WHO SHOULD GET WHAT WHEN GOVERNMENTS CHANGE THE RULES? A NORMATIVE THEORY OF LEGAL TRANSITIONS

Fergus Green

The London School of Economics and Political Science

A thesis submitted by Rohan Fergus Harley Green to the Department of Government of the London School of Economics and Political Science for the degree of Doctor of Philosophy, London, August 2019

DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it).

I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party.

I declare that my thesis consists of 91,412 words.

ABSTRACT

To advance important social values it is often necessary to change the law. Yet changes in the law create not only 'winners', but also 'losers'. Paradigmatic examples are workers and corporations in the coal industry that are adversely affected by climate change laws. Should governments take steps to avoid or mitigate transitional losses and gains? If so, for whom and under what conditions, and why? This is the normative 'problem of legal transitions', the subject of this thesis. Various theories to resolve the problem have been proposed by scholars in the normative branches of political, legal and economic theory. The first part of this thesis critically evaluates the four dominant families of theories: property theories (in the classical liberal and libertarian tradition); efficiency theories (in the 'law and economics' tradition); legitimate expectations theories; and justice theories (the last two in the liberal-egalitarian tradition). The 'wide reflective equilibrium' method is employed to evaluate both the implications of each theory in concrete cases and the antecedent (e.g. ontological) commitments in which it is grounded. The existing theories—which tend to entail state responses that are either extremely conservative (e.g. full grandfathering or compensation) or purely reformative (let all losses and gains lie where they fall)—are found wanting. The second part of the thesis specifies and defends a new theory—Adaptive Responsibility Theory—which forges a principled middle path. The appropriate state response is shown to be a function of two kinds of reasons: *wellbeing* reasons and *fairness* reasons. Crucially, these reasons have both a direction (conservative vs reformative) and a magnitude/weight. This opens up the wide middle ground between the extremes, justifying a central role for *adaptive* transition policies, the aim of which is to ensure that people have the time and adaptive capabilities needed to adapt successfully to new conditions.

ACKNOWLEDGMENTS

The first and foremost acknowledgement goes to my Supervisor, Kai Spiekermann. Kai was the ideal supervisor—supportive, encouraging, attentive, and constructively critical. In the earlier part of the PhD, Kai was more than accommodating of my exploratory reading and experimentation, but always provided a steer when necessary to ensure I stayed on course. In the later stages, he read and commented on numerous chapter drafts with lightning quick turnaround speeds. His sharp analytical eye has improved many of my ideas and arguments. The finished product owes much to his sage guidance, for which I will be forever grateful.

My Advisor, Christian List also provided guidance and feedback at various points in the project. In particular, Christian provided helpful comments on an earlier version of Chapter 4, and on a paper on "currencies" of loss/gain, material from which was later redistributed across what are now Chapters 2–6.

The Political Theory Group at the LSE has provided a stimulating intellectual community for the past four years in which to incubate this project. Opportunities to present my work to the Group on three occasions helped to sharpen the "currencies" paper and Chapters 4 and 5. Faculty and graduate students in the Group who provided helpful suggestions are too numerous to mention, but I wish to single out for thanks Laura Valentini, who took an early interest in the project and provided encouragement and helpful suggestions along the way, David Axelsen, who provided insightful comments on Chapter 4, and Signy Gutnick-Allen, who gave helpful suggestions on the history of political thought.

More widely at the LSE—where I have been based in different capacities for the last seven years—I have incurred intellectual debts to many extraordinary individuals. Among these, the strongest influence on the present project, and on my political-philosophical education more generally, was Joe Mazor. Joe supervised my masters dissertation on legitimate expectations in climate policy transitions—which was in many ways a prototype of the PhD thesis—and taught me in three subjects of my MSc in Philosophy & Public Policy. Chapter 3, in particular, bears heavy traces of Joe's influence. Also instrumental in my political-philosophical education during that MSc year were Luc Bovens and Emily McTernan.

Between masters and PhD were wedged two fruitful years at the LSE's Grantham Research Institute on Climate Change & the Environment, where I worked as a Policy Analyst and Research Advisor to Nick Stern. Working with Nick and other brilliant colleagues at the Institute was an extraordinary experience in its own right, but also helped to cement some of the ideas for this thesis. Nick's emphasis on the dynamics of economic transformation, and the need to equip people to embrace change, has been a spur to my development of an "adaptivist" approach to transitions. During the PhD, I've benefited from opportunities to discuss climate-related aspects of my work on transitions with other Grantham colleagues, in particular via the Research Network on Energy Workforce Transitions, the Governance and Legislation Research Group, and a reading group on "just transitions" in 2018.

The International Inequalities Institute's Leverhulme Program provided a third intellectual home at the LSE during my PhD. Niki Lacey and David Soskice have been extraordinarily generous with their time and ideas. Niki's influence on the thesis radiates in my discussions of "the self" and on the ontological underpinnings of my theory more generally (especially Chapter 6.2). David's "varieties of capitalism" framework has profoundly shaped my wider thinking about politics, and was a key motivating factor behind my development of a practice-based approach to the allocation of risks of legal change, which is central to my Fairness Principle (Chapter 8). Also at the III, I'm grateful to John Hills for helpful discussions about wealth taxation and about transition policy targeting the energy-poor in the context of climate mitigation. Thanks also to Andy Summers, who kindly shared with me his working paper on "loss" in the law, which influenced my thinking on the "currency" issue.

My term abroad in the School of Philosophy at the Australian National University (Sept.–Dec. 2018) was thoroughly enjoyable. I'm especially grateful to Bob Goodin for facilitating my visit, and for helpful discussion and feedback on early versions of Chapters 5 and 8. Opportunities to present those early-version chapters at the ANU PhilSoc Seminar (Chapter 5) and the Graduate Moral, Social & Political Theory Seminar (Chapter 8) yielded further useful feedback. Ten-herng Lai also provided helpful comments on the latter. Many illuminating conversations with my friend and Canberra flatmate Mark Fabian influenced my thinking on wellbeing (Chapter 6). Mark also gave helpful comments on Chapters 6 and 7.

The parts of the thesis on legitimate expectations benefited from my attendance at the conference on Justice and Legitimate Expectations, held in Graz during June 2016. I presented there an early version of a paper that later appeared in a special issue of *Moral Philosophy and Politics*, various parts of which are in the thesis—especially Chapter 1.6. That paper benefited from comments at the conference, especially from Sabine Hohl and Alex Brown, and in written form from Eric Brandstedt, Kai Spiekermann, Joe Mazor, two anonymous reviewers and the guest editors of the special issue (Lukas Meyer, Pranay Sanklecha and Thomas Pölzer). Chapter 4 also benefitted from an airing at the Warwick Graduate Political and Legal Theory Conference in February 2019 and, in an earlier guise, from the comments of two anonymous reviewers at the *Journal of Political Philosophy*.

A trip to the US for the International Studies Association conference (relating to my climate work) in April 2018 also enabled me to have two very helpful meetings relating to my thesis. The first was with Barbara Fried—whose work has shaped my thinking on so many of the issues central to this thesis—who gave generously of her time at short notice. The second was with Oded Na'aman, whose work on emotional processes and intertemporal dimensions of the self has also influenced my thinking on personal adaptation to change.

In addition to providing funding to attend some of the above-mentioned conferences, the LSE also financed this project through a four-year LSE PhD Studentship, for which I'm most grateful. I'm also grateful to the John Monash Foundation (Australia) for its financial support during my MSc, MRes and the first year of the PhD. My work on the Coal Transitions Project in 2017–18 was ultimately funded by the KR Foundation and proximately funded by the University of Melbourne, via John Wiseman at the Melbourne Sustainable Society Institute, and the Australian National University, via Frank Jotzo at the Centre for Climate and Energy Policy. Though separate from the PhD, the work I did on that project honed my thinking about adaptive transition policy measures (Chapter 9) and resulted in a working paper that became a co-authored Synthesis Article, published in *Climate Policy*, with Ajay Gambhir.

In London, I've been blessed to have a small, close-knit circle of friends who have provided social and intellectual nourishment over many years. I cannot thank them all here by name, but I thank them, nonetheless. A subset of the academics among us—Erin Nash, Liz Morrow,

Diane Bolet, Reuben Finighan and I—found ourselves in different ways engaging with the philosophy and/or politics of loss and losers, and so established a reading group on this subject that proved helpful to me in developing a number of the ideas in the thesis. Erin Nash also provided helpful written comments on Chapter 6 and has, more generally, been a wonderful travel-mate on this philosophical journey we've been on since the MSc. To my friends who were also flatmates over different stages of the PhD years—Sally Davies, Federico Mor, Liz Caldwell and Reuben Finighan—I owe an additional thanks, not only for their homely companionship and many thesis-related conversations, but for politely enduring my cello practice. Among my friendship group, a special thanks goes to Sally Davies, who has been the dearest of friends since we were first-year undergraduates in Melbourne many years ago. My thinking about "the self" (especially Chapter 6.2) was in large part worked out through countless conversations with Sal as we explored this complex construct, and the powerful but often sub-surface work it tends to do in political thought, through the surprisingly congruent lenses of feminist political theory and 4E philosophy of mind. Sal also provided helpful comments on Chapters 1 and 6, and on the various discussions of liberal models of the self that are interspersed throughout Chapters 2–5.

17,000 kilometres away in Melbourne, my parents, Jenny and Stuart, have more than bridged the geographic gap with love and support. The existential anchor this provides makes a difference in ways that they and even I probably do not recognise. I thank them for this, and for all they've done over the years to get me where I am.

Two months before submitting this thesis my maternal grandma, Elsie, died aged 102. I know she would have been proud of me for completing the PhD, and I thank her in memoriam for her love and kindness throughout my life.

In the first year of my PhD, in what turned out to be the most consequential university seminar I've ever attended, I met Diane Bolet. I was already enjoying the PhD experience, but sharing the remainder of it with her has made these years the happiest of my life. I'm particularly grateful for her support and understanding over the last few, intense months of thesis writing. Her ideas, her humour, her generosity, and her companionship brighten my every day. Thank you for everything.

TABLE OF CONTENTS

CHAPTER 1. INTRODUCTION

1.1 LOST IN TRANSITION

What we owe to individuals and corporations who lose out when the law changes is a difficult normative question that pits the value of legal stability against the value of legal change. Given the prevalence of legal changes throughout the history of law-governed societies, and the enormity of policy challenges that confront us today, it is a question that has been surprisingly under-analysed by normative theorists. What prompted me to ask it was my personal involvement in one such episode of major reform—an episode that vividly illustrates the normative and political stakes of 'the problem of legal transitions'.

The episode begins in my native Australia in the hot, dry summer of 2007. With much of the country sweltering through a prolonged drought, the body politic of the world's largest coal exporter was beginning to reckon with the inconvenient truth of climate change. A conservative government led by self-proclaimed climate change sceptic John Howard was entering its eleventh straight year in office—an election year. But it was looking stale. Over four terms in office, it had done virtually nothing to tackle the issue of Australia's ballooning greenhouse gas emissions and fossil fuel exports—a fact that would become a major electoral liability. In the November 2007 federal election—dubbed by some observers as the world's first climate change election (Chubb 2014, 4)—the Australian Labor Party led by Kevin Rudd was swept to victory. A central pillar of its election campaign was a promise to introduce an economy-wide carbon emissions trading scheme to tackle climate change.

What unfolded over the subsequent six years of Labor Government must rank as one of the greatest policy and political failures of the 21st century: a political party of government and its two successive prime ministers were destroyed by the fiendish politics of carbon pricing. Transitional losers from these reforms, and the poorly managed attempts by the Government to placate them with transitional assistance policies, were central plotlines in this story.

The most important of these plotlines featured Australia's coal-fired power generators—among them, in particular, the privately-owned power stations located in the Latrobe Valley,

two hours east of Melbourne. These ageing behemoths produced 90% of the electricity for the state of Victoria from brown coal, the most greenhouse gas-intensive of all fossil fuels. The workers in these power plants and in the adjacent coalmines, as well as the regional communities they underpinned, faced what seemed to many like an existential threat from carbon pricing. This sentiment was echoed in other regions of Australia that depended on carbon- and energy-intensive industries like coalmining, steel production and aluminium smelting. One might think that these workers and communities would have been the object of any sensible government's deliberations about transitional assistance. Yet it was the foreign owners of the Latrobe Valley power plants that captured the bulk of government attention. Under Prime Minister Rudd's proposed carbon pricing scheme, the plants' owners stood to lose hundreds of millions of dollars in the capital value of their assets. To protect these assets, they waged a "fierce, orchestrated and relentless campaign" to undermine public confidence in the scheme—threatening blackouts and economic chaos—as a basis for killing it politically or extracting billions of dollars in "compensation" (Chubb 2014, 26).

The Rudd Government severely mismanaged the generators' (that is, the owners') claims during the long process of carbon pricing policy development from 2007–2010. The original policy document on the carbon pricing scheme, the *Green Paper* of July 2008, contained no coherent, principled statement on the question of transitional assistance. In vague bureaucratese, it simply proposed that a "limited amount of direct assistance" be provided to generators to "ameliorate the risk of adversely affecting the investment environment" (Commonwealth of Australia 2008, 370).

The absence of clear and compelling normative principle at the heart of this proposal effectively left the Government with no basis other than raw political calculation for deriving specific transitional assistance policies for the generators. This much was evident in the succession of wildly variant "compensation" offers the Government produced at different stages of the policy process, with each new figure succeeding only in encouraging the generators to escalate their demands (Chubb 2014, 42–43). The *White Paper* of December 2008, for example, proposed compensating the generators (as a group) in the form of free

emissions permits worth a whopping AU$3.9 billion (£2.2 billion; USD$2.6 billion).[1] By mid-2009, when the ink on the proposed scheme legislation was dry, the Government had committed to pay the coal-fired generators a staggering AU$7.3 billion (£4.1 billion; USD$4.9 billion) worth of free carbon permits spread over ten years (Chubb 2014, 206).

In his magisterial account of Australian climate politics in this period, *Power Failure* (2014), journalist-turned-academic Philip Chubb describes the wider impact on the political process of the Government's escalating compensation offers to the generators:

> The wild swings in the fortunes of the generators made it obvious there was confusion behind the scenes. It undermined public confidence in the policy process, which contributed to a perception of a lack of leadership and eroded voter support. The generators continued to press their advantage. The government's final response [the AU$7.3 billion in free permits] did not quieten them but still managed to alienate another major stakeholder, the environmental lobby, which was appalled by the size of the handout. (Chubb 2014, 43)

"The inability to handle the generators", argues Chubb, "became a major cause of the fiasco that followed", in which the Rudd Government abandoned its own carbon pricing reform in April 2010 before it had been passed into law. This move triggered a slump in Rudd's popularity—what, many thought, did he stand for if not tackling what he had earlier called "the great moral challenge of our generation" (ibid 3, 112)? Rudd's decline in popularity, in turn, prompted a collapse in his support in the Labor caucus, leading nervous MPs to dump him two months later and install his deputy, Julia Gillard, as leader (and therefore Prime Minister) ahead of the looming election.

Seeking to put the carbon pricing fiasco behind her, Prime Minister Gillard went to the August 2010 election promising that there would be "no carbon tax under the government I lead" (ibid 143). But electoral fortune did not favour her timidity: the election delivered a hung Parliament, forcing Gillard's Labor Party to enter into a minority government alliance

---

[1] Great British Pound and US Dollar amounts calculated based on Australian Dollar exchange rates on 22 August 2019.

with the Australian Greens and a number of independent MPs. The cost of the Greens' and independents' support was a commitment to establish a multi-party committee to agree the terms of a new carbon pricing law (ibid 144–48). Many in the electorate came to see this post-election pivot on pricing carbon as an act of betrayal, severely damaging Gillard's standing in the eyes of the electorate (ibid 154–56).

The policymaking process culminating in this second version of the carbon price exhibited some marked improvements on its predecessor, and the Government ultimately had the numbers in the Parliament to get the scheme passed (ibid 195, 219–22). The voluminous scheme legislation was duly enacted in November 2011 with a commencement date fixed for 1 July 2012. But the scheme's inauspicious beginnings meant that it would be battered by political headwinds. By the time the scheme was enacted, opposition leader Tony Abbott's campaign against what he called the "great big new tax on everything" was in full swing (Abbott 2012; Chubb 2014, 154, 161–65). Abbott, aided by the coal-fired power generators, other segments of the business community, and conservative media outlets, was fomenting an atmosphere of panic in the electorate at the alleged economic destruction that the new tax would wreak (Chubb 2014, 154, 161–70, 230). These conservative forces had succeeded in so muddying the political waters that the term "climate change" itself had come to be an electoral liability, associated with Gillard's broken carbon tax promise, and everything that was disliked about the Labor Government (ibid 181, 191–92, 233).

In this febrile political environment, the Government sought to shift public attention away from the soon-to-commence carbon tax and its beneficial impact on the climate, and toward the package of transitional assistance measures for households that would flow along with it. To soften the impact of the carbon tax on the voting public, the reform package included significant cuts in personal income tax and increases in transfer payments to the tune of more than AU$4 billion per year (£2.2 billion; US$2.7 billion) (see Spash and Lo 2012, 76–77)—

a package so generous that almost 90% of Australian households would be fully compensated or *over*-compensated for the average household impact of the carbon tax (Chubb 214–15).[2]

These household assistance measures would come to form the centerpiece of a cynical government strategy to build public support for the carbon tax—a strategy that Gillard's Communications Director liked to call "cashy, cashy, cashy" while waving an invisible wad of cash in the air (Chubb 2014, 232). Central to this strategy was an advertising campaign that, remarkably, did not mention the phrases "climate change", "carbon tax" or "carbon price". Chubb describes, in chilling terms, the Ministerial decision that led to this seemingly bizarre turn of events:

> Signalling the extent of the government's fear, disillusion and disappointment, a mid-March 2012 meeting of ministers decided that to continue talking about climate change was playing into Abbott's hands, so they agreed to stop. In just over four years Australia had moved from a country galvanized by the need to act on climate change to a place where ministers no longer dared even to use the words. While the Gillard Government, against all the odds and showing tremendous determination, had instituted a major climate policy, it now could not say why. In Australian public discourse the term "climate change" had died. (ibid 233)

The ad campaign fell flat, succeeding only in sowing further confusion in the minds of the electorate and playing into Abbott's claim that the carbon tax was just a "money-go-round" (Thompson 2011), conjuring the image of a parasitic government taking with one hand and giving back with the other, with who-knows-what nefarious creaming-off along the way.

By the time of the 2013 federal election, the carbon tax had been operational for more than 14 months. The sky had not fallen in. Costs were manageable, the economy continued to perform well, and Australia's greenhouse gas emissions had fallen (Chubb 2014, chap. 11). But it was too late. The public mood had turned, and Tony Abbott's conservative coalition

---

[2] This was in addition to the AU$22 billion of assistance committed for emissions- and energy-intensive industries over six years, including AU$5.5 billion in cash payments to the coal-fired power generators, AU$1.3 billion to the owners of "gassy" coalmines, and billions of dollars to 'Emissions-Intensive Trade Exposed Industries' (see Green 2011a, 2011b).

was elected on the back of his unrelenting campaign to "Axe the Tax". Within less than a year of taking office, the newly-elected Abbott Government had secured passage of legislation to repeal the carbon tax.

(As of August 2019, Australia still has no economy-wide carbon-pricing scheme.)

***

I had a front-row seat to this unfolding spectacle. At the time, I was working as a lawyer advising companies, state governments and NGOs on how the carbon pricing policies affected their legal obligations and rights, and I was a public commentator on these issues. To my mind, this extraordinary episode raised larger normative and political questions about major policy reforms—questions that would come to occupy a central plank of my research agenda over the subsequent years, and the core of this thesis. What *do* we owe the losers from legal transitions? Do some losers have stronger claims to state assistance than others, and if so, why? How should societies balance the imperatives for reform with the value of legal stability? What, specifically, should our transitional response be (the persistent framing of this question in terms of "compensation", it seemed to me, was neither normatively warranted nor politically helpful)? What about transitional winners—should we be clawing back their gains? And could a normatively desirable set of answers to these questions provide a principled basis for a more politically effective approach to the big reforms of our time?

For answers to these questions, I turned to a larger conversation about the values of stability and change within normative political, economic and legal theory. In the next section, I provide a synoptic historical overview of these normative debates, which serves as a literature review of the wider normative field in which my thesis sits. I then come to a precise statement of the problem of legal transitions and the scope of the thesis (Part 1.3), followed by an indication of the topic's importance (1.4). Next comes an explanation of the thesis' aims (1.5) and methods (1.6), followed by an outline of its structure (1.7).

1.2 THE WIDER NORMATIVE LANDSCAPE: STABILITY VS CHANGE

In his *History of Western Philosophy*, Bertrand Russell describes the search for permanence that runs through western philosophy since the pre-Socratics:

> The search for something permanent is one of the deepest of the instincts leading men to philosophy. It is derived, no doubt, from love of home and a desire for a refuge from danger; we find, accordingly, that it is most passionate in those whose lives are most exposed to catastrophe. (Russell 2004 [1946], 52)

The struggle between the value of stability and the value of change (or reform or progress) is a recurring tension in the history of western political, legal and economic thought. It is, most obviously, the fault-line that divides conservatives and non-conservatives. But it is also one that cuts across, in interesting ways, many of what we now see as central divisions in moral and political philosophy, such as those between consequentialism and deontology, and between liberalism and republicanism. As Russell notes, moreover, it is a fault line that becomes most salient in moments of turmoil.

Peace, order and stability were central themes of the early-modern period, as exemplified in the political writings of Thomas Hobbes and Margaret Cavendish. Both of these authors, having lived through a period of political disintegration culminating in the English Civil War, advocated that absolute sovereignty be vested in a single individual so as to prevent disputes and factionalism from sliding into civil strife (see Cunning 2017, sec. 7; Lloyd and Sreedhar 2019, sec. 2).

In the decades and centuries that followed, amid lurking threats of revolution and strife, many canonical western thinkers were likewise concerned with the need for order and stability. However, they tended to see the sources of such stability quite differently from Hobbes and Cavendish. As we see in different ways with Hume and Locke, private contract and property rights—be they conventional (as with Hume) or natural (as with Locke)—were thought to be a key source of stability and order, with government justified principally for its capacity to perfect and enforce such rights (Hume 2007 [1738–40], III.ii; Locke 1967 [*c*.1679], secs. 12, 15, 21–23, 34–51, 89–90, 95, 123, 131, 138, 222). Even the great legal reformer, Jeremy

Bentham, tempered his reformist zeal with a conservative approach to legal transitions in his later economic and civil law texts (Crimmins 1996; Kelly 1990). The imperative for economic reforms, Bentham thought, had to be balanced against the superior value to people of stabilising their expectations, which stemmed from legal property rights (see my Chapter 2.3). As Kelly notes, Bentham's civil law texts were produced in the context of widespread unemployment and the circulation of "French revolutionary ideas", which may help to explain their underlying system-preservation impulses (Kelly 1989, 79). And it was, of course, French revolutionary foment that brought "self-conscious conservatism" into its own as a philosophical standpoint more generally (Hamilton 2015, sec. 1.1). Against the revolutionaries' Enlightenment project of liberating the human spirit through reason and rationality, Edmund Burke's (1969 [1790]) conservatism was marked by a scepticism of such agendas; he trusted, rather, in the historical sedimentation of traditions and conventions, preferring that they evolve gradually (see Hamilton 2015, sec. 2.3).

Sidgwick would later capture some of these tensions in his discussion of the distinction between "conservative" justice and "ideal" justice. We expect the law to protect the existing distribution of benefits and burdens, he observed. Yet at the same time we seek reform of the law in the name of an ideal of justice (Sidgwick 1962 [1874], 273–74). "It is the reconciliation between these two views", Sidgwick thought, "which is the chief problem of political Justice" (ibid 273). Sidgwick thought the expectations generated by existing laws produced a genuine normative dilemma. On the one hand, "when such expectations are disappointed by a change in the law, the disappointed persons complain of injustice, and it is to some extent admitted that justice requires that they should be compensated for the loss thus incurred" (ibid 271). On the other hand, he continued, such expectations admit of a wide range of "definiteness and importance … so that it is practically impossible to compensate them all" (ibid 171–72). Sidgwick could think of "no intuitive principle by which we could separate valid claims from invalid, and distinguish injustice from simple hardship" (ibid 172). Thus we find at the edge of conservative justice a "dim borderland", tenanted by tacit expectations of legal consistency, the normative significance of which is unclear (ibid 270).

The reformative–conservative tension has also been the subject of discussion among legal scholars under the more general rubric of 'the rule of law'. This ideal is thought to prescribe, at a minimum, a set of thin, formal criteria that laws must meet, including that they be general, public, coherent, clear, prospective, and stable (Fuller 1964; Rawls 1999, 208; Raz 1979, 214–18). The last two of these criteria seem relevant to the issue of legal transitions. The first is arguably undemanding: prospectivity merely requires that the law take legal effect on or after its enactment (Rawls 1999, 209; Raz 1979, 214; Waldron 2012, 83–84).[3] The demandingness of the stability requirement is more debatable. Few, if any, rule of law scholars would think that stability requires that individual laws stay the same. Raz, however, thought that laws "should not be changed too often" (1979, 214).[4] "If they are frequently changed", he worried, "people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was" (1979, 214; see also Fuller 1964, 79–80). Waldron, by contrast, reminds us that a degree of uncertainty in future laws is inevitable, and that uncertainty can be monetised and priced into long-term decisions (2012, 73). Provided due process is followed and the framework of law-making as a whole is stable, Waldron thinks that regular change in individual laws would not offend the rule of law's stability requirement (ibid 77, 82–83). Others have argued that the rule of law embodies certain underlying values, central among which is *predictability* (Bingham 2010, 38; Hayek 1960, 153, 156–57; Raz 1979, 220–22; Simmonds 2013, 39; Waldron 2016b, sec. 6). The idea, echoing Bentham, is that stable laws promote long-term decision-making and planning, and therefore both individual autonomy and productive efficiency.

---

[3] Here we may distinguish between retrospective and retroactive laws. *Retrospective* laws are, at the time they are enacted, nominally deemed to have taken effect at some earlier time, thus changing the legal characterisation of past behaviour. Such laws are generally thought to be inconsistent with the prospectivity requirement of the rule of law. *Retroactive* laws, by contrast, merely change the *value* of past durable decisions (e.g. asset investments) made under the old law, the ongoing value of which was sensitive to future changes in the law (Shaviro 2000, 26). Such changes, other than in the domain of criminal law, are generally thought not to offend the prospectivity requirement of the rule of law (Persad 2017, 283; Rawls 1999, 209; Waldron 2012, 83–84). However, Fuller thought such a division was too neat, and left the issue unresolved (1964, 59–62).

[4] Aristotle in the *Politics*, too, expressed the view that change in the laws was by and large a bad thing, as it undermined their role in the inculcation of virtue (1962 [*c*.350 BC], II.viii, 81–83).

Developing in parallel to these increasingly specialised legal-philosophical debates was a uniquely 'economic' perspective on government policymaking (and hence legal transitions). Increasingly sceptical about the scientific validity of the 'interpersonal utility comparisons' that were at the heart of classical utilitarian political economy (Robbins 1932), early 20th century economists began to develop theories for improving economic efficiency without the need for such comparisons (Hicks 1939, 1941; Kaldor 1939). As I shall explain in Chapter 3, this led to the predominance of two superficially contradictory approaches: Pareto-improving policies, which require that all losers be compensated from the gains of winners; and Kaldor-Hicks efficient ('potentially-Pareto improving') policies, which require that the losers are *able* to be compensated from the greater gains of the winners, but not that the losers *actually* be compensated. In the US economics and legal establishment up until the mid-1970s, something closer to the Pareto view held sway (see Fried 2003, 125; Hsu 2015, 2061; Kaplow 1986, 522, fn 26).

From the mid-1970s, the ideal of Kaldor-Hicks efficiency would come to be the dominant value guiding American legal scholarship on transitions, thanks to the ascendancy within the US legal academy of the 'law and economics' school of jurisprudence. Scholars in this tradition took seriously the reality of a political system in which laws frequently change, noting that this provided information which, on the assumption of 'rational expectations', investors would price into their decisions, effectively making strategic bets about the legal future. Rejecting the traditional rationales for a conservative approach to legal transitions, these scholars saw no reason to treat changes in the law any differently from other kinds of market risks that investors are expected to assume and manage. This led these scholars to adopt a default reformative position: let losses and gains lie where they fall (see Chapter 3).

I want to end this synoptic tour by highlighting the tensions between stability and reform in the work of Rawls, for the legacy of these tensions shapes the contemporary political-theoretic milieu in which this thesis sits. From his studies and early work in the late 1940s right through to his late works on political liberalism, Rawls was preoccupied with the question of how a pluralistic society could stably persist over time (Forrester 2019). In his mature and most important works, the theory Rawls espoused was an "ideal theory" of

stability: a set of principles of justice to regulate the basic structure of society that, *if* instantiated, would purportedly ensure the stability of social cooperation over time (Rawls 1971, 1993, 1999, 2001a). As to the reforms necessary to reach such a condition, Rawls said famously little; these were questions of "non-ideal theory" that had to somehow marry the politically possible with the morally permissible, guided by the priority rules of his ideal theory (Rawls 1999, 215–18).

But what if the best reconciliation between reformative ideals and the value of stability *in its standardly understood, conservative sense* doesn't lead to Rawls' ideal basic structure? That is, what if the best answers to the questions of *what we ought to do now* are not fully amenable to Rawls' ideal-theoretic guidance because they are to some extent constrained by the way things have historically evolved and are currently configured? There are at least two bodies of scholarship that assert an historical or presentist claim against ideal theorists such as Rawls. Framing these two bodies of work in terms of different approaches to "justice", Miller (2017, secs. 2.1, 2.2) calls these "corrective justice" and, following Sidgwick, "conservative justice", respectively. The former, also known as "restorative justice" or "historical justice", concerns remedial principles that apply bilaterally as between wrongdoers and their victims (ibid sec. 2.2), while the latter is concerned with the normative claims of individuals to retain what is due to them under existing laws (or social conventions), as pressed in the face of changing laws (or conventions) (cf. ibid sec. 2.1).

Of these two strands, it is the former that has received more attention in contemporary (by which I mean Rawls and beyond) Anglo-American political and legal theory—including in some of the most searing criticisms of Rawls by Robert Nozick (1974, chap. 7) and Charles Mills (2009, 162, 177–81). [5] Despite their otherwise radically different normative commitments and goals, what Nozick and Mills share is the conviction that history matters to justice; ideal-theoretic blueprints can't begin from the blank slate of pure reason, for doing

[5] For a sense of the variety of contemporary philosophical writings on historical/corrective/restorative justice, see Boxill (2015), Butt (2008), and Coleman (1992).

so will overlook a history marked by just transactions that should be respected, injustice that stands in need of rectification, or a mix of both.

By contrast, the 'ideal vs conservative' debate, which is the focus of this thesis, has received surprisingly scant attention from contemporary political philosophers. The exceptions are: the work on 'legitimate expectations' that I discuss in Chapter 4, most of which is very recent (Brown 2011, 2012, 2017a, 2017b; Buchanan 1975; Green 2017; Matravers 2017; Meyer, Pölzer, and Sanklecha 2017; Meyer and Sanklecha 2011, 2014; Moore 2017); works by Fried (2003), Persad (2015, 2017) and Räikkä (2014, chap. 2), and the writings discussed in Chapter 9 on state response measures, specifically grandfathering and compensation (Bovens 2011; Goodin 1995; Knight 2013, 2014; Schuessler 2017). I see these nascent discussions as very much continuous with the earlier lines of thought about the value of stability, convention and expectation sketched above, and am convinced that there is much to be gained from placing them in conversation. Likewise, I think it is fruitful in the spirit of 'PPE'—or perhaps PPEL[aw]—to collide the political-philosophical trains of thought on these matters with the hitherto almost exclusively separate trains of economists and lawyers.[6]

At this point, Rawlsians may protest that I am neglecting the sub-branch of non-ideal theory known as 'transitional' theory (Valentini 2012, 660–62), which takes forward Rawls' above-mentioned plea to figure out how to advance toward a just basic structure governed by his two principles. But rather than stacking the deck by *assuming* that the theoretical task is to find permissible ways to transition to a Rawlsian ideal basic structure, I begin with a genuine openness to the possibility that both reformative and conservative claims about legal transitions might carry normative weight. I am open, therefore, to the possibility that the past and the present might constrain any future ideal that we otherwise want to bring about (quite aside from whatever constraints rectificatory justice claims might also impose). If I had any starting intuition, it was simply that both stability and reform can be valuable under certain

[6] To my knowledge, the only example of cross-pollination between law, economics and political philosophy on the subject of legal transitions generally is Fried (2003), though the work of Michelman (1967) and Epstein (especially Epstein 1985) in the property 'takings' (law) literature also draws heavily on both economics and political philosophy.

conditions and that we need a better way of reconciling them than the western canon of political thought has bequeathed us.

1.3 THE PROBLEM OF LEGAL TRANSITIONS

With this birds-eye view of the broader normative terrain in mind, let us now descend back to earth, take up our analytical tools, and scope-out more precisely the parameters of the present inquiry into the problem of legal transitions.

Barbara Fried provides a helpful starting point:

> The problem of legal transitions, put simply, is the problem of whether it is appropriate, for reasons of efficiency or fairness, for the government to offset (through grandfathering, direct compensation or other mechanisms) changes in wealth occasioned by changes in legal regimes. (Fried 2003, 123)

I will endorse a slightly broader definition, but I agree with Fried's general, four-part structure, which involves: two conditions of application, i.e. (i) a *legal change* (ii) which *causes a change in value*; and two normative questions, i.e. (iii) *what is the appropriate state response*? And (iv) *for what reasons*?

With respect to the conditions of application, a number of questions arise. First, what counts as a legal change? As is conventional in the literature on legal transitions, I do not consider judicial decisions to fall within the scope of the problem.[7] Rather, I consider legal changes or legal transitions (I will use these terms interchangeably) to include changes to primary legislation by the legislature and administrative actions by the executive.[8]

---

[7] There are at least two reasons for this exclusion. The first, for those who subscribe to legal positivism, is that judges don't make the law but merely interpret it (though I acknowledge that this is somewhat of a fiction, at least with respect to the common law). The second is that judges have authority to make orders only in respect of the parties to the cases before them; even though their rulings will typically *affect* a wider class of persons, judges generally lack the authority to order the kinds of wider transitional responses considered central to legal transitions (e.g. compensation, adaptive support) that the legislature and/or executive has.

[8] This includes secondary legislation and other delegated legislation, as well as other kinds of general rules, regulations, and policy statements. I am open to also including "administrative measures"—defined by Brown

An interesting 'boundary' question arises in respect of more fundamental changes in the machinery of government. Post-conflict societies raise some similar issues to ordinary legal transitions, but also other issues unique to violent conflict that put this topic clearly 'outside scope' for my purposes (see the literature on "transitional justice": Eisikovits 2017). Closer to my scope boundary lie normal constitutional amendments—those that occur within the machinery of the existing constitution. Though I do not consider such cases explicitly, I take them to be within the scope of my analysis. In between 'normal' constitutional amendments and post-conflict societies lies an interesting set of cases involving peaceful but radical changes to the fundamental machinery of government, such as: constitutional replacements; radical transformations in economic institutions, as with the transition of eastern bloc countries following the dissolution of the Soviet Union; the self-determination of political territories, as with former colonies; and the joining (and leaving!) of supranational governmental institutions like the European Union (Schauer 2003). I can't give a general answer about whether such cases, which admit of wide variety, would fall within my scope. Where such cases also involve ordinary legislative change, as with Britain's exit from the EU, they will more obviously do so. But cases such as the former Soviet transitions no doubt raise additional issues to which I have not given serious consideration (though I suspect that many of the issues would be sufficiently similar that my theory could be extended to such cases, perhaps with some modification).

Second, what counts as a change in value? In other words, what is the 'currency' in which the problem of legal transitions deals? Fried mentions wealth only. Changes in wealth are clearly relevant, but I see no reason to restrict the scope of the problem to changes in wealth, or even 'resources' more generally. Rather, I think the currency is something that needs to be argued for. At this stage, I will leave the 'currency question' open, though I take a stand

---

(2017b, 98) as encompassing particular administrative orders, decisions, and adjudications that relate to a single agent or small number of identifiable agents—however in my view these will tend to be more appropriately governed by special rights and duties (see my Chapter 4.3). I am more interested in theories of legal transitions applicable to laws and administrative rules of general application.

on it in Chapter 6.3, and criticise other proposed currencies at various other points along the way.

It is worth briefly spelling out upfront, though, how such changes in value arise. They arise because agents make decisions that are "durable" (Shavell 2008, 43–44) in the sense that they have operative consequences of an enduring nature—such as buying an asset, studying to acquire skills, taking a new job, opening a business, pursuing a hobby, building a relationship, or cultivating an identity. When governments change legal rules, even where the rules are nominally prospective, they typically alter the *value* of people's past durable decisions (to the extent that the reforms were not anticipated), such that some will be made worse off relative to their position under the regulatory *status quo ante*, and others will be made better off (Kaplow 1986, 515–17; Shaviro 2000, 25–26).

Third, what does it mean for a legal change to *cause* a change in value? I assume that a legal change must be both a *necessary* and a *proximate* cause. Regarding necessity, I mean that the legal change must be a 'but-for' cause of the change in value, even if only one necessary element in an actual set of sufficient conditions (on "NESS" causation, see Wright 1985). I assume that a legal change will always only be one causal element in a wider set of conditions that will always also include some relevant durable decision of the affected agent. This assumption raises a normative question about how the effects of legal change should be apportioned as between the state and the individual. In my view, this cannot be resolved in a purely empirical or metaphysical sense, but rather requires a normative judgement, and I deal with this through the Fairness Principle (Chapter 8).

By proximity, I mean to single out those legal changes that stand out among other necessary causes for various possible reasons such as temporal closeness, social salience, and perceived causal contribution. The need for a proximity condition arises from the fact that the laws of a modern state are, strictly speaking, pervasive necessary causes in all kinds of social processes which, despite effecting changes in value, lie outside the scope of the problem of legal transitions, standardly conceived. I am thinking, in particular, of changes in value created by technological innovation and commercial competition. Though these occur against the backdrop of existing laws and policies (e.g. corporations law, labour law,

industrial policy, product standards, etc.), they are standardly conceived as too remote in their causal influence to fall within the problem of legal transitions.[9] The line I have drawn is more pragmatic than principled, as is the line between proximity and remoteness in all areas of philosophy and law where causation is relevant. Thankfully, because laws change through formal processes, the processes involved in changing the law provide a reliable pragmatic basis for identifying cases of legal transitions and anticipating their proximate effects.

Finally, on the conditions of application, note that Fried's definition refers to *changes* in wealth (or in currency-neutral 'value', as I prefer for now), not *losses*. Fried's more neutral term is quite deliberate on her part and has important implications: it means that the problem of legal transitions applies to both losers *and winners*. As Fried notes, and as we shall see, many theories of legal transitions focus only on losers, reflecting "an implicit (and probably unconscious) decision to ignore the symmetrical problem of transition winners, with the consequence that transition gains simply lay where they fell, by default" (Fried 2003, 125). I share with Fried the conviction that a theory of legal transitions must take winners seriously. There are two reasons for this. The first is that winners raise distributional issues in their own right. The second is that, in recognising that eventual losers had an *ex ante possibility* of winning, we may have reason to appraise their initial durable decision in a new normative light: as a risky bet that they lost. "No principle of ethics", after all, "requires that Monte Carlo produce only winners" (Ramseyer and Nakazato 1989, 1160). While there are limits to the casino analogy, I shall argue in Chapter 8 that there are, nonetheless, many kinds of durable decisions in which responsibility for managing the risk of legal change should be allocated to the individual, in part because it entailed the *ex ante* possibility of gains.

This leaves us with our two normative questions: how should the state respond to such changes in value that it causes by its legislative and executive functions, and for what reasons?

---

[9] The effects of these non-legal (that is, not *proximately* legal) changes may also warrant a state response. Indeed they do raise similar issues, hence some scholars consider them together (Persad 2015, 2017; Schuessler 2017). I am inclined to think that legal transitions raise additional issues, though not necessarily ones that are so unique as to justify a radically different approach to non-legal losers/winners. However, I remain neutral on this question for the purpose of this thesis.

The question of how the state should respond is the question of what the "transition policy" or "transition rule" should be (cf. Logue 2003, 211; Shaviro 2000). This is often conceived in terms of a choice between what we may call a "conservative" or a "reformative" transition policy.[10] This is—unfortunately, in my view—often reduced to a question of whether losers should be "compensated" or not (Trebilcock 2014, 6–7). Compensation is a conservative transition policy option, to be sure, but it is only one among numerous possibilities (as Fried's definition alludes to). The other main conservative option is to 'grandfather' an agent's prior legal position, effectively exempting the agent from the application of the new law. However, as I explain in Chapter 9.2.1, grandfathering can come in partial and temporary forms (compensation can also be partial). Such partial and temporary forms of grandfathering (and partial compensation) reveal a fact that is, I believe, essential to the development of a good theory of legal transitions: fully conservative transition policies (e.g. full and permanent grandfathering) and fully reformative transition policies (let all losses and gains lie where they fall) are but the two poles on a wide spectrum of possibilities, which I call the *transition policy spectrum*, or sometimes the *conservative–reformative spectrum*. A key contribution of this thesis (especially Chapter 9) is to motivate, specify and defend a central place in theorising about legal transitions for what I call *adaptive* transition policies—those that occupy the middle ground between the conservative and reformative extremes. Finally on this question of what the state should do, we must also make theoretical room for transition policies covering *winners*. At the conservative end of the spectrum, grandfathering can in principle apply also to winners (i.e. grandfathering an agent's prior *inferior* position), while the converse of compensation for losers is to claw-back the gains of winners—for example, through windfall taxation. At the reformative end, winners simply keep their gains.

---

[10] I borrow the distinction from David Raphael who discusses the distinction between "conservative justice" and "reformative justice" (Raphael 2001, 2)—see also the above discussion of Sidgwick in Part 1.2. I prefer Raphael's contrasting of "conservative" to "*reformative*" rather than to "progressive" because "progressive" would be apt to confuse, since it can connote egalitarianism (e.g. progressive political causes; progressive taxation), whereas letting losses and gains lie where they fall is not necessarily egalitarian (e.g. if the winners are already well off and the losers are already badly off).

The normative question of most interest to normative theorists, however, is *why* a more conservative or more reformative response is desirable, and this question shall occupy the bulk of my concern in this thesis. Fried mentions fairness or efficiency as the only possible reasons (I suspect because her paper is part of a symposium that engages with law and economics scholars of legal transitions, for whom these options are the only ones that tend to be considered). But there are other contenders, of which this thesis considers (in addition to efficiency and fairness) property, aggregate utility, wellbeing, justice, and legitimate expectations[11].

In light of these remarks, I adopt the following redefinition of the problem:

> ***The problem of legal transitions*** is the problem of whether, to what extent, and why it is normatively appropriate for the government to offset (through grandfathering, compensation, adaptive assistance, or other means) changes in value caused by changes in the law.

1.4 IMPORTANCE OF THE TOPIC

1.4.1 *Normative importance*

In addition to the general point made earlier about the potential constraints on 'ideal justice' arising from the normative demands of the past and present, I see an in-depth exploration of the problem of legal transitions as potentially relevant to a number of important topics in political and legal philosophy/theory. These include: the role in individual wellbeing of such things as stability, change, attachments (to people, places, cultures and material objects), expectations (and their disappointment), and long-term planning (and its frustration); the role of private property, legitimate expectations, justice, and the rule of law with respect to those issues; the distributive consequences of risky decisions; and the civic status, duties, rights and virtues of citizens in respect of processes of legal change. Since legal transitions touch on issues such as the conception of the person-through-time, the content of citizenship, and the legislative and administrative powers of the state, the topic is also relevant to numerous

[11] Respecting legitimate expectations could be considered a requirement of fairness.

foundational debates in political theory—including those between conservatives and their reformative opponents, between liberals and republicans, and among competing strands of liberalism.

As this list suggests, moreover, there is an important democratic-theoretic dimension to transitions that has been under-explored. Even the most optimistic 'ideal theorist' would have to concede that societies will never be fully ideal—there will always be a justice- or goodness-oriented imperative to change primary rules[12]—nor are we (in my view) likely to get substantial agreement on what the correct theory of justice is and how it should be implemented. But maybe societies could get better *at transitions*. That is, in the spirit of Gutmann and Thompson (1996), maybe we could get more agreement on our 'second order' democratic institutions; maybe these could consciously be shaped so that, over the long-run, we become better at fairly reforming the rules in whichever direction the majority decides. As Buchanan put it in his early critique of Rawls, "what is needed is nothing short of *a theory of institutional change*—a set of systematically related principles defining institutions for institutional change" (Buchanan 1975, 422, emphasis in original). Forty-four years later, political philosophy still lacks a good normative theory of institutional change. It is hoped that this thesis will contribute toward filling that lacuna.

Finally, some of the particular chapters in this thesis raise issues of importance for the theoretical development of positive law doctrines, and for normative economics. The chapters on property and legitimate expectations are relevant to the law of property (especially immunity to 'takings') and the law of legitimate expectations, respectively. Both of these doctrines, moreover, are relevant to investor-state dispute settlement, which is an increasingly prevalent feature of international trade and investment law. Additionally,

---

[12] As Buchanan (1975) pointed out, *even if we have already instantiated* a Rawlsian ideal basic structure at some time, the fact that conditions outside the basic structure (e.g. technology, business practices, etc.) will inevitably change means that not only will particular laws often need to change, but even the basic structure itself will need to change if compliance with the principles of justice (especially the demanding 'difference principle') is to be maintained. For different views about what should follow in terms of transitional arrangements under such conditions, compare Buchanan's view with Persad (2017).

Chapter 3 contributes to economic and law and economics debates over legal transitions and over the philosophical justification of normative-economic concepts such as efficiency.

1.4.2 *Political importance*

Making progress on many of the (arguably) most urgent political challenges of our time requires large-scale structural reforms that would make many people significantly worse off. The fate of policy reforms is to a large extent determined by the interplay of what political scientists would call 'interests' and 'institutions', but is never fully *determined* by them; 'ideas', including normative ideas about what is just, fair or otherwise appropriate, also matter greatly when it comes to both elite and mass politics (Béland and Cox 2011; Blyth 2002; Hall 1993). As the Australian carbon pricing experience illustrated, policymakers often have little clue about how to deal with transitional issues;[13] lacking a principled leg to stand on, they are at the whim of vested interests, who usually have their own (very clear!) ideas. Moreover, powerful losers often take their claims public, and since appeals to naked self-interest will rarely prove convincing, they tend to clothe their self-interested claims in the language of fairness or the public interest. Good normative analysis can provide governments with a principled default basis for transition policy and can help the public to distinguish between good and bad arguments about the impacts of reform and their mitigation (Kaplow 1986, 571–72; Swift and White 2008, 54–55).

1.5 AIMS OF THE THESIS

Adapting Timmons' (2002, 3–4) delineation of the twin aims of a moral theory, my thesis has a primary theoretical aim and a secondary practical aim:

---

[13] This experience is hardly unique. For example, in an OECD publication on the political economy of climate change mitigation, the authors note that while climate policy "is ultimately expected to create more winners than losers, those who stand to lose the most will naturally mobilise most effectively, in opposition. And, providing appropriate compensation is both costly and has proved difficult in practice" (de Serres, Llewellyn, and Llewellyn 2011, 22). But what is "appropriate" compensation? The report does not say!

Theoretical aim: to discover the best (most justifiable) normative theory of legal transitions.

Practical aim: to provide action-guiding normative prescriptions that policymakers and other stakeholders in legal transitions can deploy so as to feasibly approximate the best normative theory of legal transitions.

The theoretical aim is self-explanatory. The practical aim concerns how to operationalise the theoretical aim given additional real-world constraints, such as epistemic limitations, transaction costs, the need for a high degree of determinacy in institutional rules and norms, and the need to generate political agreement among pluralistic constituents (the last of these is also relevant to the theoretical aim: see Part 1.4.1, above, and List and Valentini 2016, pt. 7). This aim is motivated by my desire to develop a theory that can contribute to real-world political debates about legal transitions, *and* to provide prescriptions that are sufficiently action-guiding that they can be deployed by stakeholders in relevant debates (Daniel Butt calls this a "double practicality": Butt 2008, 8).

In the next section on methods, it will be clear that some evaluative desiderata are more relevant to the theoretical aim, and others to the practical aim.

1.6 METHODOLOGY

1.6.1 *Wide Reflective Equilibrium*

This thesis is concerned with normative *theories* of legal transitions, the *principles* they contain, and the *concepts* that are used to construct, motivate and justify them. Following List and Valentini, I take a normative *principle* to be a propositional statement that contains normative content and potentially applies to more than one case (2016, 535–36), and a normative *theory* to be a set of normative principles and its implications (ibid 536). A *concept* classifies "objects" in a particular "domain of application", which is "the set of objects of which it is meaningful to ask whether they fall under the given concept or not" (ibid 531). A concept also has "defining conditions"—the conditions that determine whether an object falls

under the concept or not (ibid 531). I will use the term "conception" to refer to variants of a concept whose defining conditions are fully specified.

This thesis uses the method of *Wide Reflective Equilibrium* (WRE) to critique (other) and to construct and defend (my own) theories, principles and concepts pertaining to legal transitions. WRE was first proposed by Rawls (1971, 1974)[14] and systematically developed by Daniels (1996, 2016). It has also recently been defended by Knight (2006b, 2017) and I have developed it for the specific purpose of analysing theories of legal transitions (Green 2017).

WRE is a coherentist methodology in the sense that it seeks coherence among normatively-relevant moral (and nonmoral) beliefs across three 'levels' of generality (Daniels 1996, 22; Green 2017).[15] The ultimate object of analysis in WRE is the middle level, consisting of a normative theory (or principle)—here, a theory of legal transitions. The most specific level is a set of implications in particular cases. The most general level is a set of theoretical antecedents, by which I mean, loosely, any normative theories, normative principles, ideals, concepts, and nonmoral beliefs that play a significant constitutive, motivational, or justificatory role in the middle-level normative theory (Green 2017, 185, 190–92; cf. Daniels 1996, 338–39).[16] Specific combinations of theoretical antecedents will often come pre-packaged in a tradition of political thought. Accordingly, I will often speak of traditions of political thought as shorthand for a package of theoretical antecedents that is more or less accepted among adherents to a particular tradition.[17] Middle-level theories, then, are

---

[14] Rawls uses the phrases "wide" and "narrow" reflective equilibrium in his article "The Independence of Moral Theory" (1974, 8). Though he does not use these terms in *A Theory of Justice*, the distinction is there in substance (1999, 43).

[15] There can in principle be more than three levels of generality, and sometimes Daniels refers to more (e.g. 1996, 23–24). Three levels are sufficient for my purposes.

[16] Daniels defines this most general level as involving "some or all of those elements involved in the process of giving a systematic account of moral beliefs and practices" (1996, 339). Daniels' definition, as well as his list of theoretical elements (1996, 6, 338), and Knight's (2017, sec. 3) scheme of elements, are broader than mine in that they involve more elements than I have listed. I do not wish to preclude inclusion of such elements in WRE. Rather, I am merely focusing on normative, conceptual and nonmoral theoretical elements because these are the focus of my thesis.

[17] In Green (2017, 185–86, 194–201) I allay four potential concerns one might have about engaging with theoretical antecedents as part of a putative analysis of a middle-level theory.

distinguished by having a more specific domain of application than their theoretical antecedents (Daniels 1996, 22–24, chap. 3).[18] Metaphorically, we can move from the formulation of the middle-level theory 'downstream' to specific cases or 'upstream' to more general theoretical antecedents (Green 2017; Sen 1979a, 197–98).

1.6.2 *Evaluative desiderata—theories and principles*

In this thesis, I will analyse theories (and principles) of legal transitions by appealing to a combination of desiderata at all three levels:

- *internal desiderata*, concerning the theory itself (or its principles);
- *case-implication desiderata*, concerning the relationship between intuitions (or "considered judgements"[19]) about specific (real or hypothetical) cases and the implications of the normative theory when applied to those cases; and
- *theoretical-antecedent desiderata*, concerning the more general theoretical antecedents and their relationship to the middle-level theory.

Building on the desiderata for evaluating theories and principles suggested by List and Valentini (2016, 538–44), Sen (1979a, 197–98) and Timmons (2002, 12–17), I will use the following scheme of six desiderata—two at each level—throughout the thesis (where I think it will be helpful, I will refer to "desideratum #X", where X is the Arabic numeral from the following numbering scheme, or the Roman numeral from the numbering scheme for desiderata concerning concepts, outlined subsequently):

---

[18] In this way, what counts as a middle-level theory is defined *relatively* to its theoretical antecedents.

[19] I adopt Knight's (2017) definition of considered judgements, which refers to Rawls' requirement that the judgements are those made in "conditions favorable for deliberation and judgment in general" (Rawls 1999, 42). According to Knight (2017, sec. 2), this is *all* that is required for a judgement to be deemed "considered" and thus admitted into the reflective equilibrium process. That said, in the remaining chapters of the thesis I will simply refer to intuitions, as this is less cumbersome, though I mean considered judgements.

1. Internal consistency (internal). The theory of legal transitions, together with relevant factual information, yields consistent (not self-contradictory) normative verdicts about transition policy in the cases to which it is applied (cf. List and Valentini 2016, 539; Timmons 2002, 13).

2. Determinacy (internal). The theory, together with relevant factual information, yields definite normative verdicts about transition policy in the cases to which it is applied (cf. Timmons 2002, 13–14).

3. Intuition correlation (case-implication). The theory implies verdicts about transition policy in particular cases that comport with widely shared intuitions (or considered judgements) (cf. List and Valentini 2016, 541–42; Sen 1979a, 197; Timmons 2002, 15).

4. Explanatory power (case-implication). The theory features principles and concepts that convincingly explain the verdicts about transition policy in particular cases, helping us to understand *why* the theory implies the transition policy that it does (cf. Timmons 2002, 15–16; Valentini 2015, 737).

5. Theoretical plausibility (theoretical-antecedent). The theory's concepts and principles are constituted, motivated and justified by normative and non-normative antecedent theoretical ideas that are themselves plausible (for desiderata concerning the plausibility of concepts, see below; empirical claims are plausible in virtue of, and to the extent of, the empirical evidence for those claims) (cf. Daniels 1996, 6, 13, chap. 7; Timmons 2002, 14, 16).

6. Theoretical coherence (theoretical-antecedent). The antecedent theoretical ideas are coherent with the middle-level theory (Daniels 1996; Rawls 1971, sec. 9; Sen 1979a, 197–98).

Of course, confining the three pairs of desiderata to their respective three levels is somewhat artificial. In practice, the analysis works best when one moves between the three levels, such that coherence is maintained across elements at all three levels, i.e. (for a good theory) between plausible theoretical antecedent ideals, the theory of legal transitions itself, and the compelling explanations and intuitively correct results that it consistently and determinately implies in specific cases (see Daniels 1996; Green 2017).

1.6.3 *Evaluative desiderata—concepts*

Finally, because concepts are not themselves normative (though they can be normatively loaded), we need a slightly modified scheme of desiderata for evaluating them. These six further desiderata also go to the "plausibility" of concepts insofar as they are theoretical antecedents to, or elements in, a middle-level principle/theory (see above, desideratum #5):

> *I. Motivational coherence*. The concept is defined consistently with the motivation for being normatively concerned with the concept in the first place.
>
> *II. Determinacy.* The concept is defined such that it yields definite verdicts about the classification of objects.
>
> *III. Intuition correlation*. The concept is defined such that its classification of objects comports with widely shared intuitions (or considered judgements) about whether the objects are tokens of the concept, especially if the concept has a common-sense interpretation (cf. List and Valentini 2016, 533).
>
> *IV. Explanatory power*. The concept is specified such that its classification of objects not only correlates with widely held intuitions but also convincingly explains what it is about the objects so classified that makes them tokens of the concept (cf. Timmons 2002, 15).
>
> *V. Having defining conditions that are epistemically accessible*. According to List and Valentini (2016, 534):
>
>> Depending on the intended use of a concept, we may require its defining conditions to be such that it is possible, at least in principle, for us to know whether an object meets them. For example, a concept of welfare whose defining conditions refer to certain kinds of mental states that are in principle inaccessible to any observer would be of little practical use. … Of course, the context and intended use may determine what counts as epistemically accessible.
>
> Given the practical aim of this thesis, a concept intended for use in a theory of legal transitions should be defined such that the state can feasibly access the relevant facts needed to classify relevant objects.

VI. Having defining conditions that are neither too "thick" nor too "thin". A concept's defining conditions "should not refer to any 'irrelevant' facts about the objects to be categorized, but refer to all 'relevant' facts" (List and Valentini 2016, 533). One significant aspect of thickness/thinness concerns "moralisation": a concept (the first concept) is moralised if its defining conditions refer to some other normative or evaluative concept (the second concept) and is non-moralised otherwise (cf. ibid 533–34). While moralisation is not necessarily problematic, it carries risks for the first concept: if a conception of the second concept is not specified, then the first concept will be indeterminate; the first concept might be an empty shell (i.e. where the second concept does all of the normative work); and/or the first concept might be nebulous, involving unclear relations with the second concept. These risks grow exponentially where the second concept is itself moralised.

With these analytical tools in hand, let us now proceed to a brief outline of the thesis.

1.7 STRUCTURE AND OUTLINE OF THE THESIS

The eight core chapters of this thesis constitute two halves. The first half (Chapters 2–5) is primarily *critical* and the second half (Chapters 6–9) is primarily *constructive*.

In the first half of the thesis I critically analyse theories of legal transitions structured around four idioms, respectively: property; efficiency; legitimate expectations; and justice. Aggregate utility is also discussed where relevant in the chapters on property and efficiency. The chapters are structured somewhat differently, but each essentially involves a mix of exposition and critical evaluation using the method and criteria described above. In Chapter 2, I first consider libertarian natural rights theories of property and, second, classical liberal approaches to legal transitions based on conventional-instrumental theories of property, focusing on Bentham. In Chapter 3, I consider the rich literature on legal transitions emanating from the 'law and economics' school of jurisprudence. Chapters 4 and 5 turn to liberal-egalitarianism. Chapter 4 discusses recent scholarship on 'legitimate expectations' and legal transitions, in which various conceptions of what makes expectations legitimate have been proposed. One such 'legitimacy basis' that has been debated is 'justice'. Chapter 5 considers whether justice can provide a sound basis for a theory of legal transitions in its own right. Ultimately, I argue that each of the theories of legal transitions discussed in these

chapters should be rejected. However, there are strengths and weaknesses in each that help to motivate some of the choices I make in developing my alternative theory.

Specifying and defending that alternative theory, which I call Adaptive Responsibility Theory (ART), is the task of the second half of the thesis. Chapter 6 introduces the general thrust of ART and—in the spirit of WRE's concern with antecedent theoretical ideas—discusses the key ontological, moral and political assumptions that underpin it.[20] Most important among these is what I call the 'ecological' account of the self and its agency, which I contrast with two dominant 'liberal models' of self and agency that I think do considerable implicit work in the theories of legal transition that I criticise in the first half of the thesis. The second half of Chapter 6 addresses what I referred to above as the "currency question". I specify and defend a *modified functionings account of wellbeing*, which I adopt as the currency of ART. The next two chapters specify and defend the two principles of ART—the Wellbeing Principle (Chapter 7) and the Fairness Principle (Chapter 8)—each of which generates independent reasons for transition policy. Because these reasons have both a direction (conservative or reformative) and a magnitude (their strength/weight), I sometimes refer to them as "vectors" of reasons. Chapter 9 explains how the combination of wellbeing and fairness vectors yields institutional requirements for particular classes and types of transition policy: conservative, adaptive, or reformative. Since adaptive responses are central to ART and yet have been under-theorised in the relevant literature, the bulk of that chapter is devoted to the specification and illustration of adaptive transition policies and a justification of their instrumental role in support of wellbeing and fairness.

The concluding chapter elucidates some of the key implications of ART for different agents and for various real-world cases, and compares these implications with those of the other theories discussed in this thesis. It closes with a summary of the thesis' key contributions and some suggestions for future research.

---

[20] As I shall explain in Chapter 6, these are *assumptions* because defending them in detail would take me too far off course.

CHAPTER 2. PROPERTY: LIBERTARIAN AND CLASSICAL LIBERAL THEORIES

2.1 INTRODUCTION

Legal transitions are in large part about impacts on the value of assets in which individuals have interests that could be characterised, morally or as a matter of law, as private property rights. Accordingly, in this chapter I critically analyse a tradition of political thought that is centrally concerned with theorising private property rights, *viz.* what Mack and Gaus (2004) call "the liberty tradition", encompassing libertarianism[1] and classical liberalism.

There are important distinctions between classical liberal and libertarian political theories (Freeman 2001, 2011), some of which will be emphasised in this chapter. What justifies considering them in the one chapter is that they "endorse similar (though not the same) robust conceptions of economic [including property] rights and liberties", and accordingly "endorse market capitalism as the appropriate mechanism for determining the just distribution of income, wealth, and economic powers and responsibilities" (Freeman 2011, 27, footnote omitted). In other words, theories in the liberty tradition tend to converge in their ascription to persons of robust rights in respect of whatever private property they have actually accumulated through production and/or exchange, even if the resulting distribution of property is vastly unequal (Freeman 2011).[2] Such theories therefore have direct and weighty implications for theories of legal transitions. Specifically, they tend to imply theories that are conservative in their protection of all existing property rights, whether the property in question be the council flat of someone scraping by or the estate of a billionaire.

---

[1] I am referring to *right* libertarianism. I leave aside discussion of so-called "left libertarianism", though many of the critiques of right-libertarianism discussed in this chapter apply also to left-libertarianism.

[2] Distinguishing classical liberal theories from the liberal-egalitarian tradition is slightly harder, but Freeman identifies the distinguishing feature in their respective approaches to the economic liberties (including freedom of contract and property rights). Specifically, Freeman argues that classical liberals countenance only a relatively minimal list of restrictions on economic liberties, and justify such restrictions "in terms of the conditions required to establish and maintain economically efficient market allocations of resources and distributions of income and wealth" (Freeman 2011, 21–22, and see also at 27–55).

While they share similar (conservative) conclusions with respect to legal transitions, libertarian and classical liberal theories each tend to cluster around (though are not coterminous with) a distinct theoretical approach to property: non-instrumentally valuable natural property rights (libertarian); and instrumentally valuable conventional property rights (classical liberal).[3] This chapter is therefore structured around these two theoretical approaches. Part 2.2 is concerned with libertarian natural property rights theories. I begin by outlining the relevant family of theories and explaining their broad implications for legal transitions, and then provide a number of critiques of these theories, concluding that they face an implausibility–incoherence–indeterminacy trilemma. At the end of Part 2.2, I briefly discuss the position of Epstein, which purports to generate highly-conservative libertarian conclusions about legal transitions from a foundation of utilitarianism, rather than natural rights. I show that he is subject to the same trilemma. Part 2.3 is concerned with conventional–instrumental property rights theories in the classical liberal strain of the liberty tradition, and in particular with the property-based rule-utilitarian theory of legal transitions articulated by Jeremy Bentham in his later writings on the civil law. I argue that, despite being broadly right about private property being instrumental to its holders' utility, Bentham's argument for an approach to legal transitions that is conservative of status quo property holdings is unpersuasive. The analysis of Bentham illustrates a broader point about consequentialist theories that invoke conventional-instrumental conceptions of the nature and value of property: they will tend (in existing, highly unequal societies) to imply a relatively reformative, rather than conservative, approach to legal transitions. Part 2.4 concludes.

2.2 LIBERTARIAN NATURAL PROPERTY RIGHTS THEORIES

2.2.1 *Exposition*

Libertarianism is an especially far-reaching theory of private property rights, and consequently it stakes out the most conservative position with respect to transitional issues

[3] Natural property rights are not necessarily non-instrumentally valuable and conventional property rights are not necessarily merely instrumentally valuable, however natural rights theorists tend to treat property as non-instrumentally valuable and conventionalists tend to be instrumentalists (see Freeman 2011, 33–35; Stilz 2018, 244).

(at least among philosophers). Libertarians, often drawing on one (contested) interpretation of the natural rights theory of Locke (1967 [1679]), take individuals to be initial full "self-owners"—as having a "full" set of liberal private ownership rights over their own bodies (Vallentyne, Steiner, and Otsuka 2005, 1; Vallentyne and van der Vossen 2014, sec. 1).[4] The "core" of this set of maximal ownership rights consists of "control" rights (a liberty right to use one's body and a claim right that others not use it), but the set also includes rights of disposition (e.g. to transfer by way of sale, gift, rental, loan etc.) as well as second-order rights such as enforcement rights, rights to compensation for violation, and immunities to the non-consensual loss of those rights (Vallentyne and van der Vossen 2014, sec. 1).[5] This right of self-ownership extends to one's personal endowments, talents and other attributes (Nozick 1974, 169–72; Vallentyne and van der Vossen 2014, sec. 2). From this premise of self-ownership, individuals purportedly have moral powers to acquire property rights in other unowned things (Buckle 1991; Vallentyne and van der Vossen 2014, sec. 2).[6] Once acquired (in accordance with the conditions of the particular libertarian theory[7]), the same set of full

---

[4] As Freeman notes, "Libertarians rely upon a Lockean account of natural property, but their account of absolute property rights is not Locke's view since, like liberals generally, he had no reservations about taxation and governmental regulation of property for important public purposes" (2011, 24, fn 6). See, e.g., Locke (1967 [*c*.1679], secs. 73, 120, 140).

[5] Vallentyne & van der Vossen, in their *Stanford Encyclopedia of Philosophy* entry on "Libertarianism", correctly acknowledge that the notion of self-ownership involves some indeterminacy because enforcement and immunity rights cannot *both* be maximal *for all persons*, since maximal immunity would imply A's property rights are immune to violation *even from B when B seeks to enforce B's own property rights against A*, which implies B does not have maximal enforcement rights, and vice versa (2014, sec. 3). They fail to acknowledge, however, that *all* property rights have this zero-sum structure, including the purported "determinate core" of control rights (see Part 2.2.2.1, below). They simply say "(on the issue of indeterminacy, see Fried [2004, 2005] and Vallentyne, Steiner, and Otsuka [2005])". Vallentyne, Steiner and Otsuka (2005, 205) make exactly the same concession about the indeterminacy that plagues enforcement and immunity rights (they correctly add the further concession that this uncertainty also plagues rights to compensation for violations, too), but go onto claim that there is a significant determinate core to the notion of self-ownership (ibid 205–06). As I discuss below, this claim is implausible, and Fried's reply to Vallentyne, Steiner, and Otsuka demonstrates this (see also Fried 2004, pt. II, 2012).

[6] The power of initial acquisition is typically (at least on Lockean theories) conditioned by an *interaction* requirement (the person must be the first to discover the resource, or "mix" their labour with it) (Vallentyne and van der Vossen 2014, sec. 2). On some views, this interaction constraint is thought to be a more onerous 'efficiency' constraint, requiring ongoing productive use of the land or object, as Locke seemed to envisage (1967 [*c*.1679], secs. 34–51). Libertarians disagree over the other conditions and constraints on this power to acquire unowned things, including the interpretation of the 'Lockean Proviso' that the acquisition must leave "enough, and as good" for others (Locke, 1967 [*c*.1679], secs. 27, 33) (Vallentyne and van der Vossen 2014, sec. 2).

