Forthcoming in *Philosophical Studies*

The possibility of wildly unrealistic justice and

the principle/proposal distinction[[1]](#footnote-1)

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1. Introduction

Imagine a theory of justice that is *wildly unrealistic* in the sense that it encompasses institutional principles that make demands that there is no chance (or at least a vanishingly small chance) will ever be met because we are robustly disposed (perhaps given human nature) to fail to set out to do some of the things that meeting the demands would require. Is there anything wrong with a wildly unrealistic theory of justice as such? Are institutional principles of justice subject to a *minimal realism constraint* to the effect that, in order to be valid, they must not make wildly unrealistic demands?

A central aim of David Estlund’s (2020) masterful new book is to argue that the answer is, “no.” According to Estlund, there is no minimal realism constraint on valid institutional principles of justice. Hence, a theory of justice that includes institutional principles that make wildly unrealistic demands is not necessarily, for that reason, mistaken. To be clear, Estlund is not arguing that the correct theory of justice *will* make wildly unrealistic demands (still less in favour of any particular wildly unrealistic theory of justice). Rather, his point is simply that pointing out that a theory of justice makes wildly unrealistic demands is not itself a good objection to it (even if there are other (perhaps decisive) objections to any such theory).

This is a fascinating and delightfully heretical view. The idea that institutional principles of justice are subject to a minimal realism constraint constitutes something like an orthodoxy in contemporary political philosophy. It is often simply taken for granted in our practices of arguing both for and against theories of justice. When we argue for particular theories of justice, we commonly go to quite some lengths to establish, or at least to make plausible, that the theories in question do not make unrealistic (let alone wildly unrealistic) demands.[[2]](#footnote-2) When we do so, we appear to be assuming that making demands that are not wildly unrealistic is not merely a point in favour of a theory of justice – a desirable feature of it, as it were – but, rather, a necessary condition in order for a theory to be valid. Similarly, a common strategy for arguing against particular theories of justice is precisely to try to establish that the theories in question make wildly unrealistic demands.[[3]](#footnote-3) When we do so, we appear to be taking for granted that making wildly unrealistic demands is not merely a point against a theory of justice – a cost or disadvantage that is to be weighed against its benefits – but, rather, a decisive failing: that it is a sufficient condition, in other words, for the theory to be invalid. If Estlund is right that institutional principles of justice are not subject to a minimal realism constraint, then these widespread practices rest on a mistake. We are making life harder – both for ourselves and our rivals – than is warranted.

At the same time, and while I fear that Estlund’s admirably subtle view will be caricatured on this score, it is important not to overstate (or misstate) the character of his anti-realism. Estlund is not denying that there are *any* significant realism constraints on valid normative political claims. On the contrary, he is quite explicit that he accepts at least two such constraints.

First, while he denies that there is a minimal realism constraint on institutional principles of justice, he accepts that there is what we can call an *attainability constraint* on such principles according to which they are valid only insofar as they make demands that we are *able* to meet. As he puts it, “I will grant that a theory of justice for a society can be refuted if its alleged requirements can be shown to be more than the society is able to do. The ‘ought’ of social justice implies ‘can’, or so I will allow for the sake of argument” (Estlund 2020, p. 27). Estlund accepts the attainability constraint because he accepts the more general principle that “ought” implies “can” of which the attainability constraint is supposed to be an instance (see Estlund 2020, pp. 26-9). According to Estlund, to say that we are “able” to meet a demand is to say (or at least implies) that we would be sufficiently likely to meet the demand if we were to set out to meet the demand and not give up (Estlund 2020, p. 94; cf. Brennan and Southwood 2007; Gilabert and Lawford-Smith 2012).[[4]](#footnote-4) This is supposed to be compatible with saying that the demand in question is wildly unrealistic. That’s because it could be the case that if we were to set out to meet a demand and not give up, we would be sufficiently likely to succeed; and yet we are virtually certain not to meet the demand because we are robustly disposed not to set out to do so, or, if we do set out, not to persevere. Even so, the attainability constraint places a significant limit on the extent to which institutional principles of justice may make unrealistic demands. It implies that they may not make demands that are unrealistic in the sense that we are unable to meet them.

Second, while Estlund denies that there is a minimal realism constraint on institutional principles of justice, he accepts that there is at least a minimal realism constraint on what he calls *institutional proposals*. Institutional proposals are special instances of what he calls *practical proposals*, which are supposed to provide concrete guidance concerning what particular agents are supposed to do in their actual (or likely or foreseeable) circumstances. Institutional proposals differ from other practical proposals in that they involve proposing the implementation of particular institutions. Estlund repeatedly emphasises that, in order to be valid, practical proposals (including institutional proposals), unlike principles of justice, must not make wildly unrealistic demands. For example, he describes being realistic as “an obvious constraint on practical proposals” (Estlund 2020, p. 21). Again, he suggests that “it is not a defect in a principle of justice, though it would be in a proposal, if it is unrealistic” (Estlund 2020, p. 12). And once more: “Irrealism (the property of being unrealistic) is a vice of proposals but not a vice of principles” (Estlund 2020, p. 26). Since much of the normative talk and thought that takes place within, and with regard to, politics is presumably at least implicitly concerned with institutional proposals, this, too, represents a significant limit on the extent to which our normative thinking about politics may involve unrealistic demands.

We can usefully think of Estlund’s view, then, as encompassing three important theses:

1. Valid institutional principles of justice are not subject to a minimal realism constraint.
2. Valid institutional principles of justice are subject to an attainability constraint.
3. Valid institutional proposals are subject to a minimal realism constraint.

My aim in what follows is to consider whether these three theses represent a plausible combination. To anticipate, I am going to argue that they don’t – at least given Estlund’s account of institutional principles of justice and institutional proposals, respectively. Given this account, Estlund is either wrong to reject the minimal realism constraint on institutional principles of justice. Or he is wrong to accept the attainability constraint on institutional principles of justice and/or the minimal realism constraint on practical proposals. Either way, this has significant implications for Estlund’s case against the minimal realism constraint on institutional principles of justice. While Estlund himself sometimes says that he is merely granting the additional constraints “for the sake of argument,” this is to mistake the dialectical situation, as we shall see. The additional constraints are playing at least two important roles with regard to Estlund’s overall case against the minimal realism constraint on institutional principles of justice: first, to insulate Estlund from, the charge of *manifestly implausible anti-realism*; second, to provide a kind of *error theory*. Thus, far from being an optional add-on, Estlund *needs* it to be case that the additional constraints are correct; or, if they are mistaken, that there are other theses that can play the relevant roles instead.

