, who are fallible, the natural reaction that we would have, if we were the unwilling subjects of measures that were claimed to have been justified to us, would be to

⁵¹ I should stress that this effect does not occur on the reciprocal theory, even if I were to hold that we have a duty of legitimacy towards *everyone*, because a state might fail in that duty and still be justified. Gaus, like most liberal theorists, does not seem to operate with any distinction between justification and legitimacy.

⁵² Cf 1.4.

assume that the others, those enforcing the measures upon us, were in the wrong about what our reasons were. From the point of view of the subject herself, there is no difference between a justified and an unjustified imposition, in the absence of an explanation being provided. And such explanations are very difficult to produce.

Gaus wants to claim that we have reason to submit our judgements to some form of “umpire” in the form of the democratic majority, since this is a process that allows us to preserve our belief that we are right, at the same time as we accept the judgement of the umpire, somewhat like how players in a football match agree to abide by the judgements of the referee even though they might believe that the referee is making the wrong calls.⁵³

This might seem like a plausible argument, but the analogy only goes so far. For a football player to accept the authority of the referee, she must believe that she is involved in playing a game in the first place, and there must be agreement on what the rules are. For someone who is playing ice hockey or who is just sitting on the sidelines, the commands issued by a football referee have no importance.

It is in other words the very rules of the game itself that we must make sure are accepted as legitimate by others. In this enterprise there is no automatic role for the theory of justification which Gaus puts forward. First of all, as I have said above, it is highly uncertain if we are ever in a position where we can tell that a certain proposal of ours (for instance a proposal for terms of cooperation) truly is justified to someone who denies that it is. Secondly, even if we can justify a proposal to someone against her denial, we might not be able to show to her that we have managed to do so. This is especially worrisome given that there are people who disagree with the very premises of Gaus’s theory of justification, i.e. what constitutes justifying something to someone. And so then the question is: would I agree to having proposals enforced against me, if I had no way of telling whether they were truly justified to me or not? No seems as good and reasonable an answer as yes. What good are umpires, if I do not believe that someone could force me to play the game in the first place? The question which Gaus’s account leaves unanswered is ultimately whether his justificatory liberalism could be justified on its own terms. I think the answer is no.

2.4 Summary

This chapter is the first of three where I consider challengers to the reciprocal theory. In this chapter I have considered the arguments against political liberalism presented by Estlund and Gaus, and I have sought to reject them. As I wrote in my response to Estlund, I consider the reciprocal theory a form of political liberalism, though the exact formulation of the reciprocal theory, and the motivation for it, may differ from other forms of political liberalism, such as Rawls’s. But I am bound to reject any argument against political liberalism which claims that political liberalism is too permissive and that it admits doctrines as reasonable which it should not. On the contrary, as I have hinted in Chapter 1, and as I will go on to say more about in Chapter 4, my main problem with political liberalism in its Rawlsian version is that it does not sufficiently recognise the possibility and range of reasonable disagreement about legitimacy, and the consequences this may have for our attempts to legitimise the state in reasonably pluralist societies.

⁵³ Gerald Gaus (2003): *Contemporary Theories of Liberalism*, London; Thousand Oaks, Cal.: p. 219 f.

Chapter 3. Challenges to the Reciprocal Theory II: Deliberation, Impartiality, Property and Human Rights

In this chapter, I will continue to consider some alternatives to the reciprocal theory found in the literature.

In section 3.1, I will look at deliberative democracy as an alternative approach to legitimacy, and I will argue that while deliberation may be a highly useful tool for bringing us closer to legitimacy, it is unable to solve the problem fully.

In section 3.2, I will examine Brian Barry's theory of justice as impartiality, which has many similarities with the reciprocal theory. Barry argues that we should select principles of justice that could not reasonably be rejected, but I will argue that the lack of a systematic treatment of the reasonable in Barry's theory is a fundamental problem.

In section 3.3, I will consider recent work by Anna Stilz, who develops a Kantian-Rousseauian argument for the legitimacy of a democratic state. While Stilz's argument is interesting, I will claim that it rests on a problematic idealisation of the state, as well as a denial of the possibility of disagreement about legitimacy which seems implausible.

In section 3.4, I will analyse Allen Buchanan's attempt to ground the legitimacy of democratic states in a robust natural duty of justice. I will argue that any formulation of that duty must either be implausibly strong, insufficient to ground legitimacy, or implausibly restrictive on the state, and that therefore Buchanan's argument does not succeed.

I will finish in section 3.5 by summarising my conclusions and pointing towards the next chapter, where I will focus on Rawls's political liberalism.

3.1 Deliberative Democracy

There is a significant body of literature suggesting that deliberative democracy can help us solve the problem of legitimacy. This literature ranges from the discourse ethical approach of Jürgen Habermas, which argues for a very close connection between legitimacy and deliberation, on the one hand, to more practice-centred approaches such as can be found in Amy Gutmann and Dennis Thompson's *Democracy & Disagreement*, on the other.⁵⁴

In Chapter 6, I will argue that well-functioning public deliberation is one of many means which can help us come closer to the ideal of legitimacy.⁵⁵ I am thus in no way willing to dismiss deliberation as a means to improve the legitimacy of the state. But I do want to claim that it is not a sufficient condition for the establishment of legitimacy.

In this section, I will begin by formulating a deliberative theory of legitimacy, which can be used as a contrast to the reciprocal theory. I will then present an argument against the

⁵⁴ See Jürgen Habermas (1998), *Between Facts and Norms: Contributions to a Discourse Theory of Democracy*, London: Polity; Amy Gutmann and Dennis Thompson (1996), *Democracy and Disagreement*, Cambridge, Mass.: Belknap Press.

⁵⁵ See in particular 6.3.2.

deliberative theory and consider some possible responses. I will finally meet an objection from deliberative theorists about the nature of moral reasoning.

3.1.1 The Deliberative Theory of Legitimacy

In order to see why the ideal of deliberative democracy might constitute an alternative to the reciprocal theory, we have to postulate something like a *deliberative theory of legitimacy*. This theory would hold that deliberative democracy brings about a legitimate state, or in other words, that no one reasonably could deny that successful deliberation is both a necessary and a sufficient condition for legitimacy.⁵⁶

There seems to be many attractive features to this theory. Simply having a bare democracy, by which I mean a state where we, by means of general and equal suffrage, either decide on policies directly or elect a legislative assembly which does, does not seem to suffice for legitimacy. It seems as if the protection of certain human rights is also a necessary condition for the legitimacy of any democratic state. We might then want to employ some “richer” concept of democracy, according to which certain of these rights are regarded as inherent in the concept of democracy itself. It is, for example, a common opinion that the freedoms of expression, the press, and assembly, among others, have to be guaranteed for any political system rightly to be a democracy. A state which makes a decision to abolish these freedoms may possibly do so democratically and thus perhaps legitimately, but it will cease to be a democracy, and thus a legitimate state, and thus the state henceforth ceases to have the moral right to implement its decisions.

But as soon as we move on and further specify exactly what a legitimate state must fulfil, there is disagreement. The “richer” the concept of democracy becomes, the more space for disagreement there is about exactly what ought to be included. As I will show in Chapter 4, I believe that the boundaries of reasonable disagreement are so wide as to accommodate doctrines that are mutually incompatible.

The reason why a deliberative theory of legitimacy seems attractive is that it offers us a way to try to manage this disagreement in a way that preserves legitimacy. What the deliberative theory of legitimacy would claim is that no one reasonably could deny that a functioning deliberative democracy would be legitimate. One could imagine an argument along the following lines: when faced with moral disagreement, deliberation represents an attempt to reconcile our disagreements as far as possible by removing the disagreements, or, if that isn't possible, by coming to regard the things we disagree about as less important: in other words, the hope is that we may disagree about whether something ought to be done, but not about whether it would be legitimate to do it. After all, disagreement is only a problem for legitimacy when we disagree about what's *legitimate*: while deliberation may not remove all disagreement, it may cause us to regard our opponents and their views in a different light. At the end of the day, after having listened to our opponents' ideas, carefully reflected on them and presented our objections to them, we might no longer believe that they are ones which, if implemented, would render the state illegitimate. We may reach this conclusion either because we have come to look at them in a different light, or because our opponents have modified their beliefs as a result of deliberation.

⁵⁶ This formulation makes the deliberative theory of legitimacy a liberal theory, in that it seeks to find a state acceptable to all reasonable people. I expand further on this point below.

But, the argument goes, if we persist in believing our opponents' ideas to be incompatible with legitimacy, we are then making ourselves guilty of being unreasonable in turn. Our opponents have now done everything that could reasonably be expected of them, and if we persist in regarding their views as illegitimate, we are going beyond the limits of reasonableness. Hence, deliberation is a sufficient condition for legitimacy, and views that survive deliberation may legitimately be imposed by the state.

To make the deliberative theory of democracy as palatable to a liberal understanding of legitimacy as we can, we must further make some presumptions about the *point* of deliberation. If, for example, the point of deliberation was to make people instantiate some comprehensive conception of the good, for instance a neo-Athenian conception of the good that puts heavy stress on extensive political participation as a requisite of a good life, this would be too controversial. It fails to be liberal, since it does not maintain a neutrality between different reasonable comprehensive conceptions of the good. But one could justify the demand for deliberation on the part of the citizens (which presupposes some kind of participation) by saying that it would be necessary for the achievement and preservation of a liberal state, which could be neutral with respect to comprehensive ideas of the good. In that case, one would not have to justify the idea of deliberation by reference to some idea of the good, or at least not an improperly controversial idea of the good.⁵⁷

3.1.2 Deliberation and Reasonable Disagreement

I will now consider whether the deliberative theory succeeds in finding a state acceptable to all reasonable people. For this to be the case, the deliberative theory of legitimacy must make one of the following two arguments.

The first possible argument is that deliberation will change the content of the decisions made. This may well be true. But that does not mean that they will necessarily all fall within the frame of what everyone considers to be legitimate. Indeed, this is not something we should expect. Even today, there are doctrines of legitimacy which are mutually exclusive. If, as I have argued, we should not expect the range of disagreement to diminish greatly as a result of deliberation, deliberation will not help to establish the necessary overlap.

The second argument is that whatever disagreement on legitimacy that remains will be unreasonable. There are at least three objections that can be made against this argument.

The first objection is that the argument simply seems implausible: it implies that many people who at first glance seem to be reasonable in fact are not. A constitutionalist theory of legitimacy which grounds a legitimate state not in deliberative procedures but in a successfully formulated, interpreted and applied constitution, for instance, would not be reasonable.

⁵⁷ I take a theory such as the capabilities approach, as formulated by Martha Nussbaum (see further 6.4), to be a properly liberal theory, since the values it seeks to promote are ones which it hopes could be the subject of an overlapping consensus between people who share different conceptions of the good. This is especially so since the goal of her approach is not to make sure that people actually *do* certain things in life, but that they *may choose* to do so if they wish.

The second objection is that the deliberative theory risks becoming uninteresting. Instead of trying to resolve or at least manage the moral disagreement in the society around us, it's now merely defined this disagreement out of the equation.

The third objection is that deliberation forces us to suspend our judgement on several issues that are at the centre of disagreement concerning legitimacy. Since the outcome of deliberation is legitimised by the procedure that produced it, and not by its content, we are asked to set aside many of our firm convictions concerning legitimacy. As an example, to what extent will deliberation mandate a welfare state? This is a topic on which people will have differing, firmly held beliefs. To require of reasonable people that they be willing to set aside these beliefs and accept the outcome of deliberation as legitimate, no matter what it will be, seems too demanding.

The only way to make this prospect seem less demanding is to claim that there is no room for reasonable disagreement about the legitimacy of the political solutions yielded by deliberation. In other words, we might disagree about on what grounds we accept a certain decision as legitimate, but this is no problem as long as we actually agree that the decision is legitimate. What this means is that, among the theories that disagree with the deliberative theory, only those are reasonable that do not disagree with the deliberative theory about political solutions.

But this seems to get things backwards. The idea of deliberation as a *legitimising procedure* seems to be lost. If reasonable disagreement with the deliberative theory is possible, then the legitimising force of the proposals produced by deliberation must come from the content of those proposals themselves, not from the fact that they are the result of deliberation. And this means that there must be some independent way of testing whether it would be possible to reasonably disagree with the proposals. But these proposals could presumably be arrived at by other means than deliberation. Hence, deliberation is not a necessary condition for legitimacy.

So arguing that everyone who refuses to accept the outcome of deliberation is unreasonable seems unattractive. And this means that while deliberation as an ideal seems to be highly attractive and hard to disagree with, I doubt that it can fully remove reasonable disagreement on legitimacy. There will always be space for other theories, which will pull in different and contradictory directions.

3.1.3 Discursive Moral Reasoning

I now want to consider a general objection against the way I have set out and characterised the deliberative theory of legitimacy and the problem it is supposed to solve. It can be argued that I have missed a very important aspect of deliberative democracy, which is the discursive formulation of norms. Following Habermas, we may question the very possibility of private ethical reasoning: ethics is always something that emerges through a discourse, which means that we can never set aside the importance of discourse in moral reasoning.

I don't believe that this should be read as a challenge to the entire practice of political philosophy as we know it. Academic philosophy is highly discursive when compared with other social practices. There is nothing to stop us from proposing theories of legitimacy that contain certain norms that a legitimate political regime has to abide by, as long as we are

ready to give reasons for them and to listen to and respond to alternative views in good faith; in other words, to participate in a discourse on legitimacy.

But what the insistence on the discursive formulation of norms might mean is that in the extreme, we may have to deny credence to non-discursively formulated moral beliefs. If we only have a duty to listen to and take seriously the views of those who are willing to participate in the discursive formulation of shared norms, the conclusion is that a norm formulated discursively is justified. In other words, deliberation becomes a *necessary* condition for the justification of moral norms, and *a fortiori* for legitimacy.

The reciprocal theory could presumably give quite a lot of ground to this idea without falling into difficulties. We could even grant, at least for the sake of argument, that only a discursively formulated political theory could ever legitimately be implemented. But presumably there are several such theories that could be discursively formulated. The question is whether the fact that any one of these has been formulated discursively also *suffices* to make it legitimate.

It seems fair to ask of someone who proposes terms of cooperation that she be willing to defend her terms in public and listen to the views of others with an open mind. But to be willing to participate in some form of deliberation is not the same thing as being willing to accept the results of such deliberation as legitimate. The reciprocal theory denies that norms that survive deliberation must be accepted as legitimate, because there may still be persistent disagreement on fundamental issues. Habermas himself does not assume that deliberation will always or even most often result in one particular set of norms winning through. Rather, deliberation, loosely put, lays the groundwork for the legitimacy of the majoritarian principle of democratic voting.⁵⁸ However, as I argued above, we should not assume that deliberatively produced decisions are immune to reasonable disagreement.

In other words, insisting on the discursive formulation of norms does not result in the elimination of reasonable disagreement on legitimacy. In general, it seems as if it is possible to reasonably deny that deliberation is both a necessary and a sufficient condition for legitimacy. Thus, the deliberative theory of legitimacy fails. Nonetheless, as I will argue further in Chapter 6, deliberation may have great practical benefits for legitimacy.

3.2 Justice as Impartiality

In *Justice as Impartiality*, Brian Barry distinguishes between three different types of theories of justice: justice as mutual advantage, justice as reciprocity, and justice as impartiality. Barry claims that a plausible theory of justice should be able to answer three questions: (1) What are the motives behind the formulation of the principles of justice? (2) What motives do people have for following the principles of justice? (3) How are these two questions connected? I will first set out how the relationship between these three questions leads Barry to identify a problem of motivation for justice as mutual advantage and justice as reciprocity (3.2.1), and then I will argue that this problem does not hold for the reciprocal theory (3.2.2). Finally I will argue that since justice as impartiality can be reasonably rejected, it risks being inconsistent (3.2.3).

⁵⁸ Habermas, *Between Facts and Norms*, p. 306.

3.2.1 The Problem of Motivation

Justice as mutual advantage, as developed by David Gauthier, would answer “mutual advantage” to the first two questions, according to Barry. It is thus able to give a plausible answer to the third question: the first two questions are related, since mutual advantage is the governing principle in both. But the problem is that it does not seem plausible to say that mutual advantage would lead one to follow the principles of justice. We imagine that each person acts in her own advantage, and together with others agrees on principles of justice that lead to the mutual advantage of all. But surely there are always going to be situations where one would be better off by not following those principles? For example, suppose it is in our long-term interest that people’s property is protected. The institution of property does not just allow people to exercise a modicum of control over their outside world (for which see in more detail 3.3 below), but also allows commerce and interchange which in the long run is for the benefit of all. So a rule protecting private property is a principle for mutual advantage, at least when compared to life in a propertyless state of nature. But suppose we could break this rule and escape sanction, by stealing others’ property without being discovered. It would be beneficial for us to do so, and hence justice as mutual advantage cannot explain why someone would comply with the principles of justice in a case like this, since the very motive behind designing principles of justice in the first place also motivates us to break them. Hence there is an inconsistency in justice as mutual advantage.

Justice as impartiality, however, posits fairness to be the motive both behind devising principles of justice and behind acting in accordance with these principles. Fairness can never motivate deviations from principles of justice which themselves have been designed with fairness in mind. It is thus internally consistent.

I take Barry’s attempt to solve this problem of motivation to be a possible challenge to the reciprocal theory. But before we can compare the reciprocal theory to the theories that Barry considers, we must of course remember that Barry is interested in evaluating theories of *justice*, while the reciprocal theory is a theory of *legitimacy*, making a clear comparison difficult to achieve. Since the reciprocal theory is a theory of legitimacy, and not of authority or obedience, it does not assume that people always will obey the laws of a legitimate state, and it does not hold that this is necessary in order to make the state legitimate.

This might have presented a problem if we would want to compare the reciprocal theory to theories of justice, but since Barry would not want to argue that perfect compliance is necessary for the state’s being just, there is no structural difference between the reciprocal theory and theories of justice.⁵⁹ But even though perfect compliance is not necessary for justice, Barry takes himself to have a problem of motivation. Similarly, although the reciprocal theory does not require citizens of a legitimate state always to obey the law, there is a corresponding problem of motivation: if the institutions of a just (or legitimate) state are to be sustained, they must be complied with to some extent. Further, even if those institutions survive, the point of designing them will be to a large extent undermined if people constantly fail to comply with them. The point of developing principles of social cooperation is lost if they don’t succeed in guiding people’s behaviour.

⁵⁹ Barry, *Justice as Impartiality*, p. 206.

3.2.2 Non-Compliance in the Reciprocal Theory

The reciprocal theory approaches this problem by noting that, on the whole, the fact that a state complies with someone's doctrine of legitimacy provides that person with strong reasons to act in accordance with the laws of that state.⁶⁰ Someone who refuses to see that this is the case ends up as unreasonable. She has obviously not understood the meaning of legitimacy, or she has been motivated by a desire to exploit others' compliance for her own gain all along. But while a single individual who unreasonably refuses to comply with the laws of a legitimate state does not pose a problem to the success of legitimate institutions, there will be a problem if sufficiently many act in this way. If such non-compliance becomes sufficiently widespread and deeply rooted, it may be impossible to maintain functioning reciprocal relationships. However, we can then say, as Barry does, that this just shows that the circumstances are such that legitimacy at the moment cannot be achieved, and not that there is anything wrong with the theory.⁶¹

The problem with justice as mutual advantage is thus not that people might fail to comply with the principles of justice, because this could potentially happen to any theory. The problem is that the same reason that motivates people to design and agree on certain principles of justice also gives them the motivation to break them, and so that non-compliance is built into the theory. What Barry claims is that the principles of justice as impartiality could only be broken by people acting on grounds alien to the theory, while the principles of justice as mutual advantage could be broken on grounds acceptable to the theory, thus rendering it inconsistent.

The reciprocal theory ascribes a motivation of fairness to reasonable people who propose a doctrine of legitimacy. Recall that a doctrine of legitimacy specifies only under what circumstances a state's exercise of power is morally proper. Once the state's exercise of power is morally proper, it does not ask any further questions. Take the question of whether it is morally permitted to disobey the laws of a legitimate regime. Unlike Simmons, the reciprocal theory does not argue that a duty of full obedience must be included in the concept of legitimacy.

The problem of stability, as the reciprocal theory would express it, is instead whether reasonable people would be motivated to comply with principles of legitimacy which they themselves design. The answer is yes, for the following reasons. Society is seen as a scheme of cooperation for mutual advantage (within the limits set by our duties of assistance), at least when compared to a baseline of limited cooperation in a state of nature. But the only people who are part of the justificatory community, and whose possible compliance thus forms the subject of the problem of stability proper, are those who are willing to draw up and act on fair

⁶⁰ Cf. 1.5.

⁶¹ I said in response to deliberative democracy (see 3.1) that the limits imposed on reasonableness must not be too narrow, since we thereby risk defining away the very problem of legitimacy in the first place. But now I say that if many people turn out to be unreasonable according to the reciprocal theory, this is not a problem for the theory. What is the difference? It is that the reciprocal theory goes as far as possible to accommodate existing disagreement about legitimacy. It makes the realistic assumption that in spite of this disagreement, whether reasonable or not, there will be sufficient compliance with legal norms to allow social institutions to function. If this sometimes should not be the case, then this is no fault of the theory. On the contrary, to assume that there can be no disagreement on legitimacy, or to assume that all such disagreement is unreasonable, however, is unrealistic, at least if we assume that there can be reasonable disagreement on many other important matters in pluralist societies. If our theory of legitimacy does not allow for such disagreement, it may be accused of failing to address the problem it was supposed to answer.

terms of cooperation, given assurance that others are similarly motivated. The people whom Barry is worried about on behalf of justice as mutual advantage, those who only follow their professed doctrines of legitimacy when it works to their advantage, pose a practical problem but not a philosophical one.

The reciprocal theory thus gives, at least in part, the same response to the three questions posed by Barry as does justice as impartiality, namely “fairness, fairness, fairness”. It should be said that the reciprocal theory is very much aware that this perhaps is but one of many reasons that may motivate someone to draw up and follow principles of legitimacy, but this presumably is no great difference from Barry’s theory.

I thus believe that the reciprocal theory is not vulnerable to the criticism that Barry directs against justice as mutual advantage. But why is the reciprocal theory to be preferred to justice as impartiality?⁶²

3.2.3 Is Justice as Impartiality Consistent?

When putting forward his idea of justice as impartiality, Barry does not seek to hide the fact that his theory is controversial.⁶³ However, he does believe that justice as impartiality cannot be reasonably rejected. This assumption is crucial, since by the lights of justice as impartiality itself, only those political arrangements are just (or legitimate) that cannot be reasonably rejected. This follows from the Scanlonian methodology that Barry employs. In such a way, Barry’s theory fulfils Estlund’s insularity requirement *avant la lettre*.