[7] See the previous footnote.

ownership rights extends to those things. The resulting distribution of property is said to be just insofar as it has been justly acquired and transferred. In this way, persons become entitled to their "holdings" of things in virtue of the just processes of acquisition and transfer by which they came about (Nozick 1974, 150–51).

From these "full" self-ownership and thing-ownership rights, individuals purportedly enjoy strong protections from external interference. Since individuals justly acquire full private ownership rights over themselves and over the things they justly hold (by just initial acquisition or just transfer), other persons cannot interfere with those rights without the first person's explicit consent.[8] Property rights thus serve to demarcate a system of absolute boundaries, within which rights-holders are absolutely free to do as they please (without violating others' boundaries), and which absolutely restricts others from crossing them (absent explicit consent) (see Mack 2018, sec. 2.4). By implication, governments cannot generally so interfere (Vallentyne and van der Vossen 2014, sec. 4). Accordingly, laws—and hence legal changes—that have not been explicitly consented to are generally unjustified.[9] Given the extensive conception of property rights envisaged by natural property rights theories, it follows that legal transitions are impermissible not only to the extent that they adversely affect the value of what laypersons tend to think of as property (e.g. ownership of physical assets such as land and buildings), but also the value of one's skillset and other intangible assets (see, e.g., Nozick 1974, chap. 7). Indeed, so extensive are the individual property rights claimed by libertarians that there is little if any scope left for justifiable collective action at all (Nozick 1974, 166, 270). Insofar as there is scope for collective action, laws would have to be drafted so that they did not extend beyond it, i.e. so that they did not infringe existing property rights. The full grandfathering of otherwise-affected property rights would therefore seem to be the only conservative remedy that could satisfy libertarian

[8] This is *one of* Nozick's positions on the nature of the rights—the one he invokes explicitly or implicitly in the Preface (p. ix), and in Chapters 3 (pp. 30–31, 34), 5 (p. 95) and 7 (p. 171) of *Anarchy, State, and Utopia* (1974) (hereafter '*ASU*') (see Fried 2012; Mack 2018, sec. 2.4).

[9] The use of the qualifier "generally" in this sentence alludes to some exceptions, which are more or less extensive depending on the specific libertarian theory (Vallentyne and van der Vossen 2014, secs. 3, 4).

side constraints on state law-making (I explore grandfathering and its connection to natural property rights theories in Chapter 9.2.1).

2.2.2 *Critique*

2.2.2.1 Indeterminacy and plausibility objections

Libertarian natural property rights theories are subject to two sources of uncertainty, the first of which is conceptual (and which relates also to an issue of conceptual *plausibility*) and the second of which is contingent but empirically ubiquitous in the real world.

The conceptual indeterminacy stems from the fact that the central concept of *ownership* is itself indeterminate (desideratum #II). Libertarians assume that one can logically deduce from natural property rights "particular rights over particular things held by particular persons" (Nozick 1974, 238); that "one can derive from the abstract principle of 'self-ownership' a detailed regime of unqualified rights over one's self and one's product" (Fried 2004, 75). Fried, drawing on the insights of legal realists Holmes (1895) and Hohfeld (1914, 1917), and on the social cost analysis of Coase (1960), highlights the inescapable fact that "[a]ll property rights necessarily infringe the liberties of others, as all entail reciprocal burdens on others, and in a world of scarcity, such burdens are often substantial" (Fried 2004, 74). Therefore, "in enlarging any one party's formal powers, we necessarily diminish everyone else's" (ibid 73).

No wonder, then, that *self*-ownership is indeterminate. The claim that self-ownership implies "full" liberal ownership (see Part 2.2.1, above), or at least a determinate "core" of control rights, is false. Natural rights theorists appeal to intuitions about easy cases such as forced eyeball transfers and unmotivated stabbings, about which no-one would disagree (see, e.g., Nozick 1974, 171; Vallentyne, Steiner, and Otsuka 2005, 206). Once we get to hard cases that are ubiquitous in the real world, self-ownership is revealed to say nothing about where entitlements lie and what kind of protection from interference they entail (Fried 2004, 79–82). For example, Fried asks, rhetorically (2004, 78): "Suppose I stand two feet from you and blow smoke in your face. Or suppose I imitate your voice in a commercial, passing myself off as you. Have I coercively interfered with your right to control your body?" Self-ownership

entails no answer to these and infinite other examples from social intercourse in any complex society. What self-ownership entails for the ownership of things is no less indeterminate and even more controversial, even among libertarians themselves (see Fried 2004, 82–84; Vallentyne and van der Vossen 2014, sec. 2). Natural property rights theories therefore fail the determinacy condition of a good principle/theory of legal transitions (desideratum #2) by importing an indeterminate concept (desideratum #II).

At a deeper level, there is something suspect about the idea of persons owning themselves. If ownership is a bundle of rights held by a person in relation to things, then self-ownership seems to be a contradiction in terms, at least on an ordinary understanding of what it is to be a self. It turns out that Locke himself had no ordinary understanding of what it is to be a self. Rather, Locke has a Cartesian-like dual model of the self, in which the self is *essentially* a non-physical "consciousness", self-awareness or sentience (Locke 1959 [*c*.1690], II.xxvii.11, 16*ff*; Taylor 1989, 49, 172–73). This mysterious entity is capable of taking a detached, instrumental stance toward its body and its own desires: through self-discipline it can come to fashion its desires at will in order to bring about the best results, pleasure, or happiness (1959 [*c*.1690], II.xxi.71; Taylor 1989, 171). Something like this Lockean "punctual self" (Taylor 1989, 171) seems like a necessary ontological supposition to render the idea of self-ownership coherent: an essential self (consciousness) can in principle own its contingent self (body, tastes, etc.). But this would be a costly move, importing as it does an ontological claim of dubious plausibility into a theory of legal transitions (desideratum #5). Contemporary theorists who wish to invoke such an unusual and counterintuitive conception of the self should bear the heavy burden of motivating and justifying it.

The contingent source of indeterminacy in natural property rights theories stems from the practical impossibility of tracing existing normative entitlements through to their historically rightful first appropriators and administering the necessary rectification. For one thing, the Lockean first appropriation story has to be literally true (Waldron 2016a, sec. 4), as even Nozick acknowledged (1974, 151–52). Yet the Lockean account was highly controversial at the time, and seems unlikely to have been true in many countries (Waldron 2012, 28–33, 38–39). But even if we ignore all these objections—even if we assume that natural rights confer

determinate ownership upon first possessors and subsequent transferees and that there was in fact a clearly identified and uncontested first possessor of all property—clearly there have been countless unjust interferences throughout history that demand rectification (ibid 32). Applying this problem to legal transitions, even if one was otherwise persuaded that the correct transitional theory is not to violate natural property rights, one could not assume that current resource owners were the rightful owners, according to one's favoured historical entitlement theory. The epistemic burden being insurmountable, the concept of natural property rights fails the epistemic accessibility desideratum on concepts (#V)—and therefore the determinacy desideratum on principles and theories (#2) of which that concept is an element, as with Lockean natural property rights theories.

But let's be incredibly generous and assume for the sake of argument that these indeterminacy and plausibility worries could be overcome and that natural property rights libertarianism determinately specifies the *existing* distribution of actual, legal property, implying a conservative theory of legal transitions. We might call this position "everyday libertarianism" (cf. Murphy and Nagel 2002, 15, 31–37). Still, two further objections would plague the theory, both of which appeal to the counterintuitive implications of everyday-libertarian property rights theories of legal transitions.

2.2.2.2 The 'too much' objection

To illuminate these objections, let us posit the following condition pertaining to the 'currency' of loss/gain that is used in a theory of legal transitions, which I shall call the "correspondence condition": a currency of loss/gain *should correspond to the normative significance of losses and gains to the relevant agents*. When losses (and gains[10]) are tallied in terms of natural property rights violations, I will argue, the correspondence condition is violated because, relative to widespread intuitions, this currency (i) in some respects counts too many things as losses, or at least accords many of those losses excessive moral weight, and (ii) in other

[10] Changing the law to benefit some person (other than where the benefit is the person's rightful historical entitlement according to the relevant theory) would not be permissible on a libertarian theory, so the idea of 'gains' becomes irrelevant. Hence I will focus solely on losses.

respects counts too few things as losses, or accords them insufficient moral weight. I will call these the "too much objection" and the "too little objection", respectively, and develop them in this order.

To appreciate the too much objection, let us note two key features of natural property rights theories. First, as discussed in Part 2.2.1, such theories impose absolute side-constraints on others' actions; they impose strict obligations never to cross another's property boundaries, absent explicit consent. Second, all such boundary-crossings count as *equally* impermissible and wrong. Nozick (1974, 75) captures the latter feature when he writes that the natural rights tradition with which he identifies "holds that stealing a penny or a pin or anything from someone violates his rights. That tradition does *not* select a threshold measure of harm as a lower limit …" (Nozick 1974, 75, emphasis in original). More specifically, natural property rights theories provide no basis for distinguishing among property rights violations on account of their significance for the agent whose property boundaries are crossed (Railton 2003, 189; Sobel 2012, 34, 2013, 100). It follows that causing a trivial amount of pollution that adversely affected someone in a real but incredibly small way—even if the 'victim' knew about and was unconcerned with it—would count as a property rights violation *of equal gravity* to non-consensually removing the person's spare kidney (Sobel 2012, 36). Such theories, then, "conflate cases on the trivial end of the spectrum and on the serious end and treat them as if they were equally morally important" (Sobel 2013, 103). This "conflation problem" (Sobel 2013) is enough to violate my correspondence condition for a currency of loss/gain. When combined with the first-mentioned feature of natural property rights theories—their absolute stringency—the conflation problem turns trivial infringements into grave ones, with wildly counterintuitive implications for normatively permissible conduct (Sobel 2013, 104, 2018, 125–26). Both Railton (2003, 190–94) and Sobel (2012, 35–36, 2013, 109) have demonstrated the vast extent of this problem in light of basic facts about environmental externalities that are ubiquitous in a modern economy. Applying libertarian natural rights property theories would, Sobel notes, effectively "make a wide range of industry and transportation impermissible, perhaps even most uses of fire" (Sobel 2012, 36).

My argument is simply that the same kinds of wildly counterintuitive implications follow from the application of such theories to the realm of legal transitions. A law that dispossessed a poor person from her home would count that person's loss as being of *equal* normative significance to the 'loss' experienced by a billionaire agriculturalist when a law restricts the amount of land-clearing he can undertake on his vast agricultural estates. By counting the latter as a loss of the same magnitude as the former, libertarian natural property rights theories greatly over-value the significance of many losses. This alone makes such theories problematic, violating as it does my "correspondence condition". But libertarian natural property rights theories do more than that: as noted above, legal changes instantiating any such loss would simply be morally *impermissible*. Of course, libertarians may well welcome that conclusion on the face of it, but the problems of trivial harms and the resulting (illiberal) paralysis that would seem to prevail in the *absence* of state regulation, discussed above, should give them pause. Reflection on such paralysis helps to motivate the empirical claim that legal institutions actually *enable* the economic activities of a modern industrial economy (Acemoğlu and Robinson 2012; Friedman 1962, 26, 162; Murphy and Nagel 2002, 32–33; de Soto 2001).

As it happens, when confronted with trivial infringement cases many libertarians abandon or diminish their natural property rights-based theories at a more fundamental level of the theory (i.e. well before thinking about legal transitions), and in so doing can avoid some of the 'impermissibility' implications just mentioned. Revealingly, those libertarians who have grappled with this issue of trivial infringements (Nozick 1974, chap. 4; Otsuka 2003; Vallentyne, Steiner, and Otsuka 2005, 206–7) have conceded that the issue is a problem for natural property rights theories (see Sobel 2012, 37–38, 59). They have attempted to develop responses to it, but each such attempt involves backing away from the foundational commitment to full self-ownership in a way that either abandons it altogether (at least selectively) or deepens concerns about its determinacy (Fried 2005, 2012, Sobel 2012, 2013, 2018). Let us consider here only Nozick's attempt, since it is probably the most influential, and since it affords me the opportunity to draw some connections between (what start out as) natural property rights theories and welfarist theories discussed later in this chapter and in Chapter 3.

Nozick was sufficiently aware of the problem of trivial infringements and concerned about its implications that he spent considerable effort grappling with them (1974, chap. 4). Nozick ultimately seems[11] to endorse the position that non-consensual property rights boundary-crossings (by any other agent) are *not* rights infringements (hence *are* permissible) provided that adequate *ex post* compensation is actually paid to the rights-holder, where adequate compensation means at least that which is sufficient to leave the rights-holder indifferent by her own lights as between non-infringement and infringement-plus-compensation (Nozick 1974, 57, 71–73).[12] As critics have noted, this move by Nozick amounts to abandoning the idea that individuals have property rights in themselves and their holdings (what lawyers call a "property rule") and substituting for it a "liability rule", thus rendering his entire theory of rights incoherent (Fried 2012; Mack 2018, sec. 2.4; Sobel 2012, 38–40). For one thing, understanding rights as liability rules implies that the foundation of rights is welfarist: what matters ultimately is not the maintenance of individuals' natural property rights (which, once the move to a liability rule is made, turn out to be chimerical), but rather the maintenance of individuals' welfare or utility, i.e. not causing people to fall to a lower indifference curve. If that is so, then property rights are not ultimately valuable after all: they are at best instrumentally valuable to individual welfare. Yet, it is difficult to motivate and justify libertarian conclusions in general on the basis of welfarist theories. But for my purposes, what matters is that welfarist theories certainly can't justify the ultra-conservative conclusions about legal transitions on which libertarians tend to converge (see below Parts 2.3 and 3).

---

[11] Nozick's official position is unclear from the relevant sections of *ASU* (1974, chap. 4). Sobel (2012, 38, fn 19) argues persuasively that the view I attribute to Nozick in this paragraph is the best reading. Mack also attributes this position to Nozick and explains why Nozick *needs* to make this move for his argument for a minimal state (*contra* the Individualist Anarchist) to succeed (Mack 2018, sec. 2.4, 3.2). In any case, I am less interested in precisely what Nozick thought than in an exposition of potential natural rights property theories and their implications for legal transitions.

[12] I say "at least" because actually Nozick thinks compensation that would merely leave the person indifferent would allow the boundary-crosser to appropriate all of the gains from the exchange, and so he thinks that the first-best position is to allow actual negotiations over compensation to take place (1974, 63–65).

2.2.2.3 The 'too little' objection

The "too little" objection to using natural property rights as a currency of loss/gain follows from the fact that there are many things that intuitively should count as losses but do not amount to natural property rights boundary crossings (or do not do so without exacerbating the indeterminacy problem).[13] Consider three classes of case.[14]

The first involves certain kinds of impositions of *risks* of harm to a person—specifically, cases "where there is no actual physical change produced in a person or his property by an activity that nonetheless raises the probability he will suffer wrongful harm" (Railton 2003, 193). Railton gives the example of your neighbour operating an unsafe miniature nuclear fission reactor on his property, unbeknown to you, but that happens to result in no harm to you (ibid 193–94). We could easily transpose this example to state legislative activity, such as passing a new law permitting nuclear power generation near your property (again, let's assume for the sake of simplicity that you don't know about it—maybe it's far enough away to be unknown to you but close enough to impose a serious risk). At least some such risks—those sufficiently large in terms of their magnitude and probability—do seem like they ought to count as losses.[15] Such losses can be conceptualised as losses of *security* of some valued good[16] and we should be concerned if a moral or political theory (including a theory of legal change) ignored their imposition in its evaluations and prescriptions (Herington 2017; John 2011; Railton 2003, 200–202; Wolff and De-Shalit 2007, chap. 3).

---

[13] By saying that there are things that intuitively count as losses, I am not committing to the further thesis that such losses should be remedied. I merely mean that in the moral 'accounting' that goes into the state's transitional responses, such losses must be counted.

[14] These classes of case clearly overlap. For example, the third (economic competition) could potentially be assimilated to the first (risk/insecurity) or the second (psychological effects) categories. But I think they are sufficiently distinctive and illustrative of the concerns to be worthy of separate discussion.

[15] Railton (2003, 200–203) argues convincingly that natural property right theorists *themselves* have good reasons (i.e. they have good Lockean and Kantian reasons) to take such risks seriously, and yet doing so greatly complicates the standard Lockean assumption that one has absolute freedom within one's boundaries so long as one doesn't cross another's boundary. Nozick concedes that "[i]t is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others" (1974, 75).

[16] The force of the present point does not depend on conceptualising the valued good in terms of any particular 'currency', though I will later go onto endorse a 'functionings' currency (see Chapter 6.3).

A second class of cases involves psychological (or 'psycho-social' or 'symbolic' harms), such as causing someone to experience sadness, anxiety, depression, disappointment, disrespect or offence; insulting someone; libelling or defaming someone; passing oneself off as someone; diminishing someone's social status, and so on. It seems plausible that at least some of these should count as losses for the purposes of moral and political (including legal transitions) theorising. Yet it is not clear whether, on a natural property rights theory, they would.[17] If they do not, then they provide further evidence in support of the "too little" objection to such theories. But perhaps they do; perhaps self-ownership entails the right not to have any other person diminish your psychological state (or similar). But if this is so, then such theories are *all the more* vulnerable to the "too much" objection, since all such violations would (i) count as equally bad and (ii) be impermissible, with consequently even more stultifying restrictions on everyone's freedom of action (for further discussion see Railton 2003, 204–206).

A third class of cases involves a loss of a flow—or, more specifically, a loss of an *expected* flow—such as a stream of income or profits.[18] Economic competition is perhaps the clearest example here: does shopkeeper *A* incur a loss when shopkeeper *B* sets up in competition down the road (on B's land) and customers voluntarily switch their loyalty from *A* to *B*, causing A to lose income? It seems at least plausible to consider counting expected flows as something that can be lost—certainly we do in everyday language, when we speak of the unemployed person's 'lost income' or the shrinking business' 'lost profits'. Yet since no property boundary is obviously crossed, the natural property rights theorist would presumably deny that this is a loss. But this, again, may be too fast, since it appeals only to physical property boundaries (that is, it takes the boundary metaphor *literally*). Libertarians,

---

[17] Nozick says, in a somewhat question-begging way, that "Not every act that produces lower utility for others generally may be forbidden; it must cross the boundary of others' rights for the question of its prohibition to even arise" (1974, 67). Yet he is also concerned about the consequences of permitting compensation for non-consensual boundary-crossings for people's *fears* (ibid 65–71). For discussion of the alternative positions the natural property rights theorist could take, both of which seem open, see Railton (2003, 204–207) and Sobel (2012, 44–45). In fact, these kinds of cases really just underscore the indeterminacy objection: see, e.g. Fried's example of 'passing off' and her surrounding discussion (2004, 79).

[18] I say "expected" flow, since once an income stream is banked it becomes part of one's stock of assets, just as does the rain that falls into my dam.

as we have seen, are typically wont to extend property boundaries into the intangible realm, as any modern economy must. Indeed, as Jonathan Wolff (2006, 1616–19) points out, if first appropriation on a natural property rights view yields absolute property in *land*, why not also in *spheres of economic activity* and hence flows of income (as with feudal, pure-monopolistic economic systems) or *ideas* (as with intellectual property, a partially-monopolistic system)? So perhaps loss of expected flows *are* private property rights violations, after all. But then we would have to add 'economic activity' to the list of items on our "too much" objection, since it would imply (ironically) that natural rights libertarianism rules out all economic competition (Wolff 2006). At the very least, we seem to be up to our necks in the indeterminacy problem.

In conclusion, libertarian natural property rights theories face an implausibility–incoherence–indeterminacy trilemma: purportedly determinate specifications of such theories yield profoundly counterintuitive implications that even libertarians themselves concede are troubling (*implausibility*[19]), forcing them to retreat from those implications by either making *ad hoc* modifications to their theories, which inflate underlying concerns about the theories' determinacy (*indeterminacy*), or by appealing to non-libertarian values and principles (*incoherence*).

2.2.3 *Libertarian compensation?*

It is worth exploring briefly the potential of libertarian arguments to support a somewhat weaker, but still quite conservative position on legal transitions: that legal transitions may permissibly occur despite crossing natural property boundaries, provided compensation is paid as a remedy.

One such version of this position is opened up by the Nozickian retreat to a liability rule theory of rights, discussed earlier (Sobel calls this position "cross and compensate": 2012, 38). Relevantly for our purposes, this position would seem also to licence *state* infringements of one's property (however grave) provided full compensation is paid to the rights-holder

[19] By which I really mean, in this instance, (highly) counter-*intuitive* (i.e. desideratum #3, not #5).

(call this "state cross and compensate").[20] I have already pointed out that such a move is incoherent with natural property rights (and in Nozick's case inconsistent with positions held in other parts of *ASU*). But let us set aside for now that more foundational worry (including the Nozick-specific version) and treat 'state cross and compensate' as a genuine, albeit 'second-best' libertarian position on legal transitions, and focus instead on its implications.

What state cross and compensate amounts to is something similar to a Pareto Efficiency theory of legal transitions (the concept of Pareto efficiency is explained in Chapter 3.2).[21] Such a position is not nearly as conservative as natural property rights libertarianism. This is because Paretian welfarist views would permit government actions to which individuals do not consent, provided full compensation (that which is necessary to restore that agent's previous level of utility) is paid. First, this would permit paternalist laws that actually make individuals better off (Mack 2018, sec. 2.4). Second, it would permit theoretically unlimited state interventions that disrupt people's chosen *ends* (goals, plans, projects, relationships etc.), provided full compensation is paid[22]—a result that should trouble libertarians (see, e.g., Nozick's discussion of the value of long-term planning in ensuring the meaningfulness and coherence of people's lives: 1974, 49–50). That said, in other respects the Paretian position on legal transitions remains extremely—and in my view, excessively—conservative. It would, for example, require the state to fully compensate oil companies for mitigating climate change, billionaires for redistributing a tiny fraction of their wealth, and monopolists for tightening competition (antitrust) regulation (I submit these all violate desideratum #3).

A different libertarian position on compensation, which also sits awkwardly between natural property rights libertarianism and welfarism, is that of US legal scholar Richard Epstein.

---

[20] Sobel notes that "Nozick's thought is not the relatively mundane idea that if others have already crossed our boundaries, they owe us compensation. Rather his thought is that one may permissibly prospectively plan to and succeed in crossing the boundaries of someone's legitimate property without her consent provided compensation is paid" (2012, 38–39, footnote omitted).

[21] I say "similar to" because Pareto efficiency theories deal in the *money value* of preferences ("Willingness to Accept"), not preferences *per se* (i.e. a preference-satisfaction theory of welfare), which leaves the former more hostage to resource inequalities (see Chapter 3.4.3.1).

[22] I explain why this is so and why it is problematic (drawing on Goodin 1989) in my discussion of compensation in Chapter 9.2.2.3 (see also Chapter 3.4.4).

Epstein provides a normative political-theoretic interpretation of the 'takings' clause of the 5th Amendment to the US Constitution ("nor shall private property be taken for public use, without just compensation"). In his first and most famous treatise on this topic, *Takings* (1985), Epstein purports to derive a conservative approach to takings from Lockean natural property rights foundations. *Takings* mixes utilitarian with natural rights claims (ibid 5, 11), but subsequently Epstein came to defend his theory on rule-utilitarian grounds.[23] In this later view,[24] Epstein argues that the Lockean natural rights of life, liberty and property are grounded in the imperative to maximise utility. In particular, utilitarian considerations are said to ground (i) the rule that first possession confers title, via the empirical claim that such a rule minimises conflict over scare resources, and (ii) the absolute strength of the relevant bundle of property rights, via the empirical claim that qualifications of property rights would lead to uncertainty and hence socially wasteful disputation, which undermines utility (Epstein 1986a, 258–59, 1989, 730–37, 1993, 25–38, 1995, 59–63). The only threat to utility that Epstein admits, once initial acquisitions have been settled, is the resulting inability to solve collective action problems (and related inefficiency problems), and so Epstein allows that resolving such problems is a "public use" for which the state may legitimately take private property (Epstein 1985, 5, 1986b, 4–5).[25] But this state power, argues Epstein, creates a further risk of utility drain: from "rent-seeking" behaviour (Epstein 1986b, 13–14, 17–18). His response is to restrict legitimate public takings to those that create a social surplus and to require that that surplus be divided (as compensation) among existing property holders in proportion to their existing property holdings (Epstein 1986b, 13–14).

In terms of institutional *conclusions* about legal transitions, Epstein's position leaves him somewhere in between the conclusions (and stultifying, ultra-conservative implications) of genuine natural rights property theories and the conclusions (and slightly less stultifying, but still very conservative implications) of liability rule theories. Accordingly, my above

---

[23] See especially Epstein (1986a, 256–58) and Epstein's other works cited in this paragraph.
[24] My summary of Epstein's views here draws on Wenar's summary (Wenar 1997, 1935–38).
[25] It is the only legitimate use, according to Epstein, other than the state's "police power", of which he gives a very narrow interpretation (Epstein 1985, 5, 15–16, 1986b, 11–12).

criticisms of those views (in light of their implications) apply *mutatis mutandis* to Epstein's conclusions.

In terms of its normative *foundations*, Epstein's position sits somewhere in between natural rights property theories and utilitarianism, and this leaves him exposed to the implausibility–incoherence–indeterminacy trilemma outlined earlier. If property rights are natural, then Epstein has no grounds for permitting the state to alter property rights *even in order to solve collective action problems*. The Epstein of *Takings* holds an agency conception of the state, according to which the state can hold no rights beyond those endowed to it by, and hence originally held by, its citizens (1985, 12–18, 331). However, as Wenar points out, individuals in the state of nature could not have acquired the kind of third-order power to non-consensually alter other people's second-order powers to transfer their property,[26] so the state (on the agency view) could not be endowed with such powers, either (Wenar 1997, 1940). Epstein would have to accept the *ultra*-conservative implication that the state has no power *at all* to alter anyone's property rights (not even to solve collective action problems) or he would have to abandon natural rights foundationalism. As we have noted, he chose the latter course, embracing utilitarian foundations to support his very conservative conclusion. But now his very conservative conclusion is hostage to fortune, and faces irresistible pressure from the other direction, for it is patently implausible as an empirical generality that utilitarianism would entail a very conservative approach to legal transitions of the kind Epstein advocates (or anything close to it). At least, it is implausible to think it would do so in any currently existing society, and certainly one in which property rights are so grossly unequally distributed as the contemporary United States in which Epstein is writing. To see why this is so, we must move to the second kind of property rights theory, of which Epstein—and "consequentialist libertarianism" more generally (see Wolff 2006, 1605–6)—is but a token instance.

---

[26] How could one plausibly "appropriate" such a right naturally? Nor would such an appropriation be plausible on a utilitarian-foundationalist approach to state-of-nature rights: what could create more utility-sapping uncertainty in the state of nature than having such a third-order power over others' second-order powers?!

2.3 CLASSICAL LIBERAL CONVENTIONAL–INSTRUMENTAL PROPERTY RIGHTS THEORIES

Other theories within the liberty tradition—those more closely associated with 18th and 19th century classical liberalism and their 20th century heirs—do not take private property to be a natural, morally basic right that is non-instrumentally valuable (nor do they rely on any notion of self-ownership). Rather, they tend to conceive of property rights as conventional and to place a special value on private property for instrumental reasons (Freeman 2011, 33–35). Here we may distinguish between instrumental reasons pertaining directly to the individual property holder, such as enhancing the individual's negative liberty, security, or utility,[27] and instrumental reasons pertaining to the collective good, from which (at least some) individuals derive benefit in a less direct way. Among the latter category are arguments about the value of a system of private property for social stability, social coordination, decentralisation, efficiency, and aggregate utility.[28]

Importantly for our purposes, instrumental arguments for private property are hostage to fortune; they hold only to the extent that they actually promote the ultimate value to which they are purportedly instrumental. The individual benefits of property accrue only to those individuals who hold it and only to the extent of their holdings, and the collective benefits of property are correspondingly limited by its particular distribution in a given society (Waldron 2016a, sec. 5). To the extent that property provides its holders with individual benefits, a *pro tanto* case for a more egalitarian, or at least sufficientarian, distribution of property arises, so that all persons may enjoy its putative individual benefits (Waldron 1988, 408–15, 444). And to the extent that arguments for collective benefits such as stability, efficiency, utility and democracy trade on the aggregation of individual benefits, a more egalitarian or

---

[27] I mention here only values that tend to be emphasised by classical liberals. Writers in other traditions have pointed to various other values-to-individual-holders to which their private property is instrumental, including positive and effective conceptions of liberty, wellbeing, and flourishing (see, e.g., Waldron 1988, chap. 8, 2016a, sec. 2).

[28] Again, other traditions emphasise other collective benefits. Most notably, the Republican tradition emphasises the benefits of private property for democracy and the independence of the state (see, e.g., Sunstein 1992, 914–16).

sufficientarian distribution of property would, all else equal, better promote those outcomes.[29] At least, no such redistribution can be ruled out *a priori*.

What the advocate of an instrumental property theory of legal transitions must weigh against these redistributive pressures are the *adverse* implications of the redistribution for one's favoured ultimate value—be it for the individual or for the collective. What the would-be *conservative* theorist of legal transitions needs, then, is a further argument in favour of *the current conventional or legal distribution of property* that is sufficiently weighty to defeat the *pro tanto* case for egalitarian (or sufficientarian) redistribution. In the remainder of this section, I want to explore what I think is the most explicit and thoroughly argued case that has been made in the classical liberal tradition for a conservative theory of legal transitions based on the instrumental value of property—the indirect utilitarian argument of Jeremy Bentham.[30]

2.3.1 *Exposition: Bentham's conservative theory of legal transitions*

Influenced by the empiricism of the scientific revolution, Bentham's moral and political theory is built upon a naturalistic concern with the maximisation of pleasure over pains (see Crimmins 2017, sec. 2). This imperative to avoid pain led Bentham straightforwardly to a concern with the value of bodily integrity and hence physical security. Yet he did not view human beings as mere vessels of transient sensory experience. Rather, central to Bentham's conception of the person was the notion that individuals are temporally-extended beings with future goals, plans and expectations, and a desire to connect these coherently with their past (1838–43, I, "Principles of the Civil Code", 308). Bentham thought that *security* was so important because these links between one's present and future self provide a basis for the formation of one's interests (ibid 308). Private property is then valuable partly because it provides individuals with the stability and security they need to carry out their life plans and

---

[29] Indeed, some scholars, especially those in the republican and liberal-egalitarian traditions, invoke these benefits precisely in order to argue for some such redistribution (Claassen 2015, 226–27; Freeman 2011, 33; Mill 2006 [1848], II.i.3, 223, 225; O'Neill and Williamson 2012; Rawls 2001a, 114; Sunstein 1992, 917; Waldron 1988).

[30] As Freeman points out, classical liberal arguments for relatively free market capitalism are commonly couched and justified in indirect-utilitarian terms (2011, 23 [and fn 5], 25).

hence live coherent lives (ibid 305–312). Ensuring that people enjoyed such security, Bentham believed, was a central objective of the state (see Kelly 1990, chap. 4). Bentham also assumed the diminishing marginal utility of wealth. He therefore recognised that, all else equal, the greatest happiness will be produced by an *equal* distribution of goods (Bentham 1838–43, I, "Principles of the Civil Code", 305; 1840, I, 103–9).

Yet Bentham believed that the disutility caused by changing hitherto legally sanctioned distributions of property was so strong that he endorsed a highly conservative approach to legal transitions (Brown 2017a, 437–38). How does Bentham arrive at this conclusion?

Part of the answer lies in the disutility experienced by individuals who lose their property. Bentham thought that the "four basic conditions of personal continuity and coherence, namely, person, possessions, condition in life and reputation are all modifications of property" (Kelly 1989, 78). Let us focus briefly on "possessions". Bentham thought that wealth and other physical possessions were the material conditions of interest formation and the basic focus of one's expectations (Kelly 1989, 78–79). When we possess things, Bentham argued, we not only come to treat them as our own and so vest them with a special kind of value, but we also infuse in them our expectations about the future (Bentham 1838–43, I, "Principles of the Civil Code", 307–10). Accordingly, when we lose our property we experience not only the pain of losing the relevant thing itself, but also a *sui generis* kind of acute pain in the form of *disappointment* at the frustration of our expectations (1838–43, I, "Principles of the Civil Code", 309–10; II, "Supply without Burden", 590; III, "Equity Dispatch Proposal", 312; V, "A Commentary on Mr Humphrey's Real Property Code", 416).[31] This disutility had to be weighed on the utilitarian scales against the benefits of redistributing property to others.

Still, to justify placing *so much* weight on the disutility plate of the utilitarian scales as to imply a conservative theory of legal transitions, Bentham had to appeal to something more than the psychological pains of individual property owners who lose their property. Here it

[31] This "expectation effect" (Brown 2017b, 164) has more recently been identified experimentally by psychologists and behavioural economists (Beggan 1992; Koszegi and Rabin 2006).

is necessary to understand Bentham's views about the aggregate effects of a stable property system.

Bentham thought that expectations have a social dimension that links them to the rule of law.[32] The utility individuals gain from carrying out their long-term projects is dependent upon social conditions that are sufficiently stable to permit social coordination and the expectations associated with it (Kelly 1989, 69). Accordingly, our expectations are themselves necessarily shaped by our social context, important among which are the informal sanctions of public opinion that attend social conventions and the formal sanctions and rewards that attend laws (Crimmins 2017, sec. 3.1). For Bentham, then, "social interaction and therefore social well-being depend upon the existence of rules and norms which give rise to expectations and expectation utilities" (Kelly 1989, 69). Bentham thought that law plays a particularly powerful role in shaping the content, strength and longevity of people's expectations: "expectation, as far as the law can be kept present to men's minds, follows with undeviating obsequiousness the finger of the law" (Bentham 1838–43, II, "Supply Without Burden", 589). It is their underpinning in law, then, that Bentham takes to warrant or legitimise those expectations (Brown 2017a, 437–38).

Because of the close connections between law, property, and the systemic conditions of social coordination, Bentham thought that stripping *some* people of their property by changing the law would bread *systemic* insecurity (Bentham 1838–43, I, "Principles of the Civil Code", 311–12). "The legislator", thought Bentham, "owes the greatest respect to these expectations to which he has given birth: when he does not interfere with them, he does all that is essential to the happiness of society; when he injures them, he always produces a proportionate sum of evil" (ibid 309). He continues: "if property were overthrown with the direct intention of establishing equality of fortune, the evil would be irreparable: no more security—no more industry—no more abundance; society would relapse into the savage state from which it has arisen" (ibid 312). These considerations led Bentham to propose the "disappointment

[32] My discussion of Bentham's approach to legal transitions is indebted to Alex Brown (2017a, 437–40, 2017b, 54–57, 161–64).

prevention principle", according to which security of expectations takes precedence over all other ends (including redistribution), except when the public interest manifestly requires otherwise (1838–43, III, "Equity Dispatch Proposal", 312; V, "A Commentary on Mr Humphrey's Real Property Code", 416). This meant that property rights should be conserved in all but extreme circumstances; normal legal reforms should be done in ways that avoid upsetting expectations (Crimmins 2017, secs. 4.1, 6).

2.3.2 *Critique of Bentham's argument*

What are we to make of Bentham's argument? As Bentham scholars have noted, there are obvious tensions in Bentham's oeuvre between the utilitarian reformative strand and the classical liberal conservative strand of his thought (Crimmins 1996). Sociological and (as noted in Chapter 1.2) historical-political reasons might go some way to explaining the tension (Crimmins 1996; Kelly 1989, 79). In any case, transmuted to the empirical reality of contemporary societies, Bentham's argument for a conservative theory of legal transitions is unpersuasive.[33] In contemporary capitalist societies in which many barely subsist while others are multibillionaires, no self-respecting utilitarian could claim that a significant degree of redistribution would be ruled out *a priori* on utilitarian grounds. Let us accept for a moment that, as per Bentham, hedonism is the correct conception of utility. Granted, this supposition would make Bentham's argument somewhat less implausible, since people's desires and expectations are to a great extent shaped by their histories. The magnitude of disappointment felt by the miserly landlord who loses his mansion might well be greater than the measure of happiness gained by the pauper when gifted a modest lodgement. But how far, really, can this be pushed, even on a hedonistic theory of utility? If a modest wealth tax forced a few billionaires to sell their unused luxury yachts, and the proceeds enabled thousands of starving people to eat, surely the utility gains of the latter would outweigh the losses of the former. The notion, moreover, that such redistributive transfers would induce

[33] There are also internal conflicts within Bentham's account. One problem, identified by Brown, is that Bentham unduly privileges the *law*-based aspect of expectations. Bentham himself thought that social conventions also powerfully shape expectations, as noted above. So what should the state do when social conventions conflict with the law, and some people's expectations are based on social convention and others' are based on the law? There is an indeterminacy here that Bentham does not resolve (Brown 2017a, 438–40).

widespread fear and insecurity, tending toward *systemic* breakdown, is patently overblown—at least when applied to today's circumstances.

Furthermore, these examples also point us to some concerns about using hedonism, or indeed any purely subjective conception of wellbeing, as the relevant currency. Given the documented phenomenon of hedonic adaptation (Armenta et al. 2014)—and its preference-satisfaction-theoretic cousin, adaptive preferences (Elster 1983)—we should be wary of basing social distributions on the balance of psychic pleasures and pains (or subjective preferences) alone, as contemporary capability theorists have argued (Nussbaum 2000, chap. 2; Robeyns 2017, 119–21, 125–26, 130–35).

There is certainly wisdom to be mined in Bentham's writing. There is clearly something to the ideas that: persons are more or less continuous over time; part of wellbeing consists in the pursuit of long-term projects and these projects link our past, present and future selves; planning is typically important to the pursuit of such projects; our plans and projects are shaped by our expectations; our expectations are shaped by the past, including our history of interactions with particular objects; having a degree of security over those objects is therefore valuable for planning; and the law's having underpinned that security provides some grounds for thinking that it should continue to do so. I certainly take these ideas seriously in the development of my own theory. But what they amount to is a *pro tanto* case for conserving *some* conventional property rights on instrumental grounds, not an all-things-considered case for preserving all conventional property rights (see also Michelman 1967, 1211–13). Ultimately, Bentham's arguments illustrate the difficulty that classical liberals face in generating conservative conclusions about legal transitions from premises about the conventional nature and instrumental value of private property.

Before closing, I want to probe, in the spirit of WRE, the conceptions of the person and the good life underpinning Bentham's conclusions. How, in particular, are we to square Bentham's ideal of persons as rational expected-utility calculators with his conservative approach to legal transitions, given the political reality that laws frequently change? It is fair to say that the bourgeois men of Bentham's civil law writing, whose property-based expectations he was so keen to conserve, come across as somewhat politically naïve.

Wouldn't rational, utility-maximising individuals factor in the risk of legal change and prudently manage their investments accordingly, smoothly adjusting to legal changes much as they do to price changes in the marketplace?

Perhaps an answer (though not necessarily the one Bentham would have provided[34]) lies in the classical liberal ideal of the public-private divide.[35] The marketplace takes on a special significance in the classical liberal imaginary, and classical liberals were eager to preserve it as a zone of freedom from interference by the state—hence the strict separation between the public sphere and the private sphere of commerce (and the household) (Walzer 1984). In the classical liberal imaginary, the affordances and demands of modern *economic* life left citizens with neither interest in nor time for public *political* deliberation (Constant 1988 [1819]). Correspondingly, the institution of citizenship in the classical liberal tradition serves as a legal protection for civically passive individuals from interference by the state so that they may pursue their private good relatively uninterrupted (Leydet 2017, sec. 1.2). In this way, the classical liberal ideal of personal responsibility, and associated virtues such as foresight and prudence, were scope-limited to the private sphere. This contextual aspect of the classical liberal conception of the person, argues Taylor (1989, pt. III), is bound up with modernity's "affirmation of ordinary life"—the life of productive work and family—and its rejection of life goods such as philosophical contemplation and civic virtue, which were exalted in earlier periods.

But this radical separation between a prudent and hyper-flexible self in the private sphere and a passive and hyper-vulnerable self in the public sphere cannot withstand metaphysical, empirical, or normative scrutiny. Metaphysically and empirically, no such radical separation exists: the public and private "are, and always have been, inextricably connected" (Okin 1992, 69), and feminist scholars have detailed the multifarious ways in which this is and has been true (e.g. Frazer and Lacey 1993, 72–76). This being the case, the notion that one could and ought to simply switch on and off the virtues of foresight and prudence as one moves

[34] Consider, for example, Bentham's view on popular sovereignty and civic duty (see Crimmins 2017, sec. 9).
[35] This paragraph is drawn from Green (2017, 188).

through different social contexts becomes (even more) untenable. Normatively, the juxtaposition of an active private self and a passive public one comes at a great theoretical cost: as proponents of republican citizenship have pointed out, it is unclear how such a person could be motivated to defend, and capable of defending, the democratic political order from the persistent internal and external threats to its survival (Lovett 2018, sec. 4.3). These considerations pose a challenge to the plausibility of the conception of the person and the ideal of the good life at the heart of any classical liberal justification of a conservative theory of legal transitions (desideratum #5).

2.4 CONCLUSION

In this chapter I have critically evaluated theories of legal transitions based on conceptions of property rights from the 'liberty tradition'. I first argued that Lockean natural property rights theories, as interpreted by 20th century and contemporary right-libertarians, are vulnerable to deep objections and are not a compelling basis for a theory of legal transitions. I then argued that instrumental theories of property are hostage to fortune, and therefore any attempt to build a conservative theory of legal transitions on the basis of an instrumental theory of property is likely to require heroic empirical premises that cannot withstand scrutiny. I illustrated this more general tendency by focusing on the most explicit of such arguments within the classical liberal canon, that of Jeremy Bentham. I also exposed some problems with the ideals of the person and the good life underlying classical liberal conservatism about property in the context of legal transitions.

I should emphasise that this chapter has not exhausted the possible argumentative linkages that one could make between property and legal transitions. Some contemporary scholars have drawn on the natural rights tradition to argue for a much more limited set of natural rights to property, and argued that these natural rights are of only instrumental value. For example, Anna Stilz (2018) draws on Grotius and a different reading of Locke's *Second Treatise*—a reading consonant with those of Scanlon (1976) and Tully (1980)—to argue for a limited natural right of secure use and possession of physical objects insofar as these are instrumental to our rights to a reciprocally justifiable degree of autonomy (cf. Moore 2017,

240–242).[36] Margaret Radin's Hegelian-inspired "personhood perspective" on property articulates the importance of certain kinds of property to individuals' personal development, providing a distinctive normative basis for justifying and delineating the relative importance to persons of different kinds of property rights.[37] Republican political theory, moreover, suggests democratic reasons for certain kinds of property distributions (see, e.g., Sunstein 1992, 914–16). All of these theories present potentially fruitful avenues for developing at least a partially property-based theory of legal transitions. None of them seems likely to entail the strong conservatism of classical liberal theories, let alone the ultra-conservatism of ("everyday") right libertarianism.

[36] On Stilz's account, "[o]ther aspects of liberal private ownership—like the right to alienate, to bequeath, to draw income, and to possess apart from use (incidents fundamental to the development of inequalities in modern societies)" are purely conventional, meaning her resulting account is a hybrid natural–conventional theory (2018, 245). Adam Smith, too, held a proto-hybrid theory of property, at least on one reading (Fleischacker 2004, 177–92).

[37] Given the conception of wellbeing I endorse for the purpose of ART (in Chapter 6.3), my Wellbeing Principle (Chapter 7) ends up being sensitive to these kinds of relations between persons and property.

CHAPTER 3. EFFICIENCY: 'LAW AND ECONOMICS' THEORIES

3.1 INTRODUCTION

In the previous chapter, I noted that the conservative institutional conclusions about legal transitions endorsed by natural property rights libertarians were similar to those endorsed by Paretian welfarists. I also explained that, despite their very different theoretical underpinnings, there has been a surprising amount of theoretical shape-shifting among proponents of these approaches. Fried notes that, up until the mid-1970s, a similarly conservative approach, albeit grounded in *fairness*, was dominant in the American legal and economics academy:

> Prior to the mid-1970s, the legal literature exhibited a general bias in favor of ex post compensation for the loser. That bias reflected, I think, an often unexamined assumption that people had a right to (and did) expect legal stability when they made long-term investment decisions, and hence that any significant change in legal regimes constituted unfair surprise, the ex post (negative) consequences of which they were entitled to be protected against. It reflected as well an implicit (and probably unconscious) decision to ignore the symmetrical problem of transition winners, with the consequence that transition gains simply lay where they fell, by default. Outside of the legal academy, the scant literature on the topic leaned towards the same pro-compensation position for losers, on the same or similar grounds. (Fried 2003, 125, footnote omitted)

This chapter is about what came after this prevailing conservatism in the American legal academy: the avalanche of 'law and economics' (L&E) scholarship on legal transitions. By L&E, I am referring to the scholarly legal movement beginning in the 1960s, and situated predominantly in American law schools, which draws primarily on neoclassical economic concepts, theories and analytical methods to (positively) analyse and explain the law, and to (normatively) evaluate and prescribe the law (see generally Butler n.d.; Hackney Jr. 1997). The movement, which "has had a profound effect on public policy debates" (Hackney Jr. 2003, 361), has addressed subjects spanning the gamut of American jurisprudence. By the mid-1970s, L&E scholars were beginning to address the topic of legal transitions, and

scholarly L&E writing on that topic is now extensive. In fact, more articles have been written on legal transitions by L&E scholars than by philosophers and political theorists of all other theoretical perspectives combined. Discussing this corpus therefore affords us the opportunity to trace the evolution of thinking about legal transitions from the perspective of a mature research program whose foundational normative values and methods are largely shared.

The chapter is structured as follows. Parts 3.2 and 3.3 are expository. Part 3.2 briefly introduces the key conceptions of efficiency used throughout the chapter, good grasp of which is essential to understanding the positions of L&E scholars discussed in Part 3.3 and my criticisms of them in Part 3.4. Part 3.3 describes the reasoning and conclusions of the efficiency-based "new view"—which reigned supreme in the legal academy for the last quarter of the 20th century and remains influential—and traces the subsequent scholarly debates that have challenged the empirical assumptions on which the initial "new view" conclusions were predicated. Part 3.4 develops four distinct criticisms of the L&E approach to legal transitions. Part 3.5 concludes.

3.2 EFFICIENCY CONCEPTS: A BRIEF INTRODUCTION

3.2.1 *Pareto Efficiency*

In order to understand the meaning of the dominant conception of efficiency used in L&E analysis today—as well as certain purported justifications of L&E-based transition rules—it is first necessary to consider the foundational concept of Pareto efficiency.[1]

A Pareto improvement is a change in the distribution of resources that makes at least one person better off without making anyone worse off (the new distribution is said to be "Pareto superior"). A Pareto efficient (or "Pareto optimal") distribution is one in which no further Pareto improvements can be made (because any attempts to make one person better off will make at least one other person worse off). Achieving a Pareto improvement is treated in

[1] For a more detailed introduction, see Coleman (1980a, 1984).

neoclassical public economics not merely as a transition rule, but as a decision-rule for undertaking a primary legal change in the first place, albeit one that has an in-built transition principle: the rule change can only be carried out if *full transitional relief* (i.e. grandfathering or full compensation) is given to every person made worse off by the change (Graetz 1977; Kanbur 2003).

When presented as a freestanding principle (as it often is in the economics literature), there is little that can be said by way of justification for Pareto-improving policies (and hence conservative transition rules). The virtues of a Pareto improvement are that it makes at least one person individually better off, and, because it does so without making anyone worse off in absolute terms, it also therefore results in an increase in *aggregate* welfare (Adler and Posner 1999, 188; Coleman 1984, 650–51). Aggregate welfare could thus be improved without the need to make interpersonal utility comparisons of the kind necessitated when comparing one person's loss against another's gain. Economists were thus supposedly liberated from having to make "normative" judgements that were increasingly viewed as unscientific and therefore outside the purview of economic science during the discipline's analytic turn (Robbins 1932; Hackney Jr. 1997, 288–91), allowing them instead to focus on technical improvements in efficiency (Kaldor 1939).

But there are at least four objections that can be made to the proposition that governments should implement Pareto improvements. First, where resources are scarce and there are opportunity costs, there may be an alternative Pareto improvement that leads to higher aggregate welfare than the improvement on offer (a possibility that only arises if we are willing to make interpersonal utility comparisons). Second, a Pareto improvement might make an unjust or otherwise morally objectionable status quo *more* unjust. Consider, for example, a slave-owning society in which a Pareto improvement results in the slave owners being made better off while the slaves stay at the same level of utility. Third, we may have reason to favour an alternative policy that is not a Pareto improvement but that results in a (more) just, or otherwise normatively better, distribution (Adler and Posner 1999, 188;

Hausman, McPherson, and Satz 2016, 148–49).[2] In light of these objections, perhaps the best principled justification of Pareto improvements is that, *assuming the welfare improvements are independently justifiable in a particular case*, a Pareto inefficient situation is wasteful and could be improved upon (cf. Hausman, McPherson, and Satz 2016, 148). But it was a fourth, more practical objection to Pareto improvements that was to prove more significant in the development the discipline of public economics: in the realm of public policy and law, there are very few genuine Pareto improvements available—almost everything the state does will leave at least one person worse off—which leaves the pure Paretian economist somewhat hamstrung (Adler and Posner 1999, 189; Coleman 1984, 651; Mishan 1952).

3.2.2 *Kaldor-Hicks Efficiency*

Public economists in the 1930s and '40s, dissatisfied with the restrictiveness and conservatism of a pure Paretian approach, sought to develop alternatives (see Scitovsky 1951, 305–307). An enduringly popular approach developed in the late 1930s, and now known as *Kaldor-Hicks efficiency* (KHE), advocated government policies (including legal changes) that would increase society's aggregate economic resources by producing *net*-benefits, in the sense of economic gains that outweigh economic losses. The motivating idea, expressed in Paretian terms, is that the winners from a KHE-improving legal change *could* (assuming costless transfers: Coleman 1984, 651), compensate the losers and still leave at least someone better off; that the policy is, in other words, a *potential Pareto-improvement* (Hicks 1939, 1941; Kaldor 1939, 550). In common sense terms, a KHE improvement implies that the economy's aggregate quantity of economic resources—often metaphorically called the "pie", or the economy's stock of "wealth" (Dworkin 1980a, 1980b)—and hence its *capacity* to satisfy preferences, has increased (Hausman, McPherson, and Satz 2016, 159–61).

However, application of the KHE principle does not require that the losers *actually* be compensated, hence it entails a transitional principle at the opposite extreme of the Paretian

---

[2] The last two criticisms assume there are other normative values beyond loss-avoidant aggregate welfare improvement. For a concise argument to this effect in the context of a critique of Pareto efficiency, see DeMartino (2015, 326–329).

principle: i.e. *do not* provide transitional relief (Kanbur 2003; Mishan 1952). In fact, that is a slight over-simplification: some individual economists who advocate KHE-efficiency contemplate the possibility of actually doing the compensation, though they often prefer to leave this "political" question to governments (e.g. Kaldor 1939, 550–551). The point, though, is that the KHE test *itself* does not entail a requirement to compensate losers. Indeed, if full compensation were required, then the KHE test would be redundant, since the policy would be an actual Pareto improvement (Sen 1979b, 25).

Neoclassical welfare economists typically use cost-benefit analysis (CBA) as a way of evaluating the net-benefits of a policy (ideally comparing the net-benefits of various alternative policies), and CBA is widely understood by economists to operationalise the KHE test (see, e.g., Hausman, McPherson, and Satz 2016, 159; Kanbur 2003, 29–30).[3] Net-benefits are calculated by summing the costs of a policy (costs to losers plus policy implementation costs) and subtracting these from the aggregate benefits enjoyed by the winners. For this purpose, gains and losses are measured in monetary terms: a person's "willingness to pay" (WTP) to have a desired good or service, or not to have an undesired one, is taken to indicate the intensity of their preference for that good or service.[4] Posner describes the relationship between wealth and preferences in an efficientarian system as follows:

> Wealth is the value in dollars or dollar equivalents ... of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money ..." (1979, 119).

---

[3] There are some technical differences between KHE and CBA (see Adler and Posner 1999, 190–91), but these are not relevant to the argument here.

[4] Of course, asking about WTP assumes that the respondent does not have an entitlement to the good in question to begin with; if they did have the entitlement, then "willingness to accept" (WTA) would be the correct measure. This matters greatly, because WTP and WTA values systematically diverge, and economists have no coherent means (one that is efficiency-based, all the way down) of determining initial entitlements and hence whether WTA or WTP is the appropriate means of valuation (see Kennedy 1981 for extended discussion of this "offer-asking problem" and the associated indeterminacy at the heart of the L&E enterprise).

WTP for (or "willingness to accept"/WTA to give up) a preferred good is rendered epistemically accessible by inference from market prices or through survey methods that directly elicit persons' WTP (or WTA).[5] Through such techniques, all effects of a legal change (both gains and losses) on any given individual could in principle be ascribed a monetary value, with the net impact on that individual ultimately being negative (loss), positive (gain) or zero (no transitional effect). In this way, all mental activity is reduced to the notion of a preference and agents' preferences are assumed to be completely ordered and continuous (Hausman 2012, 13–19, 77). When preferences are converted into WTP values and assumed to conform to these assumptions, they become comparable on a cardinal scale, and all objects over which agents have preferences are treated as perfectly substitutable at the margin.

The neoclassical tools of KHE and CBA thus provided L&E scholars with an operable, purportedly scientific framework for evaluating and prescribing legal rules and regimes (Hackney Jr. 1997, 303–22, 2003, 362–68), and this framework was later applied to legal transition rules. Accordingly, the remainder of this chapter is concerned with the analysis of L&E scholarship that evaluates legal transitions by reference to KHE. Subsequent references to "efficiency" should be read as references to KHE, unless otherwise specified or the context otherwise indicates.

3.3 LAW AND ECONOMICS IN LEGAL TRANSITIONS: FROM THE 'NEW VIEW' TO NO VIEW

3.3.1 *The 'new view'*

The regnant conservative consensus on legal transitions (see Part 3.1, above) was destabilised in a seminal article on tax transitions by Michael Graetz (1977), and generalised to other areas of law by Louis Kaplow (1986) a decade later. Together, these two articles ushered in

[5] See Mendelsohn and Olmstead (2009) for a discussion of how economists try to measure people's WTP/WTA and see Hausman, McPherson and Satz (2016, 163–64) and Adler (2015, 323–24) for a summary of criticisms of such techniques. By contrast, pure preference satisfaction accounts of wellbeing (i.e. not mediated by WTP/WTA) are epistemically inaccessible (violating my desideratum #V). Hedonistic accounts of wellbeing are ruled out on the same grounds.

a new consensus in the legal academy—the "new view"— in favour of generally reformative transition policy on grounds of efficiency (Shaviro 2000, 3).[6]

A key move by new view L&E scholars was to treat the risk of legal transitions as just another risk of doing business. On this view, the question of how private agents should manage that risk is just another case of decision-making under uncertainty, and the question of how government should respond to it is just another instance of the larger question of when, if ever, government should "intervene" in such private decision-making (Fried 2003, 125–26; Graetz 1977, 65–66; Kaplow 1986, 520, 523, 533–36; Shaviro 2000). "If this analogy between market and government risks is accepted", argued Kaplow, "transition policy should vanish as a separate concern" (1986, 535). A second key move was to appreciate that the risk of legal change leads to gains as well as losses—*ex ante*, such risk has an upside as well as a downside—thus extinguishing another asymmetry in historical approaches that had concentrated on avoiding investors' losses while letting them retain their gains from legal change (Fried 2003, 125–26; Kaplow 1986, 552–55).

Having neutralised any distinction between private and public risks, and between transition losses and gains, the proponents of the new view set about analysing legal transitions, in standard L&E fashion, in terms of the two key parameters affecting efficiency: *risk* and *incentives* (see especially Kaplow 1986, 527–32, 615). On the one hand, uncertainty about future government action imposes *risks* on durable (long-term) decisions, and risk is generally seen as undesirable (ibid 527). The undesirability of risk, notes Kaplow, is the reason many previous scholars had advocated conservative transition policy, which effectively mitigates the downside risk (ibid 615). But, crucially, government mitigation of risk has costs in terms of *incentives* for efficient behaviour (ibid 527–32, 586). "The efficient level of investment is that induced when investors bear all real costs and benefits of their decisions" (ibid 529). Conservative transition policy (with respect to losses) socialises downside transition risks, meaning agents externalize some of the costs of their risky choices

[6] A parallel shift in scholarship on takings law had been occurring over this period (see Fried 2003, 125–126, fn 4).

onto the government. This socialisation induces over-investment, raising the total social costs of legal change (Kaplow 1986, 528–31; Nash and Revesz 2007).

By contrast, reformative transition policy privatises the risks of legal change—both downside risks of losses and upside risks of gains (Kaplow 1986). It thus incentivises private agents to better *anticipate* those risks (Levmore 1999). It also incentivises agents to *prudently manage* those risks on their own, in accordance with their own risk preferences—for example, by self-insurance (through diversifying their investments or hedging) or by obtaining third-party insurance to the extent it is available (see Shaviro 2000, 35–36). By incentivising foresight and prudent risk-management, reformative transition policy reduces the total social costs of legal change (Kaplow 1986, 528–31).

Risk and incentive considerations "must be analysed simultaneously to determine how they interact in the context of transition policy", and "a perfect market would achieve the optimal trade-off" (Kaplow 1986, 532). Of course, markets are not perfect, but in the final analysis Kaplow took the view that "the market will generally balance these competing considerations at least as well as the government could" (ibid 578).

3.3.2 *Debating the new view*

Against this general position in favour of reformative transition policy, new view scholars and their intramural L&E critics have debated various nuances, exceptions and alternative assumptions. These fall into three broad categories: cases involving *failures of rational foresight/expectations*; cases involving *failures of prudent risk management* (both individual failures and market failures); and various issues pertaining to *government behaviour* (cf. Wonnell 2003).

3.3.2.1 Individual agents: Rational expectations?

The first line of attack has questioned the rationality of agents' expectations about the direction and probability of future legal changes. New view scholars adopt a default empirical assumption of "rational expectations", which applies the *homo economicus* of neoclassical microeconomics to the issue of legal transitions (see especially Shaviro 2000, 19–25). Shaviro, for example, assumes that "when people have reason to care about future

government policy … they make reasonably good use of available information that sheds light on it, including what the government has done in the past, its leaders' incentives or apparent beliefs, and the balance of political forces" (ibid 19). Past policies (including transition policies) are internalised and expectations of future policies adjusted, so that "people will tend to observe accurately the government's true policy over time" (ibid 21). The assumption is important to new view scholars given that they place so much emphasis on the incentive effects of transition policies: if expectations are not rational, incentives won't cause changes in behaviour.

The rational expectations assumption has been much criticised. Fried has challenged the assumption on the ground that the future direction of legal change, being the political product of a complex constellation of causes, is typically extremely difficult for people to foresee (2003, 140–41). Indeed, the more temporally remote the legal change, the more its *ex ante* probability is characterised by Knightian uncertainty in a way that makes probabilistic assessment virtually meaningless (ibid 142–43). This difficulty in isolating the causes of legal change makes it difficult for agents to extrapolate from past legal changes and transition policies, casting doubt on the causal link between reformative transition policy and the improved foresight of agents (ibid 142–43). These points go to the objective difficulty of foreseeing future legal change. Additionally, Fried argues, people err systematically because their *subjective* ability to accurately assess risks is limited (ibid 146–49).

Shaviro acknowledges that the weight of empirical evidence—e.g. in psychology and behavioural economics—renders this strong form of the rational expectations assumption implausible (2000, 19–25). But he insists that, when one recognises that imperfect rationality can lead agents to both underestimate and overestimate the probability of future legal change, and that future legal change can bring both losses and gains, a more epistemically modest version of the rational expectations assumption becomes available. A "sophisticated rational expectations view … holds only that people's use of the information available at any time should not too readily be presumed to involve systematic error in any predictable direction" (ibid 19–20). On this weaker version of the rational expectations assumption, it is a *default* position that agents have rational expectations *on average* and *over the long run*, but this can

be disproved in particular cases with evidence of systematic bias in agents' expectations (ibid 19–25). In this vein, some new view scholars have sought to identify the kinds of agents, and kinds of circumstances, which lend themselves to systematic errors in foreseeing legal transition risks. Both Kaplow (1986, 549, 2003, 186) and Logue (2003, 212), for example, have argued that corporations and other sophisticated investors (in the context of legal changes affecting asset prices) are likely to act much closer to the model of a fully rational agent than laypersons (for further discussion, see Wonnell 2003, 295–98).

3.3.2.2 Agents in markets: prudent risk management?

Another line of attack has focused on the capabilities of agents to behave prudently in *response* to risks of legal change (assuming these are knowable *ex ante*). There are two issues here: the external options available to agents to prudently manage those risks (such as the availability of third-party insurance or opportunities to self-insure) and the prudence of the agents themselves in the face of those options. With regard to the latter, Fried, drawing on evidence from psychology and behavioural economics, finds strong reason to question the blanket assumption that agents are likely to maximise expected utility in the face of such risks (2003, 146–49).

However, among L&E scholars themselves, the former issue has proved a livelier topic of debate. One might think that various "market failures" (such as adverse selection, moral hazard, transaction costs, and access to markets) could preclude agents from prudently managing the risks of legal change in the marketplace. New view scholars considered this possibility, but tended to be fairly dismissive of it (Kaplow 1986, 536; Shaviro 2000, 33–42). That said, they have also identified certain kinds of agents and investments for which insuring against the risk of legal change is likely to be especially costly or otherwise difficult.[7] For example, Shaviro thinks that "human capital and perhaps home ownership" are special cases "where we have a particular reason to suspect that the risk averse will be left underprotected

[7] Some scholars have argued that third party insurance for risks of legal changes is generally unavailable (Blume and Rubinfeld 1984; Masur and Nash 2010; Shavell 2014).

by their own best efforts" because these assets "are costly or inconvenient to diversify" (2000, 41–42; cf. Kaplow 1986, 593–96, 2003, 185–86).[8]

3.3.2.3 Government behaviour: legal progress and official virtue?

So far I have mentioned the two main debates over the new view that pertain to the efficiency of private agents' behaviour. But what about the behaviour of the state? Much transitions analysis in the tax context, up until the publication of Daniel Shaviro's influential book *When Rules Change* (2000), "simply ignored the government side of the picture, focusing on the supposed effects of compensation on individual investor behaviour" (Fried 2003, 129, fn 11). Since that time, government behaviour and other political economy factors—typically via public choice analysis—have become key empirical variables affecting the analysis of efficient transition policy (see especially Epstein 2003; Kaplow 2003, 192–200; Logue 2003, 218–19; Shaviro 2000, chaps. 4 & 5). Nowadays, notes Logue (2003, 219),

> consequentialist transition scholars evaluate transition norms not only for their effects on the incentives of private actors but also for their effects on the incentives of political actors, whether those actors are government officials making decisions about public policy or private parties seeking to influence those decisions.

For example, recent L&E transitions literature has debated the effect of different transition policies: on government incorporation of the full social costs of primary laws into CBA; on risks of government abuse of power; on the political feasibility of a particular primary legal reform (i.e. *given* interest group politics); and *on* interest groups' incentives for socially wasteful/inefficient lobbying (see, e.g., Doran 2007; Kaplow 2003, 197–200; Levmore 1999, 1665–66; Logue 2003, pt. IV; Shaviro 2000, 79–81).

Given this empirical complexity—and the need to aggregate all such effects along with the incentive effects on private agents—it is not surprising that Shaviro concluded that the would-be efficientarian faces "an indeterminate political incentives problem, at least in the

[8] Other articles have discussed various other classes of legal changes in which the general new view conclusion about the efficiency of private incentive effects is unlikely to hold (Logue 1996; Shavell 2008).

abstract" (2000, 81; for similar sentiments, see Kaplow 2003, 200). In response to this conundrum, the tendency has been toward the identification of subclasses of cases where empirical patterns of politics exhibit sufficient regularity to permit the drawing of general conclusions about the direction of political incentive effects (Logue 2003; Shaviro 2000).[9]

3.4 CRITIQUES OF THE LAW AND ECONOMICS APPROACH TO LEGAL TRANSITIONS

3.4.1 *Efficiency, all the way down?*

The problem of indeterminacy identified by Shaviro and Kaplow, and the response of moving toward more particularist solutions, are suggestive of a deeper quandary facing L&E theories of legal transitions. Efficiency analysis is—like utilitarian analysis (Lamont and Favor 2017, sec. 5)—essentially an exercise in tallying the aggregate value (in this case, monetary value) of the predicted *empirical* effects of alternative courses of action. As such, it can only get off the ground when determinate facts can be plugged into a CBA (see generally Kennedy 1981). This means that one's conception of the state (and of the virtue of public officials) and conception of the person (their foresight, prudence and rationality) must be treated as exogenously given constants. In the short run, this is fair enough: for the purposes of *a given legal transition*, an efficient transition response can reasonably take institutions and persons 'as read'. For this purpose, 'local' (spatio-temporally specific) assumptions are what matters. This is consistent with the direction in which, as I noted, recent L&E scholarship has in fact evolved: towards more partial, contingent and tentative analysis of transition rules. But this sits awkwardly with L&E scholars' professed intentions to develop "constitutional" transition norms to guide policymaking over the long run (e.g. Shaviro 2000, chap. 5).

If L&E scholars want to adopt a longer-term or more universal approach to legal transitions, they can no longer help themselves to exogenously given facts about individuals and the state. This is because individuals and state institutions are mutually constituted: institutions

[9] Some other legal scholars have argued for a more thorough-going particularism: see Hasen (2010) (resurrecting reliance and expectations-based considerations and arguing that these need to be balanced against flexibility-based considerations on a case-by-case basis) and Frisch (2006, 803).

are artefacts of human construction informed by normative ideals; and (non-state) agents are constituted by social roles and identities that are shaped by the institutions of their society (see Chapter 6.2). The kinds of institutions we have and the people and group agents who inhabit them are therefore endogenous to the very policy recommendations that L&E seeks to instantiate. But this means that, over the long run, L&E scholars would not simply be doing the 'empirical analysis' necessary for efficiency calculations; rather they would be *shaping* the very empirical reality that they are purporting neutrally to 'read off'. From the perspective of other mainstream normative political theories, this is putting the cart before the horse: most theories have a normative vision of what the state *ought* to do and the dispositions that individuals *ought* to have, and these ideals inform their short-term prescriptions (Daniels 1996, 337; Freeman 2011, 52–55; Ramsay 1997, 26–27, 32–33; Taylor 1989). If L&E scholars really want to be in the business of shaping society over the long run, they had better have a set of normative ideals, and present these up for critical scrutiny. But then these normative ideals stand in need of *independent* justification, and that means one cannot be an efficientarian, all the way down (violating desideratum #6).[10]

3.4.2 Homo economicus *in the political marketplace*

In reality, I think L&E scholars *do* operate with (often unexamined) conceptions or ideals about the individual and the state in mind. These conceptions resist the endogeneity problem I identified in the previous section only by embodying heroic assumptions about the independence of agents (both private agents and state officials). In this respect, L&E scholarship shares much with the classical liberal model of the person as *homo economicus*, who seems to materialize on his own "endowed with a starter set of basic desires, ready to select additional desires and construct overarching goals, and skilled in performing instrumental rationality tasks" and then seeks to maximise the satisfaction of his preferences in the marketplace given his budget constraint (Willett, Anderson, and Meyers 2015, sec. 1). Neoclassical economics (which informs the enterprise of L&E) retained roughly the

[10] I take Coleman (1981, 148–54), discussing constitutional economics, to be making a similar point about efficiency analysis being endogenous to institutional settings.

ontological features of this classical liberal model of the person (Davis 2003, 2009). In L&E scholarship on legal transitions, these features are reflected in the 'rational expectations' and 'prudent risk-management' assumptions discussed above: individuals are assumed to have accurate, probability-weighted *ex ante* expectations and to prudently manage risks associated with those expectations.

