

A Theory of Legitimate Expectations*

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Governmental administrative agencies routinely create legitimate expectations,¹ not least on the part of non-governmental agents,² concerning future administrative conduct.³ It is an unfortunate but unavoidable fact of life, however, that these agencies often find themselves unable to fulfil those expectations for various reasons.⁴ How governmental administrative agencies should handle the fact that they have created and then frustrated such legitimate expectations has already been discussed in the literature; indeed, I have argued elsewhere that such authorities have a *prima facie* obligation to pay adequate compensation in respect of damage or losses directly resulting from frustrated legitimate expectations.⁵ The present article is concerned with a prior question: what makes expectations legitimate in the first place?

Legitimate expectations, and here I am speaking of the general concept, possess three hallmarks. The first is that, *qua* expectations, they are *predictive*—meaning that they are partially constituted by *beliefs* or *predictions* about what will or will not happen in the future. Expectations can be about future events or states of affair. One might listen to an official weather forecast, for example, and develop an expectation

*The article grew out of conversations I had with Fergus Green, Matt Matravers, David Miller, and Margaret Moore about the legitimacy of expectations whilst attending a workshop on legitimate expectations at the University of Graz in 2016, organised by Lukas H. Meyer and Pranay Sanklecha. For their acute criticisms and suggestions concerning earlier drafts of the article, I am also indebted to the editor of, and two anonymous reviewers for, *The Journal of Political Philosophy*.

¹Be they procedural or substantive. For an overview of the legal distinction between procedural and substantive legitimate expectations, see Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000), pp. 111–2 and Paul Craig, *Administrative Law, Eighth Edition* (London: Sweet & Maxwell, 2016), pp. 677–8.

²Among them individual citizens, groups, businesses, organisations, institutions, and instrumentalities.

³The expectations in question might concern administrative policies (e.g., secondary legislation, general rules, regulations, and policy statements) or administrative measures (e.g., particular administrative orders, decisions, and adjudications that relate to a single agent or small number of identifiable agents).

⁴Reasons of justice, the public interest (where distinct from justice), severe financial constraints, or sometimes harsh political realities.

⁵See Alexander Brown, “Justifying compensation for frustrated legitimate expectations,” *Law and Philosophy*, 30 (2011), 699–728.

that the storm will probably hit one's town. But expectations can also be about whether someone, including a governmental administrative agent or agency, will do or not do something in the future. One might have an expectation that if the storm does hit one's town, then a government agency will open up its storm shelters for use by local residents. In this study I shall focus on expectations about what governmental administrative agents or agencies will do or not do in the future.

A second hallmark of legitimate expectations is that, although they are partially constituted by beliefs or predictions about the future, they are also *prescriptive*—meaning that they involve an agent's expectation about what some other agent or agency *should* do or not do in the future.⁶ One might expect, in the prescriptive sense, that a government agency should open up its storm shelters for use by local residents.

Now agents can end up with many different sorts of prescriptive expectations and in many different ways. But clearly not all these expectations will be legitimate. Thus, a third hallmark of legitimate expectations is that they are not baseless but instead *justifiable*, meaning that the agent has *epistemic justification* or *warrant* for expecting, in both the predictive and prescriptive senses, that some other agent, such as a governmental administrative agent or agency, will and should do or not do something in the future. What is more, it is perfectly normal for people to draw on their other normative beliefs as epistemic justifications for their prescriptive expectations.

But what makes for justifiable expectations? This article critically examines three existing answers to this question found in the literature (section I).⁷ It then introduces and defends a new answer, what I term the Responsibility-Based Account (section II). On this new account, the legitimacy of expectations depends not on whether these expectations are based on laws or legal entitlements nor on the substantive justice of the expectations nor on the justice of the basic structure that forms the background to these expectations nor on the legitimate authority of the governmental administrative agents or agencies whose actions or omissions are the subject of these expectations. On the Responsibility-Based Account, the legitimacy of

⁶I borrow the distinction between predictive and prescriptive expectations from M. L. Houser, "Are we violating their expectations? Instructor communication expectations of traditional and nontraditional students," *Communication Quarterly*, 53 (2005), 213–28.

⁷For an overview, see Lukas H. Meyer and Pranay Sanklecha, "Individual expectations and climate justice," *Analyse & Kritik*, 33 (2011), 449–71; Lukas H. Meyer and Pranay Sanklecha, "How legitimate expectations matter in climate justice," *Politics, Philosophy & Economics*, 13 (2014), 369–93.

expectations depends instead on the role played by governmental administrative agents or agencies in bringing about the relevant beliefs or predictions after their having been given or having assumed a role responsibility, competence, or discretion for making decisions about the administrative policies and measures which are the subjects of those expectations. If agent *A* credibly believes that governmental administrative agent or agency *G* was responsible for, or can be “credited” (if that is the right word) with, bringing about *A*’s beliefs or predictions that *G* will *x* (action/omission), after *G* had been given or had assumed a role responsibility, competence, or discretion for making decisions about *x*, then it is justifiable for *A* to affirm that *G* should *x*. In other words, if *G* tried to claim that *A* has no basis on which to affirm that *G* should *x*, *A* can reasonably say to *G* the following, “Since you led me to expect that you would *x*, you now really ought to *x*.” In setting out this account I also try to elaborate the complex theory of responsibility that it presupposes (section III).

Following on from all this, I set forth and defend what I call the *Principle of Legitimate Expectations in Public Administration* (the *Legitimate Expectations Principle*, for short). That Principle holds that any governmental administrative agents or agencies that were responsible for creating legitimate expectations on the part of non-governmental agents, or, indeed, other public bodies or even public employees, have a prima facie obligation to fulfil rather than frustrate those legitimate expectations (section IV). I also make some tentative suggestions about what sort of more abstract or general normative standard this principle might be derived from.

Finally, I offer some brief clarifications of my position on the relationship between legitimate expectations, justice, and legitimate authority (section V).

I. EXISTING ACCOUNTS OF LEGITIMATE EXPECTATIONS

I shall begin by outlining three existing accounts of legitimate expectations. The first is the Law-Based Account. According to this account, talk of *legitimate* expectations is shorthand for the sort of beliefs or predictions about the future, as well as the sort of prescriptive claims about the future, that are based on a system of law and legal entitlements, as opposed to merely social customs, habits, or conventions (pre-legal). In other words, the term “legitimate” functions to flag up the fact that an expectation

of x is grounded in a set of formalised and coercively enforced public rules which have determined that a person has a legal entitlement to x .

The idea that expectations based on a system of law and legal entitlements are important and should be protected is present in Jeremy Bentham's doctrine of *security*, of course. The doctrine begins with what Bentham takes to be the uncontroversial observation that "expectation, as far as the law can be kept present to men's minds, follows with undeviating obsequiousness the finger of the law."⁸ In other words, knowing that he or she enjoys a legal entitlement to x invariably creates in the mind of the individual an expectation of x . Moreover, according to Bentham, experience tells us that both the strength and longevity of expectations are highly sensitive to their being founded upon legal entitlements. In his *Principles of the Civil Code*, for example, he contrasts the savage who expects that he will be able to enjoy the deer that he has killed based on only his guile and strength with a person living under a system of law who expects that he will be able to enjoy the deer that he has purchased based on his legal entitlement to that property.⁹ Bentham believes that we should adopt, as a guide to public action, the "principle of security," which "requires that events, so far as they depend upon laws, should conform to the expectations which law itself has created."¹⁰ For example, "[a]s regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good."¹¹ The principle of security implies, amongst other things, that if the system of law and legal entitlements is ever changed, then such change should be applied only to future determinations of entitlement and not retrospectively to existing entitlements. Otherwise, somebody who had a legitimate expectation of x based on a legal entitlement to x would have the rug pulled from under him.

Looking beyond Bentham for a moment, the general idea behind this first account of the legitimacy of expectations is this. Expectations need to be underpinned by laws in order for agents to possess, not merely a belief that something will or will not happen in the future (such as their keeping their property or others not taking their property from them) and not merely an expectation in the prescriptive sense (that they

⁸Jeremy Bentham, *Supply Without Burden*, in *The Works of Jeremy Bentham*, vol. 2, ed. John Bowring (Edinburgh: William Tait, 1843), p. 589.

