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1

A Puzzle About Politics

SOME AREAS OF contemporary analytic philosophy have been dominated by a central question or debate: What is law? Are there mind-independent moral truths? What is knowledge? Contemporary political philosophy does not revolve around a single, central question in this way. That said, two questions have shaped the recent literature more than any of the others. These are, as Jonathan Wolff pithily presents them, “Who gets what?”; and “Says who?”¹

The first is the question of social or distributive justice. Social life involves many benefits and burdens and we need principles that determine how those benefits and burdens should be allocated. How should entitlements to physical resources such as land be allocated? What principles should regulate the allocation of income and wealth? Most of us want to be free from the interference of others to pursue various activities, but how is the scope of this freedom determined, and what should we do when one person’s apparent freedoms come into conflict with those of another? These are questions about what constitutes each person’s rightful share of freedom, resources, and other advantages.

The second is the question of political legitimacy. Who has the authority to make rules regulating our shared social life and enforce compliance with those rules? Is this authority something

1. Wolff, *Introduction to Political Philosophy*, 1.

that we must share on an equal basis? Are individuals obligated to comply with the decisions made by a political authority, and if so, on what basis? What limits, if any, are there on the rightful authority of political institutions to issue and enforce laws?

These two general topics—justice and legitimacy—are often treated as distinct. It is common practice for political philosophers to develop and defend particular accounts of distributive justice without saying anything about what their theories imply for political legitimacy. Similarly, many accounts of political legitimacy or political obligation make few, if any, detailed claims about what justice requires. Someone surveying the literature from the last several decades might conclude that the truth about distributive justice doesn't depend much, if at all, on the truth about political legitimacy, and vice versa.

But this conclusion would be a mistake. When we look more closely, the concepts of justice and political legitimacy are deeply intertwined. Most of us believe, for example, that justice sets at least some substantive constraints on what a government may legitimately do. No government, for example, has the legitimate authority to sell citizens into slavery, or to force citizens to become members of a particular religious group. A theory of political legitimacy that countenanced such grave injustices would be false. Similarly, our considered convictions about justice are not independent of our views about legitimacy. Many of us believe, for example that it would be unjust—a violation of individual rights—for a benevolent dictator to impose the truth about justice on citizens who had democratically selected alternative rulers.

Justice and political legitimacy are the two most widely discussed concepts in contemporary political philosophy, and yet there is very little agreement—indeed surprisingly little direct work—about the way these concepts are related to each other. Although it's easy to point to examples where most of us agree that the truth about one concept partly determines the truth about the other, it is far from clear how to explain systematically the

connection between the two concepts. A central project in political philosophy must be to correctly understand the relationship between justice and legitimacy.

To get a better grip on how puzzling and difficult it is to theorize the relationship between these two concepts, consider the following three claims:

- 1) “Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.”²
- 2) Some ordinary laws in liberal democratic societies are unjust.
- 3) Many of these laws can be legitimate: that is, state officials act permissibly in enforcing these laws and they have rights against harmful interference while enforcing them.

Each claim, taken on its own, seems plausible. But the three claims are collectively in tension. If justice is the first virtue of social institutions and some ordinary laws are unjust, then it should not be permissible for state officials to impose these laws. Alternatively, if it is legitimate to impose unjust laws, then justice cannot be the first virtue of social institutions. Or, another alternative: if justice is the first virtue of social institutions and it is legitimate for state officials to impose all these laws, then we ought to conclude that these laws are not in fact unjust.

Many of us believe that there can be laws that are unjust and yet that these laws can be legitimately imposed. But how can this be true if, as many of us also believe, justice is the first virtue of social institutions? This is *the puzzle of legitimate injustice*.

This puzzle is deep and important. Surprisingly, however, it has not received much direct attention. No one, to my knowledge, has formulated it as an apparent trilemma in this way. And yet a great

2. Rawls, *Theory of Justice*, 3.

deal of recent work in political philosophy can be usefully understood as offering different frameworks that promise to dissolve the puzzle in one way or another.

My primary aim in this book is to use the puzzle of legitimate injustice as a vehicle for analyzing some recent, influential, work in political philosophy. Doing so, I hope, is a novel and illuminating way to learn about, and evaluate, some important views in the field. But, to avoid any misunderstanding, this book is not a neutral survey of the literature. I will argue that leading accounts of political morality lack an adequate solution to the puzzle. Moreover, the failures of these accounts to solve this puzzle are serious and provide compelling reasons to revise or reject them. In the book's final chapter, I offer my own view about how we ought to address the puzzle, and I explain what this implies for more general theories of political morality.

Legitimate Injustice

In 1998 Tony Blair's Labour government introduced means-tested tuition fees for students attending university in the United Kingdom. The fee cap, initially set at £1,000, had multiplied to £9,000 by 2012. Many opponents of these tuition fees argued that such charges were unfair and unjust—in particular, that they were disproportionately likely to deter already economically disadvantaged people from pursuing a university education. But, as far as I am aware, these critics did not argue that, because the policy was unjust, the British government would be acting illegitimately.

In 2021, President Biden proposed raising the federal corporate tax rate in the United States from 21 percent to 28 percent. The Biden administration also proposed increasing the top individual income tax rate from 37 percent to 39.6 percent and furthermore applying the 12.4 percent payroll tax to all income above \$400,000 per year. These proposals were presented by the administration as a way of reducing economic inequality and ensuring tax burdens

were more equitably distributed between wealthy and less wealthy Americans. Some opponents argued that these increases were “outrageous” and “unjust.”³ But, to the best of my knowledge, these same opponents did not claim that, because they were unjust, the tax increases would be illegitimate.