For our purposes, what most definitively distinguishes neoclassical *homo economicus* from the conception of the self invoked in classical liberalism is not its ontological features but rather what I have elsewhere called its "contextual features" (Green 2017, 185): the conception of the good life, with its distinctive goods and domains of activity, that is imagined for such a person (see Taylor 1989, 91–107, Pt. III). In the classical liberal tradition, as we saw in Chapter 2.3.2, the valorisation of the ordinary life of commerce and a strict public-private divide were necessary to restrict *homo economicus*' calculative rationality to the marketplace while excusing his ignorance of political matters, guaranteeing instead his *protection* from state interference. L&E scholarship on legal transitions tore down that conceptual "wall" (Walzer 1984, 315). The self-responsible, savvy and flexible manoeuvring of neoclassical *homo economicus*, including the rationality of his expectations, are assumed in L&E to extend beyond the marketplace traditionally conceived and into the political domain, encompassing the anticipation of legal changes. Hence Kaplow (1986, 536) asserts: "from an economic perspective, there is nothing particularly unique about risk concerning future government policy that would justify departing from a society's more general approach toward risk bearing". Self-responsibility justifies *laissez faire* in the market; so too in the *polis*.

Whereas the classical liberal conception of the person's role in anticipating and managing the risks of legal change is, as I argued in respect of Bentham, insufficiently demanding, the L&E conception of *homo economicus*-unbound seems empirically implausible and normatively over-demanding, at least with respect to natural persons in many contexts (violating desideratum #5). Specifying and defending a position on the degree of foresight and prudent risk management that is required of individuals is a major challenge facing any theory of legal transitions (Fried 2003, 140–49). It is a challenge I take up in Chapter 8.

3.4.3 *Why maximise efficiency?*

In this section I critique the distributional implications of efficiency-maximising policies (with respect to efficientarian theories of legal transitions, this critique targets desiderata #5 and #6). Recall from Part 3.2 that one supposed virtue of KHE improving policies is that, like Pareto improvements, they do not require for their implementation controversial interpersonal utility comparisons or utility aggregations, thus giving economists a supposedly "objective" (Hicks 1941, 111), scientific yardstick for public policy analysis, yet without the conservative, loss-avoidant constraints of the Pareto test (DeMartino 2015, 318, 320–21). As we shall see, however, *implementation* is not the same as *justification*, and the *justification* of KHE-improving policies cannot in fact avoid value judgements and interpersonal comparisons (Hausman, McPherson, and Satz 2016, 165). Since KHE-improving policies can in principle condone the widespread infliction of losses (even if we assume, for the purposes of this section, that these are defined in terms of disutility) in the name of creating a greater aggregate stock of economic resources, there is nothing obviously normatively justifiable about a KHE improvement in and of itself (Adler and Posner 1999, 190–91; Coleman 1980a, 248–49; DeMartino 2015; Sen 1979b, 24–25). Accordingly, various attempted justifications of KHE-improving policies have appealed to the contingent effects of KHE improvements on related values. One such attempted justification argues that KHE policies are quasi-*Paretian*, and two others argue that they are quasi-*utilitarian*.[11]

3.4.3.1 The quasi-Paretian defence

A "quasi-Paretian" (Polinsky 1972, 409) defence of KHE-improving policies acknowledges that there will be winners and losers from any *single* KHE-improving policy viewed in

[11] By contrast, Posner (1979, 1985) attempts to justify a "principle of wealth maximization" without recourse to utilitarian or Paretian values (*contra* Posner 1980, discussed below in Part 3.4.3.1, wherein he mounts a quasi-Paretian defence). Posner's defence of wealth maximisation is, nonetheless, instrumentalist and pragmatist (see Hackney Jr. 2003, 377–83), appealing to a range of ultimate values, including productivity, happiness (of the productive and law-abiding, i.e. happiness of a more limited kind than entailed by utilitarianism), "the traditional virtues ('Calvinist' or 'Protestant')", economic and political liberty, rights, and competition (Posner 1979, 122–27, 131–32, 135–36, 1985, 97–100). Posner openly embraces the startling wealth inequalities that a system of wealth maximisation would produce (1979, 128, 130–131, 1985, 103). I leave aside detailed discussion of Posner's pragmatist/instrumentalist defence here (for criticism of his position, see Bebchuck 1980, 1687–88; Coleman 1980b, 528–30; Dworkin 1980a; Kronman 1980).

isolation, but asserts that the gains and losses from the systematic implementation of *many* KHE improvements will, *over the long run*, be distributed roughly randomly across the population. Since each policy necessarily induces a net gain, the roughly random distribution of benefits means everyone (most people?) will probably be better off; there will (probably?) be a rough *net* Pareto improvement in the long run (Hicks 1941; Hotelling 1938; Polinsky 1972; Posner 1980, 491–97; Tullock 1980, 664).[12]

As DeMartino (2015, 323–25) points out, this purported justification of KHE/CBA is "proto-contractarian" in its structure. Posner (1980, 491–97) argues that rational individuals would generally consent to a system of uncompensated KHE-improving policies because the long-run efficiency benefits are a kind of "*ex ante* compensation".[13] One way of interpreting Posner's "consent" argument is in this proto-contractarian sense (Coleman 1980b, 538–40).[14] Similarly, in the legal transition context, Wonnell asserts that transition policy:[15]

> is likely to be applied in a large number of incidents … If the losses exceed the gains in a Kaldor-Hicks sense, and if the game is played many times, it is possible that everyone … would come out ahead from the policy, and even more likely that they would have been willing to sign on to the [transition policy] principle in advance because they would reasonably have expected they would come out ahead. (Wonnell 2003, 308–09, citation omitted[16])

---

[12] Hotelling's (1938) version of the argument applied to more restrictive conditions, involving large benefits and small costs (e.g. certain public works paid for by general taxation). Hicks (1941) generalised the argument and Polinsky (1972) formalised it. Posner (1980, 491–97) and Tullock (1980, 664) are early examples of the argument's use in L&E.

[13] Posner is not invoking a hypothetical situation of radical ignorance, as per Rawls, because in such a situation "the choices of the unproductive are weighted equally with those of the productive", hence Posner assumes "actual people deploying actual endowments of skill and energy and character" (Posner 1980, 499).

[14] Another interpretation involves inferring consent literally in each relevant transaction, but this is implausible and thus has been heavily criticised (Coleman 1980b, 531–37).

[15] See McCloskey (2010, 82–85) for another example of a quasi-Paretian defence that comes quite close to being contractarian. Adler and Posner (1999, 189, fn 63) also consider and reject this possible contractarian justification.

[16] At the end of the quoted passage, Wonnell cites his earlier paper (Wonnell 2001, 659–82). In that paper, however, Wonnell acknowledges the two criticisms of the quasi-Paretian defence that I make below, and instead defends uncompensated KHE improvements on proto-contractarian grounds only when coupled with a system of redistributive taxation—an approach that is vulnerable to criticisms I make in relation to the diachronic quasi-utilitarian defence (see Part 3.4.3.2, below).

However, the purported Paretian credentials of long-run, systematic KHE policy implementation evaporate under close inspection (Adler and Posner 1999, 189; DeMartino 2015, 323–34). The Paretian defence is, at the very least, empirically speculative: there is no way of knowing, and no reason to believe, that the distribution of losses and gains from successive KHE-improving policies will be random (Little 1957; Sen 1979b, 24–25).

In fact, two stronger criticisms are available. First, the distributions of costs and benefits occasioned by the repeated application of KHE/CBA are not random, but will rather systematically advantage the relatively wealthy and disadvantage the relatively poor, with the inequalities compounding over time (Adler and Posner 1999, 183–84, 189; Baker 1975; Bebchuck 1980). This is because (i) the poorer one is, the more one's WTP for a given good is constrained by one's income, i.e. what one *can* pay (Baker 1975) and (ii) the diminishing marginal utility of income means the poorer one is, the higher one's opportunity cost of money (Bebchuck 1980, 682–84). The former reason applies only when WTP is used, but the latter applies regardless of whether WTP or WTA is used (Bebchuck 1980, 682–84).[17]

Second, certain—arguably *many*—policies or projects would obviously make some persons and groups worse-off to an extent that could not be, or would not likely be, offset by any other KHE-improving policies (DeMartino 2015, 328–30; Nussbaum 2001b, 196–200).[18] Consider, for example, the siting of a toxic waste dump, which exposes nearby residents to a heightened risk of terminal cancer. It is fantastical to think that the person who suffers cancer as a result of the siting decision will have been fully compensated by other KHE-improving policies. More generally, policy changes associated with major infrastructure projects constitute a class of legal transitions that will often concentrate large losses on few people (DeMartino 2015, 330; Kanbur 2003). Similar observations apply to policy changes that cause large job losses, such as some kinds of trade liberalisation, for the "[d]isplaced workers

[17] If WTA is used, a poor person will be more willing to accept a lower offer price for some good or entitlement he owns than a rich person will for an equivalent good/entitlement, all else equal, because the poorer person will value the money, which he can use to buy necessities, more highly (Bebchuck 1980, 683–84).
[18] Some proponents therefore place a scope condition on the quasi-Paretian defence, limiting its application to cases where relatively small costs are imposed on a given individual (see, e.g., Polinsky 1972, 414, fn 6; Posner 1980, 499–502).

who suffer them are not apt to be made whole through the lower prices now available at Walmart for the imported goods they once produced" (DeMartino 2015, 330–31).

The above two criticisms are also interactive in an important way: because the systematic application of KHE-improving policies compounds economic inequalities, it is the poor who become systematically more exposed to large risks. This asymmetry in the distribution of *ex ante* risks seriously undermines the proto-contractarian (or *ex ante* compensation, or consent-based) underpinnings of the quasi-Paretian defence of KHE: since those with less than average wealth at a given time face a higher *ex ante* risk of bad outcomes over the long run from the systematic application of KHE, why would it be rational for them to consent to such a system?

3.4.3.2 The diachronic quasi-utilitarian defence

The first purported quasi-*utilitarian* justification posits uncompensated KHE-improving policies as the first stage of a two-stage process consisting of: (1) 'maximising the pie' (efficiency); and then (2) 'redistributing the pie' through the tax and welfare system (what economists and L&E scholars call 'equity'). The idea is that the Stage-2 transfers could theoretically be engineered to maximise social welfare, rendering the overall two-stage process utilitarian (see, e.g., Frank 2000, 917).[19]

But there are two problems with this justification, both of which highlight the difficulty (if not impossibility) of separating 'efficiency' from 'equity' and pursuing them in stages. The first problem, which concerns the efficiency effects of the equity stage, is that taxes and transfers are not costless; they are not *purely* redistributive. Specifically, raising taxes and transferring wealth between persons has administration costs and adverse efficiency effects, resulting in deadweight losses (Bebchuck 1980, 707; Okun 1975). Consequently, any attempt

[19] Kaldor (1939, 550–51) was open to the *possibility* of such transfers but deemed them a "political" matter for governments, outside the technical purview of economists, since they would require interpersonal utility comparisons. By contrast, the economists discussed in this section *recommend* such transfers on explicitly utilitarian grounds.

to do 'equity' affects the overall *efficiency* of the two-stage policy combination (Adler 2015, 329).

The second problem concerns the equity effects of the efficiency stage. At the very least, the political viability of the equity stage is highly contingent and cannot be assumed (Scitovsky 1951, 309–10). Specifically, efficiency-improving policies affect the probability, nature and degree of redistributive taxation and transfers. Initial distributions shape the attitudes, beliefs, desires and preferences of people, including their political preferences (Murphy and Nagel 2002, 34–36). For example, people's psychological tendency to prefer keeping what they already own—and to prefer existing states of affairs—introduces a conservative bias with respect to people's policy preferences (Korobkin 2002, 1266–67). This bias extends to economic policy and social policy: the wealthy tend to prefer lower redistributive taxation and less welfare provision, at least in the US (Gilens 2012; Page, Bartels, and Seawright 2013; cf. Barnes 2015). Moreover, "system justification" tendencies even lead many poor people to prefer status quo distributions, believing they are justified (Jost 2019; Jost and Banaji 1994; Jost and Nosek 2004). Distributions also affect political preferences through the operation of social identity, including class identity, and through the way different socio-economic groups are constructed in popular social discourse (consider media discourse about "producers vs. scroungers" / "makers vs. takers" / "lifters vs. leaners" etc.) (Morrison 2019; Skeggs 2004). Furthermore, initial economic distributions (and their social effects) affect the distribution of political power, and hence one's ability to have one's political preferences enacted into government policy: the wealthy have greater political power with which to enact those preferences (Hacker and Pierson 2010; Soss and Jacobs 2009). Given that, as discussed earlier, efficiency improvements bias resulting distributions of resources in favour of the already-wealthy, the two-stage process is therefore likely systematically to bias redistributive taxation and welfare policy in favour of the anti-egalitarian preferences of the wealthy.

Kaplow and Shavell (1994) advance a version of this quasi-utilitarian defence that allocates the two tasks to separate *institutions* rather than separate *stages*. They propose that the judiciary be charged with wealth maximisation (via judicial decision-making) and that redistribution be left to the legislature. Their argument can be seen as a response to the first

objection raised in this section (two paragraphs above), since they are cognisant of that objection and explicitly argue that their proposed institutional division of labour would nonetheless maximise efficiency (but see Sanchirco 2000). But they say nothing that addresses my second objection (preceding paragraph), and they explicitly leave aside questions of "democracy" that affect the actual probability of utility-maximising tax and transfer schemes (Kaplow and Shavell 1994, 675). As such, they effectively "substitute political agnosticism for distribution agnosticism" (Hackney Jr. 2003, 384–85).[20]

3.4.3.3 The synchronic quasi-utilitarian defence

The other quasi-utilitarian justification seeks to render standard CBA directly (synchronically) utilitarian through the use of "welfare weights" (also known as "distributional weights") in the social welfare function (SWF). Recall that the application of standard KHE/CBA creates a pro-wealthy bias (see Part 3.4.3.1). Given the diminishing marginal utility of money, it follows that an increase in aggregate *efficiency* does not imply an increase in aggregate social *welfare/utility*. If the background distribution of income and wealth were equal, this problem would be avoided. Introducing a social welfare function with welfare weights that reflect the diminishing marginal utility of money seeks to correct for this distortion and to approximate the equal baseline, and so to render CBA distribution-sensitive (see Adler 2016, 264 and references there cited). One commonly used SWF is a utilitarian one (others include leximin and prioritarian functions). If welfare weights were applied to a utilitarian SWF then CBA would be rendered utilitarian (Adler 2016, 266).

One problem with this approach is that it entails further normative controversy over how the weights are determined (see, e.g., Adler 2016; Sen 1972). Another, more practical problem is that this approach "is not useful because it is too demanding on the decisionmaker, and

---

[20] Adler (2011, 560–66) discusses the Kaplow/Shavell approach. He makes a more cautious version of my point, raising the *possibility* that there is not an "appropriate political economy" to ensure the relevant tax-and-transfer: "The political economy of the tax system *may* be such that tax bodies would regularly fail to make the changes to the tax code required to render non-tax policies passing a simple CBA test universally beneficial" (at 564–65, emphasis added). Adler notes four, additional, more technical assumptions of the Kaplow/Shavell approach that are also highly unlikely to be satisfied in real-world tax contexts (ibid 564). Taken together, Adler concludes that "it is extremely implausible to think that the five conditions just described are jointly realized in any actual legal system" (ibid 565).

agencies do not use such ambitious social welfare functions in the real world" (Adler and Posner 1999, 193). Nonetheless, the use of social welfare functions and distributional weights is capable of translating CBA into "moral views with considerable philosophical support—the utilitarian SWF to utilitarianism, the prioritarian SWF to prioritarianism—and such SWFs (by contrast with the Kaldor-Hicks test) are therefore a plausible basis for identifying morally better or worse outcomes" (Adler 2015, 331). Such welfarist-consequentialist approaches, however, still face the next objection concerning the conception of welfare that that they seek to optimise: the preference satisfaction account of wellbeing.

3.4.4 *Why value preference satisfaction?*

Insofar as justifications of efficientarian distributive principles appeal ultimately to effects on aggregate wellbeing *qua* 'preference satisfaction', they rely on a theoretically implausible currency of value (violating desideratum #5).[21] A long-standing critique of the preference satisfaction account is that it fails to track the actual, richer, more complex structure of persons' mental, embodied, ethical and social lives (DeMartino 2015, 327–28; Goodin 1989; Hausman 2012, chap. 7; Nussbaum 2000, chap. 2; Sen 1977). As a currency of loss/gain, it therefore violates what I called in Chapter 2.2.2.2 the "correspondence condition" (offending desideratum #III).

Of particular interest for my purposes is a more specific aspect of this objection: preference satisfaction accounts of wellbeing fail to distinguish between goods valued in an agent's scheme of ultimate ends, which typically are non-substitutable goods[22], and things valued merely *instrumentally*, as mere means to those ends, which are typically substitutable (and, insofar as goods are valued for both instrumental and intrinsic reasons, it fails to distinguish these distinctive components of the good's value to an agent) (Goodin 1989; Hausman 2012, 78; Raz 1988, 177–180). The generic categories of ultimately-valued goods, which tend to be less variable among persons than instrumentally-valued goods (Hausman 2012, 78),

---

[21] Insofar as they *do not* so appeal, then they rely on an even *less* theoretically plausible concept: aggregate wealth (see above footnote 11; and see Dworkin 1980a, 1980b).
[22] I mean 'goods' in the broad sense of 'things of value'.

typically include psycho-social phenomena such as particular attachments—e.g. to people, places and things—relationships, projects and the resulting complex of identities that structure and guide our lives (see Chapters 6 and 7.2). We typically experience such ultimately-valued goods as ethically distinctive, which helps to explain (i) the discontinuities we experience when attempting to compare the value of these phenomena to one another or to merely instrumental goods, (ii) the conflicts between such goods, and (iii) the rationality of feeling regret when we correctly prioritise one good over another—feelings for which monist conceptions of value (including preference satisfaction and wealth) find it difficult to account (Mason 2016, secs. 2, 3).

3.5 CONCLUSION

This chapter has explained the findings of more than four decades of L&E scholarship on legal transitions—the most mature body of scholarship on legal transitions in any academic discipline. This literature, drawing on neoclassical economics, takes KHE improvement to be the object of transition policy. Pioneering studies in the 1970s and 80s ushered in a consensus "new view" in favour of a generally reformative transition policy, overturning a long history of presumptively conservative transition policy (for losers). New view scholarship challenged conservative orthodoxy and brought rich insights and formidable tools to bear on a long-standing problem. Recognising that legal changes cause losses *and gains*, and perceiving legal changes as just another type of market risk—in principle foreseeable and manageable by rational agents as with all other kinds of decision-making under uncertainty—new view scholars provoked a new, more prosaic, and yet more dynamic way of thinking about the relationship between the state and market actors.

Yet since the turn of the century, L&E scholarship on this topic has been marked by a persistent challenging of the assumptions that underpinned the seminal new view scholarship. Among these, I focused primarily on the assumptions of individual rational expectations and prudent risk management in efficient markets, while noting further disagreements about state behaviour and the political economy. Given the multiple fronts on which the putative efficientarian now has to defend her assumptions, prominent L&E scholars have noted that

the enterprise risks descending into indeterminacy. Consequently, the trend has been to delineate transition rules for ever more specific categories of situations.

In the second half of the chapter, I levelled four very different criticisms at L&E analysis. I first argued that the empirical complexity crisis facing L&E scholarship arises in part from a theoretically intractable problem: that the agents whose expectations and behaviour, and the institutions whose design, will determine the efficiency or otherwise of a given transition rule are themselves partly endogenous to institutions for handling legal transitions; they therefore stand in need of a normative justification that the efficientarian cannot provide without forsaking efficientarianism, all the way down. The commonly-relied upon *homo economicus* model of the person, I then argued, is both empirically implausible and overly-demanding of ordinary citizens in many contexts.

I then critiqued efficientarian distributions, asking first whether the maximisation of KHE could be justified in the light of its distributive consequences. Three common defences of (uncompensated) KHE were discussed. Only one of these—the synchronic quasi-utilitarian defence—had some plausibility, and this defence is contingent on the administratively-demanding use of "welfare weights" in the CBAs that operationalise the KHE criterion. On the basis of this discussion of distribution rules, the best theory of legal change in the neighbourhood of efficientarianism is utilitarianism *tout court*, or at least some other form of welfarist consequentialism (Adler 2011; Fried 2003, 159–60). One option, in this general spirit, is to combine multiple policies into synchronic *policy packages* that, *taken together*, have utilitarian, sufficientarian or egalitarian implications (Ahmad and Stern 1991, 2009). This approach is potentially promising. However, one residual issue these approaches face relates to the conception of wellbeing they seek to optimise, *viz*. preference satisfaction. As I argued in my fourth criticism of L&E scholarship, this conception is vulnerable to strong objections given its insufficiently close correspondence with human ethical experience, and in particular its conflation of substitutable means with non-substitutable ends.

These critiques hold valuable lessons that have shaped the development of my own theorising about legal transitions. Taking these in reverse order: first, a theory of legal transitions should account for and, where applicable, respond to, losses and gains in terms of a currency that is

sufficiently reflective of the nuance of people's subjective experience, and should in particular reflect the distinction between non-substitutable ends and substitutable means (as to which, see Chapters 6.3, 7.2 and 9); second, the fact that winners gain more than losers lose is neither necessary nor sufficient to justify a theory of legal transitions—a different theory is needed (see Chapters 7 and 8); and third (regarding the first two criticisms), any theory of legal transitions that is proposed to govern legal transitions over the long run must specify (and ideally defend) an ideal of the person and the state (see Chapter 6).

CHAPTER 4. LEGITIMATE EXPECTATIONS: LIBERAL-EGALITARIAN THEORIES (I)

4.1 INTRODUCTION

In Chapters 2 and 3, we have seen different ways in which 'expectations' about the future figure in theories of legal transitions. In Chapter 2 we saw that Bentham thought that individuals' expectations matter because they enable people to make long-term plans and thereby live a coherent life. He thought that the law played an extremely significant role in shaping people's expectations, and so argued that changes in the law should avoid frustrating them. In Chapter 3, I noted that similar conservative approaches to legal transitions (for losers, at least) prevailed in the American economics and legal academy up until the mid-1970s, after which L&E scholars criticised the 'old view' assumption that agents expect the law to stay the same. On the 'new view', this assumption was replaced by a default assumption that agents have *rational* expectations: expectations based on all relevant, available information, including what governments have done in the past (see Fried 2003, 125–27; Shaviro 2000, 19–25). While I criticised numerous aspects of the L&E approach to legal transitions—and I do not think we should endorse a default assumption of 'rational expectations'—the critical point of the new view scholars is compelling. Since it is a central function of the state to change the law, and laws do in fact change all the time (often without conservative transition policy), why *should* we assume that agents expect the law to stay the same? At the very least, the assumption needs to be explicit and defended.

Given the extensive treatment of expectations in the L&E literature, it is somewhat surprising that liberal-egalitarian political philosophers have in recent years—seemingly unaware of the L&E debate[1]—fixed on a 'legitimate expectations' approach to legal transitions that is closer to the discredited 'old view' (Brown 2011, 2012, 2017a, 2017b; Matravers 2017; Meyer, Pölzer, and Sanklecha 2017; Meyer and Sanklecha 2011, 2014; Moore 2017). The legitimate

[1] Among the works in the legitimate expectations literature, I have found not one textual reference or citation to the L&E literature.

expectations literature tends (like the 'old view') to assume that agents expect the law to stay the same,[2] but focuses (unlike the 'old view') on whether such expectations of legal stability are 'legitimate'.

The domain of legitimate expectations in which I and my interlocutors are interested is an *agent's expectations of inter-temporally consistent behaviour on the part of other agents*, and more specifically an agent's expectation that the state's laws will stay the same over time.[3] The thought is that having one's *legitimate* expectations frustrated by a change in the law gives one a normative entitlement to having those expectation secured (e.g. through grandfathering), or at least having one's consequent losses compensated, by the state. For example, Meyer and Sanklecha (2011, 2014) consider whether climate change laws violate agents' legitimate expectations about the level of greenhouse gases they will be able to emit.

In this chapter, I argue that the concept of legitimate expectations (LE) is an inappropriate conceptual tool for resolving the problem of legal transitions. The claim is defended in two parts. In the bulk of the chapter (Part 4.2), I defend a narrower claim: that LE is an inappropriate conceptual tool for resolving *an important subset* of the problem of legal transitions, *viz.* normative controversies arising from characteristic legislative transitions. A *characteristic legislative enactment* (i) affects a large number of agents with heterogeneous expectations, plans and projects; and (ii) is of general application (applying impersonally to all agents or to broad classes of agents within the relevant jurisdiction, rather than to particular, identified individuals). I argue that *any* conceivable conception of LE will face serious problems when applied to the domain of characteristic legislative transitions (in doing so, I draw on the terminology for characterising concepts/conceptions, and the desiderata for normatively evaluating concepts/conceptions, set out in Chapter 1.6).

In Part 4.3, I briefly sketch a promising future path forward for theorising about LE that avoids the pitfalls of current theorising. Specifically, I argue that normative claims based on LE are best understood as *special rights* claims arising from some triggering conduct in the

---

[2] See below Part 4.2.1.
[3] I take this to be uncontroversial and assume that my interlocutors would settle on something similar.

course of interpersonal interactions in which the parties are engaged. I will explain that, on this conception of LE, it *is* theoretically possible that *non*-characteristic legislative enactments (small-n affected class; specific application) could violate LE. However, because of the quasi-private, 'special rights' nature of LE on my account, it is not really non-characteristic legislative transitions *per se* that would ground the affected agents' normative claim, but rather the earlier 'triggering conduct' on the part of the state (i.e. as part of some interpersonal interaction) that does so. Consequently, the only possible way in which legal transitions could violate LE is not really in the realm of the legal transitions problem at all. With this argument, I make good on my wider claim—that the concept of LE is an inappropriate conceptual tool for resolving the problem of legal transitions. Part 4.4 concludes.

4.2 LEGITIMATE EXPECTATIONS IN CHARACTERISTIC LEGISLATIVE TRANSITIONS

The LE literature contains various proposed conceptions of LE. Each is constructed on a set of building blocks, some of which are explicit and some implicit. My aim is not to analyse particular LE conceptions *per se*, but rather to analyse the building blocks on which various families of LE conceptions have been and could logically be built—though I engage with particular conceptions along the way for illustration. In this sense, to borrow Lippert-Rasmussen's terminology from another context, I am engaging in a "theory-focused" critique, not a "theorist-focused" critique (Lippert-Rasmussen 2016, 184). I want to show that certain building blocks are appropriate for a good conception of LE, and other building blocks are appropriate to the circumstances of characteristic legislative transitions, *but none is suited to both tasks*. This analysis will motivate my claim that theorising about LE and theorising about characteristic legislative transitions should be advanced separately.

The first and most obvious building block on which LE conceptions can be built is what I call the *legitimacy basis*—the phenomenon that determines whether an expectation is

legitimate or not.[4] Nearly all of the scholarly discussion over LE conceptions has so far focused on the legitimacy basis. The second building block, which I call the *expectation model*, concerns the *kinds* of expectations being invoked, and the means by which they are *identified*. This issue is usually only mentioned by proponents of LE in passing (Brown 2017a, 435–36, 2017b, 5; Meyer and Sanklecha 2014, 372), and has so far not been the subject of debate within the literature. However, I believe its treatment to date has been inadequate, and that a more systematic analysis reveals problems with the application of LE to characteristic legislative transitions. I therefore begin by discussing the expectation model and its two possible parameter values, before turning to the legitimacy basis and its possible parameter values.

4.2.1 *The expectation model*

What are the *kinds of* expectations the legitimacy of which is in question? And by what means are they to be *identified*? I will take these questions in turn.

I have already limited the relevant domain to "expectations of inter-temporally consistent behaviour on the part of other agents" (and, more specifically, on the part of *the state*) (see Part 4.1). But still there are three possible senses of 'expectation' that could be at work here: predictive; normative; and conjunctive. To expect X in the predictive sense is to believe that X is likely to happen. To expect X in the normative sense is to believe that X ought to happen. The two can come apart: I might have a predictive expectation that my cello teacher will be available for a lesson at 4pm on Tuesday, since that is our usual time, but I do not expect normatively that he will always be so available (at least not without his prior confirmation), since I know that from time to time he has other commitments that crop up, such as concerts and rehearsals. To expect X in the conjunctive sense is to believe that X is both likely and ought to happen.

[4] I am adopting the equivalent language from the literature on desert concerned with the "desert basis" (see, e.g., Hsieh 2000, 92).

It is conjunctive expectations that scholars of legitimate expectations are interested in (see especially Brown 2017a, 435–36, 2017b, 5; cf. Meyer and Sanklecha 2014, 372).[5] And rightly so. The motivation for caring about expectations, particularly those based on laws, is that they facilitate the long-term planning that is widely thought to be important to practical agency, autonomy and wellbeing (Bratman 1987; Brown 2011, 713, 725, 2017b, 1, 107; Buchanan 1975, 419–22; Goodin 1995; Meyer and Sanklecha 2014, 375; Raz 1979, 220–22; Sidgwick 1962, 271; Simmonds 2013, 39).[6] Accordingly, one might think that we are really only interested in predictive expectations, since it is predictions that most obviously serve our interests in planning. But a little further reflection reveals that mere predictions tend to lack a robustness that a normative dimension adds. Consider again my cello lesson example. I wouldn't plan my life too rigidly around my expected lesson time of 4pm Tuesday because I know there is a decent chance it may not eventuate (even though, in fact, there is a >50% chance it will). But now let's assume that I have to take time off work to travel for two hours to get to my lessons, such that a high degree of regularity in my lesson time is needed. My teacher knows this and assures me that he won't cancel or change lesson times without at least a month's advance notice. The nature of our relationship is now such that I have a conjunctive expectation that my lessons will occur at that time. Crucially, the normative dimension now increases the robustness of my prediction that I will have a lesson at 4pm next Tuesday, and I arrange my work shifts accordingly.[7]

---

[5] Meyer and Sanklecha (2014, 372) assume that agents affected by legal change have "epistemically valid" expectations in the sense that they hold them "on good grounds"; the authors do this in order to "bracket the epistemic" aspect of expectations so as to focus solely on the legitimacy of the expectations. In a similar move, Brown (2017a, 435–36, 2017b, 5) adds to his conjunctive understanding of expectations the requirement that the agent have an "epistemic justification or warrant" for their conjunctive expectation. I am sceptical of these moralised definitions of expectations (desideratum #VI), for I fear that much of the normative work in evaluating expectations that would otherwise be the sole task of the legitimacy basis gets buried into these undeveloped notions of what counts as an epistemically valid/justified/warranted expectation. To properly evaluate conceptions of LE that define expectations in this moralised way, we would need to know what the normative standard for epistemic validity/justification/warrant is *in addition to* knowing the proposed legitimacy basis. An additional reason why I favour the agent-focused empirical paradigm of LE (see Part 4.2.3, below) is that questions about the reasonableness (normativity) of the agent's expectation can straightforwardly and transparently be addressed via the assessment of legitimacy alone.

[6] See also Chapter 2.3 on Bentham.

[7] Of course, it *also* increases the bare *probability* that I will have a lesson next Tuesday.

This example illustrates that many of our plans involve predictions that are normatively coloured by the subtleties of the social practices, and associated social roles, relationships and standards of conduct, that comprise our daily lives.[8] My own view, as we shall later see, is that a good theory of LE will be sensitive to these subtleties. But for now I simply hope to have shown that it is conjunctive expectations (of inter-temporally consistent behaviour) that philosophers of legitimate expectations ought to be interested in. In any case, I shall assume as much for the remainder of the chapter (and thesis).

Turning now to the question of the possible means by which the relevant decision-maker can actually *identify* what the expectations of affected agents are, I take there to be two broad possibilities: the Empirical Model and the Imputation Model.

4.2.1.1 The Empirical Model of expectation-identification

The Empirical Model is concerned with the relevant agent's actual expectation. Accordingly, it entails that the decision-maker needs to investigate what that expectation was. Of course, no-one can *literally* access another person's mental state; rather the expectation needs to be inferred. But on the Empirical Model one is nonetheless committed to investigating actual evidence—the agent's testimony and conduct, the surrounding circumstances, etc.—in order to infer the relevant expectation, much as a civil or criminal law trial will involve making inferences of *mens rea* (intention, recklessness, etc.) from admissible evidence.

This approach has a significant theoretical advantage: it is coherent with the motivation for caring about legitimate expectations in the first place (desideratum #I), *viz*. that agents' actual expectations matter to how their lives go.

But it raises two concerns the severity of which is contingent on the concept's domain of application. Both concerns pertain to the fact that the empirical approach is epistemically demanding, requiring a detailed investigation of circumstantial evidence necessary to infer agent-specific mental states. The first concern is that as the number of agents affected by

---

[8] On the predictive and normative dimensions of social roles and their effect on our practical agency, see Dahrendorf (1968).

some form of inconsistent behaviour grows, so too do the economic costs of empirically investigating the affected agent's actual expectations. The second concern is that the empirical investigations themselves may be intrusive, and thus entail moral costs of some kind if conducted without adequate justification.

In the domain of legislative transitions, it is the state that must ultimately determine which agents are entitled to transitional assistance. For LE theories, the normative basis of the state's decision about transitional assistance relating to a legislative change is whether or not each affected agent had a legitimate expectation that the law would and ought to remain the same. As such, the state must first ascertain which agents in fact had that expectation. If the state must identify these expectations empirically, then it would have to carry out the relevant investigations into the circumstances of all potentially affected agents. Accordingly, the two concerns raised in the previous paragraph would arise with a heightened moral significance. While the consequences of this are, in a sense, obvious, they have been underappreciated in the LE literature, and are therefore worth spelling out.

First, the state would have to expend (potentially immense) economic resources to conduct the necessary investigations. Financing the investigation effort would require either raising taxes, raising debt, or cutting existing public expenditure, which, all else equal, would have moral costs in the form of burdens on those agents adversely affected by the revenue-raising mechanism. Call these *financier moral costs*. Second, there would be moral costs arising in respect of the agents whose expectation is being investigated. A number of liberal-egalitarians have highlighted the moral costs associated with overly-intrusive practices engaged in by the state in order to determine citizens' entitlements (Anderson 1999; Carter 2011; Wolff 1998). These scholars are particularly concerned about state practices that entail the revelation and evaluation of agents' inner lives—their mental states, mental capacities, rationality or reasonableness (Anderson 1999, 305–6; Carter 2011, 551–69; Wolff 1998, 107–15). Empirical investigations into agents' conjunctive expectations about the law would involve precisely such probing of agents' inner lives. Call these *agent moral costs*. I shall call this combination of financier and agent moral costs associated with the state's empirical investigations the *Moral Costs Problem*.

Now note that in *characteristic* legislative transitions, the scale of the Moral Costs Problem is particularly severe. This, recall from Part 4.1, is because legislative enactments characteristically affect large numbers of agents with heterogeneous expectations, and apply impersonally. Accordingly, the range of affected agents is not only large but wide open, such that investigations would need to be made into all *potentially* affected agents. Consider, for example, the enactment of an economy-wide carbon tax, affecting producer and consumer prices for fuel, electricity, agricultural products, steel and cement, among others. If we now contemplate the moral costs of the state having to investigate the actual expectations about the legal status of greenhouse gas emissions among all potentially affected agents (as per Meyer and Sanklecha 2011, 2014, for instance), we should get a rough sense of the scale of the Moral Costs Problem.

At this point, it might be objected that in representative democracies there exist structures of representation—be they geographic, interest-group based or otherwise—that enable governments cost-effectively to ascertain information about the effects of legislation on various groups. And in most political systems—including but not limited to representative democracies—the executive branch has means and incentives to ascertain such information, for example through stakeholder consultation.[9]

In response, while such mechanisms might reasonably reliably enable the state to gauge the *interests* of affected agents, it is not necessarily a reliable guide to the prior *expectations* of those agents. As I discuss in the next section, there may be many alternative reasons why agents experience losses as a result of legal change, of which an incorrect prior expectation of legal stability is merely one. Yet constituency representatives would have a vested interest in 'spinning' all losses as resulting from expectations of legal stability. The state can readily see that the members of the coal industry association and the mining workers' union have an *interest* in avoiding the carbon tax, but did they all really *expect* that there would never be,

[9] I'm grateful to Michael Saward for suggesting this objection.

and ought never to be, a carbon tax? If it is truly (legitimate) *expectations* that matter morally in such cases, then the distinction matters a great deal.

In any case, we can restate the Moral Costs Problem in scalar terms in such a way as to accommodate the objection without undermining the overall claim: the greater the number of agents that are (potentially) affected by a legal transition and the more heterogeneous their expectations are, the more morally costly it will be for the state to ascertain their expectations empirically. Even if representative mechanisms lower the marginal cost of empirically inferring an agent's expectation, it still follows that the more wide-reaching a legislative change is, the more morally costly the Empirical Model becomes. Imagine, for example, the scale of the economic and moral costs involved if the British Government—notwithstanding all its considerable representative structures—were required to determine transitional entitlements and obligations associated with Brexit legislation using a theory of LE based on the Empirical Model of expectation-identification. The point is that in precisely those cases of legislative change that have the most far-reaching transitional implications, LE theories adopting the Empirical Model would entail the highest moral costs.

4.2.1.2 The Imputation Model of expectation-identification

The alternative option is for the state to simply *impute* to all agents adversely affected by the legal change the expectation that the law would stay the same. This is a financially costless and certainly much more practicable way for decision-makers to determine the relevant expectations of affected agents, and one that avoids the Moral Costs Problem.[10] However, there are two serious problems with the Imputation Model.

First is what I shall call the *Motivation/Explanation Problem*. Recall again that what motivates legitimate expectations theories is that agents' *actual* expectations facilitate the long-term planning that is thought to be important to their practical agency, autonomy and wellbeing. Imputing expectations to agents is thus incoherent with the motivation for our moral concern with expectations in the first place (offending desideratum #I). It also

[10] Though they would still need to ascertain which agents were adversely affected, as other theories do.

guarantees that the resulting LE conception will offend desideratum #IV ('explanatory power'): when evaluating some conception of LE in the light of the objects it classifies as *legitimate* expectations, we are unlikely to find that classification explanatorily powerful if it makes no reference to the actual expectations of the adversely affected agents.

Notably, a similar concern has been raised by legal scholars about using an imputation-like model of expectation-identification for the administrative law concept of LE that is found in various common law jurisdictions. Scholars have registered concern with the very real possibility, entailed by imputation, that one could be deemed to have a legitimate expectation about X despite having no actual expectation about, or even knowledge of, X. As one leading administrative law scholar puts it: "If the individual did not expect anything, then there is nothing that the doctrine can protect" (Forsyth 2011, 432). Similarly, Justice McHugh of the High Court of Australia (as he then was), writes: "If the doctrine of legitimate expectation were now extended to matters about which the person affected has no knowledge, the term 'expectation' would be a fiction …".[11]

At this point, one might object along the following lines: "if people's long-term projects have been adversely affected by a change in the law, then surely they *must have* expected the law to stay the same". But this inference is unwarranted and likely to be wrong in many cases, leading to an over-determination of the class of agents deemed to have expected the law to stay the same (see also Räikkä 2014, 25).[12] This brings us to the second problem faced by the Imputation Model, which I call the *False Homogeneity Problem* (this parallels the 'new view' critique of the equivalent 'old view' assumption in the L&E literature). Consider the following four kinds of case in relation to the enactment of a legislated carbon tax.

First, some agents might expect the law *to* change but have sufficiently weighty countervailing reasons to pursue the affected project anyway (example: the pleasure-seeking

---

[11] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, at [31] per McHugh J (dissenting).

[12] This matters because it widens the population of agents whose expectation stands to be classified as legitimate or otherwise, thus raising the risk of 'false positives' when the legitimacy basis—whatever it may be—is applied.

SUV driver who loves driving a big car, so buys an SUV even though he expects a carbon tax to be implemented during the operational life of the vehicle and knows that this will reduce the car's capital value due to the increase in fuel costs). Second, some agents might expect the law to change but for reasons of apathy or neglect don't manage to change their plans in time (example: the passive investor who owns coal stocks and, despite expecting a carbon tax to be implemented soon, never gets around to instructing her broker to sell them). Third, some might expect the law to change but cannot reasonably adapt in time due to no fault of their own (example: the low-income tenant in poorly-insulated social housing who expects a carbon tax to be enacted but can't afford to upgrade the insulation in her flat or to move elsewhere). And finally, I suspect that for many legal changes there is a large class of agents who just don't ever turn their mind to the relevant law, its potential to change, and its effect on their various projects and plans.[13] In all four classes of case, the imputation would be false.

Again, we can restate this problem in scalar terms: the more agents that are (potentially) affected by a legal transition and the more heterogeneous their expectations are, the more vulnerable the Imputation Model is to the False Homogeneity Problem.

4.2.2 *The legitimacy basis*

I now turn to the issue that has generated virtually all of the scholarly debate in the LE literature: the legitimacy basis. I first consider the *structure-focused accounts* more common in the literature on legal transitions, followed by *agent-focused accounts*.

---

[13] Perhaps we could say these agents had an expectation at a higher level of generality—say, that no laws would change in a way that adversely affected the value of *any* of their projects. But this reframing of the expectation illustrates the difficulty associated with determining exactly what expectation is to be imputed. Moreover, an expectation that the law would never change in an adverse way would also not be a very reasonable expectation for a person to hold. Why would we want to determine an agent's transitional entitlements on the basis of an imputed unreasonable expectation?

4.2.2.1 Structure-focused accounts

On a structure-focused account, the legitimacy basis is some macro-structural feature of the relevant legislative activity. Two such accounts are discussed[14] by Lukas Meyer and Pranay Sanklecha (2011, 2014).[15] On the *Normative Authority View*, "[i]f the political authority in charge of maintaining the background institutions and of ensuring widespread compliance is legitimate, then so are the expectations generated by those institutions and that compliance" (2014, 375, citing Meyer and Sanklecha 2011). On the *Simple Justice View*, legitimacy is a function not of the legitimacy of the authority that makes the law, but rather of the justness of the expectation of legal stability: effectively, an expectation that an unjust law will continue will not be legitimate, but insofar as the legal status quo is just, then one can legitimately expect it to continue (Meyer and Sanklecha 2014, 377–79, 388).[16] Additionally, the hybrid accounts proposed by Matt Matravers (2017) and Margaret Moore (2017) incorporate something like the Simple Justice View in the first stage of their LE conceptions.[17]

Each of these accounts of the legitimacy basis is worthy of analysis in its own right, but consistent with my "theory-focused" critique I want to elucidate a deeper problem that *all* structure-focused accounts of the legitimacy basis face (and which Moore's and Matravers' accounts face insofar as they are structure-focused), which I call the *Generality Problem*. By locating the touchstone of legitimacy in some macro-structural feature of the government or law itself, structure-focused accounts yield determinations of legitimacy that apply generally

---

[14] I say "discussed" because it is not clear whether Meyer and Sanklecha *endorse* these theories.
[15] Bentham's view, that *all* laws create legitimate expectations, is also a structure-focused account. For discussion of this view and its particular problems, see Chapter 2.3 and Brown (2017a, 437–40, 2017b, 54–57).
[16] The authors also consider a "procedural" version of the Simple Justice View, according to which a just expectation is one that came about under a just basic structure. This is essentially the Rawlsian position (1971, 10, sec. 48), but the authors leave it aside since it is an ideal-theoretic view that does not apply to real-world, non-ideal circumstances (Meyer and Sanklecha 2014, 377–378), which for them and other contemporary scholars of legitimate expectations (e.g., Brown 2017b, 2) is the context of interest.
[17] Matravers argues that laws involving violations of fundamental democratic machinery, basic rights and liberties, and a "social minimum" of socio-economic entitlements (he draws on Rawls to fill these out) can never generate legitimate expectations that such laws will continue (2017, 318). According to Moore's first stage, expectations can never be legitimate if they are contrary to "objective justice", by which she means "rules or policies or practices that are egregiously unjust, that violate basic human rights, or some kind of moral minimum" (2017, 234). The theories of justice invoked in these views are discussed in my Chapter 5.

to all agents affected by a given legal change who share the expectation of legal stability; legitimacy is determined 'upstream' and the determination applies to all such expectations 'downstream' of the legal change. Consequently, structure-focused conceptions of LE are insensitive to normatively relevant features of cases arising at the agent level that give us good reasons to treat different agents affected by the same legal change differently. These features might include: the *kind* of agents affected (e.g. corporations vs natural persons), the *social roles* the agents were performing when the expectation was formed (e.g. professionals vs lay-persons), and the other relevant *circumstances* in which the expectation arose. I say "*might* include" because my aim here is not to defend a particular agent-focused account, but rather to defend the more general claim that agent-focused considerations *like* these are normatively relevant. This more modest claim is sufficient to establish that structure-focused accounts face the Generality Problem.

Consider the following example, inspired by Buchanan (1975, 421) and Hsieh (2000, 103):

> ***National Hospital Service***: The government commits to establishing a National Hospital Service (NHS). To promote the initiative, the Prime Minister attends one of the country's top science-focused high schools to encourage students to enrol in medicine. She says to the students that if they study medicine, they'll "have a job for life with the NHS".
>
> On the basis of the PM's inspiring presentation and assurance of a job for life, ***Dorothy*** decides to switch her university preference from computer science to medicine. She undertakes extensive training over many years, at her considerable expense, and qualifies as a doctor, expecting that she will and ought to have a job for life at the NHS. However, just before she enters the job market, the government slashes funding for, and privatises, the NHS (assume this requires extensive legislative reform), and its new private owner decides to implement a hiring freeze for five years. Dorothy is never able to obtain employment as an NHS doctor despite her best efforts, and has to settle for a less lucrative and rewarding job.
>
> A company called ***SupplyCo*** is also adversely affected by this change in law. Spotting a business opportunity supplying medical equipment to the NHS, SupplyCo did well during the early NHS years. It formed the expectation that the state-ownership and funding of the NHS would and should be maintained indefinitely, and expanded its operations accordingly. When the NHS was privatised, SupplyCo's share price fell dramatically.

> ***Vanessa***, an investor with shares in SupplyCo, also expected the NHS would and should continue in its current legal form indefinitely. She incurred a capital loss when SupplyCo's share price tumbled after the privatisation and funding cuts.

These three agents shared roughly the same expectation about the government's commitment to the NHS, albeit that Dorothy's expectation was more specific, pertaining to her having "a job for life at the NHS". But they are all very different kinds of agents, whose expectations arose in the context of their performing very different social roles and in otherwise quite different circumstances. These differences seem normatively relevant to the classification of their expectation as legitimate or otherwise.

Intuitively, Dorothy seems to have a stronger case for LE-based transitional assistance than the other agents because of the specific promise made to her and her classmates by the Prime Minister.[18] SupplyCo and Vanessa, on the other hand, have a weak case. For one thing, there was no specific assurance made to them about the ongoing government support for the NHS. Moreover, SupplyCo is a business corporation and Vanessa a stockmarket investor, and both are making capital investments for profit in contexts in which investors themselves conventionally assume risks of loss, including so-called 'policy risk', as the *quid pro quo* of the chance for financial gain (see Chapter 8.3.2). Of course, markets for education and labour, too, carry inherent risks, and we might think that Dorothy ought to bear some of that risk. On the other hand, one might consider risks to the value of one's skillset to be very difficult for agents to manage because they are important, lumpy and person-specific assets, making them virtually unavoidable and yet difficult to diversify and insure against (Shaviro 2000, 41–42). We need not resolve these questions decisively here, and reasonable minds are likely to differ on the details. What I hope to have established, though, is that *the kinds of reasons that we would appeal to* are reasons arising at the agent level, and these reasons suggest at least differences in the strength of the different agents' normative claims. Structure-focused LE

[18] I take no stand here on whether her expectation was legitimate, all things considered. My point is that she intuitively has an arguable case and a stronger one than SupplyCo and Vanessa.

conceptions are blind to such agent-level considerations, since they treat all agents with similar expectations (however identified) in the same way.

Let me illustrate by applying Meyer and Sanklecha's Normative Authority View to the NHS case. If we were to plug-in a conception of legitimate authority that yielded the verdict that the government was legitimate at the relevant time, then Dorothy, SupplyCo and Vanessa would *all* be deemed to have legitimate expectations of legislative stability with respect to the NHS.[19] Intuitively, this is clearly the wrong result for at least SupplyCo and Vanessa (false positives), though an arguable case could be made that it gets the right result for Dorothy. If, alternatively, a conception of legitimate authority were plugged-in that yielded the verdict that the government was *not* legitimate, then none of the agents would be deemed to have a legitimate expectation. This would imply the correct result for SupplyCo and Vanessa, though possibly the wrong result for Dorothy (a false negative). Accordingly, this LE conception would perform patchily with respect to desideratum #III ("intuition correlation"). More fundamentally, the Normative Authority View fails to adequately *explain* these results (desideratum #IV). As I have argued, we want to classify agents' expectations on the basis of the kinds of agent-level considerations to which this View is inherently blind, and not—or at least not only—by reference to the legitimacy of the governmental authority.

Furthermore, structure-focused accounts of the legitimacy basis fail to account for idiosyncrasies arising from the conjunctive nature of expectations. If agents' expectations about the future content of the law have this dual epistemic and normative character, then the formation of an expectation necessarily engages both the rational, epistemic capabilities of an agent (e.g. to form true beliefs on the basis of which to predict the future) as well as their moral-political capabilities (e.g. to critically reflect on and reason about the legal status quo). When we see that these forms of agency are involved in the formation of relevant expectations about the law, then we must acknowledge the potential for agents to make epistemic and moral-political errors when forming their expectations. If such errors are

[19] I am assuming that legitimate authority is an "all-or-nothing" affair. For a discussion of Raz's agent-relative approach to legitimate authority in the context of the Normative Authority View, see Meyer and Sanklecha (2014, 375–76).

possible, then they ought to bear upon an assessment of the legitimacy of an expectation. How, one might wonder, could an expectation be legitimate if it is irrational and/or immoral? Because of their generality, structure-focused accounts must ignore such nuances.[20]

In sum, conceptions of LE that use a structure-focused legitimacy basis are not sufficiently fine-grained to pick up distinctions between affected agents arising at the agent level—distinctions that seem to matter to our normative characterisation of those agents' expectations and transitional entitlements.

4.2.2.2 Agent-focused accounts

Agent-focused accounts of the legitimacy basis, by contrast, do determine legitimacy by reference to normatively-relevant features arising at the agent level, such as the kind of agents affected, their relevant social roles, and other relevant circumstances in which their expectations were formed.

I am not aware of any purely agent-focused accounts in the LE literature.[21] Alex Brown's (2017b) theory incorporates some agent-sensitive considerations at various stages,[22] though it does not apply to primary legislation (I consider it in Part 4.3, below). However, Matravers' and Moore's hybrid conceptions of LE include agent-focused considerations at their second stage, i.e. to be considered where the expectations in question do not pertain to matters of basic justice (the first stage).[23] For Matravers (2017, 319–21), agent-focused features that are potentially relevant to the legitimacy of an expectation include the position of the agent

---

[20] What tends to happen is that these considerations are swept under the carpet via assumptions about the 'validity' or 'justification' or 'warrant' for the agent's holding the expectation, without specifying and defending the normative standards embodied in these assumptions: see above footnote 5.

[21] Meyer and Sanklecha's Complex Justice View (2014, 383–87) could be considered to be a hybrid structure/agent-focused account of the legitimacy basis, since it includes structure-focused considerations (a requirement that the expectation respects relevant substantive considerations of justice that are uncontroversial: at 385–86) and agent-focused considerations (such as whether the agent's expectation was consistent with her own other views about justice: at 386). I leave this account aside as its exposition and discussion would take up too much space. Suffice it to note that this account faces numerous problems, not least of which being the Moral Costs Problem, which applies *a fortiori* to this conception of LE since it requires the state to identify not only each agent's expectation about the relevant law, but also each agent's other relevant views about justice.

[22] See above footnote 5 and Green (*forthcoming*).

[23] I'm paraphrasing these authors here—refer to footnote 17, above, for the specific formulations of the first stage of their respective theories.

within the social structure, and whether the agent ought to have foreseen that their conduct was morally wrong and likely to be precluded by a future legal change. For Moore, determining the legitimacy of expectations (at the second stage) is a matter of determining the *fairness* of the expectation (2017, 239–42, 248). Moore does not give us a thorough-going account of fairness, but in the course of discussing some example cases she identifies numerous agent-focused considerations: (1) whether the agent developed a reliance interest based on their expectation that a law (or social practice) would continue; (2) whether the agent ought to have foreseen the relevant change to a law (or social practice); (3) the suddenness of the change; (4) whether the agent suffered a "serious" loss or disadvantage as a result of the change; and (5) countervailing distributional considerations, such as the agent's pre-existing wealth relative to others (2017, 239–42, 248).[24]

It can readily be seen how agent-focused accounts such as these could be sufficiently sensitive to agent-level considerations. They seem to enable us to differentiate among agents with similar expectations who are affected by the same legal change, as in my *NHS* hypothetical, in a way that would correlate with and adequately explain widely shared intuitions. For example, the standard of "reasonable foreseeability" with respect to future legal changes could provide a principled basis for distinguishing the legitimacy of expectations of legal stability harboured by a corporation or professional investor in a capital markets context from the expectations of a high school student making education choices on the basis of a specific assurance by the Prime Minister. My point, again, is not to endorse any *particular* agent-focused conceptions of LE (including any of those discussed in the previous paragraph), but rather to illustrate that such conceptions of LE at least *have the conceptual resources* to take account of intuitively difference-making features arising at the agent level; they can avoid the Generality Problem.

However, we can readily see how such conceptions of LE entail onerous informational requirements. When applied to legislative transitions, this means the state would need to investigate a range of facts about all potentially adversely-affected individuals pertaining to

[24] The numbering scheme is my own, added for clarity.

the kinds of agents they are, their relevant social roles, and other relevant circumstances surrounding the formation of their expectation. This would require potentially expensive and intrusive investigations by the state, giving rise to a version of the Moral Costs Problem, albeit in respect of the legitimacy basis, as distinct from the expectation model (again, this problem can be expressed in scalar terms: see above, Part 4.2.1.1).[25] When applied to *characteristic* legislative transitions, the scale of the epistemic burden would be such as to entail weighty moral costs for similar reasons to those expressed above pertaining to the Empirical Model of expectation-identification, discussed in Part 4.2.1.1.

4.2.3 *Two paradigms of legitimate expectations: a dilemma*

Based on the two main parameter values of each of the two building blocks of LE conceptions that I have discussed, we can identify four basic possible kinds of LE conception—and we can now see the tally of problems facing each one (Table 1). From these four possibilities, two represent more natural combinations than the other two, hence I identify two opposing *paradigms* of LE: the fine-grained, empirically-demanding Agent-Focused Empirical Paradigm (AFEP); and the coarse-grained, empirically undemanding Structure-Focused Imputation Paradigm (SFIP) (shaded cells in Table 1).

Table 1: LE conceptions and their problems

Legitimacy Basis **Expectation Model**	***Agent-focused***	***Structure-focused***
Empirical	Moral Costs Problem (EM/LB)	Moral Costs Problem (EM) Generality Problem
Imputation	Motivation/Explanation Problem False Homogeneity Problem Moral Costs Problem (LB)	Motivation/Explanation Problem False Homogeneity Problem Generality Problem

Paradigmatic LE conceptions are shaded. EM = Expectation Model; LB = Legitimacy Basis

We are now in a position to appreciate a fundamental dilemma facing anyone who seeks to build a good conception of LE and use it in a good theory of legal transitions. They must choose between: a theoretically and intuitively appealing conception of LE that faces high

[25] An agent-focused legitimacy basis will typically and naturally combine with an empirical expectation model, so the two types of Moral Costs Problem will typically go together.

moral costs when applied to characteristic legislative transitions; and a theoretically implausible conception of LE that has no moral costs when applied to characteristic legislative transitions.

This dilemma suggests that the two philosophical projects—LE conception-building, and theorising about legal transitions—should part ways. More constructively, the results of the above analysis suggest some minimal conditions for the development of good conceptions of LE and good theories of legal transitions, respectively. I will address the former in Part 4.3, and the latter in Part 4.4, below.

4.3 A WAY FORWARD FOR LEGITIMATE EXPECTATIONS THEORY

Regarding the project of building a good conception of LE *in general* (i.e. not just for a theory of legal transitions), my analysis suggests the best way forward is to build on the fine-grained, context-sensitive AFEP—since it is motivationally coherent, and able to generate intuitively correct and explanatorily powerful results—but to limit its application to subdomains in which the moral costs of information-gathering are avoidable or at least justifiable.

The most natural subdomain to build and test good conceptions of LE seems to me to be that of private interpersonal morality and, by extension, private law. These subdomains characteristically involve interactions among a small, closed number of identified individuals, whose expectations of inter-temporally consistent behaviour arise from some triggering conduct in the course of a social practice, relationship or transaction in which they are engaged. As such, my view is that LE can best be understood as a species of *special rights* (and corresponding special obligations) that are similar in nature to the special rights that arise from a (moral) promise or (legal) contract (Hart 1955, 183).[26] Archetypical examples include a recurring dinner arrangement between friends (cf. Meyer and Sanklecha 2014, 370),

[26] Indeed, I think legitimate expectations are a good candidate for filling what Sidgwick identified as the "dim borderland" of private morality that falls short of explicit promises and binding contracts and encompasses "what are called 'implied contracts' or 'tacit understandings'" (1962 [1874], 269–70). The common law of equity recognises quasi-legal obligations of transactional consistency that stem from certain kinds of behavioural interactions between agents that fall short of contracts—for example, via the doctrine of estoppel.

professional–client relationships, interactions among members of a private association, and the negotiation of a business deal between commercial parties. In these kinds of cases, the legitimacy of expectations of inter-temporally consistent behaviour will quite naturally be determined with reference to the practice-specific internal standards of the social practice in which the agents are engaged and their particular roles within it, as the two variants of my cello lesson example in Part 4.2.1 also illustrate. Moreover, the characteristically small-n, closed nature of private interactions ensures the costs of information-gathering in these subdomains would be manageable and in any case borne by the parties in the event of a moral or legal dispute among them; the state is simply not involved.[27] As such, these investigations would entail no moral costs.

Special rights-based conceptions of LE developed in these 'core' subdomains of private morality and private law could then be incrementally scaled to certain kinds of analogous public decision-making, providing a sound basis for the concept's application in political philosophy (or 'public morality') and public law. Most relevantly, the more agent-focused, relational, practice-sensitive direction of LE theorising that I endorse could help to better delimit the concept's application to administrative law—a domain in which the concept is widely found but subject to considerable jurisprudential controversy (see Brown 2017b, 7–31). It is notable that some leading administrative law scholars already adopt the kind of approach to legitimate expectations (*qua* administrative law doctrine) that I am endorsing. Robert Thomas argues that legitimate expectations "operate only in the context of a specific relationship between an individual, or a specific class of people, and the administration" (2000, 45–46 footnote omitted). Agreeing with Thomas, Paul Reynolds notes that the adjudication of "legitimate expectations cases will require a more subtle investigation into subjective perceptions and individual relationships" (2011, 340). Moreover, courts in the

[27] If, as I envisage, a suitably developed AFEP approach to LE were to be incorporated into private law doctrine, then the possibility of private litigation arises. This means the judiciary (and hence the state) *would* be involved. But that involvement would require the initiation of legal proceedings by the aggrieved party, and hence their consent to the information-gathering associated with litigation.

English common law system have tended to be loath to recognise the legitimacy of expectations arising from large-n, open-ended, and high-political contexts (see Steyn 2001).

I take up elsewhere the more onerous task of developing and defending a *specific* conception of LE that takes the broad direction sketched here (Green, *in prep.*). For now I wish merely to highlight one important implication for legal transitions of this broadly-sketched direction: it leaves open the theoretical possibility that LE could apply to certain *non*-characteristic legislative transitions. For example, where legislation affects only a small, closed number of identified agents and there is some kind of special relationship between the state and these agents in the course of which some conduct by the state triggered the relevant expectations, I think it is possible that the expectations in question could be deemed legitimate (and because of the small-n, closed nature of the context, the moral costs of determining the expectations and their legitimacy could be adequately managed).

However, once we conceptualise LE in this way, it is the special-right-creating triggering conduct (in the course of the relevant social practice / special relationship) that grounds the legitimacy of the expectation. We are no longer dealing with the standard problem of legal transitions, in which the simple fact that legislation is different from one period to the next is the normative issue. Rather, we are dealing with a quite different, quasi-private-law/morality doctrine, albeit one that sometimes applies to (non-characteristic) legislative transitions.

On this last point, the direction of my proposed approach is consonant with that of Alex Brown in his most recent publications on the subject (2017a, 2017b).[28] In Brown's work, legitimate expectations have a special rights-like status similar to what I have proposed (see especially Brown 2017b, 48–51), with government agencies being liable for frustrating legitimate expectations that they were "responsible" for inducing, where they had assumed a role responsibility over the relevant policy domain (ibid 61). Again, it is this prior triggering conduct that is doing the normative heavy lifting.

---

[28] I leave aside Brown's earlier view on the subject (Brown 2011), which differs in numerous respects from his 2017 publications.

A key difference between our approaches, though, is that the scope of Brown's theory is limited to administrative actions:[29] Brown rules out *a priori* the concept's application to either primary legislation on the one hand, or private morality and private law on the other (Brown 2017b, 15–20, 113–17). I do not think that Brown's scope limitation is defensible. Because of the broad way Brown specifies government "responsibility",[30] his theory is relatively conservative with respect to administrative actions; governments will frequently trigger their obligations to fulfil expectations or to compensate agents for frustrating them. Fittingly, for such a conservative approach, Brown appeals to the Kantian deontological maxim of respecting people as ends in themselves as a justification for his theory (ibid 189–92).[31] However, the fact that Brown limits the scope of his doctrine to administrative actions means that the state can frustrate expectations at will via primary legislation, without attracting any liability under his theory (ibid 113–17). This sits uneasily with the deontological justification given for his theory as a whole: a theory that protects people against losses caused by administrative actions on deontological grounds should, *a fortiori*, demand protection of the individual against losses caused by legislation, too.[32]

My more general, private interaction-based approach avoids this problem of overly-rigid boundaries. Rather, it allows for a more fluid traversal of subdomain boundaries (private, public, administrative, legislative), so long as the relevant conditions (pertaining to the "social practice" and "triggering conduct"—which I have not developed here) are satisfied and the moral costs of information-gathering can be managed.

---

[29] This encompasses both "administrative policies" (e.g., secondary legislation, general rules, regulations, and policy statements) and "administrative measures" (e.g., particular administrative orders, decisions, and adjudications that relate to a single agent or small number of identifiable agents) (Brown 2017b, 98).

[30] Brown specifies three illustrative (non-exhaustive) "modes" of action/omission by which government agencies will be deemed so responsible: (1) *inadvertently*, (2) *negligently*, or (3) *intentionally* causing the agent to expect that a particular administrative course of action will be taken (2017b, 64–76).

[31] Interestingly, Brown argues that his theory is partly grounded in, or supported by, *both* deontological values and principles *and* utilitarian values and principles (2017b, chaps. 6, 7). I have argued elsewhere (Green *forthcoming*) that the utilitarian justification for Brown's theory is unpersuasive given the counter-utilitarian implications of his conservative theory in non-ideal societies. Rather, his conservative theory stands in need of a deontological justification (such as those that he also invokes).

[32] Brown adduces some additional reasons for excluding primary legislation (2017b, 113–17). I argue elsewhere that these are *ad hoc*, unpersuasive and at odds with his deontological justification (Green *forthcoming*).

4.4 CONCLUSION

I have argued that the concept of legitimate expectations has grave limitations as a basis for a theory of legal transitions. The best (least-problematic) basic kind of LE conception is agent-focused and concerned with the actual expectations of affected agents. Yet this fine-grained focus on the affected agent's mental state and circumstances places an epistemic burden on the normative evaluator. In subdomains involving private interpersonal interactions, this burden will typically be manageable, as it would be in certain subdomains of government activity, such as administrative actions that have a small-n, closed, relational character, and perhaps also (non-characteristic) legislative changes that have that character. Accordingly, I sketched a direction for theorising about LE that embraces these empirically-sensitive, agent-focused building blocks and treats LE as a species of special rights that paradigmatically applies to small-n, closed, interpersonal interactions. But in characteristic legislative transitions, I argued, the epistemic burden entailed by this paradigm of LE generates qualitatively and quantitatively weighty moral costs. Future approaches to legal transitions will therefore need to balance the imperative to mitigate such moral costs with the imperative to take seriously the specific situations of the diverse agents typically affected by legislative change. The principles that I invoke in my theory of legal transitions have been framed with these countervailing imperatives in mind (a point I return to in Chapter 10.3).

I have argued here that LE is an inappropriate conceptual vehicle for developing theories of legal transitions. But in the course of the discussion, we encountered numerous theories *of the legitimacy basis* that themselves seem like *prima facie* plausible candidates to be the conceptual vehicles for a theory of legal transitions in their own right, without the superfluous chassis provided by LE, *viz.* 'legitimate authority', 'justice', and 'fairness'. I leave aside 'legitimate authority'-based views as I think they are non-starters (see my discussion of the Generality Problem, above). But justice and fairness are genuine candidates, worthy of consideration. I think LE can plausibly be conceived *as* a species of fairness (this, indeed, is how 'old view' approaches are conceived in the L&E literature), but in any event I consider a different theory of fairness—fairness as *ex ante* responsibility for managing risks (here, risks of legal change)—in Chapter 8. I consider ideal-justice theories of legal transitions in the next chapter, as a second type of liberal-egalitarian approach to legal transitions.

CHAPTER 5. JUSTICE: LIBERAL-EGALITARIAN THEORIES (II)

5.1 INTRODUCTION

We saw in the previous chapter that a number of legitimate expectations theorists have endorsed or considered the view that what makes an expectation legitimate is the substantive justness of the law that the relevant agent expects to continue, or of the basic structure of the society in which that law obtains (Brown 2017a, 440–42, 2017b, 57–59, 78–87; Buchanan 1975; Matravers 2017, 159; Meyer and Sanklecha 2014, 377–83; Moore 2017, 233–34; Rawls 1999, 273–77). In this chapter I consider the prospects of a theory of legal transitions that is grounded *directly* in considerations of justice, without invoking the fraught overlay of 'legitimate expectations'. Specifically, I focus on the notion of *ideal justice* in the Kantian/Rawlsian liberal-egalitarian tradition.[1]

Writers in the liberal-egalitarian tradition are concerned with the instantiation of a just political-institutional order that is sufficient for individuals to form, revise and rationally pursue their reasonable conceptions of the good and associated life plans in accordance with justice. Achieving such an outcome requires not only securing to individuals a suite of political liberties but also distributing to them certain generalized resources ("primary social goods") that are necessary if each is to be able to fully exercise their capacities for reason and rationality (Rawls 1971, 1974, 18). Individuals have rights to these liberties and resources and, via the institutions of the state, duties to provide them to all citizens. In this chapter, I explore the implications of a Kantian/Rawlsian ideal conception of justice for legal transitions, taken to its logical extreme and unaffected by independent considerations.