⁹Jeremy Bentham, *Principles of the Civil Code*, in Jeremy Bentham, *The Theory of Legislation*, ed. C. K. Ogden (London: Keagan Paul, Trench, Trubner & Co., 1931), p. 113.

¹⁰Bentham, *Principles of the Civil Code*, p. 111.

¹¹*Ibid.*, p. 113.

ought to keep their property), but also a sense that their prescriptive expectation is warranted, such that the rest of society could recognise it as being in some way justified. That they have a legal entitlement to the property in itself provides one such warrant.¹²

But one problem with this account is that it privileges the fact that an expectation can be based on a system of law and legal entitlements above other things that expectations can be based on. Not least among them are social customs, habits, or conventions. Returning to Bentham, it is certainly true that when it comes to property Bentham often emphasises the role of expectations based on law, especially in *Principles of the Civil Code*.¹³ Yet even he recognised the need for policymakers to heed “grounds of expectation previous to any act of law,” most pointedly in circumstances where new laws or legal institutions are being created or old ones being changed, reformed, or superseded.¹⁴ Here the question becomes what sort of principle should guide the actions of legislators and judges tasked with deciding whether or not to legally recognise expectations which are based on social customs or only partially legalised customs. The security principle is useless for this task because it merely enjoins respect for expectations that are already based on law and determined legal entitlements. Interestingly, Bentham does have a principle in mind, one that highlights the dis-euphoria which attends the frustration of even customary expectations. He points out that for any expectation based on a custom, such as a custom of treating property *x* as belonging to agent *A*, there are two parties: those who stand to benefit from the expectation being legitimised, that is, having the custom recognised in law and legal entitlements determined accordingly, and those who stand to lose from the expectation being legitimised.¹⁵ If the customary expectation is not legitimised, the first party would suffer “the pain of disappointment,” a sense of displeasure at having the customary expectation disappointed. By contrast, if the customary expectation is not legitimised, the second party would enjoy a type of access to the property which he did not expect given the custom. But when it comes to balancing these interests on

¹²See also Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988); “Superseding historic injustice,” *Ethics*, 103 (1992), 4–28; and *The Rule of Law and the Measure of Property* (Cambridge: Cambridge University Press, 2012), esp. pp. 53–4. Cf. Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press, 2015).

¹³See, e.g., Bentham, *Principles of the Civil Code*, p. 112.

¹⁴See Jeremy Bentham, *A Comment on the Commentaries*, in *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government*, ed. J. H. Burns and H. L. A. Hart (London: The Athlone Press, 1977), p. 231.

¹⁵*Ibid.*, pp. 230–3.

the scales of utility, Bentham assigns extra weight to minimising the pain of disappointment.¹⁶ Indeed, in a number of his writings relating to property Bentham defends what he variously dubs “the disappointment-preventive principle,” “the non-disappointment principle,” or “the disappointment-minimizing principle”—a principle which calls on those responsible for creating new, or making changes to existing, laws and legal institutions to minimise the disappointment of individuals’ expectations, including individuals’ expectations of certain items of property that are based on their *already being in possession* of those items and the underlying social custom (pre-legal or only partially legalised) of respecting the fact that individuals are in possession of certain items of property by not attempting to seize those items from them.¹⁷

So when confronted with the Law-Based Account one wonders why expectations are only legitimate if they are based on a system of law or set of formalised and coercively enforced public rules. Could not they also be legitimate if they are based on social customs or a set of informal public habits or conventions? Could not the fact that an individual’s prescriptive expectation of keeping *x* is based on a social custom (pre-legal) that individuals in possession of *x* get to keep *x* also make the relevant expectation warranted in one sense?

Of course, if one recognises as legitimate, expectations based on social customs, along with expectations based on laws, then one is also opening up the possibility of conflicts between the different kinds of expectations. Perhaps defenders of the Law-Based Account would argue that in such instances the expectations based on law would always trump those based on social customs, and this reveals something about the nature of *true* legitimacy. But then there may be instances when it is a good thing to uphold expectations based on customs over expectations based on law—such as if there has been a customary practice not to try to remove people living on disused, derelict, or unused land, and individuals have relied on their customary expectations

¹⁶ Ibid. Bentham also provides some concrete illustrations of how courts should decide cases involving customary expectations in accordance with the disappointment-preventive principle. Ibid., pp. 242–6.

¹⁷ See Jeremy Bentham, *Equity Dispatch Court Proposal* [1830], in *The Works of Jeremy Bentham*, vol. 3, ed. John Bowring (Edinburgh: William Tait, 1843), p. 312; *Equity Dispatch Court Bill* [1830], in *The Works of Jeremy Bentham*, vol. 3, ed. John Bowring (Edinburgh: William Tait, 1843), p. 388; *A Commentary on Mr. Humphrey’s Real Property Code* [1826], in *The Works of Jeremy Bentham*, vol. 5, ed. John Bowring (Edinburgh: William Tait, 1843), pp. 413–4; *Outline of a Plan of a General Register of Real Property* [1828], in *The Works of Jeremy Bentham*, vol. 5, ed. John Bowring (Edinburgh: William Tait, 1843), p. 419; *Lord Bougham Displayed* [1832], in *The Works of Jeremy Bentham*, vol. 5, ed. John Bowring (Edinburgh: William Tait, 1843), pp. 564, 587.

to plan and build homes, family life, or even small communities, even when the rightful landowners suddenly decide to enforce their legal entitlements. Perhaps one solution to this problem would be to only recognise as legitimate, expectations that are based on law, whilst at the same time highlighting the fact that these laws themselves reflect and are situated in a social milieu that includes customs, a fact that is not lost on the holders of such expectations.¹⁸

Nevertheless, the more fundamental problem for the Law-Based Account is its failure—or inability?—to explain or motivate what it is about expectations based on laws that *makes* the relevant beliefs and prescriptive claims about the future warranted—some deeper, morally relevant quality which expectations based on other things may clearly lack, aside from the brute fact that they are not based on laws.

The second account of legitimate expectations can be motivated with a line of questioning that tries to get at one such potential quality. Even if we assume that an expectation is based on a system of law and legal entitlements, what if that system is itself *unjust*? What if expectations of private property are based on a regime of private property which is unjust? Or, what if expectations of income are based on lawful economic institutions which are nevertheless unjust? Surely this has implications for the epistemic justification or warrant with which an agent holds certain expectations, prescriptive as well as predictive, based on sound or credible beliefs, including normative beliefs. Accordingly, it is tempting to think that simply having a basis in law (or social custom) is not sufficient to bestow legitimacy upon expectations, and that instead the legitimacy of expectations depends crucially on matters of justice. In other words, the legitimacy of expectations supervenes on the substantive justice of the expectations and/or on the justice of the scheme of rules and institutions (“basic structure”) from which they flow.

This second account has been identified with the work of Rawls, who discusses the concept of legitimate expectations in the context of expounding his ideal theory of justice for the basic structure of society. But this account is certainly not exhausted by, and perhaps not even exemplified in, the work of Rawls, once non-ideal conditions enter into the picture. Rawls argues that citizens will need to know at any given time what properly belongs to them and what is due to them. According to

¹⁸This seems to be what Bailey H. Kuklin has in mind with his conception of “reasonable expectations.” See his “The plausibility of legally protecting reasonable expectations,” *Valparaiso University Law Review*, 32 (1997), 19–66, at pp. 23–9; and “The justification for protecting reasonable expectations,” *Hofstra Law Review*, 29 (2001), 863–905, at pp. 866–7.

