Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt*

Gerald Gaus

I. Justificatory Liberalism and Substantive Liberal Conceptions

Justificatory liberalism[1] rests on a conception of members of the public as free and equal. To say that each is free implies that each has a fundamental claim to act as she sees fit on the basis of her own reasoning. To say that each is equal is to insist that members of the public are symmetrically placed insofar as no one has a natural right to command others, nor does anyone have a natural duty to defer to the reasoning of others. Given this conception of persons as free and equal, the legal authority of the state, because it is based on the use, and the threat of, force against its citizens, is deeply problematic: state functionaries employ power to force citizens, or issue threats to use force against them, to induce conformity to the law. On what grounds could anyone exercise such power and yet claim that she is respecting the person (as free and equal) that is imposed upon? In Immanuel Kant's eyes, a crucial and necessary condition is that the person imposed upon by the law verifies that following the law is the thing to do — it is what his own reason instructs him to do. If the imposed law reflects the reason of those who are subject to it, Kant and his followers have insisted, in a fundamental sense the law treats them as free and equal (qua legislators) even though (qua subjects) they are bound. "A rational being belongs to the realm of ends as a member when he gives universal laws in it while also himself subject to these laws. He belongs to it as sovereign when he, as legislator, is subject to the will of no other."[2] Justificatory liberalism thus starts out with the idea of "free persons who have no authority over one another"[3] and seeks to show how their reason can lead each to freely accept common laws to which they are subject. Only coercive laws that are publicly justified in this way — they are endorsed by the reason of all members of the public — can respect each as free and equal. "*Respect for others requires public justification of coercion*: that is the clarion call of justificatory liberalism."[4]

My concern in this essay is not to motivate justificatory liberalism, but to investigate its relation to we might call "substantive" liberalisms. Justificatory liberalism is liberal in an abstract and foundational sense: it respects each as free and equal, and so insists that coercion must be justified to all members of the public. The liberal tradition, however, is typically associated with an enumeration of substantive commitments. Or rather, the liberal tradition evinces enduring disputes about the nature of its substan-

tive commitments. Most fundamentally, since the end of the nineteenth century liberals have disagreed about the proper extent of the liberal state. On the classical view the main tasks of the justified state are to protect individual freedom and secure a regime of extensive private property rights — that is, a system of property rights in which owners have an extensive bundle of rights over their property and in which the range of resources and assets subject to private ownership is extensive.[5] While in classical liberalism these are the core functions of the justified state, it is by no means a dogma of classical liberalism that they are the sole functions: classical liberals also typically endorse provision of public goods and improvements, education, poor relief, as well as financial, health, and safety regulations.[6] Still, though classical liberalism is not committed to a "minimal state,"[7] it certainly endorses a far less extensive state than most contemporary "egalitarian" or "social justice" liberals insist is required. It is widely thought today that core liberal values require that the state regulates the distribution of resources or well-being to conform to principles of fairness, that all citizens be assured of employment and health care, that no one be burdened by mere brute bad luck, and that citizens' economic activities must be regulated to insure that they do not endanger the "fair value" of rights to determine political outcomes.[8] In John Rawls's canonical formulation of this expansive version of liberalism, a variety of new "branches" of government are added to the liberal state: a branch to keep the price system competitive, a branch to bring about full employment, a transfer branch to ensure that the least well off have the resources demanded by justice, and a distribution branch which adjusts the rights of property "to prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity."[9]

It is widely thought that all forms of justificatory liberalism must endorse this latter, expansive, understanding of the liberal state. No doubt this partly can be explained by the fact that Rawls's theory is both the most prominent instance of justificatory liberalism and the preeminent defense of the expansive conception of the liberal state. Moreover, both Rawls and his followers have insisted that the more extreme, "libertarian," versions of the classical view are not genuinely liberal, reinforcing the supposition that the justificatory liberal approach is hostile to substantive liberalisms that endorse wide-ranging limits on government authority.[10] Indeed, Rawls condemns classical liberalism ("laissez-faire capitalism" with a low social minimum) *and* welfare state capitalism as unjustifiable politico-economic systems.[11]

Classical liberals who are also justificatory liberals must address two questions. *First*, is there a sound case for the classical version in justificatory liberal terms, or is classical liberalism somehow at odds with the justificatory project, and so all reasona-

ble versions of justificatory liberalism must lead to an egalitarian, redistributive, liberalism? In a previous essay in this journal I have argued that there is a strong justificatory liberal case for classical liberal rights.[12] This, I think, defeats the claim that justificatory liberalism is necessarily an egalitarian doctrine that endorses an expansive state. It may appear, however, that the upshot of this is that justificatory liberalism is an entirely neutral framework with respect to this long-running dispute within liberalism — the very nature of the justificatory project, it may be thought, does not incline towards either view, but reasonable defenses of both versions can be accommodated within justificatory liberalism. Hence the *second* question: is justificatory liberalism a neutral framework or does it incline, or tend to favor, some substantive liberalisms? In this essay I shall argue that the core principles of the justificatory project, along with basic facts of political economy, incline towards the classical side of the debate, endorsing a more limited governmental authority.

I begin in sections II and III by reviewing the core commitments of justificatory liberalism, understood as a family of political views: the presumption against coercion (§II) and the principle of public justification (§III). Section IV examines an ambitious thesis: properly understood, justificatory liberalism *only* justifies the classical version and its stress on the primacy of ownership. I argue that, while this ambitious thesis involves an insight, it fails. Section V builds on this insight and establishes a more moderate case that, while justificatory liberalism admits as reasonable both classical and some egalitarian liberalisms, it inclines towards classical formulations. Section VI argues that the spirit of justificatory liberalism is neither egalitarian nor libertarian, but Millian.

II. The Political Liberty Principle

A. The Presumption in Favor of Liberty

A wide variety of liberals have recognized, as a foundation of liberalism, a general presumption against legal restrictions. As Joel Feinberg puts it, "liberty should be the norm, coercion always needs some special justification."[13] Stanley Benn states the principle even more expansively, in terms of a presumption against *all* "interference," not simply coercion by the law. His grounding principle of morality is that one who is simply acting as he sees fit is under no standing obligation to justify his actions to others, while those who interfere with his actions are under an obligation to justify their interference.[14] Rawls agrees with Feinberg in focusing on the law (though perhaps making room for Benn's concern with non-legal interferences) but clearly follows Benn in extending the principle beyond mere coercion, identifying legal "restrictions" as re-

quiring justification: "there is a general presumption against imposing legal and other restrictions on conduct without sufficient reason."[15] Since our concern here is liberalism as a political doctrine, and in particular about the legitimacy of state activities, it will help to focus on the application of the presumption in favor of liberty to the law; let us further restrict our attention to the law's use of force and coercion. Such a *Political Liberty Principle* holds:

1. A citizen is under no standing obligation to justify her actions to the state;
2. All use of force or coercion by the state against the persons of its citizens requires justification; in the absence of such justification such force or coercion by the state is unjust.

The Political Liberty Principle regulates political justification, and deems state force or coercion without the requisite justification to be a case of injustice.[16] As Benn says, "justifications and excuses presume at least prima facie fault, a charge to be rebutted."[17] If I have no justificatory burden I am permitted to act without justification — I have no charge to rebut, no case to answer. If the onus is on you, the failure to justify condemns your act. Conceivably, a conception of political morality might place the onus on the actor: "Never act unless one can meet the justificatory burden by showing that one is allowed to act."[18] The liberal insists that citizens have no such general burden to bear, though of course they may bear the onus of justification in special contexts in which a restriction already has been established (say, trusteeships).

Now as Rawls rightly insists, "this presumption creates no special priority for any particular liberty" — it does not serve to identify some liberties as especially important. To identify a particular liberty as having a priority in the sense of an enforceable right itself requires justification. Suppose Alf claims to possess an enforceable right to speak in a political forum, and Betty exercises her freedom to play loud music at the same time and the same place. By claiming that his freedom is a right, Alf claims a ground to interfere with Betty's playing of music — he claims that she can be made to stop, by the police if necessary. But that, of course, is to call on the state to coercively interfere with her actions, and like all such interferences claims of rights must be justified.[19] The presumption in favor of liberty does not, then, identify special liberties as deserving special protection. Nevertheless, Rawls acknowledges that even when a basic protected liberty is not at stake, "liberties not counted as basic are satisfactorily allowed for by the general presumption against legal interference."[20] There is always a standing presumption against legal interference: those who endorse a legal interference must provide a case, not those who wish to remain free.