---

[1] I mean 'ideal justice as opposed to 'conservative justice' (on this distinction, see Chapter 1.2). To be clear: I am not suddenly moving into *ideal theory*; I am simply considering the non-ideal (real world) application of a theory or principle of legal transitions that is based on some ideal notion of justice. All one needs to accept is the possibility that an overall unjust (non-ideal) state can have (some) particular laws that are just.

In a broad-brush way, I share Meyer and Sanklecha's (2014, 377–83) view that there is something intuitively plausible about basing a theory of legal transitions on justice, yet on closer inspection such a position is found wanting in certain important respects. Elucidating what is attractive and unattractive about such a view should therefore prove helpful in our quest for the best theory of legal transitions, and this thought motivates the approach and structure of this chapter.

In Part 5.2, I defend the *prima facie relevance thesis*—the claim that considerations of justice appear, *prima facie*, to be at least relevant to the determination of disputes about legal transitions. I motivate this thesis by considering, as a foil, two views that take (ideal) justice to be an *irrelevant* consideration in legal transitions (Brown 2017b, 78–87; Simmons 2010, 20–21). By appealing to intuitions in so-called 'obvious injustice' cases, such as slavery abolition, which seem to cry out for a justice-based principled explanation, I argue that justice considerations are *prima facie* relevant. The challenge for justice-based views arises when it comes to turning intuitions from 'obvious injustice' cases into a determinate, comprehensive, justice-based principle of legal transitions (that is applicable to non-ideal societies). In Part 5.3, I try to sketch how such a principled approach might go, by building on theories about basic (or 'natural') rights and duties/responsibilities that have already been widely endorsed within the tradition. I will only sketch the approach because my aim is not to *defend* it, but rather to specify a plausible *candidate* justice-based principle of legal transitions so that it can be evaluated. In Part 5.4, I discuss numerous weaknesses of this candidate principle, and justice-based approaches to transitions more generally, which, I claim, are sufficiently grave as to warrant abandoning them altogether, despite their *prima facie* relevance. Part 5.5 concludes.

5.2 THE *PRIMA FACIE* RELEVANCE OF JUSTICE TO LEGAL TRANSITIONS

Consider the following approach to legal transitions advocated by A. John Simmons:

> In changing even unjust institutional rules, we are generally sensitive to the moral dangers of "rug-pulling" … that is, cases where people base life plans or important activities on the reasonable expectation that the rules will remain unchanged … and then have the rug

> pulled from beneath them by sudden institutional change. The loss and suffering that such changes in institutional rules can bring about may often both be considerable and seem unfair to those who had little choice but to rely on the future being like the past. This fact seems to many to argue for a requirement that institutional changes proceed gradually, with ample prior warning, or that such changes be accompanied by policies providing compensation for those who have innocently relied (to their detriment) on even unjust rules. (Simmons 2010, 20–21)

I don't doubt that there is some truth in Simmons' position. But there are certain cases—call them 'obvious injustice' cases—which seem to put severe pressure on it. The paradigmatic case is that of the slave-owner in a society where slavery is legally permitted. He persistently breaches his basic duties of *morality* and/or *justice* owed to his slaves, and the slaves' basic rights are systematically violated. When slavery is legally abolished, the slave-owner would experience a range of losses (lost capital investment and a loss of social status, at least[2]). The state then has to make a decision about transitional arrangements. Simmons seems committed to the view that slavery abolition should proceed slowly, or that compensation should be paid to slave-owners.[3]

But this seems to fly in the face of ordinary morality and justice. Many readers will intuitively think that the slave-owner is *not* entitled to a conservative response. And the seemingly most obvious *reason* for this conclusion is that the slave-owner was under a prior, basic duty to avoid causing wrongful harm and/or violating others' basic rights. In light of this basic duty, we might think, he ought to have at least adapted his behaviour and plans by never acquiring slaves in the first place, or freeing them once he had done so. It seems to follow straightforwardly that, when slavery is eventually abolished legally, he should not have a

---

[2] Depending on one's theory of loss, one might also add (forward-looking) expectation losses, such as loss of future income.

[3] Much might depend on what Simons means by "innocently relied". But since Simmons explicitly envisages that his conservative approach applies to *unjust* rules, a charitable reading (one that avoids internal contradiction) would suggest that perpetrating injustice wouldn't necessarily undermine a claim to "innocent" reliance.

claim against the state for a conservative remedy. When slavery is abolished, the law is simply catching up with what agents were already under a basic duty to do.

The correctness of this conclusion seems to be fortified by symmetrical consideration of the winners from the legal change—in this example, the legally freed slaves. What transitional obligations do these 'winners' have? The freed slaves benefit from the legal change by receiving an increase in social status and opportunities (or so I shall assume). Should their disadvantageous position under the old laws be grandfathered? Should their benefits be clawed back (e.g. taxed away)? Again, most readers will intuit that the correct position is that these 'winners' should retain their benefits (if anything, we might think, it is the former slaves who are entitled to compensation for past wrongs[4]). Again, the best explanation for this intuition seems to be that the freed slaves have a basic *right* to their newfound benefits; since these gains are rightful requirements of morality and justice, they should not be denied them.

Now consider Alex Brown's view. Perhaps surprisingly for a liberal egalitarian, Brown is unimpressed by these kinds of considerations. In the course of arguing for his own 'government responsibility'-based legitimate expectations theory of legal transitions (see Chapter 4.3), Brown gives serious consideration to justice-based views but ultimately argues that the justice or otherwise of the expectation (or the underlying basic structure or particular law) is irrelevant (2017b, 78–87). To illustrate his view, Brown constructs a detailed case involving an obviously unjust system of racially-segregated access to housing (a system Brown concedes is unjust), and considers the position of a hypothetical white couple, Mr and Mrs van Ark, who buy land in a gated community designated whites-only and apply for planning permission from the state to build on the land. Permission is duly granted and the van Arks make various preparatory expenditures. But then the system of racially-segregated housing is abolished ("primarily", Brown says, "for the reason that it is unjust"), whites-only gated communities are thus also abolished, and the van Arks' planning permission is

[4] I need not take a stand on this issue here. Suffice it to say that *if* one holds the view that persons are entitled to compensation or other remedy in respect of *past moral wrongs or injustices* (see Chapter 1.2 on rectificatory justice), then *a fortiori* one should not adopt a conservative theory of legal transitions in respect of the rightful legal reform of such wrongs or injustices.

rescinded before the house is completed. On Brown's theory, the van Arks do have a legitimate expectation. Moreover, says Brown, "I believe they do irrespective of the fact that the substance of their expectation was unjust at the time of its creation".[5]

However, I think that Brown's case trades on countervailing intuitions readers are likely to have about the importance of housing to people's life plans (and hence their concern for the van Arks' wellbeing independently of the injustice), and perhaps also on ambiguities in the case about the extent and social knowledge of the injustice. Consider instead the following case, where all such doubts are erased, thus isolating the obvious injustice:

> ***The Torture Games***: The state of Barbarica holds an annual tournament in the capital, in which individual citizens—selected at random in advance—are involuntarily tortured for public entertainment. The Games bring in much revenue for the state, in the form of entry fees, tourism and gambling expenditure. The Government promotes the Games heavily for months in advance, specifically encouraging people to come and watch the "fun"—and the 2018 Games are no exception. Brute is a wealthy man who loves watching the Games. Each year, he spends a considerable sum on travel to the capital, entry tickets, accommodation, and Games-related merchandise (all of which are non-refundable). He arrives at the capital in time for the 2018 Games only to find that, following a ministerial reshuffle, the Games have been cancelled because they are unjust.[6]

Brown seems committed to the view that the injustice is irrelevant to Brute's transitional entitlement, and that the state should compensate Brute for his out of pocket expenses.

These kinds of obvious injustice cases present problems for theories such as those of Simmons and Brown. One reason we might think that they do so is because those theories deny that basic rights and duties of morality and justice can have implications for what agents ought to do, independent of what the law happens to be (Simmons) or of how public agencies

---

[5] Brown's position does not depend on the van Arks' motivation. He goes on to consider a variant of the case that includes the additional stipulation that "the van Arks are committed to a system of racially segregated housing and fully intend to participate in and support that system", and had perfectly viable options to buy land and housing in a racially mixed community. "What difference would this make to the issue of whether or not the van Arks' expectation is legitimate? I believe that it makes no difference" (Brown 2017b, 84).

[6] I frame this as an administrative action because Brown's theory applies to such actions only (2017b, 98).

have encouraged people to behave (Brown), and this seems to entail a mistaken understanding of what it is to be a moral and political agent. If people, *qua* moral/political agents, have basic duties of morality and justice to respect other people's basic rights (as libertarians and liberal egalitarians must claim they do, even if the details are filled out quite differently) then surely it follows that those individuals must assimilate those basic duties into their cognition and agency—their beliefs, expectations, plans and actions. To go on mechanically believing, expecting, planning and acting *as if* there were no moral or political imperatives to do otherwise would be to deny the moral and political force of the duties themselves. Such mechanical indifference to wrongfulness and injustice would be a sign of a defective moral and political agent; one who cannot respond to moral and political reasons.[7] Agents, rather, have moral and political reasons to *avoid* basing their life plans and actions around the benefits they could receive from injustice and moral wrongdoing.[8] This, at least, *must be* a relevant set of considerations for anyone who takes seriously the idea that justice entails basic rights and duties that stand apart from convention or law.

This line of thought should register especially forcefully against Brown's view, since he adopts a Kantian/Rawlsian conception of the person. Brown leans particularly heavily on the Kantian/Rawlsian assumption that individuals (like the van Arks) have rationally chosen their ends and generated a life plan through which they pursue those ends, entailing that the state has no business disrupting those plans by changing the law. In an earlier article, Brown justifies his conservative approach to legal transitions on the ground that "[t]o treat individuals as ends in themselves is to respect them as separate persons whose rational capacity to formulate and execute long-term plans must be respected" (2011, 725), and in his 2017 book (in which the van Arks example is discussed) he reiterates this Kantian idea to

---

[7] It is for this reason that Simmons' claim that people have a "reasonable expectation that the rules will remain unchanged" is problematic. It is not "reasonable" to expect in a *normative* sense that unjust rules will remain unchanged if basic political duties behove us, as political agents, to resist and reform unjust institutions.

[8] Such avoidance will often be more feasible than Simmons assumes in the above-quoted passage ("those who had little choice but to rely on the future being like the past"). Agents can plan their lives on the assumption that unjust laws *will* change, and can treat any benefits arising from that injustice as provisional and liable to be disgorged when the laws do change—held as if 'on trust' for the victims of injustice. When the rug is unjust, one shouldn't put too much furniture on it. See also Persad (2017, 292–95).

justify his conservative approach to legitimate expectations in administrative decision-making (2017b, 190–92). However, even if we were to assume that the Kantian/Rawlsian model of the self were the right one, it is far from clear that it supports a uniformly conservative legal transition rule. At best, this conclusion would follow in a situation of ideal justice, for in such circumstances individuals' rational life plans can be assumed to conform to the prior demands of justice (Rawls 1999, 392–96; see also Persad 2017, 284). But in non-ideal contexts, no such assumptions can be made: individuals' private plans are tainted by dint of being formed against a backdrop of injustice. If anything, those individuals are implicated in the *rectification* of that injustice since, on the Kantian/Rawlsian account that Brown otherwise seems to endorse, they have natural duties to establish just institutions, as we shall see shortly.

I take it that these considerations are sufficient to motivate the *prima facie* relevance thesis.

5.3 A JUSTICE-BASED PRINCIPLE OF LEGAL TRANSITIONS?

From here on, though, we face a difficult challenge in turning intuitions from obvious cases into a determinate justice-based principle of legal transitions—one that can handle the myriad more complex (and less 'obvious') cases that commonly arise. In this Part, I sketch how one such principle might go, drawing on the work of those who endorse a (partial) justice-based account of legal transitions (Matravers 2017; Moore 2017).

Building on the considerations outlined above in relation to the slavery abolition case, a seemingly plausible candidate for such a principle might go something like this:

> ***The Candidate Justice Principle***: where a person suffers a loss as a result of a legal transition and that which they have lost was predicated on a violation of another's basic right *or* of their own basic duty, the person should not receive transitional assistance (beyond what is necessary to secure *their own* basic rights); winners from legal transitions who have gained the entitlements implied by their basic rights should not be liable to having their transitional gains blocked or taxed away (other than to the extent necessary to comply with *their own* basic duties).

Of course, the devil lies in the detail of the underlying theory of justice—in this candidate principle, the underlying theory of *basic rights* and/or *basic duties*. Liberal-egalitarian scholars in both the idealist, Kantian tradition and those of a more critical or pragmatic inclination have posited the existence of basic rights and corresponding basic duties. By *basic* I mean to reflect the thought that, in these traditions, the rights enjoyed and duties owed are universal in that sense that they are enjoyed and owed by persons *qua* persons, regardless of their voluntary actions or group membership (e.g. Caney 2005). These are sometimes called "natural rights" (see Wenar 2015, sec. 6.1) and "natural duties" (e.g. Rawls 1971, 114), but I shall call them "basic" rights/duties to avoid the naturalistic connotations while still emphasising their purportedly universal, non-contingent character.

In their (partly) justice-based theories of legal transitions for non-ideal theory, Matravers and Moore (writing about justice-based *legitimate expectations* theories) assume a Rawlsian or Rawlsian-inspired account of the content of basic rights.[9] For Matravers, laws that instantiate the following rights and protections are deemed just (and expectations of their continuance must be honoured) while laws that violate these precepts are unjust (and cannot give rise to legitimate expectations):

> (a) fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; the scope of majority rule; and (b) equal basic rights and liberties of citizenship that legislative bodies are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and association, as well as the protections of the rule of law; and (c) with respect to social and economic matters, a 'social minimum' (an adequate standard of living to enable citizens to develop their moral powers and to participate in the political life of their communities). (Matravers 2017, 318, citations omitted)

On Moore's account, a society's laws

[9] In his consideration of the justice-based approach, Brown also assumes a broadly Rawlsian scheme (Brown 2017b, 78–79, fn 1), but he ultimately rejects the justice-based approach to legitimate expectations.

> are constrained by, at the minimum, universal negative duties (such as a no harm principle) or basic rights, which may include substantive claim rights. This means that rules or policies or practices that are egregiously unjust, that violate basic human rights, or some kind of moral minimum, cannot establish legitimate expectations, but that many laws which represent the agreed practices or policies of a certain way of organizing human life and are not objectively unjust can give rise to legitimate expectations. (Moore 2017, 234)

Matravers and Moore hold that where the legal status quo violates basic rights, it cannot found a legitimate expectation that the status quo will be maintained. Expectations about the continuation of slavery, therefore, cannot be legitimate because the institution of slavery, in Matravers' terms, would violate the "equal basic rights and liberties of citizenship" and the "social minimum" of socioeconomic goods to which persons are entitled and, in Moore's terms, would be "egregiously unjust" and violate "basic human rights, or some kind of moral minimum".[10]

Two further points of principle would surely follow from this kind of approach.[11] Losers from legal changes that instantiate basic rights surely cannot *themselves* be allowed to fall below the basic minimum thresholds (whatever they may be). Thus, when slavery is abolished, the slave-owner is not entitled to compensation for the full extent of his losses, but if he is ruined in the process, he is entitled to be brought up to the basic minimum to which *everyone's* basic rights entitle them. Second, when considering the position of winners, insofar as the beneficiaries of just reforms are gaining their basic rights, these gains should not be blocked or taxed away (but if they gain more than their basic entitlements, then those further gains are at least in principle subject to taxation). This accounts for our intuition that the freed slaves are entitled to keep their 'winnings'. With these additions, something like Matravers' or Moore's scheme of basic rights, when plugged into the Candidate Justice

[10] Moore says this explicitly, using a variant of my slavery example (2017, 232–34).
[11] These implications are built into my Candidate Justice Principle. I think Matravers and Moore would endorse them on consideration, though they do not do so explicitly.

Principle, seems able to account for our intuitions concerning both losers *and winners* in obvious injustice cases like slavery abolition.

Still, I think much more needs to be said about the basic *duties* if such an account is to handle the cases of the losers in the other 'obvious injustice' cases that we have discussed so far.[12] In the slavery abolition case, perhaps our intuitions are influenced by the fact that the loser from the reform, the slave-owner, *is himself the perpetrator of an obvious moral wrong and/or injustice*. His duty seems clear: 'do not wrongfully cause harm to others', or 'do not wrongfully violate others' basic rights' (or something like this)—perhaps the paradigmatic moral duty (Feinberg 1984; Kant 1997 [1785]; Mill 1859; Rawls 1971, 114). But what about the van Arks in Brown's housing segregation case, and Brute in *The Torture Games*? These agents do not wrongfully harm anyone—at least not in the *interpersonal-interactional* sense (I will say more about this shortly) that the slave-owner does. Yet, on Moore's and Matravers' accounts, since the legal status quo in each of these cases violates the "equal basic rights and liberties of citizenship" or is "egregiously unjust" or violates "basic human rights, or some kind of moral minimum", then presumably neither the van Arks nor Brute would be entitled to compensation or any other transitional assistance. The conclusion in these last two cases, then, implicitly relies on a stronger notion of basic duties than merely 'refraining from wrongfully harming another person' or 'violating another person's basic rights'. Another way to put this worry is that if a justice-based principle is focused exclusively on basic *rights* then it will be unable to accommodate differences in the way different losers from just reforms are situated *vis-à-vis* the rights violations occurring under the legal status quo. It would face an objection of the kind I identified in Chapter 4 in terms of the "Generality Problem" facing structure-focused accounts of legitimate expectations.

Consider first *The Torture Games*. Clearly in this case *some* people are violating the duty not to cause wrongful harm (or not to violate basic rights)—at least the torturers themselves and the state *qua* principal on whose behalf the torturers are acting as agents (remember that the

[12] If the notion of justice is to be used in a *legitimate expectations* theory, then I think the notion of the duties is *all the more* important to consider, since it is surely one's duties of justice that bear on the legitimacy of one's expectations.

Games are state-run). But *Brute* is not wrongfully causing the harm because he is not causing it at all—assuming that his presence or absence at the Games makes no difference as to whether they will proceed. However, there is a second and a third sense in which one might hold Brute to be in violation of a basic duty. Let us consider whether these possibilities put Brute on the hook.

The second sense in which Brute may be under a duty is insofar as he is the *beneficiary* of such wrongdoings / basic rights violations. Numerous philosophers have argued that, since one has a duty not to cause wrongful harm, then one also has a duty not to benefit from wrongful harm (and/or a duty to "disgorge" the wrongful benefits one has received) even if the beneficiary has not caused the relevant harm (e.g. Barry and Kirby 2017; Butt 2007, 2014; Goodin 2013; Goodin and Barry 2014; Lawford-Smith 2014; Pasternak 2016, 2017). This is because "when wrongful harm occurs, some things—jobs, material resources, competitive advantages, and so on—typically end up where they shouldn't" (Barry and Kirby 2017, 286; see also Butt 2007; Lawford-Smith 2014). Analogously, benefiting from such maldistribution is like retaining objects whose title is "tainted" (Goodin 2013, 478; see also Butt 2007, 134; Parr 2016). By attending the Games, Brute benefits from others' wrongdoing / basic rights violations. Whatever else may follow from his so benefiting, so the thought might go, surely it defeats any claim he might have to transitional assistance when the wrongdoing from which he benefits is discontinued.

One difficulty with the wrongful benefitting argument in Brute's case, though, is that *he hasn't benefitted from the 2018 Games*, since these were cancelled before they started. He has incurred costs that he otherwise would not have incurred but for the Games' cancellation, but he has not benefited from wrongdoing. At most, the wrongful benefiting argument would seem to rule out any claim Brute might have to what lawyers call the 'contract' or 'expectation' measure of damages (i.e. compensation for the disappointed expectation of benefit). But it would not provide a reason against compensating him for his out-of-pocket expenses—that is, the 'tort' measure of damages, which would put him in the position he was in before he incurred those expenses.

So let's consider a third possible duty that Brute has violated: *the moral duty of rescue / mutual aid* (Rawls 1971, 338–339).[13] Delmas (2014b, 298), synthesizing from various sources, describes this "Samaritan duty" as a duty

> to rescue people from serious peril when we can do so at no unreasonable cost to ourselves and others. It arises in situations in which (i) some fundamental human interest or non-contingent basic need, including minimally the interests in life, security, and bodily integrity is threatened; (ii) the threat is immediate, imminent, or probable; and (iii) someone else—typically an innocent passerby or bystander—is able to help at no unreasonable cost to him- or herself and others.

As is clear from Delmas' definition, what triggers the duty-bearer's duty to aid is their *capacity* to aid; it is instantiated independently of one's having caused or benefited from the victim's peril, and independently of any special or associative relationship the agent has with the victim (though any such relationship would usually be held to raise the standard of care required of the duty-bearer). Again, though, this doesn't seem to provide a reason for not compensating Brute, for there were no 2018 Games to stop, and hence no victims to rescue. Even if the 2018 Games did proceed, it is doubtful he would have met the conditions to instantiate the duty. Theoretically, perhaps he could run into the stadium and try to restrain the torturers, but this would probably be ineffective for more than a brief moment, and in any case would impose costs on him that are too great (arrest, fine or imprisonment, etc.).

The difficulty with using all of these three kinds of basic duty (not wrongfully causing harm / a rights violation; not benefiting from such a harm / rights violation; and failure to rescue) is that they are *moral* duties in an interpersonal-interactional sense—duties that we purportedly owe, paradigmatically, to proximate, specific, identified others without significant institutional mediation (cf. Pogge 2002, 170; Rubenstein 2009, 525–27; Young 2011, 46). These duties pertain to what Young calls "wrongs of individual action" (2011, 46). The limitations on these duties (both this interactional scope-limitation and the conditions of each duty's instantiation, e.g. "wrongful", "reasonable cost", etc.) leave a gap between the

---

[13] According to Feinberg (1984, 171), this duty is "virtually as stringent" as the duty not to cause harm.

basic rights that individuals are said to have and the corresponding duties that others have in relation to those rights. Brute and the van Arks (to whom I will come shortly) seem to fall into these gaps.

If the Candidate Justice Principle (or Matravers' and Moore's legitimate expectations equivalents) is to imply the conclusion that these agents should not receive transitional assistance on grounds of the underlying wrong, it seems that what is needed is a more *political* conception of persons' basic duties. That might go something like this. Persons are not only *moral* agents, interacting with others in their immediate interpersonal environment: they are also *political* agents, capable of acting, individually and jointly with others, on larger public structures, including political institutions. This thought has led many to posit basic *political* duties (cf. Pogge 2002, 170; Rawls 1971, 114–15; Rubenstein 2009, 526–27; Young 2011, 88–89).[14] Kant argued that "when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice" (1996 [1797], sec. 42, 6:307, MG 86). In a similar vein, Rawls argued that individuals have a "natural duty of justice", which "constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves" (1971, 114–15).[15] In a more critical tradition of scholarship, various authors have posited individual political responsibilities akin to Rawls' natural duty of justice, including a duty to resist and reform unjust or oppressive institutions (e.g. Bedau 1969; Cudd 2006; Delmas 2018; Murphy 2000; Shelby 2007; Shklar 1990; Young 2011). A key development in this regard was Iris Marion Young's work on responsibility for justice (see Young 2011), which sparked a significant literature on "forward-looking responsibilities" for justice (see generally Smiley 2014; Young 2011, 92, 108–9).[16]

---

[14] While the line between the moral and the political is clearly blurry, it is nonetheless a distinction that is widely endorsed in liberal-egalitarian thought, and therefore should be acceptable for the liberal-egalitarian constructive exercise I am engaging in here. On this distinction, see Young (2011, chaps. 2–3, especially pp. 65, 70–74, 81, 86–89, 91–93). On the very similar distinction between interactional vs institutional duties, see Pogge (2002, 170) and Rubenstein (2009, 525–527).

[15] On the duty to help establish just institutions, see also (in the broadly Rawlsian tradition) Buchanan (2004).

[16] There is a parallel strand of literature on non-state "agents of justice", beginning with Onora O'Neill's (2001) article of that name. The emphasis in that literature is on the duties of non-state actors to stand in for states

While the precise formulations of forward-looking duties differ somewhat from theorist to theorist, as with the basic moral duties they reflect a common core idea. We might call this *the political duty of just reform*: a duty owed by all political agents to take positive action, individually or jointly with others, to resist and reform unjust institutions and structures, and to establish and maintain just institutions and structures, proportional to the costs they face in doing so. One way to understand this duty, then, is as the political equivalent of the capacity-based Samaritan (moral) duty outlined earlier. And if individuals have this kind of *positive* political duty (or "forward-looking responsibility") to resist injustice and bring about justice, then they would seem, *a fortiori*, to have the following two *negative* political duty-equivalents of the negative moral duties mentioned earlier: a duty not to [wrongfully[17]] cause or contribute to unjust structures (cf. Barry and Ferracioli 2013, 253–55; Goodhart 2018, 216–19); and a duty not to benefit from unjust structures (we might call such benefiting "privilege").

Since I myself am not defending this scheme of duties, but rather sketching the kind of theory that a justice-based theorist would need, we can leave these duties fairly roughly defined. My point is that a proponent of a justice-based approach to legal transitions seems to need to posit something like these three basic *political* duties if their justice-based theories are to explain why many particular losers—those who do not violate a *moral* duty—such as Brute and the van Arks, should be denied transitional assistance when the law is justly reformed.

If we return to Brute, armed with this wider set of political duties, our justice-based proponent could say that by buying tickets to the Games, Brute is supporting and contributing to an unjust social practice carried out by the state (or an 'unjust political institution' or an 'unjust state'), and/or that he is failing to fulfil his duty to resist such an unjust practice/institution/state. Likewise if we turn to the van Arks in the housing segregation case,

---

when the state is ill-disposed or too weak to instantiate justice. It is thus primarily focused on the roles of group agents (O'Neill 2001, 2005, 435)—such as NGOs (Rubenstein 2009, 2015) and corporations (Orts and Smith 2017)—but not exclusively so (see, e.g., Caney 2014; Deveaux 2015; Rubenstein 2009, 437; Weinberg 2009).

[17] The proponent of such a duty would need to specify the standard of liability involved, which raises additional complications, as I discuss in Part 5.4, below.

one might say that by buying land in a whites-only gated community, the van Arks are contributing to a structurally unjust system of racial segregation, benefiting from such a system, and failing in their duty to resist it (cf. Delmas 2018; Young 2011). It is their violation of these duties that could then be invoked to deny them transitional assistance when the laws are justly reformed. The political duties also provide *additional* reasons for denying compensation to the slave-owner: not only did he perpetrate a moral wrong against his particular slaves (and benefit from such wrongdoing, and fail to rescue proximate other slaves), but he also contributed to and benefited from a wider structural injustice, and, *prima facie*, failed in his duty to resist and reform these unjust institutions.

In sum, by relying on our (admittedly sketchy) scheme of three basic moral and three basic political duties, and corresponding basic rights, we seem to have reached a conception of justice that, plugged into the Candidate Justice Principle (or Matravers' and Moore's legitimate expectations equivalents) entails and explains the intuitive reformative conclusion (i.e. 'no transitional assistance') in all three of our obvious injustice cases.

But to get here, we have had to travel a long way from the simple and powerful intuition that the slave-owner should not be compensated when slavery is abolished. Along the way, we have had to appeal to some quite extensive rights and quite demanding duties, which contain concepts whose complexity we have glossed over ("human rights", "equal scheme of basic liberties", "social minimum", "contributing [to injustice]", "resisting [injustice]", "wrongful", "harm", "benefiting", "immediate/imminent/probable threat", "unreasonable costs", etc.). And we still haven't left the practice pitch of 'obvious injustice' cases. These issues point us to some of the weaknesses of justice-based approaches to legal transitions—even if intended to govern only the 'obvious' cases (as Matravers and Moore intend)—to which I now turn.

5.4 WEAKNESSES OF JUSTICE-BASED APPROACHES TO LEGAL TRANSITIONS

An overarching weakness of justice-based approaches to legal transitions is that they require a clear and conclusive identification of what justice requires, and yet there are good theoretical reasons why people differ widely in their views about what justice requires. As Meyer and Sanklecha put it, justice-based views such as those I have considered so far rely

on the meta-ethically controversial position that there is both (a) a metaphysical truth about justice and (b) unfettered, confident epistemic access to that truth. Yet, even if (a) is true (a vexed matter I have no intention of broaching), (b) is clearly false (Meyer and Sanklecha 2014, 379–81). At the very least, then, there are widespread differences in beliefs about what justice entails; political theorising must take place amid epistemic uncertainty about justice. If there is *no* metaphysical truth about justice, then the problem of disagreement is *constitutive* of the conditions of political theorising; political theorising must take place against a backdrop of pluralistic conceptions of justice (see List and Valentini 2016, 547). Either way, the fact of widely differing views about what justice requires—at least once we move beyond 'obvious' cases—presents two problems for the proponent of a justice-based approach to legal transitions.[18]

The first is the normative problem of *justification*, and this goes to the theoretical (primary) aim of a theory of legal transitions (see Chapter 1.5). The proponent must be able to justify her preferred theory of justice, either by adducing reasons to think that it is 'the' true theory of justice, or by adducing reasons to think that it is capable of receiving widespread endorsement among a plural citizenry. Moreover, this account must be adjusted for the non-ideal circumstances of theorising about legal transitions—i.e. the fact that the existing society is by definition unjust—and this is no mean feat, as I shall elaborate shortly.

The second is the political problem of *disagreement*, and this goes to both the theoretical aim and the practical (secondary) aim of a theory of legal transitions. If a theory of legal transitions is to be capable of translation into an enduring set of political norms and practices concerning legal transitions, it must be capable of being agreed to by people with differing views about justice and about what the primary laws should be. Because transition norms are

[18] Aside from the difficulties I discuss below, the proponent of a justice-based approach to legal transitions faces a further problem: 'obviously unjust' cases may not appear so clear-cut when judged in their historical context. There is a danger of inferring the broad applicability of justice from cases that, with the benefit of hindsight, now *seem* obvious. My point is not to deny the fact that the moral evils of slavery, torture and apartheid could have been, should have been, and in fact were widely understood as such at the time, so much as to remind us that many practices that are normal today (reforms with which many jurisdictions are currently grappling) might in the future come to be seen as 'obvious' injustices in the way that they are not now.

a kind of second-order normative issue that are proposed to apply in *all* instances of primary legal change, they should be capable of attracting wide support among the citizenry in a way that primary reforms will often fail to do (see Chapter 1.5). In this sense, transition norms can be seen as analogous to other democratic norms, such as the norm of "institutional forbearance", according to which partisan officials refrain, when in office, from deploying all the institutional powers and prerogatives at their disposal to achieve partisan ends, out of the knowledge that they themselves will eventually be in opposition, and hence beneficiaries of the same restraint (Levitsky and Ziblatt 2019). Because most of us will be winners sometimes and losers other times, it should be possible for transition norms to command widespread allegiance. Seen from this perspective, the difficulty with allying transition norms to a comprehensive theory of justice is that it would seem to lose this 'second order' character; it would be hostage to the shifting views about justice held by those in power at the relevant time.

Now it is true that all normative theories of legal transitions—my own included—face these problems to some extent. My real objection to justice-based theories, then, is that they face them to a particularly great extent. This is so in virtue of two features of such theories. First, theories of justice tend to be highly moralised, in the sense that they are almost always the product of other normative principles and concepts that themselves require further specification and justification. This feature makes theories of justice especially brittle: there are multiple levels and points at which any theory of justice is vulnerable to the challenges of justification and disagreement. Second, theories of justice are deontological, and like all deontological theories their plausibility rests on the identification of an absolute threshold that divides just from unjust, right from wrong, duty-bound from permissible, etc. (Alexander and Moore 2016; Fried 2012). This raises the stakes for deontological theories: so much rides on defining the threshold correctly. When harnessed to a theory of legal transitions, this means that the difference between a person being fully compensated or receiving no assistance whatsoever depends on whether or not the relevant legal status quo is deemed unjust (and the reform just) or not. However, given their brittleness, it seems doubtful that such theories can bear this weight.

With these general observations in mind, let me proceed to illustrate these challenges by drawing on the justice-based approach to legal transitions sketched in Part 5.3, above. I will begin by focusing on the 'basic rights' aspects of a theory of justice, and then consider issues pertaining to 'basic duties'.

As noted above, both Matravers and Moore draw on Rawls' theory to identify a minimalist conception of justice, such that laws contrary to these minimum conditions cannot found a claim for transitional assistance (in their versions, cannot ground a legitimate expectation). There is a basic question of why we should accept without argument that Rawls' scheme (or their minimalist variants of it) is the correct one. But even if we were to accept this, the schemes specified are a long way from determinate. All the 'obvious' cases discussed in Parts 2 and 3, above, involved paradigmatic rights violations: slavery; torture; and apartheid. As such, these cases put no pressure on the minimal justice conditions that both authors specify. But we don't have to move too far away from these paradigmatic instances for such pressure to mount.

Consider the following cases that involve similar categories of harms to our three 'obvious injustice' cases:

- Instead of owning slaves, imagine that our businessman from the first example built a business empire on the back of very cheap labour, paying his employees wages that enabled them, working 42 hours per week, to just meet their subsistence needs, undertake some inexpensive personal hobbies, and participate to a modest degree in the political life of their community. Then the government raises the legal minimum wage by 50%, causing our businessman's business to fail, leaving him with large capital losses (consumers also face price increases on labour-intensive products made within the jurisdiction).

- In our second case, imagine that there is no longer any formal racial discrimination in access to housing, but the legacy of past discrimination means that neighbourhoods continue to be largely segregated, and many black persons cannot afford housing. The Government introduces a policy of forcibly acquiring and subdividing wealthy estates,

all of which happen to be white-owned, and redistributing the subdivided land to poor black families at a subsidised cost. Many wealthy whites are forced out of their homes but all of them are so wealthy that they simply buy new houses in other wealthy, largely white neighbourhoods nearby.

- Instead of the state in our third example running a torture tournament, consider a much more common scenario entailing lesser violations of bodily integrity. Consider a state with moderately lax environmental regulations that permits factories to pollute the air to a level that exposes a large number of persons to pollution that (i) is certain to cause moderate ill-health, or (ii) (under a different scenario) causes a small risk of serious ill-health. The government decides to regulate pollution more stringently to reduce pollution-related illnesses, driving up the costs of the polluting activity, causing losses to various producers and to consumers of the factories' products.

On a rights-based justice approach, whether the losers in all these cases are entitled to transitional assistance (and whether the winners are entitled to keep all their gains) depends on our evaluation of whether basic rights were violated in the status quo and whether the reform protects those basic rights. In Matravers' and Moore's terms, it would depend on whether the relevant class of persons' "social minimum", "moral minimum" or "human rights" (etc.) were being violated under the status quo, and protected following the reform. The point in all these examples is that it is far from obvious where the line delimiting one's minimal basic rights should be drawn. Did the workers have a basic right to the higher wages provided by the reform? What level of *de facto* social and economic inequality is rights-violating? What level of pollution-caused ill-health, or risk of serious ill-health, is rights-violating? The difficulty of rights specification is a major problem for the proponent of a rights-based justice view, because the kinds of legal transition cases I've just outlined are much more common than the abolition of clear-cut abominable practices of slavery, apartheid and torture.[19]

[19] It is true that both Matravers and Moore adopt *hybrid* legitimate expectations theories of legal transitions, with the justice component serving only to rule out manifestly unjust expectations; in cases where minimal rights are not at stake, they advocate a case-specific inquiry to determine the legitimacy of the expectation, and

But let's say our plucky justice theorist is up for the challenge, and spells out a detailed theory of rights, including a specification of the threshold of rights relevant to the cases outlined above. Any such specification would likely be vulnerable to objections at many points, and yet the lines, so drawn, will be highly consequential for the transitional losers and winners (the problematic combination of a brittle theory with high stakes consequences). Moreover, because rights-based justice theories of legal transitions will involve a single assessment of the justice of the legal status quo and its reform, all losers from that reform will be treated the same way, i.e. such approaches have the structural features that gave rise to the Generality Problem discussed in Chapter 4.2.2.1.

Now consider duty-based justice approaches. The problem of specifying basic duties is complicated by a variety of factors that have been alluded to already. Even if we take the more straightforward moral duty of not causing wrongful harm, the terms 'harm' and 'wrongful' must be specified, and this turns out to be no easy task (see, e.g., Feinberg 1984, chap. 1)—at least not if these terms are to mark absolute, deontological boundaries between right and wrong.

This becomes even harder when we think about the *political* equivalent of that moral duty, i.e. not (wrongfully) causing or contributing to injustice. Is wrongfulness actually a condition of the duty? The notion of wrongfulness implies a *mens rea* requirement such as intentionality or recklessness (cf. Miller 2001, 455–60). Must the agent have known that what they were doing was unjust, if we are to deny them transitional assistance on the ground that they violated a basic duty? Or is it enough that they ought reasonably to have known (negligence), and if so, how is reasonableness to be understood when it comes to assessing whether people ought to know what the content of justice is? Moreover, when it comes to assessing what one ought to have known about the justice of relevant laws, should we take

---

hence the correct transitional response (Matravers 2017, 316–22; Moore 2017). But then they still need to delimit the boundary between the former and the latter, and I have deliberately constructed my examples to put pressure precisely on the identification of the relevant boundary. The higher the threshold is drawn, the more agreement one will get about cases above the threshold being unjust, but the wider the region of other cases over which the relevant secondary principle applies. One could lower the threshold in order to reduce the region of indeterminacy, but then one would get less agreement about whether cases above the threshold are unjust.

into account that, due to differences in their capabilities and social positions, some individuals and groups have greater reason to question the justice of the status quo, and to avoid contributing to it, than others? Or perhaps liability should be strict, in which case factual causation or causal contribution is sufficient. But then which conception of causation should we use (remembering that, when it comes to political cases, we will often be dealing with diffusely caused institutional failures and structural injustices)? And what about cases where the measures an agent could take to avoid contributing to (or benefiting from) an injustice are impossible or unreasonably costly (Delmas 2014a, 478; Goodin and Barry 2014, 468–70)?

The basic dilemma facing the would-be justice (basic duty) theorist, in specifying such a duty, is this: the wider the standard of liability specified (the weaker the *mens rea* and causation requirements), the more cases it will cover, but the more controversial it and its implications will be (and the less plausible it will be to claim that the duties are matters of 'basic' justice); the more narrow the standard of liability, the less controversial it and its implications will be, but it will cover fewer cases.

The idea of *benefiting* from a moral wrong or injustice raises similar questions of knowledge and culpability, which will to some extent be affected by the nature and extent of the underlying moral wrong or injustice.[20] There are other complexities associated with benefit-based duties—concerning such matters as what ought to be done in response to having received unjust benefits, and how to disentangle unjust benefits from justly earned rewards when these are causally intertwined—which I need not explore here (see Butt 2014; Goodin and Barry 2014; Haydar and Øverland 2014; Parr 2016). Suffice it to say that affirmative action policies, of the kind at stake in the above-mentioned variant of the housing segregation case, raise vexed issues (cf. Thomson 1973). I don't deny that benefits from past injustice are intuitively relevant, but it is not clear to me that threshold duties to avoid benefiting from

[20] Though it may also be possible to defend a broader version of the duty not to benefit, which does not depend on an underlying wrong (Butt 2014, 345).

injustice provide the normatively (let alone politically) most attractive basis for determining the transitional entitlements of the losers from such reforms.

Capacity-based duties seem to pose even greater problems. As is apparent from the conditions of the Samaritan (moral) duty specified by Delmas, quoted earlier, the instantiation of the duty will become more contestable as the affected interest becomes less fundamental, the threat less urgent, and the costs to the rescuer more onerous. These problems are exacerbated when it comes to fulfilling the capacity-based *political* duty of just reform. Like its moral equivalent, this duty is inherently sensitive to the personal costs incurred by the agent (Caney 2014, 136–139; Delmas 2014b, 304–6; Rawls 1971, 115), but what counts as "too much costs to ourselves" (Rawls 1971, 115)?

Furthermore, this duty of just reform is thought to be imperfect and open-ended, permitting a degree of context-specific discretion on the part of agents as to how to discharge it (Delmas 2014a, 482; Rawls 1971, 339–41; Young 2011, 143). In a highly unjust society, agents will have a wide set of options as to which injustices they expend their resources trying to combat. The opportunity cost of resources spent combating one injustice—say, poverty—is the use of those resources to combat another injustice—say, racial discrimination (Smiley 2014, 7). When the state then calls on people's resources to tackle racial discrimination (say, by imposing new requirements on companies or raising taxes to pay for public programmes), is it right to deny transitional assistance to the poverty fighter on the ground that she was under a capacity-based duty to contribute to removing the racial injustice?

The myriad agent-specific complexities that attend duty-based justice theories highlights a further problem: given that the state must determine the appropriate transitional response, application of a duty-based justice theory would, for any significantly-sized legal reform, embroil the state in a colossal analytical and investigative task, which would be financially costly and require intrusive probing of duty-bearers' inner lives. In other words, it raises the Moral Costs Problem that I identified with agent-focused theories of legitimate expectations in Chapter 4.

5.5 CONCLUSION

I began this chapter with a discussion of the thesis, endorsed by Simmons and Brown, that justice is irrelevant to legal transitions. Building on intuitions from some cases involving 'obvious injustice', I developed the thought that if we take seriously the idea of moral agents who are able to think and reason critically about morality and justice, then the idea that justice is irrelevant to legal transitions seems unattractive. Justice seems *prima facie* relevant to legal transitions.

Yet I went on to show that specifying in general terms a justice-based principle of legal transitions that is sufficiently determinate to generate the intuitive conclusions in obvious cases is no easy task; and applying such a principle, beyond the most obvious cases, is even more fraught. Basic rights and duties are complex normative ideals, specification of which seems to generate so many opportunities for normative and political disagreement that any specific theory advocated will inevitably provide a brittle foundation for a general theory of legal transitions. And yet because justice-based approaches draw lines that divide, in a deontologically absolute sense, those who are entitled to transitional assistance from those who are not, the precise specification of the threshold takes on a supreme importance for those who are affected by legal change. Justice-based theories, in short, place great weight on brittle foundations. This feature makes justice-based approaches ill-suited to the vast majority of legal reforms that occupy the problem space of contemporary legal transitions. I also argued that proponents of justice-based theories face a similar dilemma to that faced by legitimate expectations theories: rights-based justice theories suffer from the Generality Problem, while duty-based theories suffer from the Moral Costs Problem.

In light of these concerns, I conclude that theories of legal transitions should not be based on justice *per se*. Accordingly, I do not include justice as an element of my own theory of legal transitions. Instead, I will specify and defend two principles that generate other reasons for transitional responses (Chapters 7 and 8). To avoid the first-mentioned problem with justice-based theories—their brittleness / amenability to contestation—the two principles I propose will invoke more normatively basic concepts. The first of these concepts is wellbeing, understood in terms of centrality-weighted functionings, and the second is fairness,

understood in terms of social practices of allocating *ex ante* responsibility for managing risks of legal change. Though far from incontestable, I submit that these concepts (and the principles and theory that invoke them) are capable of garnering wider agreement among citizens who must be subject to transition norms than are theories of justice. To avoid the second-mentioned problem with justice-based theories—their deontological absoluteness—the principles I develop in those chapters will generate reasons that have a magnitude as well as a direction. These 'vectors' of reasoning about legal transitions correspond to similarly graduated transitional responses, which I develop in Chapter 9. Because these responses, and the underlying reasons, are graduated, they avoid the 'all or nothing' character of deontological theories. As such, even if the underlying theoretical concepts are imperfect or subject to uncertainty or disagreement, the consequences of error are far less grave: for example, losers might get *a bit more or a bit less* time, money, or in-kind assistance to adapt to a legal change than they would have if the underlying concepts were optimal. This means the theory I propose is more robust to the problems of normative justification and political disagreement that plague justice-based theories.

Still, one might wonder how the nagging intuitions from the obvious injustice cases can be accommodated. To do justice, as it were, to the *prima facie* relevance thesis, I think a theory of legal transitions must make room for the idea that people are moral and political agents who are able, to some extent at least, to exercise critical judgement about the states and laws that govern them (though, as we shall see, I think that social practices affect what this will look like in different contexts). The Kantian/Rawlsian tradition that has been the subject of the present chapter is, as I suggested in Part 5.2, right to reject a conception of the person that lacks such moral and political agency, and to insist instead on a conception of the person as a moral and political agent. However, as I shall argue in the next chapter, the Kantian/Rawlsian conception has problems of its own, and I adopt an alternative set of ontological foundations for my own theory of legal transitions. Moreover, through concepts such as *central functionings* (concerning wellbeing—see chapters 6 and 7) and *citizenship practices* (concerning fairness—see chapter 8) I hope to accommodate some of the basic ingredients that animate our intuitive justice-type concerns, without falling prey to the multifarious problems of justice-based theories that I have discussed in this chapter.

CHAPTER 6. ADAPTIVE RESPONSIBILITY THEORY: FOUNDATIONS

6.1 INTRODUCTION

Having critiqued various theories of legal transitions it is now time to turn to the specification and defence of my own theory of legal transitions, which I call Adaptive Responsibility Theory ("ART").

ART incorporates two kinds of *pro tanto* reasons—wellbeing reasons and fairness reasons—into an overall judgement about appropriate transition policy. The Wellbeing Principle, developed in Chapter 7, holds that the state has a *pro tanto* reason to conserve the particular functionings of agents against losses, and not to conserve the generic functionings of agents against gains (i.e. not to grandfather a prior *dis*advantageous position or to claw-back gains), and the strength of those reasons is proportional to the 'centrality' of the functionings at stake. The Fairness Principle, developed in Chapter 8, holds that: the state has a *pro tanto* reason not to conserve the functionings of agents against losses or gains where and to the extent that the affected agent is deemed to have had *ex ante* responsibility for managing the risk of a particular kind of legal change (the opposite conclusion holds where and to extent that the *state* is deemed to have had *ex ante* responsibility for managing that risk of legal change). The strength of those reasons depends on the strength of the reasons for allocating responsibility to the relevant agent or the state, as applicable. I shall sometimes refer to the reasons generated by these two principles as 'vectors', as this nicely captures the idea that they have both a magnitude and a direction. I argue in Chapter 9 that the combination of weighted wellbeing and fairness reasons in any given case determines the most appropriate transition policy.

The aim of the present chapter is to explain, in the spirit of WRE, the core set of antecedent theoretical ideas that support ART.[1] Part 6.2 introduces the core ontological assumptions that underpin ART, and explains how they support three key normative moves made in the subsequent three chapters. Part 6.3 specifies and defends the 'currency' of loss/gain that I will use throughout ART, which I call the "modified functionings conception of wellbeing". Part 6.4 concludes.

6.2 ONTOLOGICAL ASSUMPTIONS: SELF AND SOCIETY, AGENCY AND STRUCTURE

6.2.1 *ART's foundational foil: liberal models of the self and agency*

To understand the ontological positions I will assume for the purpose of my theory, it will be helpful to present their foil. The preceding four chapters ranged mainly over three (perhaps three and a half) traditions of political thought within a broadly liberal family: the libertarian tradition, which claims Lockean natural rights lineage (Chapter 2.2); the classical liberal tradition, which descends from the 18th century classical economists and utilitarians (Chapter 2.3), and its half-brothers, the neoclassical school of economics and the L&E school of legal theory (Chapter 3); and, the Rawlsian liberal-egalitarian or 'high-liberal' tradition, which descends from Kant (Chapters 4 and 5). Underlying all theories of legal change is a tacit conception of the person-in-time. Normative theories pertaining to the value of stability or change must rely on some account of the agent's temporal extension (or lack thereof) and of what counts as desirable or undesirable change—loss or gain—for a temporally extended agent. In our special case of legal transitions, normative theories of legal transitions rely not only on these general accounts, but also on a particular account of the agent's role within a polis. As we have seen, the particular ideas invoked inform the content of one's preferred theory of legal transitions.

[1] As a shorthand, I will sometimes refer to these deeper ideas as "foundations" of ART, though in doing so I do not mean to imply that they are bedrock foundations in the sense of meta-ethical foundationalism (see Green 2017, 185); I simply mean that they are more general philosophical assumptions, themselves contestable.

Speaking very broadly, the liberal traditions of thought with which I have engaged can be read as having supplied these theories of legal transitions with two models of the person: *homo economicus* and *homo autonomous* (cf. Willett, Anderson, and Meyers 2015, sec. 1). *Homo economicus* bears resemblance to the Lockean "punctual self" discussed in Chapter 2.2.2.1—an extensionless consciousness that is ever-capable of remaking its contingent feature set through the application of rational self-discipline. But his rationalistic potential is fully unleashed only in neoclassical economic theory (Chapter 3.4.2), where he appears as the perfectly rational, fully-informed, self-generator of completely-ordered preferences over states the world, which he smoothly updates as necessary to navigate ever-changing exogenous conditions. *Homo autonomous* is the Kantian self (echoed in Rawls), who applies pure reason, free from all heteronomous sources of sensible and worldly influence, discerns the moral truth (or justice) and develops a rational life plan in conformity with that truth, which others must respect. I will return to these models at various points in the discussion below, but I want to highlight two core, ontological assumptions that they share in common:

(i) the mind (and hence the self) is separate from the body and from the world; and

(ii) the mind autonomously generates agency-oriented mental states (intentions, preferences, plans etc.) using the canons of procedural rationality or reason.[2]

These assumptions are supported by the liberal models' natural ally within the philosophy of mind: standard cognitive science. Standard cognitive science "is interested in describing the 'inner workings' of the mind" and assumes that these inner mechanisms are "computational—as consisting of operations over symbolic representations" (Shapiro 2011, 14). On this view of mind, the relation of cognition to perception and action is conceived in

[2] I do not claim that all contemporary liberal theorists necessarily adopt conceptions of the person in the mould of either of the two liberal models explicated here, nor do I claim that all liberals endorse the two core assumptions of those models. To take just two examples, in the development of my own theory I have engaged with the work of liberal theorists such as Raz and Scheffler (see below Part 6.3 and Chapter 7.2) who would, I think, reject one or both of these core assumptions. Nonetheless, it is striking how frequently in liberal texts explicit or implicit appeals are made to features of one or other of these two models and their core assumptions, which I believe end up doing quite a significant amount of normative work. In any case, I hope to show that such appeals are prevalent in liberal theorising about legal transitions.

terms of the classical "sandwich model" (Hurley 1998), according to which "cognition … is segregated from processing in low-level systems, therefore acting like meat in a sandwich em-breaded by perception and action" (Wilson and Foglia 2015, sec. 4). The first ontological assumption of the liberal models of the self is underwritten by standard cognitive science's commitment to the brain as the sole locus of cognition, while the second assumption is reinforced by the metaphor of the mind as a computer.[3]

Together, these two core assumptions of the liberal models and their standard cognitive-scientific underpinnings comprise one extreme pole of attraction within ontological debates in philosophy (and indeed in debates concerning self/society and agency/structure in a range of other disciplines). I take those assumptions to be problematic, for reasons more than amply propounded elsewhere by feminist and communitarian critics of liberalism,[4] and by critics of standard cognitive science from the "4E"—embodied, embedded, extended and enactive—paradigm of cognition (see Menary 2010; Newen, De Bruin, and Gallagher 2018),[5] all of which I draw on below.

Yet, in repudiating these ontological positions there is a danger of attraction to the opposite pole, in which the self is conceived as continuous with, indistinguishable from and determined by material and social forces over which it has no control. There is a danger, that is, in moving from atomism to holism and from a fully autonomous conception of agency to

---

[3] They also share Cartesian origins: see Taylor (1989, chap. 8) on the Cartesian origins of liberal models of the self; and Van Gelder (1995, 379–81) on the Cartesian origins of standard cognitive science.

[4] Feminist theories of the self, both critical and constructive, are largely a product of second and third wave feminism, which in different ways have radically challenged the foundations of liberal selfhood (Willett, Anderson, and Meyers 2015 provide an excellent synthesis of this vast literature). Communitarian theories of the self emerged largely in the course of debates that followed critiques of Rawls' *A Theory of Justice* (1971) by Michael Sandel (1982), Alasdair MacIntyre (1981), Charles Taylor (1985, 1989) and Michael Walzer (1983). For good overviews of the liberal-communitarian debates, see Bell (1993, 2016, sec. 2), Frazer and Lacey (1993) and Mulhall and Swift (1996). 'Communitarian' is, for some scholars, a label pinned by others; not all proponents of views discussed below identify as communitarian. The term should thus be read as a heuristic.

[5] The 4E paradigm draws on contemporary life sciences, including recent advances in neuroscience and psychology, as well as dynamical systems theory and robotics (see Shapiro 2011, chap. 3). Whereas the foil of feminist and communitarian critics are the liberal models of the self, the foil of the 4E paradigm is standard cognitive science. Much communitarian and 4E thought owes intellectual debts to the action-oriented philosophy of Aristotle (1962 [*c*.350 BC]; 2014 [*c*.350 BC]) and to the phenomenological insights of thinkers such as Husserl (esp. 1982 [1913]), Wittgenstein (1963 [1953]), Heidegger (1962 [1927]), Merleau-Ponty (1962 [1945]), and more recently Dreyfus (1972, 1991, 1992) (see Anderson 2003).

structural determinism (Frazer and Lacey 1993, 172–74). But it is a mistake to see these opposing poles as binaries (ibid 171–81); rejecting the liberal ontological assumptions does not entail acceptance of "an engulfed, acritical, non-reflective subject" (ibid 198). A principled intermediate position is possible and, I believe, correct. Indeed, the ontological assumptions I explicate below are motivated, in large part, by a dissatisfaction with matters of *emphasis and exclusivity* in the liberal ontological assumptions. Rather than simply *valuing* intentional agency, reasonableness, instrumental rationality and critical reflection (alongside other modes of being), these are reified or valorised in the liberal models to an implausible degree, such that the individual's basic and normal mode of being in the world comes to be seen as one of hyper-independence (cool, detached, sceptical, critical), hyper-rationality (intentional, instrumental, calculative, efficient, prudent, reasonable), and unperturbed control over his or her environment.[6]

6.2.2 *The ecological account of the self and agency: core assumptions*

I will now outline the ontological assumptions that I adopt for the purposes of ART. Before I do so, an important caveat is in order. I can only *explain* and *motivate* these assumptions here: I cannot defend them in any detail. The detailed defence of antecedent theoretical ideas such as these would take any exercise of WRE too far beyond the scope of the middle-level theory or principles in support of which they are invoked (for my purposes, remember, the middle-level theory is a theory of legal transitions) (Green 2017, 186, 194–201). Nonetheless, by articulating these antecedent ideas and explaining the particular roles they play at various important points in my theory, I show how ART is tethered to them in various ways. The purpose served by the following discussion, then, is to lay my theoretical cards on the table, and in so doing to render ART more explicable and determinate than it otherwise would be. As I showed in the first half of this thesis and in Part 6.2.1, above, the theories of legal transitions that I critique rely *implicitly* on certain theoretical ideas—about the nature of the self, society and the good life, for example—and these required some excavation work to

---

[6] For communitarian criticisms along these lines, see Bell (2016, sec. 2). In addition to making this general criticism, feminists have long pointed out the gendered nature of this picture, with the liberal conceptions coded masculine in opposition to the feminised other (see Willett, Anderson, and Meyers 2015, sec. 1).

bring them to light. It is hoped that, with the sketch of ART-supportive ontological foundations that follows, I can spare critical readers of my own theory the effort of such an "exercise in retrieval" (Taylor 1989, xi).

The first ontological position I assume is a conception of the person or self that is *embodied*[7] and—more importantly for my later argument—*embedded* in its environment, yet nonetheless distinguishable from that environment. What I mean by "embedded" is that the subject cannot be understood as antecedently individuated, either from its own identities and commitments or from the wider social, cultural and material environment in which these are formed,[8] and that its identity and agency cannot be adequately understood or interpreted without reference to that environment.

Embeddedness is especially important for adequately understanding the self-interpretive, or "narrative" aspects of the self (Gallagher and Daly 2018), such as the relationships, attachments and projects with which we consciously identify and that we integrate into our self-conceptions. We can only self-interpret and self-reflect using language, and since language is an inherently social artifice, our self-understandings are necessarily bound up with the social practices and moral frameworks of the communities we inhabit (Taylor 1989, 36–42). Our initiation into forms of life and their associated moral frameworks, moreover, orient us through *time*, enabling us to understand ourselves not only by where we have been, but by where we are going (ibid 46–47). It is through these social-cultural arcs that we interpret ourselves in narrative form, as having a history that projects forward into the future (MacIntyre 1981, 200–201; Taylor 1989, 46–48). These narrative aspects of the self will turn

---

[7] I assume that the body is a constitutive part of the self, and of cognition, perception and action. However, since specific claims about embodiment are less relevant for my purposes, I leave them aside. For an overview of central 4E claims about the role of embodiment in cognition, perception and action, see Wilson and Foglia (2015, sec. 3). For discussion of embodiment in feminist writing on the self and agency, see, e.g., Coole (2005, 2007), Frost (2016), Krause (2011), Nussbaum (2001a, 2001c, 2006), and Willett, Anderson and Meyers (2015). And for communitarian discussion of embodiment, see MacIntyre (1999) and Sandel (1982, 54–59).

[8] The claim that the self cannot be antecedently individuated from its ends, and the claim that the self cannot be understood ontologically as an asocial individual, existing prior to or independent of society, are similar but distinct (see Mulhall and Swift 1996, 10–18). I mean to endorse both.

out to be especially important for our discussion of the value of stability and change over time.

None of this entails that we cannot critically reflect on and revise our beliefs, values and ends, but it does entail that we can only do so within the space of social and cultural possibilities that is already framed by our existing identities, beliefs and values (Taylor 1989, 31). We cannot completely reinvent ourselves; we can only revise our beliefs, values and ends to a greater or lesser *degree*. Whatever 'autonomy' we have, then, cannot be autonomy in the literal, Kantian, sense that we are generators of our own laws; it must be autonomy of a looser, scalar, and more relational kind (e.g. Killmister 2013; Mackenzie and Stoljar 2000).[9]

My second ontological assumption is that one's brain, body and environment are constantly interacting, and therefore changing over time. This much should be implicit from the above discussion of the self, but I want to locate this assumption more firmly at a 'lower' level: in the mechanisms of human perception, cognition and action. In this respect I follow dynamical and enactive theories of mind (Beer 2003; Van Gelder 1995), proponents of which accept the basic premises of embodiment[10] and embeddedness, but add a crucial temporal dimension: since an organism's brain, body, and environment are essentially interconnected and changing over time, perception, cognition and action can best be understood in terms of the dynamic interactions, or feedback loops, between them (see especially Van Gelder 1995).

---

[9] Following Ryan and Deci (2000, 74), I also think autonomy, understood as one's subjective *feeling* of volition—a sense of an internal locus of control—accompanying one's actions is important to intrinsic motivation and wellbeing.

[10] Dynamical theories of agency rely on a further *embodiment* sub-thesis. The 'regulation' sub-thesis is that "an agent's body functions to regulate cognitive activity over space and time, ensuring that cognition and action are tightly coordinated" (Wilson and Foglia 2015, sec. 3). Rather than merely transducing from worldly stimuli to cognition and executing in the world commands sent from the brain, "[b]odily structures facilitate the real-time execution of complex behaviors in response to complex and changing environmental events" and are thus "integral to the online control of cognition itself" (ibid). From an enactivist perspective, the body develops these sophisticated regulative capacities through a process of repeat performances of actions in familiar environments (and with familiar objects, people, etc.), which allows sensorimotor capacities to become attuned to those environments and objects, encoding tacit knowledge in the body that reduces the cognitive load on the brain (Rietveld and Kiverstein 2014, 341).

These dynamic interactions greatly complicate the liberal picture of autonomously generated agency-oriented mental states using canons of rationality or reason.

Again, I do not deny that intentionality, instrumental rationality and reason are cognitive states of which agents are generally capable and that are useful to explain a significant sweep of human action, nor do I think that we should do away with the notion of agential causal responsibility. However, from the enactive perspective, agency can only be more or less intentional, rational and reason-based; likewise agential responsibility can only be a matter of degree.

The middle-ground, 'matter-of-degree' positions I take with respect to the two ontological assumptions discussed in the preceding paragraphs is rendered more plausible by positing a *more normal* and *more basic* mode of being in the world, *on and through which* humans develop capacities for independent, critical thought and practical reason, and thereby gain important levers of control over their environment. This mode of being has been characterised by feminist, communitarian and 4E scholars in slightly different but convergent ways that can be broadly synthesised in terms of an *instinctive, unreflective (or pre-reflective), "in-the-moment" responsiveness to situated demands* (Bell 2016, sec. 2; Willett and Willett 2013). 4E theorists often refer to this as "skilled coping"—engaging in the world in "a skillful and often effortless manner, without conscious deliberation, reasoning, or planning" (Schlosser 2015, sec. 2.4).[11] Oft-cited examples in this literature include instances of "flow" (Csikszentmihalyi 1990), from mundane, everyday activities such as driving a car to more recondite skilled practice such as musical improvisation or sporting prowess (Crawford 2015; Schlosser 2015, sec. 2.4). We could also include examples of the more fluid, instinctive, responsiveness to situational cues that often characterises the agency involved in caregiving activities traditionally coded feminine, such as caring for children (Addelson 1994; Walker 1999; Willett, Anderson, and Meyers 2015, sec. 1; Willett and Willett 2013).

[11] Here, the intellectual debts to Aristotle and the 20th century phenomenologists—see above footnote 5—are perhaps most obvious.

Feminist, communitarian and 4E scholars have all emphasised how much of our normal, day-to-day experience of the world is characterised by skilled coping of this kind. Compared with the more minimal forms of volition and control involved in everyday skilled coping, cognitively effortful forms of agency based on instrumental rationality and critical reflection are much less *normal*—let alone the "higher or more refined" forms of agency, such as second-order-desire-reflective choice (Frankfurt 1971) and long-range planning (Bratman 1987) that purportedly make human beings distinctively human (Schlosser 2015, sec. 2.3, 2.5). Everyday skilled coping is also a more *basic* mode of being. It is, obviously, the *only* mode available to infants (and many non-human animals). The relatively independent and rational modes of being are thus not automatic in the way the liberal models seem to assume. Rather, they are dependent on skills acquired through ordinary environmental coping—skills that require ongoing development and practice in conducive social contexts, and in-the-moment cultural and social scaffolds, as feminist, communitarian and 4E scholars recognise in convergent ways (Bell 2016; Clark and Toribio 1994; Van Gelder 1995, 379–81; MacIntyre 1999; Meyers 1989; Rietveld and Kiverstein 2014; Schlosser 2015, sec. 2.4; Willett, Anderson, and Meyers 2015, sec. 2).[12] It follows that the 'higher' modes of agency are contingent, and accessible to us only to a greater or lesser degree.[13]

The picture of the self and society, agency and structure, reflected in the two ontological assumptions I endorse is similar, and indebted to, *relational* accounts of self, agency and autonomy (Benhabib 1992; Cornell 1992; Frazer and Lacey 1993, 175–81; Held 1985; Young 1990). However, I shall refer to these ontological assumptions as the *ecological* conception of the self and its agency, which connotes not just the individual's *social* and *cultural* embeddedness (the "relational" aspects: Frazer and Lacey 1993, 199), but also its *material* embeddedness. My use of the term is a deliberate nod to 4E thinking, in which the

[12] See also the work of psychologists Ryan and Deci on the importance of 'autonomy-supportive' interpersonal and social contexts (2000, 73–74, 2008, 187–88).
[13] For example, critical reflection is often required when our ordinary, habitual interaction with the world *goes wrong*, causing a rupture that requires attentive problem-solving (Bell 2016, sec. 2).

adjective 'ecological' is often used in relation to perception, cognition and attention.[14] It also reinforces the notion of an individual as distinguishable from but deeply interconnected with its surrounding environment, which is a central theme of the science of ecology.

6.2.3 *Three key normative moves supported by the ecological account*

The ecological account of the self and agency supports ART in various ways. By "supports", I do not mean to suggest that these ontological positions *logically entail* any of my normative positions. But ontological assumptions do tend to predispose one to certain directions in moral and political philosophy, and to fit better with some moral and political positions than others (Frazer and Lacey 1993, 187–88; Parfit 1973, 142). More specifically, ontological assumptions are part of what I called in Chapter 1.6 the "antecedent theoretical ideas" that *motivate* moral and political principles, *part-constitute* them (e.g. informing the specification of concepts, like freedom or wellbeing, contained in such principles), or supply premises in *justifications* for them. I want to conclude this discussion by highlighting up front three of the key normative moves in ART that I think the ecological account supports.

First, the ecological conception of the self supplies a distinctive motivation for normatively valuing stability.[15] This distinctiveness can be appreciated most clearly in contrast with the liberal models of the self, introduced in Part 6.2.1, above. The *fact* that the ecological account values stability stands in direct contrast to the ever-flexible *homo economicus* model, which supports a purely reformative approach to legal transitions. Yet the *reason* that the ecological account values stability is very different from the reason that the Kantian *homo autonomous*

---

[14] The most prominent example is James Gibson's ecological theory of perception, which places an agent's interactions with the full informational array of its surrounding environment at the centre of the agent's perceptual system (Gibson 1979). The work of James and Eleanor Gibson spawned the field of "ecological psychology". In this spirit, I mean by "ecological" to focus on the interactions between the organism's brain-and-body and the full array of phenomena in its immediate environment (the environment to which it has sensory access)—from visual, acoustic and other sensory stimuli, to the material world of human-made and 'natural' objects, and from language and other cultural symbols to the social relations we have with other humans and non-human beings. Something like this understanding of the 'ecological' is also used by other scholars, including the concept of "ecological rationality" developed by Gerd Gigerenzer and colleagues (e.g. Todd and Gigerenzer 2012), and Matthew Crawford's discussion of "ecologies of attention" (Crawford 2015). It should be clear from this description that I intend the adjective 'ecological' *not* in the sense of having an exclusive focus on *the natural environment*.

[15] More specifically, I mean stability *of an agent's particular functionings*, as I shall elaborate in Part 6.3, below.

model does. Whereas the latter relies on the self's transcendence of the real world, the ecological conception inverts the Kantian picture: our embodiment and embeddedness in the world of meaningful objects and attachments are not heteronomous forces to be repelled from the citadel, but are rather the very *basis for* our relatively coherent sense of self over time.

Yet, just as the rejection of the ontological assumptions in the liberal models creates a danger of attraction to the opposite pole, there is an equivalent danger in rejecting pure reformism at the substantive political level: rigid conservatism. That is, there is a danger in moving from *valuing* the stability of attachments, projects and identities to *valorising*, *romanticising* or *reifying* such stability, and thus stifling the potential for valuable forms of change (Frazer and Lacey 1993, chap. 5). The ecological account of self and agency provides the basis for a principled reconciliation of the competing values of stability and change. It does so principally in two ways—and these are, respectively, the second and third key normative moves that the ecological conception supports.

One of the ways in which ART reconciles stability builds on the observation that we tend to value stability more or less in different *social practices*. More specifically, social practices vary—both within societies and across them—in the way that they balance the benefits of stability with the benefits of risk-taking. Risks of legal change are no different: practices vary in the extent to which responsibility for managing such risks is allocated *ex ante* to the individual (privatised risk) or the state (socialised risk). In Chapter 8, I draw on this insight to develop a practice-based conception of *fairness*, which lies at the heart of the Fairness Principle of ART. As I discuss in Chapter 8, the ecological conception of the self plays an important role in motivating and justifying the appeal to social practices because social practices are a crucial part of the social structure in which individuals are embedded, and which both enables and constrains their agency. Viewed from the other direction, a normative principle that appeals to social practices requires an ontology that posits the reality of such practices, and on this score the ecological account delivers in a way that the liberal models sketched above do not (cf. Frazer and Lacey 1993, 17–18, 179–82).