Rawls, “such entitlements are ... very often derived from social institutions and the legitimate expectations to which they give rise.”¹⁹ In other words, “as persons and groups take part in just arrangements, they acquire claims on one another defined by publicly recognized rules. ... [S]o a person who has complied with the scheme and done his share has a right to be treated accordingly by others. They are bound to meet his legitimate expectations.”²⁰

The implication here is that under ideal conditions the legitimacy of expectations supervenes on the justice of the social institutions that give rise to them. Yet Rawls’s brief comments on legitimate expectations focus, like his theory in general, on ideal theory, so he does not explicitly say whether or not expectations which exist under an unjust regime can qualify as legitimate. Rawls claims that *if* expectations exist against the backdrop of a just basic structure, then they are legitimate; he does not explicitly claim that expectations are legitimate *only if* they exist against the backdrop of a just basic structure. But Allen Buchanan, at least, reads Rawls as intending not merely the sufficient condition but also the necessary condition, meaning that if the basic structure is unjust then the expectations cannot be legitimate: “the rules of the basic structure determine the legitimacy of individuals’ expectations.”²¹

In effect, Buchanan is presenting a non-ideal theory-based version of Rawls’s ideal theory-based account of legitimate expectations. One implication of Buchanan’s version is that if just institutions go from being just to being unjust, then the expectations formed under the just institutions must change from being legitimate to being illegitimate. Or, as Buchanan puts it, “as previously just Rawlsian basic structures become unjust instantaneously in the light of new information about how to maximize the benefit of the worst off, so previously legitimate Rawlsian expectations *lose their legitimacy* just as instantaneously.”²²

However, it might be countered that Buchanan has no grounds on which to describe the non-ideal theory-based version of Rawls’s account that he has presented as *Rawls’ account*. For Rawls, justice enters into our judgment about the legitimacy of expectations in ideal theory. Thus we cannot presume to know what Rawls would say

¹⁹John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), p. 10.

²⁰*Ibid.*, pp. 311, 313.

²¹Allen Buchanan, “Distributive justice and legitimate expectations,” *Philosophical Studies*, 28 (1975), 419–25, at p. 421.

²²*Ibid.*

on the question of where justice enters into our judgment about the legitimacy of expectations in non-ideal theory. We are not entitled to say, for example that, for Rawls, in an unjust scheme a person could never have legitimate expectations of others.

Whilst I think this response must be taken seriously, it might nevertheless be worthwhile exploring Buchanan's non-ideal theory-based version of Rawls's ideal theory-based account of legitimate expectations, and critically evaluating his objection to that version.²³ The version still merits serious consideration even if it is more accurately attributed to Buchanan's imagination than to Rawls. After all, it is not as though Rawls thinks that issues of justice are irrelevant or immaterial in non-ideal conditions. On the contrary, Rawls explicitly states that "[i]n these cases the problem is to discover the just way to meet certain given limitations."²⁴ Indeed, in the context of discussing non-ideal theory in relation to the Law of Peoples, Rawls states that non-ideal theory has an important role to play because it "looks for policies and courses of action that are morally permissible and politically possible as well as likely to be effective."²⁵ If non-ideal theorising about justice within well-ordered societies is important for similar reasons, then Buchanan's non-ideal theory-based version ought to be assessed. Furthermore, given that Rawls *did* place great value on people's capacity to frame and execute long-term plans, it does not seem outlandish to think that if, contrary to fact, Rawls had opted to develop a non-ideal theory-based account of just and morally permissible institutional change, he would have had something to say about the need to safeguard this capacity.

Putting Rawls's theory of justice to one side, however, it is not difficult to imagine a more general theory or family of theories of legitimate expectations which appeals to justice in a broader sense of that concept. According to this family of theories, if an expectation is just it is legitimate, but if it is unjust it is illegitimate. Meyer and Sanklecha dub these "justice-based theories."²⁶ They also point out that the relevant form of justice could be the substantive justice of the expectation (the justice of what the expectation is for) as well as the justice of the basic structure (the justice of the background from which the expectation emerged). One major drawback

²³As in fact I did in Alexander Brown, "Rawls, Buchanan, and the legal doctrine of legitimate expectations," *Social Theory and Practice*, 38 (2012), 617–44.

²⁴Rawls, *A Theory of Justice*, p. 244.

²⁵John Rawls, *The Law of Peoples* (Harvard, MA: Harvard University Press, 1999), p. 89.

²⁶Meyer and Sanklecha, "How legitimate expectations matter in climate justice."

with this simplified Justice-Based Account of the legitimacy of expectations, however, is that if it turns out to be true that the basic structure is and has always been unjust, then no actual expectations can be deemed legitimate by dint of the justice of the basic structure, and if it also turns out to be true that very few expectations are substantively just, then very few actual expectations can be deemed legitimate in virtue of their being substantively just. So, at first glance, the simplified Justice-Based Account appears to have limited application for non-ideal conditions, unless, that is, it “could be modified by attempting to make space for degrees of justice.”²⁷

For their part, Meyer and Sanklecha argue that the legitimacy of expectations supervenes not on the justice of the basic structure but instead on the legitimacy of the governing agencies and political authorities in charge of the scheme of rules and institutions, and on the legitimacy of the particular laws and adjudications made by those governing agencies and political authorities. As Meyer and Sanklecha put it, “instead of requiring the perfect justice of background institutions, we should instead focus on their legitimacy.”²⁸ According to the Legitimate Authority-Based Account, “if [state] coercion is justified, then the citizens of that state are correspondingly justified in forming expectations based on the legitimate actions of the state.”²⁹ In other words, if agents form expectations about what the state will do in exercising its coercive power, and if that exercise of coercive power is legitimate, then the expectations are legitimate. This means, therefore, that legitimate governing agencies and political authorities may make legitimate changes to existing laws and thereby frustrate, with impunity, expectations that agents formed concerning the future continuation of those laws. In so doing they make the extant expectations in one sense no longer legitimate. So, for example, a government may introduce new laws on the maximum carbon emissions of citizens, and thereby frustrate the expectations of those citizens that they will be able to continue to emit their current level of carbon emissions in the future, but this will not amount to frustrating legitimate expectations (since these expectations are no longer legitimate); provided, that is, that the government is not illegitimate and that the new laws are themselves not illegitimate or illegitimately made or render the government as a whole illegitimate.³⁰

²⁷Ibid., p. 378.

²⁸Ibid., p. 375.

²⁹Ibid.

³⁰Meyer and Sanklecha, “Individual expectations and climate justice,” pp. 454–6.

Conversely, even if a governmental administrative agency creates an expectation on the part of a non-governmental agent that it will do (or not do) something in the future, such as that it will keep or change some policy or make some particular decision or adjudication, this will not suffice to make the expectation legitimate. For example, if that governmental administrative agency acted *ultra vires* (beyond the scope of its legal authority), then, on the Legitimate Authority-Based Account, the expectation it creates cannot be legitimate.³¹ This can happen in two ways: first, if the governmental administrative agency, including a particular official, lacks the legal authority to create expectations about what its policy, decision, or adjudication will be in the future; and second, if it lacks the legal authority to make the very policy, decision, or adjudication concerning which it has created the expectation.³² The principle that *ultra vires* expectations (in either of the above senses) cannot be legitimate is embraced in English administrative law,³³ Irish administrative law,³⁴ and European Community law,³⁵ for example. (Note, however, that the position in other countries, the Netherlands, for example, is different; here expectations can be recognised as legitimate by administrative courts even if they involve governmental administrative agencies acting *ultra vires*.³⁶ What is more, even in England, the Health Service Commissioner (HSC) (otherwise known as the Health Service Ombudsman) has, in some cases, recognised at least the moral standing of expectations that were “incorrectly” raised—expectations about the funding of

³¹See, e.g., Paul Reynolds, “Legitimate expectations and the protection of trust in public officials,” *Public Law* (2011), 330–52, at p. 334n.84.

³²Craig, *Administrative Law*, pp. 694–8.

³³See, e.g., *R v. Ministry of Agriculture, Fisheries and Food, Ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, at [48]; *R. v. Inland Revenue Commissioners, Ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, at 1573; *R. (Bibi) v. Newham LBC* [2002] 1 WLR 237, at [46]. For a more detailed overview and analysis of the English case law on this issue, see Craig, *Administrative Law*, pp. 694–702; Paul Daly, “A pluralist account of deference and legitimate expectations,” in M. Groves and G. Weeks eds., *Legitimate Expectations in the Common Law World* (London: Bloomsbury, 2017), pp. 101–20, at pp. 118–20.

³⁴See, e.g., *Wiley v. The Revenue Commissioners* [1994] 2 IR 160, at 166–7.

³⁵See, e.g., *Forvass v Commission* [1999] ECR 705, at [70]. See also Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Oxford: Hart Publishing, 2000), p. 57.