2. The principle/proposal distinction

Our first task is to say something about how Estlund understands the key distinction between institutional principles of justice, on the one side, and institutional proposals, on the other.

A. Institutional principles

Let’s start with institutional principles. As I understand Estlund, he holds that institutional principles are claims to the effect that a society ought to implement and comply with some particular institutional arrangement. One of Estlund’s favourite examples is what he calls the “Pre-Tax Max” theory of justice. Pre-Tax Max involves a so-called “Carens Market” in which a society’s basic institutions include “taxation or another means of redistributing income that is earned in the familiar market manner, so that income is equal” (Estlund 2020, p. 115). It is supposed to be an example of an institutional principle since it holds that a “society ought to implement and comply with the Carens Market” (Estlund 2020, p. 115).

It is worth emphasising two features of institutional principles, on this account. First, they are simply *ought claims* and valid principles of justice are simply *true* ought claims – without any presumption that it must be appropriate to *use* them for certain purposes (say, to help settle deliberation about what to do, or to advise others as to how they ought to act) and in certain contexts (say, in the messy and murky arena of real-world politics). Whether an ought claim is true is one question. Whether it is appropriate to use it for certain purposes and in certain contexts is simply a different question. So, for example, in the case of Pre-Tax Max, the relevant principle – that society ought to implement and comply with a Carens Market – might be perfectly valid even if it would be disastrous for any given state or legislature to use the principle as a basis for its social policy in the actual world.

Second, institutional principles are nonetheless *special* kinds of ought claims, namely claims to the effect that a society ought to implement and comply with some particular institutional arrangement. Estlund sometimes refers to ought claims of this kind as involving what he calls the “ought of justice” (e.g. Estlund 2020, pp. 27; 354, n. 6), and I will follow him in this respect for ease of reference.

Notice that claims involving the ought of justice are special in four key respects. First, they are *institutional* ought claims. That is to say that they are directed at actions concerning particular formal institutions (Estlund 2020, pp. 13-16. As such, they are distinct from *non-institutional* ought claims (such as the claim that individuals ought not to harm one another); *informal institutional* ought claims (such as the claim that individuals ought to comply with certain social norms); and highly *general* *institutional* principles (such as what Estlund calls “fundamental political principles,” namely “abstract principles, often without much institutional content, such as a distributive pattern (equality, priority, sufficiency, etc.), or historical principles (free transfer, legislative proceduralism, etc.), combinations of these, and so on” (Estlund 2020, p. 116)).

Second, claims involving the ought of justice are what we can call *conjunctive* ought claims. They are conjunctive in the sense that they involve a conjunction in their content. That is, they tell us that a society ought to *implement and comply* with certain basic structural institutions. They do not tell us that a society ought to *implement* (Estlund 2020, p. 116). Of course, some theorists hold that it follows trivially from the fact that we ought to X and Y that we ought to X. This is the so-called principle of *Distributivity*. However, as Estlund notes, Distributivity is a controversial principle. Many theorists think that it is false (see e.g. Jackson and Pargetter 1986). Estlund does not assume that it is true (or that it is false). Whether or not Distributivity is true – and, hence, whether or not institutional principles *imply* corresponding non-conjunctive ought claims – they are not themselves non-conjunctive ought claims.

Third, claims involving the ought of justice are addressed to, and make demands of, *societies* as a whole. As Estlund (2020, p. 126) puts it: “Social justice is a moral standard for societies … Require­ments of social justice morally require things of societies as such.” Thus, they must be distinguished from ought claims that are addressed to society’s constituents such as the state (e.g. the claim that the state ought to implement some particular institutional arrangement), or the citizens (e.g. the claim that the citizens ought to comply with a particular institutional arrangement).

Fourth, claims involving the ought of justice are examples of what Estlund calls *plural requirements*. Plural requirements are normative claims that are addressed to, and make demands of, groups of agents that do not themselves constitute agents (Estlund 2020, ch. 12). Estlund analyses such claims as a fusion of merely evaluative claims (about what ought to be the case) and conditional deontic claims (about what their constituents ought to do conditional on others doing what they conditionally ought to do). In particular: “It is a Plural Requirement that (S does x, & T does y) [if and only if and because] (i) If S does x, then T is obligated to do y, and (ii) If T does y, then S is obligated to do x, and (iii) It ought to be the case that (S does x, and T does y)” (Estlund 2020, p. 233).

If we put these various elements together, then, we get the following: Institutional principles of justice just are true claims involving the ought of justice, i.e. true claims to the effect that a) it ought to be the case that a society implements and complies with certain basic structural institutions and b) certain members of the society ought to do certain things conditional on other members of the society doing what they conditionally ought (e.g. the state ought to implement the institutions conditional on (enough) citizens complying with the institutions; individual citizens ought to comply with the institutions conditional on the state implementing and (enough) other citizens complying with the institutions; and so on).[[5]](#footnote-5)

B. Institutional proposals

So much, then, for institutional principles. How should we understand institutional proposals? According to Estlund, these “propose the implementation of rules and arrangements such as election and legislation procedure, economic rules and regulations, laws of property, marriage, employment, and much else” (Estlund 2020, p. 116). If I am understanding him correctly, the idea is that institutional proposals are something like recommendations (or injunctions or pieces of advice) to the effect that particular salient agents within societies (especially states) ought to implement some particular institutional arrangement.

Institutional proposals therefore appear to differ from institutional principles in two key respects. First, they belong to differentcategories. We saw that institutional principles of justice are simply ought claims (albeit of a special kind). In contrast, institutional proposals (and indeed practical proposals more generally) are special speech acts: namely, recommendations (or injunctions or pieces of advice). Practical proposals involve using ought claims in a particular way: to advise or recommend or enjoin others to do something. For example, if the captain of a football team makes a practical proposal to the effect that the team ought to target the opposing team’s star forward, she is using the claim in order to advise or recommend or enjoin her teammates to target the opposing team’s star forward.

Part of what this means is that, unlike institutional principles, the validity of a practical proposal is presumably not determined wholly by whether the normative claim that constitutes the content of the proposal is true or false. It is also determined, in part, by whether the speech act of using the normative claim in order to advise or enjoin or recommend is itself normatively appropriate. There are plenty of cases where there would be something normatively inappropriate about offering true normative claims in the register of recommendation or advice. In some cases offering advice or making a recommendation to the effect that an agent ought to do something will be *counterproductive*: it will make it less likely that she will do what she ought to do, or result in some other unsavoury effect. (Think about advising a teenager to clean his room.) In other cases offering advice or making a recommendation to the effect that an agent ought to do something will be *presumptuous* in the sense that, even if it is true that the agent ought to do the thing in question, one lacks the requisite standing to advise or recommend. (Think about offering advice to a complete stranger about how he ought to speak to his children.) In still other cases, offering advice or making a recommendation will be *pointless*: one’s advice or recommendation will be epiphenomenal inasmuch as the agent to whom the advice or recommendation is directed is either going to do it anyway or not going to do it anyway, irrespective of one’s advice or recommendation. (Consider advising Donald Trump to maintain (or sever) his ties with the NRA.)

