

# Book Reviews

## The Levitation of Liberalism

*Political Liberalism*. By John Rawls.\* New York: Columbia University Press, 1993. Pp. xxxiv, 401. \$29.95.

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There is nothing as seductive as the promise to do the impossible. As children, we sought the wonder of such promises in the demonstrations of magicians who claimed to defy the laws of physics. As philosophers, we seek a similar wonder in the theories of those who are bold enough to attempt the reconciliation of concepts that are, on their face, irreconcilable. And no one in this century has filled us with more philosophical wonder than has John Rawls. In work that has spanned the past four decades, he has advanced and refined a political philosophy that has claimed to synthesize dialectically opposed concepts: to make liberty compatible with equality; to achieve concern for others through the exercise of self-interest; to ensure that what is best for the greatest number can be meaningfully obtained without the sacrifice of the few; to accomplish distributive justice of an egalitarian sort with free-market capitalism. Who has not been touched by a sense of awe at the Rawlsian legacy, which combines many of the most compelling, but seemingly inconsistent, tenets of contractarian, utilitarian, libertarian, Marxist, and Kantian moral and political theory?

In *Political Liberalism*,<sup>1</sup> Rawls attempts his most ambitious philosophical feat yet: to “appl[y] the principle of toleration to philosophy itself,”<sup>2</sup> and so, to construct a political theory without using the mortar and bricks of traditional

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1. JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter *POLITICAL LIBERALISM*].  
2. *Id.* at 10.

political and moral thought.<sup>3</sup> The result, he claims, is a “freestanding view” of justice<sup>4</sup>—a substantive conception of justice (as opposed to a more modest procedural conception<sup>5</sup>) that expressly eschews its own justification by appeal to substantive moral, political, or religious doctrines. This philosophical levitation takes liberalism to its limits: It justifies liberalism with liberalism, and so requires us to tolerate the morally wrong choices of others for reasons that we cannot claim to be morally right.<sup>6</sup>

In Part I of this Review, I give a very cursory overview of the complicated argument with which Rawls levitates liberalism. Those who are already well versed in the claims of *Political Liberalism* might prefer to turn past this part. In Section II.A, I outline the sorts of queries and criticisms that have been raised by other commentators in response to the particular tenets of *Political Liberalism*. In Section II.B, I pursue a new line of inquiry—one directed at determining the philosophical point of Rawls’s project as a whole. As I shall make clear, the nature of “the problem of stability,” which Rawls seeks to solve, is not obvious. On one interpretation—what I call the motivational interpretation—Rawls seeks to give persons reasons to *do* what *A Theory of Justice*<sup>7</sup> gave them sufficient reasons to believe—namely, that they should abide by the principles of justice as fairness. As I shall demonstrate in Subsection II.B.1, if this is the right interpretation of Rawls’s project, Rawls is implicitly committed to a particular philosophical conception about the relationship between reasons for belief and reasons for action (namely, externalism)—a contentious philosophical conception commitment to which jeopardizes Rawls’s claim to apply toleration to philosophy itself. On an alternative interpretation—what I call the justificatory interpretation—*Political Liberalism* gives new reasons for people to *believe* the correctness of what *A*

3. Most of the chapters that comprise *Political Liberalism* represent refinements of previously published lectures and articles. See John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985); John Rawls, *The Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 3 (Sterling M. McMurrin ed., 1982); John Rawls, *Kantian Constructivism in Moral Theory: The Dewey Lectures 1980*, 77 J. PHIL. 515 (1980); John Rawls, *The Basic Structure as Subject*, in VALUES AND MORALS 47 (Alvin I. Goldman & Jaegwon Kim eds., 1978).

4. POLITICAL LIBERALISM, *supra* note 1, at 10.

5. For useful discussions of the distinction between procedural and substantive theories of liberalism, and for a lively debate about the success with which Rawls achieves the construction of the latter sort of theory, see Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT L. REV. 589 (1994); Stuart Hampshire, *Liberalism: The New Twist*, N.Y. REV. BOOKS, Aug. 12, 1993, at 43, 46.

6. This is, of course, an oversimplification, likely to mislead as readily as it enlightens. For one thing, it may mislead by suggesting that the reason one cannot claim that one’s reasons for toleration are right is that there are no objectively right reasons for action. But Rawls is not premising his liberalism on skepticism; on the contrary, he is seeking to premise his liberalism on agnosticism and is therefore as loathe to embrace skeptical claims as to embrace realist ones. It is his dedication to religious, philosophical, and moral agnosticism in public discourse that justifies the above broadly stated description of his project. *But see infra* text accompanying note 53.

7. JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *THEORY OF JUSTICE*].

*Theory of Justice* called upon them to do—namely, to structure their basic institutions in accordance with Rawls’s two principles of justice. As I shall argue in Subsection II.B.2, if this is the correct interpretation of Rawls’s project, then, given the constraints he imposes on those to whom his project is directed, he is preaching to the converted. In tandem, the concerns I advance in response to the alternative interpretations of Rawls’s project raise questions about the conceptual coherence and philosophical importance of *Political Liberalism*.

### I. RAWLS’S NEW PROJECT

Rawls maintains that the levitation of liberalism is necessary to overcome what he calls “the problem of stability.”<sup>8</sup> As he wrote in *A Theory of Justice*, our “scheme of social cooperation must be stable: it must be more or less regularly complied with and its basic rules willingly acted upon; and when infractions occur, stabilizing forces should exist that prevent further violations and tend to restore the arrangement.”<sup>9</sup> The stability of a conception of justice, Rawls argued, “depends upon a balance of motives: the sense of justice that it cultivates and the aims that it encourages must normally win out against propensities toward injustice.”<sup>10</sup>

Why would we fear for the stability of justice as fairness in the face of its defense in *A Theory of Justice*? Because, Rawls claims, we must take seriously the enduring “fact of reasonable pluralism.”<sup>11</sup> In a well-ordered society,<sup>12</sup> free and equal citizens will inevitably be divided over religious, philosophical, and moral doctrines, many of which are reasonable. Indeed, part of what it is to be a free and equal person in a well-ordered society is to possess “the moral power” to “form, to revise, and rationally to pursue a conception of one’s rational advantage or good.”<sup>13</sup> In light of “the burdens of judgment”—“the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political

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8. POLITICAL LIBERALISM, *supra* note 1, at xvii.

9. THEORY OF JUSTICE, *supra* note 7, at 6.

10. *Id.* at 454.

11. POLITICAL LIBERALISM, *supra* note 1, at 36.

12. Rawls defines a well-ordered society as one in which (1) everyone accepts, and knows that others accept, the same principles of justice; (2) political and social institutions are publicly known to satisfy these principles of justice; and (3) everyone possesses a “normally effective sense of justice” that leads them to generally comply with the demands of political and social institutions. *Id.* at 35.

13. *Id.* at 19. A conception of the good consists of a scheme of final ends that a person seeks to realize for their own sake, as well as attachments to other persons and allegiances to particular groups and associations. *See id.* As Rawls stated in *A Theory of Justice*:

The main idea is that a person’s good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances. A man is happy when he is more or less successfully in the way of carrying out this plan. To put it briefly, the good is the satisfaction of rational desire.

THEORY OF JUSTICE, *supra* note 7, at 92–93.

life”<sup>14</sup>—persons will endorse diverse and often conflicting conceptions of the good, a plurality of which will be reasonable.<sup>15</sup> As a result, a well-ordered democracy will be characterized by three facts: (1) its citizens will hold a diversity of reasonable but irreconcilable religious, philosophical, and moral views that will cause them to pursue competing conceptions of the good; (2) the only means of motivating the populace to endorse a single religious, philosophical, or moral doctrine is by the oppressive use of state power; and (3) without the use of oppressive tactics to secure unanimity, the regime will endure only if a substantial majority of its citizens willingly and freely support it.<sup>16</sup> It follows, Rawls believes, that in light of their reasonable religious, philosophical, and moral disagreements, citizens will willingly and freely support a regime only if the political conception on which it is founded can be the object of “an overlapping consensus.”<sup>17</sup>

If Rawls’s two principles of justice are necessarily premised on any one of the reasonable religious, philosophical, or moral doctrines embraced by free and equal citizens in a well-ordered democracy, or if they can be justified by only a limited set of these doctrines, then they will fail to secure an overlapping consensus, and hence, they will fail to comprise a stable conception of justice. In *A Theory of Justice*, justice as fairness was explicitly grounded on “a partially comprehensive” doctrine<sup>18</sup>—a conception of the good that makes justice both an intrinsic good (worth pursuing for its own sake) and the supreme good (taking priority over all other intrinsic goods).<sup>19</sup> Insofar as there are reasonable comprehensive conceptions of the good that deny that justice as fairness is the supreme good, or even an intrinsic good (because they hold, for example, that achieving happiness or union with God

14. POLITICAL LIBERALISM, *supra* note 1, at 55–56.

15. As Rawls assumes: “[R]easonable persons affirm only reasonable comprehensive doctrines.” *Id.* at 59. A reasonable person is one who (1) is willing to propose and abide by fair terms of cooperation provided that others do likewise; and (2) is willing to recognize the burdens of judgment that make reasonable pluralism a fact of life in a well-ordered society. *Id.* at 49, 54. The result is that a reasonable person endorses “some form of liberty of conscience and freedom of thought.” *Id.* at 61. Rawls is less clear in his definition of a reasonable comprehensive conception. It appears that what makes a comprehensive conception reasonable is that it is embraced by a reasonable person—i.e., it embodies, in some form, an endorsement of liberty of conscience and freedom of thought. Broadly speaking, then, it is liberal in content. *See infra* text accompanying notes 99–100.

For a detailed and very helpful discussion of Rawls’s conception of the virtue of reasonableness, see Gary C. Leedes, *Rawls’s Excessively Secular Political Conception*, 27 U. RICH. L. REV. 1083, 1091–95 (1993).

16. POLITICAL LIBERALISM, *supra* note 1, at 36–38.

17. *Id.* at 36.

18. *Id.* at xvi.

19. THEORY OF JUSTICE, *supra* note 7, at 570–75. For a helpful discussion of “the congruence argument” in *A Theory of Justice* and for a lucid explication of why Rawls abandoned it in favor of the argument for overlapping consensus concerning a freestanding political conception, see Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 628–33 (1994).

is the supreme good to which compliance with the two principles of justice is a mere means), justice as fairness cannot attract an overlapping consensus if it must rely on the conception of the good defended in *A Theory of Justice*.

*Political Liberalism*, then, “aims for a political conception of justice as a freestanding view.”<sup>20</sup> Rawls’s project is to extract from “the shared fund of implicitly recognized basic ideas and principles” provided by “the public culture itself”<sup>21</sup> a substantive political theory that rests on “no specific metaphysical or epistemological doctrine beyond what is implied by the political conception itself.”<sup>22</sup> The philosophical magic required is obvious: to obtain a basis of agreement among persons who *ex hypothesi* cannot agree, and to persuade persons to cooperate with one another by endorsing a political doctrine that does not affirm the religious, philosophical, or moral conceptions that make them who they are and that give their lives meaning. In short, Rawls must levitate his liberalism to a purely political plane. And to do this is seemingly to do the impossible, for it is to obtain long-term stability by divorcing the right from any particular conception of the good when it is admittedly their conceptions of the good that motivate citizens to do the right.<sup>23</sup>

Rawls embarks upon this seemingly impossible task by arguing that justice as fairness constitutes “a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it.”<sup>24</sup> As he maintains, “it can be presented without saying, or knowing, or hazarding a conjecture about, what such doctrines it may belong to, or be supported by.”<sup>25</sup> As a purely political conception of

20. POLITICAL LIBERALISM, *supra* note 1, at 10.

21. *Id.* at 8.

22. *Id.* at 10.

23. This is not to suggest that citizens are motivated solely by what Rawls calls “the rational” (which governs the choice of and means to the determinate ends unique to the individual), as opposed to “the reasonable” (which underlies the desire to engage in fair cooperation with others on terms they might reasonably be expected to endorse). See *id.* at 48–54. As Rawls says, “neither the reasonable nor the rational can stand without the other. Merely reasonable agents would have no ends of their own they wanted to advance by fair cooperation; merely rational agents lack a sense of justice and fail to recognize the independent validity of the claims of others.” *Id.* at 52 (footnote omitted). But as Freeman makes clear: “A just constitution is possible only if its requirements harmonize with each person’s good.” Freeman, *supra* note 19, at 626. That is, a political conception can be stable

only so long as it is rational for the great majority of people to act on that conception’s principles and incorporate it into their conceptions of the good. To show that a conception of justice is inherently stable then is to show that it is rational to be reasonable with respect to justice.

*Id.* at 627 (emphasis omitted).

24. POLITICAL LIBERALISM, *supra* note 1, at 12. For a useful illustration of Rawls’s concept of overlapping consensus, see Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 966 n.13 (1993).

25. POLITICAL LIBERALISM, *supra* note 1, at 12–13.

justice, it is not thought of as true,<sup>26</sup> but as reasonable. And it is reasonable because it is both publicly and privately justifiable.<sup>27</sup> It is publicly justifiable because all reasonable persons<sup>28</sup> can accept and endorse it in their public capacity as democratic citizens (namely, by the process of political constructivism that employs reflective equilibrium and the original position as set forth in *A Theory of Justice*).<sup>29</sup> Justice as fairness is privately justifiable because it can be derived from each of the conflicting comprehensive conceptions of the good privately endorsed by reasonable persons.<sup>30</sup> As Rawls maintains, justice as fairness is not privately justifiable because it functions as a *modus vivendi*—a political compromise struck by individuals who lack the power to secure terms they would find more favorable.<sup>31</sup> Rather, it coheres with and/or follows from each of the many comprehensive doctrines that reasonable persons might embrace. It thus functions as either an instrumental or an intrinsic good within all reasonable conceptions of the good. Since “citizens individually decide for themselves in what way the public political conception all affirm is related to their own more comprehensive views,”<sup>32</sup> justice as fairness achieves a duality of justification from persons who do not share a singular religious, philosophical, or moral method of justification. Hence, as Rawls maintains, his political liberalism represents a “dualism”: It is justified both from “the point of view of the political conception” itself and from “the many points of view of comprehensive doctrines.”<sup>33</sup>

Rawls recognizes, however, that it is not enough to remove the justification of the political from the political fray. The sort of stability with which he is concerned will not be assured unless he also extricates a means of reasoning about the political that will allow citizens to interpret and apply the

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26. To declare it true would jeopardize its status as the object of an overlapping consensus, for there are potentially comprehensive religious, philosophical, and moral doctrines that resist the metaphysical and epistemological implications of such a claim. *See id.* at xx; *see also id.* at 90–99 (comparing political constructivism (which “does without the concept of truth,” *id.* at 94) and rational intuitionism (which invokes claims of truth)).

27. For a nice overview of how *Political Liberalism* is systematically organized to advance these separate justifications, see Freeman, *supra* note 19, at 622–27.

28. Recall the complex criteria specifying what it is to be a reasonable person, discussed *supra* note 15.

29. Moreover, as Rawls argues, the public conception of justice derived by political constructivism itself both contains an account of distinct political goods and makes justice and the well-ordered political society of justice as fairness itself an intrinsic good. *See* POLITICAL LIBERALISM, *supra* note 1, at 207–11.

30. For example, as Rawls argues, it follows deductively from a Kantian moral philosophy. Justice as fairness also might plausibly approximate what the principle of utility would require. Further, it might well surface as the dominant value among a plurality of values simultaneously endorsed, but not cohered, by an individual. And it might be thought a constituent part of divine or natural law. *See id.* at 168–71.

31. *Id.* at 147.

32. *Id.* at 38. The comprehensive doctrines held by reasonable persons are sufficiently flexible to allow reasonable “citizens [to] converge on roughly the same principles of justice from quite different and incompatible moral and philosophical perspectives.” Jeremy Waldron, *Justice Revisited: Rawls Turns Towards Political Philosophy*, TIMES LITERARY SUPPLEMENT, June 18, 1993, at 5, 5.

33. POLITICAL LIBERALISM, *supra* note 1, at xxi.

two principles of justice without reference to the comprehensive doctrines that divide them. As Samuel Freeman puts the problem:

Suppose citizens, or legislators . . . interpret liberty of conscience according to their religious views (as John Locke and perhaps Justice Rehnquist), so that while it allows freedom of all (reasonable) religions, it does not rule out special government support to encourage religious over nonreligious belief, or even special support for a particular religion. Or they interpret freedom of the person (another vaguely defined basic liberty) according to their religious views about what is appropriate sexual conduct (deciding then that homosexuality, or any sex outside of legal marriage, should be legally prohibited). Nothing on the face of these abstract basic liberties would prevent such interpretations.<sup>34</sup>

In order to prevent citizens from giving content to the two principles of justice by resorting to their comprehensive conceptions, Rawls seeks the levitation of what he calls “public reason.” Public reason comprises the “guidelines of inquiry that specify ways of reasoning and criteria for the kinds of information relevant for political questions”—guidelines that all reasonable persons, regardless of their conceptions of the good and private modes of reasoning, can apply.<sup>35</sup> When it comes to debate about matters of basic justice and constitutional essentials,<sup>36</sup> “we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.”<sup>37</sup> This is because the exercise of political power is fully justifiable only when it is exercised on grounds “which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their

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34. Freeman, *supra* note 19, at 649. As Freeman goes on to make clear, in order to apply the political conception about which there is an overlapping consensus, “we must be able to reason from the *same* standards of interpretation . . . , endorsing and applying its principles to the constitution and laws for the *same* reasons.” *Id.* at 650.

35. POLITICAL LIBERALISM, *supra* note 1, at 223.

36. There are two kinds of constitutional essentials: fundamental principles that specify the general structure of government and the political process, and equal basic rights and liberties of citizenship that legislative majorities are to respect. As Rawls makes clear, while some principle of opportunity is surely a constitutional essential, the notion of fair equality of opportunity developed in *A Theory of Justice* as part of the second principle of justice is not such an essential. Similarly, while a minimum fulfillment of persons’ basic needs is a constitutional essential, the difference principle inherent in Rawls’s second principle of justice is not. Still, as Rawls makes clear, political discussions about both equality of opportunity and the difference principle raise questions of basic justice, and so are appropriately decided by the exercise of public reason. *See id.* at 228–30 & n.10.

Rawls limits the requirement of public reason to political questions that involve constitutional essentials and basic justice. “This means that political values alone are to settle such fundamental questions as: who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.” *Id.* at 214. He claims that “it is usually highly desirable” to settle other political questions by the exercise of public reason alone, but for reasons he leaves unclear, Rawls concludes that “this may not always be so.” *Id.* at 215.