The presumption in favor of liberty, and so against coercive laws, is easily misunderstood. Some view it as a libertarian principle because it "privileges" liberty. But

this is to confuse liberalism with libertarianism. The liberal does not remain neutral between those who would use the law regulate the lives of others and those who wish to remain unregulated: it is the would-be regulator who must have a case. (That Benn, Feinberg and Rawls — none of whom are remotely libertarian — advocate the principle itself should make us doubt the force of this objection.) Others dispute the presumption on the grounds that "there is no standing duty to justify morally relevant actions."[21] But to have a morally-relevant ground for interference simply *is* to have a justification: how could a representative of the state say (*i*) that the state is coercing citizens because morality calls for it but (*ii*) it has no justification for interfering? To be sure, given the presumption in favor of liberty a claim to act on morality must itself be justified: the state must have a case that morality requires the interference. Recall Rawls's key insight: we start out with the assumption of free and equal persons who have no authority over one another and so all claims to authority — including the authority to interfere with others on moral grounds — are subject to the requirement that they be justified.[22]

It is also important to stress that the presumption in favor of liberty does not ignore the fundamental truth that state force and coercion often prevents a great deal of private force and coercion. Some argue that, if the state does not act through coercive laws, there will be great private coercion, and so the presumption in favor of liberty does not really protect liberty: people will simply be subject to private rather than public coercion. The great insight of the social contract theories of Hobbes, Locke, Rousseau, and Kant was that preventing unjustified private force and coercion is the main justification of state force and coercion. As Kant understood it, the state replaces private force and coercion with "public lawful coercion."[23] That state coercion must be justified only requires that a sufficient reason for it be advanced: that it is the best way to prevent a great deal of unjustified private coercion is certainly such a reason.

B. Coercion and Rights of the Person

The Principle of Political Liberty supposes that we can make sense of the idea of legal force and coercion. Many, though, are skeptical that this can be done. The last forty years has witnessed a number of fundamentally divergent accounts of coercion.[24] It is widely agreed that coercion typically involves some sort of threat of harm by which the "coercer" gets (or aims at getting) the "corecee" to do as he wishes, but there is considerable disagreement about what constitute a threat of harm, whether all such threats are coercive, and so on. Now it might be thought that if we cannot agree on a general account of coercion we cannot usefully employ the idea in the Political Liberty

Principle. But this would be far too skeptical a conclusion: philosophical theories that seek to provide a biconditional analysis of a concept (i.e., *A* is an act of coercion if and only if conditions $C_1...C_n$ are met) are notoriously subject to counter-examples and controversy; we typically have a far better grasp of the use of an idea than the philosophical analysis of it. Moreover, the Political Liberty Principle does not require a general analysis of coercion, but only its application to the actions of the state against its citizens.

What makes the state — even a legitimate one — morally problematic to the liberal is that it employs force, or threatens to use force, against the persons of its citizens.[25] This is certainly only a subset of the many ways in which one can coerce another. If Alf threatens to destroy Betty's beloved painting — which *he* owns — if she does not agree to move to Australia with him, he may plausibly be said to coerce her into moving without threatening her person (he threatens to harm his own property). Now to be sure, some states do employ similar means (we are tempted to label them as "blackmail"): they threaten, for example, a dissident's family or friends with harm to get her to conform, or they threaten to banish her children from university if she does not cooperate with the regime. These uses of coercion are subject to special condemnation: they are not the *modus operandi* of the liberal state. Liberal legal restrictions require compliance, and if compliance is not forthcoming the citizen is typically threatened with the use of force *against his person*, not simply a harm to what he cares for. The police will come, use force against his person, and may imprison him. This, indeed, is a quintessential case of coercion. A reason to reject the claim that all instances of coercion involve a threat to violate the rights of another[26] is that, even in a condition such as Hobbes's state of nature, in which everyone has a blameless liberty to do as he thinks necessary and so no one has claim rights to non-interference, we can sensibly and importantly say that people are coercing each other.[27] Indeed, the idea of replacing such private lawless coercion with public lawful coercion is an important theme in Kant's social contract theory.[28] Applying the concept of coercion (and, of course, force) makes sense even in relations among purely "natural persons"— those whom we do not consider bearers of rights.

However, coercion by the state typically does involve a threat against a citizen's rights, for in political society one's person is largely defined — and expanded — by one's rights. This idea of the expansion of legal personhood through rights was central to Kant's analysis of property. To own a thing is not simply to have possession of it, or even stable, secure, recognized, possession. It is to enter into a juridical relation such that "any hindrance of my use of it would constitute an injury to me, even when I am

not in my [physical] possession of it (that is, when I am not a holder of the object)."[29] Once property rights are justified, a threat by the state to take my property is a threat against me: to take my property is to do an injury to me as a juridical person. Without property rights, you only do injury to me by taking my possession if you use force against my person (narrowly construed), or threaten to, when taking it. If I should put it down and walk away, it would be no injury to me for you to take it, and so it would be no threat against my person to threaten to take it away under these circumstances.[30] However, if it is my property the injury is done not by reason of physical possession but by an extension of the bounds of my person to include my relation to it. Thus, when the state threatens to fine me for non-compliance it threatens me, just as surely if it threatens imprisonment.

C. The Order of Justification

If our core concern is the state's use of force or the threat of force against the person of the citizen, and the juridical boundaries of the person expand with her set of rights, then what constitutes coercive threats against her person will also expand. This, though, in turn implies that the order of justification may affect the outcome of what is justified. If we assume, say, only natural personhood, or even simply rights of bodily integrity narrowly construed, then the state's demand that one conform to law *L* or else it will take away one's "property" (qua stable, recognized, possessions) will not involve a direct threat against your person, since you have no juridical relation to such "property." And so there would be no onus of justification on the state: it could, say, tax away those possessions at will (see further §IV.C). On the other hand, if we understand you to have a justified property right, then the state would bear such an onus, and it must justify this threat against you.

Despite first appearances, this is not, I think, a counter-intuitive implication of the Principle of Political Liberty. We will see in section IV that many of the disagreements between classical and egalitarian liberals stem from disputes about the order of justification, and, in particular, about where the justification of the rights of ownership enters into an account of liberal justice. All liberals agree that at the core of their theory are persons with rights to bodily integrity, freedom of association, freedom of conscience and speech. As we will see, the question is: at what point does the person include her property?

III. PUBLIC JUSTIFICATION AND THE DELIBERATIVE MODEL

A. The Principle of Public Justification

The Political Liberty Principle places the onus of justification on the state for the use of force and coercive threats against the persons of its citizens. The *(Generic) Public Justification Principle* determines how this onus can be met:

> *L* is a justified coercive law only if each and every member of the public *P* has conclusive reason(s) *R* to accept *L* as binding on all.

An unjustified law fails treat each as a free and equal. Our question is: when, if ever, does a coercive law treat all as free and equal?

Because I am concerned with a family of justificatory liberalisms, I focus on a generic formulation of the principle. Because this is a generic principle, I leave open the crucial problem of just how to specify *P* (whether the members must all be reasonable, fully rational, etc.). The Public Justification Principle supposes that the relevant justificatory public is an idealization of the actual citizenry (throughout "member of the public" is used as a term of art to identify this idealized public). Whereas many in the actual citizenry may act on pure self-interest, hate, or spite, or reason on the basis of manifestly false empirical theories, or make manifestly invalid inferences, the idealized members of the public make sound inferences from appropriate and relevant values, drawing on sound empirical claims. Justificatory liberals differ in just how far they press this idealization. One Kantian specification of *P* is highly idealized — the realm of rational beings; insofar as we act as members of *P* we act fully in accord with our status as rational moral beings. Rawls relies on more modest idealization: a conception of persons who, as reasonable, recognize the severe limits of human reason. In filling out a justificatory view it is critical to provide a compelling specification of *P*; because our interest here is in a family of justificatory views, we can for the most part leave this issue open (see, though, §III.B).

Note that the public justification principle maintains that a coercive law *L* applying to public *P* is justified only if every member of *P* has *conclusive* reason to endorse *L*. The conclusiveness requirement is crucial. To sees its motivation assume that Alf and Betty are both members of *P*, and Alf proposes law L_A; suppose that Alf can advance *a reason* R_1 for Betty to endorse L_A, but Betty's system of beliefs and values is such that while as a member of *P* she acknowledges that R_1 is a reason for endorsing L_A, she also holds that she has reason R_2, which is reason to endorse L_B over L_A (where L_A and L_B are incompatible alternatives). Suppose that, exercising her reason as a free and equal member of the public, Betty concludes that R_2 outweighs (or defeats) R_1, and so she concludes that L_B is better than L_A. Now some insist that, nevertheless, Alf has provided a

justification of L_A insofar as he has offered a non-sectarian reason R_1 in support of L_A — a reason that as a free and equal member of the public she can appreciate.[31] Yet, exercising her capacities as a free and equal person, Betty has concluded that, when compared to L_B, L_A is inadequately justified in the sense that it is not choice worthy; as she understands it, she has more reason to accept L_B. For Alf (even if Alf is the head of state) to *simply* impose L_A on Betty is inconsistent with treating her as free and equal member of the public. The critical question is not whether she has *some* reason to endorse L_A, but whether, all things considered, she has reason to endorse L_A *over the alternatives*, or even over no law at all. If she has some reason to endorse L_A, but more reason to endorse an alternative, what economists call the "opportunity costs" of choosing L_A exceed the benefits: she would be opting for a law that achieves less of what she values over one that achieves more.

B. Reasonable Pluralism

As stated, most political theories can endorse the Public Justification Principle: if the members of the public are so specified that they all accept, say, a certain substantive moral theory, the laws justified by that theory would also be justified by the Public Justification Principle. The Public Justification Principle would do little or no work. The Public Justification Principle becomes an interesting test — and also more obviously part of the liberal tradition — if we accept Rawls's claim that a wide range of rational disagreement is the "normal result of the exercise of human reason."[32] Suppose, then, that we accept pluralism in the sense that our characterization of *P*'s deliberation includes that they reason on the basis of a wide variety of different values, ends, goals, etc. This does not prejudge whether values are "ultimately" plural, or whether some values are truly "agent-neutral" — perhaps fully rational, omniscient beings would agree on what is valuable, or recognize agent-neutral value. The important point is that at the appropriate level of the idealization, members of *P* will be characterized by diversity in the basis of their reasoning about what laws to accept. That, after all, models the core problem of our pluralistic liberal societies.