These are just two examples, but it would not be difficult to provide many, many more. In such cases, there is a sharp dispute about whether a proposed law is just. But those who allege the proposed law is unjust do not claim that the law would be illegitimate if enacted via the appropriate procedures.⁴

The view that laws can sometimes be unjust and yet legitimate is, I think, widely accepted by both laypersons and political philosophers. Here is G. A. Cohen articulating the thought: “Suppose that a democracy enacts a (not too) unjust law. I thought it was unjust when I voted against it, but I think that the state may now rightly impose it.”⁵ And here is John Rawls expressing roughly the same idea: “neither the [legitimate] procedures nor the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. [. . .] [L]aws cannot be too unjust if they are to be legitimate.”⁶ As both Cohen and Rawls emphasize, the idea is not that laws can be legitimate no matter how unjust. The more modest thought is simply that we cannot infer that a law is illegitimate because it is

3. See Leonhardt, “Biden’s Modest Tax Plan”; and Stoll, “Here’s How Biden’s Proposed Tax Increases Will Affect You.”

4. Throughout the book I use the terms “law” and “laws” in a positivist sense: that is, to refer to directives enacted via the constitutionally approved or widely accepted legal mechanisms in a jurisdiction. But the puzzle of legitimate injustice does not depend on adopting a version of legal positivism. The puzzle can also arise for theories of natural law insofar as they allow positive enactments sometimes to influence the content of law (e.g., a theory of natural law that merely holds that positive directives must meet certain minimal moral standards to count as law).

5. Cohen, “Fairness and Legitimacy,” 7.

6. Rawls, *Political Liberalism*, 428–29.

unjust; some degree of injustice is consistent with a law being legitimate.

With this idea in hand, let's try to make the puzzle of legitimate injustice clearer by looking more closely at each of the three claims that generate the puzzle.

The Priority of Justice

Principles or theories of justice tell us how freedoms, resources, or other advantages ought to be allocated amongst persons; they purport to tell us what each person is entitled to as a matter of right. When someone is denied something to which she is entitled as a matter of justice she has typically been wronged; her rights have been infringed, or violated. Under at least a wide range of circumstances, we may permissibly use some force to defend such rights, or at least we may call upon the state to use its legal and coercive powers to defend such rights. When we are treated unjustly, we are also frequently entitled to compensation. Civil rights—for example, rights to freedom of speech, religion, and assembly—are paradigmatic claims of justice.

Justice, Rawls tells us, is the first virtue of social institutions. By that he means that it has lexical priority over other considerations when it comes to the design and implementation of our major political, legal, and economic institutions. This claim is, at least initially, intuitive. Almost everyone accepts, at least as an aspirational ideal, that our major social institutions should be just rather than unjust. Imagine someone proposing a constitutional amendment, or a modification to the existing legal regime, saying, "Yes, it's true that my proposal is unjust, but I favor the proposed change because it will achieve X." There's a reason people don't advance arguments of this kind. Such an argument would likely be dismissed as a kind misunderstanding of what our political and legal institutions are supposed to do. These institutions may have a plurality of functions, but whatever else they do, they must not be

unjust; they must not deprive people of their civil liberties, or their other rightful entitlements.⁷

Still, the idea that justice should have lexical priority might sound unreasonably fanatical. In many contexts, it's more natural to consider trade-offs between values or considerations. When deciding where to live, we might trade the length of the commute off against the attractions of the local neighborhood. When designing a new transportation infrastructure for our city, we balance the cost against improved safety features. In these decisions—and so many others—it would be odd to identify one consideration as taking lexical priority over all the others. You wouldn't prioritize reducing your commute at any cost, nor would you prioritize safety features for the infrastructure plan no matter what the cost. So why take seriously the idea that justice has lexical priority for the basic structure of our political societies? The idea that justice has lexical priority is more plausible, however, once we understand the limited nature of the claim.⁸

First, the claim is not that substantive justice must be pursued without regard for procedural or democratic constraints. The claim is rather that unjust laws and policies must be reformed or abolished; but this is compatible with holding that reforming or abolishing unjust laws must be done via certain procedures—indeed, those procedural constraints may themselves be among the requirements of justice.⁹

7. Note that even if one denies that justice is the first virtue of social institutions in the sense described in this paragraph, one can still coherently affirm the idea that it is typically wrong for non-state actors to act unjustly, and that those who are threatened with rights violations typically are permitted to use force to defend their rights and are typically entitled to compensation when their rights are infringed.

8. Also note that the tension between our three claims is lessened, but clearly persists, if the first claim is weakened. Even if justice does not have lexical priority, so long as it is a very important virtue, or a normally decisive virtue, the existence of legitimate injustice remains puzzling.

9. If some procedural constraints are part of the content of justice, doesn't this easily or quickly dissolve the puzzle of legitimate injustice? We have an apparent

Second, the subject of the claim is restricted to the major political, legal, and economic institutions of a society: what Rawls calls the “basic structure.”¹⁰ When we are designing, creating, building, reforming, or abolishing these institutions or any of their constituent parts, considerations of justice take lexical priority. Even if these institutions serve other goals or can be aptly assessed according to other criteria, these other goals or criteria never take precedence over considerations of justice. We cannot, for example, restructure the constitution to deprive some citizens of their civil liberties, even if doing so would facilitate economic growth or help to sustain important religious or cultural practices. We can countenance unjust laws or institutions, Rawls says, “only when it is necessary to avoid an even greater injustice.”¹¹

Because the priority claim is limited to the basic structure, we can set aside certain worries. The priority of justice does not entail that individual persons have to grant justice lexical priority in their everyday decisions. For example, it doesn’t necessarily follow that justice has lexical priority for individuals making choices about how to spend their leisure time or which career to pursue.¹² Another example: suppose justice demands certain important changes to the basic structure in order to combat climate change. The priority claim doesn’t entail that you must accord lexical

explanation as to why substantively unjust decisions can be legitimate: they are the results of decision-procedures required by justice. But even if we stipulate that the content of justice includes some procedural requirements, it’s not at all obvious why substantively unjust laws are legitimate. After all, why should the procedural requirements of justice reliably trump the substantive requirements of justice? As we will see in some of the chapters to follow (particularly chapter 5), some have tried to defend versions of this solution, but I argue that extant versions of the solution are unsuccessful.