³⁶C. J. Bax, “Judicial control of the administration in the Netherlands,” *European Review of Public Law*, 71 (1992), 71–81, at pp. 76–7; Rob Widdershoven and Roel de Lange, “Dutch report,” in J. Schwarze (ed.), *Administrative Law Under European Influence: On the Convergence of the Administrative Laws of the EU Member States* (London: Sweet and Maxwell, 1996), pp. 550–99, at pp. 569–70; Thomas, *Legitimate Expectations and Proportionality*, pp. 56–7.

medical treatment for conditions that the relevant authorities were within their rights to refuse to fund on the basis of a policy of not funding cosmetic conditions.³⁷⁾

In the next section I present and defend a rival account; or, at least, a rival account of legitimate expectations for public administration.

II. A NEW RESPONSIBILITY-BASED ACCOUNT

The previous accounts locate the legitimacy of expectations in the presence of laws which ground expectations (the Law-Based Account), in the substantive justice of expectations or in the justice of the basic structure which forms the background to expectations (the Justice-Based Account), or in the legitimacy of the governing agencies and political authorities whose acts and omissions are the subject of expectations (the Legitimate Authority-Based Account). By contrast, my proposed new account, the Responsibility-Based Account, focuses on the normatively salient issue of whether or not governmental administrative agencies are *were responsible for creating the expectations* after they had been given or had assumed a role responsibility, competence, or discretion over the relevant policies and measures.

The Law-Based Account, Justice-Based Account, and Legitimate Authority-Based Account each offer necessary and sufficient conditions under which expectations are legitimate. Provided that agents possess expectations and these expectations are based on laws, exist against the background of a just basic structure, or concern the legitimate actions of legitimate governing agencies and political authorities, then this is sufficient to render these expectations legitimate. On these other accounts, then, it is not crucial per se that governmental administrative agents or agencies are responsible for creating expectations. So, even if it turned out that such an agent or agency was not really *responsible* for creating the relevant expectations, those expectations would nevertheless be legitimate provided that the aforementioned necessary conditions were met.

On my proposed account, by contrast, the responsibility of governmental administrative agents or agencies for creating expectations does matter, and it matters

³⁷London North West Healthcare NHS Trust, PHSO, December 2015. *Report on Selected Summaries of Investigations by the Parliamentary and Health Service Ombudsman: October to December 2015*, Summary 1202, at pp. 141–2.

decisively. In other words, expectations about what governmental administrative agents or agencies will do or not do in the future are legitimate if, and only if, those agents or agencies were responsible for creating the expectations after they had been given or had assumed a role responsibility, competence, or discretion over the relevant policies and measures. If these conditions are met, then the expectations are legitimate even if they are not based on laws, are not substantively just or do not exist against the background of a just basic structure, and are not based on or do not concern the legitimate (*intra vires*) actions of legitimate governing agencies and political authorities.

Interestingly, defenders of existing accounts of the legitimacy of expectations have at times hinted that they might also endorse the Responsibility-Based Account. In his *Principles of the Civil Code*, for example, Bentham writes of a lawful expectation of property that “[t]he legislator owes the greatest respect to this expectation which he has himself produced.”³⁸ Similarly, at one point Meyer and Sanklecha state that “[t]he intuitive plausibility of the [legitimate authority-based] theory rests on the claim that the state plays a significant, perhaps even determining, role in the formation of Phi’s emission expectations.”³⁹ Superficially, then, it might appear as though the Responsibility-Based Account is merely a complementary account as opposed to a rival account: that it is simply stating the further conditions that must be met in order for expectations to be fully legitimate, provided that they have also been formed in relation to laws, a just basic structure, or a legitimate authority. In reality, however, the Responsibility-Based Account is *not* simply augmenting or merely stating more precisely conditions which are already implicit in the Law-Based Account, Justice-Based Account, and Legitimate Authority-Based Account. Instead, it is stating a different set of necessary and sufficient conditions that lead in different directions to the existing accounts. I believe that when push comes to shove neither Bentham nor Meyer and Sanklecha would endorse the Responsibility-Based Account. Thus, according to this account, an expectation can be legitimate even if it is not based on a law or legal entitlement, just as long as the governmental administrative agent or agency was responsible for bringing about the expectation after it had been given or had assumed a role responsibility, competence, or discretion over the relevant policies and measures. For example, the agent or agency might

³⁸Bentham, *Principles of the Civil Code*, p. 113.

³⁹Meyer and Sanklecha, “How legitimate expectations matter in climate justice,” p. 375.

provide an assurance of some future decision or adjudication which is simply a matter of administrative discretion.

Conversely, according to the Responsibility-Based Account, even when an expectation is grounded on a law or legal entitlement this does not necessarily mean that the governmental authority that promulgated the law is responsible for creating the expectation or, therefore, that the expectation is necessarily legitimate. For example, a government might have taken reasonable steps to warn agents that the law is subject to change such that if agents continue to expect the law to remain unchanged, this is not really the responsibility of the government. Bentham does not appear to endorse these views. Moreover, according to the Responsibility-Based Account, an expectation can be legitimate even if it concerns the illegitimate (*ultra vires*) acts or omissions of an illegitimate governmental administrative agent or agency, just as long as the agent or agency was responsible for creating the expectation after it had been given or had assumed a role responsibility, competence or discretion over the relevant policies and measures.⁴⁰

Finally, just because an expectation concerns the legitimate (*intra vires*) acts or omissions of a legitimate governmental agent or agency, this does not automatically mean that the agent or agency was in fact responsible for creating the expectation and, therefore, this does not automatically mean that the expectation is legitimate. Putting all this another way, whilst Bentham had insight in pointing out that “[t]he legislator owes the greatest respect to this expectation which he has himself produced,”⁴¹ a proper insistence on the centrality of the issue of whether or not governmental administrative agents or agencies are responsible for creating expectations leads to a different development of these insights vis-à-vis the core question of the legitimacy of expectations.

The starting point for the new account I am proposing is recognising what is and what is not truly significant about an agent’s expectation when it is legitimate. The basis of the agent being epistemically justified or warranted in holding the expectation (predictive and prescriptive) is not some conduct on the part of the aggrieved agent (e.g., entering into a contract with the decision-maker). Nor is it some substantive interest in *x* held by the aggrieved agent that exists independently of the legitimate

⁴⁰Contrary to Meyer and Sanklecha.

⁴¹Meyer and Sanklecha likewise make it clear that “the state plays a significant, perhaps even determining, role in the formation of [expectations].”

expectation (for example, an essential human interest in x). Rather, as Elias explains, “[it is the] legitimate expectation arising out of the conduct of the decision-maker which provides the basis of the protection.”⁴² Or, in the words of Reynolds, “the doctrine is able to intervene (and, properly understood, only intervenes) where interests have crystallised into protectable rights by virtue of some action of the decision-maker.”⁴³ At the heart of my theory is the idea that the *defining* mode of conduct on the part of governmental administrative agents or agencies in legitimate expectations cases is that they were responsible for creating expectations after they had been given or had assumed a role responsibility, competence, or discretion over the relevant policies and measures. Putting this in terms of the hallmarks of the general concept legitimate expectations (as opposed to the legal doctrine), we can say that the basis of the agent being epistemically justified or warranted in holding the expectation (predictive and prescriptive) is the agent’s normative belief that a governmental administrative agency was responsible for bringing about the agent’s expectation after the agency had been given or had assumed a role responsibility, competence, or discretion over the relevant policies and measures.

What, then, are some of the ways in which such agents or agencies can be responsible for creating expectations on the part of non-governmental agents? In answering this question I shall focus exclusively on public administration, that is, the implementation of the government’s policy agenda by administrative agents and agencies via administrative policies (secondary legislation, general rules, regulations, and policy statements) and administrative measures (administrative orders, decisions, and adjudications in particular cases). I shall also hone in on expectations that are held by non-governmental agents, which I take to include individual citizens, groups, businesses, organisations, institutions, and instrumentalities (for example, schools).

So with public administration in mind, consider now several different ways in which administrative agencies of government can be responsible for creating expectations, which are in turn, on my account, legitimate expectations in virtue of that responsibility. By offering several modes, as opposed to two or even one, I am consciously stepping outside of the narrow constraints of the doctrine of legitimate

⁴²P. Elias, “Legitimate expectation and judicial review,” in J. Jowell and D. Oliver eds., *New Directions in Judicial Review* (London: Stevens, 1988), pp. 37–50, at p. 41.