Second, institutional proposals also differ from institutional principles in that they involve *different* *kinds of ought claims*. Whereas institutional principles involve claims to the effect that a society ought to implement and comply with a particular institutional arrangement (the ought of justice), institutional proposals involve claims to the effect that the state ought to implement a particular institutional arrangement. It will be useful to have a term for ought claims of this kind to distinguish them from claims involving the ought of justice. Let us say that they involve the *ought of public policy*.

Claims involving the ought of public policy are like claims involving the ought of justice in being directed at actions concerning particular formal institutions. But they differ from claims involving the ought of justice in three important respects. First, whereas claims involving the ought of justice are conjunctive ought claims, claims involving the ought of public policy are *non-conjunctive* ought claims in that they are claims to the effect that we ought to *implement* relevant institutions (rather than to implement and comply with the institutions). Second, whereas claims involving the ought of justice are addressed to, and make demands of, societies as a whole, claims involving the ought of public policy are addressed to, and make demands, of *states*. Third, whereas claims involving the ought of justice are plural requirements (understood as a fusion of merely evaluative claims and conditional deontic claims), claims involving the ought of public policy are *straightforwardly deontic* in that the addressee (the state) is supposed to be an agent and *unconditional* in that they make demands of the state to do things (regardless of whether or not others do as they ought).

Having done something to clarify the distinction between institutional principles and institutional proposals, let us now consider whether either of the two stated differences between them allows us to vindicate Estlund’s three core theses.

3. True ought claims versus appropriate recommendations

We are looking for a difference between institutional principles and institutional proposals that can make sense of the idea that being attainable is, and being minimally realistic isn’t, a constraint on institutional principles; and of the idea that being minimally realistic is a constraint on institutional proposals but not on institutional principles. Let us begin by considering the first difference discussed above: namely, the fact that valid institutional principles are supposed to be true ought claims, whereas valid institutional proposals are supposed to be appropriate recommendations (i.e. ought claims that it is appropriate to use as recommendations (or injunctions or pieces of advice)).

Take *true ought claims*. As noted above, Estlund accepts that true claims about what we ought to do (in general, and not merely true claims involving the ought of justice) are subject to an attainability constraint. It cannot be true that we ought to save a drowning swimmer or to cure a friend of his depression insofar as we are unable to do these things. “Ought” implies “can.” Moreover, Estlund argues that true ought claims are *not* subject to a minimal realism constraint. It’s not the case that “ought” implies “not wildly unrealistic.” Estlund offers the following counterexample:

*Messy Bill:* Suppose Bill pleads that he is not required to refrain from dumping because he is motivationally unable to bring himself to refrain. Assume that there is no special phobia, compulsion, or illness involved. He is simply deeply selfish and so cannot thoroughly will, or “bring himself,” to comply. Refraining is something he could, in all other respects, easily do. Still, he will either not really try, or he will stop trying even if he might have succeeded (Estlund 2020, p. 28).

This is supposed to be a counterexample because it is supposed to be true that Bill ought to dispose of his rubbish properly in spite of the fact that it is wildly unrealistic for him to do so (that is, in spite of the fact that he is virtually certain not to dispose of his rubbish properly given that he is robustly disposed, given his profound selfishness, either not to really try to dispose of his rubbish properly; or, if he does really try, to give up before he succeeds). As Estlund puts it, “It would be silly for Bill to suggest that, since he is lazy and selfish in this way, he is out from under any requirement to take his trash to the curb” (Estlund 2020, p. 28). To deny that Bill ought for that reason to dispose of his rubbish properly would be to exhibit an unacceptable level of indulgence or “leniency” towards Bill: to let him too easily off the hook (Southwood 2016a).[[6]](#footnote-6)

Now consider *appropriate recommendations*. As we noted above, there appear to be uncontroversial cases of true ought claims that it would be inappropriate to use as recommendations (or injunctions or pieces of advice). Moreover, ought claims that make wildly unrealistic demands might seem to be a clear case in point. How so?

One initially attractive thought is that recommendations to do what is wildly unrealistic are inappropriate because they are *pointless*, and we ought not to (bother to) do things that are pointless. But this suggestion doesn’t bear scrutiny. It’s just not true that wildly unrealistic recommendations are necessarily pointless. Take Messy Bill. Even if recommending (or advising or enjoining) Bill to dump his rubbish properly has no prospect of getting him to dump his rubbish properly, it might still be a worthwhile thing to do. For one, it might lead Bill, if not to dump his rubbish properly, then at least to do something to mitigate the effects of his improper dumping: say, paying for someone else to clean up his rubbish from time to time. For another, even if it doesn’t have any such happy effects, it might still send a valuable signal that we (members of the neighbourhood) won’t stand for that kind of thing, or amount to a kind of valuable informal and intangible sanctioning, or whatever.[[7]](#footnote-7)

The more plausible view, I take it, is that wildly unrealistic recommendations are inappropriate in the sense that they are not *correct* or *fitting*. Even if it might sometimes be the case that we have reason to recommend the wildly unrealistic (as in the case of Messy Bill), doing so is necessarily contrary to the constitutive aim of recommendation: which I shall assume for the sake of argument to be something like to get the agent to do as we are recommending by following our recommendation. Given an account of this sort, there might seem to be necessarily something wrong with wildly unrealistic recommendations *qua recommendations*.[[8]](#footnote-8)

It might seem, then, that the distinction between true ought claims and appropriate recommendations provides us with exactly the vindicating explanation we were after. The explanation goes as follows: Being attainable is, and being minimally realistic isn’t, a constraint on valid institutional principles of justice because valid institutional principles of justice are true ought claims; and being attainable is, and being minimally realistic isn’t, a constraint on true ought claims. Being minimally realistic is a constraint on valid institutional proposals but not on valid institutional principles because institutional proposals (being practical proposals) are, and institutional principles aren’t, supposed to involve appropriate recommendations; and being minimally realistic is a constraint on appropriate recommendations. In other words, the truth of theses (1), (2) and (3) is explained by the truth of the following three theses:

(1\*) True ought claims are not subject to a minimal realism constraint.