37. *Id.* at 224.

common human reason.”<sup>38</sup> Only by limiting persons to the exercise of public reason is it possible to forestall their reliance on epistemic sources and criteria unique to their conflicting conceptions of the good (e.g., references to the authority of God, or to the content of astrological readings). Only by carving out a public discourse complete with public criteria of argumentation can we ensure that political debate does not disintegrate into a cacophony of private arguments that defeats the stability made possible by an overlapping consensus concerning justice as fairness.<sup>39</sup>

Rawls’s ambition in *Political Liberalism* is to demonstrate that reasonable persons can elevate themselves above the first-order moral, philosophical, and religious disagreements that divide them, by withdrawing to the second-order level of the political.<sup>40</sup> At this level, reasonable persons can avail themselves of a common language and apply the principles about which they share an overlapping consensus to the construction of basic social and political institutions that will enable them to live in peace. By divorcing its justification and application from all of the particular religious, philosophical, and moral doctrines embraced by reasonable persons within a well-ordered society, while still allowing individual citizens to justify their allegiance to that society on the basis of the particular doctrines that they embrace, Rawls contends that justice as fairness can command the agreement of people who otherwise lack any basis for agreement. If his argument is successful, Rawls has done the seemingly impossible once again; for he has articulated the grounds upon which persons who deeply disagree with one another can agree to disagree, not as a means of compromise, but because the doctrines that motivate their disagreement require such agreement.<sup>41</sup>

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38. *Id.* at 137. As Rawls explains, one can derive this “principle of legitimacy” from the point of view of the original position:

We suppose the parties to know the facts of reasonable pluralism and of oppression along with other relevant general information. We then try to show that the principles of justice they would adopt would in effect incorporate this principle of legitimacy and would justify only institutions it would count legitimate.

*Id.* at 137 n.5.

39. As Rawls maintains, the political importance of public reason, resting as it does on the principle of legitimacy, *see supra* note 38, gives rise to a moral “duty of civility,” which requires that citizens “be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason.” *Id.* at 217.

40. My distinction here between first-order and second-order principles is not to be confused with the standard distinction between ethics and metaethics. Rather, it captures the ambition—an ambition central to a liberal agenda—to make political morality distinct from ordinary morality. Both sorts of morality would properly be categorized as ethics on the standard ethics/metaethics distinction.

41. I have not described here a great deal of the philosophical machinery that powers Rawls’s sophisticated argument for political liberalism. For more detailed explications of Rawls’s political liberalism, see Joshua Cohen, *Democratic Equality*, 99 *ETHICS* 727 (1989); Freeman, *supra* note 19; Lawrence B. Solum, *Situating Political Liberalism*, 69 *CHI.-KENT L. REV.* 549 (1994).



## II. EVALUATING RAWLS'S NEW PROJECT

### A. *The First Wave of Criticism*

In the short time since the publication of *Political Liberalism*, a great deal of sophisticated philosophical attention has been paid to the central tenets of Rawls's argument.<sup>42</sup> Commentators and critics have maintained, for example:

(1) that while he is right to point out that a constitutional democracy will inevitably breed a plurality of conceptions of the good, Rawls fails to defend adequately his claim that many such conflicting conceptions can be simultaneously *reasonable*;<sup>43</sup>

(2) that in seeking an overlapping consensus from only *reasonable* conceptions of the good, essentially defined as liberal conceptions (and imposing the results of that consensus on those who are deemed to hold *unreasonable* conceptions, essentially defined as nonliberal conceptions), Rawls's political liberalism forsakes genuine political neutrality for a kind of liberal tyranny;<sup>44</sup>

(3) that if Rawls is right in maintaining that there is a plurality of reasonable, but irreconcilable, conceptions of the good, Rawls is wrong in assuming that those who hold such conceptions will be able to agree on principles of political justice<sup>45</sup> or on the constitutional essentials to which they apply;<sup>46</sup>

(4) that if reasonable persons who are deeply divided amongst themselves could agree on second-order principles of political justice, the principles they

42. *Political Liberalism* has already been the topic of dozens of individual articles and review essays. For collections of many of these, see *Consensus and Democracy: An Anglo-French Conference on John Rawls*, 7 *RATIO JURIS* 267 (1994); Symposium, *John Rawls's Political Liberalism*, 75 *PAC. PHIL. Q.* 165 (1994); *Symposium on John Rawls*, 105 *ETHICS* 4 (1994); *Symposium on John Rawls's Political Liberalism*, 69 *CHI.-KENT L. REV.* 549 (1994); *Symposium on Political Liberalism*, 94 *COLUM. L. REV.* 1813 (1994). Since most of the lectures that make up the chapters of *Political Liberalism* were published in advance of the book, see *supra* note 3, a number of criticisms concerning the central claims of the book appeared in print before its publication. I have included reference to some of those criticisms here so as to capture the scope of the controversies that Rawls's political liberalism has spawned.

43. See Brian Barry, *In Defense of Political Liberalism*, 7 *RATIO JURIS* 325, 329 (1994).

44. See Paul F. Campos, *Secular Fundamentalism*, 94 *COLUM. L. REV.* 1814, 1817–25 (1994); Leedes, *supra* note 15, at 1095–1100; Lawrence E. Mitchell, *Trust and the Overlapping Consensus*, 94 *COLUM. L. REV.* 1918, 1933–35 (1994); Chantal Mouffe, *Political Liberalism. Neutrality and the Political*, 7 *RATIO JURIS* 314, 321–22 (1994). But see Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 *SAN DIEGO L. REV.* 729 (1993) (constructing nonexclusionary conception of public reason); Lawrence B. Solum, *Inclusive Public Reason*, 75 *PAC. PHIL. Q.* 217 (1994) (arguing that Rawls has inclusive conception of public reason that is unfairly characterized as tyrannical); Robert Bork, *Justice Lite*, *FIRST THINGS*, Nov. 1993, at 31, 32 (book review) ("*Political Liberalism* is not merely unworldly and egalitarian beyond reason but contains strong authoritarian elements inappropriate to a constitutional democracy.").

45. See Mitchell, *supra* note 44, at 1925–35; Solum, *supra* note 41, at 580; Michael J. Sandel, *Political Liberalism*, 107 *HARV. L. REV.* 1765, 1782–89 (1994) (book review).

46. See Kent Greenawalt, *On Public Reason*, 69 *CHI.-KENT L. REV.* 669, 682–85 (1994).

would agree upon would likely be different from Rawls's two principles of justice as fairness;<sup>47</sup>

(5) that even if reasonable persons would agree on Rawls's two principles of justice as fairness, it would not (always) be reasonable for them to set aside their first-order religious, philosophical, and moral beliefs when debating the application of those principles to matters of basic justice or constitutional essentials;<sup>48</sup>

(6) that Rawls's insistence on limiting constitutional discourse to the content of public reason impoverishes public debate by precluding citizens from publicly discussing (and thus potentially resolving first-order disputes about) the content of the particular conceptions of the good that generate constitutional arguments (e.g., the defensibility of Catholic doctrine as it applies to questions concerning abortion rights or the morality of homosexuality);<sup>49</sup>

(7) that inasmuch as Rawls's theory relies on our present beliefs and aspires only to the construction of a theory that squares with those beliefs, and inasmuch as our present beliefs may be false, Rawls's theory can make no claim to be a true account of justice, and hence, it is philosophically irrelevant;<sup>50</sup>

(8) that while Rawls's constructivist project would be philosophically relevant if it genuinely proceeded from sound empirical research into the present beliefs of community members, Rawls's failure to engage in real sociology belies the constructivist claims he makes on behalf of his project;<sup>51</sup>

(9) that despite his claims to construct a political theory devoid of metaphysical or epistemological commitments, Rawls smuggles in presuppositions about the truth of unique moral and metaphysical conceptions;<sup>52</sup>

47. See George Klosko, *Rawls's Argument from Political Stability*, 94 COLUM. L. REV. 1882, 1892 (1994); see also James Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 CHI.-KENT L. REV. 763, 784 (1994).

48. See Samuel Scheffler, *The Appeal of Political Liberalism*, 105 ETHICS 4, 16–19 (1994); Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 COLUM. L. REV. 1936, 1942–43 (1994); Sandel, *supra* note 45, at 1777–82.

49. See THOMAS W. POGGE, *REALIZING RAWLS* 214 (1989); Mouffe, *supra* note 44, at 322–24; Wolgast, *supra* note 48, at 1941–42; Sandel, *supra* note 45, at 1789–94.

50. See Kurt Baier, *Justice and the Aims of Political Philosophy*, 99 ETHICS 771, 781–84 (1989); Jean Hampton, *Should Political Philosophy Be Done Without Metaphysics?*, 99 ETHICS 791, 807–14 (1989); Rex Martin, *Rawls's New Theory of Justice*, 69 CHI.-KENT L. REV. 737, 737–39 (1994); Joseph Raz, *Facing Diversity: The Case for Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3, 6–10 (1990).

51. See Bernard Williams, *A Fair State*, LONDON REV. OF BOOKS, May 13, 1993, at 7, 7. For a general critique of Rawls's constructivism, see JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION* 25–30 (Ciaran Cronin trans., 1993).

52. See Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 COLUM. L. REV. 1842, 1849–58 (1994); Mitchell, *supra* note 44, at 1933–34 & n.66; Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does it Really Taste That Much Better?*, 11 CONST. COMMENTARY 227, 239 (1994).

(10) that Rawls should be forthright in declaring himself a metaethical skeptic, because only skepticism can make sense of his insistence on the political toleration of pluralism;<sup>53</sup> and

(11) that to avoid claims of philosophical irrelevance or attributions of metaethical skepticism, Rawls should abandon his claim that political liberalism is merely reasonable and embrace, instead, the claim that it is true.<sup>54</sup>

I do not propose to take up the merits of any of the above arguments. Instead, I want to inquire into the essential nature of Rawls's project as a whole. My questions are these: Why did Rawls write *Political Liberalism*, and for whom did he write it?

### B. *Why Did Rawls Write Political Liberalism?*

Rawls maintains that his efforts in *Political Liberalism* are necessary to solve "the problem of stability."<sup>55</sup> But what exactly *is* the problem of stability? Rawls puts it this way: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"<sup>56</sup> Now this is a puzzling problem to puzzle about. It does not appear to be the problem of what constitutes a just society, or the problem of what count as the essential conditions of human freedom, or the problem of what are the necessary criteria of human equality. These are the classic questions of political philosophy to which Rawls gave detailed answers in *A Theory of Justice*. But, as Rawls declares, since his answers to these questions have remained essentially unchanged since the publication of *A Theory of Justice*,<sup>57</sup> these are not the questions to which *Political Liberalism* is devoted.

The question that Rawls seeks to answer in *Political Liberalism* appears to be this: How can a just society stay just? This is a peculiar *philosophical* question. One can certainly imagine it functioning as a genuine question for sociologists, psychologists, or political scientists who are interested in testing whether, for example, just institutions endure longer when bellies are fed or when force is threatened. But an empirical inquiry of the sort seemingly demanded by this question cannot be what Rawls is up to in his armchair. Rather, he must be seeking to give a philosophical account of why people should support and maintain political institutions that are *ex hypothesi* just. But what does it mean to ask whether there are reasons to do what there are, *ex*

53. See Barry, *supra* note 43, at 329–30.

54. See S.A. Lloyd, *Relativizing Rawls*, 69 CHI.-KENT L. REV. 709, 709–11 (1994).

55. POLITICAL LIBERALISM, *supra* note 1, at xvii.

56. *Id.* at xviii.

57. "[T]hese lectures take the structure and content of *Theory* to remain substantially the same." *Id.* at xvi.

*hypothesi*, reasons to do? It would seem that Rawls's very question is tautological: How can reasonable persons (defined as liberals<sup>58</sup>) be made to be reasonable (i.e., liberal)? How can reasonable persons be given reasons to do what *A Theory of Justice* already gave them reasons to do? How can a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice (i.e., a well-ordered society<sup>59</sup>), achieve acceptance of the same principles of justice? How can persons who have a capacity to understand, apply, and act on fair terms of social cooperation and a willingness, if not a desire, to do so (i.e., free and equal persons<sup>60</sup>) be made to act willingly on fair terms of social cooperation?

In what follows, I shall explore two different interpretations of the project that Rawls sets for himself in *Political Liberalism*. On the first interpretation, Rawls's project is motivational: The goal of *Political Liberalism* is to subjectively induce reasonable people to do what they in fact already have sufficient objective reasons to do, namely, to abide by justice as fairness. On the second interpretation, Rawls's project is justificatory: The goal of *Political Liberalism* is to advance new arguments that objectively justify reasonable people in believing that justice as fairness is the correct conception of justice. In examining each of these interpretations, I am interested in two questions: first, whether Rawls can escape the charges of conceptual confusion that follow from the apparently tautological nature of the problem of stability; and second, whether Rawls's theory confronts normative challenges that confound its defensibility even in the absence of conceptual difficulties.

### 1. *The Motivational Project*

Samuel Freeman argues that Rawls's project is solely motivational. Freeman's argument for this interpretation can be summarized as follows.<sup>61</sup> Rawls maintains in his introduction that *Political Liberalism* is written to revise the account of stability provided in part three of *A Theory of Justice*, an account that Rawls now believes is in conflict with the general account of justice provided in part one of *A Theory of Justice*.<sup>62</sup> An account of stability is "an account of how people can acquire the will to do justice and the desire to support just institutions."<sup>63</sup> Thus, the question of *Political Liberalism* is: "Assuming we have the correct conception of justice and have in place the institutions needed to achieve it, how are we to *motivate* individuals who are

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58. *Id.* at 58–66; see *infra* text accompanying notes 89–100.

59. See *id.* at 35.

60. See *id.* at 19.

61. For the details of his interpretation, see Freeman, *supra* note 19, at 622–33.

62. POLITICAL LIBERALISM, *supra* note 1, at xv–xvi.

63. Freeman, *supra* note 19, at 624.

members of this social scheme, to affirm and support these institutions and the conception of justice that underlie[s] them?"<sup>64</sup> As Freeman explains:

This is not simply a problem of engaging people[']s *moral beliefs* about justice. If Rawls is right, this has been achieved already in the argument for a conception of justice and a just constitution that best fit with our considered moral judgments. The problem Rawls addresses in Part III of *A Theory of Justice*, "Ends," is largely that of showing how this conception can engage the *will* of those who live under a just social scheme (a "well-ordered society" of justice as fairness). Assuming that citizens in a well-ordered society have public knowledge and agreement on justice and just institutions, how do they come to *care* about them? . . . Even assuming we can get all in a well-ordered democratic society to agree in their *judgments* on the principles of a just constitution and the institutions needed to support it, and even assuming that all citizens have a sense of justice and a desire to be just, there remains this significant problem of consistently engaging their *will*.<sup>65</sup>

If the point of *Political Liberalism* is indeed the evangelical one that Freeman describes, then Rawls's project is susceptible to at least two major criticisms. First, those who are "internalists" about morality must find the project, as stated, literally meaningless. To resist their dismissal of his project altogether, Rawls must declare himself an "externalist" about morality, and so commit himself to a metaphysical doctrine that undermines his defense of political liberalism as freestanding. Second, even if Rawls admits the externalist premise of his project, his project fails to speak to externalists. Specifically, externalists who equate just actions with actions that are motivated by the recognition of their objective justness must find Rawls's attempt to motivate just actions for reasons other than their justice fundamentally confused. Nonmotivational externalists who do not harbor such conceptual concerns about Rawls's project are deemed unreasonable (according to Rawls's criteria)—and hence, outside of the scope of the audience to whom his theory is addressed—if they are in fact in need of motivation. As a result, Rawls's project can only motivate the already motivated. Let me take up each of these criticisms in turn before articulating the second, justificatory interpretation of Rawls's project that purports to spare him these difficulties.

#### a. *The Challenge of Internalism*

Broadly speaking, internalists maintain that, as a conceptual matter, the obligations of morality subjectively motivate actors to abide by them. One

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64. *Id.* at 625.

65. *Id.* at 625–26 (footnotes omitted).

cannot be subject to a moral obligation and fail, in Freeman's words, to "care" about it. As Richard Price wrote: "When we are conscious that an action is *fit* to be done, or that it *ought* to be done, it is not conceivable that we can remain *uninfluenced*, or want a *motive* to action."<sup>66</sup> And in the words of W.D. Falk: "[S]omehow the very fact of a duty entails all the motive required for doing the act . . . ."<sup>67</sup>

As David Brink makes clear,<sup>68</sup> internalists about morality are committed to three distinct claims: (1) that moral considerations *necessarily* motivate; (2) that since the motivational force of morality is part of the concept of morality, it can be known *a priori*; and (3) that since it is the concept of morality that makes morality motivational, the motivational power of moral obligations is independent of their content. Externalists about morality deny one or more of these three claims. Externalists maintain: (1) that moral obligations only contingently motivate (if they motivate at all); and/or (2) that whether moral obligations motivate can be known only *a posteriori*; and/or (3) that the motivational power of a moral obligation depends on things other than the concept of morality, such as the content of the obligation or such facts about the actor as her interests or desires.

If Freeman has accurately characterized Rawls's project, then Rawls must be an externalist about morality. For if *A Theory of Justice* succeeds, in Freeman's words, in engaging people's moral beliefs about justice, then, according to an internalist, it must necessarily have succeeded in engaging people's will to do justice. What more is there to be done by *Political Liberalism*? If *Political Liberalism* indeed engages people's will to do justice in a way that *A Theory of Justice* does not, then, according to an internalist, it must be because it provides a correct conception of justice, while *A Theory of Justice* does not. To maintain that *A Theory of Justice* articulates the correct conception of justice while simultaneously admitting that it fails to motivate many (reasonable) persons to abide by that conception of justice is, on an internalist's theory, to engage in contradiction. If Rawls is to rescue his project from charges of conceptual confusion, it would appear that he must reject internalism about morality. But affirmatively to embrace externalism is to premise political liberalism on a first-order metaphysical thesis that many may

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66. RICHARD PRICE, A REVIEW OF THE PRINCIPAL QUESTIONS IN MORALS (1787), reprinted in 2 THE BRITISH MORALISTS 131, 194 (D.D. Raphael ed., 1969).

67. W.D. Falk, "Ought" and Motivation, in READINGS IN ETHICAL THEORY 492, 499 (Wilfred Sellars & John Hospers eds., 1952); see also SIMON BLACKBURN, SPREADING THE WORD: GROUNDS IN THE PHILOSOPHY OF LANGUAGE 188 (1984) (discussing view that "[i]t seems to be a conceptual truth that to regard something as good is to feel a pull towards promoting or choosing it, or towards wanting other people to feel the pull towards promoting or choosing it"); GILBERT HARMAN, THE NATURE OF MORALITY 33 (1977) ("To think that you ought to do something is to be motivated to do it. To think that it would be wrong to do something is to be motivated not to do it."); J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 23 (1977) ("[I]t is held also that just knowing [objective values] or 'seeing' them will not merely tell men what to do but will ensure that they do it, overruling any contrary inclinations.").

68. See DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 42 (1989).

seemingly reasonably reject. Political liberalism is no longer levitated but elevated on a foundation that may cost Rawls the overlapping consensus about it that he seeks.