⁴³Reynolds, “Legitimate expectations and the protection of trust on public officials,” p. 334.

expectations as it occurs in English administrative law, for example.⁴⁴ My aim here is to flesh out a more generalised, less doctrinally-specific description of how legitimate expectations may come about, and ultimately to develop a new, more plausible and comprehensive account of what it is that lends legitimacy to legitimate expectations. Nevertheless, the different ways are intended to be merely illustrative, rather than exhaustive, of how governmental agencies of government can be responsible for creating expectations on the part of non-governmental agents. Conceivably there may be other ways that also fall under the rubric of responsibility.

(1) *Expectations which are inadvertently caused by governmental administrative agents or agencies.*

(i) Governmental administrative agent or agency *G* has been given or has assumed a role responsibility, competence, or discretion for making decisions over certain issues which affect the important interests of non-governmental agent *A*, something of which both *G* and *A* are fully aware.

(ii) *G* is also responsible for *A* coming to believe or predict that *G* will *x* (where *x* is a procedural action/omission) by virtue of *G* inadvertently causing *A* to believe or predict that *G* will *x*.

Depending on the circumstances of the case, that *G* has inadvertently caused *A* to believe or predict that *G* will *x* could be due simply to: (a) *G* in the past permitting *A* to receive some advantage, benefit, or other outcome. In virtue of (i) and (ii)(a), *G* has thereby also created a legitimate expectation on the part of *A* that *G* will *x*, meaning *A* expects, in the prescriptive sense, *G* to *x*, and it is justifiable for *A* to expect, in the prescriptive sense, *G* to *x*.

(2) *Expectations which are negligently caused by governmental administrative agents or agencies.*

(i) Governmental administrative agent or agency *G* has been given or has assumed a role responsibility, competence, or discretion for making decisions

⁴⁴Traditionally administrative courts in England have applied the doctrine of legitimate expectations, first, to circumstances in which an expectation (procedural or substantive) is based upon past provision of an advantage or benefit, and second, to circumstances in which an expectation (procedural or substantive) is based upon an assurance or promise.

over certain issues which affect the important interests of non-governmental agent *A*, something of which both *G* and *A* are fully aware.

(iii) *G* is also responsible for *A* coming to believe or predict that *G* will *x* (where *x* could be a procedural or a substantive action/omission) in virtue of *G* negligently causing *A* to believe or predict that *G* will *x*.

Depending on the circumstances of the case, that *G* has negligently caused *A* to believe or predict that *G* will *x* could be due to: (b) *G* in the past permitting *A* to receive some advantage, benefit, or other outcome, and by *G* knowing that this past practice is set to change, but nevertheless failing to take reasonable steps to warn *A* personally, and in a timely fashion, that this past practice is set to change, or *G* failing to take reasonable steps to warn *A* that its past practice is an unreliable guide to what it will do or not do in the future; or (c) *G* doing the same as described in (b) plus relying on third parties to warn *A* of the aforementioned, but not doing enough to reinforce those warnings itself, such as by signposting, confirming, or reiterating the advice given by third parties.

In virtue of (i) and (iii)(b)/(c), *G* has thereby also created a legitimate expectation on the part of *A* that *G* will *x*, meaning *A* expects, in the prescriptive sense, *G* to *x*, and it is justifiable for *A* to expect, in the prescriptive sense, *G* to *x*.

(3) Expectations which are intentionally caused by governmental administrative agents or agencies.

(i) Governmental administrative agent or agency *G* has been given or has assumed a role responsibility, competence, or discretion for making decisions over certain issues which affect the important interests of non-governmental agent *A*, something of which both *G* and *A* are fully aware.

(iv) *G* is also responsible for *A* coming to believe or predict that *G* will *x* (where *x* could be a procedural or a substantive action/omission) by virtue of *G* intentionally causing *A* to believe or predict that *G* will *x*.

Depending on the circumstances of the case, that *G* has intentionally caused *A* to believe or predict that *G* will *x* could be due to: (d) *G* making it known there is a public interest that *G* will *x* or making it known that a state of affairs which is normally sufficient for *G* to *x* obtains, with the intention of

causing *A* to believe or predict that *G* will *x*; (e) *G* requiring *A* to make a declaration that *G* knows is thereby likely to make *A* believe *G* will *x*, with the intention of causing *A* to believe or predict that *G* will *x*; (f) *G* providing *A* with an assurance that *G* is minded to *x*, with the intention of causing *A* to believe or predict that *G* will *x*; or (g) *G* providing *A* with a commitment, undertaking, or promise that *G* will *x*, with the intention of causing *A* to believe or predict that *G* will *x*.

In virtue of (i) and (iv)(d)/(e)/(f)/(g), *G* has thereby also created a legitimate expectation on the part of *A* that *G* will *x*, meaning *A* expects, in the prescriptive sense, *G* to *x*, and it is justifiable for *A* to expect, in the prescriptive sense, *G* to *x*.

I need to make three things clear about these modes of creating legitimate expectations. The first is that, as a whole, (1)–(3) do not assume some background theory of promissory obligations and rights or theory of contractual obligations and rights; which is to say, I am not suggesting that any moral obligations and rights arising from the creation of legitimate expectations are species of promissory obligations and rights or species of contractual obligations and rights, concerning which I owe some background theory.⁴⁵ On the contrary, I take it that legitimate expectations, and any moral obligations and rights as well as any legal effects or relief to which they give rise, are *sui generis*.

Although mode (3)(iv)(g) does involve *G* providing *A* with a commitment, undertaking, or promise that *G* will *x*, the legitimate expectation created is more than, and is not reducible to, a mere promissory right alone. It also includes (i) and (iv), as well as the fact that *A* expects *G* to *x*, in the prescriptive sense, and the fact that *A*'s expectation is justifiable. Moreover, it should be noted that (3)(iv)(g) does not

⁴⁵For more on the nature of, and similarities and differences between, promissory and contractual obligations and rights, see, e.g., Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990); T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), ch. 7; T. M. Scanlon, "Promises and contracts," in P. Benson ed., *The Theory of Contract Law: New Essays* (New York, NY: Cambridge University Press, 2001), pp. 86–117; Margaret Gilbert, "Three dogmas about promising," in H. Sheinman ed., *Promises and Agreements: Philosophical Essays* (Oxford: Oxford University Press, 2011), pp. 80–108; and David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2012), ch. 5.

necessarily involve the sort of “joint commitment” that some theorists identify with promissory obligations.⁴⁶

Likewise, it is entirely feasible that none of the modes of creating legitimate expectations (1)–(3) rise to the level of *making a contract*, meaning that it is quite possible that in none of these modes is it the case that *G* has made a contract with *A*, or even an implied contract. Even if one thinks that all contracts involve promises,⁴⁷ it does not follow that all promises are contracts. On the contrary, a contract must contain mutual promises, promises travelling in both directions. Notice that in mode (3)(iv)(g) the promise is only in one direction. Now in response it might be suggested that in real life examples of legitimate expectations, there are implied promises on the part of the agent. Thus, suppose agent *A* is involved in delivering services to the public and that when a governmental administrative agency *G* causes agent *A* to believe or predict that *G* will *x* (e.g., grant funding to *A*) by providing agent *A* with a written or verbal commitment, undertaking, or promise that *G* will *x*, *G* does so not in a vacuum but partly on the basis that *A* has also made a promise to use the money for the intended purposes, to act lawfully, to deliver value for money, to achieve adequate quality levels, to maintain appropriate governance, and so forth. In this event there is a reciprocal promise and, therefore, we could be in the terrain of an implied contract. However, although I am not denying that some instances of legitimate expectations can also be instances of reciprocal promises and implied contracts, what I am suggesting is that it is quite possible for governmental administrative agents or agencies to create legitimate expectations even in the absence of reciprocal promises and implied contracts. So I think we can also imagine a situation in which governmental administrative agent or agency *G* causes agent *A* to believe or predict that *G* will *x* by promising *A* that *G* will *x* in the absence of *A* making any reciprocal promise, and in the absence of making an implied contract.⁴⁸

Second, the legitimate expectations created under modes (1)–(3) all possess the three hallmarks of legitimate expectations, as a general concept. For one thing, each mode involves an agent *A* that comes to “believe or predict that *G* will *x*.” The beliefs

⁴⁶See Margaret Gilbert, *Joint Commitment, How We Make Our Social World* (Oxford: Oxford University Press, 2013).

⁴⁷See, e.g., Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981).