10. Rawls, *Political Liberalism*, lecture VII.

11. Rawls, *Theory of Justice*, 4.

12. Even G. A. Cohen, who is otherwise skeptical of the distinction between personal choices and the basic structure, accepts that justice does not have lexical priority in many personal economic decisions. See Cohen, *Rescuing Justice and Equality*, 60–62.

priority to reducing your carbon emissions in all aspects of your personal life. This defuses, at least in part, worries that the priority claim poses an undue threat to personal integrity. People need not regard their lives as mere vehicles for securing or promoting justice, even if we insist that our major social institutions must be designed in a way that accords justice lexical priority.

Third, the scope of the priority claim is limited to reasonably favorable conditions. Conditions are reasonably favorable when “historical, economic and social conditions [. . . are] such that, provided the political will exists, effective political institutions can be established,” that secure for each person their just share of freedom, resources, and other advantages.¹³ Perhaps the most important feature of reasonably favorable conditions is moderate scarcity. Moderate scarcity entails there being resources that can be allocated amongst persons, and that while each person would prefer to have a greater rather than a lesser share, a just distribution of the resources remains possible. When there is extreme scarcity, by contrast, it becomes impossible to provide each person with his or her just share. A paradigm case of extreme scarcity is the overcrowded life raft: there are too many people aboard and so the life raft will sink, killing everyone, unless a minority are removed and left to die. It’s not possible to create policies that secure for each person a fair share of the valuable resource (space on the raft). Under such conditions, the priority claim doesn’t apply.¹⁴ This limitation on scope defuses another worry: namely, that the priority claim commits us to ignoring consequentialist or lesser-evil justifications when we face emergency conditions or terrible shortages.

Finally, the priority claim must not be confused with a very different idea: the view that a duty to obey the laws of a legitimate

13. Rawls, *Justice as Fairness*, 47. In the quoted passage Rawls focuses more narrowly on the conditions needed to secure each person’s basic rights and liberties. My definition of reasonably favorable conditions is more expansive.

14. I do not say that claims of justice do not exist in conditions of extreme scarcity; the point here is merely that the priority of justice may not obtain under those conditions.

state has priority over all other obligations or considerations. What the law requires and what justice requires can come apart—indeed this is among the central assumptions that generate the puzzle of legitimate injustice.

With those potential worries about the priority claim defused, it's easier to see why the claim is so appealing. Suppose that we confront reasonably favorable conditions whereby it's possible to design political institutions that allocate to each person his or her just share of freedom and other resources. Surely we must do this. We cannot decide to create or sustain unjust institutions instead. The most obvious reasons to accept some degree of injustice—averting great evils (e.g., where everyone on the life raft drowns) or concerns about individual demandingness or integrity—are off the table. What else could plausibly outweigh the importance of securing just institutions?

Many of the values or relationships that are commonly identified as important—family, friendship, communal belonging, moral virtue, intellectual excellence, artistic achievement—do not seem plausible candidates for at least two reasons. First, many of these considerations don't plausibly trump considerations of justice. I'm not aware of anyone who argues that it would be permissible or legitimate to violate individual moral rights to ensure greater forms of artistic achievement or intellectual excellence in our society, or to promote greater degrees of communal belonging.

Second, in a just society—one where everyone's rights are respected and each person has rightful entitlements to a fair share of resource or advantages—people can form happy families, forge deep and meaningful friendships, develop close communal associations, create great intellectual and artistic works, and so on. Indeed, we might insist that just institutions must facilitate and make possible valuable forms of life. As Rawls says,

[S]urely just institutions and the political virtues expected of citizens would not be institutions and virtues of a just and good society unless those institutions and virtues not only permitted

but also sustained ways of life fully worthy of citizens' devoted allegiance. A political conception of justice must contain within itself sufficient space, as it were, for such ways of life. Thus, while justice draws the limit, and the good shows the point, justice cannot draw the limit too narrowly.¹⁵

It might, of course, be the case that certain values or achievements cannot be *maximized* within a just basic structure. Maybe slave labor is needed to realize the greatest possible intellectual or artistic achievement. But I'm not aware of any contemporary philosopher who argues that facts like these would constitute compelling reasons to reject the priority of justice.

Some might resist the priority claim because they hold that there are deep truths about morality or the good life—truths about what we owe to others or how we ought to live—and these truths take priority over anything else. Adherents of particular religions, for example, believe that God has provided specific instructions about how we must conduct ourselves. Since nothing can trump God's commands, justice cannot have lexical priority with regard to the basic structure of our society. Let's call this *the deep truths challenge* to the priority claim.

This challenge to the priority claim requires some unpacking. To begin, note what the challenge assumes: it assumes that the deep truths about morality or the good life are not included in the content of justice, or if they are included, are not accorded lexically prime status relative to other principles. One simple way to defuse the challenge is thus to reject this assumption—to stipulate that the correct theory of justice is congruent with all the deep truths about morality and the good life.

This solution, however, isn't available to most of the leading contemporary theories of justice. John Rawls, Robert Nozick, Ronald Dworkin, Michael Walzer, Iris Marion Young, G. A. Cohen, Elizabeth Anderson, and Martha Nussbaum (to name

15. Rawls, *Political Liberalism*, 174.

only some) have each presented theories of justice which explicitly do not purport to include all the deep truths there might be about morality or the good life. Put differently, contemporary theories of justice are virtually all limited in scope. They don't provide directives with regard to all aspects of our lives. They don't tell us how to worship, whom to marry, or what activities add value to the quality of our lives. Theories of justice are typically restricted to questions about the allocation of our civil and political liberties, the distribution of valuable opportunities (e.g., employment or education), and the distribution of income, wealth, welfare, or other valuable resources. Of course, to answer these questions, some theories do depend on deeper claims about what constitutes a good life, or what our wider ethical obligations to others look like. But even theories of justice that do so depend—and not all of them do—typically don't invoke the *whole* truth about morality, religion, or the good life. Their scope is limited to the rules and institutions required to ensure each person gets his or her fair or rightful share of social advantages. Contemporary theorists of justice are virtually united in assuming that we can answer this question about the rightful allocation of shares without specifying which religion is true, whether and how you should choose whom to marry, or which activities would most enrich your life. These theories thus cannot defuse the deep truths challenge by stipulating that the content of justice is congruent with all the deep truths about morality or the good life.