The other way in which ART reconciles stability and change is across *time*. The ecological account assumes that the self is constituted by the dynamic interactions among an organism's

brain, body and world. These interactions mean that we are constantly changing; the self cannot be fully unified over time (Van Gelder 1995, 373, 380; Krause 2011, 301–2). But the durable attachments, projects and identities at the centre of our conscious, self-interpretive, "narrative" aspect of ourselves tend to change very slowly—almost always to an imperceptibly small degree from moment to moment. That change is consistent with the familiar phenomenology of self-identification, coherence and continuity over time *to a strong degree* (Daniels 1996, chap. 7; Krause 2011, 301–2; Taylor 1989, 49). To be sure, radical discontinuities occur—most dramatically with brain injuries, or rapid-onset degenerative mental conditions (Malabou 2012), but also in a more endogenous way, through 'epiphanies', for example—and humans are capable of remarkable feats of adaptation to even radical bodily and environmental changes. But when it comes to our most central and fundamental attachments, projects and identities we *tend* to seek and—under normal conditions—to find a high degree of continuity (MacIntyre 1981; Taylor 1989, 46–49; Willett 2014). The emergent ontological picture, then, is of individuals who *evolve*; whose central attachments, projects and identities we have strong reason to stabilise in the short run, but less reason to stabilise in the longer-run. In this way, the ecological account motivates and justifies the adaptivist approach to legal transitions that I will elaborate and defend in Chapter 9, in which the central focus of transition policy is on *adaptive* measures, i.e. measures that ensure that people have the time and capabilities they need to successfully adapt to the conditions ushered in by a legal change.[16]

6.3 ART'S CURRENCY: THE MODIFIED FUNCTIONINGS ACCOUNT OF WELLBEING

An important part of any theory of legal transitions is what I called in Chapter 1.3 "the currency question": with what currency should we measure losses and gains for the purpose of a theory of legal transitions? We have seen from Chapters 2–5 that there are various currencies in circulation across the literature on legal transitions: classical liberals and

[16] Adaptive measures are the *central* focus of transition policy because they cover the large middle ground of cases in which the reasons generated by the Wellbeing and Fairness Principles do not conjointly point strongly toward either conservative or reformative state responses (because they sometimes *do* so point, conservative and reformative transition policies also have a role to play in ART, as I explain in Chapter 9).

libertarians are concerned about the loss of property; L&E scholars are concerned with changes in efficiency in the sense of aggregate resources expressed in money terms (on some views, they are indirectly concerned with changes in welfare/utility conceived as preference satisfaction); and liberal-egalitarians are concerned with the frustration of autonomous life plans. Though not the primary focus of these chapters, in each case it was argued that the particular currency invoked is problematic in one way or another.

It is now time for me to set out and defend the currency that I will use in ART, drawing out along the way some connections with the ecological account of the self and its agency discussed above. The currency I advocate is what I shall call the *modified functionings conception of wellbeing*. I take there to be four steps in arguing for such a currency:

1. Why wellbeing, not resources?
2. Why a mixed objective–subjective conception of wellbeing, not a purely objective or purely subjective one?
3. Why functionings (outcomes) not capabilities (opportunities)?
4. Why a modified functionings account, not the standard functionings account?

I take these questions in turn. As we progress through this list, the questions move from those that are more general and that have been extensively debated in the wider literature, towards those that are more specific and bear more directly on my theory of legal transitions. Accordingly, the amount of attention I devote to each question increases.

6.3.1 *Why wellbeing, not resources?*

I take it that wellbeing conceptions of persons' non-instrumental good have three key advantages over resource conceptions. First, any normative theory that takes individuals to be ends in themselves should be ultimately concerned about how well that person's life goes (Robeyns 2017, 57–59). While some resources are clearly instrumental to how well one's life goes and others may be extrinsically valuable in virtue of their contingent connections to persons, resources in general are not what ultimately matters (Robeyns 2017, 48; Sen 1979a). Second, there are important ends that depend very little on material means. If we wish to

capture these, we must focus on ends directly (Robeyns 2017, 49). Third, persons have different abilities to convert resources into things that make their life go well (Robeyns 2017, 45–49; Sen 1992, 19–21, 26–30, 37–38). Resourcist currencies could only approximate people's opportunities to achieve valuable ends if people have the same or similar abilities to convert resources into valued ends (Robeyns 2017, 48). While resources could of course be distributed in a way that is sensitive to such differences, doing so would imply that resources themselves are not what ultimately matters.

6.3.2 *Why a mixed objective–subjective conception of wellbeing?*

The conception of wellbeing I adopt is a mixed objective–subjective conception of wellbeing, which stakes out a middle ground between the extremes of pure subjectivism and pure objectivism about what makes a life go well. There are good reasons to reject both extremes (Nussbaum 2000, chap. 2).

Purely objective accounts take individuals' own point of view insufficiently seriously (ibid chap. 2). The functionings account I will adopt is, like all accounts within the wider capabilities/functionings approach, normatively/ethically individualist: it treats persons as ends in themselves in the sense that "individual persons, and only individual persons are the units of *ultimate* moral concern … when evaluating different social arrangements, we are only interested in the (direct and indirect) effects of those arrangements on individuals" (Robeyns 2017, 57, emphasis in original). Accordingly, we have reason to ascribe a significant degree of moral value to individuals' preferences, intentions, plans and choices.

Purely subjective accounts (hedonic or happiness accounts; preference satisfaction accounts; and accounts based on autonomous planning), on the other hand, are vulnerable to various objections that point to the sensitivity of individuals' psychological states to environmental phenomena that we have good reason to think are problematic (Robeyns 2017, 130–35). The liberal models of the self outlined above are vulnerable to such objections. The ontological assumptions of the liberal models predispose liberal politics to take individuals' agency-oriented mental states—or their behavioural expression—as the raw data for moral valuation, without sufficient attention to the cultural, social and material conditions in which they were generated (Chambers 2008; Frazer and Lacey 1993, 55–56; Nussbaum 2000, chap. 2). On

the ecological account, by contrast, individuals' mental states and agency must be understood in terms of their embeddedness in and interactions with their environment. Insofar as we have reliable reasons to be concerned about the environmental conditions in which an individual's mental states and agency have been shaped, we have a positive reason to take a more objective stance on what is good for the person, displacing the default deference to the individual in those cases (Nussbaum 2000, chap. 2).

6.3.3 *Why functionings, not capabilities?*

Accounts of wellbeing focused on agents' capabilities and/or functionings are the most prominent among those that adopt mixed subjective–objective conceptions of wellbeing (see Nussbaum 2000, chap. 2; Robeyns 2017, 135–37; Sen 2008, 26). Following the seminal work of Sen (1979a, 1999), *functionings* are the "beings and doings" of human persons (see generally Robeyns 2017, 39–40). More specifically, functionings "are those beings and doings that constitute human life and that are central to our understandings of ourselves as human beings" (ibid 39). Capabilities are the "real freedoms or real opportunities" to achieve functionings (ibid 39). I adopt a functionings account of wellbeing, as opposed to a capabilities account.

The main reason for doing so is that I think there is a certain *prima facie* attractiveness to a functionings account that makes it the natural choice within the field of possible capabilities/functionings accounts. Part of what motivates capability theorists (e.g. Robeyns 2017, 129) to reject *hedonic* accounts of wellbeing is the fact that, on the latter, wellbeing can be achieved through the passive transmission of pleasurable mental experiences—a concern typified by Nozick's famous "experience machine" thought experiment (1974, 42–45). The objection is motivated by the conviction that what makes a life go well involves *doing* certain things (involving contact with the world beyond our heads), and *being* certain kinds of people (Nozick 1974, 43–45; Robeyns 2017, 129). But highly *capable* persons need not actualise many of the great possibilities for being and doing that are available to them, either. If it really is "beings and doings that constitute human life and that are central to our understandings of ourselves as human beings" (Robeyns 2017, 39), then we would seem to need a strong reason to prefer capabilities over functionings. At the same time, part of what

motivates capability theorists to reject *resourcist* accounts of wellbeing is the recognition that social and material structures constrain people's ability to convert resources into valuable functionings. A focus on achieved functionings mitigates the risk that individuals will choose to forego crucial functionings due to social-structural pressures.[17] Again, the motivation for rejecting this rival account of wellbeing generates momentum toward a functionings account, and so we seem to need a good reason for adopting a capabilities account instead.

Before considering candidate reasons, I should note that both of the positions mentioned in the previous paragraph rely implicitly on certain ontological ideas:[18] that the person's basic mode of being is active rather than passive; and that social structures have a strong influence on individual choices (cf. Robeyns 2017, 129, 190–92). Both of these are features of the ecological account of the self and agency. This allows us to see how the ecological account supports the *prima facie* case that I have just made for a functionings account of wellbeing.

The main reasons that have been given for preferring a capabilities account of wellbeing are that focusing on capabilities promotes the values of (i) individual choice, (ii) self-responsibility and (iii) anti-paternalism (Nussbaum 2000, 87, 2006, 79; Robeyns 2017, 107–10; Sen 1993, 40). While a capabilities account may promote these values to a greater extent than a functionings account, I don't think that a functionings account performs either so absolutely badly on these measures, or so badly relative to the capabilities account, that the *prima facie* case for preferring functionings is displaced.

With respect to (i) and (ii), there are at least two ways in which a functionings account, at least when constrained to the most important functionings, makes ample room for individuals' freedom to choose over a wide range of options, and hence for a significant degree self-responsible agency. First, focusing on functionings manifests a concern to ensure that people have the underlying skills and dispositions that are necessary preconditions to

---

[17] Though capability theorists are alive to that risk and therefore concerned about *real* opportunities, the risk is difficult to eliminate in practice.

[18] Robeyns rightly notes that antecedent ontological and explanatory commitments can influence important choices made within a broadly functionings/capabilities approach (Robeyns 2017, 68–69).

making valuable choices (for which they can reasonably be held responsible). Consider, for example, what are widely taken to be some of the most important generic capabilities: "imagination and thought"; and "practical reason" (Nussbaum 2006, 76–77). We can see instantly that to conceive of having "real opportunities" (capabilities) for imagination, thought and practical reason is somewhat strained. These are better understood as learned dispositions, dependent on the development by the agent of requisite *skills* through training, habituation, and ongoing practice during and beyond childhood (Claassen 2014, 64; Kramm 2019; Robeyns 2017, 93–94). At the very least, the capabilities and functionings implicated in thought, imagination and practical reason are so fundamentally entwined that the lines become blurred to the point that insisting on the superiority of capabilities becomes artificial (Claassen 2014, 65–67; Gandjour 2008). In any case, the crucial point is that once a person has achieved these functionings *qua* stable dispositions, they will be capable of making all sorts of choices. They will also be capable of engaging in instrumental calculation, critically reflecting on their circumstances, formulating goals and plans, and performing other cognitively-demanding tasks associated with self-responsible forms of agency. If doing those things is valuable, then securing the underlying functionings is the right way to ensure people are able to do them.

The second way in which a focus on achieving functionings respects people's freedom to choose and their self-responsible agency is by the *generic* specification of functionings. As Robeyns notes, functionings and capabilities are standardly understood in generic terms, such as "being literate, being mobile, being able to hold a decent job". As such, whether a particular person who, for example, has the functioning of being mobile "decides to stay put, travel to the US or rather to China, is not normatively relevant for the capability approach" (Robeyns 2016c, sec. 2.3, see also 2017, 49). Insofar as public policies aim at ensuring people achieve certain generic functionings, such policies will leave people with a wide range of choice as to the *particular* ways in which they realise those functionings.[19]

[19] Nothing I say below in Part 6.3.4 undermines this claim, since my incorporation of particular functionings merely *extends* the functionings account to include particular functionings that people have *already chosen*.

The kind of freedom-to-choose that the functionings account of wellbeing provides is a positive and effective form of freedom. This position, too, is supported by the ontological assumptions I have made, since relational/ecological selves are conceived as inherently dependent on other persons, resources and structures to live flourishing lives (Frazer and Lacey 1993, 180). This account of the self and its freedom has a deflationary effect on the remaining argument that has been put forward for ultimately valuing capabilities rather than functionings, *viz*. "anti-paternalism". The anti-paternalist argument is predicated on the assumption that individuals are ontologically independent (antecedently individuated and pre-social) and literally autonomous, such that all "interferences" by outside forces (especially the state) must be positively justified. These assumptions, or so I argued earlier, are implausible, and the ecological conception of the self and its agency rejects them. Rather, the functionings individuals have will, one way or another, be a product of the society in which they live and the state that governs it. So understood, we must acknowledge that what is called "paternalism" is just one of the multifarious ways in which external forces influence the individual, which may or may not be problematic (Claassen 2014, 2016, 1287–88). This shifts the terrain of the argument away from anti-paternalism *per se* back to the social and other conditions that best promote people's flourishing. Undoubtedly, an overbearing state that seeks to control the full extent of an agent's functionings would be a moral disaster (as would a minimalist state that leaves some individuals fully at the mercy of violent gangs or predatory corporations). But as I have already shown, far from entailing such a state, a suitably targeted functionings account of wellbeing would leave individuals with a wide range of valuable options from which to choose and would nurture the generic functionings needed to choose responsibly within that range. Anti-paternalism, then, does not seem to provide a strong reason to depart from the *prima facie* attractiveness of a functionings account, either.

Finally, there are practical institutional reasons for favouring a functionings account for policy-oriented purposes of the kind for which ART is intended (cf. Robeyns 2016a, 401). Most importantly, achieved functionings are simply much easier to observe and measure than capabilities (Sen 1992, 52–53). For any applied purposes in which the theory is to be operationalised, therefore, focusing on functionings is a virtual necessity. Since the

secondary aim of my theory of legal transitions is practical action-guidance, the greater feasibility of focusing on functionings provides a further, albeit less deep, reason to favour it over capabilities.

This concludes my defence of my use of a functionings account of wellbeing within ART. Before developing my conception of functionings further, I must emphasise that the arguments above pertain to the object of *ultimate* concern in a theory of wellbeing. Clearly, as functionings theorists emphasise, achieving functionings *depends* on the presence of propitious resources, structures and conditions (Robeyns 2017, 47–51; Wolff and Reeve 2015, 460). Accordingly, my commitment to valuing functionings entails a commitment to the instrumental and extrinsic valuation of resources, structures and conditions insofar as they are necessary to sustain (instrumental), or part-constitutive of (extrinsic), a valuable functioning (see also Robeyns 2017, 50–51). This caveat will become important in my discussion of state responses (Chapter 9) since it means that, in some cases—most obviously the resource-poor—it will be necessary for the state to provide people with resources (in order to secure central functionings).

6.3.4 *Why a modified functionings account? Including particular functionings*

As noted above, functionings are standardly specified in generic terms (generally achievable and agent-neutral 'types'), not particular terms (agent-relative, actually achieved 'tokens'). Understanding functionings generically is desirable in its own right. It is particularly valuable when it comes to evaluating wellbeing, depravation or disadvantage *objectively*, since it allows one to identify components of a good life that a person lacks, and thus to make policy-relevant normative claims about what such a person *ought to have* (that is, what they ought to *gain*). Translated into the present project, this strength enables us to adequately conceptualise the wellbeing gains of the 'winners' from legal change: we can analyse the generic functionings they will gain. Accordingly, I take it to be important that any conception of wellbeing for use in a theory of legal transitions should incorporate generic functionings. At any rate, mine does.

The ecological account of the self and agency helps us to see, however, that an *exclusive* focus on generic functionings is too narrow. Specifically, the ecological account motivates

the recognition of an important kind of agent-relative value that inheres in agents' *particular* beings and doings in the world; that is, the narrative functionings like the durable relationships, attachments, projects and practical identities that they consciously value, as well as the more basic functionings like the rudimentary bodily, cognitive, and extra-corporeally extended functionings arising from their histories of brain-body-world interactions. I shall call these *particular functionings*. The cost of understanding functionings exclusively generically is that it leaves functionings approaches ill-equipped to account for many of the *particular functionings losses* that arise from social, economic and cultural changes, including those induced by legal transitions. Accordingly, I adopt a modified functionings account of wellbeing, which incorporates particular functionings alongside the standardly included generic functionings.

To be sure, insofar as *organism-bound* functionings are concerned—such as blood filtration, or even 'being healthy'—the distinction between particular and generic functionings is blurred to near-irrelevance, since the overwhelmingly normal way for an agent to have achieved such functionings is via their particular bodies.[20] But when it comes to functionings that are achieved wholly or partly through external resources or conditions, the distinction becomes crucial. Consider the following example, which pertains to the generic functioning of 'being adequately housed' (or 'having adequate shelter'):

> ***Homelandia**:* In the Republic of Homelandia, every person within its jurisdiction has a constitutionally guaranteed (and rigorously enforced) right to housing. However, Homelandia takes a large inflow of immigrants—many of whom were unhoused in their country of origin—and the Homelandic Government can't quite build new housing at a rate sufficient to keep up with demand. What ends up happening is that existing housing stock gets subdivided, and poorer citizens get shuffled around from one home to another as the

[20] Though even here the distinction remains significant in principle, since many *normally* organism-bound processes can *become* extra-corporeally extended—through use of a dialysis machine for blood filtration, for example. I owe the notion of an "organism-bound" process to Clark (2008, 123) and the blood filtration example to Shapiro (2011, 195). The distinction is also blurred to near-irrelevance in practice with respect to functionings that rely on external goods purely for immediate consumption. For example, I will tend not to develop any significant particular history with the carrots I need to eat in order to be adequately nourished.

> government struggles to match supply with demand via its centralised housing allocation system. Ada is a poor citizen of Homelandia. She is forced by the government to move home roughly every three months.

Understood generically, Ada enjoys the functioning of being housed. In fact, she even enjoys that functioning with a high degree of *security* (Wolff and De-Shalit 2007, chap. 3): thanks to the rigorously enforced constitutional guarantee, there is a very high probability that Ada will always have *a* home in Homelandia; and she can have a high degree of subjective confidence in that fact (a high degree of "belief-relative security": Herington 2017, 187). Yet every time she is forced to move home, Ada loses the *particular* functioning she has of *being housed in that particular home*. Intuitively, this loss of particular functionings matters to our normative evaluation of the case. As I flagged in Part 6.2.3, the ecological account of the self and agency helps us to see the value of such particular functionings: it is through our history of interactions with the world that we generate a relatively coherent sense of ourselves over time.[21]

But if functionings were to be understood exclusively in generic terms, the capability/functionings approach could not account for the significance of these particular values and their loss.[22] While Kantian/Rawlsian liberals—and for that matter, some utilitarians (see, e.g., my discussion of Bentham in Chapter 2.3)—go too far in valorising long-term planning and the unity and coherence of one's life, a purely generic conception of functionings seems to err in the other direction by failing to value such coherence at all. Furthermore, an exclusive focus on generic functionings leaves the standard

---

[21] For a deeper explanation of the kinds of losses associated with home displacement, see my discussion in Chapter 7.2.

[22] No doubt the capability approach can say *something else* about what is wrong with the approach to housing in Homelandia. For example, it leaves citizens with very little control over their environment—arguably a core capability/functioning (Nussbaum 2011, 33–34). But this is a separate and additional point that neither subsumes nor detracts from my point. An alternative possibility is that we could account for such losses in terms of generic relational functionings like the functioning of 'being in a familiar environment' or 'being embedded in networks of relationships'. But I join with Cohen (2011) in thinking that this philosophical tendency to express value only in (ever more sophisticated) generic terms still misses something important, which is nicely captured in Cohen's thought experiment (ibid 211): imagine the qualities about your life partner that you love, and articulate these in generic terms; now imagine someone else came along with all of those generic qualities (and no additional drawbacks). Would you really be indifferent between the two?

capability/functionings approach unable to adequately manage *trade-offs*, whether intra- or inter-personal, between gaining generic functionings and losing particular functionings.[23] Consider each instance in which Ada is forced to move and new, hitherto homeless immigrants are given housing. If we were to account for the change in terms of aggregate wellbeing, where wellbeing means the achievement of generic functionings, then each such change would register as a Pareto improvement: some people's (the new immigrants') housing functioning has increased, while Ada is no worse off, since her generic functioning of 'being housed' has stayed the same.[24] Yet this would be a false accounting, since it would fail to recognise the way that Ada is made worse off by the loss of her particular functioning of being housed in her particular home. Particular functionings fill this conceptual gap, providing a means by which to account for both the generic gains and the particular losses, and hence the trade-offs involved in processes of social and economic change.

The closest analogue to this modified functionings account of wellbeing, of which I am aware, is that of Raz, articulated in *The Morality of Freedom* (1988).[25] Raz places strong emphasis on the value to individuals of success in their goal pursuits, which are particular to the person (he includes personal relationships within this category[26]) (ibid chap. 12). At the same time, Raz's account of wellbeing also includes a person's "biologically determined needs and desires" (many of which will be generic) (ibid 290).[27] The affinity between Raz's account and mine extends further: Raz recognises that people's goals, though unique, are necessarily

---

[23] Robeyns (2017, 52–53) mentions that the capability approach *could* be used to evaluate changes in a single person's (intra-personal) wellbeing over time, but notes that such uses are "much less prevalent in the scholarly literature". However, as I hope to show in this paragraph, losses (negative changes over time) could not be adequately accounted for on the capability approach without incorporating a notion of *particular* functionings.
[24] At least, this would be the case if the housing functioning were considered in isolation from other functionings, such as control over one's environment (see footnote 22, above).
[25] Raz, of course, uses this account for different purposes to me, but the account itself is relevantly similar.
[26] The value of relationships in Raz's account of wellbeing is evident from his discussion of personal goals, the larger category into which personal relationships are subsumed, in chapter 12 (e.g. at 290–91, 311–12). It is also evident in chapter 7 (at 177–78) when discussing the example of a man and his relationship to his dog, and elsewhere in the book (e.g. at 155). For other broadly liberal accounts of the value of personal relationships, see, e.g., Scheffler (1997) and Nussbaum (2000, 122).
[27] Raz's theory of wellbeing is endorsed and adapted by Nine (2018, 241–42) to a particular understanding of the self-through-time that is similar to my own. Indeed, Nine draws explicitly on the ideas of distributed/extended cognition theorists, as I do.

strongly conditioned by available "social forms" (ibid 307–13),[28] implying a clear rejection of asocial individualism and an embrace of a position closer to communitarianism than standard liberal conceptions of the self (Mulhall and Swift 1996, 326–31, 343–45). Further, Raz emphasises the importance of practice and habituation, and de-emphasises the role of pure reasoning, as the means by which individuals come to instantiate social forms within their own goal pursuits and sense of self (1988, 311–13).

The conception of wellbeing that I have endorsed and sketched above plays an important role in my theory of legal transitions. Wellbeing, so conceived, is one of the two 'vectors' of relevant reasons justifying state transition policy. In particular, it is a concept that is incorporated into (and hence part-constitutive of) the Wellbeing Principle developed in Chapter 7 and also into a key premise of the justification for that principle provided in that chapter. Furthermore, this conception of wellbeing is used as part of the conception of successful adaptation that I invoke in my discussion of adaptive state responses in Chapter 9.

6.4 Conclusion

In this chapter I introduced some key theoretical constructs that underpin ART. I first described the ecological account of the self and its agency, explaining how its two core ontological assumptions differ from the assumptions shared by the liberal models of the self that implicitly underpin much of the theorising about legal transitions that I criticised in earlier chapters. I flagged three ways in which the ecological account supports ART: essentially, by providing positive grounds for valuing both stability and change, and for reconciling these across practices and across time. Second, I specified and defended the 'currency' of loss/gain that will be used for the purposes of ART: the modified functionings account of wellbeing.

I now turn to the two principles of ART, starting with the Wellbeing Principle.

---

[28] By "social forms" Raz seems to mean something like social roles and social norms (see Raz 1988, 307–13).

CHAPTER 7. THE WELLBEING PRINCIPLE

7.1 INTRODUCTION

The aim of the present chapter is to defend the following principle of ART—the *Wellbeing Principle*:

a) the state has a *pro tanto* reason to conserve particular functionings that would otherwise be lost as a result of a legal change, and the strength of that reason is proportional to the centrality of the particular functionings at stake;

b) the state has a *pro tanto* reason to refrain from conserving an agent's prior functioning set against gains in generic functionings that they would otherwise enjoy as a result of a legal change, and the strength of that reason is proportional to the centrality of the generic functionings at stake

In short, the Wellbeing Principle provides for the anticipated *ex post* effect of a legal change on wellbeing to be taken into account in the determination of transition policy and, crucially, via the concept of 'centrality' developed below, a sense of the weight that such wellbeing considerations should have.[1] Note that the Wellbeing Principle considered in isolation is quite weak—all it establishes is what the state has a *pro tanto* reason (not) to do; it says nothing about the other reasons that should enter into the state's calculations concerning transition policy. However, being one of only two principles within ART that provides relevant reasons to support one or another transition policy, it ends up being highly significant.

For present purposes, the more important, interesting, and potentially controversial clause of the Principle is clause (a), concerning the stabilisation of particular functionings. Its effect is

---

[1] Of course, only coarse-grained comparisons are possible using a notion of functioning centrality. Particular functionings will be more readily comparable on an *intra*personal basis than an *inter*personal basis. Still, I maintain that coarse-grained interpersonal comparisons of functionings, weighted by their centrality, can meaningfully be made for the purposes of public policy. What is not on offer from such an approach is the kind of complete ordering enabled by the simplistic assumption of a single, fully comparable metric, such as money. But this does not imply that the Wellbeing Principle cannot be operationalised (see Robeyns 2017, 207–8).

to ensure that some of the strongest 'conservative justice' concerns raised in different ways by property and legitimate expectations theories are taken into account in a theory of legal transitions—albeit in a consequentialist and scalar form that I find more appealing as a basis for government policy and that is more consistent with the ontological foundations that I have endorsed (see Chapter 6.2.2). My argument for clause (a) is as follows, accompanied by a cross-reference to its treatment in this thesis/chapter in square brackets:

> P1: An agent's wellbeing is of ultimate moral value [assumed—see Chapter 6.3.2];
>
> P2: An agent's wellbeing consists (partly) in the continuity of the agent's particular functionings [defended in Chapter 6.3.4];
>
> P3: The degree to which a particular functioning contributes to an agent's wellbeing is proportional to its centrality to the agent [defended in Part 7.2, below];
>
> P4: Other agents have a *pro tanto* reason not to set back an agent's wellbeing [standard claim of interpersonal morality, discussed immediately below]
>
> C1: Other agents have a *pro tanto* reason not to set back an agent's particular functionings, the strength of which reason is proportional to the centrality of the functioning to the agent [deduction from P1–P4];
>
> P5: The state is an agent [assumed];
>
> C2: The state has a *pro tanto* reason not to set back an agent's particular functionings, the strength of which reason is proportional to the centrality of the functioning to the agent [deduction from C1 and P5]
>
> P6: A legal change is a state act [assumed];
>
> C3: The state has a *pro tanto* reason to conserve (i.e. not to set back) an agent's particular functionings when it changes the law, the strength of which reason is proportional to the centrality of the functioning to the agent [deduction from C2 and P6].

From the argument outlined above, it can readily be seen that it is a fairly short logical chain from placing moral value on particular functionings (*qua* constituents of an agent's wellbeing) (P2) to the state having a reason to conserve an agent's particular functionings when it changes the law (C3), once one makes the plausible assumptions that an agent's wellbeing has moral value (P1), that the state is an agent (P5),[2] and that a legal change is an act of state (P6).

The bulk of the remaining normative load is borne by P3, which I will elaborate and defend in Part 7.2, below. P4 is a normative premise that claims that agents have (at least) a *pro tanto* reason not to set back another's wellbeing. I take this claim (or relevantly equivalent variants thereof), to be a fairly uncontroversial, widely endorsed principle of morality, or at least an uncontroversial premise in more complex principles concerning wrongful harm (Smith 2013; Tadros 2016, chap. 10). Accordingly, I will not argue directly for P4. Rather, in the course of arguing for P3 (centrality weighting), I hope to demonstrate casuistically that the strength of the *pro tanto* reasons an agent has to not set-back another agent's particular functionings is indeed proportional to the centrality of those functionings, and that this reasoning applies equally to acts of state, including legal changes. Furthermore, in Part 7.3 of the chapter I will raise and respond to what I take to be the strongest objection to P4, which I call the "unjust functionings objection" (I also consider a similar, but weaker version of the objection that targets P2).

Clause (b) of the Wellbeing Principle is, I take it, fairly uncontroversial, so I will only say a few brief words about it here. A key purpose of changing the law is to improve people's lives. On the capability/functioning approach, this effectively means improving their most central generic functionings (on my account) or capabilities (on capability accounts). Nonetheless, for reasons I discuss in Chapter 8, there are conditions under which the state ought to block or reduce the transitional gains that would otherwise accrue to an agent arising from a legal change (through grandfathering their prior disadvantageous position or through clawing back

[2] I follow List and Pettit (2011) in assuming that the state is a group agent (i.e. a corporate agent) and is capable of causing harm or loss, in its own right, to its citizens.

their gains, e.g. through a windfall tax). The effect of clause (b) is to limit, by dint of a countervailing reason, the extent to which the most central (i.e. highest-priority) generic functioning gains can be blocked or reduced. In other words: holding constant all other reasons for transition policy, the more central the gain in generic functioning (e.g. life, bodily integrity, physical health) to an agent caused by a legal change, the weaker the reason to block or reduce an agent's enjoyment of that gain. We would not want to block a homeless person from being provided with secure shelter pursuant to a new housing policy, to take an obvious example!

Clause (b) thus advances, albeit at a more conceptually basic level, the kinds of wellbeing interests that motivated the appeals to ideal justice with respect to 'winners' from legal change discussed in Chapter 5. Our intuitions about 'winners' in the slavery abolition case discussed in that chapter are also captured by appealing to the notion of central generic functionings. The main difference is that, where clause (b) of the Wellbeing Principle provides probative reasons to let winners keep their generic functioning gains, principles of ideal justice (applied to the transition context, as per Chapter 5) would secure their *lexical priority*. It is, undoubtedly, a strength of the latter that in 'obvious injustice' cases (such as slave-owning) wellbeing interests are accorded such priority. However, as I argued in Chapter 5, the deontological conception of ideal justice has considerable limitations that are most evident when we move to less clear-cut cases. Appealing, as I do in this chapter, to the *weighty* value of central generic functionings accommodates the relevance of proto-ideal-justice considerations, albeit in my preferred consequentialist and scalar form.[3]

Note, however, that in the case of generic functionings, I cannot rely on an historical interaction-based notion of "centrality" as I will for particular functionings, since the absence

[3] This, of course, means I take a stand on the long-standing debates over lexical/deontological aggregation rules vs consequentialist aggregation rules. I cannot hope to say anything new about this debate here, and so must leave this as an undefended assumption. For discussions (which I find a compelling motivation for a complex form of consequentialism as a basis for government policy) of the challenges faced by ideal-justice theories, and the advantages of consequentialist theories, when it comes to comparing the effects of alternative government policy options on wellbeing across diversely situated agents and states of the world, see Adler (2011), Broome (1999), and Sen (1987).

of such a history is precisely what distinguishes generic from particular functioning (see Chapter 6.3.4).[4] I therefore follow the standard capabilitarian commitment and conceive of centrality in terms of some objective (agent-neutral) conception of an agent's flourishing, in the sense of functionings that are more or less constitutive of a flourishing human life in general. How to determine precisely what this is would take me well beyond the scope of this thesis.[5] Accordingly, where discussing generic functionings in the remainder of this thesis, I will simply rely on functionings that are (or whose capability-equivalents are) widely-regarded as central (Nussbaum 2006, 76–78; Wolff and De-Shalit 2007) and on example-specific intuitions.

In any case, it is losses, and hence particular functionings, that are of primary interest in the present chapter (and to theorists of legal transitions), and it is to the notion of centrality of particular functionings, and the normative significance of their loss, to which I now turn.

7.2 CENTRALITY OF PARTICULAR FUNCTIONINGS

In Chapter 6.3.4 I defined particular functionings as comprising both the cognitively sophisticated, conscious, "narrative" aspects of ourselves—our non-instrumental *identities*, *relationships, attachments* (to places, culture and material things), and *projects*—and more "basic" functionings, such as rudimentary bodily, cognitive, and emotional functionings that mostly operate subconsciously (cf. Nine 2018, 241–42; Raz 1988, chap. 12; Tadros 2016, chap. 10). Below, I first discuss the conceptualisation of centrality with respect to the former, "narrative" functionings and then consider the latter, more basic functionings.

---

[4] There has been considerable discussion in the capability literature about how to prioritise among capabilities and (generic) functionings based on their normative importance or urgency (Robeyns 2017, 95). Nussbaum uses the adjective "central" with respect to capabilities to convey such normative priority (Nussbaum 2000, 15), which suggests the plausibility of my doing likewise for generic functionings (albeit in a scalar way). Some have used the adjective 'basic' to modify 'capabilities' for this purpose. However, Robeyns (2017, 94–96) notes that "basic capabilities" has been used by different authors to convey a variety of different meanings (I use the term "basic" to refer to more biologically rudimentary functionings—see below Part 7.2), so I prefer to use "centrality" to convey normative weight.

[5] My inclination is toward some kind of mixed expert-public deliberative approach (cf. Khader 2011; Nussbaum 2000; Wolff and De-Shalit 2007).

7.2.1 *Centrality of narrative functionings*

Since narrative functionings are consciously valued, we can straightforwardly (at least conceptually) understand their centrality for an agent in terms of the weight that an agent subjectively places on them.[6]

There are many philosophical accounts of what it means to "value" or "care about"[7] things in the non-instrumental sense I intend to capture with reference to narrative functionings (Smith 2013, 304). In reviewing these, Matthew Smith notes that, despite differences in detail, "there is a substantial locus of agreement around the general picture" (ibid 304). Summarising this general picture, he takes an individual's non-instrumental values or cares to be:

> central and particularly fixed elements of a person's psychology: they have the function of regularly treating (or constituting dispositions to regularly treat) some object—be it a thing, a person, a practice, a project, a state of affairs—as normatively significant for oneself. By 'normatively significant', I mean that, as a matter of course, one is practically and emotionally responsive to whatever the care-relevant state of the object is, e.g., its flourishing, realization, continued existence, etc., such that one (consciously or sub/unconsciously) adjusts how one lives one's life in order to realize, promote, maintain, etc., that state, and one has characteristic emotional responses to changes in the cared-for object's care-relevant state. (ibid 305, footnotes omitted)

In emphasising both practical and emotional responsiveness, this 'summary' view is quite close to Scheffler's (2011) conception of valuing, which I shall work with from here on. According to Scheffler (2011, 32), to value X is to hold (i) a belief that X is good or worthy of being valued, (ii) an emotional vulnerability to X, (iii) a disposition to experience those emotions as being merited or appropriate, and (iv) a disposition to treat certain kinds of X-

---

[6] The notion of subjective 'centrality' of (what I am calling) narrative functionings is a widely used construct in the social sciences, particularly in psychology (see, e.g., Huber and Huber 2012 on the "Centrality of Religiosity Scale").

[7] Smith (2013) treats these notions as interchangeable. Scheffler (2011, 29–30) identifies some significant differences between them, and so focuses only on what it is to *value* something.

related considerations as reasons for action in relevant deliberative contexts. For my purposes, Scheffler's distinction between element (i) on the one hand, and elements (ii) and (iv) on the other, illuminates what it means for someone to treat a narrative functioning as more or less central to their own flourishing.

Consider first the difference between elements (i) and (ii). Scheffler notes that a given individual may believe that a great many things are valuable, but not value most of those things herself (ibid 31). I might instantly recognise value in other people's friendships, yet those friendships don't matter to how well my own life goes; I have no emotional vulnerability to the vicissitudes of those people's relationship. By contrast, if I think of a close friend whose friendship I greatly value

> then I may feel pleased at the prospect of spending time with him, saddened if we rarely have occasion to see one another, eager to help him if he is in need, distressed if a serious conflict develops between us or if we become estranged, and shocked and betrayed if he harms me or abuses my trust (ibid 28).

Similarly, I might think that stamp collecting is a valuable project, yet I personally do not take it to have any special normative significance in my own life, and part of what it means to say that is that I am not emotionally vulnerable to the fluctuating fortunes of the handful of stamps I happen to have in my stationery drawer, or any other stamps, for that matter. Yet I will feel frustrated, saddened and perhaps angry if an important project of *mine* becomes thwarted.

Now consider the difference between (i) and (iv). While, again, one may believe that a great many things are valuable in a general sense (i), one has only a limited subset of things that one is disposed to treat as a source of reasons for one's actions. Part of what it means to value X is to be "disposed to treat X-related considerations as constituting reasons for action in relevant contexts"; those considerations, in other words, have "deliberative relevance" in

given contexts (ibid 31). Elsewhere, Scheffler (1997, 2004) elaborates on the more specific kinds of reasons that *relationships* and *projects* provide us.[8] In summary:

> If one values one's relationship with another person non-instrumentally, then one will see oneself as having reason to devote special attention to that person's needs and interests. Similarly, if one values a personal project non-instrumentally, then one will see oneself as having reason to devote special attention to the flourishing of that project (Scheffler 2004, 257).

The *centrality* to a person of some narrative functioning—such as a project or relationship—can be captured, then, by attending to the role it plays in one's emotional life and in one's practical reasoning:

> Not everything that one values plays an equally central role in one's life. I may value both my relationship with my son and my colleague's contributions to department meetings, but they obviously do not play the same role in my life. Other things being equal, the degree of emotional vulnerability that one incurs in valuing a given thing will depend on the role that thing plays in one's life. These differences in role, in turn, are largely constituted by differences in the range and character of the reasons for action with which different valued items are seen as providing us. I see my relationship with my son as providing me with compelling reasons for action in a very wide range of contexts, many of which are highly consequential. I also value my colleague's contributions to department meetings, but these provide me with reasons for action only in a very limited range of contexts. *We speak of valuing things to different degrees, and of valuing some things more than others.* To some extent, these ordinal and comparative judgments reflect judgments about how valuable different things are. But to a great extent *they are best understood by reference to differences of role, reason, and emotional vulnerability.* (Scheffler 2011, 32–33, emphasis added)

The projects, relationships and attachments that we value most centrally, moreover, come to define our most central identities and to exert a structuring and orienting force on our agency (Taylor 1989, 27–31). They "provide the frame or horizon within which I can try to

[8] Of course, our relationships and projects are often intertwined, as Scheffler notes (2011, 259).

determinate from case to case what is good, valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon in which I am capable of taking a stand" (ibid 27). Rawls says something very similar: one's "convictions and attachments help to organize and give shape to a person's way of life, what one sees oneself as doing and trying to accomplish in one's social world" (Rawls 2001b, 405). In this way, these central functionings become the main plotlines of our personal narratives (see also MacIntyre 1981, 200–201; Taylor 1989, 46–48).[9]

Given their role in structuring and orienting our lives, we should expect the *loss* of our most central relationships, attachments, projects and identities to be phenomenologically distinctive; a kind of "injury" to the self (Noë 2009, 69). And we should expect this phenomenologically distinctive injury to register in our emotions and in our practical reasoning. Emotionally, such losses are likely to entail not only negative feelings like sadness but also more existential forms of despair and anguish. This is borne out empirically. For example, psychologist Ronnie Janoff-Bulman, who spent much of her career studying trauma victims, finds that trauma (marked by the suddenness of a severe loss) results in victims experiencing shattered assumptions about the meaningfulness and benevolence of their world, provoking existential crisis (Janoff-Bulman 1992). In terms of practical reasoning, such losses are likely to entail a kind of *disorientation* (Lear 2006, 60–62; Rawls 2001b, 405; Taylor 1989, 27–32).[10] If a person were to lose their central identities, attachments and projects, they would be "at sea … they wouldn't know anymore, for an important range of questions, what the significance of things was for them" (Taylor 1989, 27). In narrative terms, a central plotline in the narrative of one's life will have unravelled, requiring a radical change in life course but without the orienting and structuring force that that very plotline would otherwise have provided.

---

[9] Behavioural and clinical psychologists also speak of narratives as integrating human cognition at the highest level, and thus structuring our expectations of the world (e.g. Sarbin 1986).

[10] The spatial metaphor (orientation) is not merely convenient: there are indications that "the link with spatial orientation lies very deep in the human psyche", notes Taylor, citing certain personality disorders where people's radical uncertainty about themselves manifests in spatial disorientation (Taylor 1989, 28).

It is because of these distinctively damaging effects that agents have a *pro tanto* reason not to set back others' functionings, where the strength of that reason is weighted by the functioning's centrality to that other agent. In what follows, I briefly set out some examples of often-central narrative functionings that are commonly threatened by legal changes. These examples serve two purposes. The first is to illustrate the concept of centrality and casuistically substantiate the claim that the strength of the state's *pro tanto* reason to conserve particular functionings is proportional to the centrality of the functioning at stake. The second is to demonstrate how the identification of *common categories* of central functionings enables the state, as a practical, institutional matter, to mitigate the Moral Costs Problem identified in Chapter 4, by minimising the need to undertake expensive investigations into agents' inner lives (see also Robeyns 2017, 126).[11]

7.2.1.1 Loss of personal relationships

Valued personal relationships are a universal constituent of a flourishing human life, at least on any account that accepts the inherent pro-sociality of persons, as the ecological conception of the self does (see Chapter 6.2). Common experience and empirical evidence attest to the fact that losses or attenuations of centrally valued relationships are typically among the most traumatic events people can experience (Holmes and Rahe 1967).

Some legal changes have a relatively direct effect on the capacity of people to sustain and develop their most valued personal relationships. These include changes to immigration and citizenship laws that may disrupt existing living arrangements, and changes to family law (e.g. affecting the rights of separated parents in relation to children). Many of the categories discussed below also affect personal relationships more or less directly.

7.2.1.2 Loss of place attachment / loss of communities of place

The existence and benefits to persons of 'place-attachment' to one's home and local community, and the negative impacts of its loss, have been well documented by social

[11] The tension between agent-sensitivity and moral costs identified in Chapter 4 is inescapable, but I submit that this common-categorisation approach is a good way of managing it.

scientists (see Anton and Lawrence 2014; Lewicka 2011, 451–54 for overviews of the empirical literature). Normative theorists of multiple stripes recognise that geographic place-attachments are typically constitutive of people's identities, such that displacement or the experience of major changes to the local context can be not only painful but deeply disorienting (D. Bell 2016, sec. 3; D. R. Bell 2004; Meyer 2001; Moore 2015, 38–39; Nine 2018; Norton and Hannon 1997; Scheffler 2007; Stilz 2013).[12] As Nine writes:

> Place attachment can provide an anchor in life and offer important benefits when we remain in those places to which we are attached. When these bonds are broken, the disruption generally brings about the fragmentation of routines, of relationships, and of expectations, and it upsets a sense of continuity that is ordinarily taken for granted (Nine 2018, 240, footnote omitted)

A wide range of common legal transitions can adversely affect people's place attachments. One obvious field concerns changes to land law, environmental law, and zoning law (or "planning law", as it is known in some jurisdictions) that significantly alter the material character of a neighbourhood or prohibit valued activities that were previously permitted. Another obvious field concerns immigration and citizenship laws, which affect the residency and work entitlements of non-citizens.

7.2.1.3 Loss of traditions, practices, identities and concepts

A more amorphous category of narrative functionings often centrally-valued by people are what we might loosely call 'cultural' (including but not limited to religious) functionings. The ecological account of the self I endorse follows communitarian and feminist theorists in understanding the self as embedded in culturally-saturated environments containing traditions, practices, discourses, symbols, values and norms that we absorb consciously or otherwise and which profoundly shape our everyday lives and our narrative functionings (Frazer and Lacey 1993, 122; MacIntyre 1981; Sandel 1998; Taylor 1985). While cultures are always changing, and indeed must do so if they are to survive in a changing environment

[12] As these citations attest, recognition of the value of place attachment and disvalue of its loss are not limited to communitarians, but it is fair to say that communitarian theorists have especially powerful conceptual resources with which to defend the conservation of "communities of place" (D. Bell 2016, sec. 3).

(Scheffler 2007), certain cultural changes can threaten, or cause, what we might call 'cultural', 'psycho-social' or 'conceptual' losses (cf. Lear 2006).

Many kinds of legal change cause cultural losses, so understood. For example, new environmental, biosafety and animal welfare regulations can affect traditional land-use and hunting practices, like seal hunting and fox hunting (Ypi 2017, 3–5), or the traditions embodied in jobs and other skilled practices like coalmining (considered below). Immigration law changes can affect the cultural composition of communities and nations, affecting the objects of people's place-identity and national identity (Miller 2000). Cultural policies and secularisation measures can affect people's ability to practice their religious and other cultural activities (Laborde 2008).

There is also a more direct way in which legal changes have effects on people's 'cultural' narrative functionings. The law has an expressive function; it is, after all, the formal institutionalisation and public validation of norms expressed through concepts and categories that structure social relations (Dworkin 1989, 480–81). Insofar as these categories and structures have meaning for us in and of themselves, their being changed may entail a kind of loss to some. Among the more troubling examples of this phenomenon is the way in which some religious groups see the liberalisation of marriage as a threat to their religious identity (van der Toorn et al. 2017) and the way some white people see the elimination of legal privileges historically enjoyed by white people as a threat to their racial identity (Harris 1993).

One way of making sense of cultural losses such as these is through an understanding of culturally constructed "symbolic boundaries" between groups, which are often linked to culturally prevalent moral hierarchies or "orders of worth" (Hall and Lamont 2013b, 57). Where people see these boundaries and hierarchies between groups as being more morally significant, or 'thick', they are more likely to understand themselves and their sense of dignity and self-respect[13] as bound up with their position within them (Haidt 2012; Haidt and Graham 2007; Hall and Lamont 2013b, 57; Lamont 2000; Lamont and Molnár 2002; Taylor

[13] Taylor defines "dignity" as "the characteristics by which we think of ourselves as commanding (or failing to command) the respect of those around us" (1989, 15).

1989, 15–16) and are more likely to experience adverse changes to such boundaries and hierarchies as affronts to their dignity and status (Gest 2016; Gidron and Hall 2017; Lamont 2000; Stenner 2005). These kinds of insights can assist policymakers in designing effective adaptive transition policies (including expressive acts) to facilitate adaptation to symbolic losses of this kind (see Chapter 9.3).

7.2.1.4 Skill loss

If skilled coping with one's environment is the basic mode of being in the world (see Chapter 6.2.2) then our skills are by definition central to our flourishing (Crawford 2015; Sennett 2008). Certain skills are also bound up with our central projects and identities. Indeed, on some views, what it means to be an embodied agent inhabiting particular niches[14] and practical identities *just is* to have and to exercise skilled perceptions and actions characteristic of that niche or identity (Crowell 2013, 290–91; Sokolowski 2000, 32*ff*). The more skilled we are at some practice the more central it is therefore likely to be to our lives. It follows that loss of skills an agent values will tend to have a phenomenologically disorienting effect (Zoller 2017), as studies of injured and retired athletes (Lavallee et al. 1998) and the "deskilling" of employment (Braverman 1974) have argued.

The effects of legal changes on people's existing skills should therefore be of particular concern to policymakers and theorists of legal transitions. The most obvious example of relevant legal changes include regulatory changes that affect the viability of industries that require skills that employees cannot utilise in other jobs.

7.2.1.5 Job loss

Many legal changes affecting the economy cause job loss. Job loss often affects important instances of *all* of the above-mentioned kinds of narrative functionings: personal relationships, place attachments, cultural practices, social status, and skills (Jahoda 1982). Psychologists who study job loss have found that, by undermining these various functionings, job loss can have profound impacts on the identity and mental health of the job-loser (for a

[14] I introduce the concept of a niche in Part 7.2.2, below.

review of the literature, see Brand 2015). For example, job loss places stress on the multiple—typically highly valued—social roles which are used to construct and sustain a person's (positive) sense of self. These roles may not only include the worker's specific job function, organisational affiliation or industry/profession, but may also include more general social roles such as being a valued contributor to society, colleague/friend, or breadwinner (Price, Friedland, and Vinokur 1998, 308–309).[15] The serious psycho-social harms that job displacement causes, moreover, are partly explained in terms of the self-perceived centrality of one's work role to one's self-identity (Brand 2015, 365–66). Furthermore, insofar as job-losers remain unemployed, they may acquire a stigmatised social status that can be a significant source of mental stress (ibid 362, 365).[16] Job loss can also undermine personal perceptions of mastery and control, of meaning and purpose, and of belonging, which are critical to mental health (Ashforth 2001). And it typically has considerable flow-on effects into other important aspects of people's lives, including their social interactions, family relationships, and daily rhythms / 'time structure' (Brand 2015, 364–70).

7.2.2 *Centrality of background functionings*

Our particular functionings, as noted, also include rudimentary bodily, cognitive, and emotional functionings. These mostly operate "behind the scenes to make it possible for us to pursue plans and relationships" and, more generally, to "make a person capable of having a life that can go well" (Nine 2018, 242). Insofar as these functionings are organism-bound, they are fairly obviously worthy of institutional protection in their own right—hence the widespread appeal of institutions protective of life, bodily integrity, and physical and mental health. Likewise, for the purposes of legal transitions, it would be straightforward to identify a change-induced deterioration in organism-bound functionings as a loss of central functioning with which a theory of legal transitions should be concerned. This identification

---

[15] Due to the gendered nature of family roles and the especially central role that paid work plays in the construction of masculine identities, job losses often disproportionately affect the self-image of men (Lee and Owens 2002; Pugh 2015).

[16] Even when workers return to employment, they often find themselves in inferior jobs or industries—inferior not only in terms of pay, conditions and regularity, but also in terms of the psycho-social dimensions (Strangleman 2001, 257–60).

is made easier, moreover, by the more 'generic' nature of these functionings, making them relatively similar across the human species.

Less obvious, however, is the way in which these basic, or 'background' functionings are supported—perhaps even partly realised or constituted—by aspects of the external world. One way to get a grip on this is via Gibson's (1979) concept of an "affordance", which can be understood as the possibility for action that some feature of an organism's environment offers to that organism, given its bodily capacities and its goals. To speak of affordances is to recognise that we comprehend the world in relation to what we can *do* in it. A doorknob 'affords' turning to sufficiently tall and able-bodied humans, but not to a worm or a bee, or to a person with severe arthritis. Many of the affordances that shape our possibilities for action are provided by objects in the environment, and humans have an extraordinary (though certainly not unique) ability to structure their environment, using props, crutches, jigs and scaffolds to assist them in performing cognitive tasks (Crawford 2015, pt. 1; Donald 1991; Kirsh 1995). A common example is using a pencil and notepad to perform mathematical tasks (Wilson 2004, 165–66), or the way a bartender spatially arranges cocktail glasses to provide prompts that structure the tasks necessary to complete multiple orders, reducing the need for storing the orders in one's short-term memory (Crawford 2015, 32). When we interact with these objects, our cognitive performance is enhanced.

Under certain conditions, it is plausible to consider objects like these, and other external features of the world, as part of an agent's *extended cognitive system* or *extended mind*. On the strong version of this claim, the Extended Mind Thesis (Clark 2008; Clark and Chalmers 1998), external features of the world can part-*constitute* the agent's mind, and there is an ongoing debate within the philosophy of mind about the truth of this thesis and the conditions under which it is instantiated (see Shapiro 2011, 178–99). I can sidestep these metaphysical debates because, for my normative-institutional purposes, it is sufficient to recognise that external parts of the world can play a strongly causally-instrumental role in an agent's cognitive system—a weaker claim, sometimes called 'embedded cognition' on which there is much wider consensus, including among critics of the stronger version (Rupert 2004, 2009;

Shapiro 2011, 193–96).[17] What is interesting about these debates for my purposes is the discussion of conditions under which it has been thought plausible to consider external features of the world as part of an agent's extended cognitive system.

An approach that has generated considerable support relies on the dynamic-interactive conception of the mind that I introduced and endorsed in Chapter 6.2.2. Where an agent interacts continuously and reciprocally with an object, as part of a dense, non-linear feedback loop, it is plausible to conceive of the object as part of the agent's extended cognitive system (Carter and Palermos 2016, 546–49). For example, many people rely on prosthetic limbs, hearing aids, spectacles, canes, Tactile Visual Substitution Systems, wheelchairs and other artificial medical and therapeutic devices for important basic functionings, such as perception, cognition and action of various kinds. 'Smart' personal devices also increasingly perform perceptual, cognitive, and even agentic tasks. We use smartphones, personal computers, and increasingly sophisticated wearable technologies to store a wealth of personal information, to organise our activities, to communicate with others, and to generate personalised recommendations, and these "have begun to blur the lines between our biological and digital existence" (Carter and Palermos 2016, 546).[18] In some cases, people quite understandably form strong attachments to these objects, too, but in all cases their centrality to our functionings is due at least to the role they play "behind the scenes" (Nine 2018, 242). The potential for objects to play a central role in our basic functioning means that their loss will be experienced as acutely disruptive, independently of their financial value.

For my purposes we can consider the *centrality* of extended rudimentary functionings simply as the duration and intensity of reciprocal interaction between the agent and the relevant

---

[17] For many normative moral-political applications, this weak version of the thesis will be sufficient. For example, Nine adopts the same approach in her analysis of the home as a component of our extended minds (2018, 244, fn 12), which I discuss below. But some normative applications depend on the truth of the strong version of the thesis—for example, Carter and Palermos' (2016) argument that damage to certain personal objects should under certain conditions be classified as a criminal assault requires that those objects be conceived as constitutive parts of the person's mind, and hence the person, in order to fit within the standard conception of assault in common law legal systems.

[18] As Carter and Palermos note, "[w]hether such biotechnologically hybrid feedback loops will occur rarely or frequently will depend on opportunity conditions, such as the availability of appropriate technology and social norms", and these are advancing rapidly (2016, 550).

external component of the world. Because I rely on a scalar conception of centrality, I am relieved of the burden of defending any sharp distinction between an object that 'is' or 'is not' a constitutive part of a person or the person's extended cognitive system; what matters for my purposes is that objects and other parts of the external world can be more or less central to our rudimentary functionings. Consequently, our rudimentary functionings can be more or less vulnerable to their loss. It will therefore be important, in estimating the centrality of agents' particular functionings affected by legal changes, to take account of people's extended cognitive functionings as well their more obvious (generic) biological functionings and their conscious, narrative functionings.

Consider, for example, legal changes that lead to displacement from one's home—including, potentially, changes in zoning regulations, large-scale public works that require the acquisition of residential property, and taxes on land, property or generalised wealth (insofar as such taxes effectively force the sale of one's home). Attachment to one's home is a common form of place attachment that widely figures centrally in the narrative aspects of people's self-constructs (Anton and Lawrence 2014). But a full accounting of the effect of home-displacement on a person's wellbeing requires consideration of the impact on their basic cognitive functionings, too.

I discussed above how we humans purposefully structure our lives through objects and the affordances they offer us. Building up from single objects, 4E theorists invoke the concept of a *niche*, which can be understood as a durable network of interrelated affordances (Rietveld and Kiverstein 2014, 330). Cara Nine (2018), drawing explicitly on the Extended Mind Thesis, has recently argued that just as objects can form part of our extended cognitive system, so too can the niche spaces that we construct. She focuses in particular on the *home* and identifies three main extended cognitive functionings that home spaces enable: "(1) the ability to form memories, attitudes, beliefs, and emotional attachments; (2) the ability to evaluate, reflect, and revise values, attitudes, and beliefs; and (3) the ability to perform actions consistent with one's commitments" (ibid 242). These basic functionings are, Nine argues, in turn linked to our practical reasoning and emotional regulation, our capacities to

form and achieve goals, plans and projects, and our capacities to build and sustain meaningful family relationships and wider interpersonal relationships (ibid 245–52).

In light of the extended cognitive functionings that are enabled through the meaningful niche construction of a home environment, Nine argues that removal from one's home should be understood as a *pro tanto* harm (Nine 2018, 242–43, 256–57), and describes in detail the disruption to cognitive functionings that can be caused by home displacement. In further empirical support for this claim, Nine points out that changes affecting the immediate home environment are among the events toward the top of the Holmes-Rahe stress scale (Holmes and Rahe 1967), a tool used by clinical psychologists to predict stress levels and associated illness (ibid 252–53).

For my purposes, the same impairment of background cognitive functionings that Nine points to can be invoked to justify categorising displacement from the home as (typically) entailing a loss of central basic functionings, which add to the narrative-level loss of a (typically) central attachment. According to the Wellbeing Principle, the state has a strong *pro tanto* reason to stabilise such functionings, and I take it that this accords with and explains widely-held intuitions in home-displacement cases. Likewise, we could undertake a similar analysis of extended cognitive functionings that are also involved in many of the other examples of narrative functionings considered above, such as those concerning other kinds of place attachments, personal relationships, jobs and other personal projects.

This concludes my discussion of the centrality of functionings, which substantiates my claim that the strength of the state's *pro tanto* reason to conserve particular functionings is weighted by the functioning's centrality to the agent.

7.3 THE 'UNJUST FUNCTIONINGS' OBJECTION

In the above discussion, I provided examples of central attachments, projects and identities—pertaining to objects, homes, places, people, cultural values, jobs and skills—the loss of which was, in almost all cases, intuitively troubling. But what about the devoutly Christian opponent of same-sex marriage whose project is frustrated by same-sex marriage

legalisation? Or the slave-owner who loses his identity, status, and attachment to his slaves when slavery is abolished? Or the gun owner who loses the deep attachment he has to his gun when restrictive gun laws are introduced? Or the segregationist whose life project is frustrated when segregation is abolished? Call these 'unjust functioning cases'.[19] Such cases, one might object, undermine the Wellbeing Principle because the state has no reason to stabilise such particular functionings, however central they might be to a person.

Unjust functionings cases are a subset of a wider category of functionings that one might call 'odious' functionings: functionings that are objectionable in some way, though not necessarily unjust. I take the unjust functionings cases to be the hardest, and so will respond to a version of the objection that concentrates on unjust functionings cases. If my responses succeed in responding to this version of the objection, they will succeed, *a fortiori*, against wider versions of the objection targeting odious-but-not-unjust functionings.

The objector might target this objection at one of two levels. On one version of the objection, they might claim that my conception of *wellbeing* is flawed, in that wellbeing cannot consist in unjust (or otherwise odious) particular functionings. But this would result in a needlessly moralised conception of wellbeing that would considerably distort our ordinary understanding of that concept and its natural linguistic usage (desiderata #III, VI). Wellbeing is typically understood as a micro-level concept concerned with how well an agent's life goes, with no necessary dependence on interpersonal normative ideals such as moral wrongdoing or injustice (Tadros 2016, 182). If anything, the relation typically goes the other way: our moral and political ideals are often motivated, part-constituted and justified by appeals to the more basic notion of wellbeing (Raz 1988, 166; Tadros 2016, 182).

---

[19] A similar objection could be levelled by appealing to cases in which the agent's lost functioning is predicated in part on the agent's irresponsible or imprudent actions, amounting to a violation of a duty of fairness (or rather, resulting in a loss for which they should be held responsible, such that providing a transitional response to that agent would be unfair). My response to versions of this objection involving fairness cases is substantively the same as to justice cases, *mutatis mutandis*, while noting that fairness provides independent reasons for transition policy within ART, as discussed in Chapter 8.

Additionally, we should prefer a non-moralised conception of wellbeing because it is more theoretically versatile—it is deployable in both normative *and positive* theories. This is desirable from the perspective of conceptual parsimony. As List and Valentini note, "to avoid a proliferation of rival interpretations of the same concept, we might also be looking for a single interpretation that can successfully play multiple roles" (2016, 533). Since my conception more accurately tracks the actual subjective experiences of losers, it appears more promising as a positive-theoretical concept, such as an explanatory variable in a theory of political behaviour—including political behaviour that affects the prospects of enacting justice-enhancing laws.[20]

Alternatively, the objector might level the objection at P4, the interpersonal morality premise ("Other agents have a *pro tanto* reason not to set back an agent's wellbeing") or C1 ("Other agents have a *pro tanto* reason not to set back an agent's particular functionings, the strength of which reason is proportional to the centrality of the functioning to the agent"), insisting that reasons to conserve particular functionings should have no moral weight at all when the functionings are unjust. The objection, framed as such, is non-trivial, since the Wellbeing Principle provides a probative reason to conserve such functionings.[21]

My first response is one that will register only against a liberal proponent of the objection. The response is that it is not an objection that a liberal could coherently make. This first response relies on a response by Matthew Smith (2013) to essentially the same hypothetical objection that he contemplates to his own principle of interpersonal morality, which is very similar to my P4. Smith's "accommodation thesis" is: "If someone cares about something, then one ought to accommodate that care, and one ought not to frustrate that care" (by

---

[20] In the empirical sub-fields of political science, political agents' past experience or future prospect of transitional effects—especially transitional losses—is widely studied as a potential cause of political phenomena such as public attitudes, voting behaviour, lobbying, activism, and anti-system behaviour.

[21] The conservatism of the appropriate transitional response depends on the scale of the wellbeing loss (the centrality of the functioning lost—as per this chapter), the direction and strength of fairness-related reasons (*ex ante* allocation of responsibility for managing the risk of legal change—Chapter 8), and the combination of time and adaptive capabilities needed to successfully adapt to that loss (Chapter 9). I argue in Chapter 8.3.4 that the reasons generated by the Fairness Principle will become weaker the more the relevant circumstances are characterised by inequality, which has implications for the appropriateness of a conservative response in "unjust functionings" cases (see Chapter 10.1.2).

"cares", Smith means something very similar to what one "values", and hence to the narrative functionings that I discuss in Part 7.2, above) and, like my Wellbeing Principle, Smith's is a *pro tanto* consideration only (Smith 2013, 298).

Smith defends his accommodation thesis in thoroughgoing liberal terms, as an implication of the liberal commitment to treat individuals as unique ends in themselves, since it is such unique sets of cares that make one a unique individual. He is especially concerned about the paternalising effects of failing to attend to and accommodate individuals' distinctive cares (ibid 306–9). Smith acknowledges the impulse of the persistent objector who complains that "[s]ome cares are awful and simply in virtue of being awful, they do not merit deference" (ibid 312). However, Smith stands his ground, pointing out that the liberal commitment to the moral significance of the individual that drives the impulse to repudiate moral consideration of unjust/awful cares is the very same commitment that justifies his Accommodation Thesis (ibid 312). That said, Smith acknowledges that this is not so much a decisive response as a recognition of a tension in which he, by virtue of his appeal to a thoroughgoing liberalism, is also stuck:

> This is one reason why a liberal morality of difference is so difficult to develop and complicated to realize in daily life. What I am offering here, then, is not a solution to a difficult moral problem but instead a diagnosis of what I take to be a central problem faced by the liberal. The problem is that the pluralism of values is not a pluralism of innocuous, morally neutral values. It's a pluralism that includes values that many liberals will, on the basis of core liberal commitments, find odious. Insofar as one is committed to the moral significance of the individual, one ought to feel *both* the pressure to accommodate those values and to challenge them. If we simply draw up a list of acceptable values and disregard individuals (or parts of individuals) who fail to adopt those values, then we risk losing sight of the individual and seeing only locations in which proper attitudes can be manifested. We cannot stipulate away the problem of odious values without stipulating away a substantive feature of liberalism. (ibid 312–13, emphasis in original, footnotes omitted)

For my purposes, Smith's insight serves as a response (of sorts) to the would-be liberal objector to my P4/C1. Yet, in virtue of the ontological commitments I have endorsed, I can be both sympathetic to Smith's concerns about respecting the individual and yet say two further things in response to this objection, such that I am not left stuck with the liberal tension Smith identifies.

First, the objection rests on an excessively certain conception of what justice requires—one that belies the messy, uncertain, contested terrain of the concept.[22] In Chapter 5.4, I argued that the lines drawn in any theory of justice will be both brittle and highly consequential, and this makes theories of justice unattractive touchstones for a theory of legal transitions. In the inevitable multitudes of cases involving borderline just/unjust central functionings to which a theory of legal transitions would apply, the Wellbeing Principle registers the trace of a lost central functioning, and this provides a reason for the state to provide at least an adaptive response (see Chapter 9). This provides a kind of normative safety net for the losers who suffer most from legal change that is not otherwise available if we make the move proposed by the objector and draw the lines of justice in such a way that the loser's central functioning is deemed unjust. Of course, this won't be an issue in 'obvious injustice' cases, so the objector might respond by limiting the objection to obvious injustices. But then the objector would need a general theory of 'obvious injustice', i.e. a determinate specification of obvious injustice and its boundaries, as opposed to an *ad hoc* list of obvious injustices. As my discussion in Chapter 5 of Matravers' and Moore's justice-based first stage of their hybrid legitimate expectations theories shows, this is no mean feat.

The objection's second, and related, weakness is to rest on an excessively synchronic conception of the person, translating to an excessively punitive institutional approach to legal

---

[22] Smith also acknowledges this point in a footnote to the penultimate sentence of the extract block-quoted above: "People who are not moral monsters can be wrong about the statuses of both their own values and the values of others. Reasonable people make such mistakes. We should not have to be moral experts in order to properly recognize others as individuals." However, the liberal ontology of the self (to which Smith appeals) underwrites the universalised claims about the true content of justice to which many liberals subscribe (see my Chapters 5 and 6), which would seem to limit the extent to which they could lean on this kind of legitimate uncertainty about the content of justice.

transitions in injustice cases. I argued in Chapter 6.2 that the ecological account of the self affirms the agency of the individual but recognises that individuals' actions are influenced by complex social forces, and that individuals can change and develop over time. I will argue in Chapter 9.3 that this provides the ontological foundation for a diachronic, adaptivist approach to legal transitions. Presumably, Smith and fellow proponents of a very strong conception of ontological individuality will be moved to respect unjust/odious functionings in an ongoing, inter-temporally robust way. By contrast, on the ontological foundations I endorse we need not be so moved by this *inter-temporal* demand to respect a person's unjust (or odious) functionings over the long term. Rather, we can endorse measures to facilitate the adaptation of persons with 'unjust functionings' as part of a process of societal transition toward a legal regime that requires such persons to properly value other people's central generic functionings. ART thus opens a diachronic route out of the liberal tension that Smith identifies, providing a more compelling response to the objection.

7.4 CONCLUSION

This chapter has specified and defended the Wellbeing Principle—the first of two principles that provide probative reasons for transition policy. The main focus of my argument has been the claim that the state has a *pro tanto* reason not to set back (i.e. *to* conserve against losses) people's particular functionings, where this reason is weighted by the centrality of the functionings at stake. I have specified and explained in detail the notion of centrality, describing what it means for narrative functionings and rudimentary functionings—particularly extended cognitive functionings—to be central to a person's flourishing, giving numerous examples that commonly arise in legal transitions. I have also defended the argument against an objection concerning unjust functionings.

The ultimate effect of the reasons generated by the Wellbeing Principle on the justification of particular transitional responses will depend also on the strength and direction of reasons generated by the Fairness Principle—the second principle of ART, to which I now turn.

CHAPTER 8. THE FAIRNESS PRINCIPLE

8.1 INTRODUCTION

The second principle of ART concerns the value of fairness in legal transitions. Most generally, fairness is a moral ideal that arises from voluntary, cooperative social relations (Delmas 2014a, 474; Rawls 1971, 111–13). It requires reciprocity with respect to benefits received in the course of cooperation for mutual gain, which implies refraining from free-riding on others' efforts and contributions (Delmas 2014a, 467; Klosko 2005, 149; Rawls 1971, 112). As such, the ideal of fairness is well-suited to the normative analysis of relations between persons in conditions of relative equality, where we can more readily infer that the shared contributions are aptly characterised as voluntary and cooperative (rather than, say, coerced and exploitative). We might think of these as the paradigmatic "conditions of application" of a theory of fairness (cf. List and Valentini 2016, 545–46). This does not limit the application of theories of fairness to 'ideal' societies, however, since relative equality could obtain *as between a subset of the members* of an unequal society, enabling us to apply the ideal to the relations of that subset of persons *inter se*. As I shall discuss later in this chapter, when such conditions are attenuated, the strength of the reasons generated by the Fairness Principle will diminish accordingly.