I believe that the reciprocal theory of legitimacy itself can be reasonably rejected. This simply follows from the concept of reasonableness that it espouses. This does not make it any less correct, since by its own lights someone can reasonably hold to an incorrect theory, and thus reasonably reject a correct theory.

I also believe that justice as impartiality can be reasonably rejected. In order to show this, I cannot just point to the fact that it is controversial, since the mere fact of disagreement with a theory does not suffice to establish that it can be reasonably rejected.

I believe that a libertarian theory of legitimacy can be accepted as reasonable while Barry believes that a libertarian theory of justice cannot. Barry argues that the consequences of a libertarian scheme of justice, such as the lack of any publicly guaranteed safety net, would be reasonably rejected. Hence, libertarianism is unsuitable as a theory of justice since it could be reasonably rejected.⁶⁴

But there is nothing inherently paradoxical about a doctrine that can be reasonably rejected and defended at the same time. This is the whole point with the fact of reasonable pluralism. So the idea that libertarianism could be reasonably rejected and defended at the same time is not inherently flawed. Its plausibility in this case rests on how far reasonable rejectability extends in the case of justice. I will try to defend the idea that libertarianism could reasonably

⁶² We here assume that justice as impartiality can be understood, or perhaps restated as, a theory of legitimacy. If the two theories concerned two different things, there would be no basis of comparison.

⁶³ Barry, *Justice as Impartiality*, p. 122.

⁶⁴ Barry, *Justice as Impartiality*, p. 203.

be defended in Chapter 4.⁶⁵ And if it can be shown that libertarianism reasonably can be defended, then justice as impartiality could presumably reasonably be rejected, since libertarians reject justice as impartiality (or at least Barry's formulation of it). In turn, this means that justice as impartiality fails its own test.

Another argument against justice as impartiality can be taken from Barry's own claims about how the need for scepticism defeats claims that certain conceptions of the good cannot reasonably be rejected.⁶⁶ Barry responds to utilitarianism and the natural law tradition by arguing that "no conception of the good can justifiably be held with a degree of certainty that warrants its imposition on those who reject it".⁶⁷ Barry presents an argument from our experience of European religious history since the Reformation: "It is hard not to be impressed by the fact that so many people have devoted so much effort over so many centuries to a matter of the greatest moment with so little success in the way of securing rational conviction among those not initially predisposed in favour of their conclusions."⁶⁸

I would argue that Barry's argument for a need for scepticism risks backfiring onto his own theory. The story Barry tells about how persistent religious disagreement means that religiously based conceptions of the good ought not to be imposed on the population mirrors the story Rawls gives in *Political Liberalism*. Rawls identifies certain "burdens of judgment" that hinder our ability to form judgements about questions of the good. The sources of these burdens are:

1. The evidence is conflicting and complex, and thus hard to assess and evaluate.
2. Even when we agree about which considerations that are relevant, we disagree about their weight.
3. To some extent all our concepts are vague and subject to hard cases, and this means that we must rely on judgement and interpretation within some range where reasonable people may differ.
4. To some extent, the way we assess evidence and weigh moral and political values is shaped by our total experience, and our total experiences must always differ.
5. Often there are different kinds of normative considerations on both sides of an issue, and it is difficult to make an overall assessment.
6. Any system of social institutions is limited in the values it can admit, so that some selection must be made from the full range of moral and political values that can be realised.⁶⁹

The burdens of judgement seem to be a plausible explanation for the persistence of religious disagreement in the West. I would claim that these burdens of judgement make themselves felt also when applied to justice and legitimacy. This explains why there is persistent disagreement also on these issues. And so it seems as if Barry must claim that there is a need for scepticism also about justice and legitimacy, and thus that no conception of justice (or legitimacy) can justifiably be held with a degree of certainty that warrants its imposition on those who reject it. In other words, justice as impartiality, like other theories of justice, cannot be imposed on those who reject it. Once again, it would fail its own test.

⁶⁵ There I will consider the reasonableness of libertarianism as a doctrine of legitimacy. I will not attempt to consider the reasonableness of libertarianism as a theory of justice.

⁶⁶ Barry, *Justice as Impartiality*, p. 168 f.

⁶⁷ Barry, *Justice as Impartiality*, p. 169.

⁶⁸ Barry, *Justice as Impartiality*, p. 171.

⁶⁹ The above six points are a partly verbatim paraphrase of Rawls, *Political Liberalism*, pp. 56-57.

The problem with the Scanlonian approach that Barry uses is that, for it to work, there must be some theory of justice that could not reasonably be rejected. The Scanlonian approach does not seem to have the resources to explain what we are to do if such a theory is not to be found.

3.3 Stilz on the State and Democracy

In her book *Liberal Loyalty*, Anna Stilz presents a Kantian argument in favour of the state.⁷⁰ The argument seems attractive because it avoids some of the more implausible results of Simmons' theory, but at the same time it significantly contrasts with my position. I will dedicate some space to discussing Stilz's argument, because I believe it has a certain amount of appeal and credibility. I will begin by briefly setting out Stilz's Kantian argument in favour of the state (3.3.1). I will then present a critique against that argument (3.3.2). In 3.3.3 I will outline Stilz's Rousseauian interpretation of Kant, and in 3.3.4 I will see where this interpretation leads us in terms of practical policy. In 3.3.5 I will present a dilemma for Stilz's theory which hopefully shows that her argument doesn't work, and in 3.3.6 I will finish by briefly discussing how the reciprocal theory handles the problem of private domination which lies at the heart of Stilz's Kantian argument.

3.3.1 The Kantian Argument for the State

The Kantian argument proceeds from the axiom that each human being has a fundamental right to equal freedom. This right to freedom must, in order to be realised, include a right to private property: the ability to control one's own body and actions, and the right to take lasting and exclusive possession of external objects. The Kantian argument is that this right cannot be realised outside of the state. While we of course could be free in the state of nature from aggression and attempts to interfere with our body and property, such freedom is merely contingent: it could be violated at any moment by sufficiently powerful enemies. In the absence of a lawful state, there is no way that our freedom could be authoritatively protected. If we will the existence of property we thus will the existence of a state.

3.3.2 Is the Kantian State Possible?

My main objection to Stilz' Kantian argument is that it rests on an idealisation of the state, which leads to a dilemma. The Kantian idea is that the state can represent an *omnilateral* will, the will of all, rather than the *unilateral* will of each private person. The omnilateral will is that each person's private property be protected, while unilateral wills may provide for the domination of some people over others, if it is to the benefit of the person willing it.

It seems improbable that actually existing states can function in this way. The state is always composed of individuals, some of whom hold more power than others. While people may be motivated to act in accordance with general maxims, this is far from guaranteed. We can very easily imagine law-governed states that in fact represent merely the will and the interests of some particular groups, while still possessing the typical attributes of a state (as compared to merely a scheme of naked force), such as the rule of law and a monopoly of force.

⁷⁰ Anna Stilz (2010), *Liberal Loyalty: Freedom, Obligation, and the State*, Princeton, N.J.; Oxford: Oxford University Press.

This means that I don't agree with Stilz when she argues that "as soon as we commit to respecting persons as free and equal, we commit to state authority, since there is no other way to define the terms of our respective rights in a nondominating fashion."⁷¹ People fundamentally disagree on what a proper way of defining the terms of our respective rights would look like. There is little hope that the state can succeed in establishing terms that we can all agree on as acceptable. It is important to stress that the state can always be turned into a tool of oppression, and that the protection of our property, while important, pales in significance when compared to the importance of protecting our lives. As we know from the 20th century, the state is the institution most capable of committing mass murder. A possible line of argument is thus that if we truly wish to protect people's most fundamental rights, we should seek to abolish the state. I do not agree with that argument. But I am willing to grant it such a degree of credibility, that I do not want to claim that its proponents still are, in spite of their protestations to the contrary, committed to the establishment of a state. There is an unsavoury element of paternalism in Stilz's theory: an unwillingness to recognise the possibility of reasonable disagreement on the practical desirability of the state.

But although the state may become a vehicle for murder and oppression, Stilz's argument would still succeed if she could show that it is possible to establish a state which actually *does* protect our equal freedom. Why should we not be committed to the creation and preservation of such a state? The question then is what it takes for such a state to exist.

3.3.3 Stilz on Rousseau

Stilz claims that Kant's argument that states are necessary for the protection and realisation of freedom, while fundamentally correct, seems inadequate to modern sensibilities: Kant is quite clear that sovereign authority, no matter how bad it is, always must be obeyed, since citizens do not have the right to make a private judgement on the suitability of that authority. To escape from this defence of tyranny, Stilz instead relies on a Kantian interpretation of Rousseau.

Rousseau argues that a state is a state as such (as a moral body) and is legitimate only when it acts in accordance with the general will. The general will is a decision of a public-minded majority: it is not merely the result of a democratic majority vote, but also requires the people to consider the general good rather than the private good of each individual. Under such circumstances, laws must apply equally, and there is thus a condition of reciprocity: no one can legitimately will a burden upon others that she is not willing to shoulder herself.

Rousseau's solution to the problem of legitimacy is concise: "the total alienation of each associate with all his rights to the whole community".⁷² But the total authority over us which the state thereby acquires is one which it may exercise only in accordance with the general will. As Stilz writes: "Here, it is important to remember that the device of a general will is meant to express the terms to which a political authority would need to conform in order to put us under a genuine obligation to obey it. There is no difficulty in holding that individuals don't possess rights against the general will itself, since the terms of the general will define

⁷¹ Stilz, *Liberal Loyalty*, p. 57.

⁷² Rousseau, *Social Contract*, p. 50, cited in Stilz, *Liberal Loyalty*, p. 66.

their rights.”⁷³ Dent comments: “It is a mistake to infer that because Rousseau denies [the strand in natural rights thinking that holds that the individual reserves certain rights to himself inside the state], he denies natural rights altogether... Each potential associate brings to the issue of devising legitimate terms for his association with others natural moral titles and claims, which must be fitly accommodated if the conditions of association are not to be tyrannical. But it is a necessary part of the way in which they *can* be appropriately accommodated that no one associate reserves the right of judgment to himself.”⁷⁴

This idea seems to have two main differences with the reciprocal theory. One is that the “moral titles and claims” that the reciprocal theory allows a “potential associate” (ie a member of society, coming under the power of a state) to have are not fully determined by some kind of natural law. The terms of cooperation which the citizen presents can vary from person to person, within the objective and subjective bounds of fairness.⁷⁵ Another is that each associate’s right to judgement *is* reserved, in the sense that we always ourselves retain the ability to judge whether a certain state is legitimate or not. Of course, we are not at licence to do so completely freely: any judgement must be made in accordance with our reasonable doctrine of legitimacy for it to be acceptable, which is to say, for us not to have acted wrongly when making such a judgement.

Stilz continues: “Rousseau’s idea, in sum, is that we can remain free if we obey a will that emanates from no one in particular and applies equally to all. To the extent that we can do this, we retain our own freedom, simply because we are not required to obey the will of any particular person, and it is dependence on arbitrary and particular wills that jeopardizes our freedom. Each of us is, of course, dependent on political society as a whole, and the limits to our rights are given by what society as a whole could rationally agree to. But dependence on society’s impersonal authority, like dependence on necessary forces, does not violate our autonomy.”⁷⁶

Dependence on other people carries with it great risks: “When we are dependent on other people for the satisfaction of our needs or for the guarantee of our rights, there is the ever-present possibility that they will exploit our dependence to force us to obey their will, not our own, by exacting concessions from us in exchange for our compliance.”⁷⁷ Preventing this is taken to be an interest held in common by all citizens.

But there is a problem: “how are we to decide where the right boundaries [for our freedom] lie, and which particular interests are to be protected by law? (...) [Rousseau] opts for a procedural solution to this problem. What matters... is not where exactly the boundaries on our choices are drawn but instead the manner in which they are determined. To be legitimate, the limits to our actions must be expressed in the form of a law, and a law should always articulate an interest that can be protected equally for all.”⁷⁸

⁷³ Stilz, *Liberal Loyalty*, p. 66.

⁷⁴ N. J. H. Dent, *Rousseau*, pp. 188-90, cited in Stilz, *Liberal Loyalty*, p. 64, fn 11.

⁷⁵ By “objective” I mean, as I have said in 1.3 (footnote 21), that there are certain terms that are to be regarded as unfair outright. By “subjective” I mean that the individual, to count as reasonable, must act on the motivation of fairness.

⁷⁶ Stilz, *Liberal Loyalty*, p. 67.

⁷⁷ Stilz, *Liberal Loyalty*, pp. 70-71.

⁷⁸ Stilz, *Liberal Loyalty*, pp. 72-73.

Rousseau believes that a democratic vote binds the citizens when it is made by citizens who are motivated by their common interests: “Provided that a law has truly taken my interests into account, the fact that it disagrees with my opinion does not render it a threat to my freedom: it does not grant other people an unequal share of coercive power over me, because it protects my interests on an equal basis with theirs.”⁷⁹ “If a vote amid disagreement is actually to express a general will, however, each citizen must make a sincere effort to take the other citizens’ interests seriously. He must make an effort to include some opinion about their needs and interests as part of his own determination, since to form an opinion about the *common* good means concerning himself with the freedom and well-being of all other citizens, and not merely his private freedom or the freedom of a partial faction.”⁸⁰

Thus, on Stilz’s view of Rousseau, “the general will is limited by a set of outcome constraints – a general will must formulate a set of legal rights (based on common interests) that can be protected equally for all, and that burden each subject equally – as well as a set of procedural constraints – everyone subject to the laws must have a say in their formulation, and everyone must vote their view of the common interest.”⁸¹

This Kantian-Rousseauian idea carries significant similarities to the reciprocal theory. The reciprocal theory also expects citizens to be in some sense public-spirited: they are supposed to propose terms of cooperation that they regard as fair, not just as beneficial to themselves, and they should consider proffered terms of cooperation in terms of fairness, not just in terms of how the terms would benefit them. This they must do in order to be reasonable. Still, the reciprocal theory denies that a decision’s being founded on the will of a reasonable majority is sufficient to make it legitimate. We can now see that it is here in opposition not just to Rawls but also to Rousseau (on Stilz’s reading), since the reciprocal theory stresses that reasonable people can disagree not just about the substantive terms of cooperation – something which Stilz readily concedes – but also on a procedural level.

3.3.4 Limiting the Authority of the State

Stilz’s theory assumes that people are able and willing to act on the common interest of non-domination, and thus to set aside all possible other interests when these may conflict with the common interest. The Rousseauian idea of democratic legitimacy is demanding in comparison with such a theory as the Schumpeterian idea of democracy, where democracy simply consists in being able, once every few years or so, to decide who is to run the country.⁸² In the latter case, the nature of the laws, the details of the procedure according to which they are adopted, or the spirit in which lawmaking citizens act are not points of concern.

We would be in need of more detail if we were to judge how realistic and appealing Stilz’s Rousseauian democracy is. Stilz sets out three substantive and two procedural criteria that are to draw “clear’ limits to the authority of the state”.⁸³

⁷⁹ Stilz, *Liberal Loyalty*, p. 78.

⁸⁰ Stilz, *Liberal Loyalty*, p. 77. Emphasis in the original.

⁸¹ Stilz, *Liberal Loyalty*, p. 83.

⁸² “The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” (Joseph A. Schumpeter (1942), *Capitalism, Socialism, and Democracy*, New York; London: Harper & Brothers, p. 269.)

⁸³ Stilz, *Liberal Loyalty*, p. 92.

The substantive criteria are “personal inviolability, the universal allocation of property, and the institution of a fair and reciprocal system of private rights”, while the procedural ones are “sufficient citizen solidarity and democratic political participation by all who are coerced to obey the laws”.⁸⁴

What do these criteria require? The substantial criteria, firstly, entail that “no state where torture, imprisonment without due procedure, or extrajudicial coercion is allowed will be a freedom-guaranteeing state”. Secondly, “no state that established slavery or serfdom or imposed unequal restrictions on the property rights of a minority would be legitimate”. Thirdly, laws must apply equally to all, and cannot discriminate arbitrarily between people. Fourthly, “no state that did not guarantee its citizens’ most basic needs would be a lawful state”.⁸⁵ The procedural criteria further guarantee protection for the right to vote, the right to freely express one’s opinion, and the right to compete for office, but also impose a criterion of “sufficient trust or solidarity”, so that laws do not represent purely factional interests.⁸⁶

These criteria are ones without the fulfilment of which a citizen may judge that she does not have an obligation to obey the laws of the state, no matter how just the state otherwise may be. The reason why Stilz is interested in the circumstances under which a person may *judge* that she has no obligations to the state, rather than the circumstances under which a person simply *doesn’t have* any obligations to the state, is probably that she is concerned with the Kantian claim that allowing people to make private judgements about authority may undermine the public nature of the state: if everyone were allowed to judge that they had no obligations to the state, under whatever circumstances, we might soon fall back into the realm of private domination again.

3.3.5 Can the State Avoid Private Domination?

Now consider the example of capital punishment. In almost all European states, capital punishment is prohibited, often constitutionally. Many people in Europe would regard it as an act which the state may not legitimately carry out against its citizens, at least under anything remotely approaching normal social conditions. In other Western jurisdictions, such as many states in the United States, capital punishment is not just permitted but in many cases also warmly embraced. Stilz could have included a prohibition on capital punishment under the criterion of personal inviolability, but apparently she does not. Consider two cases. In the first case, Amy is a probation officer. A prisoner has been sentenced to death after a fair trial and is scheduled for execution. Amy refuses to carry out the sentence, because she believes that a freedom-guaranteeing state should never exercise more force against its citizens than necessary, and that capital punishment constitutes more force than necessary under normal social conditions. In the second case, Jack is a citizen who judges that a society which retains capital punishment is illegitimate.

Someone who has grown up in a society where capital punishment has never been used in living memory may find it a genuinely difficult question whether capital punishment is legitimate or not. We would be inclined to allow a difference of opinion on a difficult matter such as this. Some might wish to make a difference between our judgements in a public and a

⁸⁴ Stilz, *Liberal Loyalty*, p. 92.

⁸⁵ Stilz, *Liberal Loyalty*, pp. 92-93.

⁸⁶ Stilz, *Liberal Loyalty*, p. 94.

private capacity, saying that Amy, as an officer within law enforcement, is to be held to a higher standard of obedience than Jack, the private citizen. Others will disagree. But the point is that any specification of the criteria delimiting the space of private judgement about obligations will be extremely vulnerable to borderline cases such as these. We could solve this problem by reducing the scope of private judgement. But the more we do that, the closer we get to the Kantian position that Stilz wished to avoid, namely the one where we are not allowed to make any kinds of private judgements about the propriety of authority, not even in the face of tyranny.

This, then, is the dilemma for Stilz' theory. No matter what we do, the state always risks becoming an exercise of private will. Either we must force people to accept things that they cannot accept, and which we under normal circumstances would respect that they did not accept, or we must worry that the state will fall back into being an exercise of the private will of a minority. It is important to remember that these borderline cases are not mere anomalies. Rather, they represent clearcut cases of something important in public morality, namely that we reasonably disagree on a number of different points that concern the circumstances under which the state's exercise of power is legitimate.

What Stilz has done is to develop some necessary criteria for the legitimacy of the state. Similar formulations are found elsewhere, and the reciprocal theory does not seek to challenge them. However, finding criteria that are *sufficient* for legitimacy is a different matter. The reciprocal theory avoids political cooperation becoming the domination of one private interest over another by trying to arrange the terms of our cooperation in a way which is acceptable to all. This assumes that people are given more leeway to reserve their own judgement about the acceptability of the state than Stilz seems ready to grant. As I argued in 1.4, the reciprocal theory is founded on respect for the autonomy of the individual, including her right to live together with others on terms that she accepts, as far as possible. The reciprocal theory also has a strong commitment to non-domination, but it primarily leaves it up to the individual to judge when she is or isn't being dominated by others.

3.3.6 The Reciprocal Theory and Domination

I will finish by considering the following question. If everyone reserves their private judgement about legitimacy, why doesn't the reciprocal theory itself degenerate into private domination, since people can use their right to reject terms of cooperation for private gain? The answer is that reasonable people must be motivated by considerations of fairness. While someone can reject a state as illegitimate due to a personal grievance, for instance if she is being unfairly discriminated against in a matter of great importance, it must be possible to defend such a rejection to others: one cannot reject arbitrary discrimination against oneself and at the same time desire that others be discriminated against, for example. While the reciprocal theory harbours its doubts about the possibility of achieving a state which can be legitimate to all reasonable people, it nonetheless agrees with Stilz in having as its *goal* a state that can be accepted by all people acting from considerations of fairness.⁸⁷

3.4 Buchanan and the Robust Natural Duty of Justice

⁸⁷ That it is doubtful whether the state can be legitimate to all reasonable people will be argued in Chapter 4, while I will argue in Chapter 5 that this nonetheless is a goal that we should strive to attain.

Allen Buchanan claims that a “robust natural duty of justice” can ground legitimacy. He starts by distinguishing between political legitimacy, political authority and authoritativeness, and argues that political legitimacy, not political authority, “is the more central notion for a theory of the morality of political power”.⁸⁸

An entity has political legitimacy if and only if “it is morally justified in wielding political power”. Political power is distinguished from mere coercion by its element of monopoly of force.

An entity has political authority if and only if it is (1) politically legitimate and (2) has the right to be obeyed by those who are within the scope of its rules, that is, that the subjects have an obligation towards the entity to obey it.⁸⁹ We owe such obedience towards the government and not the state, since the state is the institutions and the government is the people, and it’s doubtful whether we could ever have obligations towards institutions.

An entity is authoritative if and only if “the fact that it issues a rule can in itself constitute a compelling reason to comply with that rule.”⁹⁰ We can consider an expert, for instance, as authoritative. But authoritativeness does not bring about the rights of political authority. When the doctor tells us to X, we have a compelling reason to X, but we don’t owe it to the doctor to X.

Buchanan distinguishes between two versions of political authority: one where citizens have obligations towards the government, i.e. the people who exercise political power, and one where the citizens have obligations towards each other.

Then Buchanan presents his theory of legitimacy: “The central idea is this: a wielder of political power (the monopolistic making, application, and enforcement of laws in a territory) is legitimate (i.e., is morally justified in wielding political power) if and only if it (a) does a credible job of protecting at least the most basic human rights of all those over whom it wields power, (b) provides this protection through processes, policies, and actions that themselves respect the most basic human rights, and (c) is not a usurper (i.e., does not come to wield political power by wrongly deposing a legitimate wielder of political power).”⁹¹

Buchanan grounds this theory of legitimacy on what he calls a “justice-based account of legitimacy”.⁹² This account builds on three main assumptions: (1) we have a “Robust Natural Duty of Justice” (henceforth RND), “understood as a general but limited moral obligation to help ensure that all persons have access to institutions that protect their basic human rights”; “[2] we do not have a right not to be coerced to do what we have an obligation of justice to do, at least if that obligation is implied by the principle that we are to treat all persons with equal concern and respect, and [3] the Robust Natural Duty of Justice is an obligation of justice that is implied by the principle of equal concern and respect for persons”.⁹³

⁸⁸ Buchanan, “Political Legitimacy and Democracy”, p. 689.