A different response to the challenge is to insist that theories of justice are designed to provide at least a partial solution to the fact that there is intractable disagreement about the deep truths of morality, religion, and the good life. We will never agree on which religion is true, or what activities and virtues most enrich a human life. It's partly because we can't agree on these issues that we require principles of justice to allocate to each person their fair share of freedom and other resources. By doing this, principles of justice provide each person with a rightful sphere within which we each pursue our own views about morality, religion, and the good life. Principles of justice effectively privatize some of our deepest

disagreements, enabling us to live peacefully and cooperatively on fair terms with those with whom we sharply disagree.

We will explore different versions of this response in some of the chapters to follow. But for now, it's important to note that this response requires some controversial assumptions. It assumes that living peacefully and cooperatively with others on fair terms takes precedence over trying to structure our social institutions in accordance with the whole truth about morality, religion, or the good life. This response also assumes that what constitutes fair terms of cooperative life can be determined without appeal to the whole truth about morality, religion, or the good life.¹⁶

I have been canvassing and defusing various reasons to worry about the lexical priority claim. But I want to conclude this section by re-emphasizing how compelling and widely accepted the idea is. It's almost impossible to find anyone who seriously advances the view that we should give priority to considerations other than justice when determining what people's basic legal rights should be, or that our economic system should be rendered more unjust in order to better realize some other values. It's widely accepted that the prime function of our major political, legal, and economic rules and institutions is to establish just terms on which persons can interact. These rules and institutions purport to govern us—they claim the moral authority to regulate vast aspects of our lives. It is unclear why people would accept this authority unless these rules and institutions are at least constrained by the requirements of justice and individual moral rights.

Unjust Laws

The second claim that forms the puzzle of legitimate injustice is that some ordinary laws in liberal democratic societies are unjust. This idea is familiar and easy to grasp. Consider the two

16. This assumption, though controversial, is still more modest than the Rawlsian idea that fair terms of social cooperation can be determined without appeal to *any* reasonably disputed claims about morality, religion, or the good life, apart from a very thin notion of the good of free and equal citizens.

examples presented earlier: university tuition fees in the United Kingdom, and President Biden's proposed tax increases in the United States. In each case, many who opposed the government's proposals did so because they believed the proposals were unjust; they held that these proposals unjustly deprived lower-income students of a fair opportunity for a university education or that Biden's tax plan unjustly threatened financial freedoms. In any liberal democratic society there are constant disagreements about whether existing or proposed laws are just. Mask mandates during the COVID pandemic, the Affordable Care Act in the United States, laws restricting women's access to abortion, laws tying the funding of public schools to the property tax base of local communities, laws criminalizing prostitution, and the criminalization of recreational drug use are just a handful of further examples where critics have forcefully argued that proposed or enacted laws are unjust.

Indeed, despite increasing degrees of political polarization in some liberal democracies, one of the few truths about politics that most people would accept is this: all existing liberal democracies are, to some extent, unjust. Which laws in particular are unjust is, of course, a matter of sharp dispute, but the bare idea that at least some existing laws are unjust is not controversial. Given pervasive political disagreement, the fact that at least some ordinary laws are unjust is utterly unsurprising. We don't agree about what justice requires, and we can't all be correct. Unless one holds a very implausible view about the infallibility of majorities or the representatives that they elect, we should expect democracies to make mistakes; they will sometimes, maybe quite often, enact unjust legislation.

To be a bit more precise, the claim is not simply that, as a matter of historical record, some liberal democracies have enacted unjust laws. The claim is rather that some ordinary law in liberal democracies is unjust, and indeed is bound to be so. By "ordinary" I mean law that (a) does not violate fundamental human rights (e.g., the right not to be tortured or the right against enslavement), and (b) has been enacted via a democratic process that meets certain

minimal standards (e.g., no major voting irregularities, no significant suppression of dissent by powerful state or non-state actors, etc.). The focus on ordinary law is thus meant to exclude two kinds of laws: (1) laws that are so seriously and obviously unjust that there can be no sensible or reasonable disagreement about their justness (e.g., laws permitting involuntary slavery), and (2) laws that were not enacted through the approved legislative or judicial process.

How could anyone deny that at least some ordinary laws are unjust? One way to resist this idea is to hold that law, at least in a minimally decent state, *constitutes* justice. On this view, justice is largely indeterminate with regard to specific laws and policies. Justice sets some very general limits on what states can do—for instance, states must refrain from torture, enslavement, or religious persecution—but beyond these minimal constraints, justice does not provide determinate guidance regarding the laws and institutions of a political society. Justice is only rendered determinate by the state's exercise of its legislative, executive, and judicial authority. The law provides a determinate account of citizens' various rights, duties, and legitimate expectations, and this legal regime constitutes justice for that political community. This is a view with roots in Immanuel Kant's political philosophy, and it will be the focus of chapter 3, so I will defer detailed discussion of it until then.

But for now, notice how revisionary the proposal is. If ordinary law—the kind over which people of good faith routinely disagree—cannot be unjust, then much of our existing political discourse involves a conceptual error. This is a radical view of the relationship between disagreement and injustice. The common-sense view is that thoughtful, well-informed people acting in good faith can sometimes be seriously mistaken about justice, and that this explains why ordinary law is sometimes unjust. The view under consideration denies this possibility.