(2\*) True ought claims are subject to an attainability constraint.

(3\*) Appropriate recommendations are subject to a minimal realism constraint.[[9]](#footnote-9)

This is a *prima facie* compelling account. Nonetheless, I don’t think it succeeds. Of course, we might raise questions about any of these three theses individually. The problem that I want to raise concerns the combination of them. The problem is that if Estlund’s argument for thesis (1\*) is successful, then it seems that the same kind of argument can be deployed, *mutatis mutandis*, against thesis (2\*). While there are plausible ways of blocking the parallel argument against thesis (2\*), they either a) also succeed in blocking Estlund’s argument for thesis (1\*) or b) entail that thesis (3\*) is false. Either way, the combination of theses (1\*), (2\*) and (3\*) cannot coherently be maintained.

It will be useful to start by consider the following modification of the case of Messy Bill:

*Messy Bill\*:* Suppose Bill\* pleads that he is not required to refrain from dumping because he would be virtually certain to fail to dump his rubbish properly if he were to try and not give up trying to do so. Assume that there is no special phobia, compulsion, or illness involved. He is simply deeply selfish and so has intentionally ensured that if he ever were to try to dump his rubbish properly, then he would fail (say, by purchasing and programming accordingly a sufficiently powerful robot). As a matter of fact, he will never try to dump his rubbish properly since, being deeply selfish, he cannot thoroughly will, or “bring himself,” to comply. Refraining is something he could, in all other respects, easily do. Still, he will either not really try, or he will stop trying even if he might have succeeded.

At least on the face of it, it seems hard to deny that if Estlund is right that the case of Messy Bill constitutes a plausible counterexample against the claim that being minimally realistic is a constraint on true ought claims (i.e. for thesis (1\*)), then the modified case of Messy Bill\* also constitutes a plausible counterexample against the claim that being attainable is a constraint on true ought claims, (i.e. against thesis (2\*)). Suppose that Estlund is right to say that Bill ought to dump his rubbish properly and that to insist otherwise would be to treat him with undue lenience. In that case, surely we should also say that *Bill\** ought to dump his rubbish properly and that to insist otherwise would be to treat him with undue lenience. After all, hasn’t Bill\* simply intentionally made it the case that he is unable to do what he plainly ought to do (see Southwood 2016b; see also Sinnott-Armstrong 1984)?

The only plausible way of saving thesis (2\*) from this kind of familiar counterexample of which I am aware is to insist that the “oughts” that we are interested in are oughts that are special and distinctive in virtue of being supposed to be fit to be used in certain ways. One possibility is that the ought in question is the so-called *deliberative* ought: the ought that is supposed to be fit to be used to settle the question of how we are to act (see Southwood 2016a; 2016b; cf. Schroeder 2011; Kiesewetter 2018). Another possibility is that it is the so-called *prescriptive* ought: the ought that is supposed to be fit to be used to recommend (or advise or enjoin) others regarding how they are to act (see Gilabert 2011; 2017).[[10]](#footnote-10)

How does this move help to block the counterexample? The basic idea is that, even if the reason why Bill is unable to dump his rubbish properly is that he has intentionally made it the case that he is unable to dump his rubbish properly, this does not seem to do anything to change the fact that it remains inappropriate or unfitting a) for Bill himself to use the claim that “he ought to dump his rubbish” to settle the question of whether to dump his rubbish in favour of doing so; and/or b) for us to use the claim to recommend (or advise or enjoin) him to dump his rubbish properly. Thus, the case of Messy Bill\* does not seem to be a compelling counterexample to thesis (2\*) if we interpret the “ought” in question as involving the deliberative or prescriptive ought.

Nonetheless, interpreting the “ought” in question as involving the deliberative or prescriptive ought generates other problems. Suppose, first, that we go with the deliberative ought. The problem here is that being minimally realistic seems to be a constraint on true claims involving the deliberative ought (Southwood 2016a). That’s because normative claims that make wildly unrealistic demands seem to be necessarily incorrect or unfitting since they seem to contrary to the constitutive aim of deliberation: something like to determine how we are to act by deciding how we are to act (Southwood 2016a). Thus, thesis (1\*) seems to be false insofar it involves the deliberative ought.

Suppose instead that we go with the prescriptive ought. On the face of it, this might not seem to do any better. Recall that wildly unrealistic recommendations were supposed to be necessarily incorrect or unfitting because they are contrary to the constitutive aim of recommendation: something like to get the agent to do as we are recommending by following our recommendation. If this is right, then it follows that thesis (1\*) is false insofar as it involves the prescriptive ought.

However, I must confess that it is not obvious to me that wildly unrealistic recommendations really *are* necessarily incorrect or unfitting. I certainly agree that *unattainable* recommendations are necessarily incorrect or unfitting. I am also inclined to think that there is something necessarily incorrect or unfitting about wildly unrealistic recommendations that are not accompanied by certain kinds of *conditional* recommendations: recommendations to do things that are not wildly unrealistic if the agent doesn’t do the wildly unrealistic thing. But consider instead wildly unrealistic recommendations that *are* accompanied by such conditional recommendations.

Suppose that one were to say to Bill: “Listen Bill, you really ought to dump your damned rubbish properly. But if you are not going to do that, then at least pay for someone to come and clean up from time to time.” Would this be an incorrect or unfitting recommendation? I’m not sure, but not obviously. If not, it suggests that, at most, there is a valid *disjunctive* constitutive norm of recommendation that tells us either a) to recommend only things that are not wildly unrealistic or b) if we recommend things that are wildly unrealistic, to supplement the recommendation with a conditional recommendation about what to do on the assumption that we don’t end up doing the thing that is wildly unrealistic.

If this (admittedly sketchy and speculative) suggestion is correct, then it might be enough to vindicate thesis (1\*). This would be very good news for Estlund. Of course, it would also suffice to show that thesis (3\*) is mistaken, which would not be such good news. Either way, it seems that the combination of theses (1\*) and (3\*) is straightforwardly inconsistent. Either thesis (3\*) is true, in which thesis (1\*) is false. Or thesis (1\*) is true, in which case thesis (3\*) is false. This shouldn’t be a surprise. Ought claims involving the prescriptive ought just are ought claims that are true only if they are fit to be used to recommend (or advise or enjoin) agents to act accordingly. To embrace the prescriptive ought is, in effect, to give up on the distinction between true ought claims and appropriate recommendations.