To resist this result, Rawls might maintain that political liberalism can remain agnostic between the moral metaphysics of internalism and externalism. To make out this claim, he might usefully avail himself of a set of distinctions that Brink articulates.<sup>69</sup> First, as Brink makes clear, it is helpful to distinguish the different sorts of motivation that various internalists attribute to obligations. A “weak internalist” maintains that an obligation necessarily provides *some* motivation for action, while a “strong internalist” maintains that an obligation necessarily provides *sufficient* motivation for action.<sup>70</sup> Second, it is useful to be clear about the different sources of motivation that various internalists identify. “Objective internalists,” as I shall call them, claim that a moral obligation, *simpliciter*, provides an agent with a motive to comply with it. In contrast, “subjective internalists” claim that a moral *belief* provides an agent with a motive to act on it—that is, that an actor who believes that she has an obligation is motivated to act so as to fulfill it. Finally, “hybrid internalists” maintain that the recognition of an obligation—that is, the *true belief* in the existence of an obligation—motivates an actor to comply with it.<sup>71</sup>

Rawls might attempt to make use of these distinctions in a number of ways. First, he might maintain that weak internalists must find his project fully coherent, and hence, that political liberalism can at least remain agnostic between externalism and weak internalism. Weak internalists must believe that if *A Theory of Justice* correctly articulates the obligations of justice, then it necessarily provides *some* motivation to act justly. But they can join externalists in believing that it may take additional arguments beyond those sufficient to justify justice as fairness as the correct conception of our obligations of justice—e.g., those advanced in *Political Liberalism*—to give persons *sufficient* motivation to act justly. Freeman supports the attribution of this argument to Rawls when he puts Rawls’s concern in *Political Liberalism* as follows: “[E]ven assuming that each person has a sense of justice, why should they *sufficiently* care about justice, to the degree that they recognize and are willing to respect its demands even when these demands conflict with or impede individuals in the pursuit of their conceptions of their good?”<sup>72</sup>

Rawls might further maintain that both subjective and hybrid internalists can find his project coherent, and hence, that political liberalism can remain agnostic between externalism and these two versions of internalism. Since both

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69. *See id.* at 37–80.

70. *Id.* at 41–42.

71. I am following here Brink’s distinctions between “agent internalism,” “appraiser internalism,” and “hybrid internalism,” substituting terms that I think are better heuristics to the concepts they label. *See id.* at 40–41.

72. Freeman, *supra* note 19, at 625.

subjective and hybrid internalists link moral motivation to subjective beliefs about obligations—and not to obligations, *simpliciter*—they cannot find fault with a project that has as its goal the *generation* of subjective beliefs. Rawls can thus maintain that *Political Liberalism* speaks to both externalists and subjective and hybrid internalists. In the case of subjective and hybrid internalists, Rawls's goal is to cause subjective beliefs about the true obligations of justice on the part of those who may not have come to hold such beliefs as a result of the arguments sufficiently advanced for justice as fairness in *A Theory of Justice*. *Political Liberalism* may thus accomplish what *A Theory of Justice* does not, for it may cause subjective beliefs about the validity of the two principles of justice that, according to the internalist, will then necessarily motivate. In the case of externalists, the goal of *Political Liberalism* is to generate the will to do what may (or may not) already be subjectively believed on the basis of *A Theory of Justice*. That is, its goal is to forge what externalists would deem a contingent connection between the objective correctness of justice as fairness and the subjective motivation to act in accordance with its principles.

If these arguments succeed, only strong objective internalists must find the project of *Political Liberalism* incoherent. For them, the motivational impetus for justice as fairness is exhausted by *A Theory of Justice*, and there is nothing *Political Liberalism* can add to further motivate the adoption of the two principles of justice. For other internalists, by contrast, *Political Liberalism* can make important contributions.

Yet neither of the above arguments on behalf of *Political Liberalism* will ultimately co-opt the support of weak, subjective, and hybrid internalists. First, weak internalists typically invest obligations with some, but not sufficient, motivational force because they believe that obligations have merely *prima facie* moral weight. On this view, obligations can conflict, and obligations can be outweighed by more weighty obligations. Thus, while singular obligations motivate, they cannot sufficiently motivate until it is deemed that they outweigh all other conflicting obligations. The only way to establish that the obligations of justice outweigh all (or most) other obligations is by justifying them as the most weighty obligations within the class of obligations. But this is to do justificatory work. If, *ex hypothesi*, *A Theory of Justice* did this justificatory work, then persons have all the reasons they could have to believe that the obligations of justice outweigh all (or most) other obligations. Accordingly, even weak internalists must maintain that they have sufficient reasons, and hence, sufficient motivation, to act in accordance with justice as fairness.

Second, Rawls cannot maintain that the point of *Political Liberalism* is to cause beliefs that will then, according to subjective and hybrid internalists, necessarily motivate just action. For the motivational interpretation assumes, *ex hypothesi*, that those in need of motivation already have such beliefs. Recall



Freeman's reconstruction of Rawls's inquiry: "Assuming that citizens in a well-ordered society have public knowledge and agreement on justice and just institutions, how do they come to *care* about them?"<sup>73</sup> If this is indeed Rawls's inquiry, then it must necessarily be meaningless to those who maintain that subjective beliefs in the justness of institutions necessarily cause persons to care about those institutions.

Despite his possible protestations, then, Rawls's project must be unintelligible to internalists of all stripes. If internalism is correct, and if *A Theory of Justice* already correctly articulated the obligations of justice, then there was simply nothing left for Rawls to do that would justify the writing of *Political Liberalism*. Since there exists no gap between what people should do and what people must want to do, there can be no reason to give people additional arguments why they should want to do what they have already been given sufficient reasons to do.

The internalist response strikes me as an enormously powerful challenge to Rawls's claim to levitate liberalism above metaphysics. This is not because strong internalism and objective internalism are without serious problems. On the contrary, there are good reasons to think that strong internalism and objective internalism are highly implausible theories about the metaphysics of moral obligations. But Rawls cannot articulate any of these reasons without committing himself to the truth of a particular metaphysical doctrine.

The most significant problem with all theories of internalism is that they deny the coherence of what Brink calls "amoralist skepticism."<sup>74</sup> The amoralist skeptic accepts that moral facts both exist and are known to us, but asks why we should care about these facts. As Brink says, the internalist "cannot regard as coherent the amoralist challenge 'Why should I care about moral demands?'"<sup>75</sup> Yet such a challenge appears fully intelligible: "Reflection on the stringent character of many apparent moral demands can make us wonder whether we do have good reason to be moral. We may come to wonder whether we have good reason to become amoralists. All of this seems to assume that the amoralist is an intelligible figure."<sup>76</sup> If Freeman's interpretation of *Political Liberalism* is right, Rawls's purpose is to contend with amoralist skeptics, and hence, on pain of boxing with ghosts, Rawls must reject any internalist position that declares his foe conceptually impossible. But then Rawls must premise his project on externalism. That is, he must ground his project in a particular philosophical doctrine that some may reject. And so, he must forfeit the claim to have built the political wholly without the metaphysical.

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73. *Id.*

74. BRINK, *supra* note 68, at 46.

75. *Id.* at 59.

76. *Id.* at 47.

Rawls has available a final argument in defense of his claim that political liberalism can remain *ametaphysical*. Put crudely, he can maintain that *A Theory of Justice* is written for internalists, while *Political Liberalism* is written for externalists. Together, these works reflect complete agnosticism concerning the truth of these metaphysical rivals. If one is an internalist, all one requires are sufficient reasons to believe that a political conception is correct. One will then necessarily be motivated to act in accordance with that conception. *A Theory of Justice* provides sufficient reasons to believe that justice as fairness is the correct conception of justice, and hence, it is all that internalists require to build and maintain a just society. If, on the other hand, one is an externalist, one may require both sufficient reasons to believe that a political conception is correct *and* an additional source of motivation to abide by such a conception. While *A Theory of Justice* gives externalists sufficient reasons to believe that justice as fairness is the correct conception of justice, it may fail to motivate them to act in accordance with its principles. *Political Liberalism* provides externalists with additional reasons to act on the principles sufficiently defended in *A Theory of Justice*. As Rawls can argue, it is precisely because he sought to be metaphysically agnostic that he was motivated to write both books. While those who are moved by one book and not by the other may consider only one book necessary, neither book presupposes the truth of either internalism or externalism. One can be moved to structure the basic institutions of one's society according to the dictates of justice as fairness regardless of whether one is an internalist or externalist, and hence, the content of political liberalism is not hostage to the truth of either doctrine, even if the source of one's motivation for adopting political liberalism is.

This rejoinder may indeed rescue the coherence of Rawls's project, if his project is construed as an argument in the alternative, with one alternative (that of *A Theory of Justice*) satisfying internalists and the other alternative (that of *Political Liberalism*) satisfying externalists. But the coherence of *Political Liberalism* achieved by this argument is largely a Pyrrhic victory. For such an argument admits that *Political Liberalism*, by itself, must be meaningless to internalists. And since Rawls gives us no reason to believe that our society is populated by enough externalist amoralist skeptics to undermine its stability, he gives us no reason to think that his attempt to persuade people to practice what they already preach is a necessary or important task.<sup>77</sup> Put differently, one might well think that the problem for justice as fairness is a dearth of believers, not a host of hypocrites. If Rawls's project in *Political Liberalism* is not to give new reasons to believe that justice as fairness is the correct conception of justice, but rather is merely to get those who do believe it to put

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77. As Rawls frequently insists, the primary purpose of political philosophy in a democratic society is practical—not metaphysical or epistemological. See, e.g., *POLITICAL LIBERALISM*, *supra* note 1, at 9–10.

their money where their mouths are, then Rawls may not be grappling with the principal problem confronting his theory.

b. *The Challenge of Externalism*

Internalists, however, are not the only sorts of moral theorists who must find the motivational interpretation of *Political Liberalism* misconceived. Those who might be called “motivational externalists” must also reject the project that Freeman assigns to Rawls. Motivational externalists embrace the externalist thesis that obligations do not necessarily motivate, but argue as a conceptual matter that moral action consists in action that is in fact motivated solely by the fact that it is obligatory. On this view, those who give to charity, and do so solely for its own sake, act morally. Those who give to charity not because it is obligatory to do so, but because they want to secure a tax credit, or impress a colleague, or curry political favor, do not act morally.<sup>78</sup>

From the perspective of my armchair, it appears that there are a great many people who harbor strong motivational externalist intuitions and who thus follow Kant in believing that to act “in conformity with duty, but not from the motive of duty” is to fall short of acting morally.<sup>79</sup> Indeed, it is plausible to conclude that motivational externalism is a central presupposition of most of the world’s great religions, for it is common creed that we should do the good for its own sake. And it is the stuff of common gossip to condemn those who help others solely for selfish reasons, or who keep promises only because it works to their advantage to do so, or who abide by the law solely because they fear the sanctions for disobedience, or who share the burdens of cooperation only because they are being watched.

If motivational externalism is extended to the duties of justice, then just acts are acts done because they are just. Those who accept this claim cannot consider it enough to be motivated to abide by the dictates of justice. Rather, one must be motivated to abide by those dictates for some reasons, and not others—i.e., for the reasons that make them just. Now, imagine the case of the

78. Kant was a motivational externalist about ethical duties. Kant distinguished ethical duties from juridical ones. Juridical duties are duties to perform or refrain from performing certain actions. They are blind to the motives with which we obey them. Ethical duties, in contrast, demand that we act from certain motivations and not others. As Samuel Freeman explains:

Ethical duties differ from juridical duties in that they require that we act from certain motives. They involve not (or not just) specified constraints on action, but the adoption of certain obligatory ends (such as the happiness of others or our own self-perfection—Kant’s two primary cases). It is because ethical duties require that we adopt ends and act from certain motives that they are not apt for legal enforcement.

Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PA. L. REV. 1455, 1471 (1994) (footnotes omitted).

For an extensive discussion of what I have elsewhere called Kant’s “motivational deontology,” see Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 165–70 (1994).

79. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 65 (H.J. Paton trans., Harper Torchbooks 1964) (1785) (emphasis omitted).

motivational externalist who has read *A Theory of Justice* and has come to believe that justice as fairness is the correct conception of justice, but who is not motivated to act in accordance with its dictates. Inasmuch as she is an externalist, she can meaningfully seek to acquire the motivation to do what she believes is just. But ironically, she cannot seek such motivation in *Political Liberalism*. For insofar as *Political Liberalism* seeks to motivate actors by invoking arguments distinct from those advanced in *A Theory of Justice*, it seeks to motivate actors to act for reasons other than the fact that justice as fairness is the correct conception of justice. If the motivational externalist acts on the new reasons advanced in *Political Liberalism*, as opposed to the justificatory reasons advanced in *A Theory of Justice*, then her acts will lack moral worth. Put differently, Rawls's project in *Political Liberalism* can be meaningful to motivational externalists only if it can motivate them to do just acts solely for the sake of justice—that is, for the reasons that make such acts just. Since, *ex hypothesi*, the arguments that Rawls advances are not arguments that justify justice as fairness as the correct conception of justice, those arguments must motivate just acts on grounds other than that they are just. But then, it is morally self-defeating for motivational externalists to seek the motivation to do justice in *Political Liberalism*.

The upshot of this argument is that if Rawls's project in *Political Liberalism* is construed as a motivational one, then it must be thought to be meaningless to motivational externalists. Only the arguments already advanced in *A Theory of Justice* can motivate motivational externalists in ways that guarantee just actions, for only those arguments capture the reasons that justice as fairness is just. Insofar as motivational externalists may be unmoved by these justificatory arguments, *A Theory of Justice* may fail to assure stability. But in that event, there are no arguments that can assure stability, and hence, from the motivational externalist's point of view, no sense can be made of the project in *Political Liberalism*.

Rawls can, at this point, rescue his project from the charges of irrelevance levelled by motivational externalists by declaring that motivational externalism constitutes an unreasonable philosophical conception.<sup>80</sup> He can remind us that reasonable persons “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.”<sup>81</sup> Those who possess a “reasonable moral psychology” possess

a capacity to acquire conceptions of justice and fairness *and a desire to act* as these conceptions require . . . [W]hen they believe that institutions or social practices are just, . . . they are ready and willing

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80. See *supra* note 15.

81. POLITICAL LIBERALISM, *supra* note 1, at 49 (emphasis added); see also *id.* at 54 (describing a reasonable society).

to do their part in those arrangements provided they have reasonable assurance that others will also do their part . . . .<sup>82</sup>

Insofar as motivational externalists who lack the motivation to do what they believe is just do not have a (subjective) desire to act as justice as fairness dictates, and are not ready and willing to do their part to support just arrangements, Rawls can declare them unreasonable. Since Rawls is explicitly interested only in determining how those who *are* reasonable can achieve a just society that is stable, Rawls can thus declare the challenge of such externalists irrelevant to his project.

The problem with this rejoinder is that it proves too much. Put bluntly, it leaves Rawls with no one to talk to. We have already seen that if Rawls's project in *Political Liberalism* is construed as a purely motivational one—i.e., one designed to motivate people to do what they already believe on the basis of *A Theory of Justice*—then he cannot be talking to internalists, because internalists cannot be in need of motivation. Therefore, he must be talking to externalists who are in need of reasons to do what they already believe. To reject motivational externalism on the ground that it is unreasonable not to be motivated by correct beliefs about justice is to reject externalism in general as a reasonable philosophical doctrine. But then, for whom did Rawls write *Political Liberalism*? Not for the internalist, who is already motivated to be just, and not for the externalist, who is not already motivated to be just. That leaves the externalist who is (contingently) already motivated to be just; but if this is Rawls's audience, he is preaching to the converted. His project becomes the trivial one of motivating liberals to be liberal; of giving peaceful people reasons to be peaceful; of encouraging tolerance among the already tolerant.

Freeman might at this point insist that I have missed the point of *Political Liberalism*, as he construes it. He might remind us that Rawls's aim is *not* to motivate the unmotivated, but rather to motivate the *insufficiently* motivated: “[E]ven assuming that each person has a sense of justice, why should they *sufficiently* care about justice, to the degree that they recognize and are willing to respect its demands even when these demands conflict with or impede individuals in the pursuit of their conceptions of their good?”<sup>83</sup> Insofar as externalists who *are* motivated to act in accordance with the demands of justice might be *insufficiently* motivated to do so in the face of competing values, there remains room for Rawls to do meaningful motivational work. While *Political Liberalism* cannot and/or does not speak to internalists, motivational externalists, and externalists who suffer from amoral skepticism, it can play a meaningful role in persuading externalists who are already

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82. *Id.* at 86 (emphasis added).

83. Freeman, *supra* note 19, at 625; *see also id.* at 641 (“[W]hat is to insure that justice will not give way when it conflicts with other values which people affirm within their comprehensive views?”).

motivated by justice to become sufficiently motivated by it—that is, to abide by the demands of justice even in the face of competing demands by other values within their comprehensive conceptions of the good.

This rejoinder will not do. If Rawls's object in *Political Liberalism* is in fact *purely* motivational, then *ex hypothesi* he has already given people sufficient justification to structure the basic institutions of their society according to justice as fairness and to abide by the two principles of justice in the face of competing values. His reader must thus be thought to already hold correct beliefs about the importance of justice relative to other values. If the value of justice is in fact so weighty that it ought to trump virtually all other values within any reasonable comprehensive conceptions, then *ex hypothesi*, people believe that it ought to displace other values in virtually all cases of conflict. Those who are partially motivated, but not sufficiently motivated, to set aside less important values in the name of justice put Rawls in the same dilemma as those who are not motivated to do justice at all. On pain of conceptual confusion, Rawls cannot conceive of them as internalists, for internalists take reasons to believe to *be* reasons to act. He cannot conceive of them as motivational externalists, for while such externalists may indeed lack sufficient motivation to do what they should, they cannot be given extrinsic reasons to do so. Nor can he conceive of them as "partial amoral skeptics," because those who do not possess a desire to act on the correct conception of justice lack a reasonable moral psychology. Since those who have less of a desire to act on the correct conception of justice than they should have lack the increment of desire necessary for justice when doing justice most matters (i.e., when it is threatened by countervailing values), those who are partial amoral skeptics must, on Rawls's theory, lack a reasonable moral psychology. Thus, those who are insufficiently motivated by justice cannot be motivated by *Political Liberalism* any more than can those who are completely unmotivated by justice.

Thus, if Rawls's project is given a purely motivational interpretation, it ceases to be a meaningful project. Its only congregation is composed of converts who already abide by its evangelical message. We should, accordingly, seek an alternative interpretation that does not invite charges of conceptual confusion and philosophical triviality. In the subsection that follows, I shall take up what I call "a justificatory interpretation"—an interpretation that construes *Political Liberalism* not as a source of reasons for action, but as a source of new reasons for belief in the correctness of justice as fairness.

## 2. *The Justificatory Project*

Many of the commentators on *Political Liberalism* implicitly take Rawls's project to be a justificatory one, not (at least, not primarily) a motivational one.

On this interpretation, the facts that justice as fairness can serve as the basis of an overlapping consensus and can be publicly justified by the exercise of public reason constitute new reasons to believe it the correct conception of justice.<sup>84</sup> By this account, *Political Liberalism's* arguments *supplement* the arguments from the original position and reflective equilibrium advanced on behalf of justice as fairness in *A Theory of Justice*. If, after reading *A Theory of Justice*, one remains unconvinced that Rawls's two principles constitute the content of justice, one can read *Political Liberalism* for additional reasons to believe that they do.