⁸⁹ Buchanan, “Political Legitimacy and Democracy”, p. 691.

⁹⁰ Buchanan, “Political Legitimacy and Democracy”, p. 692.

⁹¹ Buchanan, “Political Legitimacy and Democracy”, p. 703.

⁹² Buchanan, “Political Legitimacy and Democracy”, p. 704.

⁹³ Buchanan, “Political Legitimacy and Democracy”, p. 703-4.

Buchanan's argument for the RND is that just institutions that protect people's basic rights are required for equal regard for persons to be established. And just as the basic human rights are so important that they cannot be overridden by the utility of society as a whole, they require of us that we, if we hold others in equal regard, contribute to their establishment. A theory which held that we had *no* duty to do so, however slight the cost, would be "laughably anemic".⁹⁴

The argument as stated in full runs as follows:

1. Every person has a moral obligation to help ensure that all persons have access to institutions that protect their basic human rights (provided this does not entail excessive costs) (the Robust Natural Duty of Justice).
2. The Robust Natural Duty of Justice is an obligation of justice that is implied by the principle that all persons are to be accorded equal concern and respect.
3. If something is an obligation of justice, then at least in the case when this obligation is implied by the principle that persons are to be accorded equal concern and respect, no one has a right not to be coerced to fulfill it (when coercion is necessary).
4. Therefore, no one has a right not to be coerced to fulfill the Robust Natural Duty of Justice (when coercion is necessary for its fulfillment).
5. Fulfilling the Robust Natural Duty of Justice requires entities that wield political power (that attempt to exercise a monopoly in the making, application, and enforcement of laws).
6. Therefore, wielders of political power violate no one's rights simply by virtue of acting to ensure that citizens fulfill the Robust Natural Duty. Conclusion 6 leaves open the possibility that the wielder of political power's use of coercion might violate its citizens' rights in some other way, even though the use of coercion does not itself violate their basic human rights so long as it is used to ensure that they do what they have a duty of justice to do. Thus we need the additional premise that:
7. In wielding political power to ensure that its citizens fulfill the Robust Natural Duty of Justice the wielder of political power does not violate its citizens' rights, so long as it (*a*) does a credible job of protecting their basic human rights, (*b*) does so by processes and actions that do not violate their basic human rights, and (*c*) is not a usurper (i.e., does not come to wield political power by unjustly displacing an entity that is politically legitimate).
8. Therefore, a wielder of political power that satisfies conditions *a*, *b*, and *c* does not violate its citizens' rights.⁹⁵

I would argue that the way that Buchanan has constructed his argument leads him into a dilemma. Buchanan does not specify which the basic human rights that the RND refers to are. The RND is "implied by the principle that all persons are to be accorded equal concern and respect", but one could presumably imagine many different sets of basic human rights implied by this principle. Now suppose that the basic human rights are quite thin: suppose they do not would extend beyond basic negative rights to freedom of speech, religion and association, the right to a fair trial, and perhaps a basic positive right to the fundamental needs of human life such as food, clothing, etc.

In that case, Buchanan's argument seems quite unappealing. For the state to be legitimate, it must protect these basic rights by processes and actions that do not violate basic rights, as per point 7 (*a*) and (*b*). But does this suffice for the state to be legitimate, which is to say "morally justified in wielding political power"? If the basic human rights are sufficiently basic, this does not seem certain. For instance, the thin formulation of basic human rights does not contain any reference to a right to participate in the political decision-making process of one's

⁹⁴ Buchanan, "Political Legitimacy and Democracy", p. 705.

⁹⁵ Buchanan, "Political Legitimacy and Democracy", pp. 707-8.

country. Criterion 7 (c) contains protection against usurpers, but we can easily imagine non- or semi-democratic regimes that are non-usurpatory, such as 19th century European constitutional monarchies.⁹⁶ It is always difficult to judge whether we would consider such regimes legitimate if we were transported to that time, but it seems certain that we would find it difficult to accept them as “morally justified” if they were to turn up today.

Let us then consider a thick formulation of the concept of basic human rights. Suppose that we include stronger rights to freedom of speech and thought, a right to political participation within a democratic system, and social rights such as a right to education, housing, health care, work, etc. This might make the state more palatable. However, it makes the RND a much more controversial proposition. It seems to stretch the concept of “basic human rights” beyond the limits of credulity. Many of these social rights are ones that we would not consider to be “basic” human rights, but rather rights that only arise in societies that have reached a certain level of economic development. If there is to be a useful distinction between basic and non-basic human rights, then these social rights would have to fall under the latter category.

The argument against Buchanan is thus that there is no formulation of the concept of “basic human rights” which on the one hand makes it plausible that we have a natural duty to help ensure that all persons have access to institutions that protect them, and the respect of which on the other hand is a necessary and sufficient condition for the moral justification of the state. But suppose that we manage to find a middle ground between the thick and the thin formulation of basic human rights which could escape this dilemma. A candidate formulation might be that each person has a right to the rights and freedoms typically granted in a liberal democracy: the usual list of political and religious freedoms, the rule of law, and the right to political participation within a democratic system.

I think this formulation seems to be a very strong candidate. However, the exclusion of social rights from the formulation of basic human rights presents new difficulties. Buchanan’s justificatory strategy seems to be that the state is justified *only as long* as the political power is wielded in order to make people fulfil the RND. Point 7 claims that the state does not violate citizens’ rights under conditions (a)-(c) “in wielding political power to ensure that its citizens fulfill the RND”. Point 4 claims that no one has a right not to be coerced to to fulfil the RND, *when coercion is necessary for its fulfilment*.

The underlying idea is then that the state is justified because it serves some purpose, a purpose which other institutions cannot serve, namely to make its citizens fulfil the RND. But if the state goes beyond that, and tries to make its citizens do what they don’t have a natural duty to do, the state doesn’t seem to be justified in doing this. In other words, the fact that the state helps people fulfil the RND does not grant it *carte blanche* to do anything it wants, not even if it fulfils the criteria in point 7 (a)-(c).⁹⁷

⁹⁶ Haven’t such monarchies come to power through usurpation, at some point deep in history? Yes, is the answer, but the entities they replaced were not politically legitimate, at least not on Buchanan’s understanding of legitimacy, since it is unlikely that basic human rights would have been protected in the distant past. Hence they are not usurpers according to 7 (c).

⁹⁷ Buchanan may imply that the state does have *carte blanche* through his formulation of point 8 in the argument, which simply talks of fulfilling the conditions (a)-(c) in point 7, and doesn’t mention that the state must fulfil the purpose of making people fulfil the RND. If this in fact is what Buchanan implies, I would argue that the conclusion in point 8 doesn’t follow from the premises.

Suppose we plug in the liberal-democratic formulation of the concept of basic human rights into this argument. The state is thus legitimate in coercing its citizens, if and only if that coercion is necessary in order to make people fulfil their duty to help ensure that all persons have access to institutions protecting the rights of liberal democracy, and the state itself protects and respects the rights of liberal democracy while doing so, and is not a usurper.

What Buchanan seems to have argued for is a minimal state. Suppose the state establishes a general system of pensions and health care insurance, along the lines normally expected in Western Europe. The state must coerce people in order to make them contribute to the system in the way determined by the state. But this is not necessary in order to make people fulfil the RND. Hence it goes beyond the purpose which the coercion of the state is allowed to serve.

This is an unexpected conclusion. We immediately note that any attempt to increase the state's room for manoeuvre must involve a thicker formulation of the RND, which leads to the same difficulties as described before. I don't think it is possible to reach a formulation of basic human rights which gets Buchanan out of trouble here. Therefore, I do not believe that Buchanan's attempt to justify the state succeeds.⁹⁸

3.5 Summary

I have now gone through some alternative views on legitimacy and tried to see in what way they have posed challenges to the reciprocal theory. I have tried to check for internal weaknesses, but to a large extent my critique has been external. What sets the reciprocal theory apart from most other liberal theories of legitimacy is its willingness to regard legitimacy as something contested and disputed, a scene of disagreement rather than consensus. This, combined with a belief that the individual should be the one to judge when the state's exercise of power is acceptable or not, and a belief that such a judgement ultimately is the source of legitimacy, leads to a large amount of skepticism concerning attempts to create a recipe for legitimacy which can be summed up in one or a few criteria.

What remains is a full exploration of the scope of reasonable disagreement about legitimacy. I have tried to show that certain theories of legitimacy are more subject to reasonable disagreement than their authors may have believed, but this would not be of practical concern if there could still be some overlapping consensus between all reasonable doctrines of legitimacy. However, as I will try to show in Chapter 4, I don't believe there is any such consensus. I will set out my argument in relation to John Rawls's theory of political liberalism, which I have so far not considered in detail.

⁹⁸ The underlying assumption is that a theory of legitimacy that prohibits anything more than the minimal state is problematic. A libertarian would of course disagree.

Chapter 4: Challenges to the Reciprocal Theory III: Rawls

In the first three chapters, I defended a theoretical account of what the state must do in order to be legitimate, namely the reciprocal theory. A key idea of the reciprocal theory, which distinguishes it from many other liberal theories of legitimacy, is the idea that there can be reasonable disagreement about legitimacy. In this chapter, I will test the boundaries of that disagreement. Since those states are legitimate whose legitimacy one could not reasonably disagree with, this will show us which states that actually come out as legitimate according to the reciprocal theory.

The point I want to prove in this chapter is that there can be no legitimate state. I will introduce two theories of legitimacy and I will show that they are incompatible with each other, in the sense that there is no possible state which is considered legitimate by both theories. I will also show that both theories are reasonable. If we arrange the state in such a way that those who hold one of the theories will accept the state's power over them, those who hold the other theory will at the same time be made to reject the state's power over them. Achieving a state the power of which all people reasonably will accept is thus impossible. Hence there can be no legitimate state.

The theories I will contrast are John Rawls's theory of legitimacy and a consent-based theory of legitimacy along the lines proposed by John Simmons. I choose to look at Rawls's theory because I believe Rawls gives a plausible story of what is required of reasonable persons which is compatible with, and gives more substance to, the reciprocity-based account of reasonableness in 1.6. In 4.1 I will introduce Rawls's theory of legitimacy, before introducing the consent-based theory in 4.2 and showing that the two theories are incompatible. In 4.3 I will introduce Rawls's criteria of reasonable persons, and I will show them to be compatible with the reciprocal theory. I will then show that the consent-based theory fulfils these criteria. I will summarise my findings in section 4.4.

4.1 Rawls on Reasonable Disagreement

Rawls writes:

[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy. To this it adds that all questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as possible, by principles and ideals that can be similarly endorsed. Only a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.⁹⁹

I will call this theory of legitimacy L1. Similar views of legitimacy have been expressed by other liberal thinkers.¹⁰⁰ The underlying idea is that only if political power is exercised according to a constitution which is founded on values and ideas that all people would

⁹⁹ Rawls, *Political Liberalism* (henceforth PL), p. 137.

¹⁰⁰ Cf. Charles Larmore (1996), *The Morals of Modernity*, Cambridge: Cambridge University Press; Jeremy Waldron (1987), "Theoretical Foundations of Liberalism", *The Philosophical Quarterly*, Vol. 37, No. 147 (Apr. 1987), pp. 127-150.

reasonably accept is the exercise of such power legitimate. If the constitution is not founded on such values, then when citizens ask why their constitution looks the way it does, the answer may fail to convince them. If I, when asking why I have to live in a state where the highest office of state is assigned through inheritance rather than election, am told “because it is the will of God”, this is a reason I could reasonably consider not to be valid, either because I believe there is no God, or because I believe that God wills something else. Instead, the task is to find a constitution which is founded on reasons which all can accept. In practice, this rules out reasons that only make sense when placed within the framework of a particular religion or moral theory, since this is where the scope for reasonable disagreement is the greatest: when we make our minds up on questions of religion or moral theory, we are faced with great difficulties: what Rawls calls “burdens of judgment”. Therefore, we can reasonably disagree on which religious or moral doctrine is correct, and so they should not be appealed to in support of our constitution.

I take L1 to be a theory of legitimacy in the sense defined by the reciprocal theory. Let us now try to evaluate this theory. To start with, as we have said before, we note that it seems to be a theory which one could reasonably disagree with, because there are alternative theories of legitimacy out there that seem to be reasonable. Thomas Christiano, for instance, has stressed the importance of democracy as the foundation of legitimacy.¹⁰¹ This is a somewhat different approach to Rawls, since the idea of public reason is less prominent. Also, Fred D’Agostino imagines that the state will be legitimate if it comes about through a certain exercise of public reason in the form of a constitutional convention which functions in a specific way.¹⁰² Since Rawls doesn’t include such a requirement in his theory of legitimacy, and since it is not immediately obvious that it is the only way of implementing Rawls’s theory of legitimacy in practice, it seems as if it is a genuinely alternative theory.

Now, if we want to say that Buchanan’s, Christiano’s, and D’Agostino’s theories are not reasonable theories of legitimacy, we would have to say that they could only be defended by unreasonable people – people towards whom we have no duties of justification, people who are not willing to abide by basic standards of reciprocity. This seems extremely unlikely. After all, the abovementioned theories are ones that agree with Rawls’s theory of legitimacy in many important ways. They all form part of a group of liberal theories of legitimacy which seek to justify political institutions to the citizens concerned, taking the diversity of present-day societies into account. They just choose to do so in a somewhat different way from Rawls. So while Rawls does not seem to have considered the possibility of reasonable disagreement on legitimacy, there are strong *prima facie* reasons to believe that it might occur.

This presents L1 with the problem identified by Estlund: L1 may simply become incoherent, since it fails a self-application test. Since not all people could reasonably be expected to endorse L1, L1 cannot serve as a basis of public reason and justification. One might escape this problem by noting that what the word “endorse” means in this context is not entirely clear. If it means “to prefer ahead of all others”, then Estlund’s argument holds. Someone who reasonably disagrees with L1 prefers another theory ahead of it, and so since not all people can reasonably be expected to prefer L1 ahead of all others, L1 cannot serve as a basis of public reason and justification.

¹⁰¹ Thomas Christiano (2008), *The Constitution of Equality – Democratic Authority and its Limits*, Oxford; New York: Oxford University Press. p. 243 f.

¹⁰² Fred D’Agostino (1996), *Free Public Reason: Making it Up As We Go*, New York: Oxford University Press.

If “endorse” is taken in a wider sense, as meaning “to generally approve of”, then Estlund’s argument does not succeed by default. For someone who supports Christiano’s theory could still generally approve of L1, but disagree with the details. For self-inapplicability to be a serious problem for L1, it must be shown that the range of reasonable disagreement is so large as to include theories that do not generally approve of the ideas L1 expresses or is founded upon. I am not going to pursue this question further; the reader will have to judge whether the range of reasonable disagreement that I intend to establish in this chapter is wide enough to permit such theories.

This is a theoretical problem for Rawls’s theory of legitimacy, but it does not necessarily imply a practical problem: if it turns out that only those theories of legitimacy are reasonable that entirely agree with L1 in which regimes that are legitimate or not, we can still for all practical purposes apply the Rawlsian theory (as well as any other reasonable theory). In that case, the disagreement does not concern the question of which regimes are legitimate, but rather why and how they are legitimate.

At the very least, L1 might succeed in specifying some regimes that are legitimate, even though we might disagree on exactly which regimes are. I take it that this would come about if there was a regime such that all reasonable theories of legitimacy would support it. If we can show that this is the case, we might have done enough to solve the problem of legitimacy. If we can show that it isn’t the case, then we must not merely discard Rawls’s theory of legitimacy, but in fact rethink the entire approach to legitimacy.¹⁰³

In the following section, I shall present such a rival theory and show that it clashes with Rawls’s theory of legitimacy, in the sense that there is no state which both theories agree is legitimate. I shall also show that the rival theory is reasonable, both by Rawls’s own lights, and in terms of what the reciprocal theory requires of reasonable people.¹⁰⁴

4.2 Incompatible Theories of Legitimacy

Recall L1: The state is legitimate only if the essential features of the constitution are based on principles and ideals which all citizens could be reasonably expected to endorse. Also, when the legislature decides on questions that border on these essentials, or that concern basic justice, such decisions should as far as possible be made on the basis of such principles and ideals.

As a contrast with L1, we could postulate a theory L2:

L2: The state is legitimate if and only if it has received the express consent of all persons subject to it.

¹⁰³ When using actually existing theories of legitimacy, disputes of terminology might make things difficult. Not all theorists of legitimacy have the same definition of the term, and it might be that a theory which looks like it specifies a radically different set of regimes as legitimate than another theory might be based on a different concept of legitimacy. Therefore, it is important to see if we can interpret rival theories of legitimacy in ways which are compatible with my definition of the term.

¹⁰⁴ The reciprocal theory takes doctrine to be the key term and not theory. I will nonetheless use “theory” throughout in this chapter. I regard Rawls’s liberal principle of legitimacy as a theory in my sense, and so it makes sense to develop rival theories of legitimacy to contrast with his, rather than to contrast two different things: theories and doctrines. Any theory can be made into a doctrine, so it does not affect my argument.

I take this to be a Lockean-type contract theory along the lines proposed by Simmons.¹⁰⁵ The fact that Simmons takes a different view of the concept of legitimacy than I do does not rule out comparing his theory with Rawls's. We can regard L2 as a theory of legitimacy in the sense of the reciprocal theory.

L2 is a candidate for a reasonable theory of legitimacy which is incompatible with L1. To find out whether this is the case, we need to ask two questions. The first question is which regimes that L2 specifies as legitimate or not. The second question is whether L2 is a reasonable theory of legitimacy.

Simmons' belief, which I share, is that very few states would turn out to be legitimate according to L2. In societies characterised by a plurality of different views about what the state ought to do and not, securing everyone's consent for anything beyond a minimal state will almost certainly be extremely difficult. And since the definition of L2 refers to *express* consent, appealing to notions of tacit consent in order to motivate more extensive powers for the state will not work.

While Simmons places great importance on the possibility that people might simply want to go away and lead their own lives in peace, not bothering or being bothered by anyone, others such as Robert Nozick have argued that even if people in fact would consent to being citizens in a state, such a state would have to be very minimal.¹⁰⁶ Specifying exactly which states, if any, that L2 would recognise as legitimate is not necessary for our purpose, however. If we could show that no states that could plausibly turn out to be legitimate according to L2 would be regarded as legitimate according to L1, this would render the two theories incompatible. And if both theories can be held reasonably (which I have yet to show), then L1 does not succeed in specifying the states that are legitimate.

Rawls, on the contrary, believes that a minimal state would be illegitimate. While admitting in "The Idea of Public Reason Revisited" that there could be several liberal conceptions of justice, all of which would be legitimate, he argued that they would have to fulfil certain criteria in order to be legitimate, one of which is "measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms".¹⁰⁷

Now, we might well disagree with Rawls's interpretation of his own theory of legitimacy. It might be that according to Rawls's own theory, a state which did not provide adequate all-purpose means would be legitimate nonetheless. But that is, I believe, beside the point. Rawls, and presumably some others, regarded the provision of adequate all-purpose means as a necessary condition of legitimacy, and we would be inclined to say that they did so reasonably. But if people can use L2 to say that a state which takes the money of its citizens to provide for others is illegitimate, either because no state is legitimate or because only a minimal one is, then this would provide the kind of incompatibility which is problematic. If two definitions respectively specify that A and not-A are necessary conditions for P, it follows that they can never agree that P.

¹⁰⁵ Simmons, "Justification and Legitimacy". Simmons also includes the criterion that a state, in order to be legitimate, has to be morally preferable to non-state societies. While this is an important part of Simmons' theory, I've chosen to leave it out for the sake of simplicity since it doesn't affect the outcome of my argument.

¹⁰⁶ Robert Nozick (1974), *Anarchy, State, and Utopia*, New York: Basic Books.

¹⁰⁷ PL:450.

It should be added that the incompatibility between L1 and L2 is not a matter of definition. It is not logically impossible to imagine a state that satisfies both L1 and L2. Instead, the incompatibility arises when we specify which real-world political institutions would be required to satisfy L1 and L2 respectively, as I have done above.

I want to emphasise that I think incompatible theories of legitimacy are to be expected in societies such as ours, characterised by a diversity of differing opinions in all areas of human inquiry. It is true that the existence of L1 and L2 in our societies in some sense is contingent: perhaps no one will hold L1 or L2 in the future. Then other theories will have to be found to serve as examples. But I don't think we have any good grounds to expect convergence among reasonable people on mutually compatible theories of legitimacy within the foreseeable future, any more than we have reason to expect such convergence on religious or philosophical doctrines.

Instead, I regard the genuine problem as being the possibility that there can be theories of legitimacy which are incompatible and reasonable. In order to test whether a certain theory can be reasonably held, however, we need to know more about the underlying motivations of those who hold that theory. I could have chosen to present L1 and L2 simply as lists of political institutions: "L1 is a theory of legitimacy which believes, among other things, that adequate all-purpose means for all citizens, including a system of public health insurance, is a necessary condition for legitimacy. L2 is a theory of legitimacy which believes, among other things, that only a minimal state can be legitimate." If I had presented the theories in such a way, they would be straightforwardly incompatible. However, presenting L1 and L2 not as lists of political institutions but as general theories of legitimacy that are then specified in terms of political institutions allows us to examine the moral considerations which may cause persons to hold L1 or L2.

So let us then have a closer look at the moral considerations behind L1 and L2, and whether these are reasonable or not. If L2 should be found to be reasonable, it would threaten to ruin the Rawlsian project. Some people could always deny the legitimacy of the state: either the Rawlsians (if the state didn't provide some form of basic welfare) or the minimal-statists (if it did). Now, plainly some argument must be provided for why L2 is reasonable. After all, L2 presents a serious challenge to many political and economic institutions that we typically take for granted, such as publicly funded education and welfare institutions, and the accompanying belief that the state ought to take some responsibility for the welfare of its citizens, even if not everyone would consent to this.

I take it that a reasonable conception, in this case a reasonable conception of legitimacy, is one that can be held by a reasonable person. I shall thus start with Rawls's own definition of a reasonable person, and see if someone who fulfils those criteria could hold L2.