This is another way of stating the obvious: the second claim of our puzzle seems difficult to deny. It's hard to make sense of our political disagreements without this claim. Our political discourse is chock-full of cases where we disagree about whether some law

or proposed law is just or unjust. The simplest and most natural explanation of what's happening is that it's sometimes hard to know what justice requires. As a result, our views about justice are sometimes mistaken, even when we are trying in good faith to get it right. Given this kind of disagreement, it's no surprise at all that some of our ordinary laws are unjust.

Legitimate Laws

The term "legitimate" is used by political philosophers in different ways and applied to different subjects.¹⁷ Perhaps most commonly the term is applied to states, rulers, or political regimes that purport to have authority over a given territory. When applied in this way, legitimacy is about the right to rule. There are weaker and stronger versions of this sense of the term. In the weakest sense, to say that some state or regime is legitimate is to say that it typically does not wrong anyone (i.e., it does not infringe anyone's rights) when it issues and coercively enforces rules against those who reside in its territory.

A stronger view holds that a state is legitimate when, in addition to the first condition, those who reside in the territory are presumptively obligated not to interfere with the enforcement of the state's directives and presumptively obligated to obey the state's laws. This is the most familiar notion of legitimacy in the literature, and it has generated one of the largest debates in political philosophy: namely, the debate over whether there can be a presumptive duty to obey the law, at least in reasonable, well-functioning states.

A yet stronger view adds to the two preceding conditions a third: that legitimate states have rights against outsiders (i.e., those not residing in the territory) interfering with their issuing and

17. Influential recent general accounts of political legitimacy include, among others: Appelbaum, *Legitimacy*; Buchanan, *Justice, Legitimacy, and Self-Determination*, ch. 5; Simmons, "Justification and Legitimacy"; Stilz, *Liberal Loyalty*.

enforcing of commands within the territory over which the state has jurisdiction.

An even stronger conception of legitimacy adds one further condition: legitimate political authorities have the exclusive right to rule over those within their jurisdiction. No other person or institution has independent permission to issue and enforce rules within the territory and the state is answerable to no higher authority when issuing and enforcing rules that apply within its jurisdiction.

Although there is disagreement about which of the preceding are necessary features of political legitimacy there is no need, for our purposes, to wade into this debate. We can, instead, focus on legitimacy as applied to particular laws or uses of political power. Legitimacy, in this sense, concerns: (1) the moral permission of state officials to apply and enforce a given law or rule, and (2) state officials' moral rights against harmful interference as they perform their authorized roles in applying and enforcing the law. This notion of legitimacy is what's at issue in the puzzle of legitimate injustice. The puzzle is generated by the apparent fact that laws can be legitimate in this sense, and yet also be unjust.¹⁸

This notion of legitimacy also coheres with a commonsense attitude in liberal democratic societies. Many believe that state officials don't act wrongly, provided that they are applying or enforcing laws or rules that have the appropriate legal or democratic pedigree. Many also believe that state officials are immune from being harmed or attacked for enforcing those laws or policies (provided they are within constitutional limits). State officials are, to invoke a familiar phrase, just doing their jobs, and they don't act wrongly or become liable to harmful interference in virtue of lawfully doing the jobs assigned to them by the democratic process.

18. To be clear, the preceding is a stipulative account of what legitimacy is. It is not an account of the moral basis or grounds of legitimacy; it is silent about what justifies or explains why state officials act permissibly in these instances, or why such officials are not liable to harmful interference.

Of course, there are other widely used notions of legitimacy. In particular, legitimacy is sometimes applied to laws in what we can call a “positive procedural” sense. Legitimacy, in this sense, denotes only that a law has been proposed and enacted according to the generally accepted constitutional or legal process. This notion of legitimacy, though useful in various contexts, isn’t helpful for thinking about the puzzle of legitimate injustice. It’s a purely descriptive claim about positive law—it tells us only that the law was generated via the generally accepted legal process. But this is compatible with holding that such a procedural pedigree is morally inert, or largely irrelevant, to the assignment of moral rights and permissions. Our puzzle arises only if there is, at least an apparent, normative tension between justice and legitimacy. The sense of legitimacy at issue therefore has to be normative—it has to be one that makes claims about the moral status of laws or the officials who apply and enforce them. This doesn’t preclude us from considering the moral importance of the procedural pedigree of a law; you might hold that ordinary legislation is legitimate in the moral sense precisely because it is legitimate in the purely procedural sense. But that is a substantive thesis that stands in need of argument (we’ll consider various arguments to this effect in later chapters). For the sake of clarity, I think it’s helpful to limit our use of the term “legitimacy” to the moral sense I have defined above, and then consider separately what reasons, if any, could explain how ordinary legislation comes to have this moral status.

With that terminological point out of the way, let’s return to the third and final claim that constitutes our puzzle, as stated above:

- (3) Many [unjust] laws can be legitimate: that is, state officials act permissibly in enforcing these laws and they have rights against harmful interference while enforcing them.

This is probably the most controversial of the three claims. But I suspect it is more controversial amongst professional philosophers than amongst laypersons. Consider an American citizen who has fairly progressive views on matters of economic justice—someone who holds that justice requires much more

redistribution of wealth than is currently mandated by American law. Here's a nice illustrative statement of this view from Bernie Sanders's website: "The richest 10 percent of households have 70 percent of the wealth. The top 1% have increased their share of the wealth from 23% in 1989 to nearly 32% in 2018. The three wealthiest people in the U.S. own more wealth than the bottom 50% of Americans—160 million people. Bernie believes this is unjust and is calling for a downward transfer of wealth."¹⁹ Bernie Sanders, and presumably many of those who voted for him in his bids to become the Democratic nominee for president, believe the current distribution of income and wealth in the United States is unjust. But neither Sanders, nor those who supported him, were necessarily claiming that existing US laws structuring the tax code and provision of economic benefits were morally illegitimate. They were not arguing that state officials applying these laws were acting impermissibly, nor were they suggesting that such officials were liable to be harmed.