We have good grounds to favor this interpretation if it rescues Rawls's project from the difficulties engendered by the motivational interpretation. But it should be clear from the start that this interpretation competes with Freeman's motivational one only because Rawls's text is ambiguous between the two. Consider, for example, Rawls's descriptions of the argument for justice as fairness:

Justice as fairness is best presented in two stages . . . . In the first stage it is worked out as a freestanding political (but of course moral) conception for the basic structure of society. Only with this done and its content—its principles of justice and ideals—provisionally on hand do we take up, in the second stage, the problem whether justice as fairness is sufficiently stable. Unless it is so, it is not a satisfactory political conception of justice and it must be in some way revised.<sup>85</sup>

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The first three lectures set out the first stage of the exposition of justice as fairness as a freestanding view . . . . This first stage gives the principles of justice that specify the fair terms of cooperation among citizens and specify when a society's basic institutions are just.

The second stage of the exposition . . . considers how the well-ordered democratic society of justice as fairness may establish and preserve unity and stability given the reasonable pluralism characteristic of it.<sup>86</sup>

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84. [T]here is one further thing that might be said consistently with the spirit of Rawls's book, namely, that if an overlapping consensus on liberal principles can indeed be achieved in modern democracies, then accepting any one of the doctrines included in such a consensus may give one reason to support a liberal scheme. In other words, the distinctive contribution of political liberalism may be to suggest that there are many ways to arrive at liberal principles and that that very fact is a source of liberalism's strength.

Scheffler, *supra* note 48, at 22.

85. POLITICAL LIBERALISM, *supra* note 1, at 140–41 (footnote omitted); *see also id.* at 65–66 (discussing “second stage”).

86. *Id.* at 133–34.

On one hand, these passages suggest that in the two-stage exposition of justice as fairness, the first stage does the justificatory work (i.e., it gives the reasons to believe that justice as fairness is the correct conception of justice), while the second stage does the motivational work (i.e., it gives the reasons to act in accordance with what is believed). Since the arguments in the first stage of the exposition remain those of *A Theory of Justice*, this interpretation supports Freeman's view that the real contribution of *Political Liberalism* is the second stage of the exposition, and hence, that its purpose is purely motivational. On the other hand, inasmuch as the above passages explicitly contemplate the revision of justice as fairness if it should turn out to be an unstable conception of justice, they support the view that in defending its stability by showing it to be a freestanding conception of justice, Rawls is advancing new reasons to believe that justice as fairness is a fully "satisfactory" conception of justice. On this interpretation, Rawls's project in *Political Liberalism* is justificatory; its goal is to supplement the arguments advanced in *A Theory of Justice* for why justice as fairness should be believed to be the correct conception of justice.<sup>87</sup>

Notice that if Rawls's project in *Political Liberalism* is primarily justificatory, it escapes the charges of conceptual confusion levelled at it by internalists and motivational externalists. There is nothing conceptually puzzling about giving nonbelievers—be they internalists or externalists—additional reasons for belief. A conceptual puzzle arises only if the motivational interpretation is correct—that is, only if Rawls supposes that there is a gap between the existence of sufficient reasons for belief and sufficient reasons for action, such that *A Theory of Justice* is required to give the former sorts of reasons and *Political Liberalism* is required to give the latter sorts of reasons. If both books give the same sorts of reasons, and if the reasons both give are reasons for belief, then neither internalists nor externalists can challenge the coherence of either book, for both internalists and externalists presuppose that justice as fairness is justified only if it is premised on a sufficient set of reasons for belief.

Our question, then, is whether *Political Liberalism* invites a new set of problems if its purpose is thought to be justificatory rather than motivational. Certainly the commentators whose criticisms I summarized in Section A of this part take the justificatory interpretation to be problematic, for their arguments largely challenge the normative defensibility of political liberalism. As I said, I do not propose to work through the merits of these criticisms. Suffice it to say that in light of the arguments I laid out in the previous subsection, Rawls cannot rescue his project from the difficulties identified by other critics by declaring that such critics have missed its motivational point.

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87. As Rawls insists, the political constructivism that results in the conception of justice as fairness specifies an objective order of reasons: Agents "are to act from these reasons, whether moved by them or not; and so these assigned reasons may override the reasons agent have, or think they have, from their own point of view." *Id.* at 111.



I propose to explore here a source of difficulty for the justificatory interpretation that is analogous to the one encountered by the motivational interpretation. As we saw, if its goal is motivational, *Political Liberalism* lacks an audience. The question I want to raise in these final pages is whether it gains an audience if its goal is taken to be justificatory. Can the new arguments advanced in *Political Liberalism* make believers of people who do not already believe that justice as fairness is the correct conception of justice? Can the facts that justice as fairness provides the basis of an overlapping consensus and is justifiable by the exercise of public reason give people new reasons to structure basic institutions according to the two principles of justice when they would not otherwise believe those principles justified?

While the answer to this question cannot be deduced *a priori*, there are good grounds to conclude that those most in need of conversion have been deliberately excluded from Rawls's chapel. If this is the case, then the justificatory interpretation of *Political Liberalism* is subject to charges of triviality similar to those made against the motivational interpretation. The challenge of triviality proceeds as follows. First, Rawls explicitly excludes those who hold "unreasonable" religious, philosophical, and moral doctrines from the category of those from whom to solicit an overlapping consensus about the principles by which to structure basic institutions.<sup>88</sup> Thus, Rawls cannot argue that those who are unreasonable should embrace justice as fairness because it in fact coheres with, or follows from, their comprehensive conceptions. Only those whose (reasonable) beliefs comprise the "database" from which to procure an overlapping consensus can be called upon to act in accordance with the principles that comprise the content of that consensus *because* those principles reflect what they, in fact, believe and can justify on the basis of their comprehensive conceptions.

Second, unreasonable religious, philosophical, and moral doctrines are defined as doctrines at odds with a liberal conception of justice. Rawls's derivation of this definition can be reconstructed as follows:

- (1) Reasonable religious, philosophical, and moral doctrines are those doctrines affirmed by reasonable persons.<sup>89</sup>
- (2) Reasonable persons are those persons:
  - (a) who want to be and are fully cooperating members of society, and seek to be recognized as such;<sup>90</sup>
  - (b) who have an effective sense of justice, a desire to do what justice requires and to be just persons;<sup>91</sup>

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88. "Unreasonable conceptions of the good are not to be accommodated by justice; they are to be contained by it." Freeman, *supra* note 19, at 643.

89. POLITICAL LIBERALISM, *supra* note 1, at 59; see also *supra* note 15.

90. *Id.* at 81, 84.

91. *Id.* at 86.

(c) who are thus willing to propose and act in accordance with public principles that others can accept;<sup>92</sup>

(d) who recognize the burdens of judgment, and therefore recognize that the public principles that others can accept cannot be premised on any particular religious, philosophical, or moral doctrine;<sup>93</sup>

(e) who thus appreciate that “fair social cooperation . . . on a footing of mutual respect” is possible only if the values that conflict with the political conception of justice all can accept are set aside when they conflict with that conception;<sup>94</sup>

(f) who as a result refuse to use political power to repress reasonable comprehensive views different from their own;<sup>95</sup>

(g) who thus manifest the virtues of political cooperation—“the virtues of tolerance and being ready to meet others halfway”;<sup>96</sup>

(h) who accordingly advance a political conception that “protects the familiar basic rights and assigns them a special priority”;<sup>97</sup> and

(i) who recognize that the effective use of such basic rights requires the possession, and thus in many cases the provision, of sufficient material means to meet basic needs.<sup>98</sup>

(3) Thus, “the most reasonable political conception of justice for a democratic regime will be, broadly speaking, liberal.”<sup>99</sup>

(4) Unreasonable religious, philosophical, and moral doctrines are thus doctrines that are at odds with a liberal political conception.<sup>100</sup>

The upshot of this definition is that those who are not already liberals are excluded from the category of persons from whom an overlapping consensus about justice is sought. Rawls cannot, then, seek to justify his liberal conception of justice as fairness to nonliberals by means of the argument from overlapping consensus, for nonliberals cannot be shown to believe implicitly the essential tenets of political liberalism. Hence, Rawls cannot argue that justice as fairness is justified for them *for the reason that* they in fact embrace its fundamental tenets.

92. *Id.* at 19.

93. *Id.* at 54–58.

94. *Id.* at 157.

95. *Id.* at 60.

96. *Id.* at 157. The willingness to recognize the burdens of judgment “limits the scope of what reasonable persons think can be justified to others, and . . . leads to a form of toleration and supports the idea of public reason.” *Id.* at 59.

97. *Id.* at 156–57.

98. *Id.* at 157, 228–29.

99. *Id.* at 156.

100. *See id.* at 170 (excluding as unreasonable “certain kinds of fundamentalism” and all “religious doctrines” lacking “an account of free faith”); *id.* at 187 (excluding those conceptions of the good that “involve the violation of basic rights and liberties”).

By ignoring the views of nonliberals in an argument that seeks to justify political liberalism by showing it to be consistent with (most) people's views, Rawls excludes from his audience those most in need of his message. Thus he does not provide the Branch Davidians of Waco, Texas, or the terrorist bombers of the World Trade Center and the Oklahoma City federal building, or the followers of the Doomsday Cult, or the members of the Ku Klux Klan, any reasons for liberal tolerance. Since the greatest real threat to the stability of a liberal regime appears to derive from the proliferation of nonliberal (i.e., unreasonable) conceptions of the good, it is puzzling to discover that Rawls's defense of liberalism is *not* intended to persuade persons to become liberals.

Of course, Rawls could plausibly argue that there is no sense reasoning with the unreasonable. And if only hate-mongering members of fringe cults constituted the unreasonable, we might all agree that he ought to save his breath. But Rawls's conception of what it means to be unreasonable extends to many who are not, in conventional terms, crazy, bigoted, racist, chauvinistic, or evil. Indeed, in Rawls's sense, many of my best friends are unreasonable. And many political, moral, and legal theorists who are in the business of reading and learning from writers like Rawls will no doubt be surprised to find that, like the Branch Davidians and the philosophical riff-raff with whom I associate, they too are deemed unworthy of Rawls's efforts. For example, libertarians and classical liberals who do not believe in employing state power to affect wealth transfers, and who thus reject 2(i) in the above deduction,<sup>101</sup> are deemed unreasonable, and hence, unworthy of persuasion. Act consequentialists, including act utilitarians, who construe rights as consequentialist rules of thumb, and who thus refuse (in principle, if not in practice) to elevate the protection of basic liberties above considerations of what will maximize good consequences,<sup>102</sup> are similarly consigned to the

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101. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that U.S. Constitution prohibits most public transfer and welfare programs); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960) (attacking welfare state as inimical to liberty); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944) (same); JOHN HOSPERS, *LIBERTARIANISM* 291 (1971) ("The effect of the government welfare system is that increasing millions of people are dependent on government, reduced to lifelong unproductivity."); TIBOR R. MACHAN, *HUMAN RIGHTS AND HUMAN LIBERTIES: A RADICAL RECONSIDERATION OF THE AMERICAN POLITICAL TRADITION* 128 (1975) ("At the end of the road [of the welfare state] looms a total state."); TIBOR R. MACHAN, *INDIVIDUALS AND THEIR RIGHTS* (1989) (attacking welfare state); ALBERT J. NOCK, *OUR ENEMY, THE STATE* 4 (1935) ("[E]very assumption of State power, whether by gift or seizure, leaves society with so much less power . . ."); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (defending "minimal state"); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 184 (1973) (arguing that best that government can do to help the poor is "[g]et out of the way"); 2 MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* 880 (1962) (opposing "coerced exchange" as "exploitation of man by man"); JEROME TUCCILLE, *RADICAL LIBERTARIANISM* 82 (1970) ("[A]ny law which violates an individual's natural right to the ownership of his own life and his own property is essentially unjust and immoral, and . . . the individual has a moral right to resist such laws.").

102. See, e.g., RICHARD A. FUMERTON, *REASON AND MORALITY: A DEFENSE OF THE EGOCENTRIC PERSPECTIVE* (1990); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); R.M. HARE, *FREEDOM AND REASON* (1963); R.M. HARE, *THE LANGUAGE OF MORALS* (1952); R.M. HARE, *MORAL THINKING* (1981); JOHN STUART MILL, *UTILITARIANISM* 61–62 (George Sher ed., 1979) (1863).

ranks of the unreasonable by their rejection of 2(h). In like manner, many egoists, altruists, Catholics, Protestants, hedonists, perfectionists, communists, socialists, feminists, communitarians, and religious fundamentalists, who for one reason or another part ways with the fundamental liberal tenets that define Rawls's reasonable person, will find themselves excluded from Rawls's audience.<sup>103</sup>

Once one realizes the scope of the audience that Rawls is *not* addressing,<sup>104</sup> one has to wonder what remains of the justificatory interpretation of Rawls's project. Can one meaningfully take Rawls to be justifying liberalism when he has explicitly excluded everyone who is not a liberal from the congregation to whom he is preaching? The answer, it seems, is that while there may remain justificatory work for *Political Liberalism* to do, it is of a very modest order. *Political Liberalism* can be construed as arguing that liberals should embrace the specific conception of political liberalism captured by justice as fairness on the basis that this conception best reflects those tenets of their liberalism about which there is overlapping consensus and public justification. Thus, as Rawls argues, Kantians, "classical utilitarians" (i.e., rule utilitarians who attribute great utility to liberty), pluralists who place value on a freestanding public conception of justice, and free-faith religious adherents should all come to believe that justice as fairness is the correct conception of justice *because* it commands an overlapping consensus of their views and can be justified by publicly available reasons and evidence that all deem legitimate.<sup>105</sup> The problem, of course, is that insofar as these theorists are deemed reasonable, they already largely embrace the tenets of justice as fairness.<sup>106</sup> In giving them additional reasons to do so, Rawls does little more than enjoin the egalitarian to share and the democrat to value political freedom.

It is no wonder, then, that Freeman rejects the view that Rawls is seeking to convert, rather than to motivate. Inasmuch as Rawls expressly addresses only those who already essentially embrace his message, it is tempting to think

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Consider, also, all of those in the law-and-economics movement whose normative commitment to wealth maximization is fundamentally consequentialist. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

103. As Rawls illustrates, those who would deny all abortion rights because they take the life of a fetus to be more valuable than the equality of women are "to that extent unreasonable." *POLITICAL LIBERALISM*, *supra* note 1, at 243 n.32. For an articulate critique of Rawls's discussion of abortion, see Thomas McCarthy, *Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue*, 105 *ETHICS* 44, 53 n.16 (1994).

104. "Rawls approaches his topic not through an examination of American society, its institutions, and its stresses, but through a highly abstract and complex contractarian theory that advances a political agenda whose main appeal will be to persons already of the left-liberal persuasion." Bork, *supra* note 44, at 31.

105. *POLITICAL LIBERALISM*, *supra* note 1, at 168-71.

106. Notice that 2(h) and 2(i) bear a marked resemblance to the two principles of justice. See *supra* text accompanying notes 97-98.

that he must be delivering his message for reasons other than to persuade his audience to believe it. It is thus plausible to suppose that in preaching to the converted, he is hoping to prompt believers to *practice* what he preaches. However, since, as we saw, the motivational interpretation leaves his project with no larger audience than does the justificatory interpretation, there appears to be little reason to return to it.

### III. CONCLUSION

I have argued that Rawls's *Political Liberalism* levitates liberalism above the heads of those who most require an appreciation of its principles. If *Political Liberalism* is designed to motivate people to act in accordance with their belief that justice as fairness is the correct conception of justice, Rawls's levitation of liberalism exceeds the grasp of both internalists and externalists. Internalists and motivational externalists must think it a meaningless enterprise. Nonmotivational externalists, who do not find it a meaningless enterprise and who are not already motivated by justice as fairness, are deemed by Rawls to be unreasonable, and are thus expressly outside the scope of his designated audience. If, on the other hand, *Political Liberalism* is designed to justify people in believing that justice as fairness is the correct conception of justice to begin with, Rawls's levitation of liberalism exceeds the grasp of people who do not already hold such a belief. As a result, Rawls's project, however construed, appears vulnerable to charges of conceptual confusion and normative insignificance, for, at best, it appears to give reasons why the peaceful should remain peaceful and the tolerant should be tolerant.<sup>107</sup>

In light of these criticisms, Rawls's project in *Political Liberalism* may be best interpreted not as a normative project, but as a descriptive one. It describes how those who already believe and are motivated to act in accordance with the principles of justice as fairness enjoy a language of discourse and a set of common normative presuppositions that allow them to surmount private disagreements. It thus descriptively explores the depth and breadth of the potential for tolerance and peace enjoyed by those who are already admittedly tolerant and peaceful. While this interpretation construes Rawls's project in far more modest terms than do the motivational or the justificatory interpretations presupposed by critics and explored above, it has the virtue of making Rawls's project both coherent and nontrivial. Under this interpretation, *Political Liberalism* is a descriptive assessment of the power of liberalism by a liberal philosopher self-satisfied by the justificatory and motivational work he has done elsewhere. It is a celebration of the *effects* of

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107. For a useful discussion of how the matters resolved by Rawls in *Political Liberalism* "pale in comparison to an inquiry of truly momentous urgency and importance" such as the justice of a global scheme of international cooperation, see POGGE, *supra* note 49, at 215, 227–39.

the liberal triumph in twentieth-century America. And it is the basis for a prediction about the moral, political, and economic prosperity that this triumph of liberalism is likely to achieve in the twenty-first century.

# The Trouble with Trials; the Trouble with Us

*With Justice for Some: Victims' Rights in Criminal Trials.* By George P. Fletcher.\* Reading, Mass.: Addison-Wesley, 1995. Pp. 304. \$24.00.

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Hard on the heels of the civil rights movement, the women's liberation movement, and the movement to expand the rights of criminal suspects, the victims' rights movement burst on the scene in the early 1970s and quickly became a potent political force. Part backlash against what it considered the prodefendant romanticism of the 1960s, the victims' rights movement was also a spiritual heir to the '60s ethos. With its suspicion of bureaucratic government and its concern for the disempowered, the victims' rights movement spoke for the "forgotten" men and women of the criminal justice system.

Victims' rights legislation sometimes sought to repeal rights recently conferred upon criminal defendants.<sup>1</sup> But early on, victims' rights advocates also staked out an affirmative agenda. Like the leaders of previous movements, they sought to empower their adherents by helping them obtain formal legal rights.

They succeeded across a broad front. Victims won statutory rights to be kept informed of the progress of the prosecution;<sup>2</sup> to express an opinion about the propriety of a proposed plea agreement;<sup>3</sup> to be heard at sentencing;<sup>4</sup> and

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1. For example, California's "Victim's Bill of Rights," adopted by referendum in 1982, amended the state constitution to abolish the right to bail in noncapital cases and attempted to abolish the exclusionary rules required by the U.S. Constitution's Fourth and Fifth Amendments. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 953 n.87 (1985); cf. Omnibus Crime Control and Safe Streets Act of 1968 § 701, 18 U.S.C. § 3501 (1985) (attempting to circumvent *Miranda v. Arizona*, 384 U.S. 436 (1966)).

2. David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 PEPP. L. REV. 35, 49 (1989) (noting that 43 states had enacted such laws).

3. See, e.g., FLA. STAT. ANN. ch. 960.001(1)(e)(2) (Harrison 1991); see also Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 304-05, 340-45 (1987) (discussing statutes that require consultation with victim as part of plea bargaining process).