4.3 Reasonable Persons

Rawls defines reasonable persons as fulfilling two basic aspects:

Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose. [4.3.3] (...) By contrast, people are unreasonable... when they plan to engage in cooperative schemes

but are unwilling to honor, or even to propose, except as a necessary public pretense, any general standards or principles for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests when circumstances allow.¹⁰⁸ [4.3.2]

The second basic aspect... is the willingness to recognize the burdens of judgment [4.3.4] and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime.¹⁰⁹ [4.3.5]

In this section I will comment on and apply the various elements of this definition to holders of L2. I will start with the different parts of the first basic aspect, and then deal with the second basic aspect. When my discussion concerns the interpretation or application of specific elements of the definition, I've added brackets to the quote above to illustrate which parts are considered in which subsection.¹¹⁰

4.3.1. First Basic Aspect: Cooperative Schemes

When Rawls speaks of “cooperation” and “cooperative schemes”, one would naturally think that he speaks of all forms of cooperation. But Simmons disagrees.¹¹¹ Since Rawls focuses so much on political cooperation in his work, Simmons argues, the cooperation in question here is political cooperation, by which Simmons seems to mean cooperation in a state, not other forms of cooperation. So reasonable people are engaged in political cooperation, and since they are willing to engage in such cooperation, and thus presumably believe that it is worthwhile, and since political cooperation requires the existence of a state, it follows that reasonable people must already believe that there should be a state – the question is how that state should be organised.

Is the reciprocal theory committed to regarding cooperation in this way? One argument in favour of Simmons' reading might be that since a large part of the impetus behind the duty of reciprocity comes from the coercive nature of politically enforced schemes of cooperation, we should be especially concerned with whether other people are willing to propose and abide by fair terms of cooperation within such forms of cooperation. But from this it does not have to follow that reasonable persons would have to believe that there should be a state. Someone could perfectly well believe that it is precisely the absence of the coercion of the state which the establishment of fair terms of political cooperation would consist in: terms which no one would be forced to obey. In other words, Rawls' idea of the reasonable person is not as demanding as Simmons believes it to be.¹¹²

This in turn means that a supporter of L2 does not fail Rawls' definition of a reasonable person on this point. I take it that to a supporter of L2, the question of whether there ought to

¹⁰⁸ PL:49-50. My brackets.

¹⁰⁹ PL:54. My brackets.

¹¹⁰ The image painted in the following section of L2 and people who support it and related theories may sometimes come across as unflattering. It should be kept in mind that I am responding to writers like Rawls and Barry who deny that libertarian theories are reasonable. Therefore I sometimes allow myself to assume that many of those who hold L2 do so without being motivated by fairness. If I can show that L2, in spite of that, can be held by reasonable persons, my point stands.

¹¹¹ Simmons, “Justification and Legitimacy”, p. 760 f.

¹¹² One could also adopt a wider view of the concept of “political cooperation” where all forms of cooperation aimed at solving pressing problems involving conflicting interests would count as political. This would be another way of contradicting Simmons' argument.

be a state is in some sense open. Either it is possible to have a state which enjoys the consent of everyone, or it is not. Even if it is not, states may still be justified, if we adopt Simmons' concept of justification. But a supporter of L2 is not intrinsically committed to the creation and existence of a state. This would have been a problem if Rawls's definition of a reasonable person would have required, at a very basic stage, a reasonable person to engage in political cooperation under state-like forms. But as I argue above, I don't think it does.

4.3.2 First Basic Aspect: Sincerity

It seems as if it is not enough to say that someone is reasonable, if we can cooperate with them on fair terms only as long as we restrict ourselves to everyday, non-political projects. Such projects are voluntary, and if people are not willing to present fair terms of cooperation to us, we can just withdraw from such cooperation. But when people enter into their capacity as citizens, when they take part in the exercise of political power, and we become, in some sense, their subjects, this is when the question of fair terms of cooperation is put to the test. We must be certain that others will not use the power of government merely to benefit themselves, that they are not willing to violate the terms of cooperation "as suits their interests when circumstances allow".

But if this is what we should fear, then it seems perfectly plausible that someone could propose a theory of legitimacy like L2 as a result of a commitment to fair terms of political cooperation. How do we, in fact, minimise the risk that some people will abuse the power of the state in pursuit of their own interests? A supporter of L2 would suggest that we only allow the state to exercise power over people who have explicitly consented to it. By so doing, we make sure that all those people who in fact are subjects of the power of the state have good reasons to accept the authority of the state, and we are able to assure them that they will not be forced to take part in political cooperation on terms they cannot accept. Since the terms of cooperation have been accepted by everybody, they are fair, or it is at least fair to enforce them.¹¹³

Of course, there could be people who support L2 merely as a way of enriching themselves. Unscrupulous people who are rich enough not to need economic support from the state might use L2 as a way of not having to pay taxes to support other people's welfare. But the fact that a theory of legitimacy might be abused by some is in no way an argument for why it would be unreasonable for all to hold it. Presumably, even Rawlsian ideas of fairness could be put forward "as a necessary public pretense" by someone just looking to enrich themselves without any regard for the interests of others.

4.3.3 First Basic Aspect: Reasonable Acceptability

One thing remains to show that the supporter of L2 could be a person who satisfies the first basic aspect of the reasonable. The supporter of L2 must view the theory "as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair

¹¹³ The point with this argument is merely to show that those who support L2 can be committed to an idea of cooperation where political cooperation takes place on fair terms only, instead of taking place merely on whatever terms favour the stronger. We can of course disagree with them about what is required to achieve such an outcome, but if we want to show that they are reasonable persons, then showing that they adhere to the *idea* of fair cooperation is enough.

terms that others propose.” Presumably, the second part of this sentence, to be ready to discuss the fair terms that others propose, would be straightforwardly possible to satisfy for a supporter of L2.¹¹⁴ But what about the first part: that a supporter of L2 must regard her offered terms as reasonable for everyone to accept?

On the one hand, it seems as if there are strong and fairly simple arguments for why this criterion should be included: we may ask ourselves why we have any duties of reciprocity towards someone who proposes terms of cooperation that she doesn’t regard as reasonable for everyone to accept, and which she doesn’t think that we can agree with. Why do we have any duty to consider whether she might accept our proposed terms of cooperation in turn, when she isn’t willing to do this to us? So this criterion seems to be something which we should ask of reasonable people.

But on the other hand, this criterion seems too strong. Someone who believes that the burdens of judgement apply to fairness might believe that there is always scope for disagreement on what fairness is. Her reluctance to affirm that proposed terms of cooperation are justifiable to others might spring from her philosophical beliefs: she might simply hold the philosophical view that justification is a difficult thing to achieve, and that we should be wary of saying that we have managed to justify something to someone, especially when there is room for disagreement on this topic, as there is with respect to fairness.¹¹⁵ So we cannot ask more of a reasonable person than that she has done all she can to make her proposed terms of cooperation acceptable to others. And there is nothing to suggest that supporters of L2 could not do this.

This should be enough to fulfil the first basic aspect of the reasonable: supporters of L2 are ready to propose principles as fair terms of cooperation, which they view as reasonable for everyone to accept.

4.3.4 Second Basic Aspect: Recognising the Burdens of Judgement

Remember that the second basic aspect is “the willingness to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime.” First of all, it seems that someone could support L2 and recognise the burdens of judgement.¹¹⁶ What we then have, I take it, is Rawls’s fairly cryptic way of saying that since we have to bear the burdens of judgement, this means that the exercise of political power can only be legitimate if it is based

¹¹⁴ This conclusion holds, of course, even if many people who support L2 or similar ideas in fact prove unwilling to engage with ideas and terms presented by others. It is *possible* to support L2 while engaging with the ideas of others, just like with other political theories.

¹¹⁵ I believe that the justifiability criterion shows that Rawls has included too much of his own approach to justification into his idea of the reasonable: Rawls seems to have believed that justification was fully possible, and this is what he expects other reasonable people to believe as well. Maybe this criterion should be dropped, but even if we keep it as it stands, it doesn’t seem to single out any particular theory of legitimacy. One could be a sceptic towards justification and be a Rawlsian about legitimacy, and one could believe that one’s terms of cooperation are justifiable to everyone even if those terms of cooperation supported the L2 approach to legitimacy.

¹¹⁶ I am not going to provide a specific argument for this point. In what follows, I am going to argue that a supporter of L2 is able to accept and act upon the consequences of the burdens of judgement “for the use of public reason in directing the legitimate exercise of political power”. It seems highly peculiar that someone could do that and be unable to recognise the burdens of judgement themselves.

upon public reason: that is the “consequence” which the burdens of judgement carry. Now, suppose that the followers of L2 came to power and rewrote the constitution in accordance with their beliefs. Suppose then that one of the features in the constitution was that it contained a right to exit: someone could of her own free will withdraw from all duties and rights connected with citizenship when she so chose.¹¹⁷ This would obviously be quite an important feature of the constitution. The Rawlsian idea seems to be that the supporter of L2 would then have to recognise that this feature, and other essential features of the constitution, would only be legitimate if it could be defended with the use of public reason.

In fact, it seems as if there are two things the supporter of L2 must do. She must show that according to her own approach, exercise of power which is incompatible with public reason is illegitimate. But she must also show that her own approach to legitimacy, because it might underlie essential aspects of a constitution, can be defended in terms of public reason. The idea of public reason seems to apply both to and within a theory of legitimacy. If she does this, it seems hard to deny that she complies with the second basic aspect, and thus that she is fully reasonable.

Given that we live in a society characterised by the fact of reasonable pluralism, that is to say, the fact that people will always reasonably disagree on matters of the good, it would seem to follow that people can and will reasonably claim that a constitution the essentials of which are based on one certain conception of the good is illegitimate. This seems to be Rawls’s own argument, but there seems to be nothing which stops the supporter of L2 from agreeing with it. Of course, it is possible, in theory, that everyone might consent to a state which is based on some comprehensive conception of the good, and in that case, that state would be legitimate.¹¹⁸ But *because* we accept the burdens of judgement, we accept that in any modern-day society, such a state would not be regarded as legitimate. Because of this, L2 fulfils that criterion.

4.3.5 Second Basic Aspect: Defending L2 Through Public Reason

So then we have the final task left. Can L2 be supported on the basis of public reasons, reasons that do not make reference to any comprehensive conception of the good, or to any metaphysical or religious ideas? The question is where public reasons are to be found, if they cannot be found in such conceptions. Rawls’s answer is that they are to be found in the “public political culture” of our society: our “shared fund of implicitly recognized basic ideas and principles”.¹¹⁹ It is not entirely clear what these basic ideas and principles are, but ideas such as democracy, human rights and the rule of law seem to be included.

Given this uncertainty, one can only do the best one can in convincing one’s reader that a certain theory in fact can be defended by using public reason. Right at the outset, we note that Rawls recognises that the public political culture “may be of two minds at a very deep level” about certain things.¹²⁰ This should indicate that there is room for disagreement, and that different ideas found in it can pull in different directions. The fact that one theory of

¹¹⁷ As suggested by Simmons, “Justification and Legitimacy”, p. 761.

¹¹⁸ It would be legitimate according to L2 as the principle stands, but not necessarily according to Simmons’ own writings. If people consented to a state that was highly immoral, Simmons would say, it might still be illegitimate.

¹¹⁹ PL:8.

¹²⁰ PL:9.

legitimacy, namely Rawls's own, presumably could be built on materials found in the public political culture does not, then, rule out that quite radically different theories also could be so constructed.

The liberal idea of democracy is based on the idea that the exercise of power is only legitimate when it is done with the consent of the people. This is a cornerstone principle of Western democracy. Originally, such an idea might have been based in a religious conception of natural law, as we find in Locke. But today, it is affirmed by people of all faiths and none. If something is a part of our public political culture, this idea must be.

But what is L2, but a restatement of that idea in different words? If the exercise of political power is only legitimate when it is done with the consent of the people, it follows, the supporter of L2 will argue, that we should ask each (reasonable) citizen whether she consents to the state's exercise of power or not. Otherwise, it is not legitimate. Of course there are other ways to build upon this idea of the legitimating power of consent. One could experiment with notions of tacit consent, or consent as expressed by the majority of the people and not every single citizen, or consent as expressed at a moment of foundation and then permanently binding for all to come. Such ways might in our eyes be philosophically more plausible and yield more attractive outcomes, but that is beside the point. In order to argue for L2, one need only make reference to ideas that are out there, and that are central parts of our public political culture, possible for all to affirm. Hence it is a reasonable theory of legitimacy.

4.3.6 Epistemic Unreliability

In 2.3, I argued in response to Gaus that people on the whole should be regarded as epistemically reliable, at least for the purposes of legitimacy. The assumption that people on the whole are epistemically reliable is needed if I want to claim that someone's denial that the state is legitimate should be taken at face value. If someone can judge for herself what reasons she has and doesn't have, then it follows that the only way we could override her beliefs would be if she didn't have a claim on being listened to in the first place. And such is the position of unreasonable people: we have no duty to offer fair terms to them, since they do not want to offer fair terms to us.

It could be argued that supporters of L2 would be epistemically unreliable. Since they insist on denying the legitimacy of the state even in cases where it seems that most other people accept it, they do not accept their own fallibility and so are not sufficiently skilled reasoners. They should be able to take their cues from their surroundings, but fail to do so.

It is certainly true that someone could deny that the state is legitimate by being obstinate and refusing to consider other positions than her own. But this does not seem to be a problem specifically for L2. The best response is probably to say that the charge of epistemic unreliability does not have any force independently of the charge of moral unreasonableness, since Rawls's definition of the reasonable involves many of the epistemic virtues we're interested in here. A reasonable person has to be ready to listen to the opinions of others, present her opinions to others and give reasons for them, and be ready to reconsider them if needed. As long as her theory of legitimacy isn't blatantly incoherent, it should be possible for someone to be willing to do this and at the same time hold almost any theory of legitimacy, especially one which is reasonable in other respects. The charge of epistemic unreliability is not strong enough.

4.3.7 Summary

While I have based myself on Rawls's definitions of legitimacy and reasonableness, I have not done so out of exegetical interest. As I said in the beginning, Rawls's conception of a reasonable person helps spell out the account of reasonableness found in Chapter 1. The primary difference between Rawls's theory and mine is that Rawls's conception of legitimacy is less demanding. To Rawls, a state is legitimate by being a constitutional democracy which complies with the idea of public reason. I have argued that from the point of view of reciprocity, justifying the state by the use of public reason makes good sense. But it is not enough. Our public political culture can be divided on many important issues, and merely the use of public reason does not allow us to create a state which all reasonable people accept.

I would argue that other attempts to legitimise the state via public reason also suffer from the same problems. As I said in Chapter 1, we have duties of reciprocity towards our fellow citizens. This involves exercising power over them on terms that they can accept. But if there is room for disagreement about exactly what states must be like in order to be acceptable, this makes our task much more difficult, and probably impossible. Showing this, however, involves detailing what it means for someone to be reasonable and thus trying to see how much room there is for reasonable disagreement about legitimacy. I have used Rawls's approach to reasonableness and legitimacy because it seemed to be a well-argued and well-spelled-out alternative. It seems to map fairly well onto the ideas of reciprocity that I presented earlier. But I do not believe that taking a different approach to reasonableness than Rawls's would help. The only way to narrow the space for reasonable disagreement about legitimacy seems to be to require more of people in order for them to be reasonable. But we don't just tinker around with ideas of reasonableness in order to make sure that reasonable people can't disagree about legitimacy. We have a notion of reasonableness because it seems important in delimiting the group of people towards whom we have duties of reciprocity and not.

4.4 Summary

In this chapter I have shown that there can be no legitimate state, by showing that there are two theories of legitimacy which are reasonable and mutually incompatible. Political liberalism faces a dilemma: either people are undeservedly excluded from the justificatory community, or it becomes impossible to find a state which can be accepted by all members of the justificatory community. If we want to secure reasonable agreement on a certain state, we have to narrow the group of reasonable persons. But then we have to treat some people in a way which we would hold to be unacceptable if we were the ones affected: we would have to say to some people, with whom we are otherwise perfectly able to cooperate, that we are going to impose laws and regulations on them, and that we take ourselves to have no duty whatsoever to make sure that this imposition takes place in a manner acceptable to them. The Rawlsian project of legitimising the state by the use of public reason represents an interesting approach, but, if my argument is correct, it is not enough: public reason allows mutually incompatible theories of legitimacy.

In the next two chapters, I will consider what we should do next. The inquiry in the coming chapter will be theoretical: I will argue that we should aim to maximise legitimacy, but I will

not give any policy recommendations. Such recommendations will have to wait until Chapter 6.

Chapter 5: The State After Legitimacy

In the previous chapter, I showed that we should not expect states to be legitimate to all reasonable people. In this chapter, I will explore the question of what a state which is not legitimate to all reasonable people is allowed to do. I will give an answer in two stages. The first stage (section 5.1) is to return to the distinction made in Chapter 1 between justification and legitimacy, and consider whether the state can be justified even though it is not legitimate. I will argue that this is the case. The second stage (section 5.2) is to go beyond this and to argue that we should strive to maximise legitimacy and minimise illegitimacy, even if we do not manage to completely eradicate all illegitimacy. In section 5.3 I will first respond to some epistemic problems with the idea of maximising legitimacy, and I will argue that we should focus on particularly urgent cases of illegitimacy. Finally, I will summarise and look ahead to the next chapter, which will contain some practical policy recommendations (section 5.4).

5.1. The Justification of the State

I will now consider the question of whether the state can be justified. Attempts to justify the state encounter difficulties when dealing with reasonable people who simply do not want to take any part in the society under consideration. I will first present some remarks about the concept of justification (5.1.1). In 5.1.2 I will argue that the scope for reasonable disagreement about justification requires of reasonable people either to accept that the state is justified or to be willing to leave society, if given an opportunity to do so. In 5.1.3 I will explore some possible options for those who wish to leave society. I will argue that the reciprocal theory is compelled to admit some form of internal secession for reasonable groups who want to leave society. Internal secession may be a threat to legitimacy in the majority society, but in 5.1.4 I will claim that this does not defeat my argument in the preceding section. I finish by summarising in 5.1.5.

5.1.1 The Concept of Justification

Recall that in chapter 1, I introduced the distinction between *justification* and *legitimacy* along the lines proposed by A. John Simmons. Justification, according to Simmons, involves showing that there ought to be a state, because the existence of the state is better than its non-existence. Legitimacy, on the other hand, involves showing that the state has a right to enact and enforce commands and expect its subjects to obey. The question then is whether the state can be justified.¹²¹ First of all, we need to define the concept of justification carefully. Secondly, we need to look at under what circumstances the state could reasonably be said not to be justified, and how these might be overcome.

So by what metric should we judge whether the state is justified or not? Simmons takes the answer to be that the state is justified if and only if it is “rationally preferable”¹²² or

¹²¹ Simmons distinguishes between the justification of *the* state and the justification of *a* state. To justify *the* state means showing that there is any (achievable) state which is justified. To justify *a* state means showing for any particular state that it is justified. My justificatory project will be something in between: I will not attempt to justify any particular state, but I will attempt to justify a state in a society such as ours, characterised by the fact of reasonable pluralism and low-to-moderate scarcity.

¹²² Simmons, “Justification and Legitimacy”, p. 742.

“prudentially superior”¹²³ to all feasible non-state alternatives. We need to flesh out and amend this definition, however.

Firstly, the focus on *rational interest* obscures the role of the reasonable in shaping our opinions about the acceptability of states. Suppose Amy is a self-supporting hunter-gatherer, living on the outskirts of civilisation. On a regular basis, the state sends a party of mounted police to collect taxes from her in kind. Since the mounted police operates over a large area, the protection they can offer her is very small. Amy does not, then, receive much benefit from the presence of the state, which is mainly a cost to her. Nonetheless, since she believes that the taxes people pay to the state will benefit the needy, and that the needy will stand to lose if the state disappears, she believes that the state on balance does more good than harm (whether or not she considers it to be legitimate). But she is not being guided by her rational self-interest, but by her sense of morality.¹²⁴

It seems very unclear why we should claim that the state isn’t justified to Amy, even though she believes that it is. After all, the moral considerations underlying it seem to be perfectly reasonable. The question of whether the state is justified to some person or not must be answered with reference to the full range of moral and prudential judgements that that person makes. This is also consistent with our respect for that person’s status as being normally the most reliant reporter of her own beliefs, as I argued in 2.3. If someone, upon due reflection, makes a judgement on whether she prefers to live in a state or in a stateless society, that judgement should ordinarily be taken at face value.¹²⁵

Secondly, we need to distinguish between two different concepts of justification. According to the first concept, which, for lack of a better term, I will call *majoritarian justification*, a state is justified if, for most people, it does more good than harm.

According to the second concept, which I will call *full justification*, a state is justified if and only if, for each reasonable person subject to it, it is better for that person that the state exists than that it does not. It is not entirely clear which of these versions of justification Simmons refers to when he speaks of justification. It seems as if a state is justified, in the sense that it would be better for the state to continue than to cease to function, if it clears the threshold for majoritarian justification.¹²⁶ A state which makes most of its subjects worse off than a feasible non-state alternative is not a good institution to have. However, the state should still aim for full justification, and of course for legitimacy.

Thirdly, we have a duty of justification to reasonable people only. If I, as a subject to the power of a state, am to be able to count on the state’s exercising its power over me only on terms that would make me better off than in a non-state society, I must be willing to observe the same norm if I were to exercise the power of a state over others.

¹²³ Simmons, “Justification and Legitimacy”, p. 743.

¹²⁴ I take it that Simmons intends the words “rationally” and “prudentially” to exclude actions that are being done without actual benefit to oneself. If one adopts a more subjectivist reading of the phrase, a person’s rational self-interest would simply be what that person prefers, subject to certain information and consistency constraints. My objection does not concern such a reading.

¹²⁵ It might be ignored for other reasons, for instance because it rests on unreasonable moral grounds.

¹²⁶ This is as long as the state fulfils some kind of duty of non-violation, which I will not specify further. It would clearly be immoral to purchase the happiness of the many by killing or enslaving the few.

5.1.2 Reasonable Disagreement About Justification

The problem of justification is that the nature of our societies may be such that every feasible state will make some reasonable people worse off than they would be in a state of nature. In response to this worry, it can be argued that a well-functioning state provides people with protection against internal and external enemies and other threats, and thus allows people to carry out their life projects with a greater chance of success than would otherwise be possible. Such security is, with a Rawlsian term, a *primary good*: it is something that you want, whatever else you want.¹²⁷ There is thus a strong presumption in favour of the justification of the state.

The question then is whether this presumption holds for all people. In particular, we could imagine marginal groups whose beliefs and preferences are so different from those of mainstream society that our attempt to justify the state to them may fail. For there to be a problem of justification these groups or individuals must place demands on the state that are (1) reasonable, (2) so fundamental that their non-satisfaction would leave these people worse off than in a stateless society, and (3) incompatible with fundamental demands put by other members of society (since otherwise the state could just grant the demands).

A possible case where this situation may occur is in the conflict between what we might call *internal anarchists* and *statists*. I take an anarchist to be someone who wants to live outside of a state. For want of a better term, we can distinguish between *external* and *internal* anarchism. External anarchists simply want to establish some society of their own where they can live their lives in peace, without a state. Internal anarchists want to abolish the state within the existing society. Statists, finally, want to keep a state within the existing society.