Abstracting from the notions of goods, values, moral "intuitions" and so on, let us say that Σ is an evaluative standard for Alf qua member of *P* if holding Σ (along with various beliefs about the world) gives Alf a reason to endorse some *L*. Again, different justificatory liberalisms advance different characterizations of evaluative standards: some may focus largely on self-interest, others on conceptions of the good or value, others will also allow members of *P* to employ "moral intuitions" (though these will only provide reasons for those members of *P* who hold them). Evaluative standards

are to be distinguished from justified laws: as I have characterized them they need not meet the test of Public Justification, but are the reasons for some member of the public to endorse or reject a law. Our problem is how to achieve the public justification of uniform coercive laws based on disparate individual evaluative standards.

Any plausible liberal justificatory account must acknowledge the diversity of evaluative standards in political justification (and so recognize the importance of reasonable pluralism), but it also must limit the range of considerations that may be drawn upon in justification. Some limits are implicit in the very idea of public justification. Our concern is not simply whether the government and its officials respect each citizen as free and equal, but whether each citizen respects her fellows when she calls on the coercive force of the law. If each citizen is to respect her fellows as free and equal, each must have reason to suppose that the Public Justification Principle is met when calling on the force of the law; but that means that each must think that the relevant evaluative standards, which are the grounds of each member of the public's deliberation, provide her with conclusive reasons to endorse the law. Now qua member of the public I cannot think that your deliberation based on standard Σ_X provides you (as another member of the public) with a reason to endorse a law as binding unless in my view Σ_X is an intelligible and reasonable basis for deliberation. That your unreasonable standard lead you to endorse *L* cannot lead me to think you have a reason to endorse *L*: garbage in, garbage out. Plausible justificatory liberalisms, then, must at least accept what we might call "mutually intelligible evaluative pluralism" *at the level of members of P*. Members of *P* will see themselves as deeply disagreeing about the basis for a law's acceptance, but will acknowledge that the bases of others' reasoning is intelligible and is appropriate to the justificatory problem.

C. The Deliberative Model

One of Rawls's fundamental insights was that the justificatory problem — what legal requirements (or social principles) do members of *P* have reason to endorse? — can be translated into a deliberative problem.[33] Suppose we understand a member *i* of *P* as consulting her relevant evaluative standards — the full set of considerations that is relevant to her decision whether to accept a law. After consulting her evaluative standards, *i* proposes her preferred law, L_i — the law that, on her (somewhat idealized) reasoning, best conforms to her evaluative standards. (This procedure parallels that utilized by Rawls in "Justice as Fairness.")[34] At no point do the parties bargain: each member of *P* consults her evaluative standards, and proposes what she understands to

be the best law. Suppose that, having each proposed her preferred candidate, each then (sincerely) employs her evaluative standards to rank all other proposals.

This simple statement of the deliberative problem has decisive advantages over more familiar formulations. One of the problems with much contemporary contractualism is that it employs a notion of reasonable acceptability (or rejectability) without being clear about the option set: to ask what one can reasonably accept (or reject) without knowing the feasible alternatives is an ill-formed choice problem. "Rationally rejectable in relation to what options?" is the crucial question. In our deliberative problem the feasible set is defined by the set of all proposals. Rawls never made this common mistake: the parties to his original position in *A Theory of Justice* choose among a small set of traditional proposals, so their choice problem was well-defined. However, Rawls built into his later and more famous formulations of the deliberative problem a host of controversial conditions. In contrast, we can depict the deliberative problem as a straightforward articulation of the principles of Political Liberty and Public Justification which it is meant to model: if one accepts that these principles pose the correct justificatory problem, there is strong — indeed, I think compelling — reason to accept this deliberative model. The only element it adds is the interpretation of what one has a reason to accept in terms of a ranking of the proposals advanced by each member of *P*, translating the idea of having "a reason to accept" as "each member of *P*'s ordinal rankings based on her evaluative standards."

Because justificatory liberalism is committed to a widespread evaluative pluralism among members of *P*, we should expect that their deep disagreements in their evaluative standards will usher in deep disagreements about which law is best. If members of the public employ plural evaluative standards to evaluate different proposed laws, and if their evaluative standards are fundamentally at odds, these differences will inevitably result in great disagreement in their rankings of proposed laws. But given such deep disagreements in the rankings of the members of the public, it looks as if nothing can be conclusively justified, since for every proposal there will be someone who evaluates it as worse than another alternative.

The problem is this: if justificatory liberalism (*i*) adopts a strong standard of justification to each member of the public (some version of conclusiveness) while also (*ii*) insisting that members of the public have diverse bases for deliberations about what is justified, then it is hard to see how we can get a determinate result. Justificatory liberals have tended to generate determinacy either by weakening (*i*) — the balance of political values specified by a political conception must be only "reasonable"[35] and so need not be conclusively justified and/or (*ii*) by maintaining that, in the end, we share

a common basis for reasoning about political right, say, based on a shared index of primary goods, thus greatly qualifying the pluralism underlying the parties' deliberations. Rawls himself acknowledges that his restrictions on particular information in the original position are necessary to achieve a determinate result.[36]

Suppose we refuse to take either of these routes, and allow each member of the public to rank all proposals, resulting in a set of options. Is there any way for them to agree to reduce the set of acceptable proposals? Members of *P* would unanimously agree to apply the Pareto Principle: if in every member of *P*'s ordering L_X is ranked higher than L_Y, all would agree that L_X is better than L_Y. Being strictly dominated by L_X, L_Y can be eliminated from the set of options to be considered. Once all such dominated proposals are eliminated the members of the public would be left with an *optimal set* of proposals. Can they eliminate any other proposals? In the eyes of each member of *P*, some of the remaining proposals may be marginally worse than her favored law; others she may find highly objectionable. But how objectionable is too objectionable? All members of *P* accept our two liberal principles, so they believe that liberty is the norm unless coercion can be justified. What this means, then, is that in evaluating a proposal in terms of her evaluative standards, a person will find a proposal unacceptable if it is worse than a condition of liberty. For a law to be acceptable to a member of the public, it must be a net improvement on liberty. Consulting her own standards, each must hold that the law, in comparison to a condition of liberty, brings more benefits than costs. If a condition of liberty — no law at all — would be better given her evaluative standards, she has no reason to accept the law. Self-legislating such a proposal would be manifestly irrational: it would create net losses to her evaluative standards.

No member of the public can have reason to accept a law that is worse than no law at all. On the other hand, a member of the public does have some reason to accept laws that are better than no law at all: all things considered, her evaluative standards are better advanced by such laws than by "anarchy" over this area of life. Our members of the public will thus divide the proposals into eligible and ineligible sets, as in Display 1:

Alf		Betty		Charlie		Doris	
Σ*	Law	Σ	Law	Σ	Law	Σ	Law
x	L_1	*y*	L_2	*z*	L_3	*w*	L_4
y	L_2	*w*	L_1	*x*	L_1	*x*	L_1
w	L_3	*x*	L_4	*y*	L_2	*z*	L_2
z	No *L*		No *L*		L_4	*y*	No *L*
	L_4		L_3		No *L*		L_3

*Evaluative standards

Display 1: Orderings Distinguishing Eligible from Ineligible Proposals

In this case either member of the set $\{L_1, L_2\}$ is preferred by every member of P to no law at all *on this matter;*[37] *they clearly all have conclusive reason to select from this set, for both options are, from everyone's evaluative standards, improvements on the absence of legislation or the condition of liberty*. They all benefit from the law. We now have an *optimal eligible set*; *some choice from this set is justified, though (until more is said) no choice of any single option is justified*. When we are faced with an optimal eligible set there is still justificatory work to be done: members of the public need to arrive at some procedure for selecting one of the options. While I do not want to minimize the problem of selecting one member from the set, I have argued elsewhere that certain formal and informal procedures may justifiably do the job.[38] My concern here is the extent of the optimal eligible set in matters concerning ownership and redistribution: what is the range of possible laws from which citizens may legitimately choose? Rawls believed that it included some capitalist and socialist systems,[39] though we have seen that he and important disciples insist that libertarianism is not an eligible option. I believe that Rawls implausibly constrains the range of systems in the optimal eligible set while extending the set implausibly far in a statist direction.

IV. The Ambitious Case for Classical Liberalism

A. The First Step: Private Ownership Must be in the Optimal Eligible Set of All Members of P

One of the remarkable features of the Rawlsian version of justificatory liberalism is the way in which its recommendations crucially, but highly selectively, draw on claims of political sociology and political economy. For example, Rawls consistently claimed that large inequalities in wealth undermine the fair value of political liberty by corrupting the political process. It is seldom appreciated how important this claim is to Rawls's case for equality: he believes that inequalities allowed by the difference principle may threaten the fair value of political liberty, and so further equalization may be required.[40] As we saw in section I, Rawls went so far as to propose a branch of government to readjust property rights to ensure the fair value of political liberty. But while it may simply seem obvious to some that large inequalities of income and wealth undermine the value of "the least advantaged" citizen's political liberties, this claim is in fact highly conjectural. Whether citizens have real input — whether their political rights actually have "fair value" — is a matter of complex sociology, involving the features of political culture, including levels of civic participation, institutional structures relating business and governments, the existence of power centers outside of government, levels of overall wealth, and so on. Display 2 shows some of this complexity,

charting the relation between income inequality and political rights in selected OECD countries.