4. See Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 234 n.8 (1991) (noting that "[a]lmost every state allows for victim participation at sentencing").

to participate in parole-release proceedings.<sup>5</sup> Statutes require convicted defendants to pay restitution,<sup>6</sup> and broader victim-compensation schemes—now in effect in approximately forty-five states—provide state funds to reimburse victims for certain injuries, whether or not particular offenders are apprehended or convicted.<sup>7</sup> In California, a state constitutional amendment guarantees the rights to restitution, to consideration of public safety in setting bail, and to unrestricted admissibility of defendants' prior felony convictions for purposes of impeachment or sentence enhancement.<sup>8</sup>

The legal, social, and psychological impact of these reforms is no simple matter to assess, and existing research reveals mixed results. Victim participation in plea bargaining seems to leave some victims more satisfied with the process but intensifies the frustration of others.<sup>9</sup> Victim participation in sentencing and parole has had some effect on outcomes,<sup>10</sup> but commentators differ about the reasons for that impact and its legitimacy.<sup>11</sup>

Concern for the victim is a central preoccupation for George Fletcher in his latest book, an account of eight high-profile trials, followed by a provocative commentary on their lessons. Though his subtitle underscores the book's focus on victims' rights, the reform movement of the 1970s and its statutory achievements are barely mentioned; indeed, Fletcher appears to consider them irrelevant to his themes. In vivid (sometimes purple) prose, he paints a picture of crime victims who are still frustrated and uncared for, crying out in disbelief or taking to the streets in angry protest as the legal system mitigates the punishment of egregious wrongdoers or acquits them altogether.

Something, Fletcher argues, is grievously wrong. And the remedies will have to be radical. Fletcher has no patience with shilly-shallying, especially by lawyers, a group he condemns wholesale for a predisposition to focus on the marginal or irrelevant and an unwillingness "to rethink the foundations of our

5. See Maureen McLeod, *Getting Free*, CRIM. JUST., Spring 1989, at 12, 14 (noting that most states have authorized victim participation in parole proceedings).

6. See Hall, *supra* note 4, at 234 n.4 (noting that "[v]irtually every state grants authority to courts to order restitution"); Henderson, *supra* note 1, at 1007 n.315 (discussing restitution requirements under various federal and state laws).

7. See Hall, *supra* note 4, at 234 n.3 (noting that approximately 45 states have such programs); Henderson, *supra* note 1, at 1017 & n.357 (discussing victim-compensation schemes).

8. See CAL. CONST. art. I, § 28; see also Henderson, *supra* note 1, at 953 n.87 (discussing California provisions).

9. See Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349, 363 (1979) (reporting that victims who participated in settlement conferences were, on average, no more satisfied with process than were victims who did not participate). See generally Welling, *supra* note 3 (assessing victim participation in plea bargaining and proposing limited right to participate).

10. For a thorough review of the literature, see Hall, *supra* note 4, at 241-48.

11. See, e.g., *id.* at 257 (noting difficulty of assessing value of victim participation in sentencing because of lack of focused studies). Compare *id.* at 257-60, 265-66 (advocating limits on victim participation to avoid disparate sentencing for comparable crimes) with Welling, *supra* note 3, at 355 (favoring victim participation).



legal system.”<sup>12</sup> Fletcher makes no effort to disguise his contempt for the tepid responses of cautious professional study commissions, and he dismisses as mere “pap”<sup>13</sup> the reforms offered by an American Bar Association task force in response to the acquittal in the first Rodney King beating trial.<sup>14</sup>

“This,” Fletcher tells us, “is an angry book.”<sup>15</sup> He insists that we need far-reaching change. Following his descriptions of the eight trials and references to other prominent cases, Fletcher presents his “ten solutions,”<sup>16</sup> a plan to revolutionize the criminal trial, reorient the purposes of punishment, and assure victims that the community stands with them in their anger and their grief.

Fletcher is clearly on to something important. He describes the emergence of what he calls the “new political trial,”<sup>17</sup> the high-profile case in which the victim of a criminal offense comes to symbolize an entire group defined by its socially marginalized and legally underprotected status. The core of his plan is that judges should “think of every trial as an example of the new political trial”<sup>18</sup> and move toward “[c]ommunitarian [p]unishment,”<sup>19</sup> in which “[c]onvicting and punishing the guilty is our way of expressing solidarity with those who have fallen prey to the pervasive violence of American life.”<sup>20</sup> He presents his doctrinal proposals as part of a plea for a broader change of legal philosophy and cultural mind-set.

While Fletcher brings us an important subject, topical source material, and several fresh perspectives on reform, his book is less successful in its effort to separate genuine problems from trendy but spurious concerns. On almost every page, wonderful insights compete for attention with misdirected fluff. Too often, Fletcher’s enthusiasm for a good phrase gets the better of his self-proclaimed commitment to staying focused on fundamentals. “Lawyers love to blame imaginary targets,” he writes, in a wonderfully unselfconscious sentence.<sup>21</sup> Perhaps because he was writing for a broad general audience, Fletcher did not attempt to develop his pastiche of ideas or to examine the coherence and effectiveness of his solutions. The resulting book mixes fresh insight and provocative suggestion with overblown language and flawed analysis. Many readers will find it maddeningly erratic.

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12. GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* 4 (1995) [hereinafter *WITH JUSTICE FOR SOME*].

13. *Id.* at 5.

14. *See* AMERICAN BAR ASS'N TASK FORCE ON MINORITIES & THE JUSTICE SYSTEM, *ACHIEVING JUSTICE IN A DIVERSE AMERICA* (1992).

15. *WITH JUSTICE FOR SOME*, *supra* note 12, at 4.

16. *Id.* at 241–58.

17. *Id.* at 2.

18. *Id.* at 245.

19. *Id.* at 256.

20. *Id.* at 6.

21. *Id.* at 4.

The ten proposals themselves constitute a curious *mélange*. Some are sweeping and original but will do little to address the dysfunctions that Fletcher perceives; other proposals are workable but narrow, technical, and almost surely uncontroversial. An odd tension pervades the book, as Fletcher's lofty goals, fervent rhetoric, and impatience with cautious reform serve as packaging for proposals that address only peripheral problems, and mostly in a thoroughly tame manner.

An odd tension pervades Fletcher's core argument as well. If there is one central theme in this work, it is the claim that our trial process shows insufficient concern for the feelings and needs of victims. Yet Fletcher *rejects* the most prominent proposals for enhancing victims' rights. Stripped of his rhetoric, the content of his program would *restrict* (and, in one instance, repeal) new procedural rights for victims. In the end, Fletcher seems largely unpersuaded by his own thesis.

And for good reason. Fletcher's principal claim—that the justice system fails to afford victims a sufficient voice—is far off base, both empirically and normatively. Inattention to the needs of victims was at most a minor cause of the troubling results in Fletcher's eight case studies; the real difficulties lay elsewhere. Fletcher's central normative claim, that “[t]he purpose of the trial is to stand by the victim,”<sup>22</sup> is simply not true and could not conceivably become an acceptable touchstone for reform.

In due course, I will fulfill the reviewer's traditional role by elaborating on these objections and by touting my own agenda. Our underlying problem, I will argue, is not that our legal system still pays insufficient attention to victims but that, more than ever, our society holds superficial, emotion-laden, and powerful—but utterly conflicting—intuitions about just what it wishes to accomplish in the administration of criminal justice. But before I develop that point, it is worth taking time to canvas Fletcher's thought-provoking body of material and ideas.

One feature of my analysis may strike readers as especially surprising. I propose to consider the trouble with trials, and with high-profile trials in particular, without discussing the recent prosecution of O.J. Simpson. Apart from the fact that commentary on the Simpson case is not in noticeably short supply, this Book Review was completed before that trial ended, and there seemed to me to be a danger in trying to revise and tailor my discussion to fit, with 20/20 hindsight, the lessons we now think we have learned from that prosecution. I do not claim to have anticipated the Simpson verdict, although—like many others—I feel in retrospect that I should have. In particular, some of what was written in the original draft of this Review applied quite readily to the Simpson case and to the verdict that was forming, though I did not see all those connections at the time. Accordingly, I have

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22. *Id.* at 256.

chosen to leave my original discussion unaltered and to make no effort to defend its implicit claim that the broad themes developed here should, if true, have relevance for our understanding of what happened in this country's highest-profile trial ever. I will center my discussion on the eight earlier cases that form the core of Fletcher's book and try to extract from them the kind of general lessons that should have wide and lasting application.

## I. THE TRIALS

The "forgotten" victims who were at the center of the original victims' rights movement were just average citizens, "typical" Americans in every way. In the "new political trial," the victim comes to symbolize an entire group defined by its marginal, outsider status. Fletcher discusses his eight trials in four chapters: "Gays," "Blacks," "Jews," and "Women."

Fletcher's first case deals with the 1979 trial of former San Francisco City Supervisor Dan White, who assassinated Mayor George Moscone and openly gay Supervisor Harvey Milk in a fit of pique apparently fueled by homophobic rage. White's claim, subsequently ridiculed as the notorious "Twinkie" defense, was that he lacked the malice necessary for murder because of mental and emotional disturbance aggravated by high-sugar junk foods. When a jury accepted White's theory and found both killings to constitute only manslaughter, San Francisco gays poured into the streets, breaking windows, overturning police cars, and setting fires in an all-night rampage.<sup>23</sup>

Fletcher's second case is the prosecution of four white police officers for the videotaped beating of Rodney King. As all the world knows, the first trial was transferred to a largely white Los Angeles suburb, and when the jury acquitted the defendants, downtown Los Angeles erupted in one of the most violent and destructive riots in American history.

Fletcher treats four cases at length in the chapter devoted to women. Two are well-known rape cases: the 1991 prosecution of William Kennedy Smith for the alleged rape of a woman he had met in a Palm Beach bar, and the 1992 prosecution of heavyweight boxing champion Mike Tyson on charges of raping a contestant in the Black Miss America pageant. Smith was acquitted and Tyson convicted; neither result satisfies Fletcher. In *Smith*, the jury decided only that Smith was not to blame; it had no chance to pronounce on whether the woman, from her own point of view, could legitimately feel victimized.<sup>24</sup> Conversely, in the *Tyson* case, the jury vindicated the victim's feelings by convicting, but it was never permitted to consider whether Tyson might have held a reasonable (though mistaken) belief that she had consented.<sup>25</sup>

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23. *Id.* at 15.

24. *Id.* at 118.

25. *Id.* at 125-31.

Fletcher's next exhibit is *State v. Norman*,<sup>26</sup> in which a woman, who had endured years of brutal abuse, killed her sleeping husband and then sought to raise a battered woman's defense. Fletcher finds the North Carolina Supreme Court obtuse for barring the defense, but he quickly acknowledges the risks in his position by moving to a discussion of the prosecution of the Menendez brothers. In *Menendez*, two grown sons who had killed their parents used claims of years-old abuse to win a hung jury on murder charges—a result Fletcher views as outrageous. Here, he argues, the abuse claims were factually implausible and legally irrelevant. Once again, the system failed, this time because the judge did not exercise proper control over the relevancy of the evidence and the permissible range of expert testimony.

Fletcher recounts with especially vivid freshness the two cases involving Jewish victims. El Sayyid Nosair was tried in the fatal 1990 shooting of Jewish Defense League leader Meir Kahane in a Manhattan hotel. According to Fletcher, the evidence implicating Nosair was overwhelming. Bystanders saw the killer flee the hotel and commandeer a cab; moments later, he ran from the cab but collided with a uniformed postal service officer who exchanged shots with him and brought him down. The wounded suspect—Nosair—was apprehended. There remained only one small opening for the defense. Because the pursuers had not kept their quarry directly in sight, their attention could have been misdirected toward a different taxicab carrying an innocent man. But how to explain the fact that this man then engaged in a shoot-out with a peace officer and that, when he fell to the ground, the weapon that had killed Kahane was found lying beside him?

Undaunted, defense attorney William Kunstler peppered the courtroom with both subtle and overt anti-Semitic innuendo. There were hints, never made coherent, of a conspiracy to plant the gun on Nosair. The jury was swayed; with no Jewish members, it acquitted Nosair on the homicide charges and then (at some cost to conventional notions of logic) convicted him of several lesser offenses, including illegal possession of the weapon. Jews, and many others, were outraged; the trial judge (himself Jewish) sentenced Nosair to the maximum term on the lesser counts.

The other Jewish victim was Yankel Rosenbaum, truly a person in the wrong place at the wrong time. Tragedy had struck a Brooklyn neighborhood where blacks and Hasidic Jews lived in tense proximity. Traveling with police escort, a motorcade carrying the Jewish community's revered Rebbe had gone through an intersection, and one vehicle had collided with an oncoming car, mortally injuring a black child, Gavin Cato. Black bystanders were furious with what they saw as the callousness of the Rebbe's entourage and the indifference of Hasidic ambulance drivers, the first to arrive, to the black child's urgent need for medical attention. When Cato died, blacks stormed into

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26. 378 S.E.2d 8 (N.C. 1989).

the streets for what turned into three days of looting and assaults, a rampage that Fletcher calls "the worst race-motivated riots in New York City's post-Second World War history."<sup>27</sup> On the first night, a few blocks from the site of the accident, a crowd of black teenagers surrounded a Hasidic scholar visiting from Australia; one of the teenagers drew a knife, and in moments Yankel Rosenbaum lay on the hood of a car, bleeding from four stab wounds in the chest.

Police quickly grabbed youths fleeing the scene and brought them to Rosenbaum for identification, but he exonerated several of the initial suspects. Then Lemrick Nelson was captured and brought to the dying Rosenbaum, who spat in his face and named him as the assailant. Mistaken identity was still possible, of course, but the arresting officer found a bloody knife in Nelson's pocket, and tests showed that the blood matched that of Rosenbaum. Yet, in a virtual replay of the Kahane trial, Nelson's defense attorney zeroed in on small inconsistencies in police testimony, and the courtroom echoed with anti-Semitic innuendo and obscure hints of a conspiracy to plant evidence. The jury, largely black and Hispanic and with no Jewish members, acquitted. Fletcher reports that nearly 5000 Hasidic Jews assembled that evening to protest the verdict and demand federal intervention to protect their civil rights.<sup>28</sup>

Outraged by the poor performance of the American trial process in these eight cases, Fletcher concludes that the criminal justice system is deeply flawed. He finds that lawyers and experts are out of control, juries are irrational and out of touch, and victims are mistreated or ignored. To meet the urgent need for radical reconstruction, the second half of Fletcher's book offers a plan to correct the dysfunctions that the eight trials illustrate.

## II. FLETCHER'S SOLUTIONS

Fletcher offers a package of "ten solutions."<sup>29</sup> Before discussing details, it is helpful to have a sense of the whole. The ten points, in Fletcher's words, are:

1. "*Think of Every Case as a New Political Trial.*"<sup>30</sup> Even when victims are not members of an organized group prepared to riot in protest

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27. WITH JUSTICE FOR SOME, *supra* note 12, at 86.

28. The case remains open and continues to stir controversy. Nelson was indicted on federal civil rights charges, but when a federal judge ruled that Nelson should be tried as a juvenile, New York City Mayor Ralph Giuliani and New York Governor George Pataki both protested the decision and called on the Justice Department to appeal it. See Joe Sexton, *Appeal Urged in Ruling on Crown Heights Figure*, N.Y. TIMES, Apr. 14, 1995, at B8. The Second Circuit subsequently reversed that ruling and ordered that Nelson be tried as an adult. See Joseph P. Fried, *Ruling Voids Juvenile Status of Crown Hts. Case Defendant*, N.Y. TIMES, Oct. 18, 1995, at B4.

29. WITH JUSTICE FOR SOME, *supra* note 12, at 241.

30. *Id.* at 242.

against an adverse verdict, Fletcher argues, the judge should treat the victims in each case "as though they represent[] a political force and warrant[] full protection at trial."<sup>31</sup>

2. *"Divide the Verdict into Two Stages."*<sup>32</sup> The jury should declare first whether the defendant's conduct violated the victim's rights and then, if so, whether the violation was excusable.

3. *"Reallocate the Victim's Power from Sentencing to Plea-bargaining."*<sup>33</sup> Victims should no longer be heard at the sentencing hearing, but their consent should be a formal prerequisite to entry of a plea agreement.

4. *"Give the Victim a Role at Trial."*<sup>34</sup> The victim's attorney should be permitted to cross-examine witnesses.

5. *"Establish Diverse Juries."*<sup>35</sup> The number of peremptory challenges should be reduced to no more than three for each side.

6. *"Abolish Changes of Venue."*<sup>36</sup>

7. *"Establish an Interactive Jury."*<sup>37</sup> The jury should be permitted to submit written questions that the judge or the witnesses would be requested to answer.

8. *"Psychiatric Experts Should Not Testify about Issues of Moral Responsibility."*<sup>38</sup>

9. *"Experts in Police-Brutality Cases Should Not Testify about Departmental Policy."*<sup>39</sup>

10. *"[Move] Toward Communitarian Punishment."*<sup>40</sup> We should recognize that "[t]he purpose of the trial is to stand by the victim."<sup>41</sup>

### III. APPRAISING THE REMEDIES

The themes underlying Fletcher's ten-point program are only loosely related. Though his concern is primarily with the justice system's inattention to crime victims, many of his proposals focus instead on the mismanagement of expert testimony and shortcomings in the jury's decisionmaking process. Those two problems clearly do pose difficulties in modern trials, and they did so specifically in the book's eight cases. Yet most of Fletcher's solutions fail to address the real difficulties underlying the performance of juries and experts; his proposals do little more than chip ineffectually at the tips of these icebergs.

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31. *Id.* at 243.

32. *Id.* at 245.

33. *Id.* at 247.

34. *Id.* at 248.

35. *Id.* at 250.

36. *Id.* at 252.

37. *Id.* at 253.

38. *Id.* at 254.

39. *Id.* at 255.

40. *Id.* at 256.

41. *Id.*

When we move to Fletcher's concern for victims, the diagnosis itself becomes more controversial. For me, it is not the right diagnosis at all. First, insufficient concern for victims was at most a minor cause of the troubling results in Fletcher's eight cases. The problems relating to the jury and to the management of testimony, which Fletcher correctly highlights, were undoubtedly the main villains in these stories. Second, Fletcher himself evinces telling ambivalence about paying more attention to victims. Most of his steps toward that goal are deliberately constricted, and one of his most important solutions—the proposal to end victim participation at sentencing—works explicitly (and in my view unnecessarily) *against* that goal.

Fletcher's specific procedural proposals are nonetheless imaginative and worth examining for their own sake. In this part, I consider each of his proposed remedies in some detail, without insisting that they justify themselves solely in terms of the concern-for-victims wrapping in which Fletcher packages them. Fletcher's proposals for a more interactive jury and for restrictions on peremptory challenges can make useful (though limited) contributions to improving jury performance. In contrast, Fletcher's suggestions for limiting expert testimony are mostly unwise and, even if adopted, would have little or no practical effect. Finally, the "victims' rights" elements in his reform package are largely unworkable and counterproductive—even for the victims who are their ostensible beneficiaries.

Readers willing to thread their way through the thicket of detailed appraisals to follow will notice that, like Fletcher's package of recommendations, my critique is eclectic and lacks a common theme. Yet to work through Fletcher's proposals—which prove, by turns, workable but narrow, unsound and ineffectual, or inconsistent and counterproductive—does suggest its own moral: that Fletcher's program does not reflect a coherent vision, but rather epitomizes the very indecision and ambivalence that constitute prominent causes of our culture's criminal justice predicament.