This is one example, but there are countless others where many ordinary citizens apparently endorse some version of the third claim in our puzzle: for example, in debates over socialized medicine, immigration law, or climate policy. In each case there are people who sincerely hold the view that the existing law is unjust—indeed sometimes extremely unjust—and yet also appear sincerely to accept the view that state officials can permissibly enforce such laws and have rights against harmful interference. Those most likely to resist the third claim are people in the grip of a philosophical theory, one that yokes legitimacy and justice very tightly together. But most non-philosophers aren't in the grip of a philosophical theory about the relationship between justice and legitimacy, and so are more likely to be comfortable accepting the possibility of legitimate injustice.

Of course, the mere fact that many people accept a claim doesn't mean that it's true, or even philosophically defensible. But there are plenty of respectable-looking arguments in support

19. See Sanders, "Bernie Sanders on Economic Inequality."

of this third claim. Some hold the third claim to be true because political institutions—at least of a certain type—have crucial instrumental value in realizing good outcomes such as peace, stability, and protection of the rule of law. Alternatively, some defend the third claim on the basis that democratic institutions are essential to fairly resolve political disputes, or that such institutions are essential to instantiate egalitarian or non-hierarchical social relations. We will examine these arguments more closely in chapters 4 and 5, including reasons to be skeptical about them.

But at this stage I only wish to emphasize that many laypersons and philosophers are inclined to accept the third claim. Moreover, as I will argue in chapter 2, the theoretical and practical costs of rejecting the third claim are steep. I am skeptical that a diverse political society can function in a fair or effective manner if we reject the third claim—if citizens endorse the view that state officials act wrongly whenever they apply and enforce unjust laws, and that such officials are therefore liable to harmful interference.

Dismissing the Puzzle

The subsequent chapters of the book examine how different influential accounts of political morality might explain the puzzle of legitimate injustice or dissolve it by rejecting one of its core claims. But before we get to that, I want to consider two initial attempts to dismiss the puzzle altogether—attempts to show, in effect, there's nothing puzzling here in the slightest; that all three claims can easily or obviously be affirmed.

Recall the three claims that constitute the puzzle:

- 1) “Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and

well-arranged must be reformed or abolished if they are unjust.”²⁰

- 2) Some ordinary laws in liberal democratic societies are unjust.
- 3) Many of these laws can be legitimate: that is, state officials act permissibly in enforcing these laws and they have rights against harmful interference while enforcing them.

You might object that there’s no formal inconsistency between the claims, and so no real puzzle. Rawls says unjust laws must be reformed or abolished, but this doesn’t logically entail that it is impermissible for state officials to impose unjust laws. A skeptic might claim the puzzle can be dissolved if we hold that the obligation to reform or abolish unjust laws does not fall on the state officials who enforce the laws, but rather only on officials in the legislatures (and other entities) that enact them, or the courts that interpret or review them. But while this division of labor might show that there’s no logical contradiction between the three claims, it doesn’t explain the phenomenon of legitimate injustice. If justice is the first virtue of social institutions, why should state officials, but not legislatures and courts, be allowed to disregard its requirements when imposing laws on citizens? Shouldn’t everyone, especially those wielding significant political power, abide by the requirements of justice? How can we sensibly say that a law must be reformed or abolished while also insisting it can be permissibly imposed by those in power? Maybe there are answers to these questions, but figuring them out means solving the puzzle. So the puzzle doesn’t disappear just by pointing out the lack of formal inconsistency.

Maybe we should instead dismiss the puzzle because the three claims operate or apply at different levels of ideal or non-ideal theory. More specifically, you might think the first claim about justice applies only under conditions of full compliance: that is,

20. Rawls, *Theory of Justice*, 3.

conditions whereby everyone, or nearly everyone, acts in accordance with the requirements of justice. Under conditions of full compliance perhaps it's true that justice is the first virtue of social institutions, but this claim isn't true once we stipulate significant levels of non-compliance or wrongdoing. But the second and third claims seem to presuppose significant non-compliance. Once we stipulate that there are unjust laws, we're in the realm of non-ideal theory. So there's no puzzle, since the normative injunctions in ideal theory must differ from the normative injunctions under non-ideal conditions.

Although I think this suggestion points us in the right direction, it doesn't dissolve the puzzle—it doesn't explain how the three claims can all be comfortably affirmed. Why would some degree of non-compliance suddenly change the relationship between justice and other considerations, depriving justice of its lexical priority? Indeed, when faced with at least some problems of non-compliance, most of us are not tempted to abandon the priority of justice. We know that some people cheat on their taxes, but it doesn't follow that we should no longer accord justice priority when designing the tax code. We know that some people commit heinous crimes such as murder and rape, but it doesn't follow that our criminal justice system should prioritize other values at the expense of respecting individual rights. Perhaps there is a story that can explain why, under some levels of non-compliance, justice should no longer be the first virtue of our social institutions. But this is no easy way to dismiss the puzzle. Such a story amounts to a substantive and controversial thesis about how the three claims can be reconciled; one that stands in need of justification.

Aims and Scope

Before providing an overview of the chapters to follow, I want to say something about the scope of the book, and how it relates to the broader landscape of political philosophy.

This book is emphatically not a comprehensive introduction to contemporary political philosophy. There's no attempt to cover the vast range of topics that have received sustained attention in the recent literature. Indeed, the sub-field is now far too broad and diverse for this to be a realistic ambition for any single text.