External anarchism might not be an unreasonable position, and it might also be something which the state conceivably could grant (see next section). Internal anarchism, however, is not so easily accommodated. Either a certain society has a state or it does not. There is no middle ground.

If internal anarchism is an unreasonable position, there is no problem of justification with regards to it, since we would have no duty of justification towards the internal anarchist. However, I will review some possible arguments claiming that internal anarchism does not pose a problem of justification, and I will claim that they don't work. I will nonetheless claim that the state achieves majoritarian justification, and that this may be the best we can hope for. I will then argue that the internal anarchist must accept that majoritarian justification gives the state moral permission to exist, but that there are forms of internal anarchism that could do so and still maintain a reasonable disagreement about justification. In other words, our attempts to eliminate reasonable disagreement about justification do not fully succeed. I will finally consider and respond to the worry that my response to anarchism means that the problems of justification and legitimacy become uninteresting.

I will now present and respond to three possible arguments claiming that internal anarchism does not pose a problem of justification. The *first argument* goes as follows. Suppose that we allow people some form of choice between remaining in the majority society and leaving it to

¹²⁷ Cf. John Rawls (1999), *A Theory of Justice*, rev. ed., Oxford: Oxford University Press, p. 348. There have of course been people whose life plans have been based on taking advantage of a *lack* of security for personal gain. But such people, who would undermine common security or who would unfairly exploit it to their own advantage, fall into the category of the unreasonable.

form a society of their own (as I argue we should, in the next section). In that case, if there is a feasible non-state society which is better for those people than the current state, we might quite simply expect those people to move to that society. By staying in our society, they are judging that it, all told, is better for them than any society they could build by themselves.

Response: It is not clear that this idea of “tacit justification” might work. The reasons why the internal anarchist might choose to stay do not have to have anything to do with the state. It might be because she has her friends and family in this society. The internal anarchist might prefer to live in the present society (with a state) than to live in a different society without a state, but still prefer most of all to live in the present society without a state.

The *second argument* is that an internal anarchist is unreasonable, because she believes that the views of others carry less weight than hers. In other words, she cares but little for how other people will come to perceive her dream society.

Response: It is true that this is an unreasonable position, but there also seems to be ways to motivate internal anarchism without falling into this trap. Could one quite simply not just advocate the abolition of the state through peaceful, democratic means? Why is that position unreasonable? Why would it be unreasonable to try to change people’s minds and persuade them of the promises of anarchy? I don’t think that it would.

The *third argument* is that the internal anarchist is unreasonable, because she believes that the mere fact that she thinks that every person would be better off without a state gives her a mandate to bring about the abolition of the state, whatever people believe. This position does not recognise the equal ability of others to form and act upon beliefs about the good. Unlike the case in the first argument, she might believe that everyone’s interests are to count equally, but she is the sole judge of what is in everyone’s interest.

Response: This argument carries with it an obvious risk of indeterminacy. Statists must recognise that some people will disagree with them about whether there ought to be a state or not, but statism is not taken to be unreasonable because of this. And if the unreasonableness of the internal anarchist’s position hinges merely on the fact that she wants to introduce a society which others will not want to live in, then there is a risk of double standards.

While the third argument does not seem to work, it may be possible to modify it. We begin by noting that the conflict between the internal anarchists and the statists presents us with a dilemma which has to be solved. If different groups are intertwined with each other, then only one group can be satisfied. What I would claim is that the only possible solution is that a *majoritarian criterion* be allowed to govern the choice of whether or not there should be a state. Simply put, *there ought to be a state if a majority of those who live in the society think there should be*. This corresponds to the concept of majoritarian justification raised earlier. It seems hard to imagine that any other criterion would do a better job of solving the problem of justification.

I would claim that the majoritarian criterion must be applied even if internal anarchism is reasonable. If it is reasonable, we must be content with a state which achieves majoritarian justification, even though it does not achieve full justification. The question then is whether an internal anarchist who rejects the majoritarian criterion can be reasonable. By rejecting the majoritarian criterion I mean that the internal anarchist believes that it would be right for the state to be abolished even if it would make a majority of people worse off than before. I think

it is highly doubtful whether this is a reasonable position to take. It seems to imply a disrespect for the equal consideration of the fundamental welfare of others which is hard to reconcile with basic ideas of fairness and reciprocity.

However, the disagreement between the internal anarchist and the statist does not have to hinge on the majoritarian criterion. The internal anarchist may believe that, as a matter of fact, a majority of the people will do better if the state were abolished – it just happens to be the case that most people haven't understood this. I am much less sure whether all versions of this position must be unreasonable. I have previously argued that we should ordinarily take people's beliefs about justification and legitimacy at face value, which contradicts the internal anarchist's position. But I have not argued that the internal anarchist's position is *unreasonable*. Nor do I intend to do that here. A reasonable person must allow other people a certain ability to form correct beliefs about the world, but does not have to regard others as infallible with respect to their own beliefs. Given that we know that people can be mistaken about their own beliefs and interests, it would be odd to set up such a criterion.

To sum up, internal anarchism may be a reasonable position to take. But this does not threaten the justification of the state, as long as the state is justified to the majority of the people living under it.

I would now like to respond to the following worry. I have implied that membership of society is, or ought to be, a matter of free choice. But if this is the case, isn't there a risk that the problems of justification and legitimacy would simply disappear? Couldn't whoever is in charge of the state just tell people to leave or accept the state?

I think this worry is mostly unfounded when it comes to justification. The only time something approaching this form of ultimatum may be given is when applying the majoritarian criterion: the majoritarian criterion might seem to imply that as long as the state would be in the interest of the majority, the minority would have no claim on having the state justified to them. But this is of course erroneous. The majoritarian criterion comes into play in a situation where two incompatible social orders face off: having some form of state, or not having one. But we can easily imagine situations where people to whom the state is unjustified still would desire a state, though not the current one. The reason why a genocidal state isn't justified to the minority whom it kills is not because the minority desire anarchy, but because they desire a state which doesn't oppress them. In other words, just because people are able to leave the society where they live doesn't mean that there isn't a problem of justification.

The fate of the problem of legitimacy requires more explanation. Legitimacy is a problem because someone who is subject to the power of the state does not have a free choice of whether to remain in the state or not. Even if she is able to leave the state, the price she has to pay is too high. But why is it too high in the case of legitimacy, but not too high in the case of justification?

I think it depends on the very different background conditions against which the problems of justification and legitimacy are set, respectively. The problem of justification arises when there is a breakdown in the fundamental institutions of society. Some people stand to lose from a statist society. Others stand to lose from a non-state society. The reason why the majoritarian criterion is invoked here is not because it is an unproblematic way of resolving the dispute, but because it seems to be the only option available. There is nothing in my

argument which needs to imply that offering people a choice between accepting the state and leaving society is unproblematic. On the contrary, it is an extremely difficult thing to do, but it may be that it is the only option.

This means that if we have other options, these should be chosen. The problem of legitimacy is set against a somewhat brighter background. We already have a state which is justified, and which is thus doing some things well. The problem is how we should design the state so that it can be acceptable to everyone. Two things must be kept in mind. Firstly, the option of leaving the state seems distinctly less palatable once the state actually represents an improvement on any feasible non-state society. The opportunity costs have risen. Secondly, the fact that the state is justified and that it might succeed in providing security and other primary public goods to its citizens does not mean that there is no problem with legitimacy. The sense of injustice, alienation and oppression that comes with living in an illegitimate state is still equally strongly felt. The fact that one might be even worse off if the state did not exist at all is scant comfort.

For those reasons it seems to me that the problem of legitimacy very much remains. We cannot expect political dissenters to leave a justified state, nor can we expect them to acquiesce in the way the state is governed simply because it is justified.

5.1.3 Managing Reasonable Dissenters

So we have managed to determine that minority groups who want to abolish the state must either accept the will of the statist majority or move to another society. We can consider a number of possible options for how such a move practically may come about:

1. We set aside some (habitable) part of planet Earth for people to emigrate to.

Problem 1: there are no such areas at the moment, since the only parts of the Earth that are not claimed by any state are the oceans and parts of Antarctica. If any country is to detach part of its territory and set it aside as a state of nature, its inhabitants are also entitled to compensation for the loss of resources which this entails. But it is unclear who should pay this compensation: those who move into the territory or other countries (as compensation for not detaching parts of their territories in a similar fashion)? Further, there seems to be no moral imperative requiring a particular state to set aside some of its land to house others.

Problem 2: the establishment of an area outside of the jurisdiction of any state may be damaging to existing states. It may for instance become a base for piracy, arms trade, or the production and export of drugs – not necessarily because those groups who requested the establishment of the area may have had that in mind, but because the absence of a police force and shared rules may make it impossible to stop. In another example, if successful societies were to develop in that area, one could imagine that industries would be established that would fall outside the scope of any global agreement regulating the emission of carbon dioxide. The problem there is not so much the establishment of a moral duty on the part of the polluters to pay compensation to those affected as the absence of a mechanism by which this might be brought about.

2. We permit some form of “internal secession”, allowing people to remain on the territory of a state while not having any of the duties or rights of ordinary citizens.

Problem: an argument against internal secession is that the state provides certain public goods which benefit all who live within it, such as defence. In other words, people who choose internal secession act unfairly, since they derive the public goods provided by the state without paying anything back. Simmons' response is that some people might not value these public goods, or at any rate are not willing to pay the price of conforming to the laws of society because of them. Is this a good argument? The problem with someone holding these beliefs is that they build on hypothetical reasoning which is highly conjectural.

Suppose some of the people who believe that they would not be willing to pay the price of being provided with defence by the state might be in error. I have already said that we should normally trust people to be normally reliable reporters of their own views towards the justification of the state. Since we must rely on vague and contradictory evidence, it does not seem as if those of us who do believe that a state of nature would be an unpleasant surprise can use this belief to override the wishes of those who believe otherwise.

Rather, if there is to be an argument against internal secession, one would have to claim that internal secession is unreasonable by definition. This seems to be a problematic claim. It seems as if one can reasonably prefer internal secession, and that this would represent a possible mode of coexistence between people with radically different views about how to live their respective lives, in a situation where one group believes that their forming a state encompassing the territory on which both groups live is very important for their ability to construct the kind of society they want to have, or where other solutions are practically infeasible.

But although internal secession may be reasonable, there are at least two restrictions that can be set.

The first restriction is that internal secession must be more or less complete: the group of people who want to undergo internal secession must isolate themselves from the majority society. As long as people remain in the majority society and thus cooperate with its members, they accept the same rights and duties as the other members. Believing that one is entitled to benefit from the gains of social cooperation without seeking to distribute the accompanying burdens in a fair manner is unreasonable.

The second restriction builds upon the idea that our duty to justify the state is primarily directed to reasonable people: they are the ones towards whom we have that duty. This means that internally seceded communities must be governed according to reasonable principles. Oppression and dictatorship are not principles that can be used within such a community, nor blatantly unfair principles of distributive justice. Otherwise, the state is entitled to stop the formation of such a community, since the state has not acquired a duty not to stop it.

The state may of course wish to perform a supererogatory action and extend the right to internal secession to unreasonable communities as well. This would be a supererogatory action, since the state does not have a duty to tolerate unreasonable communities.¹²⁸ This would be a supererogatory action only insofar as it did not violate any duties the state may have towards individual members of such communities. Given how different opinions and

¹²⁸ Which is to say that it has no duty *towards the members of those communities* to tolerate them. It might have a duty towards other reasonable members of the state to tolerate unreasonable communities, because those members have made such toleration a condition for *their* acceptance of the state's exercise of power over *them*.

beliefs can arise even in small communities, it may be hard to see how the state could allow some community to govern itself unreasonably without committing a dereliction of duty with respect to one or more of the community's members. As always, duties of assistance still hold towards the members of the internally seceded community. It would be beyond the scope of this thesis to develop a full theory of exactly which duties of assistance there are and under which circumstances they might grant some form of right (or duty) of humanitarian intervention, but it seems clear that there are at least some circumstances where this might come about. If the internally seceded community is not able to protect its members' right to life, for instance, this may ground an intervention on the part of the state.¹²⁹

3. We allow a group to form an independent state or non-state society on territory which it controls or uses – in other words, secession proper.

This option shares many problems and constraints with options (1) and (2). Just as with option (1), establishing a new state may cause damage to existing states if the new state is unable or unwilling to stop activities that harm people in other states. And just as with option (2), the seceded state or society must be governed according to reasonable principles.

5.1.4 The Relationship Between Justification and Legitimacy

The concept of internal secession itself is thus not inconsistent with the reciprocal theory, although the restrictions that must be placed upon it are so strict as to in all likelihood render it a marginal phenomenon in contemporary states. But what if people reasonably reject the legitimacy of a state which granted others the right to internal secession? It seems as if there could be reasonable people who would do precisely this; among them might be many liberal theorists of legitimacy, who have not considered internal secession as a serious alternative. Not everyone would be willing to accept Simmons' argument that some people should be able to withdraw from having to pay for the public goods that the state provides, even if the latter consider the price to be too high. In other words, there may be a conflict between justification and legitimacy. The question is how this conflict should be settled.

If we always favour legitimacy, this would mean that we would have to accept a solution that made a few people satisfied with the state, while many more would be so badly off that even living in an anarchy would be preferable. Conversely, if we always favour justification, this does not rule out a situation where the internal secession of a small group of people leaves a large amount of people in the majority society dissatisfied with the state.

Nonetheless, justification is a more fundamental duty than legitimacy. A state which is not justified is a state which actually leaves some of its citizens worse off than if there were no state at all. This might of course be morally unproblematic in some cases. A band of highwaymen may thrive in a stateless society, but will be caught and brought to justice by a well-functioning state. Since the highwaymen are not willing to abide by fair rules of conduct,

¹²⁹ Some people, notably Chandran Kukathas (*The Liberal Archipelago*, Oxford: Oxford University Press, 2003), have argued that the state should guarantee a right to exit for communities within the state. Kukathas does not operate with the concept of "internal secession" as such, but on his model, the "liberal archipelago", communities do enjoy very significant autonomy, where the right to exit is almost the only right to be upheld by the state. (I will return to Kukathas' arguments in 6.3.4.) The right to exit does seem to be one which communities populated by reasonable people would have to grant their members, or at least such members as have not freely chosen membership by immigrating to the community in question (or who did so under false auspices).

we do not have a duty to justify the state to them. However, in other cases a lack of justification is deeply problematic: one central property of the state is that it is able to uphold its directives by force, and while it is problematic enough if this cannot be done on terms that are accepted by those subject to these directives (that is, if the state isn't legitimate), it seems even more problematic if it is done in such a way that it leaves its citizens worse off than if a state had not existed. So it seems that in the conflict between justification and legitimacy, we should side with justification.

5.1.5 Summary

In summary, the state can be justified on different grounds. One is that living under that state is in someone's interest compared with not living in a state. Another way is that the state's exercise of authority over one is necessary if one's duties towards others are to be fulfilled. Some of those duties, the duties of assistance, are ones we have to others independently of our relationship with them. Others, the duties of reciprocity, arise from living in a society with others. If a group of people do not want to live in such a society with others, but would want to withdraw and live on their own, they do not have such duties of reciprocity towards the others. Hence a state emanating from the majority society cannot claim to be justified to that group on such grounds. Nor could that state always claim to be justified on the grounds that the group in question benefitted from being subject to the state's authority. This is otherwise a claim that is fairly common: the state provides certain public goods that accrue to everyone on the state's territory, but at the same time makes certain demands, financial, behavioural, or otherwise, of its citizens, not just in order to provide for the public goods but almost always also to achieve other projects. If the costs associated with living under the state are exceeded by the gains, then the state is justified. But as Simmons argues, this might not always be the case: for some people, supporting the establishment of public goods may be so onerous as to render the costs greater than the gains.

If I am a member of a society, I have a duty to reciprocate against other members by proposing terms of cooperation for that society that I *believe* to be fair and that in some minimal sense *are* fair. The question is whether that duty involves promising to pay the taxes and obey the laws of that state, provided everyone else does. I think it depends on what the alternative would be. If obeying the state is so onerous that one would be better off living in the state of nature, that is to say not just outside of the state but even outside of society, then it seems that one could claim exemption on that ground. The reason is that reciprocal participation in society must be to everyone's advantage. But if the alternative is simply to collect the gains from cooperation without shouldering one's share of the burdens, this is clearly an unreasonable position.

I further believe that at least most fairly decent, democratic states are clearly justified to ordinary reasonable members of society. The difficulties would emerge with states that are on the borderline of not being justified at all. I am much happier in those cases to say that some people indeed reasonably can reject the justification of the state, and that they should not be subject to its authority.

However, my argument that fairly decent democracies are justified to those living in the societies they govern does not apply to people living in separation from that society. If we accept that the public goods argument does not have to work either, we may have to accept the validity of claims of internal secession. This seems a much less odious prospect if we

remember that in order to live in a different society from us, people have to live separated from the society we live in. It seems quite natural to say that people living in a different society should be allowed to govern themselves as they see fit.

5.2. Maximising Legitimacy

I think I have managed to show that the state is justified (or at least justifiable) even if it is not legitimate. The question is how we proceed from here. I propose that we regard legitimacy as something that a state should strive to maximise. To maximise legitimacy means to organise the state in such a way that as many reasonable people as possible will accept it as legitimate. The idea that we should maximise legitimacy seems to be a natural conclusion if we regard legitimacy as something to be desired, despite the fact that it cannot be fully achieved. In this section, I will consider some general objections to the idea of maximisation.

One objection is that maximising legitimacy seems like a numbers game. It may be claimed that people's opinions about legitimacy are treated like bargaining chips, and can be ignored if contrary opinions have greater support. And it is indeed true that a state which cannot satisfy everybody's views will have to leave certain opinions unsatisfied in order to satisfy others that are shared by more people. But I see nothing unacceptable about this. Maximisation does not lead to morally repugnant conclusions of the kind we recognise from arguments against utilitarian utility calculus. There is no room for a "utility monster", which thrives on the misfortune of others, of the kind which Nozick imagines in *Anarchy, State and Utopia*. Since we are concerned with reasonable doctrines of legitimacy, doctrines of legitimacy that base themselves on the suffering and persecution of others will be disqualified.

The very thought of maximisation does not, then, risk leading to a repugnant conclusion. A second objection, which I shall call the *minimisation argument*, runs as follows:

- (1) Legitimacy is something which applies only to the actions of states.
- (2) Hence, if there is no state, there can neither be legitimacy nor illegitimacy.
- (3) Maximising legitimacy is the same as minimising illegitimacy.
- (4) Therefore, if we should strive to maximise legitimacy, then we should abolish the state.

Premise (3) may seem tenuous, but I believe it is correct. The term "maximising legitimacy" expresses the idea that the state's exercise of power should take place on fair terms. It is *illegitimacy*, the failure of a state to carry out its duty of reciprocity against its citizens by exercising power on terms that they can accept, which is the problem that the reciprocal theory attempts to solve.

It may be argued against premise (1) that legitimacy can be applied to other types of organisations than states. If this is the case, then abolishing the state may not remove all cases of illegitimacy. As A. J. Julius puts it: "Say that a group of people is *protolegitimate* if the people who set terms for these people's interaction have a duty to make certain that every member can accept them."¹³⁰ The question is whether only states are protolegitimate. Julius thinks not, and it is easy to see why he might think so. The United Nations and the other international organisations affiliated with it are not a state. Nonetheless they do affect

¹³⁰ A. J. Julius, "Nagel's Atlas" (2008): *Philosophy and Public Affairs*, Vol. 34, No. 2, p. 181. Emphasis in the original. The group, or rather its interaction, becomes *legitimate* only when those who set terms for that interaction actually fulfil their duty.

people's lives in large parts of the world, and although individual member states may leave the UN, exit comes with difficulty, and it is not at all available for individual residents of member states. Under such circumstances, those who set the terms for the interactions in the UN system have a duty to make certain that every member of the UN system can accept them.¹³¹

If we apply this idea to the minimisation argument, the response to that argument will be that abolishing the state does not lead to the abolition of all protolegitimate groups, and thus not to the abolition of all illegitimacy. Not only may already existing protolegitimate groups survive the fall of the state, but new state-like protolegitimate groups may arise to fulfil the needs that the state used to serve.

It can be argued that such state-like protolegitimate groups, because they aren't states, and thus not involuntary in the way that states are, will cause less illegitimacy, since one of the greatest causes of illegitimacy is the involuntary and coercive imposition of various norms and rules. But this need not be true. Recall that the involuntary character of the state is not the same thing as its having a monopoly of force. Most states do not exercise their monopoly of force to prevent ordinary citizens from leaving the country (though some do). The involuntary nature of the state is not due to the fact that citizens strictly speaking cannot leave. They can very often leave, but only at the very high price of abandoning their friends and family. And groups where membership is involuntary in this way will surely proliferate even in a non-state world. In many ways, their involuntary nature will be even more profound. There are of course many situations when people can voluntarily choose to abandon their friends and family. Typically (though not always) the cost of doing so is higher when moving from one state to another than when moving within a state. One of the reasons why the cost is lower when moving within a state is that the individual who moves will still be maintained in a position of right, with certain claims that she can make valid against the state in her own right, while she has fewer guarantees in other states, and none in a non-state society. The presence of the modern state in many ways emancipates people.¹³² We can expect societies in a non-state world to be more closely knit, and thus that our dependence on those in our nearest social networks would be higher than it is today. Alienation from our local protolegitimate community would mean alienation from our family, and thus alienation from our network of support.

I think it is possible to accept Julius' claim that there can be non-state protolegitimate associations while at the same time insisting that there is something unique about the state which makes its justification and legitimacy a philosophically salient problem. States span over large territories and control the lives of thousands or millions of people. Potentially, states can achieve a level of control over people's lives, down to the minutiae of human existence, that no other organisations have been able to do. Other protolegitimate groups, at least as long as they coexist with states, are usually able to wield control only over parts of

¹³¹ Members are not only the member states, but also the people resident in those states, since they are represented by their states and are directly affected by decisions made in the UN system.

¹³² Recall that in 3.3, I argued against Stilz's Kantian argument in favour of the state. Stilz also claims that the state emancipates people, in that it is only in the state that we are able to enjoy equal liberty. My argument here is different from Stilz's, in that I see it as a *practical* tendency of states that they increase our freedom, while Stilz sees it as a *conceptual* feature: we cannot have true freedom outside of the state, according to her. Furthermore, I am using the emancipatory role of the state as an argument in favour of its *justification*, whereas Stilz used it as an argument in favour of its *legitimacy*. Hence, I am not adopting the Stilzian position I argued against in 3.3.

people's lives, precisely because they do not have monopoly of force. Therefore the state is singled out for attention. This goes especially for societies such as ours, which are characterised by a plurality of different organisations and associations, none of which come close to wielding the power of a state. In other words, I think we can reject the idea that abolishing the state will remove all causes of illegitimacy, while we at the same time can continue to focus on the legitimacy of the state.