#### A. *Strengthening Juries and Expert Testimony*

The adversary system and jury fact-finding are the vaunted guarantors of accuracy and common sense in the American criminal process. But Fletcher's cases illustrate just how easily these safeguards fail. Lawyers and experts manipulate voir dire to produce a jury that is not an impartial cross section of the community, but rather unrepresentative of it. The advocates can manipulate testimony and courtroom atmosphere to distract the jury with irrelevancies and to play upon its least attractive prejudices. Far from vindicating civics-book theory, our trial process can generate verdicts that flagrantly affront common sense.

Fletcher surely understands that these difficulties are largely confined to high-profile cases in which the defendant can mount a vigorous, fully funded defense. In the criminal cases that fall outside this category (well over ninety percent of the total),<sup>42</sup> the most frequent obstacle to an accurate verdict is not the excesses of adversariness that hold center stage in this book, but rather the *absence* of a vigorous, conflict-free defense.<sup>43</sup> Yet high-profile cases obviously matter a lot. To protect the jury from the stresses of widely publicized, intensely adversarial trials, Fletcher wants more interaction between the jury and other trial participants, more diverse juries, and more restrictions on the testimony of expert witnesses.

### 1. *An Interactive Jury*

Fletcher believes that the legal system almost invites jurors to misinterpret the law and the evidence by requiring them to sit passively through the trial and by imposing absolute secrecy on their deliberations.<sup>44</sup> He describes a number of postverdict interviews in which jurors are caught in errors of reasoning and mistakes about subtle points of fact and law that arose in their cases. He concludes that more active juror involvement could prevent such errors and thereby avoid controversial verdicts and shocking mistakes. He therefore recommends that the jury be encouraged to suggest questions for the witnesses, to put questions to the judge as he reads his instructions, and to ask the judge for guidance on legal questions that arise during its deliberations.

Because Fletcher is more at home in doctrinal analysis than in cultural reportage, the lesson he draws from the jury interviews seems a bit too simple. Given the high stakes and intense emotions that surrounded his cases, it remains an open question whether the often-defensive juror comments in these interviews provide a reliable window into the thought process (or intuition process) that produced a problematic verdict. Yet Fletcher's analysis of the juror interviews makes no effort to separate genuine rationale from post hoc rationalization. It is hard to feel confident that clarification of factual and legal fine points would change many jurors' minds in cases of this sort.

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42. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992) (noting that in urban jurisdictions roughly 80% of defendants are indigent, and most others can afford only modest flat fees payable in advance).

43. See generally Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993) (exploring solutions to problems inherent in indigent criminal defense).

44. WITH JUSTICE FOR SOME, *supra* note 12, at 236–39.



In less highly charged cases, those that are *not* examples of Fletcher's "new political trial," an interactive jury might be more likely to produce constructive improvements. In this respect, Fletcher's call for an interactive jury is one of the most attractive of his suggestions. Unfortunately, however, he does not consider the practical problems posed by more active jury involvement,<sup>45</sup> problems that will loom large in any comprehensive effort to reform a trial process that is already overlong and overladen with opportunities for reversible error. That said, Fletcher's suggestions for an interactive jury remain intriguing and well worth further study.<sup>46</sup>

## 2. *Diverse Juries*

To produce more diverse juries, Fletcher proposes to restrict peremptory challenges to no more than three each for the prosecution and the defense.<sup>47</sup> He develops a thoughtful argument for what many litigators will consider an unthinkable violation of the natural order. As Fletcher shows, peremptories are too easily manipulated to implement invidious prejudices and to eliminate intelligent or independent-minded jurors. The recent line of Supreme Court cases barring gender-based and race-based discrimination in the use of peremptories<sup>48</sup> offers little protection here because the Court is unlikely to extend the equal protection limitation beyond race and gender to groups

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45. If seriously encouraged, juror questions could easily disrupt and extend the trial. Moreover, if judges were to explain the law extemporaneously rather than to read boilerplate instructions tested by decades of appellate litigation, the possibilities for reversible error would grow exponentially. But compelling evidence suggests that juries do not understand these boilerplate instructions. *See, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12-17 (1982). Plain explanations in question-and-answer format are clearly preferable to boilerplate instructions that no juror could possibly follow; if reversible error ensues, that result seems preferable to maintaining the legal fiction that jurors understand the incomprehensible. Nonetheless, a less risky course might simply be to draft instructions in ordinary English, which would reduce the need for questions and extemporaneous judicial explanations. *See, e.g.*, William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981); Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198 (1984).

46. Those interested in the subject of jury dysfunction will find a comprehensive discussion of the issue in STEPHEN J. ADLER, *THE JURY* (1994). Adler's book presents vivid portraits of many less-well-known trials and focuses systematically on the jury's value and limitations. Adler suggests an array of promising reforms, including interactive questioning (as in Fletcher's proposal), elimination of exemptions from jury service, steps to make jury service less burdensome, complete elimination of peremptory challenges, drastic restriction of challenges for cause, instruction on the law at the outset of the trial rather than at the very end, shortened trial time, and encouragement of juror notetaking. *Id.* at 218-40.

47. Fletcher also notes that part of the reason for unrepresentative jury panels is that many citizens go to great lengths to avoid jury service. To reduce the heavy proportion of no-shows (only two million of the approximately five million people called to jury service in the United States every year respond by appearing in court), he sensibly proposes steps to make jury service less onerous by providing more amenities, raising jury compensation, and limiting the juror's commitment (as many jurisdictions now do) to one day or one trial. *See* WITH JUSTICE FOR SOME, *supra* note 12, at 223.

48. *E.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994); *Batson v. Kentucky*, 476 U.S. 79 (1986).

defined by sexual orientation, national origin, and the like,<sup>49</sup> and because pretextual motivations can too easily be invoked to hide prohibited biases.<sup>50</sup>

These problems have prompted some critics to propose the complete elimination of peremptories.<sup>51</sup> Stephen Adler's recent book<sup>52</sup> suggests the virtual elimination of challenges for cause as well.<sup>53</sup> But these reforms would sacrifice the legitimate functions of juror challenges, and are probably unnecessary. Fletcher's compromise makes sense: Preserve enough peremptories to give each side a sense of participating in the selection of the panel and to permit exclusion of the occasional juror who seems extraordinarily unsympathetic or biased; at the same time, keep the number of peremptories small enough to ensure that neither side can systematically exclude individuals who happen to be intelligent or independent.

Both Fletcher's approach and the more radical assaults on juror challenges are all too cautious, however; none of these solutions can possibly ensure consistent success in obtaining diverse panels. In a jurisdiction that randomly selects its juries from a population that is 15% black, 14.2% of the jury panels can be expected to have *no* black members.<sup>54</sup> Similarly, except in a community like San Francisco, which has an unusual concentration of openly gay men and lesbians, jury panels will seldom have gay (or openly gay) members, even if those panels are chosen purely at random. Yet Fletcher concludes, no doubt correctly, that no law can guarantee representation on the jury panel for groups that identify with the victim.<sup>55</sup>

Concern about achieving jury diversity is now widespread, however, and a number of ambitious solutions (not addressed by Fletcher) are on the table. In Hennepin County (Minneapolis), where people of color represent 9% of the population, a task force has recommended a procedure to ensure that every twenty-three-person grand jury has at least two minority members.<sup>56</sup> Jury commissioners in DeKalb County, Georgia, use computers to maintain proportional representation among thirty-six different demographic groups on every venire.<sup>57</sup> Professor Albert Alschuler has proposed setting quotas that

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49. WITH JUSTICE FOR SOME, *supra* note 12, at 220–21. As the Court noted in *J.E.B.*:

[W]here peremptory challenges are made on the basis of group characteristics other than race or gender . . . , they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life.

*J.E.B.*, 114 S. Ct. at 1428 n.14.

50. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 175–76 (1989).

51. See, e.g., *Batson*, 476 U.S. at 107 (Marshall, J., concurring).

52. ADLER, *supra* note 46.

53. See *id.* at 221–24.

54. The probability of drawing 12 consecutive whites from a pool that is 85% white is  $(0.85)^{12} = 0.142$ .

55. WITH JUSTICE FOR SOME, *supra* note 12, at 251.

56. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 DUKE L.J. 704, 707–11 (1995).

57. *Id.* at 711. Alschuler also discusses quota-like efforts to enhance diversity in several other jurisdictions. *Id.* at 711–12.

would guarantee proportional representation for racial minorities on each petit jury panel, not just on the venire.<sup>58</sup> In order to increase the likelihood of diversity on actual panels and to block covert racial motivation in the exercise of peremptories, states could also require that jurors struck by peremptory challenge be replaced by other jurors of the same race.<sup>59</sup> An intense debate now rages over the desirability and constitutionality of these and related measures.<sup>60</sup> Fletcher's more cautious proposal for limiting peremptories is a sensible step forward. By itself, however, it will do little to assure diverse juries or representation for outsider groups that may see themselves as the targets of high-profile offenses.

### 3. *Police Experts*

Fletcher addresses two of his ten "solutions" to the problem of "imperialistic" experts who distract the jury by manipulative and irrelevant testimony.<sup>61</sup> The first of these two solutions is prompted by a particular quirk in the first Rodney King trial. Sergeant Charles Duke—a police expert testifying for the defense—offered a detailed, frame-by-frame analysis of the famous videotape in an effort to show that King's movements could be seen as attempts to roll or rise in ways that threatened the officers. Duke also testified about Los Angeles Police Department policies relating to the use of force in apprehending suspects.

Fletcher notes that the prosecutors failed to meet this challenge effectively and "allowed Duke to shape the jury's perception,"<sup>62</sup> largely because the state's rebuttal expert, Commander Michael Bostic, "was discredited as a desk man without adequate experience on the street."<sup>63</sup> Yet Fletcher also believes that Duke's testimony was irrelevant and therefore not admissible in the first place. To avert similar errors in the future, Fletcher includes as one of his ten major planks a proposal that "Experts in Police-Brutality Cases Should Not Testify about Departmental Policy."<sup>64</sup>

The departmental policy point is a narrow detail in Fletcher's larger agenda, but it is symptomatic of the ways he sometimes proves an unreliable

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58. *Id.* at 712–13.

59. *Cf. id.* at 724 n.84 (noting that a minimum quota would in effect require that struck jurors be replaced by other jurors of same race, whenever peremptory challenges reduced the number of minority jurors below the level mandated by quota).

60. *See, e.g., id.*; Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993); Andrew Kull, *Racial Justice*, NEW REPUBLIC, Nov. 30, 1992, at 17; Jeff Rosen, *Jurymantering*, NEW REPUBLIC, Nov. 30, 1992, at 15. A related issue is whether the jury should be a deliberative or a representative body. *See* JEFFREY ABRAMSON, *WE, THE JURY* 245–50 (1994).

61. WITH JUSTICE FOR SOME, *supra* note 12, at 230.

62. *Id.* at 47.

63. *Id.*

64. *Id.* at 255.

guide to the lessons of his cases. His skimpy description of the Duke testimony gives no specifics on what departmental policy Duke cited or how he related it to the facts of the case. Did this witness really claim, as Fletcher implies,<sup>65</sup> that departmental policy authorized the use of excessive and unnecessary force on an unthreatening suspect? If so, Fletcher is surely right that the testimony was irrelevant. More likely, however, departmental policy would be used to illustrate how officers are trained to determine whether a suspect *does* pose a threat and whether defensive force *is* necessary. This is just the sort of testimony that often proves crucial in enabling prosecutors and tort plaintiffs to win their police brutality suits.<sup>66</sup> Fletcher never makes clear why he would regard testimony of this sort as irrelevant or how he could justify excluding it.

Nor, in any event, does Fletcher's focus on departmental policy capture what made Duke's testimony so powerful: the dissection of King's movements frame by frame and the resulting argument that each baton blow was a response to a potentially threatening act.<sup>67</sup> This argument cried out for effective rebuttal, and it seems sanguine to expect that merely stripping away the departmental policy strand of the testimony would significantly diminish its impact. Whether Fletcher's proposal is technically sound or not, it misses what is most problematic in the law and psychology of police-brutality prosecutions.

#### 4. *Mental Health Experts*

Testimony by psychiatric and psychological experts played a central role in three of Fletcher's eight cases. Such testimony contributed to the mitigation of punishment in the double homicide of Mayor George Moscone and Supervisor Harvey Milk; supported the claim in the *Menendez* case that child abuse could lead to "rewiring of the brain," which prompted the hung jury; and was vital to determining the significance of battered woman's syndrome in the *Norman* case. Fletcher wants to dismiss expert testimony in cases like the first

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65. *Id.* at 231.

66. See, e.g., *Heflin v. Stewart County*, 958 F.2d 709, 714, 716-17 (6th Cir. 1992) (upholding jury verdict for family of pretrial detainee who hanged himself in county jail; plaintiffs' expert witness testified about state's jailer training program, which instructed jailers that hanging victim should never be left undisturbed "to protect the 'scene of a crime,'" that victim instead should be immediately cut down so that first aid and breathing assistance can be supplied, and that jailers' failure to do so in this case was "contrary to their training and common sense"). Such testimony seems equally relevant in the converse situation: The fact that actions of a police officer or jailer conformed to training would be relevant to (though not determinative of) the question of whether any mistake of fact was reasonable and in good faith.

67. As Kimberle Crenshaw and Gary Peller note:

Once the video was broken up like this, each still picture could then be reweaved into a different narrative about the restraint of King, one in which each blow to King represented, not beating one of the 'gorillas in the mist,' but a police-approved technique of restraint complete with technical names for each baton strike (or 'stroke').

Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, in *READING RODNEY KING/READING URBAN UPRISING* 56, 59 (Robert Gooding-Williams ed., 1993).

two, but he thinks that the testimony should have played a greater role in *Norman*.

Fletcher proposes a seemingly powerful device for threading this needle: "Psychiatric Experts Should Not Testify about Issues of Moral Responsibility."<sup>68</sup> On first reading, the proposal sounds extraordinarily broad. Would it preclude use of psychiatric testimony in support of battered women, and thus aggravate the problems that troubled Fletcher in the *Norman* case? Does Fletcher mean to abolish all psychiatric testimony in insanity cases? Does he mean, in effect, to abolish the insanity defense altogether? Not at all. Carefully read, Fletcher's solution is in fact extremely narrow. All he means to recommend is that states adopt the provision of the Federal Rules of Evidence that permits experts to testify on any background facts relevant to a material issue but bars them from expressing a conclusion on the "ultimate issue" as to "whether a defendant 'did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.'"<sup>69</sup>

The narrow, technical character of Fletcher's proposal should not in itself be a ground for criticism, but what is surprising is that this "solution" is unresponsive to Fletcher's own concerns. It does preserve room for the kind of testimony he thinks should be admissible, like the battered woman's syndrome evidence in *Norman*, provided such testimony is deemed relevant to the elements of a claim of self-defense. That latter issue, however, was the stumbling block in *Norman*, and Fletcher's proposal does nothing to make it easier to overcome. Conversely, the "solution" does nothing to keep out the kind of psychiatric testimony that Fletcher (rightly) finds objectionable. The problem in the *Moscone-Milk* case was not ultimate-issue testimony but a substantive standard of malice aforethought under which the most slippery psychiatric concepts became relevant. Fletcher's rule would do nothing to change the result in that case.<sup>70</sup> Similarly, Fletcher's "solution" fails to lay a glove on the testimony he found so problematic in the *Menendez* case: The expert's claim about a possible "rewiring of the brain" was not ultimate-fact evidence, so even under Fletcher's rule it remains admissible if it is relevant<sup>71</sup>

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68. WITH JUSTICE FOR SOME, *supra* note 12, at 254.

69. *Id.* at 255 (quoting FED. R. EVID. 704(b)); *cf.* *United States v. Sheffey*, 57 F3d 1419, 1426 (6th Cir. 1995) (holding that Rule 704(b) does not bar testimony to effect that murder defendant was acting "recklessly and in extreme disregard for human life," where terms used do not have "specialized meaning in law different from that present in the vernacular").

70. A subsequent change in California homicide law did abolish diminished mental capacity as a defense to murder. *See People v. Saille*, 820 P.2d 588 (Cal. 1991). Fletcher approves of this change but does not mention any other substantive redefinitions of the excuses that would be necessary to avert the problems he discusses. *See WITH JUSTICE FOR SOME*, *supra* note 12, at 35.

71. *But cf.* FED. R. EVID. 403 (relevant evidence inadmissible if prejudicial effect substantially outweighs probative value).

and inadmissible if it is not. The real problem—whether it *is* relevant—is one that Fletcher's solution does not address.<sup>72</sup>

The dispositive (and very tough) question here concerns the extent to which atypical mental conditions and background conditions of abuse or duress should constitute an excuse. The power of experts is inextricably tied to this substantive question of criminal responsibility. The results Fletcher deplors have almost nothing to do with the admissibility of ultimate-fact testimony and everything to do with the unresolved state of our intuitions about the moral and legal relevance of excuses. In Part IV of this Review, I will have more to say about the nature of that ambivalence and its connection to the systemic stresses that Fletcher reports.

### B. *The Role of the Victim*

Fletcher's list of solutions includes several interesting and concrete suggestions for ways to enhance the victim's role in the criminal process. The main components of his program are proposals to abolish changes of venue, to divide the jury's verdict into two parts, and to change the victim's formal status in litigation. Fletcher intends all of the proposals to advance his last and most basic reform, which would require society to recognize that "[t]he purpose of the trial is to stand by the victim."<sup>73</sup>

The point that needs to be made first here is that the purpose of the criminal trial is *not* to stand by the victim. The purpose of the trial is to determine whether the defendant is factually and legally responsible for an offense.<sup>74</sup> Indeed, the Supreme Court has sometimes implied that this truth-determining function should be virtually the *sole* task of the criminal trial.<sup>75</sup> Presently, our society remains committed to a small number of devices that can sometimes interfere (mostly in modest ways) with the primary truth-seeking

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72. Fletcher himself seems uncertain about whether his proposed reform would render Menendez expert Ann Burgess's rewired-brain testimony inadmissible. Compare WITH JUSTICE FOR SOME, *supra* note 12, at 235 ("[T]he vague standard I have proposed would probably not prevent . . . Burgess from offering the jury [her] supposedly scientific wisdom about . . . the rewiring of the brain.") with *id.* at 255 ("This [proposal] might be enough to prevent a witness like Ann Burgess from testifying that child abuse . . . had led to the rewiring of Erik's brain . . .").

73. *Id.*

74. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) ("[T]he trial of a criminal case [is] a decisive and portentous event. . . . Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.").

75. During the heyday of the Burger Court, prevailing criminal procedure decisions "flirted incessantly" with this guilt-or-innocence model, which would "forsak[e] goals outside the immediate, guilt-determining function of the system." Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 445, 449 (1980). As Professor Seidman notes, however, the Burger Court's actions did not live up to its guilt-or-innocence rhetoric: "All the while protesting that the system should be concerned solely with the defendant's guilt or innocence, the Court succumbed to the familiar temptation to use the system for purposes unrelated to the determination of factual guilt." *Id.* at 449.

function of the trial.<sup>76</sup> But we remain acutely aware of the costs of procedural rules that serve goals other than determining the truth, and we are rightly suspicious of efforts to burden our trial process by adding more rules of that sort.<sup>77</sup>

Any thoroughgoing effort to reshape the criminal trial to serve the victim, at the expense of truth seeking, would have dramatic and totally unacceptable costs.<sup>78</sup> It is therefore not surprising that when Fletcher turns to specifics, he produces only narrowly hedged, technical devices that will do little or nothing to implement his fervent stand-with-the-victim rhetoric. Those who want to make the criminal trial more victim-friendly will surely be disappointed with what Fletcher has to offer: His proposals are mostly unworkable and ineffective solutions to the wrong problem.