	Below Average Income Inequality OECD	*Above Average Income Inequality OECD*
High Political Pluralism/ Participation Score (16)	DENMARK	UNITED STATES
Middle Political Participation Score (15)	CZECH REP, FRANCE	JAPAN
Lower Political Participation Scores (12-14)		MEXICO, TURKEY
High Electoral Process Score (12)	CZECH REP; DENMARK, FRANCE	JAPAN
Middle Electoral Process Score (11)		UNITED STATES
Lower Electoral Process Score (10)		MEXICO, TURKEY
High Functioning Government Scores (11 & 12)	DENMARK (12), CZECH REP; FRANCE;	UNITED STATES
Middle Functioning Government Score (10)		JAPAN
Lower Functioning Government Scores (8-7)		MEXICO, TURKEY

Display 2: The Relation between Income Inequality
and Effective Political Rights in Selected OECD Countries

Sources: Jean-Marc Burniaux, Flavio Padrini and Nicola Brandt, *Labour Market Performance, Income Inequality and Poverty in OECD Countries*, Economics Department Working Paper No. 500 [ECO/WKP(2006)], 44; Freedom House, "Freedom in the World 2008: Subscores (Political Rights)" [http://www.freedomhouse.org/template.cfm?page=414&year=2008]

Display 2 gives little ground for accepting a strong relation between income inequality and low value of political rights. To be sure, below average income inequality countries always score high or middle on political rights, while above average income inequality countries scored both high and low. The United States, though, scores high on OECD income inequality, but also high on political participation/political pluralism, outperforming more egalitarian countries. The differences between the Czech Republic, Denmark, France, Japan and the United States, however, are very slight; they are essentially tied when compared with Mexico and Turkey, countries of significantly lower overall wealth and income.

Perhaps the real danger to political rights is not income, but wealth, inequality. Calculating wealth inequality is a difficult task, mainly because the idea of "wealth" is open to numerous interpretations. However, income and wealth inequality are strongly correlated in OECD countries,[41] so we should not expect a great deal of difference. Display 3, employing a different data set of selected OECD countries concerning wealth inequality arrives at comparable results to Display 2.

	Lower Wealth Inequality OECD	*Higher Wealth Inequality OECD*
High Political Pluralism/ Participation Score (16)	FINLAND, SWEDEN	UNITED STATES, CANADA
Middle Political Participation Score (15)	JAPAN, GERMANY	AUSTRALIA, ITALY
Lower Political Participation Scores (12-14)		MEXICO
High Electoral Process Score (12)	FINLAND, GERMANY, JAPAN SWEDEN	AUSTRALIA, CANADA, ITALY
Middle Electoral Process Score (11)		UNITED STATES
Lower Electoral Process Score (10)		MEXICO
Highest Functioning Government Scores (12)	FINLAND, SWEDEN, GERMANY	AUSTRALIA, CANADA
Higher-Middle Functioning Government Scores (11)		UNITED STATES, ITALY
Middle-Lower Functioning Government Score (10)	JAPAN	
Lower Functioning Government Scores (8)		MEXICO

Display 3: The Relation between Wealth Inequality
and Effective Political Rights in Selected OECD Countries

Sources: Markus Jäntti1and Eva Sierminska, *Survey Estimates of Wealth Holdings in OECD Countries: Evidence on the Level and Distribution*, United Nations University, World Institute for Development Economics Research, 2007; Freedom House, "Freedom in the World 2008: Subscores (Political Rights)" [http://www.freedomhouse.org/template.cfm?page=414&year=2008]

Of course this is data is merely indicative, and much work needs to be done, but it is dubious indeed that there is any powerful empirical evidence for the strong claims of political sociology on which much of Rawls's rejection of classical liberalism relies.

On the other hand, there is powerful evidence that extensive private ownership — including capital goods and finance — is a requisite for a functioning and free social order. It is, I think, nothing short of astounding that Rawls draws deeply on highly speculative political sociology concerning the effects of economic inequality on political rights but ignores the economic and political case for private ownership, insisting that well functioning markets can be divorced from "private ownership in the means of production."[42] There has never been a political order characterized by deep respect for personal freedom that was not based on a market order with widespread private ownership in the means of production. As Display 4 shows, no country rated by Freedom House (in 2008) in category 1 on protection of civil rights scored less than 50 on protection of property rights, or less than 59 in ratings of overall economic freedom (by the 2008 Heritage Foundation scores); with the (close) exception of Cape Verde, all states recognized by Freedom House as best protectors of civil rights were classified as free or mostly free in the economic freedom ratings.

Country	*Property Rights Protection Score*	*Overall Economic Freedom Score*
Australia	90	82
Barbados	90	71
Belgium	80	72
Canada	90	80
Cape Verde	70	59
Chile	90	80
Costa Rica	50	65
Czech Republic	70	69
Denmark	90	79
Estonia	90	78
Finland	90	75
France	70	65
Ghana	50	57
Greece	50	70
Germany	90	71
Hungary	70	67
Iceland	90	77
Ireland	90	82
Israel	70	66
Italy	50	62
Japan	70	72
Lithuania	50	70
Luxemburg	90	75
Netherlands	90	77
New Zealand	90	80
Norway	88	69
Poland	50	60
Portugal	70	64
Slovenia	50	61
Spain	70	70
Sweden	90	70
Switzerland	90	80
Taiwan	70	71
United Kingdom	90	80
United States	90	81

Display 4: Economic Freedom in States that Best Protect Civil Rights

Sources: Freedom House, "Freedom in the World 2008: Subscores (Civil Rights)" [http://www.freedomhouse.org/template.cfm?page=414&year=2008]; Heritage Foundation, "Index of Economic Freedom" [http://www.heritage.org/Index/]

Country	*Civil Rights Score (all "not free")*	*Political Rights Score (all "not free")*	*Property Rights Protection Score*	*Overall Economic Freedom Score*
China	6	7	20	53 (*mostly unfree*)
Cuba	7	7	10	28 (*repressed*)
Laos	6	7	10	50 (*mostly unfree*)
Vietnam	5	7	10	50 (*mostly unfree*)

Display 5: Civil Rights Scores and Economic Freedom in Remaining Socialist Sates

Sources: Freedom House, "Freedom in the World 2008: Subscores (Civil Rights)" [http://www.freedomhouse.org/template.cfm?page=414&year=2008]; Heritage Foundation, "Index of Economic Freedom"

In comparison, Display 5 gives the scores of the remaining state socialist regimes on civil rights and political protection and economic freedom. To be sure, Rawls rejects such state socialist systems. But what is truly breathtaking about the Rawlsian position in light of Displays 2-5 is his claim that "laissez-faire" capitalism, welfare state capitalism, and state socialism with a command economy all are unjustifiable partly because they fail to secure the fair value of political liberties,[43] even though states such as the United States and the United Kingdom score "1" and all socialist states "7" on effective political rights. Display 5, of course, does not include market socialist systems, which is one of Rawls's favored alternatives (since none exist). However, the only large-scale market socialist system in history — Yugoslavia under Tito — also repressed civil liberty.

This knowledge is relevant to the deliberations of members of *P*. We suppose that they have already justified civil rights and rights of the person: such rights are basic for all liberals, and so would be prior in the order of justification (§II.C). Knowing the importance of these rights, when selecting schemes of economic cooperation, the members of the public will rank all systems with extensive private ownership and economic freedom as superior to socialist systems. Not only does everything we know about economic productivity indicate that private ownership is far superior to socialist systems, but, as we have seen, the shared commitment of all liberals to civil rights provides decisive reason to rank such systems above socialism. And, we have seen, the Rawlsian counter-claim that, in turn, strong private ownership systems have a tendency to endanger political rights is at best empirically dubious. Thus socialist systems would be dominated by private ownership systems and, so, would not be in the optimal set.

B. The Second Step: Redistribution is not in the Optimal Eligible Set of All Members of P

Once it has been concluded that systems with private ownership in the means of production (with great economic freedom to invest, start businesses, and so on) is in the optimal eligible set of all members of *P*, it looks as if the proponent of classical liberalism has won the day, for egalitarian, redistributive, proposals will not be in the eligible set of all members of the public. We must suppose that some members of the public have egalitarian intuitions (evaluative standards), some are welfare statists, while others are more strictly classical liberal. Now the classical liberal members of *P* are apt to hold that almost every redistributive plan or scheme of social justice is worse than no redistributive/social justice laws at all. Recall that, given the basic Political Liberty Principle, the baseline for liberals must be the absence of legislation (§III.C). Unless a

law is endorsed by every member of the public as an improvement (from the perspective of her own evaluative standards) over no law at all, the law cannot possibly be one that all endorse as free and equal persons. But classically liberal inclined citizens will rank few if any redistributive laws as better than no laws at all, and so such laws will be excluded from the eligible set. It seems, then, that the optimal eligible set will contain only laws with a strong commitment to private ownership and economic freedom.