Although this book focuses on the puzzle of legitimate injustice, it does not engage in great detail with the large literature on more specific questions about principles of distributive justice. One question concerns the content of such principles. Does distributive justice require equality, sufficiency, priority for the worst off, or something else entirely? A second question concerns the currency of distribution: what is getting distributed by principles of justice? Is it external resources, welfare, freedom from the power of others, capabilities to perform key functions, or some combination of all of these? Relatedly, there's a lively debate about the extent to which principles of justice must be responsibility-sensitive. There is also a question about the scope of distributive principles. Do they, for instance, apply across political borders, or only within each political community? Do the principles apply intergenerationally?

Some also reject the very idea that justice is fundamentally, or primarily, distributive. Relational or social egalitarians hold that justice requires establishing egalitarian, or non-hierarchical, social relations. The distribution of goods or advantages will sometimes be relevant to securing such relations, but the distribution is not the point—it only matters insofar as it helps to establish the relevant relations of equality.²¹

This book, will not, for the most part, be wading into these debates. I assume that justice requires an appropriate (I will often use “fair”) distribution of the relevant currency, but this assumption is consistent with relational accounts of justice, since it

21. For an illuminating recent attempt to reconceptualize the debate between so-called distributive and relational theories of justice, see Schouten, *Anatomy of Justice*, esp. chs. 1–4.

remains neutral about the more fundamental explanation of why appropriate distributions are required by justice. I also assume, at various points, that particular goods or advantages are part of the currency of social or distributive justice, but these assumptions will be, for the most part, uncontroversial. Few deny, for example, that the distribution of income, wealth, or civil and political liberties are matters of justice.

The book also has nothing to say about the geographic scope of justice. I will talk about justice and legitimacy within a political society or community, but this is for ease of exposition—the puzzle of legitimate injustice is going to arise regardless of whether the scope of justice is global or more local.

There are also many more specific or applied questions about justice that don't receive much, if any, attention in the chapters to follow. These topics include (to name only a few): the justification of criminal punishment; racial justice; just war theory; animal rights; environmental justice; immigration; and the use of algorithms and artificial intelligence. But although the book doesn't engage with particular applied issues, the more abstract question of how to conceptualize the relationship between justice and legitimacy has significant implications for these topics.

I also want to emphasize a few things about the approach and method of the book to avoid disappointing readers who may have been expecting something else. This book does not offer a survey or overview of leading ideologies or “isms” in politics. If you're looking for a text that analyzes and compares influential theories of liberalism, socialism, libertarianism, and so on . . . this is not the book for you.

There is also no discussion of act utilitarian theories of political morality, or simple act consequentialist theories more generally. There are at least two reasons for this. First, the puzzle of legitimate injustice doesn't arise for such views. If each agent is directed to maximize utility, then the only puzzle there can ever be is working out which option, from the available alternatives, in fact brings about the most good. There's no interesting question about how

injustice could be legitimate. Second, simple forms of act consequentialism have not been very influential in political philosophy. One reason for this, I suspect, is that the institutions and rules of political life are not plausibly explicable by reference to such theories. Their moral import has to be understood in some other way.

There are also various methodological or meta-philosophical debates that are not a focus of this book. One issue that has occupied a great deal of attention in recent years is the distinction between ideal and non-ideal theory. A lot of ink has been spilled over how to draw this distinction, and yet more has been spilled over which kind of political philosophy (ideal or non-ideal) should be the focus of our discipline. I have views about these issues, but rather than argue for them here, I'm just going to lay my cards on the table. My view is that there is no single, canonical, "correct" way to draw the distinction between ideal and non-ideal theory. There is instead a plurality of dimensions along which our theories of political morality can vary with regard to how realistic or non-realistic its assumptions can be. Theories can be more, or less, realistic with regard to the degree to which parties comply, the degree to which agents behave altruistically, the level of resources available, the degree of information available, and technological limitations, as well as various other dimensions.²² Because there are so many different ways in which theories can be more, or less, ideal, I'm skeptical that there's a uniquely correct answer to the question of whether political philosophers ought to be concentrating primarily on ideal or on non-ideal theory. There are good reasons to engage in different kinds of political philosophy, some of which will be heavily idealized along multiple dimensions, and some of which will be much more realistic along many dimensions: it all depends on the more specific aims of the theorist.

22. For helpful discussions of the distinction between ideal and non-ideal theory, see, for example, Hamlin and Stemplowska, "Theory, Ideal Theory"; Valentini, "Ideal vs. Non-ideal Theory."

Another meta-philosophical debate that has received a fair bit of attention, but about which this book has little to say, is that between so-called realism and moralism within political philosophy.²³ It's notoriously difficult to pin down exactly what this debate is supposed to be about, but I think that if it is about anything substantive, it is the following idea. Realists maintain that the domain of political morality is in some sense *sui generis*: the rules or principles that apply in politics are not derivable from, or reducible to, morality outside the political realm. Realists sometimes insist that there is something about the nature of political life, or its practices, that serves as the unique source of political normativity, a source that isn't reducible to more general moral values or principles. Differing realists then offer more specific claims about the distinctive nature of political morality. Moralists, by contrast, view political philosophy as a particular branch of moral philosophy—as simply one of several domains where general moral principles or truths must be worked out.

Again, because I lack the space to properly engage with these claims, I'll state my view without defending it. I think that there are normative questions and puzzles—for example, about the collective use of power to set rules for everyone—that are distinctive to politics. I thus agree there are questions for political philosophy that have no precise analog in non-political moral theory, and so the answers will be, in some sense, distinctive to political philosophy. But I don't believe political philosophy is *sui generis* in the way that at least some realists seem to hold. The solutions to political philosophy's distinctive puzzles depend on moral values or ideals that are not distinctive to the political realm. Freedom, equality, and fairness, for example, are central political values, but they aren't distinctive to, or limited to, the political realm. Since I

23. For an overview of realism, see Rossi and Sleat, "Realism in Normative Political Theory." For a discussion of the contrast between realism and moralism, and a defense of an alternative middle ground, see Larmore, *What Is Political Philosophy?*.

don't think we can solve the central normative questions in political philosophy without appeal to such values, I don't agree with the realist thesis, at least the version of it described above.