These introductory remarks about the nature, content and conditions of application of the ideal of fairness are necessarily general. We need a more specific and refined conception of fairness for use within ART. One conception of fairness appeals to the notion of *responsibility*, holding that the distribution of the fruits of social cooperation is fair if people get what they are responsible for. On the particular, practice-based approach to the allocation of responsibility that I advocate, and taken as a *pro tanto* consideration only, I think there is something attractive about this idea.

Responsibility is an historical principle, meaning that distributions should be sensitive to the way they came about. This backward-looking aspect of responsibility-based principles makes them useful for considering questions of risk from an *ex ante* perspective: we can ask, *ex ante*, who bears responsibility for managing some risk—including a risk of legal change—

and allocate the outcome of that risk (good or bad), *ex post*, to the responsible agent (Fried 2003). Thus we can ask, in respect of some impending legal transition, did the affected individual or the state bear the responsibility for managing that risk, *ex ante*? This leads me to the following principle of ART—the *Fairness Principle*:

In respect of a legal change, the state has

a) a *pro tanto* reason to refrain from conserving an agent's functionings to the extent that the agent was, *ex ante*, responsible for managing the risk of such a change to him/her/itself, and the strength of that reason is proportional to the degree to which the agent was so responsible; and

b) a *pro tanto* reason to conserve an agent's functionings to the extent that the state was, *ex ante*, responsible for managing the risk of such a change to that agent, and the strength of that reason is proportional to the degree to which the state was so responsible.

The plausibility of the Fairness Principle depends crucially on the persuasiveness of the account of what it means to be *ex ante* responsible for managing a risk of legal change. I begin, in Part 8.2, by discussing and rejecting one approach to allocating responsibility for risk that is prominent in the philosophical literature: non-moral (metaphysical) 'luck egalitarianism'. This discussion, along with the discussion of the ontological foundations of ART in Chapter 6.2, helps to motivate the conventionalist—or practice-based—moral approach to responsibility allocation that I will go onto specify, defend and illustrate in Part 8.3. Part 8.4 concludes.

8.2 NON-MORAL LUCK EGALITARIANISM AND LEGAL TRANSITIONS: A CRITIQUE

If a central issue posed by the problem of legal transitions is how to allocate the risks of legal change *ex ante*, then an obvious candidate within liberal-egalitarian thought would be so-called 'luck egalitarianism'. Luck egalitarians typically take fairness to be "the demand that no one should be advantaged or disadvantaged by arbitrary factors" (Wolff 1998, 106). Non-arbitrary factors are commonly conceived as those factors for which the agent in question is

responsible: no-one should be advantaged or disadvantaged as a result of phenomena for which they are not responsible; but inequalities are justified insofar as they reflect choices for which people are responsible (Arneson 1989; Cohen 1989; Rakowski 1991; Roemer 1996). The products of luck, in other words, should be equalised through redistribution, but the products of responsible choice should not. Moreover, agents can become responsible for (un)lucky outcomes where they have voluntarily run risks and failed to take out insurance. Such chosen gambles, for which agents are responsible, Dworkin calls "option luck", which he distinguishes from "brute luck", for which agents are not responsible (1981, 293). The paradigmatic example of "option luck" is placing a bet in a gambling casino (ibid 293–95).

This general luck-egalitarian principle of fairness could, it might seem, readily be applied in a transition context to determine whether or not losers should receive transitional relief and winners should be taxed. As Fried (2003) has noted, the philosophical literature on luck egalitarianism has largely paralleled the law and economics literature on legal transitions in its adoption of an "ex ante perspective": "While the luck egalitarian literature has had little to say on the specific problem of legal transitions, its general argument for sticking people with the ex post consequences of their risky choices would cover that case" (Fried 2003, 131).[1] Indeed, for the luck egalitarian, transition policy would be a matter of working out for each affected agent whether the legal change in question was, *ex ante*, a risk they were responsible for bearing.

Given that choices made under uncertainty are, following Dworkin (1981), generally considered matters of option luck, many luck egalitarians would probably be inclined towards a reformative transition policy: since agents take, and choose how to manage, risks to their functionings and holdings under conditions of pervasive uncertainty about the legal future, the consequences of those risks should lie where they fall. Distributive losses and gains would, in this way, seemingly track the prudence of individual agents with respect to their anticipation of future legal transition risks and their management of those risks via strategies

[1] Indeed, to the author's knowledge, Fried's paper is the only one to address legal transitions from a luck egalitarian perspective, and it does so critically.

of self-insurance (diversifying their investments or hedging) or obtaining third-party insurance to the extent it is available.

Whatever the merits of this reformative legal transition policy, the conclusion that individuals are responsible for the outcomes of legal change is inadequately justified: there is nothing within luck egalitarianism itself that dictates such a reformative approach to legal transitions. A fundamental problem facing luck egalitarianism is that, in standard accounts, it relies on a sharp distinction that is philosophically untenable: it is not clear, as a metaphysical matter, what individuals are (causally) responsible for, and what is a matter of circumstance for which they are not responsible (Scheffler 2003, 17–18).[2] To posit otherwise is to rely on an implausibly asocial, individualist ontology (see Chapter 6.2). Luck egalitarians often bypass this issue by trading on cases in which we have clear *intuitions* about responsibility; indeed "the luck egalitarian literature, when it leaves behind the artifice of Monte Carlo in favor of real-world risk-taking, tends to gravitate to examples of ultrahazardous activity to defend its moralism about choice" (Fried 2003, 141). But this does not help us in the infinitely more complex cases that confront people in most aspects of their lives (ibid 141).

Faced with this challenge, one strategy luck egalitarians have adopted is to define 'responsibility' in a *non-moral* way, by specifying further non-moral properties in virtue of which responsibility is said to obtain. Prominent candidates are the "choice"- and "control"-based accounts (see Lippert-Rasmussen 2016, chap. 3.4). But again, while one can identify cases in which strong intuitions about choice and control do seem to yield the right answers, there is no underlying non-moral fact about what constitutes choice or control, and so it is easy to identify cases in which these concepts give us no analytical purchase. Contemporary proponents of choice- and control-based accounts must therefore make continual refinements

---

[2] Cohen concedes that reliance on this distinction may leave luck egalitarians "up to our necks in the free will problem," but he dismisses this as "just tough luck" (1989, 934). One response is to accept non-moral luck egalitarianism as a true theory that lies in waiting until a committee of metaphysicians has pronounced on the truth about what individuals are responsible for (Knight 2006a). That would surely be enough to render this approach inadequate to a theory of legal transitions for use in the here and now (Fleurbaey 2001, 502; but see Knight 2006a). But at a deeper level I think that the search for metaphysically clear lines is itself misguided, as suggested by my endorsement of a different set of ontological (including social-ontological) foundations in Chapter 6.2 (see also McTernan 2016, 749–52; Scheffler 2003, 17–18).

to plug this determinacy gap, such as referring only to "genuine choice" (Cohen 1989, 934). But then, they need to say what distinguishes a "genuine" from a "non-genuine" choice, and so the search continues. As they undertake this search, non-moral luck egalitarians have been characteristically reluctant to admit any *moral* values into their avowedly non-moral conceptions of responsibility, choice, genuine choice, control, etc.[3]

This search is misguided. As long as it continues, luck egalitarian accounts will remain indeterminate, or else they will smuggle in moral values about what people *should* be considered to be responsible for and in control of (Anderson 1999, 295–302; Fried 2003, 146).[4] But once moral values are introduced—as they must be to render a luck egalitarian account determinate—then the theory is no longer luck egalitarian, all the way down. A non-moral conception of responsibility is required for luck egalitarianism to be rendered determinate (and hence for any practical purpose, such as theorising about legal transitions). Accordingly, the salient question becomes what *ought* people to be *held* responsible for (McTernan 2016). This means that, if they are to be normatively plausible, the kinds of judgements involved in evaluating the fairness of the outcomes of people's risky choices must ultimately appeal to thick ideals embodied in social conventions (McTernan 2016), market outcomes, or 'perfectionist' theories of the good (Stemplowska 2009, 247–51)—all of which entail normative commitments outside of luck egalitarianism itself.[5] The same goes for the more specific task of developing an *ex ante* fairness based approach to legal transitions. It is this task to which I now turn.

---

[3] Some luck egalitarians have sought to draw lines based on simple lists of which aspects of a person should fall on each side of the boundary, as with Dworkin's position that we are responsible for our preferences, tastes and ambitions, but not for our talents and abilities (2000, 289–90, 322–25). But such line-drawing exercises are arbitrary and easily criticised for lacking plausibility (Scheffler 2003, 19–21).

[4] We may say that avowedly non-moral conceptions of luck egalitarianism are vulnerable to "normative encroachment" (Southwood and Lindauer 2019).

[5] Of course, some scholars sympathetic to luck egalitarianism, or responsibility-sensitivity, including those cited in the preceding sentence, are up front about that and justify their approach accordingly.

8.3 *EX ANTE* RESPONSIBILITY FOR TRANSITION RISKS: A PRACTICE-BASED APPROACH

8.3.1 *Theoretical introduction*

Accepting the necessity of a moral account, I claim that ascriptions of *ex ante* responsibility for risks of legal change should be based on an analysis of the social practices in which the relevant (at-risk) action occurs—be it investing on the stockmarket, buying a house, undertaking a course of skills training, etc.[6] Determinations of *ex ante* risk responsibility should be, in other words, conventional, or *practice-dependent*.

Two considerations motivate this appeal to practices. First, on the ecological account of self and agency I endorsed in Chapter 6.2, persons are conceived as deeply embedded in social, cultural and material structures, with which they constantly interact. Social practices (defined below) are a crucial part of the social structure in which individuals are embedded, and which both enables and constrains their agency (Frazer and Lacey 1993, 17–18). If social practices are thought to play a crucial *causal* role in shaping and explaining human behaviour, it seems plausible to attribute to such practices at least some role in *normative* moral and political theory (ibid 17–18, 180–82, 187–88). We can think of this as a 'bottom-up' motivation for appealing to practices (assuming ontology is at the 'bottom' of a normative theory). The second motivation, then, is 'top down'. In Part 8.1, above, I noted that fairness is a normative ideal that regulates *voluntary, cooperative relations*. As such, it seems right that the content of fairness should be moulded to the particularities of local practices that structure such relations. A practice-based conception of fairness, then, is the logical meeting point between these bottom-up and top-down motivations.

I adopt Haslanger's conception of social practices as:

> *patterns* of learned *behavior* that enable us … to *coordinate* as members of a *group* in creating, distributing, managing, maintaining, and eliminating a *resource* (or multiple

[6] In deferring to practices, I follow McTernan (2016), though I mean to refer to a wider notion of practices than encompassed by her "responsibility practices", and this is because allocations of *ex ante* responsibility for managing legal risks are rather more implicit in wider social practices than the more explicit practices of holding people responsible, and associated reactive attitudes, that she has in mind (see McTernan 2016, 249).

> resources), due to *mutual responsiveness* to each other's behavior and the resource(s) in question, as interpreted through *shared meanings/cultural schemas*. (Haslanger 2018, 245, emphasis added)

Among the elements emphasised in this definition (and in Haslanger's surrounding discussion), two stand out as central: social coordination and resources. First, practices *coordinate* human action by encouraging or enforcing some behavioural regularity (they have a "descriptive normativity"—I will elaborate on this shortly) (ibid 237). They do so through the semiotic concepts, scripts and meanings that comprise culture (also referred to as "cultural schemas" or "social meanings"), which set expectations about the right way for people to behave in a given context (ibid 238–40). This leads to *mutual responsiveness* among practitioners: "One performance expresses a response to another, for example, by correcting it, rewarding or punishing its performer, drawing inferences from it, translating it, imitating it (perhaps under different circumstances), circumventing its effects, and so on" (Rouse 2007, 530, cited in Haslanger 2018, 240). In this way, practices "set the stage" for human agency, enabling and constraining it by providing social roles to perform, reasons to perform them, and scripts and tools to perform with (ibid 233–36, 240–42).[7] This coordinating aspect of practices is closely connected to the notion of *social roles*: social practices determine the sets of normative and predictive expectations that constitute an agent's social roles, and the performance of those social roles (normally) reinforces those expectations, further facilitating coordination (cf. Zheng 2018, 873–75).

The second central element in Haslanger's definition is *resources*. Practices, according to Haslanger, always coordinate action in relation to resources, which Haslanger defines very broadly to mean things that have a positively (or negatively) valenced social (dis)value, be it economic, aesthetic, moral, prudential or spiritual (Haslanger 2018, 243). The social meanings that coordinate action "evolve to enable us to perceive, produce, and organize the

---

[7] In this regard, practices may involve more or less formalised rules and shape intentional and unintentional agency: "practices fall along a spectrum from explicitly coordinated behavior that is rule-governed, intentional, voluntary (e.g., games), to regularities in patterns in behavior that are the result of shared cultural schemas … that have been internalized through socialization" (Haslanger 2018, 235, footnote omitted).

resource" (ibid 243), for example by "creating, distributing, managing, maintaining, [or] eliminating" it (ibid 245).

The fact that practices, on this definition, coordinate action in relation to things of *value* (resources) helps us to understand the dual normativity of practices in a way that is helpful for my purposes with respect to legal transitions—which, after all, pertain to how some 'resource' in this broad sense should be distributed in light of its being affected by a legal change. On the one hand, as noted above, practices have what Haslanger calls a "descriptive normativity" in that they *in fact* encourage or enforce the relevant behavioural regularities (we could think of this as a kind of normativity that is 'internal' to the practice). Thus resources "have normative significance *in the context of* our practices" (ibid 243, emphasis added). For example, "[a]n ear of corn can be viewed as something to eat, as a commodity to be sold, [or] as a religious symbol" depending on the social schemas we apply to it in the context of a practice. "The different schemas not only offer modes of interpretation, but license different ways of interacting with the corn"—cooking it, shipping it, drying and hanging it to be worshipped, etc. (Haslanger 2016, 126). But the fact that practices organise social coordination around things of value opens the possibility for a second, *evaluative* (or 'external') kind of normativity that is familiar to the normative theorist (and the social critic or activist): "Practices differ in the extent to which they promote *apt* responses to what is valuable: they are problematic if they presuppose something to be valuable that lacks value, if they overestimate the value of something, or if they misconstrue how something should be valued" (Haslanger 2018, 244, emphasis added).

When it comes to the allocation of *ex ante* responsibility for managing the risks of legal change, I am ultimately interested in the first, descriptive, kind of normativity of practices. Let me state the question of interest slightly more formally:

> in some practice *P*, does agent *A* conventionally bear responsibility for managing risk *R* (in which case, the risk is *privatised*), or does the state *S* conventionally bear this responsibility (in which case, the risk is *socialised*)?

Answering this question will be a matter of *interpreting* the social practice in question, the associated social roles of the agents engaged in the practice, and the distinctive goods, ends or resources in relation to which the practice coordinates action (cf. Goldberg 2017; MacIntyre 1981, 175, 1999, 65–66; Sangiovanni 2008). Through the interpretation of practices, we avail ourselves of conventional standards against which to assess the reasonableness of the decisions agents make in relation to 'resources' that are affected by legal change. Where it is clear which practice governs some relevant decision, and the practice clearly allocates *ex ante* responsibility for managing risks of legal change one way or the other (i.e. to the agent in question or to the state), the advantages of this practice-dependent approach are greatest. Specifically, to the extent those conditions prevail, a practice-dependent approach helps to address two difficulties identified by Fried (2003) that otherwise arise when applying *ex ante* fairness considerations to legal transitions.

First, in the domain of legal changes, with their complex political aetiologies, it is difficult if not impossible to foresee the existence, let alone probabilities, of many specific future legal changes, especially those in the more distant future (ibid 140–44). Given these difficulties, it becomes harder to characterise risks of legal change as being deliberately chosen in any meaningful sense, at least in some contexts.[8] To operationalize a coherent requirement of *ex ante* prudence as our basis for transition policy, Fried argues, we therefore "need some theory about which risks are psychologically salient, such that they actually affect decision-making, and which are not" (ibid 141).

Second, because risks of legal change are often bundled in with other choices and difficult to avoid or manage, it is often hard to say categorically that the agent chose to accept the risk in the sense of taking full responsibility for the outcome, good or bad (ibid 144–46). Some activities involve risk but are not pursued for the chance of a gain, or at least not only for that purpose, and these activities may be avoidable only at high cost. Moreover, standard risk management techniques, such as third-party insurance, diversification and hedging may be

[8] Further, drawing on findings in psychology and behavioural economics, Fried argues that even insofar as a risk is objectively foreseeable, real-world agents systematically and predictably misapprehend risk and fail to behave in ways that maximise their expected utility (Fried 2003, 146–49).

unavailable or too costly. Thus, we need some theory about "what level of risk avoidance we can fairly require of people" in the name of prudence (Fried 2003, 144–45).

To these two problems, we can add a third: if a fairness-based theory of legal transitions required the state to address both of the issues raised by Fried through a particularistic, agent-by-agent analysis of foreseeability and prudence, the theory would be up to its neck in the 'Moral Costs Problem' I identified in Chapter 4.

A practice-based approach helps to address both concerns raised by Fried without resorting to the kind of particularism that raises the Moral Costs Problem. This is because there are certain *practices* in which participants generally expect certain kinds of agents with certain kinds of social roles to bear those risks (effectively, those agents are expected to be hyper-diligent about the relevant risks). At the same time, there are other practices in which it is generally expected that agents can pursue the relevant activity secure in the knowledge that the risk of bad outcomes has been socialised. In such cases, we may value the security of what we have (with no downside or upside risk) more than the opportunity costs of financing such security (Stemplowska 2009, 248–51; Williams 2006, 501–3).[9] Identifying such practices avoids the need for agent-specific, particularistic judgements about foreseeability and prudence. What I hope to demonstrate with the following discussion of examples is that appealing to clear-cut conventional practices of this kind will help to settle, in a wide range of concrete cases, the question of whether or not it is fair to let individuals bear the consequences of their durable decisions where these are affected by a legal change. The first, common example case I discuss in the next section is an example of what I take to be a clear-cut case.

Sometimes, however, the interpretive exercise will be indeterminate as to the practice of risk allocation. This could be, for example, because the practice itself is unclear or in a state of

[9] As Andrew Williams (2006, 501–3) points out, securing people's entitlements (socialising the risk of bad outcomes) has a cost which can either be (i) internalised into risky activities themselves (e.g. through compulsory insurance, or taxes on the activity), which reduces the economic liberty of those who benefit from the security or (ii) externalised onto others (e.g. through social insurance, or redistribution), which reduces the economic liberty of those others. See also Shiffrin (2004).

flux, or because the resource in question is the subject of multiple practices that yield conflicting allocations of responsibility and it is unclear which takes precedence. The second common example I discuss (in Part 8.3.3, below), is an example of this kind, and I show that the Fairness Principle can handle such cases well.

Some ambiguities in practices will be the result of conflicts between the two senses of normativity discussed above: some participants (or some external critics) will be contesting the descriptive normativity of a practice by questioning its aptness in light of other (external) schemas and norms (Haslanger 2018, 244–45). These kinds of cases—let's call them "norm conflict cases"—are likely to be particularly interesting to normative theorists, especially where a risk of legal change is conventionally socialised (implying a reason to conserve the agent's functionings) but where the relevant functionings are implicated in an 'obvious injustice' of the kind discussed in Chapter 5.2. These are the hardest cases for a practice-based approach. The third common example case I discuss (in Part 8.3.4, below) involves such a norm conflict case. I argue that the Fairness Principle, and ART as a whole, can handle them satisfactorily.

8.3.2 *Common example #1: commercial competition*

Consider first the following case involving an efficiency-enhancing legal change:

> ***Trade liberalisation****:* The government of Adaria seeks to increase efficiency by liberalising trade in numerous sectors of its economy, including the auto sector, pursuant to a Free Trade Agreement (FTA) with Beria. These countries enact the various provisions of the agreement in domestic law shortly after signing the agreement in 2017. The following agents are affected by the legal change:
>
> > ***CarCo***: CarCo is an automobile manufacturer with operations throughout Adaria. Pursuant to the entry into force of the FTA, CarCo loses various trade protections *vis-à-vis* Beria hitherto enshrined in Adarian law. Having failed to anticipate and prepare for this eventuality, CarCo can no longer compete with Beria's auto manufacturers (which have lower production costs) and its net-present value declines dramatically. It is forced to close its Adarian operations and becomes insolvent.

> ***Carmen***: Carmen owns shares in CarCo as part of her share portfolio. She incurs an economic loss (capital depreciation) when CarCo's share price falls.
>
> ***FinCo***: FinCo is a bank with operations throughout Adaria. Pursuant to the entry into force of the FTA, Beria is required to liberalise its restrictions on foreign banks. FinCo had long anticipated the liberalisation of foreign trade restrictions in the banking sector and was ready to capitalise quickly on the new market opportunities to expand its operations and grow its profits in Beria. Its net-present value and share price both appreciated significantly upon the implementation of the FTA.
>
> ***Finnegan***: Finnegan owns shares in FinCo as part of his share portfolio. He receives an economic benefit (capital gain) when FinCo's share price rises.

I take it that most readers in most countries would share my intuition that the state has a weighty reason to conserve neither CarCo and Carmen's prior position (against their losses—e.g. through compensation) nor FinCo and Finnegan's prior position (against their gains—e.g. by clawing them back through an *ad hoc* tax[10]). Moreover, I submit that this conclusion is robust to issues of timing, and hence to the questions of foreseeability (objective probability and psychological salience of the risk) identified by Fried. That is, I don't think it matters when CarCo and FinCo were established or decided to invest in their relevant sector-specific assets. Nor do I think the timing of Carmen and Finnegan's share purchases matters. *Even if* they all made their relevant decisions decades ago, well before any kind of free trade deal between Adaria and Beria was on the political agenda, I submit that the reasons not to conserve any of these agents' positions would not change.[11]

I suggest that the most powerful explanation for these conclusions lies in the nature of the social practice in the course of which these agents made their long-term decisions. CarCo and FinCo are corporations engaged in commerce in the pursuit of profit, and Carmen and Finnegan are (part-)owners of those corporations. The profit-seeking commercial

---

[10] Of course there might be other valid reasons to tax their capital gains. My point is simply that conserving their prior position in the name of fairness doesn't seem to be one of them.

[11] It is also, I suggest, robust to whether the agents were professional investors or laypersons with stock portfolios. But if they were professional investors then the conclusion would apply *a fortiori*.

competition in which these agents are engaged is a social practice the purpose of which approaches a pure, 'free market' allocative efficiency rationale. Elizabeth Anderson (2008, 249), drawing on Hayek, explains this rationale:

> The great virtue of markets is that, in giving people the freedom to use their partial, situated knowledge according to their own judgments and tastes for risk, in response to market signals, they are able to effectively utilize essentially widely dispersed knowledge for the advancement of others' interests.

Market transactions—particularly those involving long-lived assets—entail a wide variety of risks (which can here be conceptualised as probabilities of deviations in future conditions relative to expectations about those future conditions). Consumer demand, competitors' costs of production, or the weather, for example, might all turn out to be different from what was expected, and markets reward those who take and prudently manage these and other relevant risks with superior returns. Being an excellent capitalist, then, entails a very high standard of epistemic agency in general, such that it would be contrary to the very purpose of markets for governments to counteract market transactions on the basis that a particular risk was difficult to foresee, *ex ante*. According to Hayek (1982, vol. 2, 125, footnote omitted):

> The whole [market] system rests on providing inducements for all to use their skill to find out particular circumstances in order to anticipate impending changes as accurately as possible. This incentive would be removed if each decision did not carry the risk of loss, or if an authority had to decide whether a particular error in anticipation was excusable or not.

This incentive may explain why it is contemporary business practice in many jurisdictions for changes in law and policy (often referred to as "policy risk") to be characterised as everyday business risks that owners of capital should factor into the risk-return analysis (see, e.g., UNCITRAL 2001, 141). These are the standard descriptive-normative and predictive expectations that apply among players in the game of commercial competition.

Commercial competition also shares certain features with the gambling casino. Like gamblers, business corporations and their equity holders typically voluntarily assume the risk of losses as the *quid pro quo* of the chance to benefit. Furthermore, like the gambling casino,

these risks are relatively 'pure' in the sense of not being inextricably bundled up with other choices that are difficult to avoid. Moreover, in line with the capital-intensive and highly voluntary nature of business ventures and stockmarket transactions, the agents engaging in these activities are conventionally expected to achieve their preferred risk position through their own actions (e.g. diversification, hedging, or third party insurance where available).

Assuming these considerations accurately reflect commercial practice in the relevant jurisdictions, it seems reasonable to view the decisions of our hypothetical agents in *Trade Liberalisation* as an "implicit bet about the future" (Shaviro 2000), which CarCo and Carmen lost, and FinCo and Finnegan won, with the corresponding implication that the state has a strong fairness-based reason to let these losses and gains lie where they fall. The Fairness Principle therefore correlates with and powerfully explains our intuitions in this case (desiderata #3 and #4).

In *Trade Liberalisation*, the social practice in question is the most important feature. The fact that two of the agents are corporations and two natural persons does not matter so much to the outcome. But it does not follow that the distinction doesn't matter at all; it does matter, and in some cases it will matter decisively. That is because different standards of reasonableness with respect to the foreseeability and management of legal risks conventionally apply to different *kinds* of agents, too, given their different social roles in the context of practices. In addition to the fact that business corporations operate in market contexts for the pursuit of profit (like natural person shareholders), corporations have certain legal and structural privileges (such as limited liability for shareholders) that enable them to manage risks in pursuit of profit effectively and efficiently at scale, including by raising large sums of capital. Their function, structure, and capital-raising abilities enable corporations to avail themselves of capabilities to both anticipate (via governmental relations staff and lawyers) and manage (via diversification, hedging and insurance) legal risks to their business. This, I submit, provides a further reason why it is reasonable to hold corporations responsible for anticipating and managing risks of legal change in a strong *ex ante* sense, and hence a fairness-based reason against conservative transition policy for corporations (see also

Kaplow 1986, 549–50, 2003, 186; Logue 2003, 212).[12] In other words, an interpretation of the practice of commercial competition yields general reasons to hold corporations to higher standards of *ex ante* responsibility for managing risks of legal change than natural persons, all else equal.

8.3.3 *Common example #2: residential property*

Now consider the following case, involving only natural persons and in the context of residential housing:

> ***Rail Link**:* In 2017 the government decides, on the basis of a cost-benefit analysis, to build a high-speed rail link between two large cities (assume the rail extension is both efficiency-enhancing and aggregate welfare-enhancing). Accordingly, it passes the *Rail Extension Act*, enabling it to rezone land, compulsorily acquire property lying in the rail corridor, and otherwise construct and complete the rail link. The following agents are affected by the project:
>
> > ***Millie***: Millie is an average, middle-aged, middle class citizen. She bought her first and only property in 1997—well before there was any politically salient discussion of a new rail link—in the then quiet, residential suburb of Suburbia. Millie conducted standard due diligence before her home purchase and this revealed no risks of major infrastructure works in the area. Millie's home turns out, 20 years later, to be right next to the rail corridor (but not close to any of the new railway stations). Its value drops significantly due to the increase in noise from construction and operation of the rail link, and Millie incurs a corresponding capital loss on her property investment (but remains in her home and remains middle class and easily able to meet all her basic needs).
> >
> > ***Morris***: Morris is an average, middle-aged, middle class citizen who bought his home at the same time, under the same circumstances (including the same level of due diligence) as Millie, albeit in a different part of Suburbia. Morris' home turns out, 20

[12] This is an additional reason to the fact that corporations cannot meaningfully be said to have wellbeing (or corporate wellbeing, if meaningful, is not normatively significant), which I discuss in Chapter 10.1.3.1.

> years later, to be 300 metres' walk from where one of the new stations on the rail link will be built—just far enough away to avoid the noise and inconvenience of its construction and operation, but close enough to add greatly to his convenience and quality of life once the rail link is operational. Morris receives a corresponding capital gain on his property investment (but remains middle class).

Millie and Morris did standard due diligence and yet there was no indication of the prospect of such a dramatic zoning law change resulting in such a shift in their respective property values. Accordingly there is clearly a sense in which that risk was too remote to be psychologically salient to a reasonably prudent consumer, and this might be thought to provide a fairness-based reason to conserve their prior position (e.g. through some compensation). But there is another sense in which this risk, though remote, is precisely the kind of risk that we expect home owners to bear; the fact that "standard due diligence" did not reveal the risk of the rail link 20 years later is not dispositive. As we saw in *Trade Liberalisation*, there are some contexts in which agents should bear the risks of legal change even when these are not foreseeable. Houses are traded on markets and have an exchange value, which is subject to a wide range of risks. It is conventional in many parts of the world to expect home-buyers to assume many of those risks, even if they cannot identify all of them precisely, let alone their precise probabilities. Anderson's and Hayek's points about market incentives do resonate somewhat in the home purchase cases, too.

But there are also some key differences between the home purchase cases and *Trade Liberalisation*. Critically, secure housing typically plays an important role in people's most central generic and particular functionings, as I discussed in Chapter 7.2.[13] To the extent it does so for a given agent, this matters in its own right for the purposes of the Wellbeing Principle (as I argued in Chapter 7). But facts about the role that certain goods *conventionally* play in people's lives will also affect social practices concerning the level of risk

[13] One might object that home *ownership* is not necessary for secure housing. This is likely to vary from society to society: in some countries, for example, the ready availability of secure, long-term leases may militate against the state promoting or providing special protection (including in respect of legal transitions) to first home-ownership. But this only highlights the value of a social practice-based approach to allocating responsibility.

management/avoidance that it is reasonable to expect of people in respect of those goods (O'Neill and O'Neill 2012, 11–12; Wolff and De-Shalit 2007, chap. 3).

When one buys a house to live in, one is not only making a risky financial investment but also acquiring a secure place to put down roots, from which to form and maintain family and social relationships, work, and pursue other projects of value to them. For most people in most parts of the world, this kind of stability and security reflects a strongly culturally-valued form of life. Because secure housing is, if not strictly a precondition, at least highly conducive to these other important dimensions of wellbeing, it is also conventionally valued as a basic entitlement, "gateway social good" (O'Neill and O'Neill 2012, 11; O'Neill 2006, 578–80), basic right,[14] or human right (OHCHR/UNHABITAT 2009). This security would be undermined if we simply applied to home-owners the free market approach to the management of legal transition risks, since doing so would place them under considerable pressure to constantly inquire into and manage the risk of losing the value of their homes as a result of future legal changes. As Cohen says, in favour of conserving existing things that people value: "We cannot keep everything 'under review.'" (Cohen 2011, 223, footnote omitted). In any case, one cannot easily unbundle these other values from the upside and downside financial risk aspects of a property purchase, and self-managing the risk of legal change to the value of one's home is, for most people at least, difficult: one's home is a costly and lumpy asset, often the most valuable asset a person owns, which complicates diversification or hedging strategies; and third-party insurance against risks of legal change is rarely available (Kaplow 1986, 593–96; Shavell 2014; Shaviro 2000, 40–42).

Residential housing is, then, a token case of the category identified earlier in which a resource is subject to multiple practices that seem to imply conflicting approaches to risk allocation. Putting the situation in Haslanger's terms, the resources at stake in a residential housing market are subject to multiple social practices involving different cultural schemas, which licence different ways of interpreting and interacting with those resources: houses have an

[14] Freeman (2011, 31–32) interprets Rawls' views on property (1999, 53–54) as implying that "ownership of one's residence and personal belongings is necessary for individual independence and privacy" (Freeman 2011, 32).

exchange value subject to market practices, but also have multiple, richer forms of use value as typical constituents of people's central particular functionings, and publicly recognised generic value as part of a flourishing life generally (see also Radin 1982). By contrast, the resources implicated in commercial competition—most notably stock values and business asset values (e.g. commercial land, plant and equipment)—have only, or at least overwhelmingly, exchange value.

Despite—or perhaps because of—these conflicting practices, it will often be the case that there is a *more specific* practice governing the allocation of responsibility for risks of legal change that can be identified through interpretation. For example, there may be a practice governing risks of *particular kinds of legal changes* to property and/or risks of legal changes affecting *particular incidents* of property. In fact, what we do see is a widespread allocation of *some* such risks to the state, even in the more economically liberal Anglo-American jurisdictions with which I am familiar. Specifically, we see the widespread use of constitutional immunities from uncompensated 'takings' or 'acquisitions' of property (e.g. Fifth Amendment to the US Constitution; Australian Constitution, sec. 51(xxxi)) and of 'existing use' / 'nonconforming use' provisions in zoning/planning regulations (which grandfather previously lawful property uses that, following an amendment, would otherwise no longer comply).

The practices just mentioned only protect against certain kinds of legal risks to certain incidents of property: they provide *immunity* against *takings/acquisitions*, and *permit* existing non-conforming *uses*. They do not necessarily protect against other risks, such as risks to the *financial value* of property.[15] This may suggest the presence of a practice of allocating such other risks *to the owners* of property. Indeed, this way of thinking about 'conflicting practice' cases is consistent with the idea that a society may have a *general practice* according to which responsibility for the risk of legal change is allocated to the agent (or, in theory, to the state), but that this 'default rule' may be displaced by more specific practices, as with takings

[15] Though, on some philosophical and jurisprudential theories of takings, they do. For an overview and critical analysis of such theories, see Wenar (1997).

and non-conforming use provisions for property in the jurisdictions mentioned above, where the risk is conventionally allocated to the state.[16]

This general practice concerning responsibility allocation for risks of legal change we might think of as an element of the set of *citizenship practices* that obtain in a polity (cf. Waldron 2012, 84). Any advanced political system has a set of social practices concerning the rights, duties and ethos of citizenship, a subset of which pertains to citizens' critical engagement with the state and its laws. As we have seen, different political theories embody different normative ideals about citizenship and make different empirical assumptions about social circumstances and individuals' general capacities for more or less active forms of citizenship. Recall, for example, that classical liberals conceive of the good life as being fulfilled exclusively or primarily in the private sphere, and citizenship is imagined as a shield against state interference, so people cannot reasonably be expected to engage in critical reflection about the law (see Chapter 2.3.2). The republican tradition, by contrast, has a much more active conception of citizenship (see Leydet 2017, sec. 1.2), and this might be thought to entail a general expectation that citizens will critically reflect on and engage with matters of legal change.

On the ecological conception of the self and agency that I endorsed in Chapter 6.2, the expectations of citizenship will be driven by particular social structures and practices. It is, on this view, a genuinely open question as to the degree of civic engagement with questions of legal change that citizenship requires.[17] We can therefore legitimately look to the citizenship practices of a relevant society to ascertain general benchmarks for reasonable foresight and prudence when more specific practices are unclear, contested, or conflicting.[18]

---

[16] This interpretive rule is analogous to the legal doctrine *lex specialis derogat legi generali* (the more general law must give way to the more specific law).

[17] In principle, an ecological self is imagined as potentially exercising a mix of more-'private' and more-'public' functionings across a range of more or less public social practices.

[18] For those inclined normatively toward a more active conception of citizenship as a normative ideal, this appeal to practices might seem disappointing. But nothing in my theory denies that states ought to cultivate more active citizenship practices over the long run as a matter of primary policy. My appeal to conventional citizenship practices to resolve difficult cases of legal transitions should, rather, be understood as an acknowledgement of the limits of what can be expected of people in the short run when people are understand 'ecologically'—as constituted by their distinctive identities and social roles; as practitioners of social practices.

At least in the Anglo-American jurisdictions just mentioned—but also, I suspect, much more widely—I think it is fair to say that there is a general citizenship practice of allocating responsibility for the risks of legal change to the individual, meaning this can be considered as a kind of 'default' rule, albeit one that is overridden where there is a more specific practice involving the allocation of risks to the state.[19]

Returning to *Rail Link*, then, the brief survey of relevant responsibility practices in Anglo-American jurisdictions suggests that, if our hypothetical rail link were situated in a country like the US, Canada, Australia of the UK, the risk of the relevant legal change would be allocated to the households in question since there has been no taking[20] and existing uses have not been affected. (If this seems harsh on the losers, remember that the Wellbeing Principle also provides reasons for transitional responses, which may militate in favour of adaptive assistance: see Chapters 7 and 9.) But the point is that the social practice approach to risk responsibility directs us to have regard to what is conventional social practice in the relevant jurisdiction. In some jurisdictions, market approaches to managing such risks will be prevalent in housing systems. In others, solidaristic approaches that provide greater security, with less economic freedom, will be more prevalent.[21] And in cases of conflict, general citizenship practices may provide a default position.

It recognises that there is something normatively problematic about requiring people to live up to ideals and obligations that they have not had a reasonable opportunity to internalise, or whose internalisation has been thwarted by countervailing cultural, economic or political forces, as critically-minded civic republicans have recognised (Laborde 2008; White 2003).

[19] Again, I am assuming for now legal changes occurring under conditions of relative equality (including legal changes affecting similarly situated agents). Under such conditions, a default rule allocating responsibility to citizens has the further attractive quality of minimising the transaction costs of transitions (i.e. it will be more efficient than case by case redistribution), yet without compromising the distribution of wellbeing, since any serious wellbeing concerns will be picked up by the Wellbeing Principle (cf. Rawls 1971, 355). Under relative equality, it is also reasonable to expect that small wellbeing losses and gains from particular legal changes will cancel out over time (cf. Chapter 3.4.3.1). For this reason, my scheme is likely to be attractive to relational egalitarians (Anderson 1999, 2008; Scheffler 2003).

[20] At least, not on an ordinary language understanding of a taking—as to which, see Wenar (1997).

[21] Where the value of security is especially important, compulsory or state-provided insurance schemes can provide this function (O'Neill and O'Neill 2012, 11–12), and will often do so more effectively (e.g. if a formalised system is perceived to be more credible) than *ad hoc* approaches to legal transitions.

An important caveat is warranted here. I am *not* claiming that one should be neutral, as a matter of *ideal primary laws/policies*, between a fully marketised approach to housing (or any other resource, for that matter) or a more socialised or 'solidaristic' model, for I am not endorsing a thorough-going practice-based model of political morality. Rather, my appeal to practice is more limited: I am only defending the appeal to practices as part of a conception of *fairness*, and I do not think fairness is exhaustive of relevant considerations in the philosophy of public policy generally or legal transitions in particular. Moreover, as I noted in Part 8.1, fairness is paradigmatically applicable to conditions of relative equality among the mutually-interacting parties. Under such conditions, deferring to the 'internal' normativity of practices is likely to be unproblematic from the perspective of 'external' normativity. I consider more problematic, 'norm conflict' cases in the next section.

8.3.4 *Norm-conflict cases and the limits of fairness*

Let us conclude this discussion of example cases by considering some 'hard cases' for the practice-based approach. Consider a different case involving housing, in which social cooperation occurs in a context that is far from equal, giving rise to a 'norm conflict' in the sense discussed in Part 8.3.1:

> ***Segregated Housing***:[22] the government of Attica (at t_1) operates a system of racial segregation concerning access to important public services, including housing. Via zoning regulations, the best areas of land are reserved exclusively for whites and the worst exclusively for blacks (many mid-range areas are not racially segregated). It is also conventional practice to grandfather existing land uses when zoning laws are changed. Racial tensions within the country are highly salient, with the opposition Attican Black Congress Party (ABCP) campaigning, through formal channels and widespread protests, to end housing segregation and redistribute the best areas of land to oppressed black persons via changes in the zoning law. Though party officials make no explicit comment about grandfathering non-conforming uses, it is obvious that any such grandfathering would thwart the purposes of their reform. Two years later (at t_2) the ABCP wins an historic election victory and

[22] This example is based on a similar one constructed by Alex Brown (2017, 81–84)—the seed for which, according to Brown, was planted by Matt Matravers—involving the van Arks, which I discussed in Chapter 5.

immediately implements its proposed housing reforms. The following agents are adversely affected:

> ***The Whites***: Mr and Mrs White are affluent (middle-upper class), white citizens of Attica. They purchased a plot of land in a greenfields development, at t_1, in an area zoned white-only and set about procuring the construction of a house on it that would come to be their new home, moving in one year later. A further one year later (at t_2) the region in which their property is located is rezoned as black-only, and their existing use is not grandfathered. They have no choice but to sell their property. Given the changes in zoning, the best price they are able to get for their house (by selling it to a lower-middle class black family) is a fraction of their initial investment. Given the blow to their stock of wealth, they can now only afford to buy a modest property in a lower-middle class area.

In this case, there was an established practice of grandfathering existing uses, but the 'internal' normativity of this practice, insofar as it applies to *racially segregated* uses, was obviously unjust by 'external' normative standards of non-discrimination in access to gateway social goods. Now, recall from Chapter 5 that one of the strengths of an ideal-justice (basic duties) based approach to legal transitions is it provides a straightforward basis for rejecting any claim for transitional assistance by the perpetrators of 'obvious injustice'. For those inclined to think the Whites deserve no assistance, on grounds of the obvious injustice in which they are implicated, this path is likely to be appealing. But recall that part of my criticism of the justice-based approach is that it is *too* straightforward, in the sense that it is unable to deal well with greater factual complexity. We could tweak the facts of *Housing Segregation* above to make it less clear-cut along various dimensions—for example, the extent of discrimination, the political salience of the discrimination, the Whites' degree of control over their decision (ability to buy a home elsewhere), and so on—until our intuitions conflict, and we have to concede that 'obvious injustice' is a vague and indeterminate concept. In any event, by ultimately rejecting such an approach, I have forsaken this path to determining the present case. What is an easy case for an ideal-justice-based principle of legal transitions is a harder case for my practice-based Fairness Principle. Nonetheless, I think that ART *as a whole* can cope well with such cases.

As background social conditions become increasingly unequal, the paradigmatic conditions of application of the Fairness Principle become correspondingly attenuated, making it less plausible to characterise social relations as voluntary and cooperative (see Part 8.1). In cases like *Housing Segregation*, part of the explanation of the norm conflict is that background social conditions are so unequal. Under such conditions, the ideal of fairness has limited applicability—we have little reason to appeal to the *internal* normativity of social practices—and therefore the Fairness Principle simply *doesn't* yield strong reasons for one kind of transition policy or another (conservative or reformative). The Fairness Principle, remember, provides that fairness-based reasons for conservative or reformative transition responses are to be *weighted* in proportion to the degree of responsibility the state or the agent, respectively, is deemed to have had in the relevant case. If the conditions of application of fairness itself are attenuated, then so must be the reasons generated by the Fairness Principle. Consequently, in such cases the appropriate transition policy will tend to be more sensitive to the reasons supplied by the Wellbeing Principle (see Chapter 9). Since the Wellbeing Principle has strong (albeit indirect) resource-egalitarian implications (see Chapter 10.1.1), it is fitting that it play a more dominant role in unequal societies.

Thus, in *Housing Segregation*, the Fairness Principle provides only weak reasons one way or the other, which rules out both strongly conservative and strongly reformative responses (see Chapter 9). The most appropriate transitional response to the Whites will rather be dictated by the effects of the transition on their wellbeing. For reasons discussed in Chapter 9, this should be limited to the provision of time and resources necessary to successfully adapt to the new conditions, which in their case seems unlikely to be too much, given their existing wealth (a key component of their "adaptive capability", which I discuss in Chapter 9.3.1).[23]

[23] Moreover, as I discuss in Chapter 9.3.2.1, for a reform as significant as that contemplated here, the procedures required (independently of ART) by the rule of law themselves have the effect of dilating the time for adaptation and increasing the information available to people like the Whites (and hence their adaptive capability).

8.4 CONCLUSION

In this chapter I have specified and discussed the second of my two principles of ART, the Fairness Principle, and endorsed a more specific ideal of fairness concerned with the *ex ante* allocation of responsibility for managing the risk of legal change. After rejecting the non-moral luck egalitarian approach to the allocation of this kind of responsibility, I specified, illustrated and defended a practice-based alternative. I argued that this conception of fairness, by piggy-backing on the internal normativity of concrete practices of responsibility allocation, provides plausible and relatively determinate reasons for conservative or reformative transitional responses (holding constant the wellbeing implications of a legal change) while avoiding the pitfalls and moral costs of particularistic foreseeability and prudence judgements rightly identified by Fried. I also discussed plausible interpretive responses in cases involving conflicting practices, highlighting the importance of general citizenship practices as providing a 'default rule' that specific practices may overturn.

I cautioned, however, that the plausibility of the reasons generated by the Fairness Principle holds only to the extent that the conditions of application of the underlying ideal of fairness also hold. Effectively, the strength of the reasons generated by the Fairness Principle will be attenuated as the cases in question move away from the paradigm of voluntary social cooperation under circumstances of relative equality. When the Fairness Principle's conditions of application hold, the marginal strength of the reasons generated by the Wellbeing Principle will be greater, and cases will tend to be more sensitive to the effect of legal changes on wellbeing, in the sense specified in Chapters 6 and 7. The two principles, in this way, are complementary.

This does not mean that the two principles will always point in the same direction. Sometimes they will, and sometimes they will not. What remains is for me to develop a theoretical account of how, exactly, the state should respond to the reasons generated by the Fairness and Wellbeing Principles, considered together. It is this task to which I now turn.

CHAPTER 9. STATE RESPONSES: THE CRUCIAL ROLE OF ADAPTIVE TRANSITION POLICY

9.1 INTRODUCTION

I have now set out two 'vectors' of reasons about legal transitions: one based on wellbeing, and the other on fairness. It remains for me to show how different potential combinations of these reasons in a given case justify a particular transition policy response from the state.

As we saw in the first half of the thesis, most discussions of transition policy gravitate toward one end of the transition policy spectrum or the other; toward the conservative or reformative "corner solutions" (Shaviro 2000, 3). I consider these extreme possibilities in this chapter, but less attention has been paid in the existing literature to the gradations in between these extremes. Responses falling in middle part of the spectrum can best be described as *adaptive*. The aim of adaptive transition policy is to facilitate the agent's successful adaptation to the circumstances prevailing under the new legal regime. In this sense, an adaptive response is neither fully conservative, nor fully reformative. It is not fully conservative, since it presumes that the agent must change. It is not fully reformative because it presumes that the state has a role to play in facilitating that change, and this role may include providing for a measure of stability to one's existing functionings. I decompose adaptive policies into two subcategories: procedural and substantive. Roughly (for now), procedural adaptive policies include measures such as notice periods, information campaigns, consultation processes, and deliberative and participatory processes. Substantive adaptive policies include a wide range of measures ranging from conditional cash transfers to public goods provision, and also include expressive acts (such as respect, recognition, acknowledgement etc.).

This classificatory scheme yields a typology of four broad categories of transition policy that I will use throughout this chapter: conservative; adaptive (substantive); adaptive (procedural); and reformative. In the remainder of this chapter, I outline and defend the conditions under which each kind of response is most appropriate, i.e. best supported by the combination of reasons generated by the Wellbeing and Fairness Principles. Where applicable, I engage with existing literature on state responses to transitions. In Part 9.2, I

discuss conservative transition policies, which I take to include grandfathering and compensation (I focus on losers, but discuss winners briefly at the end of Part 9.2). Since this is where the existing literature has focused, I discuss others' proposed justifications for such policies and defend my own, 'instrumental' justification in terms of wellbeing and fairness. In Part 9.3, I discuss adaptive transition policy (which is applicable to losers only). I describe what I mean by successful adaptation and explain the key variables influencing the success of an agent's adaptation to the loss of a given central functioning (time and 'adaptive capability'). I then consider the specific adaptive policies that states should take, in light of the balance of reasons generated by the Wellbeing and Fairness Principles. Reformative transition policy is, on my scheme, justified residually, i.e. where the reasons for conservative or adaptive transition policy are lacking (see Part 9.4).

The most appropriate transition policy responses for transition losers, as defended in this chapter, are summarised in schematic, binary form (in reality, these are vectors) in Table 1, below.

Table 1: Schematic representation of most appropriate transition policy responses for losers

Fairness Condition **Wellbeing Condition**	***State has ex ante risk responsibility***	***Individual has ex ante risk responsibility***
Ex post impact on peripheral particular functionings only	Adaptive (procedural)	Reformative
Ex post impact on central particular functionings	Conservative	Adaptive (substantive)

The most appropriate transition policy responses for transition winners are summarised in schematic, binary form in Table 2, below.

Table 2: Schematic representation of most appropriate transition policy responses for winners

Fairness Condition **Wellbeing Condition**	***State has ex ante risk responsibility***	***Individual has ex ante risk responsibility***
Ex post impact on peripheral generic functionings only	Conservative (stronger)	Reformative (weaker)
Ex post impact on central generic functionings	Conservative (weaker)	Reformative (stronger)

9.2 CONSERVATIVE TRANSITION POLICY

9.2.1 *Grandfathering*

9.2.1.1 Kinds of grandfathering

A grandfather clause is defined as "an exemption from, or relaxation of, regulatory requirements, allowing actors to continue an activity following an institutional change that either legally prohibits or regulates the activity for others" (Damon et al. 2019, 25). The term has also come to be used in relation to statutory property markets such as tradeable permit or quota schemes for environmental resource use: if permits are allocated freely rather than auctioned, there must be an allocation rule; an allocation rule according to which permits are allocated based on past usage of the relevant resource has come to be referred to as grandfathering (ibid 25).

Philosophical discussion of grandfathering has been focused mostly on the allocation of greenhouse gas emissions entitlements in the context of international (and, to a lesser extent, domestic) climate change law and policy. Most philosophers who have discussed emissions grandfathering have rejected it (L. H. Meyer and Roser 2006, 229*ff*; Moellendorf 2009; Roser and Seidel 2017, chap. 11). However, certain moderate versions of the principle have attracted qualified support (Bovens 2011; Knight 2013, 2014; Schuessler 2017). Before exploring the normative justifications provided by the latter group of scholars, it is necessary to understand the various senses in which the grandfathering they endorse is moderate and qualified. To do so, I must introduce some distinctions, which will also be helpful for the subsequent discussion of other transition policies.

First, one's prior legal position could be grandfathered to a greater or a lesser *degree*. In fact, there are two senses in which this is the case: the full extent of one's prior position could be grandfathered (*full grandfathering*) or only part of it (*partial grandfathering*); and the grandfathering could be *permanent* or *temporary* (Knight 2013, 412–13; Schuessler 2017). The question of partial vs full grandfathering is particularly pertinent to activities undertaken by an agent that yield a variable flow of valuable goods, like uses of common pool resources

(e.g. fish catches, or grazing on common land), or polluting activities[1] (e.g. yielding variable flows of greenhouse gas emissions).[2] The potential for partial and temporary grandfathering means grandfathering is not an inherently 'conservative' transition policy: full and permanent grandfathering is the most conservative policy possible, but the more partial and temporary grandfathering becomes, the more appropriate it will be to classify it as an adaptive response rather than a conservative one.

The second distinction concerns the *relationship* between the grandfathering claim and the normative considerations that purportedly justify such a claim.[3] The strongest relationship is one in which the relevant normative considerations logically entail grandfathering (a *necessary relationship*). The second kind of relationship is a contingent, *instrumental relationship*, according to which grandfathering is justified because and to the extent that it promotes another value (Knight 2013, 415–16). The forms of justification for the transitional responses I discuss in this chapter posit an instrumental relationship in this sense.

The third and final distinction concerns the *weight* of a grandfathering claim vis-à-vis any other admissible normative considerations that bear on the all-things-considered decision about transition policy. Knight (2013, 411–12) distinguishes three positions in relation to the specific case of greenhouse gas emissions, which can be generalised as follows: the grandfathering claim has absolute or determinative weight, i.e. it is the sole or lexically prior normative consideration (*absolute weight*); the grandfathering claim provides a *pro tanto* reason (*moderate weight*); or the grandfathering claim is a tie-breaker, applying only when all other considerations are equal (*marginal weight*) (cf. Knight 2013, 411–12).[4] We can also

---

[1] Flows of pollutants can be re-described in terms of resource usage: we can conceive, metaphorically, of a pollutant sink as a common resource that is 'used' by polluting it (see, e.g., Bovens 2011, 129).
[2] Variable historic flows and uses raise a further difficulty: how to determine the baseline level of flow or use that would count for the purposes of 'full' grandfathering. For a useful discussion of this issue, see Knight (2013, 413–14).
[3] See Knight (2013, 414–16) for a discussion of similar distinctions to which my account is indebted.
[4] Knight's (2013, 411–12) account of these distinctions, to which my own is indebted, is substantively equivalent but uses slightly different terminology—*strong claim*, *moderate claim* and *weak claim*, respectively.

understand the 'moderate weight' category in terms of a spectrum of more or less weighty *pro tanto* reasons.

The three sets of distinctions are related, in that the justified degree (extent and duration) of grandfathering depends on the other two sets of distinctions. The degree of grandfathering could be 'internally' limited by the underlying normative considerations that purport to justify grandfathering (the second distinction), or it could be 'externally' limited by other normative considerations as part of an all-things-considered decision about appropriate transition policy, assuming the normative consideration purportedly justifying grandfathering does not have absolute weight (the third distinction) (Bovens 2011, 136–44; Knight 2013, 413).

In the remainder of this section, my interest is in seeing whether there is any plausible justification for full and permanent grandfathering (or something close to it).

9.2.1.2 Necessary grandfathering

The surest route to such a conclusion would be to identify a normative consideration that logically entails grandfathering (what I referred to above as a 'necessary relationship') and that has absolute weight relative to external considerations. Deontological constraints would be the most likely candidate to fit this bill. I have considered various possible deontological approaches to legal transitions throughout this thesis: libertarian natural property rights; justice; and (on some views) legitimate expectations. However, I argued that all such theories should be rejected (with the exception of a special rights-based version of legitimate expectations, which I argued will rarely apply to legislative transitions and is in any case not really a theory of legal transitions—see Chapter 4.3). It is notable that the one scholar who has argued for necessary grandfathering on Lockean natural property rights grounds (Bovens 2011) advocates only partial and temporary grandfathering due to a combination of 'internal' and 'external' considerations. As such, that argument is better categorised as a claim for an adaptive response, albeit one based on different reasons from those that I advance in Part 9.3.2, below. I conclude that there is no good theory of legal transitions that would necessarily entail strong (full and permanent) grandfathering.

9.2.1.3 Instrumental grandfathering

There is a theoretically possible instrumental route to full and permanent grandfathering: if normative consideration *X* is best promoted by full and permanent grandfathering, and this consideration outweighs other, countervailing normative considerations, then full and permanent grandfathering will be the most appropriate response so long as consideration *X* and its superior weight obtain (cf. Knight 2013, 413).

Neither of the remaining proponents of grandfathering (Knight and Schuessler) support full and permanent grandfathering. Rather, both support partial and temporary grandfathering—which I think are better conceived as "adaptive" transition policies (see Part 9.2.2.3, below)—on instrumental grounds. Coincidentally, both Knight (2013, 2014) and Schuessler (2017) provide a fairness (albeit luck egalitarian) argument for instrumental grandfathering and Knight also provides welfarist (utilitarian, egalitarian and sufficientarian) arguments.

My own conclusion about grandfathering is in broad agreement with both Knight's and Schuessler's: considerations of wellbeing and fairness can provide *pro tanto* reasons for grandfathering on instrumental grounds. Those reasons will sometimes justify a partial and temporary form of grandfathering as an adaptive response. It follows from the Wellbeing and Fairness Principles, however, that a more complete and durable form of grandfathering could in principle be justified where weighty fairness *and* weighty wellbeing considerations point in the same direction.[5] In Chapter 8, I accepted the possibility that in some contexts the state should be deemed *ex ante* responsible for managing certain risks of legal change in respect of some agents. Where this is the case, it seems to follow that a more or less conservative response is warranted. Among the relevant class of persons who lack *ex ante* risk responsibility for this reason, a more conservative response is warranted in respect of those *individuals* whose wellbeing has been very adversely affected, in the sense that they would otherwise lose more central particular functionings. At the limit, this would entail full and

[5] Knight (2013, 413) acknowledges that the weight of welfare considerations could in principle instrumentally justify permanent grandfathering. We agree that this will be unlikely in practice. My point is that combining such reasons *with fairness considerations* (where *ex ante* risk responsibility is clearly assigned to the state) strengthens the justification for a relatively conservative form of grandfathering.

permanent grandfathering. For reasons I discussed in Chapter 6.2 concerning people's natural rates of change and adaptation to new circumstances, I doubt that the wellbeing impact could ever justify this limit case in practice. However, I think it quite plausible that a *relatively* conservative (i.e. close to full and long-lived) form of grandfathering could be justified in particular cases where both wellbeing and fairness reasons are sufficiently weighty. That said, I suspect that such combinations will tend to be rare in practice, in light of the conception of wellbeing I adopt and my anecdotal knowledge of facts about actual practices of *ex ante* responsibility allocation for risks of legal change.

Of course, there are certain kinds of primary legal change, and certain effects that such changes have on people, for which grandfathering is not a viable option because it would thwart the purpose of the primary legislation to an unacceptable degree. Examples include: existing land-uses that are fundamentally incompatible with the new zoning classification (as is often the case with major infrastructure projects, which necessitate the property being acquired to prevent existing uses or to demolish existing structures); and the loss of skills and jobs in industries that are effectively wiped-out by pressing environmental and public health and safety regulations. In these and other cases, we must turn to consider compensation as an alternative (putatively) conservative response.

9.2.2 *Compensation*

In the context of legal transitions, the most commonly discussed—indeed, often the *assumed*—transitional response is "compensation". The term has a broader and a narrower usage. According to the broader usage, compensation means any form of monetary payment by the state to an agent adversely affected by a legal transition. On the narrower usage, compensation means a monetary payment by the state to an agent adversely affected by a legal transition, where the payment is *justified by conservative reasons*. In this part of the chapter, I am interested in the narrower usage.

Specifically, I am interested in two kinds of conservative reasons, which align with the justificatory strategies discussed above with respect to grandfathering. On the first of these, compensation is a *corrective* remedy awarded in respect of violation of a *right*. In that case, compensation is logically entailed by (i.e. has a 'necessary relationship' to) the underlying

normative reason. I will call this *corrective compensation*. On the second, compensation is instrumentally justified because and to the extent that it promotes other values, where such values are themselves conservative ('backward looking') in the sense of restoring some feature of the *status quo ante*. Conserving an agent's wellbeing (particular functionings) prior to a legal change-induced loss is a conservative value in this sense. I will call this *instrumental compensation*. I consider each strategy in turn. I then clarify the objective of compensation that follows from the position I advocate, which leads me to a surprising conclusion about the limited role of compensation in ART.

9.2.2.1 Corrective compensation

Corrective compensation has familiar analogues in private morality and private law (e.g. tort, contract and property). In the realm of legislative transitions, however, the plausibility of corrective compensation turns on the existence of a right to the legal status quo, enforceable against the state. I considered three possible rights-based justifications for grandfathering: natural property rights; ideal justice (basic rights); and legitimate expectations (*qua* rights-like normative claim). If one of these provided a good basis for a theory of legal transitions, then it could ground a 'second-best' argument for corrective compensation: if there were independent reasons why grandfathering was not possible, practicable or otherwise desirable, but the legal change were to proceed anyway, the relevant right would be violated, and compensation would be necessary to correct that violation. However, I rejected all three bases for a theory of legal transitions (and hence as reasons for grandfathering). Accordingly, the second-best argument for corrective compensation also fails.

9.2.2.2 Instrumental compensation

The second-best argument does, however, work as a justification for instrumental compensation. Instrumental compensation is justified where (i) the coincidence of wellbeing and fairness reasons justifies conservative (relatively full and permanent) grandfathering of losers' prior positions (see Part 9.2.1.3, above) *but* (ii) grandfathering is impossible, impractical or otherwise undesirable (e.g. it would excessively thwart the purpose of the

primary legal reform).[6] Accordingly, the argument I made in respect of instrumental grandfathering in the penultimate paragraph of Part 9.2.1.3, above, applies, *mutatis mutandis*, in respect of instrumental compensation, subject to the addition of condition (ii), discussed in the final paragraph of Part 9.2.1.3.

9.2.2.3 The objective of compensation

A clarification is warranted concerning the objective of the instrumental compensation I envisage. It is helpful to introduce a distinction defended by Bob Goodin (1989) between *means-replacing compensation* and *ends-displacing compensation*. Goodin argues that there is a difference between losing something—like money, or goods that can readily be acquired on a market—that are merely replaceable means to our ends, and losing something that, for one reason or another, is irreplaceable. In the former case, compensation can replace what has been lost such that the person can genuinely be left no worse off than they were (or otherwise would have been) without the loss, or at least very close to it; it is means-replacing. In the latter case, since the relevant object *cannot* be replaced, compensation can at best give the agent the means to pursue a different end; it is ends-displacing. While this different end could be seen as, in a sense, 'as good' as the end one has lost, or as leaving the person 'as well off', or 'indifferent' compared with what they had, Goodin insists (*contra* the welfare economist[7]) that it is an inferior form of compensation compared with means-replacing compensation. This is so, Goodin argues, because it forces the affected agent to pursue different ends from the ones they had in fact chosen. That the ends are different compromises the unity and coherence of the person's life, and that they are forced upon the person by policymakers compromises the person's autonomy (Goodin 1989, 68–70).

---

[6] See Brown (2017b, 35–38, 94–98, 101) for a more detailed discussion of the kinds of cases in which the prima facie duty of the state to provide a substantive remedy (he discusses expectation-fulfilment, but similar considerations apply to grandfathering) is overridden by independent ("public interest") considerations.

[7] Goodin considers the welfare-economist objection that there will always be some compensating price, or package of goods, that leaves a person on the same indifference curve they were on before the loss. He responds that there are actually two kinds of indifference corresponding to the two kinds of compensation (1989, 66). Welfare economists, with their "studied indifference to the deeper structure of people's preferences" (ibid 64), err in failing to distinguish between the two. See also DeMartino (2015) and my Chapter 3.4.4.

Indeed, because humans are social and interpretive beings, the social *causes* of policy-induced losses and the social *nature* and *effects* of many kinds of particular functionings (ends) losses will often imply that the provision of ends-displacing compensation to individuals is inadequate—potentially even *worsening* the loss (DeMartino 2015, 331–34). With regard to the social *causes* of loss, there is something distinctive about losing one's most central particular functionings *because* the state changed the law—something that the payment of compensation alone seems inapt to repair (cf. DeMartino 2015, 332). Expressive acts such as recognition, acknowledgement, respect, and possibly apology—perhaps *accompanied by* monetary payments—may be more fitting responses (ibid 332–33). Some losses are also highly social in *nature* and in their *effects*. For example, in cases where individual functionings are lost *because* some communal public good is lost (e.g. because of a hazardous facility siting that affects community safety or amenity, or where a community is devastated by the regulatory wipe-out of a vital industry), individual ends-displacing compensation may well be less apt than the provision of other public goods (Mansfield, Van Houtven, and Huber 2002). Absent such expressive acts, public goods or other appropriate state responses, ends-displacing compensation may be perceived as trivialising the loss, or insulting to the losers, and may be repudiated by the persons and communities to whom it is offered. As DeMartino (2015, 333) notes, citing empirical work by Frey et al. (1996), this "might help to explain why the promise of financial payments to communities for public projects that threaten harm, such as environmental damage, sometimes *reduces* support for the projects".[8] These kinds of cases demonstrate that where legal changes adversely affect people's central particular functionings, it will be important to carefully identify the causes,

[8] The social-scientific literature on host community reactions to industrial facility siting is vast and complex, highlighting a wide range of factors that influence community responses, including the type (e.g. monetary vs. non-monetary; individualised vs collective) and quantum of compensation offered, the process of arriving at the compensation offer (e.g. how inclusive/participatory it was), the way the offer is framed, wider contextual factors, and more (see Mors, Terwel, and Daamen 2012, for a review of the literature). Nonetheless, there is more than enough evidence to complicate the simple picture that individualised ends-displacing compensation alone is always sufficient to conserve affected persons' prior wellbeing. Note that the term "compensation" in this literature encompasses non-conservative and non-monetary benefits, and thus is used more loosely than both the narrow *and broad* usages I identified at the beginning of Part 9.2.2.

nature and effects of losses and to fit an appropriate response. This is a key motivation for adaptive transition policy.

Given that ends-displacing compensation requires people to abandon one or more of their previous ends and facilitates their adoption of new ones, and given the evident complexity of this process, there is a sense in which ends-displacing compensation is not really compensation at all—at least not if compensation is understood in the narrow (conservative) sense introduced at the beginning of Part 9.2.2. Rather, developing new central functionings following the loss of existing ones seems to me to be the very definition of *adaptation*. At the very least, ends-displacing compensation, where compensation is understood in the sense intended here—as a monetary payment justified by conservative reasons—is very close on the conservative–reformative spectrum to a monetary payment justified by adaptive reasons, which I discuss in Part 9.3, below. There may be a difference in emphasis or context, but in substance it would not be a large one.

9.2.2.4 The surprisingly limited role of compensation in transition policy

For my purposes, these remarks about the inferiority and nature of ends-displacing compensation have two important implications for the choice and justification of transition policies. One concerns the pairwise comparison between grandfathering and compensation, and the other the pairwise comparison between compensation and adaptive assistance. With regard to the former, in cases where it is only money or some other replaceable good whose loss is threatened by a legal change, the difference between grandfathering and compensation is theoretically nil (or in practice, small), since either full grandfathering or full compensation will leave the agent in the same position as before with respect to their particular ends. Compared with grandfathering, means-replacing compensation under those conditions is, we might say, a 'close second-best'.[9] But in cases where the relevant loss of central functionings involves an irreplaceable end (hence means-replacing compensation is not a theoretical

[9] Of course, a feature of my theory is that the state only has a reason to conserve 'mere means' such as these where they are instrumentally necessary to support a person's central functionings—as with a poor person, for example (see Chapter 6.3.3).

possibility), the inferiority of ends-displacing compensation makes it a 'distant second-best'; grandfathering should be favoured, all else equal.[10] Furthermore, in reference to the second pairwise comparison, I also noted that once a legal change displaces an agent's central particular functionings (ends), ends-displacing compensation might be inferior to, or better conceived as part of, an *adaptive* transition response.

This matters quite a lot for ART. Because the ultimate focus of my Wellbeing Principle is on people's 'ends', *qua* particular functionings weighted by their centrality, it will often be the case that the strongest reasons the state has to conserve wellbeing will apply to people's irreplaceable ends—their particular home or jobs, for example. In these kinds of cases, where the state also bears *ex ante* responsibility for managing the relevant risk of legal change, I have argued that a conservative response—grandfathering or ends-displacing compensation—will be most appropriate on instrumental grounds.[11] Where grandfathering is not possible, practicable or desirable for independent reasons, ends-displacing compensation will be the only form of compensation (understood as a conservative response) available. But if ends-displacing compensation is really a form of adaptive assistance—and not necessarily the best one—then the scope for (conservative) compensatory responses is accordingly limited.

The combined effect of these implications, then, is to overturn the traditional emphasis within the transition literature on compensation: when the reasons from the application of ART shake out across a wide sweep of cases, compensation will rarely be the most appropriate response.[12]

---

[10] Goodin draws a similar implication from his analysis: that *prevention* of the loss is better than compensation (1989, 70–72). I agree, but I am assuming that prevention is not a transition policy option because the primary legal change is taken as a 'given'. Goodin overlooks the potential for grandfathering as a superior transition policy to ends-displacing compensation in these cases.