It is important to stress that once an extensive system of private ownership has been justified, redistributive proposals are manifestly coercive. To take away one's property infringes one's rights; the threat to do so is coercive. This is not, of course, to say that taxation cannot be justified, but as an exercise of coercion by the state it stands in need of justification. This "everyday libertarian" view of ownership — that when the government taxes me it takes away *my* property — is criticized by Liam Murphy and Thomas Nagel as a "myth":

> There is no market without government and no government without taxes; and what type of government there is depends on laws and policy decisions that government must make. In the absence of a legal system supported by taxes, there couldn't be money, banks and corporations, stock exchanges, patents, or a modern market economy ….
>
> …It is therefore *logically impossible* that people should have *any* kind of entitlement to all their pretax income. *All* that they can be entitled to is what they would be left with after taxes under a legitimate system….[44]

This is an error. I logically can have an entitlement to all my pre-tax income in the sense that taking away any of it must be publicly justified: as something I have a right to, any infringement of that right must be justified. Murphy and Nagel are certainly correct that some activities of the state are necessary for my property rights to exist: funds required for those activities are justified claims against my property. But that someone has a justified claim against some of my property does not show that I do not have "any kind of entitlement" to that part of my property. Alas, my creditors have claims against a good deal of my current income, but it hardly follows that I have no entitlement to that income: even my creditors may not simply raid my bank account. They have claims that can justify overriding my entitlements if so authorized by a justified law, but having liabilities is not the same as not having the property needed to discharge those liabilities.

C. Property, Redistribution, and the Order of Justification

Murphy and Nagel also suggest a rather more comprehensive criticism of the "everyday" conception of ownership. Property rights are essentially conventional. As Kant was well aware, even if there is a basic moral right to have private property, this right

cannot be implemented without a political order that specifies it, provides the economic institutions for it be effective, and so on. Kant held that, although we can have a "provisional" right to property in the state of nature, justified rights to property only become actual in a juridical condition which determines the shape of property rights.[45] The aim of jurisprudence, Kant says, is to precisely specify "what the property of everyone is"; only in civil society is property adequately guaranteed through public law.[46] Now if the state is in the business of determining the shape of property, it may seem that everything it does — including taxing as it sees fit — is part of this job of specifying property rights. If so it might appear that nobody could be in a position to argue that the state is taking away his property since until the state specifies, there really is no effective right to property. There is, on this way of thinking, no Archimedean point outside of the state's determinations of your property rights (or any other rights?) from which to criticize the state's activity as taking away what is yours, for its decisions determine what is yours.

This conclusion does not follow from recognizing that effective property rights are conventional and depend on the state. As I have stressed, all laws are to be justified. This justification occurs against a background of one's already justified rights, what I have called the order of justification. Now property rights, if not the most basic rights in the liberal order of justification, are certainly prior to many state laws and policies such as, say, funding museums. Hobbes, Locke, Rousseau, and Kant all recognized that distinguishing "mine" and "thine" is one of the first requisites of an effective social order. In seeking to fund museums representatives of the state cannot simply say that citizens have no entitlement to their incomes because they, the representatives, determine property rights, and so they may tax for these purposes without justification. "Without us, there would be no property, so you have no property claims against us!" Once property rights have been justified, they form the background for further justifications; they can be overridden in order to tax, but this must be justified.

All political theories must recognize an order of justification: some things are settled, and that settlement provides a background for further justification. Of course "settled" does not mean that we cannot go back and rethink the answers we have given, but we must decide the more basic issues before going on to others. That is the key insight of Rawls's focus on "constitutional essentials" — once we have justified them, we have a fixed point for further justification. The problem with the case for classical liberalism we have been examining is not that it relies on an order of justification in which determining property rights is fairly basic, but that it insists that we first justify ownership rights and, taking these as settled, look at the justification of all redistribu-

tive proposals. It is only because the classical liberal first fixed private ownership that she was able to eliminate redistributive proposals. That is arbitrary. The history of debate about economic justice and redistribution has been about the shape of a justified system of private ownership. Many members of *P* could not possibly evaluate and rank schemes of private ownership unless they know their distributive implications:[47] for many members of the public these issues are tightly bound together. If the classical liberal is not to beg the question, she must show that even when we justify private property and redistributive proposals at the same time (i.e., at the same point in the order of justification) justificatory liberalism still favors the classical view.

V. COERCION, TAXATION, AND THE REDISTRIBUTIVE STATE

A. The Political Liberty Principle, Degrees of Coercion, and the Costs of Coercion

Recall our two foundational principles — Political Liberty and Public Justification. Liberalisms based on them hold that the first problem of a morally acceptable legal regime is that coercion must be justified to everyone; in the absence of such justification people are to be left free. Now if coercion requires justification — if as Benn says, one who coerces others has a case to answer — then those who engage in more coercion must have a greater case to answer.[48] The more coercive the law, the greater must be the gains from the law if it is to be justified. A law that instructs all to *X* based on the threat of a small fine may be publicly justified while a law instructing all to *X* based on a threat of years imprisonment may not be. Draco (who codified the first set of law for Athens) is said to have insisted that even the smallest infractions such as stealing an apple should be punished by death: Draconian laws are objectionable not necessarily because their aims are unjustifiable, but because the degree of coercion employed cannot be justified. To say, however, that a law that coerces to a higher degree requires a higher level of justification must be to say that coercion is a moral cost that triggers justification, and the higher that cost the greater must be the law's benefits if it is to be justified.

Coercion limits liberty, and greater coercion limits liberty more. As Feinberg observes:

> There is a standing presumption against all proposals to criminalize conduct…but the strength of this presumption varies … with the degree to which that interest in liberty is actually invaded by the proposed legislation. Invasions of the interest in liberty are as much a matter of degree as invasions of the interest in money, though we lack clear-cut conventional units for measuring them. The interest in liberty *as such* … is an interest in having as many open options as possible with respect to various kinds of action, omission, and possession.[49]

A coercive law that closes off only one or two options is, other things equal, less coercive than a law that makes the same threats but closes off many options. Hayek stresses this perhaps more than any recent liberal theorist: "coercion occurs when one man's actions are made to serve another man's will."[50] Now for Hayek, the more one's options are restricted to one or a few options — the more the coercer succeeds in getting you to do the thing she seeks — the more you are serving another's will, and so are coerced. On the other hand if the coercion forecloses few options — say it attaches to a law that simply forbids you to take up one of your many options — you are only minimally subject to the will of another.[51] As Benn points out, coercive laws seek to render some options ineligible by "threatening penalties for a prescribed action, attaching to it costs which make it significantly less attractive an option than alternative ones."[52] Coercive laws restrict freedom by rendering options considerably less eligible as choices; as the law renders a larger set of actions less eligible in this way, it is more coercive and its costs to liberty increases.

B. The Redistributive State and Coercion

Classical liberals have long maintained that the redistribute state is more coercive than the classical liberal state. The debate between classical and egalitarian liberals on this matter has been extensive, protracted, and often confusing. Some of the familiar claims made are:

- Some classical liberals argue that we cannot distinguish liberty and property: property rights simply are liberty rights, or liberty rights simply are property rights. So any redistribution of property is ipso facto an interference with personal liberty, and so needs to be justified. I believe that it can be readily shown that the conception of property rights underlying this view is, at best, dubious.[53]
- Classical liberals have argued that, since one has a right to one's property, any threat to take away one's property is a threat of coercion against one's person. This, however, is the crux of the ambitious case for classical liberalism, which we have rejected (§IV).
- Advocates of more redistributive forms of liberalism argue that, since property rights are purely conventional, the state may determine their shape as it sees fit, and this includes level of taxation. We have seen that this argument too should be rejected (§IV.C).
- It is often wondered how increasing a marginal tax rate increases coercion. Will Wilkinson writes: "libertarians and many conservatives often talk about lower

> taxes as a matter of liberty. But a higher tax isn't more coercive than a lower one. You're either being coerced or you're not. A guy who mugs five people with thin wallets is no less guilty of coercion than a guy who mugs five people with thick wallets. The harm from coercion might be greater if more is taken, but there is no more or less coercion."[54]

To help see our way through these complexities, let us begin with a simple contrast between two states with flat rate income tax: a low and a high rate state. To make the distinction stark, suppose that the low rate state has a flat rate of 20%, the high rate state of 80%. Otherwise the tax codes are identical, including both monetary penalties and prison terms. For at least two reasons the high tax state will, other things equal, be more coercive.