Another response that can be made to the minimisation argument is this: when we compare a society which doesn't have a state compared to a society which does, the question to be asked is not "Which society is more legitimate?" but the more general question "Which society ought we to bring about?" And the answer which reasonable people (nearly) always will give is that we ought to bring about a society where there is a state. It might be that we even have a *duty* to enter into a political society with others, even if a defective one, if it is needed to realise our duties towards others, whether these are duties of assistance or of reciprocity. Furthermore, the security provided by the state makes it possible for people to realise their interests and lead good lives to a much greater extent than otherwise.

But this opens up for a counterargument, which I shall call the *pluralist argument*: I assume here that when evaluating different societies from a moral point of view, we would prefer a society with a state to a society without one. But if the moral status of a society is what ultimately counts, then why should liberals worry about legitimacy so much? Why should legitimacy take centre-stage and not other moral values? Couldn't legitimacy be outweighed by other values such as equality, justice or efficiency?

It is not satisfactory simply to say that legitimacy must be our prime concern because we have a duty to legitimise the state to others with whom we would like to coexist. Since this task is unlikely to be achievable, we must reinterpret this duty in some way, for instance by making it less absolute. And if it conflicts with other duties we may have, then what are we supposed to do? Perhaps we have a duty to build a state that others can accept, but perhaps we also have a duty to treat others equally, and perhaps these duties conflict, because a state that treats other people fully as equals would be rejected by some people, and would thus remain unacceptable to them. And so we have to choose what to do, where the question is whether legitimacy overrides all other liberal values.

When answering that question, we have to distinguish between the role which legitimacy plays in one's self-directed conception of values, i.e. the things one values for oneself, and one's other-directed conception, i.e. the things one believes one should accomplish for others. Certainly there are many different positions a reasonable person can take when it comes to legitimacy as a self-directed value. Some people are simply not terribly interested in politics, and may consider other things more interesting.

It may also be that many people would regard their duty of legitimacy as a duty of less pressing concern than other duties, not only because one is not often called upon to reflect on the legitimacy of the state, but also because there may be situations where legitimacy would have to yield to more basic concerns, such as saving people's lives. And so far the reciprocal theory agrees: the basic duty of assistance may take precedence over duties of legitimacy. Furthermore, as I argued at 5.1.4, legitimacy must yield to justification.

But beyond this, it seems as if there is not much room for choice. The reason why duties of legitimacy *prima facie* must take precedence over other duties is that our duties of legitimacy

are ultimately derived from the concept of reciprocity, which is a fundamental concept of human interaction. There may be other duties of reciprocity that hold within various non-state reciprocal relationships, but should they conflict with our duties of legitimacy they have to take second stage.

The conclusion is that we should strive to make the state as legitimate as possible. What this presumably involves is to identify causes of illegitimacy and to treat these causes in such a way that more illegitimacy isn't being generated by the treatment itself. This can take place at the same time as, and quite conceivably in tandem with, a practice where liberals are active participants in a debate about what *should* be regarded as necessary and sufficient conditions for any particular individual to regard the state as legitimate. What I have assumed is that each person, when assessing her relationship with the law and with law-giving authorities, must for herself judge what the state must do in order for her to be able to accept its exercise of power. There are a multitude of reasonable and incompatible answers to this question, and the liberal state should seek to satisfy them to the greatest extent possible. But this does not mean that they cannot be exposed to rational criticism and be brought up to public debate.¹³³ And this may in itself be a powerful tool for the increase of legitimacy, as I will go on to say in the next chapter.

5.3. Maximising Legitimacy: Epistemic Problems and Urgent Cases

I will now finish by dealing with two epistemic questions: (1) Isn't it difficult for an ordinary person to know when he or she has rejected the legitimacy of the state? (2) Isn't it difficult for someone who cares about legitimacy to know how many persons reject the state, and why they do it? These two come together to a large degree.

What I have claimed is that a reasonable person should ordinarily be regarded as the most reliable witness to her own beliefs about legitimacy. This means that if someone says that the state is illegitimate, then that person believes that the state is illegitimate, and vice versa: someone who does not object to the legitimacy of the state does not believe that the state is illegitimate. I realise that this idea may be far from unproblematic. It opens up for type I errors, when someone claims that the state is illegitimate even though she does not in fact believe it, because she might use "legitimacy" in a different sense from mine, and type II errors, when someone believes that the state is illegitimate even though she wouldn't say so, maybe because her definition of legitimacy may be more permissive, or because she lacks the language of legitimacy and the habit of thinking in such terms, or, more worryingly, because she is hindered from freely forming and expressing her beliefs about legitimacy.

If someone rejects a certain law, claiming that she does not consider the state to be legitimate, it can often be difficult to tell whether she doesn't, deep down, still believe that the state has the right to enact laws and enforce them, but that this belief is massively outweighed by other beliefs, such as that she believes the law to be immoral, unjust or too burdensome etc. And if someone who normally is highly critical of the way the state is organised nevertheless displays a high degree of willingness to obey the law, it can often be hard to tell whether that person is in fact motivated by her belief that the law is legitimate or by other reasons (or if she simply obeys the law out of habit). For many people, different kinds of reasons would tend to coincide in practice and would be difficult to tell apart even upon reflection. The difference

¹³³ This is especially the case since a reasonable person cannot actively be unwilling to withhold her proposed terms of cooperation, and the arguments that underpin them, from public scrutiny and debate.

between disliking a law but still recognising that its legitimacy gives you some reason to obey it (no matter how strongly that reason is outweighed by others) and quite simply rejecting the legitimacy of that law is not always very sharp.

For this reason, I think that it would be easiest and most productive for someone who wishes to maximise legitimacy to focus on the most clear-cut and urgent cases of failure of legitimacy. Such cases are ones where people behave in a way which clearly indicates that they reject the institutions of the state and regard the state as functioning in an unacceptable manner. This type of behaviour does not have to be violent. It can also express itself through non-violent protest, but also through apathy or withdrawal from society, which might be harder to spot but no less worrying.

There are some objections that might be made against this idea:

(1) If clearcut cases are to be focused on, aren't we then discriminating against the ordinary citizens who don't have the energy or the voice to protest? Aren't we benefitting groups that hold extreme views ahead of moderates?

Response: talk of "extreme" versus "moderate" groups is unfortunate as long as we are still talking about reasonable people. It is true that reasonable people may choose positions on legitimacy (and other subjects) that diverge more or less from the mean, but they should still count equally in the eyes of the state and of other reasonable people. If it is in fact the case that it is difficult to find out whether someone is rejecting the legitimacy of the state or not unless that person radically disassociates herself from the institutions of the state, it is difficult to see that anything can be done about it.

(2) How do we know that satisfying certain demands will not cause other people to reject the legitimacy of the state?¹³⁴

Response: This might be difficult to know in the individual case. I treat this as a practical question that can be solved, if not completely, then at least to such a degree that it allows the general strategy of minimising failures of legitimacy to do more good than harm.

(3) How do we know that this failure of legitimacy is made by reasonable people, especially if they do not have access to an equal voice in public discourse?

This is a difficult question. We might often, through studying the way controversial issues are dealt with in the public debate, find out if it is possible to reasonably reject the legitimacy of the state on such a basis, but this does not tell us much about the proportion of actual people who are reasonable, only that some people could be. Through acquiring detailed knowledge of the factors that drive people to reject the legitimacy of the state, and through trying to understand what the underlying motivations of people look like, it might be possible to gain sufficient information to enable us to make some guesses as to what the answer might be like. But also remember that this problem arises especially in situations where one alternative must face off against another, or where the choice of a certain option risks creating a backlash with new failures of legitimacy. If such backlashes are not to be expected, the problem does not arise to the same extent. The problem is not that we are making the state into something

¹³⁴ To give an example of what I mean, we can use the discussion in Chapter 4. Satisfying the libertarian theory L2, which claims, that the welfare state is illegitimate, by dismantling the welfare state, will cause the state to seem illegitimate to those for whom a welfare state is a necessary condition for legitimacy.

which will be acceptable also to unreasonable people. That might in some sense be regarded as a supererogatory act, in that these people aren't part of the community of people towards whom we have a duty to create a legitimate state, but it's not a problem as such. Rather, the problem is that it may be easier to determine how many people will be affected from the point of view of legitimacy by certain policy choices than it will be to determine how many of these that are reasonable. We might then either limit ourselves to looking only at such failures of legitimacy where we should not expect that there will be a great backlash if we were to rectify them, or we could choose to provisionally reckon all people as reasonable until the opposite had been proven and hope that this method, as above, would still lead to greater success than doing nothing at all, even if it wouldn't be perfect in every single case.

Providing people with a stronger voice in public discourse may also enable us to identify people's positions on various issues. I have argued in 3.1 that deliberative democracy does not in and of itself secure a legitimate form of government, attractive though it may be as an idea. In the next chapter, I will argue that making our democracy more deliberative may be one way of increasing legitimacy as it might make more people feel that they can participate in society and make their voices heard. However, allowing more people to participate in public discourse and enabling their voices to be heard also makes it easier to identify people who reject legitimacy and identifying the grounds on which they do it. In this sense, deliberative democracy can function both as a remedy and as a diagnostic tool.

5.4. Summary

In this chapter, I have said the following things: irrespective of its legitimacy, the state is justified. While we may have a duty to allow people who genuinely do not want anything to do with our society to go their own way, the state must be allowed to continue to function even if dissenters remain. Further, the state should focus on trying to maximise the occurrence of legitimacy, rather than on making the state legitimate only to some people and then turning its attention to other values. With the exception of justification and our duty of assistance, legitimacy shouldn't be traded in for other values; the state can only deny some people's claims to live in a legitimate state if it be necessary in order to satisfy the claims of others who are more numerous, or if such people are unreasonable. And finally, there are good reasons to start by focusing on the claims that are easiest to identify, and which involve situations where it is clear that efforts to achieve legitimacy may fail. In the next chapter, I will identify some situations where this happens.

Chapter 6. Towards Legitimacy

Previously in my dissertation, I have argued that since people can reasonably disagree about legitimacy, there can be no such thing as a state which is legitimate to all reasonable people. This, however, is not reason enough to do away with the state. Rather, we should treat the concept of legitimacy as something to be maximised rather than fully realised, and we should identify instances where the legitimisation of the state fails, and seek to remove those. I have argued that the instances of failed legitimisation we should look for should be the most urgent ones, those to which our attention is most immediately drawn.

In this chapter, I will be looking for occurrences of a failure of legitimacy. This is the situation I have argued that we have to find ourselves in: we have, in some sense, a duty to justify the political order to our fellow citizens in terms which they can reasonably be expected to endorse, but no such justification can ever satisfy all reasonable people, and so liberals always face a tragic dilemma: no matter what they do, some people can still reasonably feel that they are alienated by the state. The question I asked at the end of the last chapter was: how, in a particular situation, can we tell someone who rejects the legitimacy of the state from someone who is merely very angry with it, or who does not find sufficient reason to obey a particular law but who may still deep down recognise the state as legitimate? Well, the answer was to look towards those who make it clear, in words or in deeds, that they in some ways break with the state as such, they reject the state, they are alienated from it. And this is a condition of alienation, because as reasonable people, the citizens subject to such a condition will have made an honest attempt to play fair, to be a part of a society together with others, and so on. Yet society has not reciprocated, and this is the source of the alienation.

Under which circumstances does such a situation arise? And what can be done to ameliorate it? Since a person is herself responsible for how she reasonably judges the legitimacy of the state, it would go too far for me to lay down any general theory which proceeds from abstract principles. A more careful description is the work of sociologists and empirical political scientists, not of philosophers. Nevertheless, I shall try to point to some areas where I believe that illegitimacy is most prone to occur. To the extent that my analysis is true, however, it will not be true *by definition*, neither by definition of the term legitimacy, nor of the term reasonableness. In many cases the choice is up to the individual whether she regards a certain situation as being illegitimate or not. And let me also say that the factors I will point to in this part of my dissertation usually do not function such that they, taken each by themselves, will cause someone reasonably to reject the legitimacy of the state (except in extreme cases). Rather, they may add up and finally cause someone to believe that enough is enough and cross the threshold to illegitimacy.

I will start by considering an important question in our search for legitimacy, namely to what extent we should consider institutions or actions (section 6.1). I will then move on to look at four distinct areas where our efforts to legitimise the state may fail:

1. Failure of public justification: the state is governed according to comprehensive values people would not reasonably be expected to accept (section 6.2).
2. Failure of equal influence: through the ways public institutions are set up, people find themselves excluded from equal influence over the way power in society is exercised (section 6.3).

3. Failure of policy: people find that the property relations and welfare distribution of the state are governed by schemes that are regarded as incomprehensible, grossly unfair, or confiscatory (section 6.4).

4. Failure of trust: people fail to believe that others, be it their fellow citizens or political office-holders, fulfil their part of the bargain (section 6.5).

I will finish by summarising my findings (section 6.6).

In this chapter, special attention will be devoted to the topic of trust (6.5). I choose to do so because this topic to a large degree has been neglected in contemporary political philosophy, while it has been identified in much social-scientific literature as being a vital component of well-functioning societies.

6.1 Institutions and Actions

As Amartya Sen says with respect to justice, the focus of almost all theorising has concerned just *institutions*.¹³⁵ Rawls, to take one prominent example, focuses exclusively on institutions. But, Sen continues, our sense of injustice is often directed not towards institutions but towards concrete instantiations of injustice. It is when we, in our everyday lives, are treated wrongly, or when we see others being so treated, that we are most likely to feel anger over the injustices that exist in our societies. Sen goes on to claim that it is not necessary to have a complete description of the perfectly just society in order to create increases in justice, and that it is those increases, those incremental steps towards justice, that theorists should focus on.

And similarly with legitimacy, I have mentioned the emotional response with which people react to societies that fail in one or another respect to be legitimate. I also take myself to be very much in agreement with Sen when I say that we need to eliminate, step by step, such occurrences of illegitimacy that can be removed without reducing the legitimacy of the state in the eyes of an even larger number of people. Indeed, as will be seen further ahead in this chapter, some of our actual solutions also overlap.

Now, with reference to this I would like to address a potential worry with my theory. The way the theory has been presented, it seems as if reactions to individual situations should not matter. Someone who accepts a certain law because she considers it to be legitimate does so because she believes that there is something about the way the law has come about which makes the law worthy of respect for its own sake: it is a law laid down by a legitimate regime, in a way compliant with fair terms of cooperation.¹³⁶

Sen argues that people could react towards some particular situation, thinking “That person has been unjustly treated”, and limit their reaction to this particular situation, without having a general theory of justice. The question is whether one could at all, conceptually speaking, do

¹³⁵ Amartya Sen (2009), *The Idea of Justice*, Cambridge: Belknap Press; p. 388 f.

¹³⁶ It is of course not necessary for an individual personally to be in a situation where she has to decide whether to accept the law or not: we can ask ourselves how we *would* react, how we *would* reason, if we *were* to face laws which we might think would be illegitimate. Even before potentially illegitimate laws have been adopted, we consider their consequences, and we let the anger, the rejection and the frustration we feel guide us, both before and after the laws have been enacted.

this with legitimacy. If so, we need to be aware of this when theorising about how the state can increase its legitimacy.

It seems to be a plausible idea that there are measures which the state might undertake which are so egregious that they, in virtue merely of their content, become illegitimate. These are actions which by their nature cannot reasonably be defended. In many cases such actions may result from institutional flaws, but it might be possible for such actions to be undertaken without the illegitimacy of those actions being reflected onto the institutions of the state, something which would match Sen's idea.

The question then is whether this means that someone on the basis of such actions could hold the state as a whole to be illegitimate even though the institutional arrangements of the state are not to be blamed, just as one on the basis of unjust actions could hold the state to be unjust, since there is injustice in it. It appears as if it would take very special circumstances for this to be the case. In many cases, one can blame the institutions, or the absence of institutions, for shortcomings in individual situations. If one is mistreated by public officials in violation of existing norms, this might have been mitigated had they been given clearer instructions, better training, recruited differently, paid higher or threatened with heavier punishment, for instance, and if that does not work, there might be very little one could do about it. Special circumstances would involve either individual errors that would have very great consequences, or a massive failure of norm-obedience, where the norms become facades rather than truly action-guiding.¹³⁷

But I would also like to point out that the feeling of alienation, and of being abandoned and treated wrongly, *could* occur with respect to individual situations. The underlying reason why it occurs may be systemic error – the institutions of society do not work well in a particular instance – but the individual affected might still not transfer her anger and frustration to all other acts undertaken by the government. For example, if a state, otherwise legitimate, decides to introduce capital punishment, many people would reject the application of capital punishment as illegitimate, though they might otherwise continue to support the legitimacy of the state in other respects. But the reason why such a case could ever arise might well be systemic: for instance, the state might not have granted its citizens due protection against capital punishment by including it among the human rights in a constitution the provisions of which would be inviolable and enforceable in a court of law. And so, to prevent further such cases from arising, the institutions of the state might need reform, while rectifying the particular instance of illegitimacy does not need a complete reform of the state, but merely the abolition of capital punishment.

In summary, individual actions by public officials may be perceived as illegitimate by citizens, but only in extreme cases will they cause the entire state to be perceived as illegitimate. Nonetheless, since the experience of illegitimacy is what we seek to avoid, we should keep in mind individual situations where this might happen, and design institutions which will prevent them from occurring.

¹³⁷ What *might* be the case, however, is that many theorists of justice (and legitimacy) have focused too exclusively on one set of institutions only, namely those that are regulated by law. An institution is a much more nebulous concept than this, and comprises all manners of regular or regulated behaviour. If a state has good laws but the administration of them is corrupt, the problem might not be the *formal* institutions, but the *informal*, the *unwritten* ones. And against these a citizen might certainly militate, if they lead the state to fail in its task of legitimisation. And about these, comparatively speaking, theorists like Rawls have not had that much to say. But both in matters of justice and of legitimacy, they would seem to be very important.

6.2 Public Reason and Justification

In this section, I will explore how legitimacy will be affected by the kinds of reasons that we admit into public discourse. Many liberals, such as Rawls, have warned of the danger to legitimacy which comes about when society is instituted along the lines of one certain comprehensive conception of the good. Rawls claims that, as a rule, politicians ought only to put forward reasons that do not make reference to a comprehensive conception of the good in the public debate. At first sight, it seems correct to say that public reason in some form is a necessary prerequisite of legitimacy: if people are to be able to accept the state as legitimate, they have to be able to understand and accept the reasons put forward for why it looks the way it does.

Rawls goes on to say that a reasonable person, among other things, must be willing “to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime”.¹³⁸ In Chapter 4, I accepted Rawls’s definition of a reasonable person, and I claimed that it seemed to be a useful way of spelling out the account of reasonableness given in Chapter 1.

If the acceptance of the idea of public reason and the role it is supposed to play is a precondition for reasonableness, then it would seem that according to Rawls, someone who rejected these ideas would become unreasonable. This is a worrying conclusion, since the idea of public reason is not at all an intuitive or obviously correct idea.¹³⁹ We should thus allow some room for manoeuvre with respect to the role of public reason, within which reasonable disagreement might take place.¹⁴⁰ And so the way in which society admits non-public reasons into public discourse will affect the legitimacy of that society. In general, one could imagine tendencies towards rejection of legitimacy in two different directions.

The *first* direction is towards an increasing use of non-public reasons in the debate. One reason for this may be that allowing participants in public debate to use whatever reasons they like puts all parties on an equal footing. It also promotes honesty and sincerity, since parties will be able to put forward those terms that they actually believe underlie their views on the various issues. And although Rawls’s duty of civility is primarily intended to cover politicians and other decision-makers, and thus not ordinary citizens, the latter may still find themselves aggrieved, since those persons whom they have elected to speak for them and articulate their political beliefs are not allowed to present the full range of reasons in favour of their political positions.

The *second* direction is towards holding a more restrictive view than Rawls. What Rawls calls “the duty of civility”, namely our duty to justify ourselves in terms that others might

¹³⁸ PL:54. Cf 4.3.

¹³⁹ It is counterintuitive in that it sets some kind of limit on the reasons that can be cited in public debate. Often, we believe that public debate benefits from many different voices being heard. Of course a defender of the idea of public reason can reply that this objection does not defeat the idea of public reason. Since we cannot expect other citizens to accept non-public reasons, bringing them up in public debate will not advance deliberation. But people can reasonably disagree on whether this response is successful or not.

¹⁴⁰ As a bare minimum, we should allow some room for manoeuvre for those who want to hold a more restrictive line on public reason (what I refer to below as “the second direction”). There is nothing in Rawls’s writings that seems to classify such beliefs as unreasonable.

reasonably accept – in short, to use public reasons – only holds for constitutional essentials and matters of basic justice.¹⁴¹ But Jonathan Quong and others have argued that this duty holds for all kinds of legislation, not just on those fundamental topics that Rawls mentions.¹⁴² Furthermore, it could be argued that all citizens should be subject to the duty of civility. As I said above, Rawls imagines that only politicians, their campaign managers, and judges and other public officials must adhere to the idea of public reason. But the nature of public debate has changed a lot since Rawls wrote *Political Liberalism*. The Internet allows everyone to present their views in public.

It does not appear to be a bold guess that the importance of the issue of public reason for legitimacy varies from country to country. In some countries a secularised public discourse may have been the norm for so long that it isn't seriously questioned, while in other countries this issue is a daily source of contention. From the point of view of maximising legitimacy, it might be difficult to present any general prescriptions for what individual states should do. If, in countries such as the United States, there seems to be considerable pressure to permit the use of some comprehensive reasons in public discourse, but if there is also good reason to assume that these would be used on all sides in the debate, to defend all kinds of propositions, then that might be a necessary concession to those who otherwise genuinely find it difficult to express what they regard as the true reasons for their beliefs. This would then obviously conflict with Rawls's idea that such reasons, being non-public, are to be kept separate from public discourse. On the other hand, under certain circumstances it might be necessary for sharper distinctions than those Rawls envisages to be introduced. For instance, his proviso claims that non-public reasons may be cited in support of a political proposal, so long as public reasons will be cited later.¹⁴³ But suppose it turns out that the use of non-public reasons in fact reduces the perceived legitimacy of the measures that they support, for instance because they make others fear that policy-making is being governed by the agenda of some comprehensive doctrine. In that case, this proviso cannot hold unconditionally. Restraint in the use of non-public reasons may be called for.¹⁴⁴

However, the arguments for permitting the use of comprehensive reasons in certain contexts do not seem to be nearly as strong when it comes to permitting the creation of public institutions that are based on comprehensive conceptions. Reciprocity requires that someone could only advocate being morally permitted to draw upon non-public reasons in public discourse if she were at the same time willing to admit that others have the equal moral right to draw upon their respective non-public reasons. Hence it seems difficult, by analogy, to imagine that someone could reasonably deny the legitimacy of the state because her comprehensive conception was not given a favoured status with respect to other reasonable comprehensive conceptions, for instance in the form of being granted the status of a state church (if the conception is a religious one). On the other hand, it seems as if people could very well reject the legitimacy of the state if there were a state church whose faith they did not share, precisely because their own views then would be discriminated against. This is not to say, of course, that people automatically will react in such a way against the establishment of state churches – if effective freedom of religion is otherwise guaranteed, the existence of a

¹⁴¹ John Rawls (1997), "The Idea of Public Reason Revisited", *The University of Chicago Law Review*, Vol. 64, No. 3 (Summer, 1997), p. 769.