Having made some deflationary remarks about the book's scope and aims, let me say something more positive about what it does aim to do.

Theories of justice purport to tell us about the rightful allocation of freedom and other advantages amongst persons. There's a widely shared assumption that justice has a special priority in political life—we can't choose unjust institutions to better realize some other goals. Theories of political legitimacy purport to tell us under what conditions some people or institutions can rightfully wield enormous power over others; issuing and enforcing commands over a very wide range of our social life. To put it differently, theories of justice and legitimacy each claim to tell us how political rules and institutions can be rightfully organized. But justice and legitimacy are typically presented as having different normative bases. Theories of legitimacy are often procedural or historical in nature. That is, legitimacy is typically held to reside either in the procedural pedigree of a law or command, or in some historical fact about the relationship between those who issue the command and those to whom the command is supposed to apply. At least some principles of justice, on the other hand, are widely assumed to be true independent of such procedural or historical facts. The result is that justice and legitimacy seem likely to conflict. Indeed, given certain plausible assumptions, they're going to conflict on a regular basis. We thus won't have a clear picture of political morality without understanding the relationship between justice and legitimacy and how their apparently conflicting claims are to be adjudicated. Focusing on the puzzle of legitimate injustice is thus one way to tackle what I take to be one of the central issues, indeed perhaps the central issue, in political philosophy.

The chapters that follow examine different ways of addressing the puzzle. We learn new and important things, I believe, by looking at some of the recent literature through the lens of legitimate

injustice. Too often theories of justice or theories of legitimacy are assessed in isolation from each other. By asking what different views tell us about legitimate injustice, we get a clearer and deeper picture of the strengths and weakness of different theories. Does a theory require us to give up one of the three claims listed above, or does it promise some reconciliation of them, and if so, how is that reconciliation to be achieved? I hope that addressing these questions illuminates some of the landscape of political philosophy in ways that are novel and fruitful.

Overview

Here is a quick overview of the rest of the book.

One way to resolve the puzzle of legitimate injustice is to deny the third claim. On this view, individual moral rights are sacrosanct. When governments enact and enforce unjust laws, they act impermissibly and the relevant officials lack rights against harmful interference with the enforcement of such laws. Chapter 2 considers this view.

Although this position has the virtues of clarity and simplicity, I argue that we ought to reject it. It entails that public officials, acting in good faith and enforcing laws with an accepted procedural pedigree, are regularly guilty of serious wrongdoing. It also entails, given certain other plausible premises, that citizens might permissibly use necessary and proportionate harmful force against public officials who attempt to enforce democratically enacted but substantively unjust tax policies, safety regulations, or environmental regulations. These implications are very counterintuitive, and they point us to the deeper problem with this view: it has nothing to say about how groups of sincere and thoughtful people are supposed to live peaceably together when they disagree about what justice requires.

Some contemporary Kantians dissolve the puzzle by rejecting the second claim: that many ordinary laws in liberal democratic societies are unjust. On this view, the focus of chapter 3, the

requirements of justice are largely indeterminate in the absence of laws issued by an impartial public authority. Conclusive individual rights are only established when a state serves as the impartial adjudicator to resolve problems of moral indeterminacy and lack of assurance. The laws of a suitably legitimate state thus cannot be unjust. Instead, the law in such a state renders the requirements of justice determinate. To be sure, some goals or policies are so gravely at odds with securing the mutual independence of persons that no legitimate state can permissibly pursue them. But once those cases are set aside, there can be no gap between legitimate law and justice—the one constitutes the other.

Although it has much to recommend it, I argue that we should not accept this picture. Most importantly, I argue that the Kantian view is vulnerable to a dilemma. To vindicate the idea that political institutions are uniquely constitutive of just relations between persons, the Kantian must make some very sweeping and implausible claims about the extent to which justice is indeterminate. On the other hand, if the Kantian makes more modest assumptions about the extent to which justice is indeterminate, it's no longer clear that other essential aspects of the Kantian view—in particular the claim that the unilateral use of force is never fully rightful—can be sustained.

Chapter 4 examines theories that focus on the instrumental value of political institutions, in particular the instrumental value of relations of authority. Consider Joseph Raz's hugely influential normal justification thesis:²⁴

the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him [...] if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.

24. Raz, *Morality of Freedom*, 53.

Here's how this might help to explain legitimate injustice. If state officials generally comply better with the reasons that apply to them by accepting the directives issued by their superiors as authoritative, rather than by engaging in first-order deliberation, then the superiors have legitimate practical authority over those officials. This is true even if there will be some cases where the directives are mistaken. If some of the mistaken directives are mistakes about justice, this could explain how government officials can legitimately enforce unjust laws.

This proposal, however, is confronted by a version of the rule worship objection that plagues rule consequentialism. It's true that if I can better comply with the reasons that apply to me by following the directives of the authority than by trying to decide things for myself, following the directives of the authority is the right thing to do. But when the authority is in fact mistaken, it's odd to assert that I still have a justification for complying with the mistaken directive simply because, as a general matter, following the authority's directives is a good rule. We do have reasons for adopting the rule, but these reasons are merely instrumental, and only imperfectly track the more fundamental considerations. When the two come apart in particular instances, there's no justification for following a purely instrumental rule that fails to deliver its promised benefits. I call this the *bridging problem*.

Chapter 5 turns to consider a family of views that make claims about the intrinsic or non-instrumental value of democracy. These theories identify some egalitarian property of democratic institutions that is held to be non-instrumentally valuable and claim that value grounds the authority of democratic decisions, an authority that might explain the phenomenon of legitimate injustice. Some of these views reject the first claim of the puzzle—that justice is the first virtue of social institutions. But other versions promise a resolution of the puzzle without abandoning any of its claims.

All such views, however, face the same problem. Whatever property is identified as having non-instrumental value—the public manifestation of equality, equal respect, or relations of social

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