4. Oughts of justice versus oughts of public policy

Let us now turn to the other key difference between institutional principles of justice and institutional proposals. Recall that institutional principles of justice and institutional proposals are supposed to be different, not merely in virtue of belonging to different categories (ought claims and recommendations, respectively), but also in virtue of involving different kinds of ought claims: claims involving conjunctive, plural requirements addressed to societies on the one hand (the ought ofjustice); and claims involving non-conjunctive, genuine deontic and unconditional ought claims addressed to the state on the other (the ought ofpublic policy). Perhaps this second difference will allow us to vindicate theses (1), (2) and (3). The idea would be that, while claims involving the ought of justice are like claims involving the ought of public policy in that they are necessarily false insofar as they make unattainable demands, they are unlike claims involving the ought of public policy in that they may be true in spite of making wildly unrealistic demands. In other words:

(1\*\*) True claims involving the ought of justice are not subject to a minimal realism constraint.

(2\*\*) True claims involving the ought of justice are subject to an attainability constraint.

(3\*\*) True claims involving the ought of public policy are subject to a minimal realism constraint.[[11]](#footnote-11)

A view along these lines might seem to be highly promising. Thesis (2\*\*) might seem to follow relatively straightforwardly from the idea that “ought” implies “can.” While, as we have seen, there are legitimate questions to be asked about “ought” implies “can,” let’s suppose for the moment that these can be satisfactorily answered. Certainly, it might seem strange to concede the truth of “ought” implies “can,” and yet to deny its validity in, or application to, the case of claims involving the ought of justice.

Moreover, theses (1\*\*) and (3\*\*) might seem to square especially well with our intuitions in what we can call *non-compliance case.* Non-compliance cases are cases where, given objectionable but deeply entrenched character traits, it is wildly unrealistic for us to comply with some highly desirable institutional arrangement (though we are perfectly able to comply); and where (perhaps for that reason) the state refrains from implementing (or taking steps to implement) the institutional arrangement. A good example is the case mentioned above of a Carens Market with which “people, in virtue of human nature, would not be able to bring themselves to comply” (Estlund 2020, p. 115). Another example is a regime of “fully equal civil rights” that would be “furiously and successfully resist[ed]” by the “virulently racist citizenry” (Estlund 2020, p. 23). The intuitive verdict in such non-compliance cases, I take it, is that there is (or at least may be) a violation of the ought of justice, though there is no violation of the ought of public policy. There is a violation of the ought of justice because (or at least insofar as) a society that fails to include the relevant institutional arrangement is for that reason unjust. Yet there is no violation of the ought of public policy because the state does exactly what it ought to do as a matter of public policy in refraining from implementing, or taking steps to implement, the relevant institutional arrangement. To insist that the state ought to implement or take steps to implement an institutional arrangement with which individuals are robustly disposed not to comply seems plainly wrongheaded. As Estlund puts it, “the state … does as it should given what the citizens will do. But this is patently not a just society. The question of what the state should do is not the question of what social justice requires of this society” (Estlund 2020, p. 23).

However, this is too quick. While non-compliance cases have the right structure to justify thesis (1\*\*), they have the wrong structure to justify thesis (3\*\*). In order to justify (3\*\*), we would need cases where claims involving the ought of public policy seem to be false on account of making wildly unrealistic demands. But non-compliance cases are not like that at all. Indeed, the cases are not even ones where the relevant false claims involving the ought of public policy make wildly unrealistic demands at all (still less, claims that seem to be false on account of making wildly unrealistic demands). That’s because they are claims to the effect that the state ought to implement a particular institutional arrangement; and, for all that we are told, it is *not* wildly unrealistic for the state to implement the institutional arrangement. What is supposed to be wildly unrealistic is for the citizens of the society to *comply* with the institutional arrangement (and, hence, for the society to be such that the state implements the arrangement and the citizens comply with it). But Estlund does not claim that it’s false that the citizens ought to comply. (Indeed, he thinks it’s true.) So, he has not given us a case of a claim involving the ought of public policy that seems to be false in spite of, still less on account of, making wildly unrealistic demands.[[12]](#footnote-12)

What we would need, then, in order to motivate (3\*\*) is not non-compliance cases but what we can call *non-implementation cases*: cases where i) it is wildly unrealistic, though not unattainable, for the state to implement some highly desirable institutional arrangement; ii) the state’s refraining from implementing the institution in question does not involve a violation of an ought of public policy (even if it entails a violation of an ought of justice); and iii) insisting otherwise seems to be mistaken on account of (i). Are there cases of this sort? One possibility is to appeal to cases in which there are intractable (and not necessarily reasonable) divisions or disagreements among the core constituents of the state such that there is no prospect of the core constituents reaching agreement to implement the institutional arrangement in question.[[13]](#footnote-13) It seems at least arguable that insisting that the state ought as a matter of public policy to implement such an institutional arrangement is for that reason mistaken.

What should we make of such a view? Once again, I shall argue that it fails because the combination of theses (1\*\*), (2\*\*), and (3\*\*) cannot coherently be maintained. I shall offer two separate arguments. The first argument is that theses (1\*\*) and (2\*\*) represent an incoherent combination. The second argument is that theses (1\*\*) and (3\*\*) represent an incoherent combination. Thus, either thesis (1\*\*) is correct, in which case we should reject theses (2\*\*) and (3\*\*). Or thesis (2\*\*) and/or thesis (3\*\*) is correct, in which we should reject thesis (1\*\*). Either way, the combination of theses (1\*\*), (2\*\*), and (3\*\*) cannot coherently be maintained.

Let us start with the first argument. This concerns the combination of theses (1\*\*) and (2\*\*). The good news for Estlund is that, given his account of the ought of justice, it seems to follow relatively straightforwardly that he is right to accept thesis (1\*\*). How so? According to Estlund, claims involving the ought of justice are conjunctive, plural requirements addressed to societies as a whole. Focus, in particular, on the fact that they are plural requirements. Being minimally realistic is not a constraint on plural requirements. As we have seen, plural requirements are supposed to involve a fusion of merely evaluative claims (about what ought to be the case) and conditional deontic claims (claims to the effect that members of the group ought to do their part conditional on (enough of) the other members doing their part. Being minimally realistic is *not* a constraint on either of these two sorts of claims. First, being minimally realistic is obviously not a constraint on merely evaluative claims about what ought to be the case. Take Estlund’s case of Slice and Patch. I take it that no one think there is anything remotely incoherent about insisting that it ought to be the case that Slice slices and Patch patches (and, hence, that the patient be saved) in spite of the fact that this is wildly unrealistic. Second, nor is being minimally realistic a constraint on the relevant conditional deontic claims. Consider a modification of Estlund’s case of Slice and Patch in which the closest worlds in which it is not wildly unrealistic for Slice to slice and indeed where he is prepared to slice are also worlds in which it is not wildly unrealistic for Patch to patch and indeed where he is prepared to patch, and vice versa. In the modified case, I take it that it remains true that Slice ought to slice conditional on Patch patching and that Patch ought to patch conditional on Slice slicing. So, being minimally realistic is not a constraint on plural requirements. Given Estlund’s understanding of the ought of justice, he is right to insist that being minimally realistic is not a constraint on claims involving the ought of justice. Thus, he is right to endorse thesis (1\*\*).