(*i*) As tax rates rise non-compliance will also rise; it is hopelessly utopian not to expect increased non-compliance as tax rates increase. As tax rates rise so does the opportunity cost of voluntarily complying; self-interested citizens have increasingly strong incentives to become non-compliers, and we must assume that in the real world a significant number of citizens will be so motivated. As non-compliance increases the state will increasingly turn its attention to identifying and coercing non-compliers. The amount of money involved will be enormous, and we can expect states to turn increasingly to the criminal law. Something along these lines has occurred in the United States. In the last twenty years the United States Internal Revenue Service developed the concept of a "tax gap" — "the difference between the amount of tax owed and the amount paid."[55] In 2001 the Internal Revenue Service estimated that the tax gap was approximately $312 to $353 billion, resulting from a very significant non-compliance rate of roughly 16%.[56] As the tax gap has grown, the Internal Revenue Service has undertaken a "zealous fight" to close the gap, implementing a "Tax Gap Strategy" that involves increased effort to detect violations and criminal law enforcement.[57] Tax enforcement thus increasingly comes to stress criminal penalties. The problem is clearly is that taxpayers do not at present sufficiently fear detection.[58]

(*ii*) The criminal law seeks to make options ineligible — no longer choice worthy — because of the threatened costs to one's person. Now in our 80% rate state, tax policies have the effect of making a large number of options basically ineligible. To be sure, the threat is conditional: if you engage in a range of activities, you must either pay 80% to the state or be punished. The state essentially demands that one pay 80% to take up an option, and threatens one's person if one does not. And indeed a wide range of options are made less eligible. Market transactions involving traceable monetary transfers become far less eligible than: informal bartering, leisure activities, writing philoso-

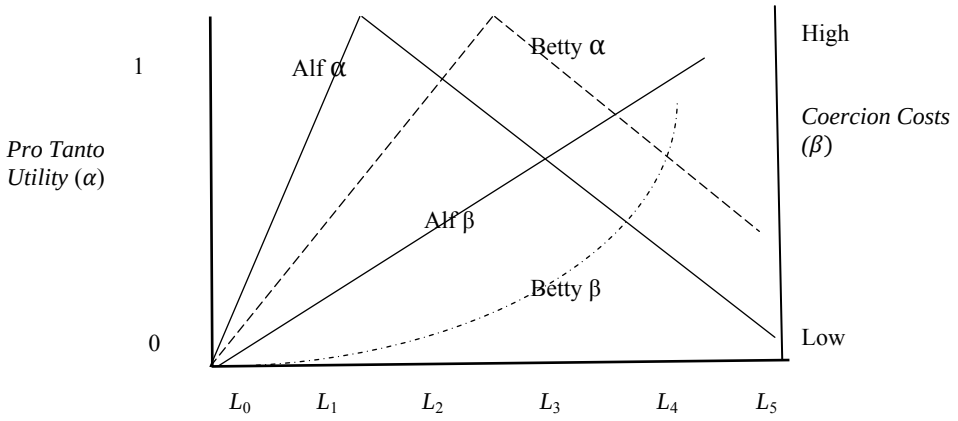
phy, artistic pursuits, and political activities. By radically increasing the costs of a wide range of market activities these are made far less eligible as a result of the state's power to coerce. If we adopt a metaphor of Feinberg's, and think of one's options as a series of railroads tracks that one might follow, high tax rates make it very difficult to follow a great many; given the costs involved in taking those routes, they are effectively closed.[59] Of course one still *can* engage in these activities if one is willing to pay the 80%, but one *can* still engage in criminal activities if one is willing to pay the penalties.[60]

As a rule, we should expect that increases in taxation (and, so generally the redistributive activates of the state) to be strongly positively correlated with increases in coercion.[61] Both the variables I have noted — increasing non-compliance and decreasing eligibility of options — are continuous, and we should expect that throughout most of their range the effects noted here will be monotonically related to tax rates. This is not to say that the relation between taxation and coercion is linear: coercion may be insignificant at very lows levels of tax and become really oppressive at very high levels. And, of course, the overall relation between degree of coercion and tax rates may differ depending on historical circumstances. In the Great Depression, for example, an attempt by the state to enforce basic property rights with no significant redistribution against, say, a general population in great economic distress might have required a great amount of coercion, while a state that engaged in modest redistribution may well have secured social peace with much less need for threats. We must not succumb to the simple idea that the tax rates and degree of coercion are perfectly correlated in all circumstances. We can, however, suppose that classical liberalism has strongly favored property regimes that typically employ less coercion, while the heavy reliance of the expansive state favored by Rawls and his followers would seem inevitably to rely on relatively high levels of taxation, and so favor more coercive states. If justificatory liberalism favors less over more coercion, it favors classical liberalism over the expansive state proposed by many of today's egalitarian liberals.

C. A Formal Analysis

And justificatory liberalism does indeed favor less coercive over more coercive proposals. Recall the deliberative model (§III.C). Members of the public order all proposals; this would yield for each an ordinal utility function. It is absolutely crucial to keep in mind that the idea of a "utility function" is simply a mathematical representation of a member of *P*'s views about the choice worthiness of a proposal based solely on her reasonable evaluative standards (§III.B). This point is of the first importance; utility is

not an independent goal, much less self-interest, but a mathematical representation of an ordering of the choice worthiness of outcomes.[62] It will help to translate each person's ordinal ranking of the alternatives (based on her set of evaluative standards) into a cardinal function.[63] Because our interest is in the way that the costs of degrees of coercion figures into the deliberations of members of *P*, let us separate out the costs in terms of the coercion imposed by a law from each member of *P*'s utility function. For each person we then have (α) her evaluation of all the costs and benefits of the law (based, as always on her evaluative standards) except for (β) her evaluation of the coercive costs of the proposal. Members of *P*, I assume, will disagree about the level of costs though they will agree that the costs increase as coercion increases. Call (α) the member of the public's *pro tanto evaluation of the law* (1=best law, 0=a law that is not better than no law at all) and (β) her estimate of *the coercion costs of the law*. It is important that (β) concerns simply the coercion costs imposed *by* the law: we do not count as part of the coercion costs of a law non-state coercion that might occur under a law. A law that itself imposes low coercion may fail to stop non-state coercion; a law that imposes greater coercion may do a better job at halting non-state coercion. But non-state coercion that is reduced by a law falls under the benefits of that law; if non-state coercion is rampant under a law that will reduce its *pro tanto* utility.



Display 6: Two Utility Functions, Each Split Into Two Parts (α & β)

In Display 6 Alf and Betty are members of the public deliberating about five systems of law concerning property rights/redistribution (recall that we have accepted the argument that ownership cannot be justified prior to distributive justice). L_1 involves the least state coercion; L_5 the most. If we consider only their *pro tanto* evaluations, each of the five laws is better than no law at all (L_0). But the costs of increasing coercion has been omitted from the *pro tanto* utility. Once we factor in this cost, as long

as the *pro tanto* evaluation stays above the cost of coercion curve, the member of the public holds that the overall benefits of the law exceed the costs; once the *pro tanto* curve dips below the coercion cost curve the costs of coercion outweigh the other (semi-) net benefits of the proposal.

In Display 6 Alf's ordering is $L_1 \succ L_2 \succ L_3 \succ L_0 \succ L_4 \succ L_5$; Betty; is $L_2 \succ L_3 \succ L_1 \succ L_4 \succ L_0 \succ L_5$. Notice that Alf does not see as justified the additional coercion required for L_4. Given his evaluation of the coercion costs involved, and the benefits that the coercion yields, for Alf the costs of coercion outweigh the *pro tanto* utility of L_4, and so it is not in the eligible set.[64] *What we see here is that, as proposals involve higher degrees of coercion, they tend to be dropped from the eligible set because of the evaluations of those such as Alf, who evaluate their coercion costs as high and are more skeptical about the benefits*. Note that the model (1) assumes members of the public agree on the ordering of proposals from least to most coercive but (2) incorporates disagreement about the costs of coercion: some may see coercion as a less serious matter than others.

VI. JUSTIFICATORY CLASSICAL LIBERALISM

A. The Influence of Classical Liberal Standards in Public Justification

One interesting result thus far is that for a justificatory liberalism, the presence of members of the public whose evaluative standards lead them to assign higher costs to coercion will push the eligible set towards less coercive laws. Classical liberals such as Mill have long stressed that a central elements of their evaluation of laws is their coercive character. This is basic to the argument of *On Liberty* but, importantly, also to Mill's defense of *laissez-faire* in *The Principles of Political Economy*:

> To be prevented from doing what one is inclined to, or from acting according to one's own judgment of what is desirable, is not only always irksome, but always tends, *pro tanto*, to starve the development of some portion of the bodily or mental faculties, either sensitive or active; and unless the conscience of the individual goes freely with the legal restraint, it partakes, either in a great or in a small degree, of the degradation of slavery. Scarcely any degree of utility, short of absolute necessity, will justify a prohibitory regulation, unless it can also be made to recommend itself to the general conscience; unless persons of ordinary good intentions either believe already, or can be induced to believe, that the thing prohibited is a thing which they ought not to wish to do.[65]

Because coercion has such high costs, Mill repeatedly stresses that it should be used sparingly, and only where there is great social benefit to be obtained.[66] To justify legal coercion we must show real necessity, "and there are large departments of life from which it must be unreservedly and imperiously excluded."[67]