### 1. *A Two-Stage Verdict*

A major sore point for committed victim advocates is the proliferation of criminal law excuses that permit defendants to win acquittal by proving lack of intent, "reasonable" mistake, emotional disturbance, diminished mental capacity, irresistible impulse, insanity, and the like. If truly radical solutions are up for discussion, we might expect a full-fledged "Victim's Manifesto" to advocate the complete abolition of excuses. Such a step can no longer be dismissed as unthinkable radical: Considerable authority has now accumulated for abolishing each of the defenses just mentioned. Numerous cases and statutes reject the diminished capacity defense,<sup>79</sup> discard the Model Penal

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76. See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 196-205 (1983) (noting that no American court could adopt a pure guilt-or-innocence model and that functions other than guilt determination are intrinsic to criminal procedure).

77. This recognition is prominent not only in "conservative" Court opinions narrowing the scope of procedural safeguards, see, e.g., *supra* note 75, but also in commentary from the opposite end of the spectrum, see, e.g., Seidman, *supra* note 75, at 442 (discussing tension between the trial as a process of accurate guilt determination and "the trial as a method of fighting proxy battles over issues of social policy"). Professor Seidman refers to several cases in which a "criminal trial [became] a symbolic confrontation over issues of social policy" and was therefore "deflected from narrow questions of guilt or innocence to broader social or political issues." *Id.* at 442-43 n.35. In assessing cases that Fletcher would consider examples of the "new political trial," Seidman concludes that "[i]ndividualized truth is often the first casualty in large-scale struggles over the meaning of social justice." *Id.* at 442.

78. Of course, no victim wants someone to be incorrectly identified as the perpetrator. But the victim's interests clash at many points with society's interest in the accurate assessment of criminal responsibility. A trial process designed to "stand by the victim" will look different from one designed to promote the accurate determination of legal responsibility. Differences would appear in the following contexts: setting and administering the burden of proof, controlling testimony, adjusting the balance between probative value and prejudicial effect, determining the meaning and effect of such concepts as negligence and consent, and deciding the appropriate scope of excuses.

79. See, e.g., CAL. PENAL CODE § 28(a) (West 1988); *State v. Provost*, 490 N.W.2d 93 (Minn. 1992) (holding that expert psychiatric evidence is never admissible to prove that defendant lacked required mental state, even in limited context of effort to reduce first-degree to second-degree murder); *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982) (disallowing expert psychiatric testimony, unrelated to insanity defense, on question of defendant's ability to form specific mental state); see also SANFORD H. KADISH & STEPHEN

Code concept of extreme emotional disturbance in favor of highly restrictive categories of legally adequate provocation,<sup>80</sup> deny a defense for irresistible impulse or for impaired capacity to control due to mental disease,<sup>81</sup> abolish the insanity defense completely,<sup>82</sup> permit conviction for serious felonies like rape on the basis of a negligent mistake,<sup>83</sup> or hold that even a "reasonable and good faith" mistake about the victim's consent is not a defense to a charge of forcible rape.<sup>84</sup>

Fletcher says little about these issues, but it becomes apparent, by reading between the lines, that he favors few if any of these positions. He stresses the limitations on society's right to inflict suffering and the moral imperative of assuring that criminal punishment is deserved.<sup>85</sup> He emphasizes the importance of requiring proof of mens rea and the other ingredients of moral fault.<sup>86</sup> At bottom, Fletcher is committed to preserving the excuses. He is, in effect, *opposed to* a major plank in the victims' rights platform.

How, then, can Fletcher claim to offer a rallying cry for victims? How does he pursue his vision of a criminal trial in which society "stand[s] by the victim"?<sup>87</sup> His device for achieving this evocative symbolic goal turns out to be a complex procedure: the bifurcated verdict. To meet the victim's need for vindication without subjecting defendants to unjust punishment, Fletcher would require the jury to state first whether the victim's rights were violated, and then, if they were, to state whether the defendant should be held responsible for that violation. Through this technique, Fletcher hopes to offer victims a chance for vindication while protecting defendants from conviction in the absence of fault.

Ingenious compromise? Or formalistic illusion? The social psychology that connects form and symbol to public attitudes is too elusive to justify an automatically cynical and dismissive appraisal. Nonetheless, one is entitled to be skeptical about the value of Fletcher's "solution." Fletcher does not consider the formidable practical obstacles to a bifurcated verdict procedure.<sup>88</sup> More

J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 1004-06 (6th ed. 1995) (summarizing current state of law).

80. See, e.g., *Girouard v. State*, 583 A.2d 718 (Md. 1991); *State v. Shane*, 590 N.E.2d 272 (Ohio 1992); see also KADISH & SCHULHOFER, *supra* note 79, at 419, 423 (summarizing limited acceptance of Model Penal Code approach).

81. See, e.g., *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984); see also KADISH & SCHULHOFER, *supra* note 79, at 953-54 (summarizing current state of law).

82. See, e.g., IDAHO CODE § 18-207 (1987); *State v. Korell*, 690 P.2d 992, 996 (Mont. 1984).

83. See, e.g., *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975); *State v. Smith*, 554 A.2d 713 (Conn. 1989); *State v. Oliver*, 627 A.2d 144 (N.J. 1993).

84. See, e.g., *State v. Reed*, 479 A.2d 1291 (Me. 1984); *Commonwealth v. Ascolillo*, 541 N.E.2d 570 (Mass. 1989).

85. See WITH JUSTICE FOR SOME, *supra* note 12, at 199-200.

86. See *id.* at 125-27.

87. *Id.* at 256.

88. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1901-02 (1984) (describing costs associated with special verdicts in juries' determinations of justification and excuse). Also, Fletcher's approach might sometimes backfire by affording juries a new way



basically, he offers little but speculation to back his claim that a mixed verdict ("violation but excused") will frustrate victims less than would an outright acquittal. The victim who yearns for genuine vindication, not to mention the satisfaction of seeing the violator punished, could regard a partial verdict as cold comfort, if not mere pap.

Victims from marginal or disempowered groups are a particular concern for Fletcher. He believes that the bifurcated verdict will help protect such victims, because a correctly reasoning jury should understand that the perceived value of the victim's life cannot affect its appraisal of whether the defendant qualifies for an excuse.<sup>89</sup> Blacks, gays, and other minorities, however, may not be so sure that real-world juries will follow Fletcher's well-founded, but subtle, line of thought.<sup>90</sup> Indeed, Fletcher's own raw material contradicts him here, because in his first case, the Dan White prosecution, the law already permitted a kind of bifurcated verdict: Voluntary manslaughter represents a finding that the killing was unjustified but partially excused. It was just such a verdict that outraged gays, convinced them that the community did not properly value the life of an openly gay man, and sent them rampaging through the streets of San Francisco.

In substance, Fletcher's bifurcated-verdict proposal represents a complex tactic for *preserving* a generous conception of the excuses. This may be the right position to advocate, but it is not an argument that Fletcher attempts to develop here. And it is certainly not one that will advance his stated goal of creating a trial process that will become "our way of expressing solidarity with those who have fallen prey to the pervasive violence of American life."<sup>91</sup>

## 2. *Abolish Changes of Venue*

Ever since the first Rodney King trial in Simi Valley, commentators have deplored changes of venue that shift a criminal trial to a community vastly different from the place where the offense occurred. Had the King case been transferred to Oakland, a city with a socioeconomic profile roughly similar to that of Los Angeles, the verdict (or at least the public acceptability of that verdict) almost surely would have been different. A number of reformers have therefore recommended the adoption of rules requiring that the new venue and the original be socially and economically as similar as possible.<sup>92</sup>

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to avoid convicting a sympathetic defendant; Fletcher's proposal might actually make conviction more difficult in a situation like that of the Rodney King beating, for example.

89. WITH JUSTICE FOR SOME, *supra* note 12, at 180.

90. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (detailing evidence that juries in death penalty cases attribute greater value to lives of white than black victims).

91. WITH JUSTICE FOR SOME, *supra* note 12, at 6.

92. See M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1935-42 (1993) (discussing California, New York, and New Jersey proposals); Laurie Levenson, *Change of Venue and the Role of the Criminal*

Fletcher finds this approach too tame. For him, even a shift to a demographically similar venue uproots the case from the community in which injury was experienced and in which healing is needed. "The crime cannot be abstracted from the soil on which it occurred," he writes;<sup>93</sup> "the community 'owns' the crime that occurs within its borders."<sup>94</sup> So Fletcher recommends that changes of venue be abolished altogether. He believes it naive, in an era of nationwide media coverage, to think that prejudicial publicity in a case like the King beating will be any stronger in Los Angeles than elsewhere: "[I]n the era of CNN and Court TV, there are no high-profile cases that escape the notice of even the most remotely situated citizens."<sup>95</sup> Thus he would rely on voir dire to ferret out jurors with unshakable convictions about the case and otherwise would assume that jurors familiar with the case could put aside preconceptions and attempt to render a fair verdict.<sup>96</sup>

Fletcher is surely right to stress the local community's strong claim to participate in adjudicating an assault on its security. And nationwide, saturation publicity can make it as difficult to empanel an unbiased jury in any new venue as it would be where the crime occurred. In any event, exposure to publicity should not invariably disqualify jurors who can put aside what they have heard and render a decision on the basis of the evidence they hear in court.

But the move from these claims to a complete bar on changes of venue is a dangerous non sequitur. Even for cases fitting Fletcher's paradigm, those involving high-profile crime that prompts news reports throughout the country, a change of venue could still be essential to a fair trial. Before the bombing in Oklahoma City, every law professor could have quickly sketched the hypothetical now before us in real life: a federal office building and part of a city's downtown destroyed, the federal courthouse and the offices of the Federal Public Defender both heavily damaged, the Federal Defender's car crushed by debris from the explosion, initial defense appointments falling to attorneys who were themselves mourning friends killed in the blast.<sup>97</sup> Of course, lawyers not tied to the victims can be found locally or nearby, and a courtroom can be set up in an undamaged local building. But how many of the Oklahoma jurors will not feel personally touched by the attack? Perhaps enough to cobble together a panel of twelve, but it will not be easy to find them.

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*Jury*, 66 S. CAL. L. REV. 1533 (1993) (discussing Rodney King case in particular); see also *State v. Harris*, 660 A.2d 539 (N.J. Super. Ct. App. Div. 1995) (holding that trial court must consider racial demographics in selecting county for change of venue or as source for foreign jury).

93. WITH JUSTICE FOR SOME, *supra* note 12, at 171.

94. *Id.* at 252.

95. *Id.* at 253; see also *id.* at 174 ("[I]n an era of nationwide supermarket tabloids and CNN, the notion of securing a jury unaffected by publicity seems fanciful.")

96. *Id.* at 253.

97. See Pam Belluck, *Lawyers Ask to Drop Out of Bombing Case*, N.Y. TIMES, Apr. 25, 1995, at A18.

The more important reasons to preserve changes of venue arise in commonplace crimes. The police-brutality charge that is a major event for Des Moines or Duluth will not get the same national media attention as the Rodney King beating video. Fletcher appears to believe that there is no longer any such thing as a local media market. Yet even in the 1990s, large numbers of people get their information from local papers and the local segment of the nightly news. The Rodney King video received extensive airtime everywhere in the nation; Peoria's latest child-abduction case is not even publicized in every town in Illinois.

Nor are potential jurors always able to put aside what they learn about a case through the media. Those who formed an opinion about the King case from watching the videotape could be expected to ignore first impressions and listen with an open mind to arguments about what the tape showed. Can we be equally confident about seating a juror who knows that an accused murderer gave an inadmissible confession, or that the defendant has seven prior convictions for kidnapping and raping small children? What if almost everyone in Peoria knows all of this? Still no change of venue to a town where those facts were never reported?

Fletcher characterizes a change of venue as, in effect, a peremptory challenge exercised against an entire community.<sup>98</sup> The analogy would be apt if either side were permitted to impose a change of venue without giving reasons. In fact, changes of venue are granted only when the prosecution or defense can show that prejudicial publicity will make it extremely difficult to empanel an unbiased jury where the crime occurred.<sup>99</sup> A change-of-venue motion is a challenge for cause, and extremely strong cause must be shown.<sup>100</sup> Fletcher's change-of-venue proposal is thus an interesting but ultimately unworkable means to enhance community participation in the criminal process.

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98. WITH JUSTICE FOR SOME, *supra* note 12, at 252. Fletcher attributes this analogy to Akhil Amar. *Id.* at 287 n.8.

99. See AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 8-3.3(c) (1986); see also *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (denial of due process to refuse request for change of venue where "people of [the] Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail").

100. See, e.g., *Simmons v. Lockhart*, 814 F.2d 504, 511 (8th Cir. 1987) (holding that, despite extensive pretrial publicity, jury was not "irretrievably poisoned by the publicity"; refusal to change venue therefore did not violate due process); *People v. Whitehead*, 508 N.E.2d 687, 693 (Ill. 1987) (finding prejudicial pretrial publicity so "hysterical" as to require change of venue); *State v. Swafford*, 897 P.2d 1027, 1035 (Kan. 1995) (finding no abuse of discretion in denying motion for change of venue, even though pretrial publicity was extensive and local newspapers had detailed defendant's prior convictions; motion need not be granted unless defendant proves that "it is impossible to get an impartial jury"); *Willingham v. State*, 897 S.W.2d 351, 357 (Tex. Crim. App. 1995) (holding that denial of motion for change of venue was proper in absence of "pervasive, prejudicial and inflammatory" publicity that would prevent selection of impartial jury).

### 3. *Change the Victim's Formal Status*

Fletcher wants to enhance the victim's status and opportunities to participate actively in the criminal process. He proposes three procedural changes—victim participation at trial as a formal party, a victim veto over the terms of any plea agreement, and exclusion of the victim from participation in sentencing. Fletcher's first suggestion is inspired by the "civil party" mechanism in continental European criminal trials; the victim has the right to participate in the litigation as a formal party. Nonetheless, Fletcher recognizes that the fairness of the trial would be at risk if the victim—freed of the constraints applicable to an ordinary witness—were permitted to speak directly to the jury without observing the normal rules of relevance and without facing cross-examination. He therefore narrows his proposal, permitting the victim, through counsel, only to suggest questions that the judge could put to any witness.

Thus limited, Fletcher's recommendation carries few major costs, apart from the obvious danger of adding another layer of complexity to the already cumbersome American adversarial trial.<sup>101</sup> Under the control of a competent and energetic judge, the proposal is probably worth trying. Nonetheless, like many of Fletcher's other suggestions, this proposal contributes little to the needs of victims. Except in homicide cases, most victims are crucial witnesses and thus are almost sure to testify. Their sense of exclusion arises because the rules of relevance often bar them from giving voice to their deepest emotions about the crime or the offender. Attorneys control the flow of their testimony, and victims may have little feeling of direct communication with the jury. But this is just the sort of participation that Fletcher's solution would also exclude. Even if indigent victims were provided counsel at state expense (a problem Fletcher does not consider), the chance to ask a question through the formal structuring mechanisms of litigation seems unlikely to meet the felt need for a personal role in the criminal process.

The stage where that need *can* be met, by giving the victim a chance in open court to speak directly and personally about his or her feelings, is at sentencing. Ironically, at the very stage where victim involvement will best serve the victim's interests and will least threaten the defendant's,<sup>102</sup> Fletcher wants to *eliminate* victim participation.<sup>103</sup>

The second piece of Fletcher's package is a recommendation to give victims a veto over any proposed plea agreement. If no terms acceptable to the victim could be negotiated, the prosecution would have to take the case to trial. As is, "victims' rights" legislation in many jurisdictions requires the prosecutor

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101. Several of Fletcher's other recommendations carry a similar risk. *See supra* notes 45, 88 and accompanying text.

102. *See infra* text accompanying note 117.

103. WITH JUSTICE FOR SOME, *supra* note 12, at 198–201, 247–48.

to consult the victim before finalizing a plea bargain;<sup>104</sup> Fletcher's proposal would take this development one step further by making the victim's consent essential.

It is easy to picture the howls of protest that Fletcher's proposal will evoke from seasoned practitioners and "practical" people of all sorts: Constrain the prosecutor's discretion over plea bargaining? Increase the probability that cases may have to be tried? Unthinkable—or so they will say. I do not share these concerns. Prosecutors negotiating guilty pleas have too few incentives to respect fully the victim's and the public's interests in an adequate penalty for the offender.<sup>105</sup> Defense attorneys' interests often diverge from those of their clients; as a result, they may encourage settlement even when a trial would be in their clients' interests.<sup>106</sup> More checks on the exercise of prosecutorial discretion and more trials would be all to the good. But the problem for Fletcher's proposal is in the principle that lies at its core. Why should a person who would be instantly disqualified from serving on the defendant's jury be granted a veto over the terms of a disposition by plea? If the plea bargaining system is to be retained at all, why should victims have control over decisions that we want to further public, not private, purposes?

As structured, moreover, Fletcher's proposal would only marginally affect the trial rate or the kinds of bargains struck in cases that settle. And the proposal would not bring victims into the process in any genuinely satisfying way. These failures result from the ease with which a victim's veto could be evaded. Fletcher's proposal requires victim consent only for a *bargain*, not for an unbargained (or "open") plea. Indeed, extending the victim veto power to include open pleas would be difficult to justify. But this qualification renders Fletcher's safeguard porous. Prosecutors could conduct pre-charge or pre-indictment negotiations over charges to which the defendant would enter an open plea. A bargain could then be struck whether the victim liked it or not,<sup>107</sup> or defendants could enter open pleas and hope for leniency from the judge. In order to keep guilty pleas flowing, a system of tacit concessions would undoubtedly develop.

Either way, a system of plea bargaining would remain in place, and—as before—there would be no need for victim consent. The only difference would be that Fletcher's proposal would eliminate the more limited forms of consultation usually required when prosecutorial bargaining is explicit. In fact, Fletcher's system would leave the victim more marginalized than ever, because

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104. See *supra* note 3 and accompanying text.

105. See Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50–53 (1988).

106. See Schulhofer, *supra* note 42, at 1988–90.

107. Fletcher might want to give the victim a veto over the charging decision as well, but it would be hard to justify such a veto, especially with regard to charge reductions prompted by bargains for information in other cases.

the bargaining system would be transferred to the judicial sentencing process, and at that stage Fletcher would exclude the victim completely.<sup>108</sup>

Even if prosecutors did not use subterfuge to evade the victim veto, a requirement of victim consent would have little bite because, in practice, victims tend to want what the prosecutor wants them to want.<sup>109</sup> Reinforcing the prosecutor's influence over victim choices is, again, the lack of any provision (either in Fletcher's proposal or in the real world) for state-funded counsel to advise the victim. Without such advice, most victims will have little alternative but to defer to the prosecutor's judgment that, in light of applicable law and the evidence, the proposed bargain is a good deal. A victim veto that carries little practical bite might still be worth having if it were to give victims the feeling of empowerment; there is an advantage here, but one that could easily be lost if prosecutorial actions were to leave victims feeling manipulated.