⁴⁸For an account of non-contractual liability for frustrated legitimate expectations in EU law, for instance, see Constantin Stefanou and Helen Xanthaki, *A Legal and Political Interpretation of Article 215(2) [New Article 288(2)] of the Treaty of Rome: The Individual Strikes Back* (Dartmouth: Ashgate, 2000).

or predictions outlined in (1)–(3) can be simple beliefs that *G* will *x*, but they can also be more complicated probabilistic predictions that *G* will *x*, signifying that *A* predicts that *G* will *x* with *n* degree of probability. Either way, they are expectations about the future.

Moreover, the relevant expectations are also prescriptive: they involve not merely *A* believing or predicting that *G* will *x*, but also *A* holding that *G* should *x*. In addition, each of these three modes involves prescriptive expectations that are not baseless but are instead justifiable, in the sense that there is some epistemic justification or warrant for *A* expecting that *G* should *x*. This justification is based on agent *A*'s sound or credible belief that *G* was in some way responsible for bringing about *A*'s expectation. Together these descriptions and conditions play a crucial role in ensuring that (1)–(3) are in fact modes of creating legitimate expectations as opposed to ways of creating states of affair that are legitimate but not expectations, or states of affair that are expectations but not legitimate.

The third thing I need to make clear is that I use the phrase “in virtue of” in order to underscore the fact that the grounds or bases for saying that legitimate expectations have been created are contained in the preceding descriptions and conditions. In other words, what is supposed to explain why it is justifiable, or what is supposed to make it justifiable, for *A* to expect *G* to *x*, in the prescriptive sense, is specified in the descriptions of what is at stake, in what is believed or predicted, and in the contents of the conditions (i), (ii), (iii), or (iv) that come before the phrase “in virtue of.”

But what is it about the various descriptions and conditions set out in modes (1)–(3) that render it justifiable for *A* to expect *G* to *x* in the prescriptive sense? What do they have common? I believe that one of the crucial elements here is the conduct of *G* or, to be more precise, *G*'s responsibility for bringing about *A*'s belief or prediction. I shall say more about the nature of this responsibility (and why it is not question begging) in section III. For now I simply want to make the claim that *A*'s epistemic justification or warrant for holding or affirming that *G* should *x* is partly *A*'s sound or credible belief that *G* was responsible for bringing about *A*'s belief or prediction that *G* will *x*. Putting this another way, if a governmental administrative agent or agency *G* is responsible, or can be credited (if that is the right word), for producing *A*'s beliefs or predictions that *G* will *x*, then it is more justifiable for *A* to hold that *G* should *x* than would otherwise be the case. In short, if *G* tried to claim that *A* has no basis on

which to affirm that *G* should *x*, *A* can reasonably say to *G* the following, “Since you led me to expect that you would *x*, you now really ought to *x*.”

However, I believe that a second shared element is necessary to make agents’ expectations truly justifiable: namely, the fact that governmental administrative agents or agencies had already either been given or assumed, in the sense of taking upon themselves, a role responsibility, competence, or discretion (administrative courts aside) for making binding decisions about issues that impinge on the interests of non-governmental agents—decisions which are the subject matter of those agents’ expectations. Irrespective of whether or not governmental administrative agencies actually have legitimate authority on their side or are acting with legitimate authority, the brute fact that they have taken on this *role responsibility* means that non-governmental agents have no real option but to rely on the conduct of governmental agencies qua decision-makers. Suppose agent *A*—a school—is forming a belief or prediction about public funding for a rebuilding project it aims to undertake, and a government agency *G* directly induces the expectation that funding will be forthcoming. It matters crucially, as far as the legitimacy of *A*’s expectation is concerned, that *G* has also taken on the role of primary decision-maker on public funding for school rebuilding projects like *A*’s. In short, *A* will need to take its lead about what to expect in terms of public funding from the indications and representations made by *G*.

On the proposed account, therefore, the relevant form of responsibility is two-fold: first, being a governmental administrative agent or agency which has already been given or has assumed a role responsibility, competence, or discretion for making binding decisions about what will or will not happen in matters affecting non-government agents’ important interests; second, being a governmental administrative agent or agency which has been responsible for creating expectations on the part non-government agents.

I call this the Responsibility-Based Account not to contrast it superficially with Law-Based Account, Justice-Based Account, and Legitimate Authority-Based Account, but because of its distinctive emphasis on the responsibility of governmental administrative agents or agencies. Because of this emphasis, it is no coincidence that none of the aforementioned modes of creating legitimate expectations involve an agent unilaterally developing beliefs or predictions about what governmental administrative agents or agencies will do or not do, that is, without any input from

those agencies. Quite the reverse, the expectations are to a large extent the outcomes of the acts and omissions of the governmental administrative agents or agencies. A legitimate expectation can never be based on a unilateral leap of faith made by the expectation holder. In the case of inadvertently caused beliefs or predictions, as described in (1)(ii)(a), these expectations come about in response to the past behaviour of the governmental administrative agency. In the case of negligently caused beliefs or predictions, in (2)(iii)(b)/(c), the beliefs or predictions are proximately caused by omission and negligence. Here the operative issue is whether *G* could or should know that *A* will develop the expectation and whether *G* has taken reasonable steps to prevent *A* from harbouring unreliable expectations. In the case of intentionally caused beliefs or predictions, in (3)(iv)(d)/(e)/(f)/(g), the beliefs or predictions are proximately caused by actions performed with the intention of producing these expectations. I shall say more about these different forms of responsibility in section III.

The idealised conditions set out in modes (1)–(3) provide, I think, one way of assessing the decisions of administrative courts—or a way of reinterpreting what the legal reasoning might have been had, contrary to fact, the judges operated with my theory in mind. Consider the European Union (ex European Community) law case *Alessandro Accorinti and Others v. European Central Bank*.⁴⁹ Mr Accorinti and a group of Italian investors in Greek Government bonds (GGBs) had developed certain beliefs and predictions that GGBs would continue to be given a status of “adequate collateral” by the European Central Bank (ECB), thus enabling the GGBs to be used for access to Eurosystem liquidity operations by Greek banks. The General Court (EGC) found that the ECB had not created substantive legitimate expectations. Specifically, it found that the ECB had made only statements of a “general nature” about the situation in Greece and the GGBs and, more importantly, had made unequivocal statements that it lacked the power to control states of affair that would be conducive to the relevant beliefs or predictions turning out to be correct.⁵⁰ I would reinterpret this judgement as the EGC in effect saying that ECB could not justifiably be deemed responsible for causing the relevant beliefs or predictions because the ECB

⁴⁹Judgement of the General Court of the European Union (Fourth Chamber) of 7 October 2015, Case T-79/13.

⁵⁰*Ibid.*, at [79].

did in fact take reasonable steps to clarify that it was precisely not making the sorts of representations typical of mode (3).

Or consider the local government ombudsman case *Trafford Council*.⁵¹ Here Trafford Council's policy stated that direct payments could not normally be used to employ as a carer a relative living in the same household unless the council makes an exception if it believes this is necessary. Mrs C had been in receipt of direct payments for the care of Mr D for some time. In 2010 Mrs C emailed the council asking if she could employ her son, Mr E, as a carer for Mr D, even though Mr E was a relative living in the same household. The Council did not provide a clear answer. Mrs C from that point did use direct payments to pay Mr E to care for Mr D. The council knew by mid-2012 that the direct payments were partly being used to employ Mr E as a carer for Mr D. It took no action until mid-2013 when it gave Mrs C four weeks' notice it would stop direct payments that funded Mr E's employment. The Ombudsman concluded that by failing to act for a year to warn Mrs C that she was acting in contravention of the policy, both Mrs C and Mr E had a legitimate expectation that Mr E was being employed as a carer for Mr D.⁵² On the Responsibility-Based Account, the decision of the Ombudsman could be justified on the basis of finding that the Council had negligently caused the expectation by not having taken reasonable steps to warn Mrs C and Mr E that they were in contravention of the policy and could not reliably assume that they would be treated as an exception case, as per mode (2).

III. A COMPLEX THEORY OF RESPONSIBILITY

The theory of responsibility underpinning the Responsibility-Based Account is complex in the following ways. One aspect of responsibility pertains to whether or not a governmental administrative agent or agency has already been given or assumed, in the sense of taking upon itself, a role responsibility, competence, or discretion for making binding decisions over certain issues which affect the important interests of non-governmental agents. Of course, in one sense no governmental administrative agent or agency can be given or assume the mantle of making *final* decisions so long as their decisions are reviewable by administrative courts. But setting the rule of law

⁵¹No. 13 011 545 (LGO England, 18 January 2016).