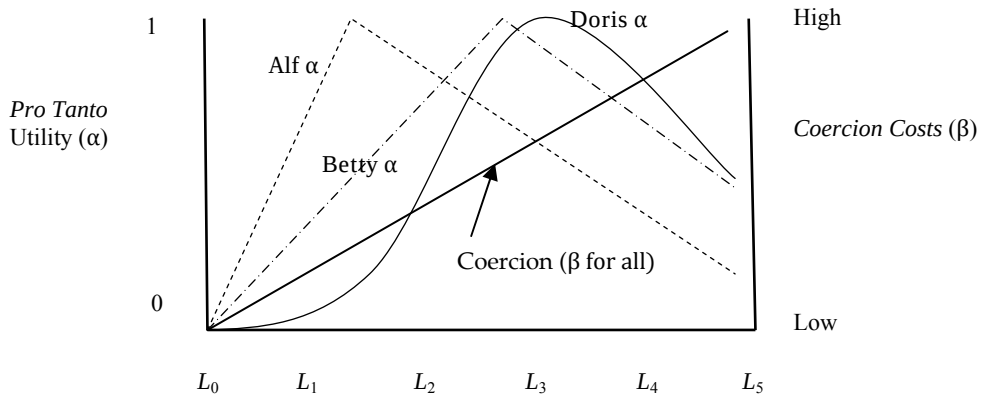
The presence of Millians in the public will thus push the eligible set towards less coercive laws: they will be the first to come to the conclusion that the benefits of in-

creased coercion are less than the additional costs of coercion. They will not be dictators: the optimal eligible set may well contain proposed laws far from their ideal proposal. As long as for everyone the benefits of the law exceed the costs, the law is in the eligible set. It will be important that some matters be regulated by law, and so the conclusion that some proposed law is worse than no law at all on this matter will not be quickly reached. Indeed, on many basic matters even Millians may place outside their eligible set only extremely coercive proposals. (It is also important to keep in mind that we are not concerned with strategic and other bargaining behavior, but people's sincere evaluation whether the reasons for legal regulation outweigh those against.) Nevertheless, insofar as laws can be arranged from least to most coercive, Millian members of the population will move the eligible set in a classical liberal direction.

Some are apt to insist that this is unfair: why should Millians, whose evaluative systems strongly disvalue coercion, have so much influence in public reasoning? Shouldn't they have to compromise with those who think that coercion is relatively benign? As Rawls might say, shouldn't Millians be concerned that their views on coercion be acceptable to others and shouldn't they exercise the virtue of meeting others half way?[68] Now Rawls is undoubtedly correct that in public justification we must only appeal to evaluative standards that are not outrageous or absurd. More than that: we have seen (§III.B) that when I am justifying myself to another, I must understand his deliberation to be based on intelligible and reasonable values. However, Mill's view of the dangers of coercion is manifestly an intelligible and reasonable basis for deliberating about laws; it connects up with a wide range of basic and intelligible human values.[69] To reason in a way that is intelligible to others and relevant to the problem of the justification of laws need not mean that others agree with your reasoning: that is the very point of evaluative pluralism. So there is no good reason to think that Millian anti-coercion values would have been excluded by a plausible specification of the extent of reasonable pluralism in the deliberative model. Once the standards of some member of *P* are acknowledged as a reasonable basis for the evaluation of laws, it is objectionable to add a further requirement that she must seek to meet others half way or comprise with them in order to reach an agreement. This is to turn justification and self-legislation into a bargain. Because our members of the public are committed to adopting only publicly justified laws, they already are taking account of each other's evaluations, and refuse to impose any law not validated by everyone's reasons. Respect for the reasons of others is built into the public justification requirement.

B. Anti-Millians?

Because the classical liberal suspicion of coercion is entirely reasonable, and so is a part of the evaluative standards of some members of the public, classical liberals exercise an important influence on the range of the eligible set. However, there may seem to be the possibility that their influence could be countered by anti-Millians: those whose evaluative standards are such that they conclude that laws characterized by low levels of coercion do more harm than good. Consider, for example, Doris's utility function in Display 7 (for simplicity, I assume agreement about the costs of a law's coercion):



Display 7: Doris, an Anti-Millian

For Doris, the costs of coercion exceed the *pro tanto* net benefits until L_2; when she is included in the public, the eligible set contracts to $\{L_2, L_3\}$; importantly L_1 is now excluded. Suppose that we are justifying a property rights regime: Doris might hold that a classical liberal state that enforces property rights with a modest provision for the poor imposes coercion costs on the poor that exceed the benefits, and so such a state is not justified in her view. We can easily imagine more radical versions of Doris's position, contending that in no state short of total egalitarianism would the positive values brought about by inegalitarian states compensate for the costs of coercion. What is important about Doris is that she accepts Alf's "Millian" evaluation of the costs of coercion, but nevertheless rejects the least coercive option.

Classical liberals need not, and should not, insist that utility functions such as Doris's are intrinsically unreasonable. Some regimes might employ coercion so selectively and unfairly that, even though they employ it sparingly, their laws may be ranked as worse than no law at all by some members of *P*. The eligible set need not include the least coercive laws for just this reason. However, we have seen that the evidence

strongly indicates that private ownership is a necessary foundation for core liberal values (§IV.A). As a general rule, positions such as Doris's will not undermine justificatory liberalism's classical tilt since all reasonable persons devoted to the basic liberal rights of body, the person, speech, and so on accept that the benefits of private ownership exceeds the costs across a wide range of private ownership systems. Given the canonical liberal order of justification, the basic liberties of the person and civil rights themselves ground a social and economic order based on extensive rights of ownership.

Again — and this point really cannot be emphasized enough — the classical justificatory liberal need not deny that according to the reasonable evaluative standards of some citizens this level of coercion is far from optimal, and so such citizens may correctly hold that much more extensive coercion would better satisfy their evaluative standards. A classical-justificatory liberalism by no means must claim that all citizens believe that we reach optimality at the limited state of classical liberalism: we have seen that classical liberalism is endorsed by justificatory liberalism even in the face of reasonable views that a more extensive state is better (think of Betty is Display 6).

7. JUSTIFICATORY LIBERALISM'S CLASSICAL TILT

Justificatory liberalism tilts towards classical positions. Widespread private ownership will be endorsed by all reasonable members of the public as necessary for a liberal regime. Proposals that go beyond a regime of private ownership certainly may be justified, but as they become increasingly coercive they are almost sure to be deemed ineligible by those who, like John Stuart Mill, see coercion as a great cost, which can only be justified if it brings great benefits. Justificatory liberalism leads not to socialism, or a thoroughgoing egalitarian liberalism, or to libertarianism, but to the more nuanced approach to legislation we find in the fifth book of Mill's *Principles*, allowing that there are a number of tasks that government justifiably performs, but having a strong overall inclination towards less rather than more "authoritative" (i.e., coercive) government.

Philosophy
University of Arizona

Notes

[*] The ideas explored in this paper derive from discussions at a workshop on public reason, held in Tucson in November 2007. I would like to thank all the participants, and especially Andrew Lister. His criticisms of my previous work led me think about a number of matters in a new way. My thanks also to Fred D'Agostino, Steve Macedo, Peter Vallentyne, and Kevin Vallier for their extremely helpful and insightful comments on earlier versions of this essay.

[1] Christopher J. Eberle applies this term to a family of liberal views, as do I — it includes what is known as "political liberalism." See Eberle's *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 11-13.

[2] Immanuel Kant, *Foundations of the Metaphysics of Morals*, ed. [trans.] Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), 52 [Akademie, 433-434].

[3] John Rawls, "Justice as Fairness" in Samuel Freeman, ed., *John Rawls, Collected Papers* (Cambridge: Harvard University Press, 1999), 55.

[4] Eberle, *Religious Conviction in Liberal Politics*, 54 [emphasis in original].

[5] I explore these dimensions in more detail in "The Idea and Ideal of Capitalism" in Tom Beauchamp and George Brenkert, eds., *The Oxford Handbook of Business Ethics* (Oxford: Oxford University Press, forthcoming).

[6] The classic work on the economic policy of classical liberal political economy is Lionel Robbins, *The Theory of Economic Policy in English Classical Political Economy* (London: Macmillan, 1961). Perhaps the most sophisticated classical analysis of the functions of government is Book V of John Stuart Mill's *Principles of Political Economy* in J.M. Robson, ed., *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1977), vol. 3. See also my "Public and Private Interests in Classical Political Economy, Old and New" in S.I. Benn and G.F. Gaus, eds., *Public and Private in Social Life* (New York: St. Martin's, 1983), 192-193.

[7] It is thus unfortunate that so many have viewed Robert Nozick's somewhat doctrinaire defense of the "night-watchman state" as definitive of the classical liberal tradition. See his *Anarchy, State and Utopia* (New York: Basic Books, 1974), 25-27. On the relation between libertarianism and classical liberalism, see Eric Mack and Gerald Gaus, "Classical Liberalism and Libertarianism: The Liberty Tradition" in Gerald F. Gaus and Chandran Kukathas, eds., *Handbook of Political Theory* (London: Sage Publications, 2004), 115-130.

[8] See John Rawls, *A Theory of Justice,* revised edn. (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 197ff.

[9] Ibid., 242-51. Rawls also believes that a just society would seek reasonable ways to limit wasteful forms of advertising: "the funds now devoted to advertising can be released for investment or for other useful social ends." *Political Liberalism* (New York: Columbia University Press, 1996), 365.

[10] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 48; Samuel Freeman, "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View," *Philosophy & Public Affairs*, vol. 30 (no. 2): 105-151.

[11] Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge, MA: Harvard University Press, 2001), 135ff.

[12] "On Justifying the Liberties of the Moderns: A Case of Old Wine in New Bottles," *Social Philosophy & Policy*, vol. 25 (2007): 84-119.

[13] Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 9.