The problem is that, so far as I can tell, being *attainable* is not a constraint on plural requirements either. Consider a further modification of the case of Slice and Patch in which neither Slice nor Patch has the requisite know-how or capacities to slice and patch, respectively, because they intentionally or negligently failed to develop the capacities in the past. Suppose, moreover, that the closest worlds in which Slice has and is prepared to exercise the slicing capacities are also worlds in which Patch has and is prepared to exercise the patching capacities, and vice versa. I take it that it remains true in this further modified case that it ought to be the case that Slice slices and Patch patches (and, hence, that the patient be saved), even though this is not merely wildly unrealistic but unattainable. Moreover, while it’s not true that Slice ought to slice, or that Patch ought to patch, I take it that it remains true that Slice ought to slice conditional on Patch patching; and that Patch ought to patch conditional on Slice slicing. It follows that Slice and Patch are subject to a plural requirement to save the patient even though they are unable to do so. Thus, Estlund is wrong to insist that being attainable is a constraint on plural requirements – and, hence, on claims involving the ought of justice. Thus, he is wrong to accept thesis (2\*\*). What makes thesis (1\*\*) correct appears to make (2\*\*) mistaken.

What should Estlund say in response? It seems to me that the source of the problem lies with Estlund’s account of plural requirement. The conditions he offers for plural requirement may be necessary, but they are not sufficient. We can appreciate the force of this thought by observing that it does not seem right, in the final modified version of Slice and Patch, to say that Slice and Patch ought to slice and patch (or that they ought to save the patient); or to insist that they have *gone wrong* or *violated a legitimate demand* insofar as they fail to do so. In contrast, it does seem right to say these things in the original version of the case. This suggests that there is some *other* necessary condition on plural requirement that is being satisfied in the original version but not in the modified version. I won’t try to say here what it might be. Suffice it is to say that if we could identify this extra necessary condition – a big if, to be sure – then *perhaps* this would allow Estlund to resist the aforementioned argument against thesis (2\*\*).

Let us now turn to the second argument. This concerns the combination of theses (1\*\*) and (3\*\*). The problem is that thesis (3\*\*), while not, strictly speaking, *inconsistent* with thesis (1\*\*), nonetheless makes thesis (1\*\*) very hard to maintain. Recall that Estlund holds that, unlike claims about the ought of justice (i.e. conjunctive, plural requirements addressed to societies as a whole), claims involving the ought of public policy are non-conjunctive, genuinely deontic requirements addressed to states: e.g. claims to the effect that the ought to implement a Carens Market, or fully equal civil rights, or whatever. Thus, thesis (3\*\*) says that if the state ought to implement a particular institutional arrangement, then it must not be wildly unrealistic for the state to implement the institutional arrangement in question. This presumably also encompasses certain *conditional* claims: claims to the effect that the state ought to implement a particular institutional arrangement if (enough of) the citizens are going to comply with it. That is, given Estlund’s account of the ought of public policy, thesis (3\*\*) entails that if the state ought to implement a particular institutional arrangement if (enough of) the citizens are going to comply with it, then it must not be wildly unrealistic for the state to implement the institutional arrangement if (enough of) the citizens are going to comply with it.

Next, recall that Estlund understands claims involving the ought of justice as conjunctive, prime requirements addressed to societies: claims to the effect that a) it ought to be the case that a society implements and complies with certain basic structural institutions and b) certain members of the society ought to do certain things conditional on other members of the society doing what they conditionally ought (e.g. the state ought to implement the institutions conditional on (enough) other citizens complying with the institutions; individual citizens ought as a matter of justice to comply with the institutions conditional on the state implementing and (enough) other citizens complying with the institutions; and so on).

But now consider what this means. Since Estlund holds that 1) claims to the effect that a society ought as a matter of justice to contain some institutional arrangement entail claims to the effect that the state ought to implement that institutional arrangement conditional on (enough of) the citizens complying with it and, as we have seen, 2) claims to the effect that the state ought to implement a particular institutional arrangement if (enough of) the citizens are going to comply with it entail that it must not be wildly unrealistic for the state to implement the institutional arrangement if (enough of) the citizens are going to comply with it, then it follows that 3) claims to the effect that a society ought as a matter of justice to contain some institutional arrangement entail that it must not be wildly unrealistic for the state to implement the institutional arrangement if (enough of) the citizens are going to comply with it.

Does it follow that being minimally realistic is a constraint on claims involving the ought of justice and, hence, that thesis (1\*\*) is false? No. Rather, what follows instead is that there is a *related* constraint on claims involving the ought of justice: namely that such claims, in order to be true, must be minimally realistic in the sense that *a state’s implementation of the institutions in question conditional on (enough of) the citizens being prepared to comply not be wildly unrealistic*. This related constraint does not entail the minimal realism constraint. To insist otherwise would be to neglect non-compliance cases. It is consistent with the related constraint that the minimal realism constraint is invalid – and, hence, that thesis (1\*\*) is true – if and because there are claims involving the ought of justice that are true in spite of making wildly unrealistic demands (to the effect that citizens ought to comply, conditional on (enough) other citizens complying).

Nonetheless, while the related constraint and the denial of the minimal realism constraint are logically consistent, I suggest that they make for a strange combination. To see this, consider the following modification of Estlund’s case involving unequal civil rights:

*Civil rights\**: Consider a society in which civil rights are genuinely, but not terribly, unequal at present. Suppose that the citizenry is on board with, and would support and comply with, fully equal civil rights. However, suppose that, in spite of this, it is wildly unrealistic for the state to implement fully equal civil rights – perhaps due to the presence of intractable divisions and disagreements among its core constituents. There is simply no prospect of the relevant agents reaching an agreement to implement fully equal civil rights, though if they were to reach agreement, they would easily succeed in implementing the rights.