The last piece in Fletcher's package is his proposal to eliminate the victim's role at sentencing. More precisely, Fletcher would enhance victim control over sentencing decisions in the guilty-plea process, but would completely prohibit victim participation in sentencing decisions made after trial. In a program ostensibly designed to "stand by the victim,"<sup>110</sup> the latter element is surely a surprising feature, and one expects to find Fletcher forced to it by overwhelming concerns for practicality and fairness. Instead, the proposal is tossed in with almost no supporting argument.

Fletcher's entire discussion of sentencing is focused on the role of victim-impact statements at capital sentencing hearings. He argues that victim-impact statements improperly distort jury sentencing and that such statements, when they detail victim harms that the defendant had no reason to foresee, are irrelevant to the just-deserts issue that should control the death penalty decision.<sup>111</sup> Yet the step from these arguments, which are eminently sound and well presented, to a position barring any victim participation in any sentencing hearing, is a non sequitur.

Death penalty procedure is anything but representative of the sentencing process in noncapital cases. Noncapital sentencing rarely involves a jury, and it operates without the elaborate constitutional restrictions that govern in death penalty cases. Victim participation in noncapital sentencing has been

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108. WITH JUSTICE FOR SOME, *supra* note 12, at 198–201, 247–48.

109. Empirical studies of victim decisions much less complex than whether to agree to a plea bargain (such as regimes in which police give weight to the victim's desire to press charges) indicate that the victim's expressed preference tends to conform to police preferences. See, e.g., Wayne A. Kerstetter & Barrik Van Winkle, *Who Decides? A Study of the Complainant's Decision to Prosecute in Rape Cases*, 17 CRIM. JUST. & BEHAV. 268, 279–81 (1990) (finding that complainant's decision to prosecute in rape cases was frequently influenced by preferences of detectives).

110. WITH JUSTICE FOR SOME, *supra* note 12, at 256.

111. *Id.* at 198–201.

commonplace for the past two decades and takes a variety of forms.<sup>112</sup> Victims may testify personally in court, or they may relate their views to the probation officer who prepares the presentence report. The victim may describe the defendant's demeanor and behavior at the time of the offense and the scope of injuries deliberately inflicted (all matters obviously relevant to desert), or the victim may relate unforeseeable harms that many scholars believe a sentencing judge should ignore.<sup>113</sup> The victim may or may not be permitted to ask for imposition of a particular sentence. The judge's decision may or may not be governed by formal guidelines structured to prevent an emotional appeal from influencing the actual sentence determination.

The available evidence presents a mixed picture of the effects of victim participation under these various permutations.<sup>114</sup> There is much room for criticism of the ways in which victim participation has sometimes been implemented.<sup>115</sup> But a carefully structured procedure can meet victims' legitimate need for a chance to participate and give voice to deeply felt concerns, while minimizing the risk of an improper sentence. Sentencing guidelines may provide a particularly promising vehicle for permitting only the "right" kind of victim influence on the sentencing judgment.<sup>116</sup> In any case, wholesale condemnation of victim participation under all circumstances is surely unwarranted.

Fletcher's unsupported broadside against victim participation at sentencing is especially ironic. Acknowledging, as all of us must, that victims have a powerful moral claim to our attention and a legitimate role to play in the criminal process, we must decide where in the process that role is best situated. Because the purpose of the trial and plea bargaining stages is *not* to "stand by the victim" but to ascertain whether the defendant is guilty, victim participation at these stages (except as a witness) is by definition likely to complicate the proper performance of the relevant legal mission. It is when we know we have an offender, not just a defendant, that the victim is most strongly entitled to be heard. Yet Fletcher's package of proposals gets the emphasis wrong at every point, pushing for more victim participation where it does not belong (and where it inevitably will be restricted), while seeking to exclude victim participation at the very place where it is most appropriate

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112. See Hall, *supra* note 4, at 238–41; Henderson, *supra* note 1, at 986–87.

113. See, e.g., Hall, *supra* note 4, at 255–57; Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

114. See Hall, *supra* note 4, at 246–48.

115. See, e.g., *id.* at 248–65.

116. See, e.g., *United States v. Sheffey*, 57 F.3d 1419, 1431 (6th Cir. 1995) (stating that prosecutor's emotional outburst at sentencing of drunk driver convicted of murder (where outburst included recounting personal losses prosecutor had suffered due to drunk drivers) did not require resentencing where sentencing judge imposed sentence consistent with U.S. Sentencing Guidelines). *But see* Hall, *supra* note 4, at 261–65 (noting danger of aggravating victims' sense of alienation and distrust by encouraging victim participation under structured sentencing regimes that render victim's contribution irrelevant).

and can be allowed freer rein.<sup>117</sup> The trade that Fletcher offers, eliminating the victim's role at sentencing and increasing it at the trial and plea stages, is a bad deal for victims and a destructive one for sound policy.

In sum, Fletcher's ten "solutions" are poorly grounded, unresponsive to most of his own major concerns, and likely to produce inconsequential or unsalutary results. Nonetheless, his palpable frustration with our trial system cannot be dismissed. Fletcher is surely right to insist that something in our criminal justice process is deeply amiss. His vivid examples should prompt us to search for a better understanding of precisely what has gone wrong.

#### IV. WHAT AILS US?

Fletcher's cases, and their many cousins in contemporary criminal law, pose a puzzle: How can we explain the willingness of twelve sane human beings unanimously to endorse what often seem to be deplorable verdicts? Is the explanation simply that juries are unrepresentative, racially bigoted, anti-Semitic, homophobic, or just plain dumb? Sometimes these explanations seem all too plausible. But are they the whole story? I doubt it.

Fletcher's cases vividly illustrate trends we see elsewhere every day, especially in the increasing prominence of the "abuse excuse"<sup>118</sup> in ordinary social discourse, pop psychology, the mass media, and (not unrelatedly) the criminal law that such a society produces.<sup>119</sup> One can only speculate on the reasons for this development. The growth of psychiatric specialization and pseudoscience, and the sophistication of the defense bar in making effective use of forensic specialties, may be parts of the story. Yet recent developments cannot easily be attributed to these factors, which were well in place in the 1950s, when mental impairment defenses expanded, and in the 1970s, when the opposite trend prevailed.

To understand the developments of the 1990s, and the dysfunctions of what Fletcher calls the "new political trial," we must look not to psychiatry, not to juries, not to the legal system, and certainly not to modern society's all-purpose scapegoat, the lawyers. Pogo's over-quoted aphorism is still apt: The enemy is us.<sup>120</sup>

Our culture has become ever more fascinated by excuses. Tales of extreme victimization resonate for an ever wider audience and more easily gain

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117. Another way in which victims can express their concerns and society can express its solidarity—without distorting the process of guilt determination—is through victim compensation. Procedures for compensation may include the hearing of restitution claims after conviction and the consideration of victims' claims in a separate proceeding before a victim-compensation board. Fletcher does not discuss victim compensation. For an appraisal, see Henderson, *supra* note 1, at 1007–20.

118. ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE* (1994).

119. See, e.g., ROBERT HUGHES, *CULTURE OF COMPLAINT: THE FRAMING OF AMERICA* (1993).

120. See *Walt Kelly, Pogo Creator, Dies*, N.Y. TIMES, Oct. 19, 1973, at 46 ("We have met the enemy, and they is us.").



credence—sometimes justifiably so. The victims, once pitied or despised for what was seen as weakness or masochism, are now “survivors,” with status that brings respect. Jurors sometimes accept the abuse arguments (or “fall” for them) not because they are stupid or perverse, but because they are just like the rest of us: They have a capacity for empathy, a desire to believe the best of people, and a reluctance to impose criminal punishment when they cannot find moral blame.

Yet verdicts that exonerate touch something else in us too: the fear of violence, the need for protection, the concern that decisionmakers of good conscience will be conned by manipulative predators who will win freedom only to offend again. Our culture’s attitude toward excuses is deeply conflicted; we are fascinated by abuse claims, simultaneously sympathetic to and repelled by them.

These conflicting impulses reflect tensions that are universal and eternal, but the legal and social ambivalence now seems stronger than ever. Society and our juries are more sympathetic to claims of abuse, more willing to lend such claims factual and normative credence, and yet simultaneously more preoccupied with questions of personal security, more attracted to punitive responses, and thus, at the level of formal law and policy, more vehemently opposed to lenient sentences and to recognizing mental and emotional excuses.<sup>121</sup> In a society afflicted with this level of ambivalence, is it any wonder that trials lose their focus, that judges and juries lose their bearings, that verdicts frequently seem bizarre? The social response to individual cases reflects strong, almost enthusiastic receptivity to abuse claims and a powerful drive to accept mental and emotional excuses, but this response coexists with a pervasive and powerful drive to do just the opposite—to deny the factual validity or normative relevance of excuses and to adhere to strict punitive attitudes in the name of effective crime control.

In this volatile brew of inconsistent instincts, the inevitable human foibles have more than their usual capacity to affect results. Ignorance, confusion, or petty prejudice can easily determine whether a jury takes the path of identification and sympathy or the equally plausible path of antipathy and fear. When the jury can be offered two compelling but diametrically opposed ways to frame the moral inquiry, it should be no surprise that powerful stereotypes driven by race, gender, and ethnic bias so often control the choice. The instability of our instincts enlarges the space in which manipulative advocacy and raw prejudice can dominate.

Why are we simultaneously so punitive, so unempathetic, especially at the wholesale level of abstract policy, and yet more ready than ever to find reasonable doubt, justification, or excuse at the retail level of individual cases? Society itself may simply lack consistent instincts here, but there could be a

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121. I am grateful to Catherine Hancock for a perceptive discussion of this phenomenon.

crude logic underlying the phenomenon. As our fears drive us toward ever harsher sentencing policies, capital punishment and life sentences proliferate; mandatory minimums become more common, and those that exist are pegged at ever higher levels; prison programs such as weightlifting and college studies are replaced by hard labor on chain gangs; "three-strikes-and-you're-out" legislation brings lesser felons, including nonviolent felons, within the ambit of mandatory life sentences; and "two strikes" proposals loom as the inevitable next step.<sup>122</sup> Increasingly, the ground rules for our "war" on crime are set not by the Geneva Convention but by a scorched earth, take-no-prisoners philosophy (literally, for advocates of capital punishment).

Fighting this kind of war requires a certain view of the enemy. It is not the view that contemporary car buyers hold of the German or Japanese worker but the view that permitted Dresden and Hiroshima.<sup>123</sup> The uncompromising legal doctrines and harsh sentences that increasingly characterize our criminal law presuppose that view of the criminal offender—someone hostile to civilized values, devoid of human sensibilities, utterly "other." The conception of the criminal offender as alien enemy fuels savage punishments, and such punishments in turn require that we demonize those on whom they will be dropped.

The sticking point for this scorched-earth conception of criminal justice comes when the defense gets its turn at trial. Cultural demonization of the criminal offender provides the emotional energy to condemn without remorse and eventually to pull the lethal switch, but it also leaves a large opening for defense counsel, because that picture of the generic Mobster or Mugger seldom corresponds to the facts of the particular case. If a guilty criminal is defined as a moral monster who deserves execution or isolation from human society forever, then the individual on trial—a three-dimensional person with human frailties and human needs—probably will not fit the picture, even if he is a privileged youth who has, without provocation, blasted his own mother and father to smithereens.

The punitive orientation of contemporary culture, with its remorseless blame game, affords the defense another opening as well. The claim that the defendant is not entirely "other," that he does not fully fit "the picture," is a negative, purely defensive, claim. But the best defense is a good offense, as

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122. See, e.g., Mark Curriden, *Hard Time*, A.B.A. J., July 1995, at 72 (describing recent steps to replace prison exercise programs with chain gangs); Jerome Skolnick, *Wild Pitch: "Three Strikes, You're Out" and Other Bad Calls on Crime*, AMERICAN PROSPECT, Spring 1994, at 30 (detailing recent developments in sentencing policy).

123. See, e.g., JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR 15-23* (1986) (arguing that, during World War II, American officials consciously set out to generate propaganda presenting extremely negative stereotypes of Japanese). Dower also argues that American policymakers deliberately chose to demonize the German and Japanese people as a whole, not just their leaders, *id.* at 322 n.8, and that American propagandists quickly reversed their strategy after the war's end: The Chinese, formerly portrayed as innocent and sympathetic victims of Japanese aggression, became Communist enemies and were saddled with virulently negative racial stereotypes. *Id.* at 309-10.

the defense attorneys in all of Fletcher's cases knew. So the strategy of excuse is two-sided—the abused or impaired defendant is not a moral monster who deserves blame and remorseless punishment, but someone else in the picture (often the person the defendant has harmed) *is* a moral monster who *does* deserve blame and punishment. In cases as diverse as the *Smith* and *Tyson* rape trials, the Rodney King beating case, the *Norman* battered-spouse prosecution, both of the *Bobbitt* prosecutions, and of course the *Menendez* homicide case, we can see this dynamic at work, as the defense seeks simultaneously to humanize the defendant and to demonize the victim.<sup>124</sup> The coexistence of a punitive blame game with increasing receptivity to the abuse excuse is therefore less paradoxical than symbiotic; each reinforces the other.

Judges and jurors with a traditional conception of the trial enterprise might regard both sides of the modern, two-pronged defense strategy as repugnant, or at least irrelevant to the task at hand. Judges could easily keep the arguments within bounds, and the trial would stay focused on the question of whether the defendant, however human, committed an unjustified, inexcusable act. But in the current cultural climate, it is only natural that the humanity of the defendant and the evil character of the victim (or the prosecutor or the police) seem to be powerfully relevant considerations. The more we believe that “the purpose of the trial is to stand with the victim,” the more urgently we will need to focus on determining who the *real* victim is. If the attempt to locate genuine evil and genuine victimhood is what a trial should be about, the skewed verdicts of so many of Fletcher's cases lose some of their absurdity and take on a certain perverse coherence.

But the symbiotic relationship between the blame game and the abuse excuse proves self-defeating and dysfunctional. We are driven to ever more drastic penalties that we then hesitate to impose, at least whenever the defendant is in a position to finance a capable defense. We rail against lawyers and the inefficiency of cumbersome trial processes but find ourselves drawn to open-ended psychological defenses and blame-shifting strategies that make both problems worse. An attempt to prevent these malfunctions by giving the victim a formal trial role (mediated by another set of lawyers) is about as promising as an attempt to douse a fire with gasoline.

If law enforcement policy and individual trials are so easily derailed by unstable and intrinsically conflicting intuitions, part of the reason is that we conceive of crime as a morally clear-cut transgression, with an evil perpetrator on one side and a blameless victim on the other. Too often that conception simply is not true to life. When the defendant is a battered wife who killed her abuser, a child who killed her abusive parents, a police officer who beat an

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124. When the character of the person killed affords the defense little opportunity for a plausible “blame the victim” argument (the prosecution of O.J. Simpson for the slayings of Nicole Brown Simpson and Ronald Goldman is an illustration), defense blame-shifting strategies may turn instead to the behavior of prosecutors and the police.

uncooperative suspect, or any of countless similar situations, the defendant eludes the “evil perpetrator” designation; it becomes plausible to think of the injured party as the “real” offender and to think of the defendant as the actual victim. Yet that view is unstable as well, because the injured party is seldom *that* bad, and the defendant’s actions are seldom totally blameless. Normatively complex, high-profile trials typically command attention precisely because they involve offenders who are themselves victims and victims who have themselves transgressed.<sup>125</sup> By assuming that the search for “the” victim has an all-or-nothing answer, our culture almost guarantees that such trials will become roller coasters of emotional manipulation.

Though our recent politics and contemporary culture leave little room to recognize it, there is another way. The alternative might be called the way of tragic necessity—not an emotion-driven blame game of remorseless punishment for unmitigated evil, but a considered policy of modulated punishments imposed to further complex social purposes. Punishments are modulated because society understands their costs and imposes them not in anger, but with regret. The animating force is not righteous indignation, but only the recognition of two complex necessities. First, we must condemn and seek to deter criminal acts when the perpetrators could have done otherwise—even if their motivations evoke sympathy. And second, we must punish for the sake of victims, not because they are saints, but because, whatever their own failings, they are human beings whose lives and interests a well-ordered society must protect.

The great English philosopher of the criminal law, Sir James Stephen, famously urged that “it is morally right to hate criminals.”<sup>126</sup> Our society is in no danger of ignoring his injunction. What we do seem to have forgotten is his simultaneous warning that such sentiments “are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement.”<sup>127</sup> The stresses and failures that we observe in our trials, in our criminal law, and in our society at large will not yield to another round of societal emotion and moral outrage. Those responses, though spawned by justified impatience to solve our problems, only serve to make the difficulties worse.

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125. For a discussion of this phenomenon in the context of battered women’s self-defense claims, see Stephen J. Schulhofer, *The Gender Question in Criminal Law*, SOC. PHIL. & POL’Y, Spring 1990, at 105, 116–30.

126. 2 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81 (London, MacMillan 1883).

127. *Id.* at 82.

## V. CONCLUSION

Only the most determined Polyanna or bar association cheerleader can continue to lavish unbridled praise on modern America's criminal trial system. The distortions are clear and recurring, but the solutions are elusive. Procedural reform can produce some improvement, mostly by reducing peremptory challenges, streamlining voir dire, insisting on tighter control over adversarial theatrics and expert witnesses, and imposing strict relevancy limits on testimony, cross-examination, and lawyer's advocacy. But short of complete abolition of the criminal jury trial—a step I would not welcome and that the Constitution forbids<sup>128</sup>—procedural change will have only modest impact. Egregious malfunctions will remain.

Jury trial, to its credit, guarantees that the administration of the criminal law will be infused with the values, the intuitions, and the everyday working morality of the ordinary citizens who constitute our community. But this virtue of jury trial takes on the appearance of vice when intuitions about justice are volatile or conflicting and when the community loses its moral compass. No amount of procedural reform can possibly succeed, nor should it succeed, in producing jury verdicts that are insulated from the moral confusion that permeates our culture.

When juries and judges, along with their fellow citizens outside the courtroom, remember that a criminal trial is not a vehicle for moral appraisal of the victim or the police; when judges are prepared to keep the trial narrowly focused on issues relevant to guilt; when we leave adequate room for excuses that negate awareness of wrongdoing and capacity to avoid harm; when we remember that mental abnormality, emotional disturbance, troubled childhood, an abusive partner, and similar predisposing conditions do not by themselves negate responsibility; when we have a penalty structure appropriate to the complexities of personality and experience that lie in the background of a criminal act; when we are able to think of punishment as a tragic and preferably modulated necessity, rather than as a righteous condemnation of a wholly evil offender, to vindicate a wholly innocent victim—then, perhaps, our well-conceived adversary procedures and our valuable jury system will have a chance to produce rational appraisals of guilt and stern, but appropriately moderated, punishments.

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128. U.S. CONST. amends. VI, XIV; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that Fourteenth Amendment incorporates Sixth Amendment right to jury trial).