[14] Stanley Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), 87.

[15] Rawls, *Justice as Fairness*, 44.

[16] This is not to say that the presumption in favor of liberty does not itself have to be argued for. See my *Value and Justification* (Cambridge: Cambridge University Press, 1990), 379ff.

[17] Benn, *A Theory of Freedom*, 87.

[18] I consider such a presumption in some detail in *Value and Justification*, 381-86.

[19] Loren E. Lomasky and I argue this point in more detail in "Are Property Rights Problematic?" *The Monist*, vol. 73 (October, 1990): 483-503.

[20] Rawls, *Justice as Fairness*, 112.

[21] Rainer Frost, "Political Liberty: Integrating Five Conceptions of Autonomy" in John Christman and Joel Anderson, eds., *Autonomy and the Challenges to Liberalism* (Cambridge: Cambridge University Press, 2005), 240, note 24.

[22] The way in which morality involves claims to authority over others is a central theme of Stephen Darwall, *The Second-person Standpoint: Morality, Respect and Accountability* (Cambridge, MA: Harvard University Press, 2006).

[23] Immanuel Kant, *Metaphysical Elements of Justice*, second edn., John Ladd, ed. [trans.] (Indianapolis: Hackett, 1999), 115-116 [Akademie, 311-313]. See also the "Translator's Introduction," xxxv-xxxix.

[24] For an excellent survey, see Scott Anderson's entry on "Coercion" in *The Stanford Encyclopedia of Philosophy* (Spring 2006 Edition), Edward N. Zalta, ed.
[URL = <http://plato.stanford.edu/archives/spr2006/entries/coercion/>.]

[25] This is not to say that coercion against non-citizens does not require justification; it simply falls outside the scope of the Political Liberty Principle, which specifies a necessary, not a sufficient, condition for justified coercion.

[26] See Alan Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987), 277ff.

[27] I defend this interpretation of Hobbes in *Value and Justification*, 275ff.

[28] Kant's view is complex; though we have private rights in the state of nature, because there is no impartial judge about their contours, the state of nature also is characterized by

an absence of public claims of justice; the idea of the social contract is to establish public justice and rights. *Metaphysical Elements of Justice*, 115-116 [Akademie, 312].

[29] Ibid., 45 [Akademie, 249].

[30] To be sure, there may be an intelligible sense in which I still might be said to coerce you: "If you don't do what I want I will pick up your possession the next time you put it down!" Again, though, a general account of coercion (if one is to be had) is not our aim.

[31] See George Klosko, "Reasonable Rejection and Neutrality of Justification" in Steven Wall and George Klosko, eds., *Perfectionism and Neutrality: Essays in Liberal Theory* (Lanham, MD: Rowman & Littlefield, 2003), 178.

[32] Rawls adds: "within the framework of free institutions of a constitutional regime." *Political Liberalism,* xviii.

[33] Rawls, *A Theory of Justice*, 16.

[34] "Their procedure … is to let each person propose principles …." "Justice as Fairness," 53.

[35] Rawls, *Political Liberalism*, 224ff.

[36] Rawls, *A Theory of Justice*, 121.

[37] The deliberative problem supposes that we can identify laws that regulate an "area" of social life, or as Rawls termed it a "practice." ("Justice as Fairness," 47). I set aside for now how to identify these in any precise way.

[38] For the informal, social, procedure, see "On Justifying the Rights of the Moderns"; for the formal, political, procedure see *Justificatory Liberalism* (New York: Oxford University Press, 1996), Part III.

[39] Rawls, *Political Liberalism,* 338; Rawls, *A Theory of Justice*, 242.

[40] Rawls, *Political Liberalism*, 329.

[41] Daniela Sonedda, "Wealth Inequality, Income Redistribution and Growth in 15 OECD Countries," *Royal Economic Society Annual Conference* (2003) Royal Economic Society, 21. [http://ideas.repec.org/e/pso158.html].

[42] Rawls, *A Theory of Justice*, 239.

[43] Rawls, *Justice as Fairness*, 137-38.

[44] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002), 32-33. Emphasis added.

[45] Kant, *Metaphysical Elements of Justice*, 46ff [Akademie 250ff].

[46] Ibid., 33 [Akademie, 233], 41 [Akademie, 238]. See further Hillel Steiner, "Kant, Property and the General Will" in Norman Geras and Robert Walker, eds., *The Enlightenment and Modernity* (New York: St. Martin's, 2000), 71ff.

[47] This is certainly Mill's view in his discussion of private property in Book II of *Principles of Political Economy*.

[48] See Robert Audi, *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press, 2000), 87-8.

[49] Joel Feinberg, "The Interest of Liberty in the Scales" in his *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), 36.

[50] F.A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960), 133.

[51] Hayek actually seems to go so far as to say you are not coerced at all in this case. Ibid., 141.

[52] Benn, *A Theory of Freedom*, 144.

[53] As I have tried to show in "Property, Rights and Freedom." *Social Philosophy & Policy*, vol. 11 (Summer 1994): 209-40.

[54] Will Wilkenson, *The Fly Bottle*. Wilkenson is suggesting a topic for discussion, and the claim is based on theories of freedom commonly held by classical liberals.
[http://www.willwilkinson.net/flybottle/2008/05/30/please-discuss/] Accessed July 28, 2008.

[55] Ted F. Brown (Assistant for the Criminal Division of the IRS [1998]) quoted in Liezl Walker, "The Deterrent Value of Imposing Prison Sentences for Tax Crimes," *New England Journal of Criminal and Civil Confinement*, vol. 26 (Winter 2000): 1, note 4.

[56] "Understanding the Tax Gap" (FS-2005-14, March 2005), Internal Revenue Service [http://www.irs.gov/newsroom/article/0,,id=137246,00.html] Accessed July 28, 2008.

[57] Walker, "The Deterrent Value of Imposing Prison Sentences for Tax Crimes," 6.

[58] Ibid., 7.

[59] Feinberg, "The Interest of Liberty in the Scales," 36.

[60] It might be objected that this must be wrong: whereas the criminal law seeks to render options less eligible in order to deter, an effective tax law (putting aside sin taxes) must hope that citizens continue with the activity for revenue to be generated. The will of the state is not for citizens to refrain, but to persist, so they are not being coerced in Hayek's sense. Coercion thus may seem to require an intention to deter people from the act, but that is exactly what the state does not seek to do with taxation — and that is why the state does not close off options, but only makes them more difficult. One who threatens, however, need not wish to deter, for often enough those making the threat hope that the target will not give into the threat. In 1918, for example, Germany issued an ultimatum to the neutral Dutch, demanding the right to ship materials across their territory, and threatening the Netherlands and Dutch ships in its colonies if their demand was not met. At the time this threat was seen by many as a pretext, believing that Germany hoped that the Netherlands would not give into the threat but instead enter the war. What Germany's intentions were did not nullify the coercive threat. See *The New York Times*, April 23 and 28, 1918.

[61] By comparing only flat tax states I have simplified the analysis. With variable rate taxation, what constitutes a high tax country depends on the combined score on at least two dimensions: the average personal tax rate and the degree of progressivity. On one estimate, the ranking of 15 OECD countries from lowest to highest in average personal income tax rates, over the period 1974-1997, was: the Netherlands, Denmark, Finland, Belgium, Swe-

den, The United Kingdom, The United States, Germany, Norway, Canada, Italy, France, Japan, Australia, Spain. The ordering with respect to progressivity was, from lowest to highest Spain, Australia, Germany, Norway, Japan, Italy, Denmark, Sweden, France, United States, Canada, Finland, United Kingdom, Netherlands, Belgium. When we take account of levels and not simple orderings, we find three group of countries: (1) High Tax countries (high on both dimensions): France and Canada; (2) Higher Progressivity/Lower Average Rates: Denmark, Sweden, The United States, Finland, the United Kingdom, the Netherlands, Belgium; (3) Lower Progressivity/Higher Average Rates: Germany, Norway, Italy, Japan, Australia and Spain. On this analysis the country closest to being Low Average/Low Progressivity was Denmark. Sonedda, "Wealth Inequality, Income Redistribution and Growth in 15 OECD Countries," 19.

[62] See further my *On Politics, Philosophy and Economics* (Belmont, CA: Wadsworth, 2007), chap. 2.

[63] This is merely for purposes of exposition; a cardinal analysis is not required.

[64] All this was implicit in our original ordinalist idea of an eligible set. A law is only in the eligible set if each member of the public believes its benefits outweigh its costs compared to a condition of liberty. If a member of the public holds that a law has net negative costs, he has no reason to accept it. And one of these costs to be considered is the cost of coercion: if the law is really in the eligible set, the costs of coercion have been conclusively justified to all.

[65] Mill, *Principles*, 938 (Book X, Chap. xi, §2).

[66] See for example Mill's discussion of the proper bounds of moral sanctions in *Auguste Comte and Positivism* in *Collected Works*, vol. 5, 337ff.

[67] Mill, *Principles*, 937 (Book X, Chap. xi, §2).

[68] Rawls, *Political Liberalism*, 253

[69] I try to show just how broad this range is in "Controversial Values and State Neutrality in *On Liberty*," in C.L. Ten, ed., *Mill's On Liberty: A Critical Guide* (Cambridge: Cambridge University Press, 2009).