Surely, if Estlund is right that the society described in the case of civil rights “is patently not a just society,” then we had better be able to say the same of the society described in the case of civil rights\*. But the related constraint entails that there is no violation of the ought of justice in civil rights\*. If the related constraint is valid, this suggests that our intuitive verdicts in civil rights involve some kind of mistake. One possibility is that we are conflating claims about what societies ought to do as a matter of justice with merely evaluative claims about what conditions are necessary in order for perfect (or sufficient) justice to obtain (see Southwood 2019; cf. Broome 2007).

What should Estlund say in response? What seems to be generating the problem is Estlund’s account of the ought of public policy. The conditions he offers for the ought of public policy may be necessary, but they are not sufficient. What is needed is a richer characterisation of the ought of public policy and, hence, a more plausible account of the distinction between the ought of public policy and the ought of justice. We might try to provide a *substantive* characterisation (by pointing to a special class of reasons to which claims involving the ought of public policy are supposed to be sensitive); and/or a richer *formal* characterisation (by pointing to additional formal properties of claims involving the ought of public policy); and/or (my own favourite) a richer *functional* characterisation (by pointing to special roles that such claims are supposed to play within social life). If we could provide a plausible characterisation of this kind – again, a big if – then this *might* allow Estlund to hang onto thesis (3\*\*) without this undermining thesis (1\*\*).

5. The upshot

I have argued that the combination of theses (1), (2), and (3) cannot coherently be maintained given Estlund’s account of the principle/proposal distinction. As we saw, Estlund holds that there are two differences between institutional principles and institutional proposals. First, institutional principles and institutional proposals belong to different categories. Valid institutional principles are simply true ought claims, whereas valid proposals are appropriate recommendations, which are ought claims in something like the register of advice or recommendation or injunction. Second, institutional principles and institutional proposals involve different kinds of oughts. Valid principles involve the ought of justice (i.e. claims involvung conjunctive, plural requirements, addressed to societies as a whole), whereas valid proposals involve the ought of public policy (i.e. non-conjunctive, genuinely deontic requirements, addressed to states). The combination of theses (1), (2), and (3) cannot coherently be maintained given this account.

How significant is this conclusion? Estlund might respond that his aim was only ever to argue against the minimal realism constraint on principles of justice (i.e. to argue for thesis (1) and that his endorsement of the additional constraints (theses 2 and 3) was only ever “for the sake of argument.” I have not argued against thesis (1). So, it might seem that, at most, I have shown that Estlund cannot be as non-committal as he was hoping to be.

But this would be a mistake. In particular, it would be to ignore the important roles that the additional constraints are playing within Estlund’s overall case for thesis (1). They are playing at least two important roles. First, I take it that the additional constraints are supposed to be pre-empting, and insulating Estlund from, the charge of *manifestly implausible* anti-realism.[[14]](#footnote-14) The idea is that there are certain normative political claims that seem plainly invalid on account of making unrealistic demand such that to insist otherwise would be to be guilty of objectionable unworldliness or utopianism, but that Estlund cannot explain this given his antipathy to the minimal realism constraint on principles of justice. The response is that he can, in fact, explain why the relevant normative claims are invalid on accounting of making unrealistic demands and thereby avoid the charge of manifestly implausible anti-realism: by pointing out that they violate the additional constraints. Principles of justice are invalid on account of making unattainable demands, and insisting otherwise is to be guilty of objectionable unworldliness. Practical proposals are invalid on account of making wildly unrealistic demands, and insisting otherwise is to be guilty of utopianism.

Second, I take it that the additional constraints are supposed to be providing a kind of *error theory*. That is, they are supposed to be doing something to explain why so many of us have been inclined to mistakenly accept the minimal realism constraint on principles of justice. One possibility is that the mistake is due to the fact that we have mistakenly thought that we *needed* the minimal realism constraint on principles of justice to avoid the aforementioned charge of manifestly implausible anti-realism. Another possibility is that the mistake is due to the fact that we have mistakenly *conflated* the minimal realism constraint on principles of justice with either or both of the additional constraints. That’s because we have either conflated principles of justice and practical proposals (or at least mistakenly assumed that the former entail the latter). Or we have conflated unattainable demands and wildly unrealistic demands (or, again, at least mistakenly assumed that the latter entail the former).

If I am right that the combination of theses (1), (2) and (3) cannot be maintained, then the additional constraints cannot play these important roles. They cannot play the role of insulating Estlund from the charge of manifestly implausible anti-realism. Rather, for all that has been said, his account is just as quixotic as the objector claimed – and much more so than he claimed. This is not necessarily fatal to Estlund’s account. But it is a bullet to bite, and Estlund is not in a good position to claim otherwise. (Otherwise, he would hardly have tried to disarm the objections.) His anti-realism about justice is much more radical than he claims. Moreover, the additional constraints cannot provide a compelling error theory. Which means that the question re-emerges: Why, if Estlund is right, have so many of us been mistakenly inclined to reject the possibility of wildly unrealistic justice? Without a good answer to this question, it seems hard to accept Estlund’s scepticism about the minimal realism constraint.

Where does this leave us? So far as I can tell, there are three possibilities. First, we might conclude that the minimal realism constraint on principles of justice is correct after all. To be sure, it seems highly unlikely (to say the least) that Estlund will want to embrace an option that would amount, in effect, to giving up on the central ambition of his book. Second, we might try to make our peace with the possibility of unattainable principles of justice and/or the possibility of wildly unrealistic institutional proposals. Perhaps this can be done but it would be to incur an even more formidable burden: to explain why so many of us have been inclined to mistakenly accept, not merely the minimal realism constraint on principles of justice, but also the attainability constraint on principles of justice and the minimal realism constraint on institutional proposals. Third, and most promisingly, we might try to provide some alternative account of the principle/proposal distinction that can do a better job of explaining the truth of all three theses. This would not be a trivial task, but it certainly seems worth trying, and I have provided several brief gestures at how it might be done.

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2. Examples include Rawls 1971, ch. 8; Walzer 1983; Pettit 1997, part 2; Anderson 1999; and Nussbaum 2000, ch. 1. [↑](#footnote-ref-2)
3. Philip Pettit (2012, p. 126) puts the objection well when he suggests that certain theories of justice “seem like moral fantasies: manuals for how God ought to have ordained the order of things ... rather than real-world manifestos for what the state should do in regulating the affairs of its citizens” (Pettit 2012, p. 126). Examples of theories that are commonly objected to on grounds of being wildly unrealistic include certain radical socialist theories, radical egalitarian theories, certain cosmopolitan theories, and certain radically participatory democratic theories. [↑](#footnote-ref-3)
4. As Estlund fully appreciates, this is a controversial view of ability. For criticisms, see e.g. Wiens 2015; Stemplowska 2016; Southwood 2018. However, I will grant it for the sake of argument in what follows. [↑](#footnote-ref-4)
5. Notice that if I have interpreted Estlund correctly, it means that some of his remarks about the “subject of justice” are not right. For example, he writes: “I will assume that what it is for a society to be just is for its basic structure to be the way it ought to be in certain respects” (Estlund 2020, p. 14). This cannot be right. If principles of justice involve plural requirements and assuming that what it is for a society to be just is for it not to violate any valid principle of justice, then it follows that a society’s basic structure could be the way it ought to be in the relevant respects and yet the society not count as just (because some of its members violate their conditional deontic duties).