[11] This will not always be the case: where a central particular functioning is necessarily dependent on income or some other readily replaceable resource that is threatened by a legal change, the reason to conserve the functioning effectively becomes a reason to replace the means (see Chapter 6.3.3).

[12] "Rarely", but not "never": see previous footnote.

9.2.3 *Conservative responses for winners*

With respect to winners from legal change, conservative responses (grandfathering or claw-back of gains) of greater or lesser degree will be most appropriate where the state has assumed *ex ante* responsibility for managing the relevant risk of legal change according to the Fairness Principle (see Table 2, above). Such responses are justified by the symmetrical application to winners of the underlying fairness-based rationale for conservative policy to losers: where there is a practice of allocating *ex ante* responsibility for *upside* risks to the state, then the individual has no claim of fairness to that upside, should it eventuate. It will often be the case that the allocation of upside and downside risks of legal change go together—recall, for example, practices relating to commercial competition and the gambling casino, where both the downside and upside risks are appropriately allocated to individuals. This may hold for allocations of responsibility to the state, too. For example, one could envisage a practice whereby the state socialises the risk of state-caused losses in property values and also the 'upside risk' of state-caused gains in property values, with the latter effectively acting as the insurance premium for the former.

The strength of the reasons for conservative transition policy for winners will vary in light of reasons generated by the Wellbeing Principle: where the winners would gain a relatively central generic functioning, the reasons to conserve the agent's prior position will be weaker than when the winners would gain merely peripheral functionings. For example, consider again the case of *Rail Link* from Chapter 8.3.3, where a new rail link decreases Millie's property value and increases Morris' property value. Let's further assume that the impact on both of their central functionings is minimal—the change in their capital stock has effect only on their peripheral functionings—and let's further assume that the clear practice in the jurisdiction is to allocate to the state the responsibility for managing risks of legal changes from major state infrastructure projects (admittedly, this would be an unusual practice). Clawing back Morris' gains would be an appropriate response in those circumstances.

9.3 ADAPTIVE TRANSITION POLICY

9.3.1 *Adaptivist institutions and the concept of successful adaptation*

Given that wellbeing and fairness reasons will rarely jointly point strongly in the direction of conservatism, and will often point somewhere in the middle of the transition policy spectrum, I argue that a central goal of transition policy should be to facilitate agents' successful adaptation to new conditions.

Surprisingly little has been written about adaptive transition policy. There are, however, various state institutions that are analogously adaptivist to those that I consider below insofar as they (i) adopt, at least implicitly, a diachronic (or multi-chronic) conception of the person (or part thereof, e.g. the person's health, wellbeing, functionings, skills, attitudes, behavioural dispositions, etc.); and (ii) aim to facilitate a desirable change in a particular person (or part thereof) over time. Some such institutions are inherently adaptivist, such as education policy (Brighouse et al. 2018) and climate change adaptation policy (Lindley et al. 2011). Additionally, there are many areas of social policy in which adaptivist models are possible, and have in fact been used and/or advocated by philosophers and subject-matter experts, including: clinical healthcare policy for addiction-based disorders (Pickard 2013, 2017); criminal law and criminal rehabilitation policy (Lacey and Pickard 2013, 2015); temporary earnings-related benefits in social welfare policy (Goodin 1990); and so-called 'structural adjustment assistance' and other forms of labour market and industry policy aimed at facilitating adaptation to changing technological, market or policy conditions (Green and Gambhir 2019, pt. 3.1).[13]

The only advocacy of adaptive state responses I found in the literature on state responses to legal and other transitions is that of Schuessler (2017). Schuessler combines luck-based and welfarist considerations into a principle of justice he calls the "buffering principle":

[13] Insightful recent work has been done on adaptive and diachronic aspects in other parts of morality and ethics, including processes of fitting emotional change (Na'aman *forthcoming*) and diachronic accounts of moral responsibility (Khoury 2013).

> People who seriously suffer under adaptive pressures through no fault of their own ought to receive the resources or the time they need to adapt in a morally acceptable way if they lack the means to do so on their own. Acceptability implies that, if possible, the suffering of those people should not exceed a threshold that is to be determined by moral considerations. (The costs of intervention may enter these considerations.) (2017, 153)

Schuessler's principle is very similar to the adaptive approach that I favour in respect of a considerable part of the terrain of legal transitions, and is similar in its justification (combining responsibility and wellbeing considerations). It differs, however, in numerous respects. First, the buffering principle is framed as an independent principle of *justice* (ibid 154). Second, it is a *pro tanto* consideration to be counterbalanced against consequentialist considerations about wellbeing, even though it is itself justified by wellbeing considerations involved in transitions, and even though it is framed as a principle of justice—a combination that seems rather incoherent. Third, it is broader in scope than my theory insofar as his principle applies to all kinds of losses, not merely those caused by legal transitions (ibid 154–55). I remain agnostic in this thesis about the state's obligations outside of legal transitions, suffice it to note that expanding adaptive responses to cover losses that have other proximate causes (e.g. market changes) would dramatically expand the scope of the state's liability. Fourth, and most importantly for present purposes, the buffering principle is, in a different way, narrower than my approach insofar as it applies only to no-fault, "brute luck" losses (what Schuessler elsewhere calls "undeserved" losses), whereas adaptive responses are available on my approach even where the *ex ante* risk responsibility *is* (conventionally) allocated to the individual—and hence, potentially, where the individual *is* at "fault" or "deserving" of those losses[14]—if the effects on their wellbeing are sufficiently significant.[15]

Schuessler says little, though, about what it means to adapt in a 'morally acceptable way'—or, in my terms, to adapt successfully. I define successful adaptation as follows:

---

[14] The Fairness Principle is, of course, not based on luck/desert but rather on conventional allocations of responsibility (see Chapter 8).

[15] Schuessler says that an expansion of scope to include fault-based losses "seems plausible" but does not pursue that possibility (2017, 153).

> ***Successful adaptation*** is a process, beginning with the loss of a central particular functioning, by which a person cultivates new central particular functionings, or centralises previously marginal particular functionings.

From this definition, we can see that there is an 'adaptation' factor and a 'success' factor. That a person cultivates new particular functionings (or newly centralises formerly marginal ones) following a loss implies that *adaptation* has occurred. That these particular functionings are central implies that the person has found new sources of meaning, value and purpose in their life—in the sense of something to which the person is emotionally vulnerable and which serves as a source of practical reasons for them—to displace that which has been lost, and this is what makes the adaptation successful.

Metaphorically, the adaptation process can be seen as a 'bridge' between the set of particular functionings that has been lost and a new set of particular functionings. The length of the bridge corresponds to the centrality of the functioning that has been lost. Like crossing a bridge, a process of adaptation is a liminal state. Constructing and crossing a bridge, moreover, takes time, effort and supportive conditions, as does recovering from and adapting to a loss. Moreover, as one crosses a bridge, one can still look back to see where one has come from, but as one goes further along it, one can eventually see the other side, and look forward to it. Similarly, adaptation, though fundamentally about change, will often require both forward-looking and backward-looking work (Janoff-Bulman and Berg 1998; Miller and Omarzu 1998; Snyder 1998). The backward looking aspect involves accepting and coming to terms with the loss of the relevant functioning, including recognising and respecting its value and mourning its loss, all of which requires cognitive and emotional work. The forward-looking aspect involves cultivating new particular functionings. This requires the availability and accessibility to the agent of a range of valuable social practices, roles and relationships from which the agent can choose. And it requires individuals to have the time and capabilities to identify with options among these and, through a process of engagement and reflection, integrate these into their scheme of narrative functionings and into their more basic modes of being (cf. Ryan and Deci 2000). Both of these aspects are facilitated (or hindered) by a range of internal capacities and external resources, conditions and structures (discussed below).

Just how much work a process of adaptation entails depends in part on the number of particular functionings that have been lost and their centrality to the agent, as well as her baseline generic functioning levels and the dynamic effect of the particular functionings losses on her generic functionings. It is important in this regard to identify how particular events (those triggered by legal changes) affect interrelated networks or *bundles* of functionings, including through spill-over or flow-on effects from one to another (cf. Wolff and De-Shalit 2007, chap. 7).[16] Many of the categories of loss considered in Chapters 7 and 8—such as home displacement and job loss—typically implicate bundles of central functionings, which helps to explain their seriousness.

Another variable affecting successful adaptation is time. The longer the time period over which a change to a central functioning occurs, the more manageable it will be, all else equal. This follows from the position, discussed in Chapter 6.2, that we are always changing anyway because of the dynamic interactions among brain-body-environment, but that we typically change slowly, such that most changes are only perceptible over long stretches of time. If changes affect our central particular functionings slowly, we have more time to process those changes, and to adjust our expectations, plans and practical affairs (Goodin 1990).

The final key variable affecting adaptation is what I call *adaptive capability*.[17] The greater one's adaptive capability, the better one will be able to manage a given kind of loss over a given timeframe. A person's adaptive capability can be understood as the factors that affect their ability to prepare for the risk of (*ex ante*) and to respond to and recover from the manifestation of (*ex post*) an adverse event (Lindley et al. 2011). For our purposes, the adverse event is a legal change affecting one's functionings. Empirical and empirically-informed philosophical literatures on personal resilience to shocks and losses suggest that such factors can be grouped into three categories: 'internal resources' (or, in terminology I

---

[16] In a manner similar to the way in which Wolff and De-Shalit (2007, chap. 7) have urged policymakers' attention more generally on supporting "fertile functionings" and avoiding "corrosive disadvantage", I am arguing that theorists of legal transitions should be particularly concerned with densely connected, or "clustered", central functionings.

[17] The term 'adaptive *capacity*' is often used to refer to a similar idea. I prefer adaptive capability because 'capacity' connotes internal abilities whereas 'capability' connotes internal abilities *and* external factors.

used in Chapters 6 and 7, rudimentary or background functionings); 'external resources'; and external conditions/structures (cf. Wolff and Reeve 2015, 460). Table 3 lists the constituents of these three categories, with illustrative examples.

Table 3: Adaptive Capability—constituents and examples

Category	Constituents	Examples
Internal resources[a]	Knowledge, cognitive abilities	Greater knowledge about the political system and the law will tend to enable people to better anticipate risks of legal change
	Emotional and social skills	Emotional and social skills enable people to leverage social networks in aid of effective recovery from loss, and to build new relationships (Thompson 1998, 25–27)
	Self-efficacy and autonomous motivation	People who perceive themselves to be more efficacious are better able to integrate new goals and values into their autonomous motivation structures, and more autonomously motivated people are better able to change their behaviour and tackle new projects (Deci and Ryan 2000; Ryan and Deci 2008)[18]
External resources[b]	Money/financial assets	Money can be used to educate oneself about risks, manage risks (e.g. through purchasing insurance), outsource risk-management to professional advisers, and purchase goods and services that aid in the recovery from losses and in the pursuit of new projects
	Property rights	Secure housing provides control over resources necessary for managing and recovering from risks.
	Social networks (instrumental benefits)	Social networks can be leveraged to cope with losses, aid in recovery, and pursue new projects (Hall and Lamont 2013b, 64).
External conditions/structures[c]	The physical layout of urban environments	Transport infrastructure affects people's mobility and access to new opportunities (Beatty and Fothergill 1996, 638)
	Institutionalised entitlements/ obligations	The education system affects people's general civic competencies (e.g. understanding the government and legal system). Government services that support people's autonomous motivation improve their ability to adopt and achieve new goals (Deci and Ryan 2000; Ryan and Deci 2008; Wolff and De-Shalit 2007, chap. 10).
	Social practices, social norms and customs, cultural imaginaries and cultural repertoires, etc.	Cultural schema and social norms can affect how some groups of losers experience the effects of legal change—for example, cultural stigmatisation of the unemployed can inhibit the adaptation of job-losers (Brand 2015, 365–70). In other cases collective imaginaries can provide symbolic resources on which people can draw to construct new identities and strategies of action (Hall and Lamont 2013b, 64).

References: (a) (Hobfoll 1989, 2002; Hobfoll, Stevens, and Zalta 2015; Lindley et al. 2011, 20–28); (b) (Lindley et al. 2011, 20–28; Wolff and Reeve 2015, 460); (c) (Hall and Lamont 2013a, 2013b, 64; Holland 2017; Lindley et al. 2011, 20–28; Nussbaum 2000; Schlosberg 2012; Sen 1999; Wolff and De-Shalit 2007; Wolff and Reeve 2015, 460)

[18] Within Deci and Ryan's Self-Determination Theory, autonomy "concerns the self-endorsement of one's behavior and the accompanying sense of volition or willingness" in the sense of having "a more internal perceived locus of causality" (Ryan and Deci 2008, 186–87).

9.3.2 *Adaptive transition policy measures*

From this discussion of the role of time and adaptive capability as factors affecting successful adaptation, we can see a wide range of potential intervention points for adaptive transition policy. I summarise these transition policy options below, dividing them into *procedural* and *substantive* measures. For each of these two categories, I will indicate the combination of fairness and wellbeing reasons for which such measures would be instrumentally justified (I assume that, as far as the state is concerned when contemplating a particular transition policy response, the centrality of a lost/threatened functioning to a particular agent is given[19]).

9.3.2.1 Procedural adaptive measures

Where the state has responsibility for managing the risk of legal change risk in respect of a given agent (fairness condition), but the adverse wellbeing impact on that agent is relatively small (wellbeing condition), the state will have, overall, positive but relatively weak reasons to conserve the agent's particular functionings. In these circumstances, procedural adaptive transition policies will be most appropriate.[20] It must be remembered, moreover, that the idea of conservation of functionings has to be understood against a baseline level of normal change in people's functionings: since brain, body and world are constantly interacting, they are constantly changing, albeit relatively slowly (Chapter 6.2). Where the impact of a legal change on people's particular functionings is small, then, there is little the state need do to ensure that affected persons successfully adapt.

In fact, in these circumstances, the standard procedural and formal requirements for introducing legal changes—requirements thought to be central to the rule of law—will often be sufficient to discharge the responsibility the state has for managing the risks of legal change to people's particular functionings.[21] The following formal and procedural rule-of-

---

[19] Of course, states should (*prima facie*) be particularly concerned to avoid or minimise where possible causing the loss of those kinds of central functionings that we know are particularly difficult for people to adapt to.
[20] The same can be said where the fairness reasons are *weak* (i.e. not strong in *either* direction), albeit that the combined reasons (still assuming weak wellbeing reasons) will then point closer to the reformative end of the spectrum.
[21] In such 'peripheral impact' cases where, in addition, the *individual* bears responsibility for managing the risk of legal change (according to the Fairness Principle) the state's transition policy should be reformative. In such

law requirements applicable to legislation provide affected agents with both considerable notice (time) and relevant knowledge (adaptive capability) to adapt to legislative changes (Waldron 2012, 106–9):

- public consultation;
- the commissioning of reports and consultative papers;
- informal stages of public debate;
- successive stages of official deliberation in the legislature (including in legislative committees and often in two chambers); and
- formal prospectivity (i.e. a present or future commencement date for the enactment).

As the effects on wellbeing (central functionings) increase,[22] however, the *ex ante* responsible state may need to provide more extensive procedures to discharge that responsibility, for example, by providing more salient information campaigns and more inclusive consultation processes targeted at vulnerable groups, and potentially even more deliberative or participatory policymaking processes, which give people a greater degree of control over the legal risks they face.[23]

While procedural measures will typically be most appropriate and sufficient in cases of state responsibility for the relevant risk (where wellbeing impacts are low), they may also play a role in facilitating adaptation where individuals bear the responsibility but where wellbeing impacts are more significant, as we shall see in the following section.

9.3.2.2 Substantive adaptive measures

Substantive transition policies will generally tend to be most appropriate where agents' central functionings are threatened by the relevant legal transition (wellbeing condition) but

---

cases, the procedural requirements independently imposed by the rule of law may mean that the individual effectively is given *more* time than is warranted by transition policy.

[22] Of course, if they increase *a lot* then we are closer to the realm of conservative transition policy: see Part 9.2.

[23] We might say that the state must, in these circumstances, go beyond what is required by the rule of law. Alternatively, we might say that the extensiveness of the procedures required by the rule of law (e.g. those on Waldron's list, above) should be proportionate to the effects of the proposed law on agents' central functionings.

where a conservative response is not required because the state does not have *ex ante* responsibility for managing the risks of legal change (fairness condition).

Substantive measures that states can take to increase the time available to adapt and/or to enhance people's adaptive capabilities include the following (see generally Green and Gambhir 2019, pt. 3.1; Trebilcock 2014):

- deferred or phased in commencement dates of new laws or provisions;
- partial and/or temporary grandfathering (see above Part 9.2.1);
- public insurance schemes, or subsidies for private insurance;
- conditional cash transfers tied to the recipient's spending the money on certain measures designed to facilitate their adaptation;
- in-kind provision of goods or services;
- measures to improve people's general social connectedness[24] and specific access to social support services;
- expressive acts that publicly recognise and confer esteem on those who have incurred losses in the wider public interest;[25] and
- measures that in other ways expand people's opportunities to access new meaningful endeavours, be they in the formal labour market (e.g. by stimulating aggregate demand for meaningful labour), via informal labour, or via artistic or recreational pursuits.

As noted above, the reasons generated by the Wellbeing Principle and the Fairness Principle provide general guidance as to the kind and magnitude of appropriate adaptive state responses to transition losses. However, they cannot themselves fully determine which of these many specific policy options will be most appropriate; they can only really require a response within a *range* of permissible adaptive measures. This opens the space for *additional*

[24] This can be fostered in a variety of ways, including through urban planning regulation, public support for social institutions (e.g. subsidisation of arts and sport), labour market regulation, and social policy.
[25] DeMartino (2015, 332) lists various forms of "acknowledgement" that may constitute appropriate (full or partial) reparation for particular kinds of harm, including apology, sympathy, gratitude, recognition, respect, and honour.

normative values to be introduced to bridge the gap between the range selected by ART and the specific adaptive policy response (in the language I introduced in Part 9.2.1.1, such additional values would then carry *marginal weight*). For example, we could imagine *efficiency* in the sense of *cost-effectiveness* (*not* Kaldor-Hicks efficiency) being a helpful value for discriminating among specific adaptive measures. Likewise, we could appeal to liberal-egalitarian justice considerations to play a role in 'obvious injustice' cases: for example, this would rule out "apologising" to those who lose unjust functionings, and perhaps lead instead to a focus on developing opportunities for such persons to engage in justice-respecting alternative projects. In light of these possibilities, we can perhaps best understand the Wellbeing and Fairness Principles as the *core modules* of ART, and envisage a range of additional *optional modules* based on other values and political traditions to help discriminate among measures within the wide 'adaptive' range of the transition policy spectrum.[26]

I will conclude this discussion of adaptive transition policy by discussing three illustrative examples, in which I assume that substantive adaptive transition policy is the most appropriate response in light of the wellbeing and fairness reasons (i.e. individual responsibility but significant wellbeing impact).

Adapting to job and skill losses

In Chapter 7.2.1, I discussed the role of skills and jobs in people's central functionings, and their vulnerability to loss as a result of many kinds of legal changes. We can also see how such losses often have flow-on effects that further erode people's adaptive capability, by undermining their internal and external resources (Brand 2015, 364–70). With respect to loss of jobs, states could support individuals to transition to alternative employment by providing them with a combination of supportive services (e.g. careers counselling, job search services) and measures to expand the availability of and access to alternative jobs that have similar characteristics. These could include, for example, expanding transport infrastructure or

[26] I borrow the language of "modules" from Robeyns (2017), who uses it in relation to the capability approach.

public transport services where there are mobility barriers to matching labour supply and demand, or place-based industry policy to stimulate economic opportunities in the places where unemployed workers already are. Where affected persons have invested in specialised firm-specific or sector-specific skills, the state can facilitate the redeployment of the skills that people would otherwise risk losing, for example by using its convening power to negotiate sector-specific agreements with businesses and workers, and using industrial policy to subsidise worker reemployment or on-the-job retraining (Green and Gambhir 2019, pt. 3.1). Where skills are no longer marketable, the state can provide or subsidise education and training to support workers to upgrade their skills as an aid to reemployment.

Community adaptation to loss of place attachment

People who live in rural areas and smaller communities tend to be more place-attached than urban dwellers, which may render them less capable of adaptation to geographic displacement or to sudden changes affecting their community (Anton and Lawrence 2014; Lewicka 2005). In these cases, provision of community-level public goods and services may be appropriate (Mansfield, Van Houtven, and Huber 2002), for example new economic, social or civic infrastructure, expanded provision of social services, or funding for environmental and amenity improvements (Green and Gambhir 2019, pts. 3.1, 4). Additionally, procedural measures may be effective in such contexts: involving local residents in processes to decide collectively their town's future direction in the face of major threats (e.g. the regulatory wipe-out of a key industry) can help communities and individuals to adapt successfully (Veldhuizen et al. 2018).[27] Similarly, expressive acts can play a role in facilitating adaptation in some contexts. For example, where legal changes such as reductions in trade protection or new environmental regulation contribute to the decline of spatially-concentrated industries such as auto manufacturing or coalmining, official acknowledgment of the contribution that affected communities have made to the national economy of the past,

[27] Other measures can be used to promote diversify people's options for central functionings in such places, including improving transport connectivity to other areas, though these themselves pose threats to the cultural experience of place, suggesting the importance of coupling these options with *ex ante* measures.

and acts to memorialise those contributions, can facilitate adaptation to regional change (Green and Gambhir 2019, pt. 3.1).

Already disadvantaged and vulnerable persons

Persons who are already poor or otherwise disadvantaged are often particularly vulnerable to the effects of legal changes (Lindley et al. 2011; Nine 2018, 252–53; Wolff and De-Shalit 2007). Of course, poverty entails a lack of *external* resources with which a person can prepare for, reduce and manage risks to their central functionings, and with which they can repair, modify or replace losses. Poverty also entails a chronic *feeling* of scarcity that undermines one's *internal* resources: the constant quest to make ends meet entails a "tunnelling" of one's attention toward scarce necessities, which reduces one's cognitive abilities, self-control, and ability to focus on other things (Shafir and Mullainathan 2013). Accordingly, poverty also diminishes one's ability to adapt to losses in central functionings, and the resources that support them, that one does (or rather, did) have. This reinforcing relationship between generalised disadvantage and adaptive capability underscores and adds to the point made earlier about the importance of loss dynamics and clustering: the flow-on effects of central functioning loss are likely to be exacerbated under conditions of existing disadvantage, and may include the loss of internal resources to adapt to yet further losses (Lindley et al. 2011, 20–21; Nine 2018, 250–52; Wolff and De-Shalit 2007, 68–70). The upshot is that policymakers should be especially careful to: identify the ways in which legal changes may adversely affect the wellbeing of the already disadvantaged, remembering that poor persons' central functionings will often be *indirectly* affected by reductions in their income or purchasing power; target procedural measures at disadvantaged persons and groups; and mitigate any adverse wellbeing effects through substantive adaptive measures.

Useful insights in this regard can be gleaned from recent climate policy reforms, including fossil fuel subsidy removal and carbon pricing, both of which tend (in the absence of transition policy) to have negative effects on poor persons (Dorband et al. 2019; Hills 2012; Markkanen and Anger-Kraavi 2019). Since poor persons tend to be excluded from policy consultation processes, to have less access to information, and to face barriers in accessing substitutes/alternatives, experience from these reforms shows that transitional responses

should include: *ex ante* consultations that are inclusive of poor persons and representative groups (e.g. relevant charities) during planning and implementation; and targeted information campaigns, so as to communicate the effects of the intended policy on such groups and the means by which they can access available substantive transitional support (Hills 2012; Markkanen and Anger-Kraavi 2019; Rentschler and Bazilian 2017). Successful substantive measures have included targeted conditional or unconditional cash transfers and the provision of in-kind goods and services (such as energy efficiency retrofits, free energy efficient products, etc.) to ensure that central functionings are at least maintained (Hills 2012; Markkanen and Anger-Kraavi 2019; Rentschler and Bazilian 2017).[28] These measures overwhelmingly target the external resources, structures and conditions relevant to adaptive capability. Pro-poor transition policy should also be autonomy-supportive (see Table 3, row 8), providing genuine choice and control to poor and other disadvantaged persons and groups (Wolff and De-Shalit 2007, chap. 10; Wolff and Reeve 2015, 460–61).

Wealthy persons

What about the opposite end of the baseline adaptive capability spectrum, such as the wealthy? Insofar as external resources are concerned, the wealthy will by definition tend to have sufficient resources on which to draw in order to adapt successfully to losses in central functionings. Assuming the wealthy don't lack adaptive capability deficits in areas other than external resources (i.e. in internal resources[29] and external structures and conditions), there will often be little in the way of substantive transition policy that the government can and should do to facilitate their successful adaptation. Whatever reasons the state may have to provide a transitional response to the wealthy will therefore tend to be discharged through the side-effects (time and information) of standard procedural measures, as discussed in Part 9.3.2.1, above.

---

[28] When it comes to poor persons, the Wellbeing Principle generates such strong reasons for conservative transitional responses that means-replacing compensation and substantive adaptive support will tend to converge on the same response.

[29] In order to avoid intrusive and disrespectful state interventions (see Chapter 4 where I discuss the Moral Costs Problem), there will in any case be limits to what the state can do to address internal resource deficits.

9.4 CONCLUSION

I began this chapter by considering the conditions under which conservative transition responses—grandfathering, and compensation (losers) or claw-back (winners)—will be the most appropriate transition policy. I acknowledged a potential conservative role for grandfathering and (to a lesser extent) compensation on instrumental grounds. I also explained why, in practice, compensation will rarely be the most appropriate transition response under ART—a somewhat surprising implication given the standard emphasis on compensation in the literature and public debate.

The remainder of the chapter focused on an under-theorised but normatively attractive set of transition policy options (for losers) that I have called *adaptive* transition policy. I defined the objective of 'successful adaptation' to the conditions created by a legal change, explained the key factors that affect it (time and adaptive capability), outlined the procedural and substantive options available to governments to facilitate it, and specified the conditions (in light of the Wellbeing and Fairness Principles) in which such adaptive policies will tend to be most appropriate.

I have not discussed reformative transition policy in any detail. The *content* of reformative transition policy—let losses and gains lie where they fall—is self-explanatory. The *justification* for reformative transition policy is a residual one: it is the appropriate response under those conditions in which the state lacks wellbeing or fairness-based reasons for conservative or adaptive transitional responses, i.e. when the individual has *ex ante* risk responsibility *and* the wellbeing impacts on losers are small and on winners are large.

This concludes my specification and defence of ART.

CHAPTER 10. CONCLUSION

In this concluding chapter I would like to draw out some of the implications of ART and compare these with the implications of the other theories I have critically analysed in this thesis. In Part 10.1, I will compare the theories according to their implications for different *agents*: individual natural persons (those with different resource endowments, and those with different particular narrative functionings) and collectives (corporations and communities). In Part 10.2, I will compare the theories' implications in ten concrete *cases* by way of a summary table. The remainder of the chapter steps back from the particulars of the different theories and considers this thesis' key contributions (Part 10.3), before closing with some suggested directions for future research (Part 10.4).

10.1 COMPARING THE THEORIES: IMPLICATIONS FOR DIFFERENT AGENTS

10.1.1 *Effects on individuals with different resource endowments*

I noted in Chapter 1.2 that theories of legal transitions, to the extent they recognise conservative claims, will constrain what can be implemented by way of 'ideal theory'. One way in which they may do so pertains to the permissibility of redistributive resource transfers. Since resources are typically at stake in legal transitions, and since all theories I have considered are either directly or indirectly concerned with resources, it will be useful to consider the normative constraints that the various theories place on the state's ability to redistribute resources, and hence on the degree of resource egalitarianism each theory would permit.[1]

Starting at the most conservative end of the spectrum, libertarian theories would seemingly preclude the state from engaging in any kind of resource redistribution whatsoever. A similar restriction would effectively apply on a Pareto efficiency theory of legal transitions: since

[1] I say "permit" because theories of legal transitions are not first-order theories of distributive justice that *prescribe* ideal distributions; but insofar as they entail conservative or substantive adaptive transitional responses they potentially constrain what can be done in the name of first-order distributive justice.

full compensation must be paid to the losers by the winners, with an allowance for transaction and administration costs, the direct effects of such redistribution would be negative-sum, and so non-Pareto-improving.[2] Bentham's classical liberal theory of legal transitions would be slightly less restrictive, since he advocated wide-ranging government interventions, including to improve the condition of the poor. However, his highly conservative approach to legal transitions places severe restrictions on the state's power to achieve such redistribution through directly taking from the propertied classes.

In the middle of the range we have various liberal-egalitarian theories. At the more conservative end of this middle group sits Alex Brown's theory (which applies to public administration only). In respect of persons who made plans on the basis of expectations of legal stability induced through the acts or omissions of a responsible government agency, Brown's theory requires the fulfilment of the expectations or compensation for reliance losses. As noted in Chapter 5.2, the inequality or injustice of the status quo is irrelevant to the legitimacy of people's expectations on Brown's theory.[3] Brown invokes Kant's categorical imperative to respect persons as ends in themselves to guard against any such sacrifices of one for the many (Brown 2011, 724–28, 2017a, 459, 2017b, 191–92). Presumably, then, administrative policies designed to redistribute resources in a more egalitarian fashion would often trigger the state's liability to fulfil conservative expectations or pay compensation. Other legitimate expectations theories could also end up being quite conservative, depending on how the legitimacy basis is specified. Certainly the Legitimate Authority View (Meyer and Sanklecha 2011, 2014, 275–77), if specified in terms of a relatively minimal conception of legitimate authority, would result in most expectations of legal stability being legitimate, entitling the relevant agents to compensation upon the frustration of those expectations by redistributive reforms. This would have significant

[2] The same goes for the "cross and compensate" version of libertarianism (i.e. if property really just yields a liability rule)—see Chapter 2.2.
[3] Brown claims his theory would have egalitarian distributive implications (2017b, 148–53), but I have argued elsewhere that this is improbable in the aggregate, given the theory's conservatism (Green *forthcoming*).

counter-egalitarian implications, as Meyer and Sanklecha's (2011) discussion of climate change mitigation reforms suggests.

Justice-based views (Matravers 2017; Meyer and Sanklecha 2014, 377–87; Moore 2017), be they legitimate expectation-based theories or otherwise, would seem to be more permissive of (justice-enhancing) redistributive resource transfers, though this would depend on how the concept of justice is specified. A narrower conception of justice would end up being more conservative. On the other hand, as I explored in Chapter 5, in non-ideal societies justice-based approaches could be highly reformative and would therefore permit widespread redistributive transfers.

Efficientarian theories have the greatest reformative potential, at least on the 'new view', in which a fully reformative transition policy is the default (Chapter 3.3.1). This approach would therefore also permit widespread redistributive transfers. However, the reformative conclusion of 'new view' efficientarianism is contingent on the balance of empirical consequences, and as I noted in Chapter 3 it has been challenged on its own terms. The trend is toward analysing particular kinds of cases in which the default does not hold, leading to a patchwork of different conclusions, some significantly more conservative than the new view default. At the very least, adherents of the diachronic quasi-utilitarian defence of uncompensated Kaldor-Hicks Efficiency-enhancing policies seem committed to permitting uncompensated redistributive transfers (up to the utilitarian optimum).

In contrast, ART permits the redistribution necessary for a strong (though not absolute) form of resource egalitarianism. I think this as an important implication of the theory, which merits some explanation and discussion. In this discussion, I focus on the effect of the Wellbeing Principle, assuming that the Fairness Principle will tend on the whole to generate reformative reasons (due to practices of commercial competition and default citizenship practices—see Chapter 8.3) and therefore not counteract the resource-redistributive impulse of the Wellbeing Principle to a great degree. For heuristic purposes, I will also refer to relatively peripheral functionings simply as "peripheral functionings" and will likewise drop the "relatively" from "central functionings", as if central–peripheral were a binary, even though I actually intend them as poles on a spectrum.

It is worth noting at the outset that my ultimate concern with human functionings *inevitably* leads to a degree of permissible inequality in resources. Even if we were, hypothetically, to endorse as a matter of ideal theory an egalitarianism of *functionings*, this would entail permissible inequality of *resources*. This is because an ultimate concern for functionings implies a merely instrumental concern for resources (Robeyns 2017, 50), and given differences in individuals' capacity to convert resources into functionings ("conversion factors"), equality of functionings will imply inequality of resources (Robeyns 2017, 45–49; Sen 1992, 26–30, 36–38).[4] If *ideal* equality of functionings permits resource inequality, then ART permits resource inequality, *a fortiori*. This is because it is a non-ideal theory that provides reasons to stabilise particular functionings (and hence resource holdings that are instrumental to those functionings) to an extent that would not be condoned in an ideal-theoretic society created *de novo*. For these reasons, ART would permit some degree of resource inequalities, thus constraining the egalitarian possibilities of 'ideal theory'. However, for the following reasons, the constraints that ART places on egalitarian resource redistribution will tend to be quite minimal.

The main reason for this is that the state only has strong wellbeing-based reasons to stabilise *central particular functionings*. Many functionings affected by legal changes will be merely peripheral, meaning the state has only correspondingly weak reasons to stabilise them—reasons that will usually be discharged by adhering to standard legislative and administrative procedures mandated by the rule of law (see Chapter 9.3.2.1). While the state has reasons to stabilise *central* functionings, the resource implications of these reasons will turn out to be quite limited. This is because the state does *not* have a direct wellbeing-based reason to stabilise people's *resources*. The only wellbeing-based reasons for the state to stabilise people's resources are indirect, i.e. insofar as such resources are (i) necessarily instrumental to stabilising their central particular functionings, or (ii) extrinsically valuable because bound up with those central particular functionings.

[4] Sen and Robeyns make this point in respect of *capabilities*, not functionings, but it applies also to functionings.

With respect to (i), the cases in which resources are necessarily instrumental to central functionings will typically be those where the resources belong to persons who are already poor, and hence whose resources support necessary functionings like food, shelter and clothing. To the extent that the Wellbeing Principle implies that payments or other resources should go to such persons, those transfers will avoid worsening existing inequalities. Nothing counter-egalitarian about that.

With respect to (ii), conserving extrinsically valuable objects will no doubt have some counter-egalitarian implications, but these will be severely limited by the inherent practical (cognitive, emotional, spatio-temporal) limitations on one's total set of central particular functionings. Recall from Chapter 7.2 that one can only have so many central relationships, attachments, identities and projects before the addition of new ones displaces the existing ones in a zero-sum process (Scheffler 2011, 31). Persons who have a significant range of choice about what to value must inevitably prioritise among these. While it is possible for a person to accumulate a virtually unlimited stock of resources, and thus of peripheral functionings, only a limited amount of money and other resources is necessary to enable and service the central functionings of an inherently limited self. In this sense, the effect of weighting particular functionings by their centrality has a similar effect to the assumption of decreasing marginal utility of money: the functionings-benefit from an additional unit of resources approaches zero.[5] It follows that *removing* many resources from wealthy persons will tend to have a very limited impact, if any, on their central functionings (Robeyns 2016b).

We are now in a position to appreciate the strong, indirect resource-egalitarian potential of ART, via the Wellbeing Principle. If the Principle is correct, the state has weighty reasons to stabilise only central functionings and the resources necessarily instrumental to, or extrinsically-related to, those functionings. It follows that it is normatively permissible—or at least, *not impermissible by reason of its transitional impact*—for the state, through due process of law, to tax and otherwise expropriate vast (though not unlimited) sums of wealth

[5] In this respect, my approach adopts a similar attitude toward money as does the capabilities approach (Robeyns 2017, 47–51).

from wealthy individuals, which will then be available for egalitarian redistribution. The effect of the Wellbeing Principle's centrality weighting, then, is to put a ceiling on the resources that can robustly be protected from the adverse effects of legal change.

10.1.2 *Effects on individuals with different particular functionings*

A weakness of resourcist theories of legal transitions—those that use currencies such as money or property—is that they fail to capture many important effects on persons, namely those that are not adequately expressed in terms of the relevant resource. Property theories fail to capture effects on persons that do not affect their property, such as their relationships, projects, identities, and attachments. Efficiency theories can in principle reduce everything to the value of money (WTP/WTA) or preferences, but as I argued in Chapters 3.4.4 and 9.2.2.3, this currency fails to capture the distinction between people's non-substitutable particular functionings (ends) and mere means to those ends. The effect of such theories is to let losses of such particular functionings lie where they fall.

A key motivation for expressing wellbeing in terms of my modified functionings account is that it means ART captures such effects on people's non-substitutable ends. Consequently, where such functionings are threatened as a result of a legal change, and they are relatively central and/or it would be fair to protect them, ART would provide at least an adaptive response in respect of those threatened functionings. This means that there are many kinds of cases in which ART requires the state to provide a measure of stability and relief, if only partial, to those whose non-substitutable ends are threatened by legal change (see Chapter 7). I consider this to be a strength of ART.

Additionally, credible public commitments to the transition policies implied by ART will likely improve people's wellbeing, all else equal, whether or not legal changes that affect their central functionings in fact materialise. These benefits would follow from agents' subjective (belief-relative) sense of heightened security with respect to their central functionings that such a commitment would entail. Security with respect to some central good can be conceived as the current probability of enjoying it in the future (cf. Herington 2015, 2017; Wolff and De-Shalit 2007). One's subjective (belief-relative) sense of security with respect to some such good can seriously affect one's wellbeing in at least two ways

(Herington 2017, 188–90). First, (in)security of central functionings affects the psychological components of wellbeing: insecurity can cause fear and anxiety, whereas security is apt to cause psychological and emotional tranquillity (Herington 2017, 188). Second, perceived insecurity adversely affects one's cognitive functioning and capacity to make long-term plans, and hence one's ability to engage in practical reasoning and ultimately one's functioning as an agent (Herington 2017, 189–90; John 2011; Shafir and Mullainathan 2013; Wolff and De-Shalit 2007, chap. 3). By providing a degree of security in proportion to the functionings that are most central to people's lives (holding fairness reasons constant), ART addresses one of the central concerns motivating many theorists in the conservative camp of legal transitions (see Chapters 1.2, 2, 4, 5.2), yet without falling into the trap of conserving everyone's *resources* and doing so *indefinitely*.

The potentially less palatable implication of providing a measure of stability and relief in respect of people's non-substitutable ends is that doing so will sometimes require similar adaptive responses in respect of persons whose identities, projects, relationships and attachments are odious, offensive, and even unjust. I defended this implication in Chapter 7.3. In a theory of legal transitions, we are not looking for a wrinkle-free conception of justice (which, as I showed in Chapter 5, would in any case inevitably be far too vague and/or controversial to do the work of a theory of legal transitions). Rather, we are looking for the most defensible normative theory all round (the primary, theoretical aim of this thesis) and one that is also likely to be robust to pluralistic views about justice and the good life (relevant to both the theoretical aim and the secondary, practical aim). By appealing to basic values like wellbeing and practice-based conceptions of *ex ante* risk allocation (fairness), I believe ART can achieve these aims better than its rivals.

Three further points further ameliorate the sting of this 'unpalatable' implication of ART. First, we must remember that those high in adaptive capability will usually not require further state assistance to adapt successfully to legal changes. That means those who have done best out of the previously unjust, offensive or odious status quo will tend not to receive state assistance under ART (see also Part 10.1.1, above). Second, the point of adaptive responses is to facilitate adaptation to the new status quo. Where the lost functionings were genuinely

odious, offensive or unjust, adaptive assistance will be directed toward the affected persons developing replacements of those functionings. ART thus provides a diachronic way of achieving the same outcome that the would-be justice theorist wants to achieve synchronically/immediately. As such, ART operates in the way that other diachronic policy institutions mentioned in Chapter 9.3.1 already work. Third, we must remember that the Wellbeing and Fairness Principle will often point only generally toward a range of permissible state responses, from which *a* specific measure (or package of measures) that facilitates successful adaptation is required; other values will be often necessary to select *the* specific responses from within this range (see Chapter 9.3.2). In cases where the lost functionings were genuinely odious, offensive or unjust, this can shape the kinds of responses that are appropriate, as I discussed in Chapter 9.3.2.2.

10.1.3 *Effects on collectives*

Let us now consider how the various theories deal with group agents and non-agent groups. I will consider the case of corporations (*qua* group agents) and communities (*qua* non-agent groups).

10.1.3.1 Business corporations (*qua* group agents)

Business corporations are key players in political processes and have much at stake—both to lose and to gain—from legal transitions. They make many—and often expensive—long-term-investments in highly risky market contexts that are sensitive to a wide range of laws. They also are typically the most active claimants of conservative transitional assistance, frequently both lobbying against proposed legal reforms that adversely affect them and simultaneously seeking transition relief in the event a reform is enacted (Green 2017, 184). I have touched on issues particular to corporations at various points throughout the thesis, but because of their prominence in contemporary legal transitions they merit some brief discussion in the context of this overall comparative evaluation of the various theories. I assume that corporations are profit-seeking group agents with separate legal personality (i.e. they are incorporated).

Among the families of theories I have critically discussed, the one that engages with corporations most explicitly is the efficientarian L&E family. It is the only one, moreover, that incorporates anything close to a realistic conception of the modern business corporation into the analysis of legal transitions. The standard 'new view' conclusion that corporations' losses and gains should lie where they fall comes close to the conclusion of ART, albeit for different reasons (as I shall elaborate shortly).

The other theories I have critically discussed have oddly little to say about corporations. This is not so much of an issue for theories in the liberty tradition because we can discern their treatment of corporations from their more general commitment to economic liberties and market exchange. In the libertarian case, corporations would probably be treated no differently from natural persons, and would receive conservative protection from legal transitions (cf. Bovens 2011). The classical liberal treatment of corporations is likely to be similar, though it is complicated by the fact that classical liberals envisage state regulation to maintain the efficiency of free markets—for example, by regulating to prevent monopolies (Freeman 2011, 21). It is not clear whether classical liberals would consider such regulations to be permissible *without* compensating the adversely affected corporations.[6] The place of corporations in liberal-egalitarian theories of legal transitions is, however, less clear. Meyer and Sanklecha (2011, 2014) consider the case of climate change mitigation reforms in detail across two papers, but they never mention corporations—despite the fact that corporate entities control most of the trillions of dollars of resources (fossil fuels deposits and other capital) at stake in climate mitigation (Green 2017, 184). Alex Brown's theory of legitimate expectations is intended to cover corporations, though he says little about them explicitly (Brown 2017b, 64, 192). How corporations would be treated under a justice-based theory (especially a duty-focused one) is but one further complication that such theories would need to address.

---

[6] Freeman says that "contemporary classical liberals accept government's powers of eminent domain for public purposes (on the condition that compensation is provided for any government 'taking')" but mentions no such compensation requirement as attaching to the other regulatory interventions on his list of those that classical liberals permit (Freeman 2011, 21).

According to ART, there is no *a priori* restriction on providing transitional assistance to corporations, however various aspects of the theory effectively rule out such assistance, or at least make it both highly improbable and substantively limited. The content of the Wellbeing Principle effectively makes it impossible for there ever to be a *wellbeing*-based reason to provide assistance to corporations directly in their capacity as group agents. This is because, on the normatively-individualist functionings approach to wellbeing that I have defended, what ultimately matters is *human* wellbeing (see Chapter 6); corporations are at best instrumentally or extrinsically valuable *to humans* and cannot themselves generate wellbeing-based reasons for transitional responses. In theory, the Fairness Principle could generate reasons to provide transitional responses in respect of corporations. That said, I think it will *rarely* be the case as an empirical matter that social practices relevant to the activities of corporations will allocate risks of legal change to the state. This is for two reasons discussed in Chapter 8.3.2. First, corporations engage in business competition for profit—a practice in which the risk of legal change is standardly allocated to the market participants themselves. Second, there are additional reasons to do with corporations' nature, objectives, functions and powers that will typically mean that any exceptions to the standard practice of market-based risk allocation will rarely apply to corporations.

Two implications follow from this application of ART to corporations. First, it will always be normatively permissible—or at least, *not impermissible by reason of its transitional impact*—for the state, through due process of law, to regulate, tax and otherwise adversely affect the property and other resources of corporations without grandfathering or providing compensation in any form. Second, the most that could theoretically be required of the state in respect of legal transitions affecting corporations is an adaptive response of a procedural nature which, in the uncommon cases where this is required, will typically be satisfied by adherence to the legislative and administrative processes independently required by the rule of law (see Chapter 9.3.2.1). I think these implications of ART will correlate with widely held intuitions and that the wellbeing and fairness-based reasons for this result are explanatorily powerful. Moreover, given the amount of global wealth owned or controlled by business corporations, these implications add considerably to the already strong indirect resource-egalitarian potential inherent in ART, discussed above.

What of corporations that are extrinsically valued as part of agents' central narrative functionings—their identities, attachments and projects? Could ART justify providing assistance to corporations as an indirect way of providing assistance to those natural persons to whom the corporation is extrinsically valued in this way? In theory, yes, but in practice, not likely. The practices of risk allocation pertaining to business competition, as noted in Chapter 8.3.2, typically allocate risks of legal change to the investor, so there will rarely be a fairness-based reason to conserve such narrative functionings. At most, the Wellbeing Principle might generate a reason for substantive adaptive support of some kind, but it seems highly unlikely that the kind of persons who identify so closely with particular corporations will lack the resources to successfully adapt to legal change-induced corporate failures on their own.

10.1.3.2 Communities (*qua* non-agent groups)

It is worth briefly comparing the way ART treats corporations with the way it would treat non-agent groups. I will consider 'communities' (of place or purpose), since such communities are frequently affected by legal changes (see Chapters 7.2 and 9.3). To take a topical example, consider the regional coalmining communities that will be hit by losses associated with climate change mitigation policy. Now note that, since such groups are neither humans with ends of their own nor incorporated group *agents* that could theoretically receive transitional assistance in their own right, there can be no case for providing assistance to communities as such. However, insofar as such communities feature in the central particular identities, attachments and projects of individual persons, it is both plausible and likely that adverse effects on such groups will register as losses in the central functionings of individuals, generating at least wellbeing-based reasons for transition policy. Moreover, as argued in Chapter 9.3.2.2, it will often be appropriate in such cases for the state to provide transitional responses at the group level, in the form of public goods and services that facilitate the adaptation of group members.

Given the importance of group identities and attachments to how well people's lives go, I take this to be a considerable strength of ART. It is a strength, moreover, that is not evidently

shared by the other theories I have critically analysed (little has been said in the normative legal transitions literature about non-agent groups[7]).

10.2 COMPARING THE THEORIES: IMPLICATIONS IN PARTICULAR CASES

Having compared the theories considered in this thesis across different kinds of agents, it will also be instructive to compare the implications of the different theories in a range of important kinds of legal reforms. I present this comparison in tabular form in the two landscape pages that follow.

I consider ten cases. Precise comparisons between the theories are not possible without providing considerable details on relevant cases. To mitigate this problem, I have chosen cases that are widely known and have effects that will be obvious to most contemporary readers, or else I have included cases that have been described in greater detail at other points in the thesis (e.g. *Carbon Tax*, *Rail Link*, *Trade Liberalisation*). Still, the analysis will necessarily be somewhat simplified, but I think it sufficiently captures the thrust of the different theories. For the purposes of giving a little more content to social practices (and thus the Fairness Principle), I will assume that all of these legal changes occur in jurisdictions with competitive, majoritarian electoral systems and liberal-market political-economic institutions, such as the US, the UK and Australia.

For each case, I consider the following six theories as representatives of the different approaches I have considered:

1. Libertarian natural property rights theories, assuming an "everyday libertarian" interpretation (since actual theories are indeterminate);

[7] The exception is Brown, whose theory of legitimate expectations applies to the expectations of "individual citizens, groups, businesses, civil society organizations, institutions, and instrumentalities" (2017b, 64), though he does not distinguish between groups and group agents or between business corporations and other kinds of groups / group agents.

2. Classical liberal conventional-instrumental property rights theories, represented by Bentham's conservative theory;
3. The efficientarian 'new view' in L&E;
4. Meyer and Sanklecha's Legitimate Authority View of legitimate expectations, specified with a fairly minimal conception of legitimacy such that the jurisdictions I am considering—the US, UK and Australia—satisfy the minimal conditions (let us assume);
5. The Candidate Justice Principle, filled out with a basic rights-based specification of justice;
6. ART.

Since the general implications of the first five of these theories will be the same across each case (non-italicised text in Table 1), I will use 'ditto marks' (" ") in row two and subsequent rows, but I will highlight some *particular* implications that bear on our intuitive evaluation of those theories in italics (in other words, the italicised text should not be read as describing the totality of implications). Since ART is more nuanced, non-italicised text is used throughout the ART column.

Table 1: Summary of case-implications of different theories

Theory / Case	Libertarian (natural property rights)	Classical liberal (Bentham)	L&E ('new view')	Legitimate Expectations (Legit. Authority View)	Candidate Justice Principle (rights-based)	ART
Carbon tax	1st best: law impermissible (*states can't mitigate climate change*); 2nd best: grandfathering or compensation for all natural property rights violations (*states can't respond with sufficient urgency / fossil fuel corporations receive trillions in compensation*); winners keep gains	Grandfathering or compensation for all persons whose property rights are infringed (losers); winners keep gains (*states cannot respond with sufficient urgency to climate change, or fossil fuel corporations receive trillions in compensation*)	Fully reformative. Possible exceptions for 'human capital' and residential property but only to overcome limited opportunities for risk mitigation (e.g. failures in insurance markets for legal risk). (*Poor consumers face erosion of central functionings due to increased energy prices; vulnerable workers may receive some assistance*)	Grandfathering or compensation for all losers (assuming 'imputation' model of expectation identification) or for all those who in fact expected no carbon taxation ('empirical' expectation model); winners keep gains (*states cannot respond with sufficient urgency to climate change, or fossil fuel corporations receive trillions in compensation*)	Depends if status quo unjust (and the reform just). If so, fully reformative for all winners and losers (*poor consumers face erosion of central functionings due to increased energy prices; many vulnerable workers pushed out of labour market*). If not, fully conservative for all losers (and perhaps all winners) (*states cannot respond with sufficient urgency to climate change, or fossil fuel corporations receive trillions in compensation*)	Adaptive assistance for persons whose central particular functionings are adversely affected, e.g. poor consumers (conditional cash transfers; in-kind goods and services); vulnerable workers (e.g. retraining; job-search assistance); specially-affected communities (e.g. local public goods). No assistance for corporations, investors, or individuals with sufficient adaptive capabilities to self-adapt
Wealth tax	" " (*States cannot do anything to address wealth inequality*)	" " (*States cannot do anything to address wealth inequality at the upper end of the distribution in respect of existing stocks of wealth*)	" " (*Some middle-class home-owners may lose their home, though potentially protected due to limited risk mitigation opportunities*)	" " (*States cannot do anything to address wealth inequality at the upper end of the distribution in respect of existing stocks of wealth*)	" " (*States cannot do anything to address wealth inequality at the upper end of the distribution in respect of existing stocks of wealth* or *some middle-class homeowners lose their home*)	Generally reformative (lack of impact on central functionings of the wealthy); conservative re first home possession and use (e.g. protecting an existing central functioning + assumed practice of risk allocation to state re use of residential property); adaptive support where no such practice but central functionings affected (e.g. centrally valued objects such as heirlooms for current holders only)
Zoning law change	" " (*State has no power to control zoning*)	" " (*All existing uses, including commercial/industrial uses, are fully protected*)	" " (*No existing uses protected, except possibly existing residential home uses*)	" " (*All existing uses expected to continue, including commercial/industrial uses, are fully protected*)	" " (*All uses, including commercial/industrial uses, are fully protected* or *no existing uses, including residential home uses, are protected*)	Standard practices typically protect existing uses (or require compensation); additional (wellbeing-based) reasons to protect uses tied to central particular functionings of persons, e.g. residential property uses
Rail link (property value changes only)	" " (*State has no power to build infrastructure projects*)	" " (*Full compensation for lost property values*)	" " (*Losses and gains lie where they fall*)	" " (*Full compensation for expectation-based losses, e.g. property values*)	" " (*Full compensation for lost property values* or *fully reformative*)	Standard practices typically don't protect financial value *per se*. Adaptive assistance available where use values impaired

Gun control	" " (*State has no power to regulate gun production, sale, purchase or use*)	" " (*Full compensation for lost property values*)	" " (*Individuals lose guns without any transitional assistance*)	" " (*Full compensation for expectation-based losses, e.g. gun value and personal projects*)	" " (*Full compensation for lost property values* or *individuals lose guns without any transitional assistance*)	Standard practices allocate risk of (1) outright takings to state, but not for (2) regulation of sale, use etc. Re (1): where also loss of central functioning → compensation (adaptive cash transfers); otherwise procedural measures. Re (2): where also loss of central functioning → adaptive support (opportunities for new functionings); otherwise, no support
Same-sex marriage legalisation	" " (*State has no power to regulate marriage*)	" " (*No assistance to cultural losers since no loss of property*)	" " (*Fully reformative; no assistance to cultural losers*)	" " (*Full compensation for expectation-based losses, e.g. expectations of religious conservatives re 'sanctity of marriage'*)	" " (*Full compensation to cultural losers* or *no assistance to any*)	Individual bears responsibility for risks of legal change (default citizenship practices); loss of wellbeing of cultural/religious conservatives provides reason for adaptive support, but little the state can do other than ensuring sufficient opportunities for developing other central functionings
Fox-hunting ban	" " (*State has no power to regulate fox hunting*)	" " (*Full compensation in respect of lost value of property incidents, e.g. liberties to hunt foxes*)	" " (*Fully reformative*)	" " (*Full compensation for expectation-based losses, e.g. expectations of continued liberty to hunt foxes*)	" " (*Full compensation to losers* or *no assistance to any*)	Individual bears responsibility for risks of legal change (default citizenship practices); loss of wellbeing provides reason for adaptive support, but insofar as affects the landed gentry, no assistance required as those affected have sufficient adaptive capabilities
Trade liberalisation	" " (*State has no power to regulate trade*)	" " (*Full compensation in respect of lost property value*)	" " (*Workers may receive some assistance due to lack of opportunities to mitigate risks to their human capital*)	" " (*All losers fully compensated for expectation losses; beneficiaries keep gains*)	" " (*All adversely affected corporations and natural persons are fully grandfathered or compensated,* or *none is*)	Individual bears responsibility for risks of legal change (market practices and default citizenship practices); adaptive support to vulnerable workers whose jobs/skills are adversely affected (e.g. retraining, job search assistance)
Immigration liberalisation	" " (*State has no power to regulate immigration*)	" " (*No assistance to losers since no loss of property*)	" " (*Fully reformative)*	" " (*Full compensation for expectation-based losses, e.g. economic and cultural expectations*)	" " (*Full compensation to cultural losers* or *no assistance to any*)	Individual bears responsibility for risks of legal change (default citizenship practices); loss of wellbeing of cultural losers provides reason for adaptive support (e.g. ensuring sufficient opportunities for developing other group-based central functionings)
Brexit	" " (*State has no power to regulate relevant matters*)	" " (*Grandfathering/compensation for lost property*)	" " (*Fully reformative, with possible protections for lost human capital and residential property*)	" " (*Full compensation for all expectation-based losses*)	" " (*Full compensation to all losers* or *no assistance to any*)	Risk of constitutional changes more likely allocated to state, so strong reasons for at least extensive procedural measures to facilitate adaptation. Additional reasons for stronger (conservative or substantive-adaptive) measures re central functioning losses (e.g. grandfathering immigration status); procedural adaptive approach re mere resource losses and gains

10.3 KEY CONTRIBUTIONS OF THIS THESIS

Integrative, trans-disciplinary coverage

One key contribution of this thesis has been to provide the first academic treatment of the problem of legal transitions that integrates normative perspectives from across the three disciplines that have considered this issue: political philosophy; economics; and law. A major advantage of this integrative, trans-disciplinary approach is that it has identified connections across previously disconnected disciplinary conversations. For example, contemporary political philosophers writing about legitimate expectations may not be aware that similar arguments about expectations and reliance were made by American economists and legal scholars up until the mid-1970s. They may also be unaware that L&E scholars launched, in the last quarter of the 20th century, some powerful criticisms of such expectation-based approaches, questioning the assumption that agents expect the law to stay the same, and recognising that the prospect of gains from legal change is a crucial part of the analysis of transitions. Furthermore, L&E's recognition that much of the value at stake in legal transitions is controlled by corporations—something which, it is fair to say, political philosophers writing on legitimate expectations have been slow to appreciate—adds an important degree of realism to the analysis of transitions. In the other direction, political philosophers' objections to resourcist theories, and their richer conceptualisations of the nature of agents' wellbeing, provide important grounds for critiquing the efficientarian project of L&E. For my purposes, this integrative approach has allowed me to learn from the strengths and weaknesses of each theory, to the benefit of ART.

Critiques of proposed theories

A second key contribution has been my critique of the main candidate theories of legal transitions. Using the method of WRE, I developed critiques of each theory at multiple levels: the theory itself (especially its determinacy); its 'downstream' implications in particular cases; and its 'upstream' theoretical antecedent ideas, including normatively salient concepts such as property, ownership, efficiency, legitimacy, justice, and responsibility, as well as

deeper ontological ideals about the self/persons (especially as understood trans-temporally), agency, and society. In some of these critical chapters, especially those pertaining to the longer-standing and much debated concepts of property and efficiency, I brought wider critiques of libertarian, classical liberal and neoclassical economic ideas to bear on the more specific issue of legal transitions. In others, particularly those pertaining to the liberal-egalitarian themes of legitimate expectations and justice, I developed novel critiques of theories of legal transitions which I hope will shape the nascent evolution of liberal-egalitarian debates on these topics.

A new theory of legal transitions

The third and most significant contribution of this thesis has been to specify and defend a new theory of legal transitions: Adaptive Responsibility Theory. ART strikes a hitherto elusive principled middle path between the conservative and reformative extremes to which existing theories of legal transitions gravitate. While ART will imply strongly conservative or reformative state responses in some cases, the theory's central focus is the 'adaptive' state responses that occupy the wide middle ground of the transition policy spectrum. Adaptivism is a position that accepts the inevitability and desirability of the self's evolutionary change over time and that recognises that, under propitious conditions, agents can successfully adapt to even major changes to their central functionings. Many agents already have the resources and other capabilities that they need to adapt perfectly well within what Waldron aptly calls the ordinary "rhythms and cycles" of democratic, rule-of-law-based legislative activity (2012, 83, 108–9). Others, though, need state assistance to adapt successfully. Through a combination of procedural and substantive measures targeting these people's adaptive capabilities and the time they have before a legal change takes effect, adaptive transition policy can build a bridge for them to cross from the social, cultural and material conditions prevailing under the legal status quo to the new set of conditions ushered in by the legal change. Such an approach serves to stabilise protected central functionings to a degree in the near term, while equipping people with the means to change over the longer term.

ART has, I think, a number of key normative-theoretical strengths over its rivals: it parsimoniously combines the two most important kinds of normative reasons for transition

policy, *viz.* wellbeing and fairness; it specifies these reasons in terms of both a direction (conservative or reformative) and a magnitude, allowing them to be combined in a way that generates nuanced reasons for particular transition policy responses; it incorporates a wide range of possible transition policies, recognising that the bulk of the logical space of reasons generated by the Wellbeing and Fairness Principles imply a case for adaptive measures of one kind or another; it is grounded in plausible and coherent ontological, moral and political foundations; and it is capable of generating reasonably determinate, intuitively correct and explanatorily powerful conclusions in a wide range of specific cases.

With respect to the practical aims of this thesis, the theory also has a number of advantages. First, the reasons for action it generates can be approximately inferred by the state in a low-cost, respectful way. With regard to fairness, this simply requires an interpretation of relevant practices. With regard to wellbeing, this can be done through the identification of common categories of central functionings that are at stake in a particular legal transition (as illustrated in Chapter 7.2), and through an understanding of the linkages between central functionings and permissibly-observable individual resources and conditions, such as income, wealth, occupation, and place of residence (cf. Carter 2011, 562, 564). Second, the relatively basic notions of wellbeing and fairness that generate the reasons for transition policy are the kinds of reasons that I think are capable of commanding widespread agreement in polities whose constituents disagree on first-order questions of what the law should be—questions that often involve conflicting understandings of justice and the good life.

In addition to the overall contribution and strengths of ART, the constructive chapters made a number of proto-contributions to wider debates. These include: the elaboration of the ecological account of the self and agency, and the articulation of connections between this account and the concepts of wellbeing, fairness, and adaptation; the specification of the concept of particular functionings and the defence of a modified functionings account of wellbeing that incorporates particular functionings alongside the standardly included 'generic' functionings; the specification and defence of a practice-based conception of fairness in terms of conventional allocations of *ex ante* responsibility for managing risk; the argument that compensation (understood narrowly as monetary payments for conservative

reasons) has only very limited applicability as a state response to transitions; the motivation, specification and defence of adaptive transition policies; and the articulation of the link between propitious conditions for adaptation to legal change and the minimal (formal and procedural) requirements of the rule of law.

10.4 DIRECTIONS FOR FUTURE RESEARCH

There are many exciting directions for future research that this thesis illuminates. I will conclude by mentioning six clusters of these.

The first cluster involves picking up some of the lines of argument for theories of legal transition that I suggested in my critical discussion but did not pursue in detail. At the end of Chapter 2, I suggested that other instrumental arguments for property rights could be used to develop a partial theory of legal transitions based on property, including the 'natural' part of Stilz's hybrid theory (e.g. Stilz 2013, 2018) and arguments about personal property made by Radin (1982). In Chapter 3, I suggested that genuine utilitarianism, and somewhat-Paretian 'policy packages' that at least leave low-income persons no worse off, are distributional objectives worth exploring in the context of legal transitions. And in Chapter 5, I set the would-be justice theorist of legal transitions a challenge to specify a good justice-based theory of legal transitions that can handle more than 'obvious injustice' cases.

A second cluster concerns the development and refinement of ART. In particular, there is room for further refinement of the adaptive transition policy options. I noted in Chapter 9 that the fairness and wellbeing reasons generated by ART only go so far in selecting appropriate adaptive responses; additional normative theories and values are needed to generate more specific policy recommendations within the range generated by ART. As such, I suggested that the version of ART specified in this thesis could be viewed as the "core" theory, with additional normative values generating optional "modules" containing a more refined menu of adaptive policy options (e.g. "the *ART-Republican Module*, with rigorous civics education and extensive pre-reform deliberative and participatory mechanisms", etc.). Further thought—perhaps in collaboration with economists—should also be given to the incorporation of a 'cost effectiveness' criterion (a different conception of efficiency to those

explored in Chapter 3) that can be used to select among the permissible range of policy options generated by the Wellbeing and Fairness Principles. And there is interesting potential to bring in justice considerations to develop adaptive transition policies for the losers from transitions away from 'obvious injustices'—a project that certainly has political merit in an era of Trumpian backlash.

The third cluster of future research directions involves picking up some of the ideas I developed in the course of critiquing other theories or developing ART, but which have wider applications than legal transitions and thus may be of more general interest to normative political, legal and/or economic theorists. One of these is the ecological conception of the self and agency, and more generally links between political and legal philosophy and 4E philosophy of mind, which are only just beginning to be explored (e.g. Carter and Palermos 2016; Nine 2018). The notion of 'particular functionings', and the modified functionings account of wellbeing of which it is a part, could facilitate the extension of functionings/capabilities theory into new policy realms where loss dynamics are salient. The practice-based conception of fairness as *ex ante* risk allocation, building on McTernan (2016) and the approach I develop in Chapter 8, has considerable potential as a rival to non-moral luck egalitarianism for the analysis of risky choices. Cashing out the values of stability and predictability under the rule of law, in light of many of the other ideas and themes explored in this thesis, is a topic that also merits more detailed treatment in the philosophy of law. Likewise the 'special rights' conception of legitimate expectations holds promise as a political- and legal-theoretic institution (see Green, *in prep*.).

A fourth cluster of research directions involves more specific applications of ART. As the range of example cases listed in Table 1, above, suggests, this includes issues such as: climate change and the "just transition" to low-carbon economies (UNFCCC n.d.); other regulations necessary to tackle urgent and looming environmental crises and improve public health and safety; measures to reduce inequality and redistribute resources, such as tax reforms pertaining to wealth, property and incomes; consumer protection and antitrust/competition regulation; Brexit; and a range of reforms that have significant socio-cultural implications, including immigration and multicultural policy, reforms to the institution of marriage and

other domestic partnership statuses, and the regulation of cultural practices such as fox-hunting. Other specific applications include relevant domains of positive law, such as the law of property, takings, eminent domain, legitimate expectations, and investor-state dispute settlement.

A fifth cluster concerns scope expansions. In Chapter 1.3, I noted that there might be lessons and ideas from this thesis' discussion of normal legal transitions for more fundamental transitions in the machinery of government (such as devolutions; joining supranational structures; constitutional replacements; and economic system transitions). There might also be lessons for the state's role in *non*-legally-induced changes, such as social, labour market, education, industrial, and regional policy, and initiatives to address 'technological unemployment' from innovations in fields such as automation and artificial intelligence.

Finally and perhaps most importantly, I think there is a fascinating research agenda to be developed at the intersection of normative theories of legal transitions, democratic theory and empirical political science. Exciting collaborations between normative and empirical democratic theorists—e.g. in the field of deliberative democracy—are already occurring, and many of these pertain to contentious policy reforms. Future normative theory on legal transitions could both learn from and contribute to this research agenda. For example, I have suggested that ART captures widely held, basic transitional concerns about wellbeing and fairness, and is more likely to generate political agreement among citizens who otherwise disagree about primary laws and policies. I have also argued that democratic processes such as information provision, consultation, public deliberation and participatory policy mechanisms have a valuable role to play in facilitating successful adaptation to legal changes. These ideas could usefully be empirically tested through a combination of fieldwork with would-be losers and winners from legal change, surveys, and field experiments.

***

I began this thesis with an illustration of the interplay between normative ideas and the politics of legal transitions, using a case-study of attempted carbon pricing reforms in Australia. Climate change is but one of many immense challenges of policy and legal reform

across a dizzying array of issue domains that societies and their governments are facing—and at a time when democracy is under strain from many quarters. It is hoped that the ideas advanced in this thesis might help societies steer these reforms successfully through the muddy waters of transition politics. There are, of course, limits to what normative theories can achieve, even when embraced by powerful hands: major reforms will always involve the disagreement, bargaining and compromise characteristic of *realpolitik*. But as Australia's ill-fated carbon pricing schemes showed, trying to sail these treacherous seas without a normative compass can be politically disastrous, leaving governments bogged down in a morass of side-payments that can ultimately sink the very reforms they are trying to implement. It is hoped that ART might provide at least a prototype of the normative compass that well-intentioned governments and their citizens need to avoid getting lost in transition.

REFERENCES

Abbott, Tony. 2012. Speech to Liberal Party Federal Council Meeting, Melbourne. Available at "Opposition Leader Tony Abbott's speech to the federal council of the Liberal Party", *Sydney Morning Herald* (online). 30 June 2012. https://www.smh.com.au/politics/federal/opposition-leader-tony-abbotts-speech-to-the-federal-council-of-the-liberal-party-20120630-2195j.html.

Acemoğlu, Daron, and James A. Robinson. 2012. *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*. London: Profile Books.

Addelson, Kathryn Pyne. 1994. *Moral Passages: Toward a Collectivist Moral Theory*. New York: Routledge.

Adler, Matthew D. 2011. *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis*. Oxford: Oxford University Press.

———. 2015. "Value and Cost-Benefit Analysis." In *The Oxford Handbook of Value Theory*, eds. Iwao Hirose and Jonas Olson. Oxford: Oxford University Press, 317–37.