⁵²*Ibid.*, at [26].

aside, the issue is whether the governmental administrative agent or agency has been given or simply adopted the posture of principal decision-maker with the power to make those decisions binding. If so, then the conduct of that agency in terms of creating expectations about what it will do or not do takes on a greater significance.

By making this claim I am not appealing to the Legitimate Authority-Based Account. That a governmental administrative agency has been given or assumed a role responsibility, competence, or discretion for making binding decisions about issues that impinge on the important interests of non-governmental agents is separate from the issue of its doing so with or without *legitimate authority*. This separate issue concerns not only whether or not a governmental administrative agent or agency has acted or would be acting, on a particular occasion, *intra vires* (within its legal authority) or *ultra vires* (outside its legal authority),⁵³ but also whether or not it, and the system of law and government of which it is a part, in general exhibits *legitimate political authority* (a justified right to rule).⁵⁴ Even though “legitimate expectations” is a compound noun, in fact the semantics of this term are non-compositional. In other words, one does not come to properly understand what the term means simply by adding together the ordinary meanings of the terms “legitimate” and “expectations” as they occur in other areas of legal and political thought.

In a modern state, more often than not, it will be a governmental administrative agent or agency that is given or assumes a role responsibility, competence, or discretion for making binding administrative decisions about the provision of public services, goods, and benefits. But where another body, such as a private organisation, does have something akin to this responsibility, then potentially it could also be appropriate to speak of legitimate expectations. Then again, such an appeal to legitimate expectations might be unnecessary or redundant if there are other legal

⁵³For more on the doctrine of *ultra vires* as it relates to administrative law and legitimate expectations, see, e.g., Craig, *Administrative Law*, pp. 694–8.

⁵⁴For debate on the nature and sources of legitimate authority, see e.g., A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979); A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001); Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); Joseph Raz, *The Authority of Law, Second Edition* (Oxford: Oxford University Press, 2009); Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988); Christopher W. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998); David Estlund, *Democratic Authority* (Princeton, NJ: Princeton University Press, 2008); Arthur Isak Applbaum, “Legitimacy without the duty to obey,” *Philosophy & Public Affairs*, 38 (2010), 215–239; Merten Reglitz, “Political legitimacy without a (claim-) right to rule,” *Res Publica* 21 (2015), 291–307; Amanda Greene, “Consent and political legitimacy,” in D. Sobel et al. (eds.), *Oxford Studies in Political Philosophy* (Oxford: Oxford University Press, 2016), pp. 71–97.

doctrines that can be utilised by aggrieved agents, such as the doctrine of promissory estoppel in private law.⁵⁵

A second aspect of responsibility concerns the connection between the conduct of the governmental administrative agent or agency and the occurrence of the non-governmental agent's belief or prediction about what the former will do or not do. Here responsibility can be grounded in different ways. For one thing, responsibility might be based primarily in simple causation, including causation by omission, causation by action, and causation by a combination of omission and action. Under mode (1), for example, *G* might inadvertently cause *A* to believe or predict that *G* will institute a fair procedure prior to changing its policy simply by *G* permitting *A* to enjoy that policy for an extended period of time. *A* need only prove that *A* has the expectation and that *G* was responsible for the expectation in the sense that *G* caused it, even if *G* did not act negligently or with intention. Of course, even if it is not necessary to prove that *G* failed to take reasonable steps to disabuse *A* of the expectation or to prove that *G* intended to cause the expectation, it still might be necessary to show that *G* was conscious or aware that by permitting *A* to receive some advantage, benefit, or other outcome it was bringing about *A*'s expectation. So in that sense this responsibility might be primarily based on causation, but also includes some element of *G* being conscious or aware of doing the actions which caused the expectation, albeit inadvertently. Note that mode (1), unlike modes (2) and (3), only covers *procedural expectations*. This is because the brute fact of past practice is insufficient by itself to make a governmental administrative agency truly responsible for an agent coming to harbour a substantive expectation, in the absence of other conduct on the part of the agency that might justify such an attribution.

Responsibility can also be grounded on negligence or intention depending on the circumstances of the case. Under mode (2), *G* might negligently cause *A* to believe or predict that *G* will provide some advantage, benefit, or other outcome by *G* in the past permitting *A* to enjoy that outcome, and by *G*'s failure to take reasonable steps to try to prevent *A* from forming this expectation, despite *G* knowing its unreliability. Negligence is reflected in the fact that as an administrative agency of government *G* has a duty of concern to agents to take reasonable steps to prevent them from harbouring unreliable expectations about what it will do or not do in the future, under

⁵⁵For a discussion of the differences between the legal doctrines of legitimate expectations and estoppel, see Thomas, *Legitimate Expectations and Proportionality*, pp. 50–1.

circumstances when *G* knows that *A*'s expectation is unreliable (because *G* knows what is on the cards).

This duty of concern might well be idiosyncratic to government. Ordinarily we cannot hold individual citizens, businesses, or non-governmental organisations responsible for causing expectations by omission. If they change their courses of action in ways that frustrate our expectations—because we expected them to behave in the future as they have done in the past—we cannot reasonably blame them for not warning us in advance that their behaviour is subject to change. But administrative agencies of government are not the same in that regard: they do have a duty of concern not to let us form expectations of future courses of action without taking reasonable steps to prevent us from forming what they know to be unreliable expectations. Thus, the substantive issue that will need to be decided by courts given the facts of particular cases is whether or not the governmental administrative agency has done enough to prevent agents from developing unreliable expectations, such as by issuing sufficient warnings.

Turning to mode (3), here responsibility is partly based on causation by actions, but also based on intention, reflected in the fact that *G* has intentionally set out to cause *A* to form a belief or prediction that *G* will *x*. Therefore, one substantive issue that will need to be addressed by courts given the facts of particular cases is whether or not the governmental administrative agency had indeed intended to cause the agent to believe or predict that the agency would *x*. Consider the English case *R v. Secretary of State for Education and Employment, Ex parte Begbie*.⁵⁶ Here the court made much of the fact that some of the early representations made by the Secretary of State for Education on the matter of government policy regarding the assisted places scheme exhibited “mistake” and “incompetence” as opposed to revealing any “intention” to flag up a new policy whereby a certain category of children would keep their funded places beyond primary school age.⁵⁷ In light of these sorts of judgements, it is surely not too far a stretch to ask courts, therefore, to enquire as to whether a governmental administrative agency had intended to cause the agent to believe or predict that the agency would *x*. One implication of applying an intention test is to ensure that administrative courts would not compel governmental administrative agencies to honour expectations that it was never their intention to create. Another implication is

⁵⁶[2000] 1 WLR 1115.

⁵⁷*Ibid.*, at 1127 (Gibson LJ) and 1131 (Sedley LJ).

that the test would prevent a non-governmental agent from attempting to exploit a situation in which it knew full well that a governmental administrative agency had not intended to create an expectation of some outcome or benefit, say, but nevertheless sought to take advantage of a representation given by mistake, due to ambiguity in wording or in some other unintentional way, in order to secure that outcome or benefit, either voluntarily from the agency or through substantive relief ordered by the court.⁵⁸

IV. THE LEGITIMATE EXPECTATIONS PRINCIPLE

Let us now focus on circumstances where governmental administrative agents or agencies were responsible for creating legitimate expectations on the part of non-governmental agents. How should they subsequently handle these expectations? According to the Legitimate Expectations Principle, any governmental administrative agents or agencies that were responsible for creating legitimate expectations on the part of non-governmental agents, or, indeed, other public bodies or even public employees, have a prima facie obligation to fulfil rather than frustrate those legitimate expectations. The Legitimate Expectations Principle not only reflects but also enshrines in a principle of administrative justice the hallmarks of legitimate expectations as both prescriptive and justifiable.