¹⁴² Jonathan Quong (2005), "Disagreement, Asymmetry, and Liberal Legitimacy." *Politics, Philosophy, & Economics* Vol. 4, No. 3, pp. 301-330.

¹⁴³ Rawls, "The Idea of Public Reason Revisited", p. 776.

¹⁴⁴ One should also keep in mind the importance which public reason plays for successful deliberation – indeed, the connection between public reason and deliberation is very strong for many authors. See 6.3.2.

state church in traditionally monoreligious societies might not turn out to be highly controversial from a legitimacy point of view. Nor does this mean that the state cannot support any kind of comprehensive conception – if there are people who feel that they are being treated unequally because some doctrines are given an unfairly privileged position, the state can then withdraw its support, or decide to support all (reasonable) comprehensive doctrines equally.¹⁴⁵ But it does mean that the general tendency should be towards increasing neutrality between different religions on the part of the state, in countries where this has not yet been fully achieved.¹⁴⁶

6.3 Equal Influence

6.3.1 Minorities and Majorities

“Majority rule loses its moral appeal when there are ‘discrete and insular minorities’¹⁴⁷ in a democracy, citizens who systematically find themselves in the minority on most important decisions because of the prejudices or distinctly different interests of majorities. In these circumstances, majoritarianism often works unfairly to the disadvantage of minorities, especially on issues of critical importance to them. Because the inspiration of procedural democracy is the ideal of citizens ruling themselves on equal terms rather than being ruled by an external power, the presence of discrete and insular minorities who consistently lose out undermines the moral appeal of majoritarian procedures. It is reasonable for discrete and insular minorities to reject majoritarianism on issues of critical importance to them if there is a procedural alternative that would better protect their legitimate interests.”¹⁴⁸

I have already touched upon the fact that norms of public justification and public reason need to be adhered to in order to minimise the loss of legitimacy. But this is just one way in which we can make sure that society is designed in such a way that people as far as possible will consider it to be legitimate. Another factor which might also be important is that people feel that they are able to have an equal amount of influence over the issues that concern them. It might seem as if the existence of majoritarian decision-making procedures of the “one citizen, one vote” type might satisfy this criterion, but there are two distinct ways in which in fact it might not. Both of them presuppose the existence, at least on some issues, of fairly firmly entrenched minorities who over a long period of time cannot hope to get their preferred options adopted by a straight majority vote, no matter if the issues at stake are ones which are more or less static over time, or if they represent changing realisations of underlying differences which remain static (such as the divide between different perspectives on the role of the market economy, where the questions that are put to a vote may change throughout the years but where the underlying ideological differences remain).

The first type of failure is alluded to by Gutmann & Thompson in the quote above, namely when minorities have certain spheres into which the majority intrudes, while the majority, due

¹⁴⁵ For instance, it is possible for more than one faith to be given official status. Both Lutheranism and Russian Orthodoxy are treated as national faiths in Finland, to give one example.

¹⁴⁶ The underlying assumption here is of course that the religions in question are reasonable in how they view the relationship between adherents, and other citizens and public institutions, as well as among the adherents themselves.

¹⁴⁷ Justice Stone in *United States v. Carolene Products Co.* [Footnote in the original.]

¹⁴⁸ Amy Gutmann & Dennis Thompson, “Moral Disagreement in a Democracy”, p. 95, *Social Philosophy & Policy*, Vol. 12, No. 1, Winter 1995.

to its numbers, does not have to accept similar restrictions in its sphere(s). So if speakers of a certain minority language find that their right to use that language within certain areas is being forbidden by law even though it would be economically feasible to grant them such rights, or even though speakers of other languages, though fewer in number, enjoy such rights, this might be one factor weighing on their minds when they judge that the state does not act in their equal interest.¹⁴⁹

Another case is when some people may agree that a domain of issues genuinely is one fit for public decision-making, but where they nonetheless feel alienated because they *never* get the chance to influence the course of events. Votes are continuously taken and this group of people always loses. An intuitive example is that of “dominant-party systems” such as Japan until very recently, Sweden during the period 1932-1976 or, within the framework of the German Federal Republic, the ongoing CSU dominance of the state of Bavaria.

We can see a potential problem with majoritarian democracy by considering a very easy example in the form of a vote on a budget. Suppose that we have two parties in a legislature, A and B. Due to its strength, A has two votes in the legislature, while B has only one. Suppose that money is to be distributed between the two items of guns and butter, and that there are 30 units to spend. A wants to spend 20 units on guns and 10 units on butter; B wants to spend 10 units on guns and 20 units on butter. A straight majoritarian yes-or-no vote on this matter would of course give A the victory. But there is a different way, namely to weigh all of the votes equally and calculate an average. In this case, the outcome would be that 16,7 units would be spent on guns and 13,3 units on butter. All the participants have had an equal say in the outcome. On average, the positions of the B party are farthest from the actual outcome. But they have no reasonable cause for complaint, since their votes counted equally. Their opinions just happened to be shared by too few of the others.

This, then, might be a procedural alternative which better protects the legitimate interests of minorities, like Gutmann and Thompson requested in the quote above. The problem is that it seems difficult to apply the same formula to non-fungible goods. What is the common “currency” which we should use to trade off rights, liberties and privileges against one another? And there is also the problem of intensity: for a minority, getting increased access to certain public positions, such as jobs in the public sector or places at universities, through some form of affirmative action programme, might be a matter of extreme importance, whereas most members of a majority community, while they might dislike such proposals and see them as damaging the idea of equality under law, do not consider the issue to be of paramount importance. But more importantly, in cases of rights and liberties, the therapeutic value of this kind of decision procedure might be fairly limited. If people believe that issues that concern such rights and liberties are important enough that they might reject the legitimacy of the state, they are unlikely to be mollified by knowing that they might have

¹⁴⁹ Concrete examples of this abound in Europe: there has been a strong trend towards granting minorities increased language rights if these minorities are “historical”, that is to say (in the terminology of the European Charter for Regional or Minority Languages) that they have lived in the country before 1900, while contemporary immigrant communities, who may be much more numerous, often do not have such rights. Hence the ca. 4,500 Sami speakers in Sweden have the right to use their language in contacts with authorities, while the ca. 93,000 speakers of Arabic do not. (The numbers from Mikael Parkvall (2009), *Språken i Sverige*, Stockholm: Reports from the Department of Linguistics at Stockholm University, p. 160.) The situation becomes even more complicated when the minority community which has been granted such rights consists of people who both have an immigrant and an “indigenous” background, such as the case is with the Finnish-speaking community in Sweden or with the Russian minorities in Estonia and Latvia, some of whose members can trace their ancestry in the country through generations, while some are first- or second-generation immigrants.

some influence, proportional to their size of the population, instead of losing a straight yes-or-no vote. The smaller the minority is, the less benefit this kind of procedure would have, while at the same time, smaller minorities are arguably the ones who tend to be the most vulnerable and prone to being alienated from the state. So while not disregarding the procedure of averaging alternatives, we need to look elsewhere.¹⁵⁰

6.3.2 Equal Influence and Deliberation

Previously in my dissertation, I argued that moving towards a deliberative democracy would not help us establish a fully legitimate society. There is such widespread room for reasonable disagreement about the necessary and sufficient conditions for a legitimate state that any given decision-making procedure can be rejected by some as not sufficient for legitimacy. But this does not rule out that deliberative democracy might still play an important role in reducing illegitimacy. The difference is just that it will not get us all the way there.

The existence of efficient mechanisms of deliberation might have some influence over how able a persistently losing minority will be to accept the outcomes of the votes as legitimate. If one can use the power of argument to influence the decisions that are being made, one might not feel so strongly that one is being shut out from all opportunities to control power in one's society. Of course, one additional effect might be that one will be increasingly able to see one's opponents' policies as reasonable, which will make them easier to accept. This effect might come about both because one's opponents change their positions in the light of one's arguments, or because one will come to see the reasons behind the proposals and accept them as reasonable.

Since deliberation is important as a mechanism for the reduction of opposition between majority and minority groups and for strengthening the belief among minority groups that they are in fact able to exercise a fair degree of influence over the affairs of their society, this provides a further dimension to the issue of the use of public reason in public discourse, which I discussed in the beginning of this chapter. The question is then how we decide which reasons are acceptable and which are not in such a way as to maximise the legitimating effect of deliberation. As I pointed out at the beginning, one could imagine people rejecting the legitimacy of a certain regime of reason (that is, a certain way in which different reasons are acceptable in different discourses) either because it admits reasons that are non-public and hence unacceptable to the losing minority, or because it doesn't allow certain groups to present the reasons that really matter to them. Now, remember that the Rawlsian conception of public reason makes reference to a public political culture, which has developed over time. Since it can be supposed that minorities that have found themselves at a disadvantage when it comes to exercising power also in many ways have found themselves marginalised in the public sphere, it might be the case that the public political culture really only contains those reasons that are found acceptable by the traditionally dominant groups. Allowing minorities to make reference to certain reasons outside of this sphere of reasons might go some way towards rectifying this bias.

¹⁵⁰ A further argument against the idea of averaging alternatives is that such a decision-making procedure is extremely rare in most current political systems, which might make its introduction somewhat utopian. I take note of this problem, but merely because a proposal seems politically infeasible does not mean that we should refrain from arguing for it.

Another reason for permitting minorities to bring up non-public reasons is because it reassures the minorities that they truly have the ability to present all of their reasons in public discourse, and that they are thus able to present the maximally best case for their views. At the same time, not permitting majorities to bring up their non-public reasons reassures the minorities that they will not be faced with a situation where important legislation is being justified in terms that are unacceptable, unintelligible or frightening to them. Keeping the majority discourse strictly within the limits of public reason makes it easier for the minorities to see that the legislation which is being adopted can be justified by the use of good and acceptable reasons.¹⁵¹ However, this argument only works without qualification if the minorities and majorities are permanent or near-permanent. If the minority group becomes a majority, it must be ready to restrict itself to reasons that are acceptable to the minority.

6.3.3 Shifting Power Downwards

An attractive way of breaking up the persistence of long-term majorities and minorities is to devolve power downwards, and to give power to the minority groups themselves. The cases that have been the most discussed in the literature concern the granting of rights to ethnic or religious communities or to substate areas that are seen as the territorial instantiation of some form of nationhood or cultural community, such as Quebec or Scotland. The reason why devolution in these cases might be attractive is of course the importance which people attach to questions of language, religion and community. Knowing that decisions are made by people of one's own community, rather than by "outsiders", might make them easier to accept, even though one does not agree with them.

Much attention is devoted in contemporary political philosophy to questions concerning identity, religion, language, and culture. Coming to grips with the challenges and opportunities presented by multicultural societies, should not cause us to lose track of the more traditional issues of politics, issues that concern distributive justice, tax policy, welfare and so on, and how important these really are to many people. In some cases, such issues coincide with the struggle for recognition, so that those who belong to disadvantaged and unrecognised minorities also tend to do less well economically, but in other cases, these issues do not, but are nonetheless regarded as being of great importance. Devolving power over such issues to more local decision-making bodies allows for two things. First of all, it means, on the whole, that decision-making on these issues does not become all-or-nothing. People who find themselves in the minority at the national level can still work to realise their political visions at the local level. But secondly, one might argue that it makes processes of deliberation significantly easier. While it is usually not possible in the age of urbanisation and mobility to know all members of one's local community by face or by name, one can nonetheless know one's local representatives, and one can experience the issues and the places and reality that go with them in one's everyday life.

Such devolution of power is likely to have the greatest legitimising effect when it comes to issues that (1) are of great concern for those who find themselves in a minority at the national level, and (2) strongly divide the population on a geographical basis over a long stretch of time, so that a devolution of power would reduce the amount of people who feel that they have no long-term hopes of being able to affect decision-making on issues that matter greatly to them. It is important, once again, to make sure that such devolution in fact brings a net

¹⁵¹ It should be stressed that, as for Rawls, "permitting" the use of certain reasons in certain discourses should be read in its moral, not its legal, sense.

increase in legitimacy. If the decision-making power over moral issues was delegated to local communities, for example, people leading minority lifestyles might in some communities find themselves discriminated by intolerant local opinions, which might in fact lead to a negative effect. Also, there may be cases where devolution of power in fact limits deliberation rather than improves it, at least when it comes to these important and general issues. Reducing the size of the deliberative community and making it more homogeneous is bound to make it harder for alternative voices to make themselves heard, and may lead to possible alternatives being excluded from consideration.¹⁵²

6.3.4 Kukathas on Community Rights

Granting people rights of decision-making based on one's ethnic or religious affiliation is also one possible strategy for the reduction of illegitimacy. In his work *The Liberal Archipelago*, Chandran Kukathas argues at length for extensive autonomy for various communities within a country. The role of the state is reduced to maintaining internal peace and guaranteeing each citizen a right to exit her community.

While this idea might seem to provide an attractive solution, it is nonetheless not necessarily going to solve all the existing problems. Education policy is one such example. Kukathas's favoured idea is that parents be left to provide their children with education as they wish.¹⁵³ This might sound attractive until we remember that not just the content of education, but also its financing, is thus left completely outside public regulation. There is thus no guarantee whatsoever that poorer communities will have the resources to invest as much in education as richer ones.¹⁵⁴ The marginalised position of minorities risks being even more deeply entrenched by this system. And it is also important to realise that the way in which individual people regard themselves and their relationship to the different communities to which they belong varies. In the example of education policy, some might well regard the local community, or maybe the state, as the best decision-maker rather than their respective ethnic or religious community, while at the same time wanting more community self-determination in other areas.

Kukathas limits his discussion almost entirely to a single value, namely that of tolerance. But when considering legitimacy, it is important to remember that a social order must be able, as far as possible, to realise the different values that people hold to. Tolerance is important in the eyes of many, but so is justice. And justice may require tolerance, but it may also require more than that: it may require not the isolation of various communities from each other but their interaction on more equal terms. And this requires more from the traditionally dominant communities than simply leaving the others alone.

Kukathas justifies his high valuation of tolerance by referring to the value of autonomy.¹⁵⁵ Now, while it is true that tolerance would seem to play a very important role for respecting

¹⁵² In *The Idea of Justice*, Amartya Sen strongly stresses the point that justice requires that views be heard not just within, but also outside the community of justice. A strong argument for this point is that minority groups will be able to enlist the help of others in defence of their cause, and will be able to draw upon a wider range of sources and arguments.

¹⁵³ Kukathas, *Liberal Archipelago*, p. 162n.

¹⁵⁴ Nor, of course, on the individual level, that individual families will be able or willing to invest as much in educating their children as other families.

¹⁵⁵ Kukathas, *Liberal Archipelago*, p. 127.

people's autonomy, it does not seem to rule out that there are other values that deserve to be realised, nor is it certain that tolerance, regarded as narrowly as Kukathas views it, would be the only way to realise autonomy fully. What I have argued for is that we should pay more attention to the different terms on which different members of different minorities want to interact with the state and with the majority community (or the historically dominant communities). This might not just increase autonomy, but is primarily important from the point of view of legitimacy.

It is difficult to see that Kukathas's argument would be acceptable if it led to the *a priori* abolition of public policy-making within all areas not concerned with inter-group relations. Kukathas's vision of "society as an archipelago of different communities operating in a sea of mutual toleration"¹⁵⁶ seems to reduce the role of the state to maintaining such inter-group relations, and to securing the right of every member to exit her respective community. If such a separation of various communities into more or less self-governing entities can be brought about, then the logical next step would be for these communities to continue to regulate their internal affairs in much the same way as politics is being done now, namely by ensuring compliance with publicly decided rules by means of a monopoly of force. And such a monopoly of force, whether exercised by the state, or by some new, intra-community organ, would look suspiciously like a state engaging in many areas beyond merely upholding toleration, even though the task of the "real" state had been reduced merely to upholding toleration and the right of exit. And if this is the case, then the problem of legitimacy will simply resurface at a lower level. Recall that, as I mentioned in the previous chapter, non-state political associations can also be proto-legitimate: there can be a problem of legitimacy for such associations as well.

Either Kukathas is committed to the idea that state-like associations with varying degrees of power can exist among self-governing communities within a mostly minimal state, or he is committed to the idea that the only organ of political power should be a mostly minimal state, which maintains toleration and the right to exit. Neither of these options seems to represent a plausible way forward for legitimacy. In the first case, the problem of legitimacy simply shifts downwards, to the community level. In the second case, the state takes on a role which by many will be viewed as heavily insufficient, and which will create problems of legitimacy for that reason. While it should be said that the first option carries with it those advantages that I have mentioned, namely that devolution downwards can bring an increase in legitimacy by bringing greater flexibility and an increased sense of participation, the very radical devolution which Kukathas imagines may not be accepted by those who believe that the state should play a more active role.

6.3.5 Summary

In summary, there are several measures that may be undertaken to secure a more equal distribution of power and influence in society. That this should have a beneficial effect on legitimacy is not surprising. The problem of legitimacy is how we make sure that the terms of cooperation – the distribution of rights, claims and duties in society – are ones that all reasonable people accept, and reciprocity strongly favours solutions that tend towards an equal distribution of power, influence and self-determination for all.

¹⁵⁶ Kukathas, *Liberal Archipelago*, p. 8.

6.4 Welfare and Capabilities

As I have said before in this dissertation, I have with Rawls spoken of *reciprocity* as an ideal of cooperation lying between mutual advantage and altruism. The difference between reciprocity and mutual advantage mainly directs itself towards the person who stands to gain more from a society arranged strictly according to principles of mutual advantage: to her, Rawls says that ideas of fairness and justice in distribution must also feature in a well-organised society, and that someone who is not moved by these ideas is not reasonable.

But as we've seen, reasonable ideas of legitimacy are compatible with a very wide range of ideas about fairness and fair distribution, and about what implications fairness has for legitimacy. This means that disagreements will arise concerning what the state owes its citizens in return for their loyalty. Such discrepancies can of course be motivated by purely ideological reasons, but it is unrealistic not to expect ideology to be driven at least in part by material circumstances. It is thus not unlikely that such discrepancies will prove to be both wider and more heavily charged in circumstances where economic differences are very significant between those who, relatively speaking, have more and those who have less.

More particularly, a sense of alienation might arise among people who work hard but still fail to see tangible results, people who find themselves marooned on an island of poverty in the midst of a sea of plenty, who come to look upon their society as one where birth decides your position more than talent or effort, and who may also hold that people are not awarded resources according to their just deserts.¹⁵⁷ This creates a desire for some kind of compensation, namely the creation of a society where the state makes sure that all citizens are guaranteed at least some kind of minimum welfare rights, such as primary education and basic health care.

But just as much as there is theoretical space for illegitimacy in this direction, there is theoretical space for illegitimacy which arises in the other direction, namely with respect to those who think that the state intrudes *too far* with regards to how they are able to dispose of the resources they have acquired. They may object that with respect to some goods people simply should not be assured a certain minimum level by the state, or they object that the way in which the state goes about accomplishing this threatens their autonomy. For instance, in a general welfare state, the services that the state provides are handed out to *all* citizens. The problem is that these might not be the services that all citizens want, or in the amount or with the quality that all citizens want, simply because people may have different life projects. Someone who foresees spending their retirement in a low-cost country may not want the state to force their employer to put away so much of their wage in payroll tax each month, but may instead want to spend some of that money now since they're not going to need all of it upon retirement.

We should accept that these different perspectives cannot be fully reconciled. But one way to at least go part of the distance may be found in the writings of Martha Nussbaum. Her *capabilities approach*, developed in a series of papers and writings throughout the last 20 years, emphasises the importance of *capabilities* for human development and people's

¹⁵⁷ While Rawls criticised theories of justice based on moral desert (see eg "The Idea of Public Reason Revisited", pp. 778-9), the reciprocal theory finds no reason why these should be considered unreasonable from the point of view of legitimacy.

opportunities to lead good lives.¹⁵⁸ Nussbaum has developed a list of capabilities necessary for a good life which she hopes can be the subject of an overlapping cross-cultural consensus.¹⁵⁹ The capabilities that are listed there have two thresholds: a lower one, which is the limit below which someone cannot be said to be leading a human life at all, and a higher one, above which people are leading fully flourishing lives. The role of the state is to make sure that all citizens first of all reach the lower level with respect to all capabilities, and then, once this has been accomplished, reach the higher level.¹⁶⁰

There are a number of reasons why the capabilities approach offers a useful tool for minimising illegitimacy.

(1) Since it focuses on *capabilities* rather than *actions*, what one is *able to do* rather than what one *does*, it can defend itself against accusations of paternalism and is compatible with a number of conceptions of the good life.

(2) Since it does not address to any greater extent the question of just relative distribution (in the way that Rawls's difference principle does, to take the most obvious example), it is compatible with any number of approaches in this respect. Depending on public opinion and the outcome of democratic processes, a state might want to ensure all citizens the necessary capabilities and beyond that leave the market economy to flourish as it will, or move on to a greater regulation and control over the economy with the aim of realising some principle of relative distribution.

(3) It removes those factors most likely to cause alienation first, in that it claims that the state should first assure all citizens of their basic minimum capabilities before moving on to ensure the fuller set of capabilities.

In doing so, the capabilities approach also helps to reinforce the positive value of deliberation, which I touched upon above. Capabilities reinforce one another. Someone who has a certain amount of education and who is able to feed and clothe herself can devote a certain amount of time to participating in the public affairs of her society. Someone for whom life is a day-to-day struggle for survival will find it much harder to do that.

Point (3) above connects the capabilities approach to related but more pessimistic ideas, such as Judith Shklar's "liberalism of fear".¹⁶¹ According to Shklar, liberal states must continually seek to avoid placing their citizens in fear, be it fear of internal oppression or external aggression. Just as another more pessimistic liberal, John Gray, she conceives of liberalism as ultimately a very fragile form of social organisation, continuously exposed to both domestic and foreign threats. Whatever one's view of this is, mine (and probably Nussbaum's) response

¹⁵⁸ Among Nussbaum's relevant works are "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism", *Political Theory* Vol. 20, No. 2 (May, 1992), pp. 202-246; *Women and Human Development* (2000), Cambridge: Cambridge University Press; "Aristotle, Politics and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan.", *Ethics* Vol. 111 (2000), pp. 111-140; *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, Mass., London: Belknap Press (2006) .

¹⁵⁹ The idea that there can be cross-cultural support for the capabilities approach and its usefulness for political theory which takes postcolonial objections to Eurocentric thought seriously, has been explored by Duncan Ivison (2002), *Postcolonial Liberalism*, Cambridge: Cambridge University Press.