A possible response is that the distinction between claims about what ought to be the case and claims about what we ought to do collapses when we are talking about the basic structure. This is suggested by Estlund’s remark that the “focus on social structure as the subject of justice … fits with my treatment of social justice as a requirement over actions (in a plural fashion) – so long as the basic structure of a society is, in the end, really just certain patterns and orientations of action” (Estlund 2020, p. 14).

However, we have good reason to reject this response. First, the idea that the basic structure is nothing over and above “certain patterns and orientations of action” is deeply implausible. At the very least, the basic structure surely also includes patterns of *attitudes*. Estlund appears to agree when he writes: “As understood here, the basic social structure is partly constituted by *certain prevalent attitudes*, motivations, and patterns of behaviour” (Estlund 2020, p. 14: italics added). Second, even if the basic structure were nothing over and above certain patterns of behaviour, claims to the effect that we ought to do certain things are obviously quite different from, and do not collapse into, claims to the effect that it ought to be the case that we do certain things. The former have addressees and make demands of the addressees: to the effect that they do the things in question. The latter do have addressees and, hence, do not make demands, at all. One way to see this is to observe that when we fail to do what we ought to do, it follows that we have flouted a demand and, hence, gone wrong. By contrast, when we fail to do what it ought to be the case that we do, it does not follow that we have flouted a demand or gone wrong; all that follows is that the world is not as it ought to be. [↑](#footnote-ref-5)
6. We might wonder whether it is really wildly unrealistic (as opposed to merely unlikely) for Bill to refrain from dumping his rubbish properly (see Wiens 2016). But I shall grant Estlund his description of the case in what follows. [↑](#footnote-ref-6)
7. Of course, we can also imagine *different* versions of the case where it would indeed be inappropriate: say, where advising or enjoining him to dump his rubbish properly would lead him to dump his rubbish all over your garden; or to call his biker friends and terrorise the neighbourhood. But notice that, even in these cases, the explanation for why it would be inappropriate has nothing to with whether his dumping his rubbish properly is wildly unrealistic. Rather, it is simply due to the unsavoury consequences of advising or enjoining him to dump his rubbish properly. Making wildly unrealistic demands does not seem to be inappropriate *as such*. [↑](#footnote-ref-7)
8. Notice that I am assuming for the sake of argument an account of the aim of recommendation according to which it is at least *prima facie* plausible to suppose that appropriate recommendations cannot make wildly unrealistic demands. However, David Wiens made the very good point that there are *other* accounts of the aim of recommendation according to which this does not seem even *prima facie* plausible. For example, suppose that the aim of recommendation is “simply to provoke further thought about one's actions in a way that prompts one to improve upon the *status quo*.” Achieving this aim can obviously be consistent with doing something other than what's being recommended. If we accept this, then it's easy to see why appropriate recommendations need not be subject to a minimal realism constraint. A wildly unrealistic recommendation, if taken to be worth serious reflection, might provoke the kind of reflection and deliberation that leads us to improve upon the *status quo*. For example, a wildly unrealistic recommendation for dealing with climate change might prompt people to recognize the scale of the emergency and do what they can to mitigate it. [↑](#footnote-ref-8)
9. Notice that whereas (2\*) and (3\*) plausibly entail (2) and (3) (assuming that i) principles of justice involve ought claims of the relevant sort and ii) valid institutional proposals involve appropriate recommendations), (1\*) does not *entail* (1). That’s because it is *consistent* with (1\*) that principles of justice involve special ought claims for which being minimally realistic is a constraint. However, I shall set aside this complication for the time being. [↑](#footnote-ref-9)
10. Estlund himself disavows the idea that institutional principles involve the deliberative ought (see Estlund 2020, p. 349, n. 14). In spite of this, it is with considering whether the idea might help him. [↑](#footnote-ref-10)
11. I am not saying that this is Estlund’s view. Rather, my claim is that, given his account of the distinction between principles of justice and institutional proposals, and at least insofar as he wants to vindicate theses (1), (2), and (3), he is *committed* to either a) this view or b) the view discussed in the previous section. [↑](#footnote-ref-11)
12. A possible response is that, even if non-compliance cases don’t give us *quite* what we were after, namely thesis (3\*\*), they do give us something interesting in the *ballpark* of thesis (3\*\*). They do not show that being minimally realistic is a constraint on claims involving the ought of public policy – and, hence, on institutional proposals. But, arguably, they do show that it is a constraint on claims involving the ought of public policy – and, hence, on valid institutional proposals – that *compliance* with the relevant institutions be minimally realistic. That’s because they might seem to show that any claim to the effect that a state ought to implement some institution – and, hence, any institutional proposal – must be false insofar as and because compliance with the institution is wildly unrealistic.

But even this is not right. To be sure, it will presumably *often* be a very bad idea to build institutions with which individuals are robustly disposed not to comply. This is because the value of building certain institutions often depends on the institutions securing at least a minimal level of compliance. In some cases, the very existence of valuable institutions depends on such compliance. On the other hand, there can surely be value in building institutions that individuals are robustly disposed not to comply with: either because there is value in approximating compliance and it is not wildly unrealistic to suppose that compliance will be approximated (think of the value of imposing speed limits on highways); or because there is value that does not depend (wholly) on compliance (think of the expressive value of introducing certain anti-discrimination legislation). In such cases it might be the case that the state ought to build certain institutions even if it would be wildly unrealistic to suppose that the citizens will comply with them. So not even the thesis in the ballpark of thesis (3\*\*) can credibly be maintained. [↑](#footnote-ref-12)
13. Of course, many theorists will insist that such cases are cases where the state is *unable* to implement the institutional arrangement, but I shall set this aside given that it is not what Estlund means by “unable.” [↑](#footnote-ref-13)
14. That Estlund is sensitive to this charge and the importance of avoiding it can be seen by his frequent disparaging remarks about certain forms of what he calls “utopian” thinking, especially in chapter 1. [↑](#footnote-ref-14)