———. 2016. "Benefit-Cost Analysis and Distributional Weights: An Overview." *Review of Environmental Economics and Policy* 10(2): 264–85.

Adler, Matthew D., and Eric A. Posner. 1999. "Rethinking Cost-Benefit Analysis." *The Yale Law Journal* 109(2): 165–247.

Ahmad, Ehtisham, and Nicholas Stern. 1991. *The Theory and Practice of Tax Reform in Developing Countries*. Cambridge: Cambridge University Press.

———. 2009. *Effective Carbon Taxes and Public Policy Options: Insights from India and Pakistan*. London. http://eprints.lse.ac.uk/38348/.

Alexander, Larry, and Michael Moore. 2016. "Deontological Ethics." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://plato.stanford.edu/archives/win2016/entries/ethics-deontological/.

Anderson, Elizabeth. 1999. "What Is the Point of Equality?" *Ethics* 109(2): 287–337.

———. 2008. "How Should Egalitarians Cope with Market Risks?" *Theoretical Inquiries in Law* 9: 239–70.

Anderson, Michael L. 2003. "Embodied Cognition: A Field Guide." *Artificial Intelligence* 149: 91–130.

Anton, Charis E, and Carmen Lawrence. 2014. "Home Is Where the Heart Is: The Effect of Place of Residence on Place Attachment and Community Participation." *Journal of Environmental Psychology* 40: 451–61.

Aristotle. 1962 [*c*.350 BC]. *Politics*, trans. T. A. Sinclair. Harmondsworth: Penguin Books. [Textual references are to the book number, chapter number, then page number of this

edition]

———. 2014 [*c*.350 BC]. *Nicomachean Ethics*, trans. C. D. C. Reeve. Indianapolis: Hackett Publishing Co.

Armenta, Christina, Katherine Jacobs Bao, Sonja Lyubomirsky, and Kennon M. Sheldon. 2014. "Is Lasting Change Possible? Lessons from the Hedonic Adaptation Prevention Model." In *Stability of Happiness: Theories and Evidence on Whether Happiness Can Change*, eds. Kennon M. Sheldon and Richard E. Lucas. London: Academic Press.

Arneson, Richard J. 1989. "Equality and Equal Opportunity for Welfare." *Philosophical Studies* 56: 77–93.

Ashforth, Blake. 2001. *Role Transitions in Organizational Life: An Identity-Based Perspective*. Mahwah, NJ.: Routledge.

Baker, C . Edwin. 1975. "The Ideology of the Economic Analysis of Law." *Philosophy & Public Affairs* 5(1): 3–48.

Barnes, Lucy. 2015. "The Size and Shape of Government: Preferences over Redistributive Tax Policy." *Socioeconomic Review* 13(1): 55–78.

Barry, Christian, and Luara Ferracioli. 2013. "Young on Responsibility and Structural Injustice." *Criminal Justice Ethics* 32(3): 247–57.

Barry, Christian, and Robert Kirby. 2017. "Scepticism about Beneficiary Pays: A Critique." *Journal of Applied Philosophy* 34(3): 285–300.

Beatty, Christina, and Stephen Fothergill. 1996. "Labour Market Adjustment in Areas of Chronic Industrial Decline: The Case of the UK Coalfields." *Regional Studies* 30(7): 627–40.

Bebchuck, Lucian A. 1980. "The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?" *Hofstra Law Review* 8: 671–709.

Bedau, Hugo A. 1969. *Civil Disobedience: Theory and Practice*. New York: Pegasus.

Beer, Randall D. 2003. "The Dynamics of Active Categorical Perception in an Evolved Model Agent." *Adaptive Behavior* 11: 209–43.

Beggan, James K. 1992. "On the Social Nature of Nonsocial Perception: The Mere Ownership Effect." *Journal of Personality and Social Psychology* 62(2): 229–37.

Béland, Daniel, and Robert Henry Cox, eds. 2011. *Ideas and Politics in Social Science Research*. Oxford: Oxford University Press.

Bell, Daniel. 2016. "Communitarianism." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/communitarianism/.

Bell, Derek R. 2004. "Environmental Refugees: What Rights? Which Duties?" *Res Publica* 10: 135–52.

Benhabib, Seyla. 1992. *Situating the Self: Gender, Community and Postmodernism in*

Contemporary Ethics. Oxford: Polity Press.

Bentham, Jeremy. 1838–43. *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring.* 11 vols. Edinburgh: William Tait. [Textual references are to the volume number, then title of the work, then page number]

——. 1840, *Theory of Legislation; by Jeremy Bentham. Translated from the French of Etienne Dumont, by Richard Hildreth*. 2 vols. Rept. Bristol: Thoemmes Continuum, 2004. [Textual references are to the volume number, then page number.]

Bingham, Tom. 2010. *The Rule of Law*. London: Allen Lane.

Blume, Lawrence, and Daniel L. Rubinfeld. 1984. "Compensation for Takings: An Economic Analysis." *California Law Review* 72(4): 569–628.

Blyth, Mark. 2002. *Great Transformations: Economic Ideas and Institutional Change in the 20th Century*. Cambridge: Cambridge University Press.

Bovens, Luc. 2011. "A Lockean Defense of Grandfathering Emission Rights." In *The Ethics of Global Climate Change*, ed. Denis G. Arnold. Cambridge: Cambridge University Press, 124–44.

Boxill, Bernard. 2015. "Black Reparations." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/black-reparations/.

Brand, Jennie E. 2015. "The Far-Reaching Impact of Job Loss and Unemployment." *Annual Review of Sociology* 41: 359–75.

Bratman, Michael E. 1987. *Intention, Plans and Practical Reason*. Cambridge, MA.: Harvard University Press.

Braverman, Harry. 1974. *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century*. New York: Monthly Review Press.

Brighouse, Harry, Helen F. Ladd, Sussana Loeb, and Adam Swift. 2018. *Educational Goods: Values, Evidence, and Decision-Making*. Chicago: University of Chicago Press.

Broome, John. 1999. *Ethics out of Economics*. Cambridge: Cambridge University Press.

Brown, Alexander. 2011. "Justifying Compensation for Frustrated Legitimate Expectations." *Law and Philosophy* 30(6): 699–728.

———. 2012. "Rawls, Buchanan, and the Legal Doctrine of Legitimate Expectations." *Social Theory and Practice* 38(4): 617–45.

———. 2017a. "A Theory of Legitimate Expectations." *Journal of Political Philosophy* 25(4): 435–60.

———. 2017b. *A Theory of Legitimate Expectations for Public Administration*. Oxford: Oxford University Press.

Buchanan, Allen. 1975. “Distributive Justice and Legitimate Expectations.” *Philosophical Studies* 28: 419–25.

———. 2004. *Justice, Legitimacy, and Self-Determination*. Oxford: Oxford University Press.

Buckle, Stephen. 1991. *Natural Law and the Theory of Property*. Oxford: Clarendon Press.

Bullard, Nathaniel. 2014. *Fossil Fuel Divestment: A $5 Trillion Challenge*. Bloomberg New Energy Finance White Paper. London: Bloomberg New Energy Finance.

Burke, Edmund. 1969 [1790]. *Reflections on the Revolution in France*. Harmondsworth: Penguin.

Butler, Brian Edgar. “Law and Economics.” In *The Internet Encyclopedia of Philosophy*, https://www.iep.utm.edu/law-econ/.

Butt, Daniel. 2007. “On Benefiting from Injustice.” *Canadian Journal of Philosophy* 37(1): 129–52.

———. 2008. *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations*. Oxford: Oxford University Press.

———. 2014. “‘A Doctrine Quite New and Altogether Untenable’: Defending the Beneficiary Pays Principle.” *Journal of Applied Philosophy* 31(4): 336–48.

Caney, Simon. 2005. *Justice Beyond Borders: A Global Political Theory*. Oxford: Oxford University Press.

———. 2014. “Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens.” *Journal of Political Philosophy* 22(2): 124–49.

Carter, Ian. 2011. “Respect and the Basis of Equality.” *Ethics* 121(3): 538–71.

Carter, J. Adam, and S. Orestis Palermos. 2016. “Is Having Your Computer Compromised a Personal Assault? The Ethics of Extended Cognition.” *Journal of the American Philosophical Association*: 542–60.

Chambers, Clare. 2008. *Sex, Culture, and Justice: The Limits of Choice*. University Park, PA: Pennsylvania State University Press.

Chubb, Philip. 2014. *Power Failure*. Melbourne, Australia: Black Inc.

Claassen, Rutger. 2014. “Capability Paternalism.” *Economics and Philosophy* 30: 57–73.

———. 2015. “The Capability to Hold Property.” *Journal of Human Development and Capabilities* 16(2): 220–36.

———. 2016. “An Agency-Based Capability Theory of Justice.” *European Journal of Philosophy* 25(4): 1279–1304.

Clark, Andy. 2008. *Supersizing the Mind: Embodiment, Action, and Cognitive Extension*. Oxford: Oxford University Press.

Clark, Andy, and David Chalmers. 1998. “The Extended Mind.” *Analysis* 58(1): 7–19.

Clark, Andy, and Josefa Toribio. 1994. “Doing without Representing?” *Synthese* 101: 401–31.

Coase, Ronald H. 1960. “The Problem of Social Cost.” *The Journal of Law and Economics* 3: 1–44.

Cohen, G A. 1989. “On the Currency of Egalitarian Justice.” *Ethics* 99(4): 906–44.

———. 2011. “Rescuing Conservatism: A Defense of Existing Value.” In *Reasons and Recognition: Essays on the Philosophy of T M Scanlon*, eds. R. Jay Wallace, Rahul Kumar, and Samuel Freeman. Oxford: Oxford University Press, 203–26.

Coleman, Jules L. 1980a. “Efficiency, Exchange, and Auction.” *California Law Review* 68(2): 221–49.

———. 1980b. “Efficiency, Utility, and Wealth Maximization.” *Hofstra Law Review* 8: 509–51.

———. 1981. “The Foundations of Constitutional Economics.” In *Constitutional Economics: Containing the Economic Powers of Government*, ed. Richard B. McKenzie. Washington, DC.: Heritage Foundation, 141–55.

———. 1984. “Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law.” *Ethics* 94(4): 649–79.

———. 1992. *Risks and Wrongs*. Oxford: Oxford University Press.

Commonwealth of Australia. 2008. *Australian Government Carbon Pollution Reduction Scheme: Green Paper*. Canberra: Commonwealth of Australia.

Constant, Benjamin. 1988 [1819]. “The Liberty of the Ancients Compared with that of the Moderns.” In *Political Writings*, ed./trans. B. Fontana. Cambridge: Cambridge University Press.

Coole, Diana. 2005. “Rethinking Agency: A Phenomenological Approach to Embodiment and Agentic Capacities.” *Political Studies* 53: 124–42.

———. 2007. “Experiencing Discourse: Corporeal Communicators and the Embodiment of Power.” *British Journal of Politics and International Relations* 9: 413–33.

Cornell, Drucilla. 1992. *The Philosophy of the Limit*. London: Routledge.

Crawford, Matthew. 2015. *The World beyond Your Head*. St Ives: Penguin Books.

Crimmins, James E. 1996. “Contending Interpretations of Bentham’s Utilitarianism.” *Canadian Journal of Political Science* 29(4): 751–77.

———. 2017. “Jeremy Bentham.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/bentham/.

Crowell, Stephen. 2013. *Normativity and Phenomenology in Husserl and Heidegger*. New

York: Cambridge University Press.

Csikszentmihalyi, Mihaly. 1990. *Flow: The Psychology of Optimal Experience*. New York: Harper and Row.

Cudd, Ann. 2006. *Analyzing Oppression*. Oxford: Oxford University Press.

Cunning, David. 2017. "Margaret Lucas Cavendish." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://plato.stanford.edu/archives/sum2017/entries/margaret-cavendish/.

Dahrendorf, Ralf. 1968. "Homo Sociologicus." In *Essays in the Theory of Society*, London: Routledge & K. Paul, 19–87.

Damon, Maria, Daniel H. Cole, Elinor Ostrom, and Thomas Sterner. 2019. "Grandfathering: Environmental Uses and Impacts." *Review of Environmental Economics and Policy* 13(1): 23–42.

Daniels, Norman. 1996. *Justice and Justification: Reflective Equilibrium in Theory and Practice*. Cambridge: Cambridge University Press.

———. 2016. "Reflective Equilibrium." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/reflective-equilibrium/.

Davis, John B. 2003. *The Theory of the Individual in Economics: Identity and Value*. London: Routledge.

———. 2009. "Competing Conceptions of the Individual in Recent Economics." In *The Oxford Handbook of Philosophy of Economics*, eds. Don Ross and Harold Kincaid. Oxford: Oxford University Press, 223–44.

Deci, Edward L., and Richard M. Ryan. 2000. "The 'What' and 'Why' of Goal Pursuits: Human Needs and the Self-Determination of Behavior." *Psychological Inquiry* 11(4): 227–68.

Delmas, Candice. 2014a. "Political Resistance: A Matter of Fairness." *Law and Philosophy* 33(4): 465–88.

———. 2014b. "Samaritanism and Civil Disobedience." *Res Publica* 20(3): 295–313.

———. 2018. *A Duty to Resist: When Disobedience Should Be Uncivil*. Oxford: Oxford University Press.

DeMartino, George F. 2015. "Harming Irreparably: On Neoliberalism, Kaldor-Hicks, and the Paretian Guarantee." *Review of Social Economy* 73(4): 315–40.

Deveaux, Monique. 2015. "The Global Poor as Agents of Justice." *Journal of Moral Philosophy* 12: 125–50.

Donald, Merlin. 1991. *Origins of the Modern Mind: Three Stages in the Evolution of Culture and Cognition*. Cambridge, MA.: Harvard University Press.

Doran, Michael. 2007. "Legislative Compromise and Tax Transition Policy." *The*

University of Chicago Law Review 74(2): 545–600.

Dorband, Ira Irina, Michael Jakob, Matthias Kalkuhl, and Jan Christoph Steckel. 2019. "Poverty and Distributional Effects of Carbon Pricing in Low- and Middle-Income Countries – A Global Comparative Analysis." *World Development* 115: 246–57.

Dreyfus, Hubert L. 1972. *What Computers Can't Do: A Critique of Artificial Intelligence*. New York: Harper and Row.

———. 1991. *Being-in-the-World: A Commentary on Heidegger's Being and Time, Division 1*. Cambridge, MA.: The MIT Press.

———. 1992. *What Computers (Still) Can't Do: A Critique of Artificial Reason*. Cambridge, MA.: The MIT Press.

Dworkin, Ronald. 1980a. "Is Wealth a Value?" *Journal of Legal Studies* 9: 191–226.

———. 1980b. "Why Efficiency? A Response to Professors Calabresi and Posner." *Hofstra Law Review* 8: 563–90.

———. 1981. "What Is Equality? Part 2: Equality of Resources." *Philosophy & Public Affairs* 10(4): 283–345.

———. 1989. "Liberal Community." *California Law Review* 77: 479–504.

———. 2000. *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, MA.: Harvard University Press.

Eisikovits, Nir. 2017. "Transitional Justice." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/.

Elster, Jon. 1983. *Sour Grapes: Studies in the Subversion of Rationality*. Cambridge: Cambridge University Press.

Epstein, Richard A. 1985. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, MA.: Harvard University Press.

———. 1986a. "A Last Word on Eminent Domain." *University of Miami Law Review* 41(1): 253–76.

———. 1986b. "An Outline of Takings." *University of Miami Law Review* 41(1): 3–20.

———. 1989. "The Utilitarian Foundations of Natural Law." *Harvard Journal of Law & Public Policy* 12(3): 711–52.

———. 1993. *Bargaining with the State*. Princeton: Princeton University Press.

———. 1995. *Simple Rules for a Complex World*. Cambridge, MA.: Harvard University Press.

———. 2003. "Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest." *Journal of Contemporary Legal Issues* 13: 69–91.

Feinberg, Joel. 1984. *The Moral Limits of the Criminal Law Volume 1: Harm to Others*. Oxford: Oxford University Press.

Fleischacker, Samuel. 2004. *On Adam Smith's Wealth of Nations: A Philosophical Companion*. Princeton, N.J.: Princeton University Press.

Fleurbaey, Marc. 2001. "Egalitarian Opportunities." *Law and Philosophy* 20(5): 499–530.

Forrester, Katrina. 2019. *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy*. Princeton: Princeton University Press.

Forsyth, Christopher. 2011. "Legitimate Expectations Revisited." *Judicial Review* 16(4): 429–39.

Frank, Robert H. 2000. "Why Is Cost-Benefit Analysis so Controversial?" *The Journal of Legal Studies* 29(S2): 913–30.

Frankfurt, Harry G . 1971. "Freedom of the Will and the Concept of a Person." *The Journal of Philosophy* 68(1): 5–20.

Frazer, Elizabeth, and Nicola Lacey. 1993. *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate*. Hemel Hempstead: Harvester Wheatsheaf.

Freeman, Samuel. 2001. "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View." *Philosophy and Public Affairs* 30(2): 105–51.

———. 2011. "Capitalism in the Classical and High Liberal Traditions." *Social Philosophy and Policy* 28(2): 19–55.

Frey, Bruno S., Felix Oberholzer-Gee, and Reiner Eichenberger. 1996. "The Old Lady Visits Your Backyard: A Tale of Morals and Markets." *Journal of Political Economy* 104(6): 1297–1313.

Fried, Barbara H. 2003. "Ex Ante/Ex Post." *Journal of Contemporary Legal Issues* 13: 123–60.

———. 2004. "Left-Libertarianism: A Review Essay." *Philosophy and Public Affairs* 32(1): 66–92.

———. 2005. "Left-Libertarianism, Once More: A Rejoinder to Vallentyne, Steiner, and Otsuka." *Philosophy & Public Affairs* 33(2): 216–22.

———. 2012. "Does Nozick Have a Theory of Property Rights?" In *The Cambridge Companion to Nozick's Anarchy, State, and Utopia*, eds. Ralf Bader and John Meadowcroft. Cambridge: Cambridge University Press, 230–54.

Friedman, Milton. 1962. *Capitalism and Freedom*. Chicago: University of Chicago Press.

Frisch, David. 2006. "Rational Retroactivity in a Commercial Context." *Alabama Law Review* 58: 765–809.

Frost, Samantha. 2016. *Biocultural Creatures: Toward a New Theory of the Human*. Durham: Duke University Press.

Fuller, Lon L. 1964. *The Morality of Law*. Revised Ed. New Haven: Yale University Press.

Gallagher, Shaun, and Anya Daly. 2018. "Dynamical Relations in the Self-Pattern." *Frontiers in Psychology* 9: 1–13.

Gandjour, Afschin. 2008. "Mutual Dependency between Capabilities and Functionings in Amartya Sen's Capability Approach." *Social Choice and Welfare* 31: 345–50.

Van Gelder, Tim. 1995. "What Might Cognition Be, If Not Computation?" *Journal of Philosophy* 92(7): 345–81.

Gest, Justin. 2016. *The New Minority: White Working Class Politics in an Age of Immigration and Inequality*. Oxford: Oxford University Press.

Gibson, James J. 1979. *The Ecological Approach to Visual Perception*. Boston: Houghton Mifflin.

Gidron, Noam, and Peter A. Hall. 2017. "The Politics of Social Status: Economic and Cultural Roots of the Populist Right." *British Journal of Sociology* 68: S57–84.

Gilens, Martin. 2012. *Affluence and Influence: Economic Inequality and Political Power in America*. Princeton: Russell Sage Foundation and Princeton University Press.

Goldberg, Sanford C. 2017. "Should Have Known." *Synthese* 194: 2863–94.

Goodhart, Michael. 2018. *Injustice: Political Theory for the Real World*. Oxford: Oxford University Press.

Goodin, Robert E. 1989. "Theories of Compensation." *Oxford Journal of Legal Studies* 9(1): 56–75.

———. 1990. "Stabilizing Expectations: The Role of Earnings-Related Benefits in Social Welfare Policy." *Ethics* 100(3): 530–53.

———. 1995. *Utilitarianism as a Public Philosophy*. Cambridge: Cambridge University Press.

———. 2013. "Disgorging the Fruits of Historical Wrongdoing." *American Political Science Review* 107(3): 478–91.

Goodin, Robert E., and Christian Barry. 2014. "Benefiting from the Wrongdoing of Others." *Journal of Applied Philosophy* 31(4): 363–76.

Graetz, Michael J. 1977. "Legal Transitions: The Case of Retroactivity in Income Tax Revision." *University of Pennsylvania Law Review* 126(1): 47–87.

Green, Fergus. 2011a. "A Clean Energy Future for Whom?" *Inside Story*. https://insidestory.org.au/a-clean-energy-future-for-whom/.

———. 2011b. "Carbon Compensation in the Resources and Energy Sectors." *AMPLA Yearbook [Journal of the Australian Resources and Energy Law Association]* 5: 468–89.

———. 2017. “Legitimate Expectations, Legal Transitions, and Wide Reflective Equilibrium.” *Moral Philosophy and Politics* 4(2): 177–205.

———. In prep. “Illuminating the ‘Dim Borderland’ of Tacit Understandings: A Unified Theory of Legitimate Expectations in Morality and Law.”

———. Forthcoming. “Book Review: Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford: Oxford University Press, 2017), pp. 226.” *Law and Philosophy*.

Green, Fergus and Ajay Gambhir. 2019. “Transitional assistance policies for just, equitable and smooth low-carbon transitions: who, what and how?” *Climate Policy*. https://doi.org/10.1080/14693062.2019.1657379.

Gutmann, Amy, and Dennis F. Thompson. 1996. *Democracy and Disagreement*. Cambridge, MA.: The Belknap Press.

Hacker, Jacob S., and Paul Pierson. 2010. “Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States.” *Politics and Society* 38(2): 152–204.

Hackney Jr., James R. 1997. “Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory.” *Law and History Review* 15: 275–322.

———. 2003. “Law and Neoclassical Economics Theory: A Critical History of the Distribution/efficiency Debate.” *Journal of Socio-Economics* 32(4): 361–90.

Haidt, Jonathan. 2012. *The Righteous Mind: Why Good People Are Divided by Politics and Religion*. London: Allen Lane.

Haidt, Jonathan, and Jesse Graham. 2007. “When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recognize.” *Social Justice Research* 20(1): 98–117.

Hall, Peter A. 1993. “Policy Paradigms, Social Learning , and the State: The Case of Economic Policymaking in Britain.” *Comparative Politics* 25(3): 275–96.

Hall, Peter A., and Michèle Lamont. 2013a. *Social Reslience in the Neoliberal Era*. Cambridge: Cambridge University Press.

———. 2013b. “Why Social Relations Matter for Politics and Successful Societies.” *Annual Review of Political Science* 16: 49–71.

Hamilton, Andy. 2015. “Conservatism.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/conservatism/.

Harris, Cheryl. 1993. “Whiteness as Property.” *Harvard Law Review* 106: 1707–91.

Hart, H.L.A. 1955. “Are There Any Natural Rights?” *Philosophical Review* 64(2): 175–91.

Hasen, David M. 2010. “Legal Transitions and the Problem of Reliance.” *Columbia*

Journal of Tax Law 1: 120–73.

Haslanger, Sally. 2016. "What Is a (Social) Structural Explanation?" *Philosophical Studies* 173(1): 113–30.

———. 2018. "What Is a Social Practice?" *Royal Institute of Philosophy Supplement* 82: 231–47.

Hausman, Daniel M. 2012. *Preference, Value, Choice, and Welfare*. Cambridge: Cambridge University Press.

Hausman, Daniel M., Michael S. McPherson, and Debra Satz. 2016. *Economic Analysis, Moral Philosophy and Public Policy*. 3rd ed. Cambridge: Cambridge University Press.

Haydar, Bashshar, and Gerhard Øverland. 2014. "The Normative Implications of Benefiting Frominjustice." *Journal of Applied Philosophy* 31: 349–362.

Hayek, Friedrich A. von. 1960. *The Constitution of Liberty*. Chicago: University of Chicago Press.

———. 1982. *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*. London: Routledge.

Heidegger, Martin. 1962 [1927]. *Being and Time*. trans. John Macquarrie and Edward Robinson. Oxford: Blackwell.

Held, Virginia. 1985. "Feminism and Epistemology: Recent Work on the Connection between Gender and Knowledge." *Philosophy and Public Affairs* 14(3): 296–307.

Herington, Jonathan. 2015. "The Concepts of Security, Fear, Liberty, and the State." In *Security: Dialogue across Disciplines*, ed. Philippe Bourbeau. Cambridge: Cambridge University Press, 22–44.

———. 2017. "Climate-Related Insecurity, Loss and Damage." *Ethics, Policy & Environment* 20(2): 184–94.

Hicks, John R. 1939. "The Foundations of Welfare Economics." *Economic Journal* 49(196): 696–712.

———. 1941. "The Rehabilitation of Consumers' Surplus." *Review of Economic Studies* 8(2): 108–16.

Hills, John. 2012. *Getting the Measure of Fuel Poverty: Final Report of the Fuel Poverty Review by John Hills*. London. https://www.gov.uk/government/publications/final-report-of- the-fuel-poverty-review.

Hobfoll, Stevan E. 1989. "Conservation of Resources: A New Attempt at Conceptualizing Stress." *The American psychologist* 44(3): 513–24.

———. 2002. "Social and Psychological Resources and Adaptation." *Review of General Psychology* 6(4): 307–24.

Hobfoll, Stevan E., Natalie R. Stevens, and Alyson K. Zalta. 2015. "Expanding the Science

of Resilience: Conserving Resources in the Aid of Adaptation." *Psychological Inquiry: An International Journal for the Advancement of Psychological Theory* 26(2): 174–80.

Hohfeld, Wesley Newcomb. 1914. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23(1): 16–59.

———. 1917. "Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 26(8): 710–70.

Holland, Breena. 2017. "Procedural Justice in Local Climate Adaptation: Political Capabilities and Transformational Change." *Environmental Politics* 26(3): 391–412.

Holmes, Oliver Wendell Jr. 1895. "Privilege, Malice, and Intent." *Harvard Law Review* 8(1): 1–14.

Holmes, Thomas H., and Richard H. Rahe. 1967. "The Social Readjustment Rating Scale." *Journal of Psychosomatic Research* 11(5): 213–18.

Hotelling, Harold. 1938. "The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates." *Econometrica* 6(3): 242–69.

Hsieh, Nien-hê. 2000. "Moral Desert, Fairness and Legitimate Expectations in the Market." *Journal of Political Philosophy* 8(1): 91–114.

Hsu, Shi-Ling. 2015. "The Rise and Rise of the One Percent: Considering Legal Causes of Inequality." *Emory Law Journal Online* 64: 2043–72.

Huber, Stefan, and Odilo W. Huber. 2012. "The Centrality of Religiosity Scale (CRS)." *Religions* 3: 710–24.

Hume, David. 2007 [1738–40]. "Treatise of Human Nature". In *A Treatise of Human Nature: A Critical Edition*, eds. D. F. Norton and M. J. Norton. Oxford: Clarendon Press. [Textual reference is to the Book number, then Part number]

Hurley, Susan. 1998. *Consciousness in Action*. London: Harvard University Press.

Husserl, Edmund. 1982 [1913]. *Ideas Pertaining to a Pure Phenomenology and to a Phenomenological Philosophy – First Book: General Introduction to a Pure Phenomenology*. trans. F. Kersten. The Hague: Nijhoff.

Jahoda, Marie. 1982. *Employment and Unemployment: A Social Psychological Analysis*. Cambridge: Cambridge University Press.

Janoff-Bulman, Ronnie. 1992. *Shattered Assumptions: Towards a New Psychology of Trauma*. New York: Free Press.

Janoff-Bulman, Ronnie, and Michael Berg. 1998. "Disillusionment and the Creation of Value: From Traumatic Losses to Existential Gains." In *Perspectives on Loss: A Sourcebook*, ed. John H. Harvey. Philadelphia: Taylor & Francis.

John, Stephen. 2011. "Security, Knowledge and Well-Being." *Journal of Moral Philosophy*

8(1): 68–91.

Jost, John T. 2019. “A Quarter Century of System Justification Theory: Questions, Answers, Criticisms, and Societal Applications.” *British Journal of Social Psychology* 58(2): 263–314.

Jost, John T., and Mahzarin R. Banaji. 1994. “The Role of Stereotyping in System-Justification and the Production of False Consciousness.” *British Journal of Social Psychology* 33: 1–27.

Jost, John T., and Brian A. Nosek. 2004. “A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo.” *Political Psychology* 25(6): 881–919.

Kaldor, Nicholas. 1939. “Welfare Propositions and Inter-Personal Comparisons of Utility.” *The Economic Journal* 49(195): 549–52.

Kanbur, Ravi. 2003. “Development Economics and the Compensation Principle.” *International Social Science Journal* 55(175): 27–35.

Kant, Immanuel. 1996 [1797]. *The Metaphysics of Morals*. ed. Mary Gregor. Cambridge: Cambridge University Press. [Textual reference is to the original section number, then volume and page number of the Prussian Academy of Sciences edition of Kant’s works (in this case the version edited by Paul Nortrop in volume 6 of 1907), then page number of Mary Gregor’s edition preceded by the letters ‘MG’]

———. 1997 [1785]. *Groundwork of the Metaphysics of Morals*. ed. Mary Gregor. Cambridge: Cambridge University Press.

Kaplow, Louis. 1986. “An Economic Analysis of Legal Transitions.” *Harvard Law Review* 99(3): 509–617.

———. 2003. “Transition Policy: A Conceptual Framework.” *Journal of Contemporary Legal Issues* 13: 161–209.

Kaplow, Louis, and Steven Shavell. 1994. “Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income.” *Journal of Legal Studies* 23: 667–81.

Kelly, Paul J. 1989. “Utilitarianism and Distributive Justice: The Civil Law and the Foundations of Bentham’s Economic Thought.” *Utilitas* 1: 62–81.

———. 1990. *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law*. Oxford: Clarendon Press.

Kennedy, Duncan. 1981. “Cost-Benefit Analysis of Entitlement Problems: A Critique.” *Stanford Law Review* 33: 387–446.

Khader, Serene J. 2011. *Adaptive Preferences and Women’s Empowerment*. Oxford: Oxford University Press.

Khoury, Andrew C. 2013. “Synchronic and diachronic responsibility.” *Philosophical Studies* 165: 735–52.

Kirsh, David. 1995. “The Intelligent Use of Space.” *Artificial Intelligence* 73: 31–68.

Klosko, George. 2005. *Political Obligations*. Oxford: Oxford University Press.

Knight, Carl. 2006a. “The Metaphysical Case for Luck Egalitarianism.” *Social Theory and Practice* 32(2): 77–93.

———. 2006b. “The Method of Reflective Equilibrium: Wide, Radical, Fallible, Plausible.” *Philosophical Papers* 35(2): 205–29.

———. 2013. “What Is Grandfathering?” *Environmental Politics* 22(3): 410–27.

———. 2014. “Moderate Emissions Grandfathering.” *Environmental Values* 23(5): 571–92.

———. 2017. “Reflective Equilibrium.” In *Methods in Analytical Political Theory*, ed. Adrian Blau. Cambridge: Cambridge University Press.

Korobkin, Russell. 2002. “The Endowment Effect and Legal Analysis.” *Northwestern University Law Review* 97: 1227–93.

Koszegi, Botond, and Matthew Rabin. 2006. “A Model of Reference-Dependent Preferences.” *Quarterly Journal of Economics* CXXI: 1133–65.

Kramm, Matthias. 2019. “Capability and Habit.” *Journal of Global Ethics* 15(2): 183–92.

Krause, Sharon R. 2011. “Bodies in Action: Corporeal Agency and Democratic Politics.” *Political Theory* 39(3): 299–324.

Kronman, Anthony T. 1980. “Wealth Maximization as a Normative Principle.” *Journal of Legal Studies* 9: 227–42.

Laborde, Cecile. 2008. *Critical Republicanism: The Hijab Controversy and Political Philosophy*. Oxford: Oxford University Press.

Lacey, Nicola, and Hanna Pickard. 2013. “From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm.” *Oxford Journal of Legal Studies* 33(1): 1–29.

———. 2015. “To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice.” *Oxford Journal of Legal Studies* 35(4): 665–96.

Lamont, Julian, and Christi Favor. 2017. “Distributive Justice.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/justice-distributive/.

Lamont, Michèle. 2000. *The Dignity of Working Men: Morality and the Boundaries of Race, Class, and Immigration*. Cambridge, MA.: Russell Sage Foundation.

Lamont, Michèle, and Virág Molnár. 2002. “The Study of Boundaries in the Social Sciences.” *Annual Review of Sociology* 28(1965): 167–95.

Lavallee, David, J. Robert Grove, Sandy Gordon, and Ian W. Ford. 1998. “The Epxerience

of Loss in Sport." In *Perspectives on Loss: A Sourcebook*, ed. John H. Harvey. Philadelphia, PA.: Taylor & Francis, 241–52.

Lawford-Smith, Holly. 2014. "Benefiting from Failures to Address Climate Change." *Journal of Applied Philosophy* 31(4): 392–404.

Lear, Jonathan. 2006. *Radical Hope: Ethics in the Face of Cultural Devastation*. Cambridge, MA.: Harvard University Press.

Lee, Christina, and R. Glynn Owens. 2002. "Men, Work and Gender." *Australian Psychologist* 37(1): 13–19.

Levitsky, Steven, and Daniel Ziblatt. 2019. *How Democracies Die*. London: Penguin.

Levmore, Saul. 1999. "Changes, Anticipations, and Reparations." *Columbia Law Review* 99: 1657–1700.

Lewicka, Maria. 2005. "Ways to Make People Active: The Role of Place Attachment, Cultural Capital, and Neighbourhood Ties." *Journal of Environmental Psychology* 25: 381–95.

———. 2011. "Place Attachment: How Far Have We Come in the Last 40 Years?" *Journal of Environmental Psychology* 31(3): 207–30.

Leydet, Dominique. 2017. "Citizenship." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/citizenship/.

Lindley, Sarah et al. 2011. *Climate Change, Justice and Vulnerability*. York: Joseph Rowntree Foundation.

Lippert-Rasmussen, Kasper. 2016. *Luck Egalitarianism*. London: Bloomsbury Academic.

List, Christian, and Philip Pettit. 2011. *Group Agency: The Possibility, Design, and Status of Corporate Agents*. Oxford: Oxford University Press.

List, Christian, and Laura Valentini. 2016. "The Methodology of Political Theory." In *The Oxford Handbook of Philosophical Methodology*, eds. Herman Cappelen, Tamar Szabó Gendler, and John Hawthorne. Oxford: Oxford University Press, 525–50.

Little, Ian M. D. 1957. *A Critique of Welfare Economics*. 2nd ed. Oxford: Oxford University Press.

Lloyd, Sharon A., and Susanne Sreedhar. 2019. "Hobbes's Moral and Political Philosophy." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://plato.stanford.edu/archives/spr2019/entries/hobbes-moral/.

Locke, John. 1959 [*c*.1690]. *An Essay Concerning Human Understanding*, ed. A. C. Fraser. New York: Dover Publications. [This publication is based on the First Edition. Textual references are to the book number, chapter number, then section number]

———. 1967 [*c*.1679]. "Second Treatise of Government". In *Two Treatises of Government*, ed. Peter Laslett. Cambridge: Cambridge University Press. [Textual

references are to the section numbers]

Logue, Kyle D. 1996. “Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment.” *Michigan Law Review* 94(5): 1129–96.

———. 2003. “Legal Transitions, Rational Expectations, and Legal Progress.” *Journal of Contemporary Legal Issues* 13: 211–60.

Lovett, Frank. 2018. “Republicanism.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/republicanism/.

MacIntyre, Alasdair. 1981. *After Virtue*. Notre Dame: University of Notre Dame Press.

———. 1999. *Dependent Rational Animals: Why Human Beings Need the Virtues*. London: Gerald Duckworth & Co.

Mack, Eric. 2018. “Robert Nozick’s Political Philosophy.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/nozick-political/.

Mack, Eric, and Gerald Gaus. 2004. “Classical Liberalism and Libertarianism: The Liberty Tradition.” In *Handbook of Political Theory*, eds. Gerald F. Gaus and Chandran Kukathas. London: Sage Publications, 115–30.

Malabou, Catherine. 2012. *The New Wounded: From Neurosis to Brain Damage*. New York: Fordham University Press.

Mansfield, Carol, George L. Van Houtven, and Joel Huber. 2002. “Compensating for Public Harms: Why Public Goods Are Preferred to Money.” *Land Economics* 78(3): 368–89.

Markkanen, Sanna, and Annela Anger-Kraavi. 2019. “Social Impacts of Climate Change Mitigation Policies and Their Implications for Inequality.” *Climate Policy* 19(7): 827–44.

Mason, Elinor. 2016. “Value Pluralism.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/value-pluralism/.

Masur, Jonathan S., and Jonathan Remy Nash. 2010. “The Institutional Dynamics of Transition Relief.” *New York University Law Review* 85: 391–456.

Matravers, Matt. 2017. “Legitimate Expectations in Theory, Practice, and Punishment.” *Moral Philosophy and Politics* 4(2): 307–23.

McCloskey, Deirdre N. 2010. *Bourgeois Dignity: Why Economics Can’t Explain the Modern World*. Chicago: University of Chicago Press.

McTernan, Emily. 2016. “How to Be a Responsibility-Sensitive Egalitarian: From Metaphysics to Social Practice.” *Political Studies* 64(3): 748–64.

Menary, Richard. 2010. “Introduction to the Special Issue on 4E Cognition.” *Phenomenology and the Cognitive Sciences* 9: 459–63.

Mendelsohn, Robert, and Sheila Olmstead. 2009. “The Economic Valuation of Environmental Amenities and Disamenities: Methods and Applications.” *Annual Review of Environment and Resources* 34(1): 325–47.

Merleau-Ponty, Maurice. 1962 [1945]. *The Phenomenology of Perception*. trans. Colin Smith. London: Routledge & K. Paul.

Meyer, John M. 2001. *Political Nature: Environmentalism and the Interpretation of Western Thought*. Cambridge, MA.: The MIT Press.

Meyer, Lukas H., and Dominic Roser. 2006. “Distributive Justice and Climate Change: The Allocation of Emission Rights.” *Analyse & Kritik* 28: 223–49.

Meyer, Lukas, Thomas Pölzer, and Pranay Sanklecha. 2017. “Introduction to the Special Issue on Legitimate Expectations.” *Moral Philosophy and Politics* 4(2): 173–75.

Meyer, Lukas, and Pranay Sanklecha. 2011. “Individual Expectations and Climate Justice.” *Analyse & Kritik* 33(2): 449–471.

———. 2014. “How Legitimate Expectations Matter in Climate Justice.” *Politics, Philosophy & Economics* 13(4): 369–93.

Meyers, Diana. 1989. *Self, Society, and Personal Choice*. New York: Columbia University Press.

Michelman, Frank I. 1967. “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘“Just Compensation”’ Law.” *Harvard Law Review* 80: 1165–1258.

Mill, John Stuart. 1859. *On Liberty*. London: John W. Parker & Son.

———. 2006 [1848]. *Principles of Political Economy*. Indianapolis: Liberty Fund. [Textual reference is to the book number, then chapter number, then section number followed by a comma, then page numbers.]

Miller, David. 2000. *Citizenship and National Identity*. Cambridge: Polity Press.

———. 2001. “Distributing Responsibilities.” *Journal of Political Philosophy* 9(4): 453–71.

———. 2017. “Justice.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/justice/.

Miller, Eric D., and Julie Omarzu. 1998. “New Directions in Loss Research.” In *Perspectives on Loss: A Sourcebook*, ed. John H. Harvey. Philadelphia: Taylor & Francis, 3–20.

Mills, Charles W. 2009. “Rawls on Race/Race in Rawls.” *The Southern Journal of Philosophy* 47(S1): 161–84.

Mishan, E. J. 1952. “The Principles of Compensation Reconsidered.” *Journal of Political Economy* 60(4): 312–22.

Moellendorf, Darrel. 2009. *Global Inequality Matters*. Basingstoke: Palgrave Macmillan.

Moore, Margaret. 2015. *A Political Theory of Territory*. Oxford: Oxford University Press.

———. 2017. "Legitimate Expectations and Land." *Moral Philosophy and Politics* 4(2): 229–55.

Morrison, James. 2019. *Scroungers: Moral Panics and Media Myths*. London: Zed Books.

Mors, Emma, Bart W. Terwel, and Dancker D. L. Daamen. 2012. "The Potential of Host Community Compensation in Facility Siting." *International Journal of Greenhouse Gas Control* 11S: S130–38.

Mulhall, Stephen, and Adam Swift. 1996. *Liberals & Communitarians*. 2nd ed. Oxford: Blackwell.

Murphy, Liam. 2000. *Moral Demands in Non-Ideal Theory*. Oxford: Oxford University Press.

Murphy, Liam, and Thomas Nagel. 2002. *The Myth of Ownership: Taxes and Justice*. Oxford: Oxford University Press.

Na'aman, Oded. Forthcoming. "The rationality of emotional change: toward a process view." *Noûs*.

Nash, Jonathan Remy, and Richard L. Revesz. 2007. "Grandfathering and Environmental Regulation: The Law and Economics of New Source Review." *Northwestern University Law Review* 101(4): 1677–1733.

Newen, Albert, Leon De Bruin, and Shaun Gallagher, eds. 2018. *The Oxford Handbook of 4E Cognition*. Oxford: Oxford University Press.

Nine, Cara. 2018. "The Wrong of Displacement: The Home as Extended Mind." *Journal of Political Philosophy* 26(2): 240–57.

Noë, Alva. 2009. *Out of Our Heads: Why You Are Not Your Brain, and Other Lessons from the Biology of Consciousness*. Macmillan.

Norton, Bryan G., and Bruce Hannon. 1997. "Environmental Values: A Place-Based Theory." *Environmental Ethics* 19(3): 227–45.

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

Nussbaum, Martha. 2000. *Women and Human Development: The Capabilities Approach*. Cambridge: Cambridge University Press.

———. 2001a. "Animal Rights: The Need for a Theoretical Basis." *Harvard Law Review* 114(5): 1506–49.

———. 2001b. "The Costs of Tragedy: Some Moral Limits to Cost-Benefit Analysis." In *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, eds. Matthew D. Adler and Eric A. Posner. Chicago: Chicago University Press, 169–200.

———. 2001c. *Upheavals of Though*. Cambridge: Cambridge University Press.

———. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA.: Harvard University Press.

———. 2011. *Creating Capabilities: The Human Development Approach*. Cambridge, MA.: Harvard University Press.

O'Neill, John, and Martin O'Neill. 2012. *Social Justice and the Future of Flood Insurance*. York: Joseph Rowntree Foundation.

O'Neill, Martin. 2006. "Genetic Information, Life Insurance, and Social Justice." *The Monist* 89(4): 567–92.

O'Neill, Martin, and Thad Williamson, eds. 2012. *Property-Owning Democracy: Rawls and Beyond*. Chichester: Wiley-Blackwell.

O'Neill, Onora. 2001. "Agents of Justice." *Metaphilosophy* 32(1): 180–95.

———. 2005. "The Dark Side of Human Rights." *International Affairs* 81(2): 427–39.

Office of the United Nations High Commissioner for Human Rights [OHCHR] and UNHABITAT. 2009. *The Right to Adequate Housing: Fact Sheet No. 21/Rev.1*. https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.

Okin, Susan Moller. 1992. "Women, Equality, and Citizenship." *Queen's Quarterly* 99(1): 56–72.

Okun, Arthur. 1975. *Equality and Efficiency: The Big Tradeoff*. Washington, DC.: The Brookings Institution.

Orts, Eric W., and N. Craig Smith, eds. 2017. *The Moral Responsibility of Firms*. Oxford: Oxford University Press.

Otsuka, Michael. 2003. *Libertarianism without Inequality*. Oxford: Oxford University Press.

Page, Benjamin I., Larry M. Bartels, and Jason Seawright. 2013. "Democracy and the Policy Preferences of Wealthy Americans." *Perspectives on Politics* 11(1): 51–73.

Parfit, Derek. 1973. "Later Selves and Moral Principles." In *Philosophy and Personal Relations*, ed. Alan Montefi. London: Routledge, 137–69.

Parr, Tom. 2016. "The Moral Taintedness of Benefiting from Injustice." *Ethical Theory and Moral Practice* 19: 985–97.

Pasternak, Avia. 2016. "Benefiting From Wrongdoing." In *A Companion to Applied Philosophy*, eds. Kasper Lippert-Rasmussen, Kimberley Brownlee, and David Coady. Oxford: Wiley-Blackwell, 411–23.

———. 2017. "Fair Play and Wrongful Benefits." *Journal of Moral Philosophy* 14(5): 515–34.

Persad, Govind. 2015. "On H. M. Oliver's "Established Expectations and American Economic Policies." *Ethics* 125: 829–32.

———. 2017. “Downward Mobility and Rawlsian Justice.” *Philosophical Studies* 175(2): 277–300.

Pickard, Hanna. 2013. “Responsibility Without Blame: Philosophical Reflections on Clinical Practice.” In *The Oxford Handbook of Philosophy of Psychiatry*, eds. KWM Fulford et al. Oxford: Oxford University Press, 1134–1152.

———. 2017. “Responsibility without Blame for Addiction.” *Neuroethics* 10: 169–80.

Pogge, Thomas. 2002. *World Poverty and Human Rights*. Cambridge: Polity Press.

Polinsky, A. Mitchell. 1972. “Probabilistic Compensation Criteria.” *Quarterly Journal of Economics* 86(3): 407–25.

Posner, Richard. 1979. “Utilitarianism, Economics, and Legal Theory.” *The Journal of Legal Studies* 8(1): 103–40.

———. 1980. “The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication.” *Hofstra Law Review* 8: 487–507.

———. 1985. “Wealth Maximization Revisited.” *Notre Dame Journal of Law, Ethics & Public Policy* 2: 85–105.

Price, Richard H., Daniel S. Friedland, and Anuram D. Vinokur. 1998. “Job Loss: Hard Times and Eroded Identity.” In *Perspectives on Loss: A Sourcebook*, ed. John H. Harvey. Philadelphia, PA.: Taylor & Francis, 303–16.

Pugh, Allison J. 2015. *The Tumbleweed Society: Working and Caring in an Age of Insecurity*. Oxford: Oxford University Press.

Radin, Margaret Jane. 1982. “Property and Personhood.” *Stanford Law Review* 34(5): 957–1015.

Räikkä, Juha. 2014. *Social Justice in Practice: Questions in Ethics and Political Philosophy*. Springer.

Railton, Peter. 2003. “Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk.” In *Facts, Values, and Norms: Essays toward a Morality of Consequence*, ed. Peter Railton. Cambridge: Cambridge University Press, 187–225.

Rakowski, Eric. 1991. *Equal Justice*. Oxford: Oxford University Press.

Ramsay, Maureen. 1997. *What’s Wrong with Liberalism? A Radical Critique of Liberal Political Philosophy*. London: Leicester University Press.

Ramseyer, J. Mark, and Minoru Nakazato. 1989. “Tax Transitions and the Protection Racket: A Reply to Professors Graetz and Kaplow.” *Virginia Law Review* 75: 1155–75.

Raphael, David D. 2001. *Concepts of Justice*. New York: Oxford University Press.

Rawls, John. 1971. *A Theory of Justice*. Cambridge, MA.: Harvard University Press.

———. 1974. “The Independence of Moral Theory.” *Proceedings and Addresses of the American Philosophical Association* 48: 5–22.

———. 1993. *Political Liberalism*. New York: Columbia University Press.

———. 1999. *A Theory of Justice*. Revised Ed. Cambridge, MA.: Harvard University Press.

———. 2001a. *Justice as Fairness: A Restatement*. ed. Erin Kelly. Cambridge, MA.: The Belknap Press.

———. 2001b. “Justice as Fairness: Political Not Metaphysical.” In *Collected Papers*, ed. Samuel Freeman. Cambridge, MA.: Harvard University Press.

Raz, Joseph. 1979. *The Authority of Law*. Oxford: Clarendon Press.

———. 1988. *The Morality of Freedom*. Oxford: Clarendon Press.

Rentschler, Jun, and Morgan Bazilian. 2017. “Principles for Designing Effective Fossil Fuel Subsidy Reforms.” *Review of Environmental Economics and Policy* 11(1): 138–55.

Reynolds, Paul. 2011. “Legitimate Expectations and the Protection of Trust in Public Officials.” *Public Law*: 330–52.

Rietveld, Erik, and Julian Kiverstein. 2014. “A Rich Landscape of Affordances.” *Ecological Psychology* 26(4): 325–52.

Robbins, Lionel. 1932. *An Essay on the Nature and Significance of Economic Science*. London: Macmillan.

Robeyns, Ingrid. 2016a. “Capabilitarianism.” *Journal of Human Development and Capabilities* 17(3): 397–414.

———. 2016b. “Having Too Much.” *NOMOS* LVI: 1–42.

———. 2016c. “The Capability Approach.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/capability-approach/.

———. 2017. *Wellbeing, Freedom and Social Justice: The Capability Approach Re-Examined*. Cambridge: Open Book Publishers.

Roemer, John E. 1996. *Theories of Distributive Justice*. Cambridge, MA.: Harvard University Press.

Roser, Dominic, and Christian Seidel. 2017. *Climate Justice: An Introduction*. New York: Routledge.

Rouse, Joseph. 2007. “Practice Theory.” In *Handbook of the Philosophy of Science. Volume 15: Philosophy of Anthropology and Sociology*, eds. S. Turner and M. Risjord. Oxford: Elsevier, 499–540.

Rubenstein, Jennifer. 2009. “Humanitarian NGOs’ Duties of Justice.” *Journal of Social Philosophy* 40(4): 524–41.

———. 2015. *Between Samaritans and States: The Political Ethics of Humanitarian INGOs*. Oxford: Oxford University Press.

Rupert, Robert D. 2004. “Challenges to the Hypothesis of Extended Cognition.” *The Journal of Philosophy* 101(8): 389–428.

———. 2009. *Cognitive Systems and the Extended Mind*. Oxford: Oxford University Press.

Russell, Bertrand. 2004 [1946]. *History of Western Philosophy*. Oxford: Routledge Classics.

Ryan, Richard M., and Edward L. Deci. 2000. “Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being.” *American Psychologist* 55(1): 68–78.

———. 2008. “A Self-Determination Theory Approach to Psychotherapy: The Motivational Basis for Effective Change.” *Canadian Psychology* 49(3): 186–93.

Sanchirco, Chris William. 2000. “Taxes versus Legal Rules as Instruments for Equity: A More Equitable View.” *Journal of Legal Studies* 29: 797–820.

Sandel, Michael J. 1982. *Liberalism and the Limits of Justice*. Cambridge: Cambridge University Press.

———. 1998. *Liberalism and the Limits of Justice*. 2nd ed. Cambridge: Cambridge University Press.

Sangiovanni, Andrea. 2008. “Justice and the Priority of Politics to Morality.” *Journal of Political Philosophy* 16(2): 137–64.

Sarbin, Theodore R., ed. 1986. *Narrative Psychology: The Storied Nature of Human Conduct*. Westport, CT: Praeger/Greenwood.

Scanlon, Thomas. 1976. “Nozick on Rights, Liberty, and Property.” *Philosophy & Public Affairs* 6(1): 3–25.

Schauer, Frederick. 2003. “Legal Development and the Problem of Systemic Transition.” *Journal of Contemporary Legal Issues* 13: 261–78.

Scheffler, Samuel. 1997. “Relationships and Responsibilities.” *Philosophy & Public Affairs* 26: 189–209.

———. 2003. “What Is Egalitarianism?” *Philosophy & Public Affairs* 31(1): 5–39.

———. 2004. “Projects, Relationships, and Reasons.” In *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, eds. R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith. Oxford: Clarendon Press, 247–69.

———. 2007. “Immigration and the Significance of Culture.” *Philosophy and Public Affairs* 35(2): 93–125.

———. 2011. “Valuing.” In *Reasons and Recognition: Essays on the Philosophy of T. M. Scanlon*, eds. R. Jay Wallace, Rahul Kumar, and Samuel Freeman. Oxford: Oxford University Press, 23–39.

Schlosberg, David. 2012. “Climate Justice and Capabilities: A Framework for Adaptation Policy.” *Ethics & International Affairs* 26(4): 445–61.

Schlosser, Markus. 2015. “Agency.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/agency/.

Schuessler, Rudolf. 2017. “A Luck-Based Moral Defense of Grandfathering.” In *Climate Justice and Historical Emissions*, eds. Lukas Meyer and Pranay Sanklecha. Cambridge: Cambridge University Press, 141–64.

Scitovsky, Tibor. 1951. “The State of Welfare Economics.” *American Economic Review* 41(3): 303–15.

Sen, Amartya. 1972. “Control Areas and Accounting Prices: An Approach to Economic Evaluation.” *Economic Journal* 82(325): 486–501.

———. 1977. “Rational Fools: A Critique of the Behavioral Foundations of Economic Theory.” *Philosophy & Public Affairs* 6(4): 317–44.

———. 1979a. “Equality of What?” *The Tanner Lecture on Human Values*. Delivered at Stanford University, California. 22 May 1979.

———. 1979b. “The Welfare Basis of Real Income Comparisons: A Survey.” *Journal of Economic Literature* 17(1): 1–45.

———. 1987. *On Ethics and Economics*. London: Blackwell.

———. 1992. *Inequality Re-Examined*. Oxford: Clarendon Press.

———. 1993. “Capability and Well-Being.” In *The Quality of Life*, eds. Martha Nussbaum and Amartya Sen. Oxford: Oxford University Press, 1–35.

———. 1999. *Development as Freedom*. Oxford: Oxford University Press.

———. 2008. “The Economics of Happiness and Capability.” In *Capabilities and Happiness*, eds. Luigino Bruni, Flavio Comim, and Maurizio Pugno. Oxford: Oxford University Press, 16–27.

Sennett, Richard. 2008. *The Craftsman*. New Haven, CT.: Yale University Press.

de Serres, Alain, John Llewellyn, and Preston Llewellyn. 2011. *The Political Economy of Climate Change Mitigation Policies: How to Build a Constituency to Address Global Warming?* Paris: OECD.

Shafir, Eldar, and Sendhil Mullainathan. 2013. *Scarcity: Why Having Too Little Means so Much*. London: Allen Lane.

Shapiro, Lawrence. 2011. *Embodied Cognition*. Oxford: Routledge.

Shavell, Steven. 2008. “On Optimal Legal Change, Past Behavior, and Grandfathering.” *The Journal of Legal Studies* 37(1): 37–85.

———. 2014. “Risk Aversion and the Desirability of Attenuated Legal Change.” *American Law and Economics Review* 16(2): 366–402.

Shaviro, Daniel. 2000. *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity*. Chicago, Ill.: University of Chicago Press.

Shelby, Tommie. 2007. “Justice, Deviance, and the Dark Ghetto.” *Philosophy & Public Affairs* 35(2): 126–60.

Shiffrin, Seana Valentine. 2004. “Egalitarianism, Choice-Sensitivity, and Accommodation.” In *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, eds. R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith. Oxford: Oxford University Press, 270–302.

Shklar, Judith. 1990. *The Faces of Injustice*. New Haven, CT.: Yale University Press.

Sidgwick, Henry. 1962 [1874]. *The Methods of Ethics*. 7th ed. London: MacMillan & Co.

Simmonds, Nigel. 2013. *Central Issues in Jurisprudence: Justice, Law and Rights*. 4th ed. London: Sweet and Maxwell.

Simmons, A. John. 2010. “Ideal and Nonideal Theory.” *Philosophy & Public Affairs* 38(1): 5–36.

Skeggs, Beverley. 2004. *Class, Self, Culture*. London: Routledge.

Smiley, Marion. 2014. “Future-Looking Collective Responsibility: A Preliminary Analysis.” *Midwest Studies in Philosophy* 38(1): 1–11.

Smith, Matthew Noah. 2013. “The Importance of What They Care about.” *Philosophical Studies* 165: 297–314.

Snyder, C. R. 1998. “A Case for Hope in Pain, Loss, and Suffering.” In *Perspectives on Loss: A Sourcebook*, ed. John H. Harvey. Philadelphia: Taylor & Francis, 63–79.

Sobel, David. 2012. “Backing Away from Libertarian Self-Ownership.” *Ethics* 123(1): 32–60.

———. 2013. “Self-Ownership and the Conflation Problem.” In *Oxford Studies in Normative Ethics*, ed. Mark Timmons. Oxford: Oxford University Press, 98–122.

———. 2018. “The Point of Self-Ownership.” In *The Oxford Handbook of Freedom*, ed. Carmen E. Pavel. Oxford: Oxford University Press, 124–40.

Sokolowski, Robert. 2000. *Introduction to Phenomenology*. New York: Cambridge University Press.

Soss, Joe, and Lawrence R. Jacobs. 2009. “The Place of Inequality: Non-Participation in the American Polity.” *Political Science Quarterly* 124(1): 95–125.

de Soto, Hernando. 2001. *The Mystery of Capital*. London: Black Swan.

Southwood, Nicholas and Matthew Lindauer. 2019. "Feasibility and the problem of normative encroachment." Working Paper.

Spash, Clive L., and Alex Y. Lo. 2012. "Australia's Carbon Tax: A Sheep in Wolf's Clothing?" *The Economic and Labour Relations Review* 23(1): 67–86.

Stemplowska, Zofia. 2009. "Making Justice Sensitive to Responsibility." *Political Studies* 57: 237–59.

Stenner, Karen. 2005. *The Authoritarian Dynamic*. Cambridge: Cambridge University Press.

Steyn, Karen. 2001. "Substantive Legitimate Expectations." *Judicial Review* 6(4): 244–49.

Stilz, Anna. 2013. "Occupancy Rights and the Wrong of Removal." *Philosophy & Public Affairs* 41(4): 324–56.

———. 2018. "Property Rights: Natural or Conventional?" In *The Routledge Handbook of Libertarianism*, eds. Jason Brennan, Bas van der Vossen, and David Schmidtz. Oxford: Routledge, 244–58.

Strangleman, Tim. 2001. "Networks, Place and Identities in Post-Industrial Mining Communities." *International Journal of Urban and Regional Research* 25(2): 253–67.

Sunstein, Cass R. 1992. "On Property and Constitutionalism." *Cardozo Law Review* 14: 907–35.

Swift, Adam, and Stuart White. 2008. "Political Theory, Social Science, and Real Politics." In *Political Theory: Methods and Approaches*, eds. David Leopold and Marc Stears. Oxford: Oxford University Press, 49–69.

Tadros, Victor. 2016. *Wrongs and Crimes*. Oxford: Oxford University Press.

Taylor, Charles. 1985. "Atomism." In *Philosophy and the Human Sciences: Philosophical Papers 2*, Cambridge: Cambridge University Press, 187–210.

———. 1989. *Sources of the Self: The Making of the Modern Identity*. Cambridge: Cambridge University Press.

Thomas, Robert. 2000. *Legitimate Expectations and Proportionality in Administrative Law*. Oxford: Hart Publishing.

Thompson, Jeremy. 2011. "Abbott clears up another carbon comment". *ABC News* (online). 20 July 2011. https://www.abc.net.au/news/2011-07-20/tony-abbott-carbon-price/2803206

Thompson, Suzanne C. 1998. "Blockades to Finding Meaning and Control." In *Perspectives on Loss: A Sourcebook*, ed. John H. Harvey. Philadelphia, PA.: Taylor & Francis, 21–34.

Thomson, Judith Jarvis. 1973. "Preferential Hiring." *Philosophy & Public Affairs* 2(4):

364–84.

Timmons, Mark. 2002. *Moral Theory: An Introduction*. London: Rowman & Littlefield.

Todd, Peter M., and Gerd Gigerenzer, eds. 2012. *Ecological Rationality: Intelligence in the World*. Oxford: Oxford University Press.

van der Toorn, Jojanneke et al. 2017. "In Defense of Tradition: Religiosity, Conservatism, and Opposition to Same-Sex Marriage in North America." *Personality and Social Psychology Bulletin* 43(10): 1455–68.

Trebilcock, Michael J. 2014. *Dealing with Losers: The Political Economy of Policy Transitions*. Oxford: Oxford University Press.

Tullock, Gordon. 1980. "Two Kinds of Legal Efficiency." *Hofstra Law Review* 8: 659–69.

Tully, James. 1980. *A Discourse on Property: John Locke and His Adversaries*. Cambridge: Cambridge University Press.

United Nations Commission on International Trade Law [UNCITRAL]. 2001. *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pfip-e.pdf.

United Nations Framework Convention on Climate Change Secretariat [UNFCCC]. *Just Transition of the Workforce, and the Creation of Decent Work and Quality Jobs*. Bonn. https://unfccc.int/sites/default/files/resource/Just transition.pdf.

United States Department of Labor [USDOL]. 2019. *Trade Adjustment Assistance: About Us*. https://www.doleta.gov/tradeact/about-us/.

Valentini, Laura. 2012. "Ideal vs. Non-Ideal Theory: A Conceptual Map." *Philosophy Compass* 7(9): 654–64.

———. 2015. "Social Samaritan Justice: When and Why Needy Fellow Citizens Have a Right to Assistance." *American Political Science Review* 109(4): 735–49.

Vallentyne, Peter, Hillel Steiner, and Michael Otsuka. 2005. "Why Left-Libertarianism Is Not Incoherent, Indeterminate, or Irrelevant: A Reply to Fried." *Philosophy & Public Affairs* 33(2): 201–15.

Vallentyne, Peter, and Bas van der Vossen. 2014. "Libertarianism." In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/libertarianism/.

Veldhuizen, Caroline et al. 2018. *State of the Art Review of Smart Specialisation in Europe*. Melbourne.

Waldron, Jeremy. 1988. *The Right to Private Property*. Oxford: Clarendon Press.

———. 2012b. *The Rule of Law and the Measure of Property*. Cambridge: Cambridge University Press.

———. 2016a. “Property and Ownership.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/property/.

———. 2016b. “The Rule of Law.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://plato.stanford.edu/entries/rule-of-law/.

Walker, Margaret Urban. 1999. “Getting Out of Line: Alternatives to Life as a Career.” In *Mother Time: Women, Aging, and Ethics*, ed. Margaret Urban Walker. Lanham, MD.: Rowman and Littlefield, 97–111.

Walzer, Michael. 1983. *Spheres of Justice*. New York: Basic Books.

———. 1984. “Liberalism and the Art of Separation.” *Political Theory* 12(3): 315–30.

Weinberg, Justin. 2009. “Norms and the Agency of Justice.” *Analyse & Kritik* 31(2): 319–38.

Wenar, Leif. 1997. “The Concept of Property and the Takings Clause.” *Columbia Law Review* 97(6): 1923–46.

———. 2015. “Rights.” In *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/rights/.

White, Stuart. 2003. *The Civic Minimum: On the Rights and Obligations of Economic Citizenship*. Oxford: Oxford University Press.

Willett, Cynthia. 2014. *Interspecies Ethics*. New York: Columbia University Press.

Willett, Cynthia, Ellie Anderson, and Diana Meyers. 2015. “Feminist Perspectives on the Self.” In *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta. https://plato.stanford.edu/entries/feminism-self/.

Willett, Cynthia, and Julie Willett. 2013. “The Seriously Erotic Politics of Laughter.” In *Philosophical Feminism and Popular Culture*, eds. Sharon Crasnow and Joanne Waugh. Lanham, MD.: Lexington Books.

Williams, Andrew. 2006. “Liberty, Equality, and Property.” In *The Oxford Handbook of Political Theory*, eds. John S. Dryzek, Bonnie Honig, and Anne Phillips. Oxford: Oxford University Press, 488–506.

Wilson, Robert A. 2004. *Boundaries of the Mind: The Individual in the Fragile Sciences - Cognition*. Cambridge: Cambridge University Press.

Wilson, Robert A., and Lucia Foglia. 2015. “Embodied Cognition.” In *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta. https://stanford.library.sydney.edu.au/entries/embodied-cognition/.

Wittgenstein, Ludwig. 1963 [1953]. *Philosophical Investigations*. trans. G.E.M. Anscombe. Oxford: Basil Blackwell.

Wolff, Jonathan. 1998. “Fairness, Respect, and the Egalitarian Ethos.” *Philosophy and Public Affairs* 27(2): 97–122.

———. 2006. “Libertarianism, Utility and Economic Competition.” *Virginia Law Review* 92: 1605–23.

Wolff, Jonathan, and Avner De-Shalit. 2007. *Disadvantage*. Oxford: Oxford University Press.

Wolff, Jonathan, and Doug Reeve. 2015. “Well-Being and Disadvantage.” In *Routledge Handbook of the Philosophy of Well-Being*, ed. Guy Fletcher. Oxford: Routledge.

Wonnell, Christopher T. 2001. “Efficiency and Conservatism.” *Nebraska Law Review* 80: 643–714.

———. 2003. “The Noncompensation Thesis and Its Critics: A Review of This Symposium’s Challenges to the Argument for Not Compensating Victims of Legal Transitions.” *Journal of Contemporary Legal Issues* 13: 293–311.

Wright, Richard W. 1985. “Causation in Tort Law.” *California Law Review* 73: 1735–1828.

Young, Iris Marion. 1990. *Justice and the Politics of Difference*. Princeton, N.J.: Princeton University Press.

———. 2011. *Responsibility for Justice*. Oxford: Oxford University Press.

Ypi, Lea. 2017. “Structural Injustice and the Place of Attachment.” *Journal of Practical Ethics* 5(1): 1–21.

Zheng, Robin. 2018. “What Is My Role in Changing the System? A New Model of Responsibility for Structural Injustice.” *Ethical Theory and Moral Practice* 21: 869–85.

Zoller, David. 2017. “Skilled Perception, Authenticity, and the Case Against Automation.” In *Robot Ethics 2.0: From Autonomous Cars to Artificial Intelligence*, eds. Patrick Lin, Keith Abney, and Ryan Jenkins. Oxford: Oxford University Press.

THESIS-RELATED PUBLICATIONS

The following works relating to this thesis were published by the author during the period of enrollment in the MRes/PhD Program at the LSE (* denotes works cited in this thesis):

Green, Fergus. 2017. "Legitimate Expectations, Legal Transitions, and Wide Reflective Equilibrium." *Moral Philosophy and Politics* 4(2): 177–205.*

———. 2018. "Transition Policy for Climate Change Mitigation: Who, What, Why and How." CCEP Working Paper #1807, Centre for Climate & Energy Policy, Crawford School of Public Policy, Australian National University.

———. In prep. "Illuminating the 'Dim Borderland' of Tacit Understandings: A Unified Theory of Legitimate Expectations in Morality and Law."*

———. In prep. "Legislative Transitions without Legitimate Expectations." [This is a stand-alone paper version of Chapter 4, which is currently being reworked for resubmission to the *Journal of Political Philosophy*]

———. Forthcoming. "Book Review: Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford: Oxford University Press, 2017), pp. 226." *Law and Philosophy*.*

Green, Fergus, and Ajay Gambhir. 2019. "Transitional Assistance Policies for Just, Equitable and Smooth Low-Carbon Transitions: Who, What and How?" *Climate Policy*. https://doi.org/10.1080/14693062.2019.1657379.*

Spencer, Thomas et al. [incl. Fergus Green] 2018. "The 1.5°C Target and Coal Sector Transition: At the Limits of Societal Feasibility." *Climate Policy* 18(3): 335–51.

Wiseman, John, Stephanie Campbell, and Fergus Green. 2017. "Prospects for a 'just transition' away from coal-fired power generation in Australia: Learning from the closure of the Hazelwood Power Station." CCEP Working Paper #1708, Centre for Climate & Energy Policy, Crawford School of Public Policy, Australian National University.