¹⁶⁰ The full list of basic human functional capabilities can be found in Nussbaum, "Human Functioning and Social Justice", p. 222.

¹⁶¹ Judith N. Shklar, "The Liberalism of Fear", in Shaun P. Young (ed; 2004): *Political Liberalism: Variations on a Theme*, Albany: State University of New York Press.

to Shklar would be that while avoidance of fear is certainly one of the goals which a liberal state should strive towards achieving as soon as possible, there is no need to stop there provided that more can be done. Shklar's pessimism is easy to understand, given the fact that she wrote against a personal and historical backdrop of Communist and Nazi oppression in East and Central Europe. And the rebirth of xenophobic and illiberal tendencies in such countries is of course a signal that the work of building liberal societies is still fraught with difficulties. But it should not make us rule out the possibility of establishing more deeply rooted liberal social orders in other countries. More particularly, it should not make us believe that the minimal state, and the minimal state alone, is always the best recipe for social stability and wide-range acceptance of the state. My thesis is that it probably is not. On the contrary, a quick dismantlement of the welfare state in societies where it has a long history is likely to engender social instability and disorder.

The capabilities approach is, as I have said above, compatible with a number of different models of fair distribution of welfare, beyond achieving the full set of human capabilities. This is not just positive in sense (2), in that this allows it to be democratically responsive (and hence might make it more acceptable), nor just in sense (1), in that it does not force a citizen to actually exercise the capabilities that are provided, but it is also positive in the sense that the very capabilities it provides preserve a large sphere of autonomy. It is not possible for a state which takes the capabilities approach seriously to regulate the minutiae of its citizens' lives. While citizens will be provided for, they cannot be treated like children, because children are not autonomous agents. Obviously, this means that the state must make some very difficult decisions. On the one hand, the capabilities that a citizen is to be assured must hold, as far as possible, throughout the whole of a citizen's life – and one way to achieve part of that goal is to have some form of pensions system. On the other hand, the ability to draw up and execute a life plan is one of the very most important capabilities – it is extremely tempting, if we for a moment adopt the Aristotelian language of Nussbaum, to say that someone who has never been able to plan ahead and shape the longer-term outcome of her life, in any significant respect, has not been leading a good life. And if someone is to realise this capability fully, we might desire for her autonomous self to have as much power of disposal as possible over the means which she possesses, subject to her obligation to provide for the capabilities of others. But this seems to undermine the extent to which the state can regulate how citizens spend their money – not take this power of regulation away entirely, but to limit it.

The capabilities approach, despite its many advantages, will of course not appease libertarians who believe that *any* redistributive measure by the state represents an illegitimate intrusion into an inviolable right to property. This is not to be expected, either. As I have repeatedly said, there is no one distribution of claims and duties that will be reasonably accepted by all. While the capabilities approach may help to reconcile various perspectives, it cannot achieve full legitimacy.

6.5 Trust

This section will be devoted to exploring how trust matters for legitimacy. As I said in the introduction to the chapter, trust is an underexplored concept within contemporary political philosophy, despite the fact that much work has been made on trust by empirical social scientists. I will first discuss the concept of trust. Then I will give some more detail on the presence (or absence) of trust in political philosophy (6.5.2), and I will set out why trust is a

problem for legitimacy (6.5.3). I will briefly discuss what might be done to increase trust, before summarising (6.5.4).

6.5.1 Reciprocity and the Concept of Trust

The concept of trust can be thought of in many different ways. A simple but in many ways unsatisfying approach is what Hardin calls the “expectations approach”: I trust you to do X if I expect you to do X. Hardin himself prefers the “encapsulated interest” approach: trust is only relevant when one’s own interests potentially are in conflict with the agent’s. We trust someone not to take advantage of us in a situation where they may benefit from so doing. Seen from this perspective, it is often irrational of us to trust, and what we think of as trust may instead be other things, such as a convergence of interests which makes trusting unnecessary.¹⁶²

Jane Mansbridge puts forward a more moralised conception of trust.¹⁶³ According to Mansbridge, trust can be “altruistic”: we can have a duty to trust others even though trust would not be warranted on purely rational grounds. For instance, good parenting may involve trusting a child with certain responsibilities even though it cannot be certain that the child will be expected to live up to that trust. Similarly, people may through their behaviour come to “earn” trust for moral, and not for rational reasons. To trust someone is to make a judgement about the moral qualities of that person, and as such, trusting is a part of expressing one’s respect for another person.

The concept of reciprocity is arguably connected with trust in this moralised, altruistic sense. It seems as if one can have a duty to trust someone with whom one has been engaged in a long-standing reciprocal relationship. If we imagine two partners in trade, who have been trading with each other for a long time without problems, we would normally be surprised to hear one of them declaring about his partner: “I still don’t know whether to trust her or not.” We would believe that he has seriously misunderstood the nature of their partnership and misjudged his partner.¹⁶⁴ There seems to be a close connection between trust and reciprocity.

In what follows I will not primarily be interested in whether we ought to trust others, but rather in the consequences of actually trusting or not trusting others. I will regard trust in others as something possible to achieve, but not to be taken for granted, in modern-day societies. I will be interested in how trust affects legitimacy, and how this affects possible political solutions.

6.5.2 The Problem of Trust in Political Philosophy

¹⁶² Russell Hardin, “Do we want trust in government”, in Mark E. Warren (ed; 1999), *Democracy and Trust*, Cambridge: Cambridge University Press.

¹⁶³ Jane Mansbridge, “Altruistic trust”, in Warren (ed), *Democracy and Trust*.

¹⁶⁴ It is obviously possible to imagine situations where such a lack of trust could be warranted. If it were common practice among some people to carefully develop long-standing business relations and then betray their partners or principals whenever a possibility to do so profitably arose, one could perhaps never fully trust someone else.

In sociology and political science, noticeably in the works on social capital that have been undertaken the past 20 years beginning with Robert Putnam's *Making Democracy Work*,¹⁶⁵ the concept of trust has played a highly important role. Yet if we look to the great works of liberal political theory from Rawls and onwards, we find it to be almost completely gone and missing. We can, as John Dunn does,¹⁶⁶ contrast the current absence of trust within political philosophy with the role that the concept of trust played for the earliest foundations of the liberal tradition. For Hobbes, mistrust (or "diffidence") in the state of nature was the problem, and the state was the solution. Similarly, for Locke, the problem in the state of nature is how to trust people to abide by the laws of nature, when people are not under the control of any authority. However, with the possible exception of David Gauthier,¹⁶⁷ we do not find the problem of trust mentioned in the mainstream of contemporary liberal thought.

To some extent, this is a chronological problem. Much of the modern research on trust had yet to be carried out when Rawls wrote *A Theory of Justice*, and even today, much remains to be explored. But one does not require scientific surveys to realise that many of the central functions of our society assume a certain amount of trust in people whom one doesn't know. We need to trust deliverers not to just keep the money without delivering the goods. We need to trust our friends and associates to make good on the promises they've given, and so on.

From a political point of view, there can be two interesting kinds of trust. Trust can be interpersonal, in that it concerns how we trust our fellow human beings, and it can be political, in that it concerns how we trust those who happen to be in power, and whose job it is to act on our behalf, either as our representatives or as officials carrying out instructions according to rules and goals that have been democratically determined. And that both of these kinds of trust are important to society can be easily seen. And certainly Hobbes, Locke and other early modern thinkers shared these insights. So why have they not been discussed by modern liberal theorists?

I think that part of the answer probably lies in the methodology that many of these theorists have adopted. If we are to solve the problem of justice or legitimacy, we find our way either to an organisation of society which is just or legitimate or to a procedure by which we can select a political order which becomes just or legitimate in virtue of its pedigree. And when this fact becomes generally known to people, the hope is often that they will be motivated to act in accordance with it on the basis of their moral reasoning. This does not mean that there is no room for trust – we still need to *trust* people to do the right thing. But trust is not as much of a problem as it might have been, since this trust is easy to bestow on people.

For example, Rawls writes:

"Thus, very briefly: i) besides a capacity for a conception of the good, citizens have a capacity to acquire conceptions of justice and fairness and a desire to act as these conceptions require; ii) when they believe that institutions and social practices are just, or fair (as these conceptions specify), they are ready and willing to do their part in just or fair arrangements provided they have reasonable assurance that others will also do their part; iii) if other persons with evident intention strive to do their part in just or fair arrangements, citizens tend to develop trust and confidence in them; iv) this trust

¹⁶⁵ Robert D. Putnam (1992), *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton: Princeton University Press.

¹⁶⁶ "Trust", in Robert Goodin and Philip Pettit (eds; 1998), *A Companion to Contemporary Political Philosophy*, Oxford; Cambridge, Mass.: Blackwell.

¹⁶⁷ David Gauthier (1986), *Morals by Agreement*, Oxford: Clarendon, p. 173.

and confidence becomes stronger and more complete as the success of cooperative arrangements is sustained over a longer time; and v) the same is true as the basic institutions framed to secure our fundamental interests (the basic rights and liberties) are more firmly and willingly recognized.”¹⁶⁸

What Rawls seems to be doing here is to lay out a step-by-step explanation of how people in a just society can come to trust one another. One major point of concern for Rawls was showing that a just society can be stable, and a society where people distrust one another would be prone to instability. But the account which Rawls presents here assumes in step (ii) that people (a) *believe* that institutions and social practices are just or fair, and (b) have “reasonable assurance that others will also do their part”. But as I have argued, and as Rawls himself concedes, people will have different conceptions of justice and fairness, and so no matter what the social arrangements of society are, there will always be people who do not think that these arrangements are just or fair. It should be added that the question of *reasonable* disagreement on justice does not even have to be considered here (even though this is something which Rawls also concedes might be possible), because distrust among citizens will undermine the stability of society irrespective of whether these citizens are reasonable or not. And, as I have said throughout, just as there is disagreement on justice, there is also disagreement on legitimacy, and so Rawls’s attempt to explain how citizens could trust one another will not work for legitimacy either.

6.5.3. Trust and Legitimacy

So what does the problem of trust have to do with legitimacy? The first problem is that societies, in order to be able to function, must actually contain some level of trust. It is only if people can trust others to pay taxes and obey the laws that they will be willing to do so themselves, and it is only if they know that the government will spend the money for the purposes it was collected in tax that they will be willing to give that money to it. But a state operating on mafia-like principles, collecting its money through threats rather than through trust, could still be made to work. From a political perspective, the problem is that such a state would not enjoy a great deal of legitimacy in the eyes of its citizens. Different people have different thresholds for when they consider the state to be legitimate, and different, perhaps non-overlapping, expectations of what a legitimate state should do and not do. But irrespective of which doctrine of legitimacy someone supports, it would seem to be a very natural idea to require of the state that it actually do the things that are required of it in order for it to be legitimate – indeed, this might seem almost as a truism. But it is not an idea without importance, because it requires citizens to be able to trust the government not just to purport to embrace the ideals of legitimacy, but to make them count in practice. Hence the need for *political* trust.

But interpersonal trust is also important. Even if one trusted the government to do the right things with one’s money, one would still need other people to contribute in order for the government to be able to do those things it has to in order to be legitimate. More importantly, many of the things one wishes or allows the government to do might be regarded as legitimate only on the condition that they apply equally. One might regard a certain level of taxation as legitimate because it allows the government to do things that are necessary for, or compatible with, legitimacy, but one would not regard a state of affairs where one was the only person to pay tax as legitimate. Similarly, one might wholeheartedly consent to laws protecting private property from theft or robbery as not just compatible with legitimacy, but in fact necessary for

¹⁶⁸ PL:86.

a legitimate state. But if one cannot trust one's fellow citizens to follow these laws, both because the state is unable to uphold them and because people in general do not trust each other to obey them, one might see no reason why one should follow these laws oneself.

This view of the problem of trust is somewhat different from the Hobbesian problem of trust. The problem of trust as characterised by Hobbes is that we cannot trust others in the state of nature, since there is nothing which ensures their cooperation. As Russell Hardin reads Hobbes, the establishment of the state is akin to solving a coordination problem: we need some kind of rules governing our interaction, almost no matter what these rules are.¹⁶⁹ The establishment of a state ensures that a certain set of rules, namely the one chosen by the sovereign, stands out as particularly salient.

This may be true when we are talking about genuine coordination problems, namely such problems that solve themselves once agents have managed to coordinate on the same strategy. But the problem of trust, as I see it here, arises when people decide it is in their interest to break the laws. This first of all creates a problem of interpersonal trust, that is, a problem of trust *vis-à-vis* one's fellow citizens, since one cannot know that it is in the interest of one's fellow citizens to follow the law provided one does it oneself – one needs to *trust* them to follow the law, in a way in which we in most circumstances don't need to trust our fellow citizens to follow a chosen solution to a coordination problem, for example to drive on the same side of the road provided that we do. But it also requires that the state *uphold* the law against its citizens. And this creates a problem of *political* trust, that is, a problem of trust *vis-à-vis* the *state*.

Having a democratic form of government seems like a good recipe to overcome the problem of political trust. If one can depose corrupt officials, or depose legislators who do nothing to stop corruption, and if one can freely expose and debate how the government is spending people's money, one could hope that this would go far towards removing corrupt practices and establishing trust in government. The importance of openness, of the easy availability of public documents, is difficult to overestimate in this context. But democracy, where all public power is supposed to proceed from the people, also exacerbates the problem of interpersonal trust, and makes it more political. In a pre-democratic state, the problem of interpersonal trust is the problem that no government can function, or at least not do good things, without some form of cooperation from its subjects. In a democratic state, the problem of interpersonal trust also is the problem that we need to trust our fellow citizens with the reins of power. We need to trust them not just not to play the system for personal gain by evading taxes or breaking the law when they can get away with it, but we also need to trust them to share democratic values, and to exercise the power that they have on behalf of all the people, not just themselves.

And once again, the issue of public reason comes to the forefront. As Rawls points out,¹⁷⁰ public reason has a reassuring effect. Since the only values on which citizens are at all likely to have some form of agreement in a pluralist society are political ones, making reference to political values can reassure dissenting citizens that those who are in the majority in fact act in what they perceive to be (and in what to some extent also is, or is required to be) the interest of all, and not just their own. And Rawls's proviso, namely that one may cite non-public reasons in order to reassure others about one's good intentions, by showing that one's public

¹⁶⁹ See Russell Hardin (1995), *One for All: The Logic of Group Conflict*, Princeton, N. J.: Princeton University Press, p. 34 f.

¹⁷⁰ PL:157 f.

reasons in fact follow from or are in harmony with one's non-public reasons, should also be understood to serve this purpose.

But recall that Rawls limits his discussion of public reason to the public sphere: the sphere of politicians, campaign managers, judges and public officials, and the problem of interpersonal trust when applied to the political sphere then becomes the problem of political trust, but applied to reasonableness rather than honesty. The regime of reason which Rawls presupposes assumes that all or almost all leading politicians will be reasonable, and the problem of political trust thus becomes the problem of reassuring the citizens that these politicians in fact are honest. But in a democracy, if there is enough support for policies that are unreasonable, politicians and parties will appear who will take advantage of that support. So the problem of interpersonal trust when applied to the political sphere is then how it can be common knowledge among reasonable people that they in fact are reasonable.

Since conceptions of reasonableness differ from one person to the other, and since we have very limited time and ability to know other persons' political beliefs in any detail, the problem of interpersonal trust cannot entirely be solved. What we can do is to maintain institutions that are regarded as sufficiently effective in upholding basic democratic values and the rule of law. Deliberation can help in upholding the norms that these institutions represent, both among ordinary people and among the political class.

But it should also be said that the transmission of trust of social norms, the development and maintenance of a "culture of trust", may be very difficult to create or change through political measures. Interpersonal trust in the political sphere is but a part of the more general question of trust in one's fellow citizens. People who may defend reasonable political ideas may turn out to act in private contrary to the norms they defend in public, not because of mistrust of others, but because they don't consider their political beliefs to be sufficiently strongly action-guiding in ordinary life. Someone may in great detail defend the idea that we should obey the laws of the state, but still refuse to pay the TV licence, even though it is required by law.

This thesis is not the place to lay down specific suggestions about what should be done to generate a culture of trust in society. There are of course various such suggestions, such as promoting the rule of law¹⁷¹ and creating a sense of national cohesion and civic pride,¹⁷² that each might have their respective merits. It is to be hoped that efforts to increase legitimacy within different areas may reinforce one another, so that people are more likely to trust one another if they accept the general way in which society is organised and if they believe that others do so too. Whether such processes can have a noticeable effect on interpersonal trust is not a question which can be answered here.

6.5.4 Trust: Summary

In this part of the chapter, the purpose has been to discuss the concept of trust and its role for legitimacy. I realise that, given the complexity of the issues involved, the comments found here are extremely brief. However, since I believe that the issue of trust is of considerable significance for political philosophy, and since I further believe that it has not been given the

¹⁷¹ Bo Rothstein (2000), "Trust, Social Dilemmas and Collective Memories", *Journal of Theoretical Politics*, Vol. 12, October 2000, pp. 477-501.

¹⁷² Robert D. Putnam (2007), "*E Pluribus Unum*: Diversity and Community in the Twenty-first Century. The 2006 Johan Skytte Prize Lecture", *Scandinavian Political Studies*, Vol. 30, No. 2, pp. 137-174.

attention it deserves, I thought it would be important to say something about it, even though it in fact would merit considerably more time and space than I have been able to devote to it. I will return to the subject in the Summary to this thesis, where I will point to some directions for further study.

6.6 Summary

In this part of my thesis, I have looked at some areas where some of the causes of illegitimacy may be found, and, where possible, I have discussed possible strategies to come to terms with this. No doubt other areas could have been chosen as well, and no doubt much more deserves to be said about those areas that I chose. But since one of the primary claims of my thesis is that we ought to maximise legitimacy, I believed that it was important to try to indicate some areas where this might be done.

Summary

In this summary, I would like to summarise the main conclusions of the thesis and discuss two possible directions for further study. While philosophy is not a cumulative enterprise like science, I feel it is important to mention some areas of inquiry that ought to be touched upon by theorists of legitimacy, whether or not they accept the claims made in this dissertation.

The main conclusions of my thesis are as follows. The state is legitimate, by which I mean that it has a right to enact and uphold laws and other regulations by force, if it does so on terms which all reasonable people accept. A person is reasonable if she abides by basic norms of reciprocity. Mutually incompatible doctrines of legitimacy are all compatible with reciprocity, which means that there is no state that all reasonable people will accept. In other words, no state can be fully legitimate. Despite this, it is fully possible for states to be justified, by which I mean that it is better that they continue to exist than that they be abolished. Abolishing the state is thus not the solution. Rather, our goal should be to make existing states as legitimate as possible, by identifying and removing causes of illegitimacy. We will still be faced with a situation where reasonable people will be unable to accept the state, but it is simply the best we can hope for.

Directions for Further Study

Global Legitimacy

I mentioned in the Introduction that I would have to exclude any discussion of the legitimacy of institutions beyond the nation-state. I have done so with regret, because I believe that focusing solely on the political institutions of the nation-state leaves many important issues out of the picture. We are seeing the emergence of a global “basic structure”: a globally unified structure of economic interdependence. This means that decisions made in one country can have very significant ramifications in other countries. Do our duties of legitimacy apply to people living in other countries, if we affect them by our actions? Which norms should govern political conduct at the international level – which consequences does the reciprocal theory have for just war theory? And if our economic interactions are sufficiently close to make it possible to speak of a global economic society, do we have a duty to establish a global state to manage that society?

Furthermore, to what extent are those supranational political institutions that already exist legitimate? In Chapter 5, I referred to A. J. Julius’s concept of proto-legitimacy: not just states, but also other kinds of associations, can have a duty to justify their actions to their members. This seems to hold especially for international organisations like the United Nations and the European Union, which are not sovereign but whose authority is backed up by the power of the member states. How can political decisions taken within the UN or EU framework be acceptable to all, given the lack of a global (or European) public political culture?

There is a large and growing literature on the topic of global justice, often focusing on the question of to what extent principles that govern economic justice within states should be applied globally as well. With the increasing interdependence of people in different countries, and the emergence or transformation of international political institutions to handle the

opportunities and challenges that this causes, there should be plenty of reason to explore the legitimacy of the global political sphere as well.

Trust, Cohesion and Multiculturalism

As I tried to make clear in the section on trust (6.5), I think this area deserves much further study within political philosophy as a whole, not just in relation to legitimacy. It also seems clear to me that if trust is to play a part in political philosophy, we need a better understanding of how trust is generated at the societal level.

Trust at the societal level is connected with issues like social cohesion and diversity. Robert Putnam has drawn our attention to the challenges and opportunities that the increasingly multicultural nature of our societies presents us with.¹⁷³ From the point of view of legitimacy, the challenge consists in trying to avoid a situation where democratic decision-making becomes, or is regarded in the eyes of the losing side as, little more than an ethnic or religious census, where society becomes divided into a number of coexisting subgroups, and where policies only express values that are predominantly associated with some of these groups. In such a situation, the members of some of these subgroups might be prone to reject the legitimacy of the resulting outcome. I have already sketched some ways in which this might be avoided, such as providing extensive local self-government. When taking this path, we try to enable different groups to act in accordance with their values, and we allow several different policy approaches to coexist side by side within the same country. But one could also try to implant the values of the dominant groups into the minority groups, or one could try to achieve some kind of synthesis, compromise or consensus between groups about how conflicts about values are to be handled, to make sure that they do not become a threat to legitimacy.

One version of the latter approach is to bring about a change in perspective. If political conflict within a society or country is looked upon by some of the groups that live therein as conflict between groups, or between individuals who belong to different communities, political conflict might be regarded in zero-sum terms: some people win, and some people lose. But if members of society look upon themselves, at least when acting politically, as part of the *same* group – the nation of which they all are citizens – then handling such conflicts might be easier.

Putnam's suggestion is that states create institutions that instil a feeling of civic identity among their citizens. His leading example here is the United States, which has managed throughout a long period of time to integrate wave after wave of immigrants into American society, which is precisely the problem that modern-day European societies are facing.

Social cohesion is also related to trust in a wider sense. Widespread distrust of authorities does not have to be motivated by ethnic segregation or by disbelief in the religious or other values governing the authorities. As we have seen recently in this country, a sense that opportunities are lacking can be enough to make people distrust authorities and disregard laws and regulations. It is obviously a matter of pressing concern to see what can be done to re-establish the trust that has been lost, and thus to restore the legitimacy of the authorities in the eyes of disaffected citizens. The 2011 riots have of course been the subject of a wide-ranging

¹⁷³ Putnam, “*E Pluribus Unum*”.

national debate, which shows that questions of how one can make people believe that those who decide over them are doing the right thing and are acting from good intentions are not too far from the heart of the public debate, regardless of the dry academic form in which they have been raised here.

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