Of course, governmental administrative agencies are not always able to honour the legitimate expectations they have previously created. Sometimes other areas of justice, sometimes the public interest (where distinct from justice), sometimes severe financial constraints, and sometimes harsh political realities dictate the frustration of legitimate expectations. In these scenarios we need to know what justice demands of government administrative agencies in how they handle the situation, that is, how they treat or what they owe to the agents concerned. Do they owe it to those agents to compensate any losses they suffer as a result of the frustrated expectation?⁵⁹ Or do they owe them next-best remedies only? What form might these take? Could an appropriate remedy take the form of a good faith attempt to reduce or lessen to some

⁵⁸A similar point was made by the court in the Singaporean administrative law case *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047, at [119(d)(i)].

⁵⁹See Brown, “Justifying compensation for frustrated legitimate expectations.”

extent the detrimental effects of the frustrated expectation? Or could the remedy be a more imaginative, in kind benefit, such as giving them priority when it comes to the allocation of other public resources permissions or privileges in the gift of relevant administrative governmental agencies? Or should the remedy simply take the form of an official apology? Or maybe the duty of a governmental agency in this situation is limited to informing the agents concerned with all deliberate speed that their expectations are going to be frustrated, so that those agents have as much time as possible to adjust their plans and cut their losses?⁶⁰ For the purposes of this article, however, I am setting aside these questions in order to focus on what makes expectations legitimate in the first place.

I have characterised the Legitimate Expectations Principle as a principle of administrative justice. But it has often been said by administrative courts themselves (including in England) that dashing legitimate expectations is “unfair.” In *Council of Civil Service Unions v Minister for the Civil Service*,⁶¹ for example, Lord Roskill characterised the obligation to honour procedural legitimate expectations as being a “manifestation of the duty to act fairly.”⁶² (In other cases judges have turned to the phrase “so unfair as to be abuse of power” suggesting a conjoining of two standards, albeit without much guidance as to which is primary and which subsidiary.⁶³) No doubt the Legitimate Expectations Principle can be justified by appeal to consequentialist as well as deontological considerations and values.⁶⁴ But assuming for the sake of argument that the Principle embodies and can be justified by (albeit not exclusively) more general ideas of fairness, what are those ideas?

One possibility is that the moral point of the Legitimate Expectations Principle is to guard against governmental administrative agents or agencies *letting down* non-governmental agents, where letting down is a more general family or kind of unfairness. Letting down can include the creation and subsequent failure to meet legitimate expectations, to disappoint in that sense, but it might also include not performing one’s responsibilities as one should, to fail to act with due diligence, for

⁶⁰See also Henry Sidgwick, *The Methods of Ethics* (London: Macmillan, 1874), pp. 243–4; and A. John Simmons, “Ideal and non-ideal theory,” *Philosophy & Public Affairs*, 38 (2010), 5–36, at pp. 20–1.

⁶¹[1984] 3 All ER 935.

⁶²*Ibid.*, at 954.

⁶³See *R v. North and East Devon Health Authority, Ex parte Coughlan* [1999] LGR 703 (CA), at [57]; and *R. (Bhatt Murphy and others) v. Independent Assessor* and *R. (Niazi and others) v Secretary of State for the Home Department* [2008] EWCA (Civ) 755, at [28].

⁶⁴See Brown, “Rawls, Buchanan, and the legal doctrine of legitimate expectations.”

instance, and it might also include simply withdrawing support, to forsake (with or without dashing expectations). Then again, what is the distinctive character of letting agents down as compared to other kinds of wrongs? In other words, is there some feature that all instances of letting agents down share in common? Or is this instead just a heterogeneous cluster of wrongs that do not in fact have any features or properties in common other than our propensity to refer to them with the phrase “letting people down”? Moreover, why is it unfair for governmental administrative agencies to let down non-governmental agents? Furthermore, if we already intuitively think that it is unfair for governmental administrative agencies to create and subsequently frustrate legitimate expectations on the part of non-governmental agents, what more does the idea of *letting down* add?

Building on this line of questioning, my hunch (which I do not have space to explore fully here) is that if what is needed is a richer and deeper normative account of why it is unfair for governmental administrative agencies to create and subsequently frustrate legitimate expectations, then perhaps the Legitimate Expectations Principle could be understood instead as being derived from even more abstract or general standards governing relations between state and citizen—even more general, that is, than the duty not to let people down. This might include Rawls’s idea of principles of justice which citizens viewed as “moral agents” would accept in an initial position of equality and freedom as defining the fundamental terms of their cooperative association,⁶⁵ or else Dworkin’s idea of citizens’ fundamental right to equal concern and respect. Or perhaps our account of fairness could reach more deeply still to some very basic principle of right conduct concerning human action in general. One obvious candidate might be Kant’s Categorical Imperative, that individuals are always to be treated not as means only but also as ends in themselves.

V. LEGITIMATE EXPECTATIONS, JUSTICE, AND LEGITIMATE AUTHORITY

I want to end by briefly clarifying my position on the relationship between legitimate expectations, justice, and legitimate authority. In terms of justice, I would argue that even an expectation that is justly frustrated may retain a residue of legitimacy in

⁶⁵Ibid.

virtue of the responsibility of the governmental administrative agent or agency in bringing about the relevant belief or prediction. Of course, governmental administrative agencies will often create and will sometimes frustrate legitimate expectations for the sake of other areas of justice, such as in the arrangement of economic inequalities, justice in the conditions of access to jobs, housing, transport, and services, and justice in the provision of basic liberties. But I see no reason to suppose that the legitimacy of these expectations must themselves supervene on or be determined by justice in these other areas of justice.

However, by saying that justice in other areas does not determine the legitimacy of expectations I do not mean to imply that legitimate expectations do not raise issues of justice. On the contrary, I believe that the ways in which governmental administrative agencies handle legitimate expectations is in fact constitutive of one form of justice. Rawls has provided an account of the justice (under ideal conditions) presupposed by legitimate expectations. I am seeking to provide an account of justice in how governmental agencies handle the creation and then potential frustration of legitimate expectations (under non-ideal conditions). We may call this form of justice *administrative justice* to help distinguish it from social or distributive justice.

In terms of legitimate authority, I would argue that even an expectation that is frustrated by a legitimate authority may retain a residue of legitimacy in virtue of the responsibility of the governmental administrative agent or agency in bringing about the relevant belief or prediction. Furthermore, I do not think that in order for an expectation to be legitimate at t_2 it must be the case that the expectation was created by an agency acting *intra vires* and based on legitimate political authority at t_1 . Even if a governmental administrative agent or agency was acting *ultra vires* and/or lacked legitimate political authority at the time of creating the expectation at t_1 or would be acting illegitimately in honouring the expectation at t_2 , the expectation can still be legitimate at t_2 based on the responsibility of that agency for creating it.

Now it might be objected at this stage that for administrative courts to recognise legitimate expectations that have been created by governmental administrative agencies acting *ultra vires* would, in effect, permit public bodies to arbitrarily extend their powers beyond their authority, as set down in statutes, for example. This would be anathema to principles of legitimate authority. For, “the court cannot through the doctrine of legitimate expectation require a body to do what is prohibited by statute or

confer upon it a power which statute has not given it.”⁶⁶ I would argue, however, that seen from the perspective of agents, the legitimacy of their expectations—that is, their justification or warrant for expecting, in a prescriptive as well as predictive sense, governmental administrative agents or agencies to act or not act a certain way—is simply a matter of those agents or agencies being responsible for creating the expectations and having been given or assuming a role responsibility, competence, or discretion over the relevant policies or measures. That an administrative agent or agency of government created an expectation whilst acting *ultra vires* or would be acting *ultra vires* if it honoured the expectation is beside the point as far as the legitimacy of the expectation is concerned, according to my Responsibility-Based Account.

Nevertheless, this does not mean that the *ultra vires* nature of the expectation is irrelevant to the further question of whether or not a court should grant relief and enforce the legitimate expectation. On the contrary, this is where the prima facie, non-absolute nature of the obligation specified in the Legitimate Expectations Principle comes directly into play. Governmental administrative agencies have an obligation to honour legitimate expectations they are responsible for creating unless there is a pressing public interest reason for them not to do so. That their doing so would amount to an arbitrarily extension of their powers is one such reason. But this does not mean that the expectations themselves have been downgraded as non-legitimate or illegitimate. There should be a residue of standing or legitimacy left even where a court does not enforce the expectation.

⁶⁶Rabinder Singh, “Making legitimate use of legitimate expectation,” *New Law Journal*, 144 (1994), 1215–16, at p. 1215.