

POLITICAL LEGITIMACY

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LEGITIMACY AS A RIGHT TO ERR

DANIEL VIEHOFF

The legitimacy of political and legal institutions—by which I mean, their normative legitimacy, rather than their descriptive or legal legitimacy—has been analyzed in a number of different ways in recent philosophical discussions.¹ One influential approach focuses on these institutions' claim that they have the authority to make morally binding, or perhaps coercively enforceable, decisions for their subjects, and takes legitimate institutions to be those that have the authority they claim to possess.² Another asks whether an institution's exercise of power (coercive or other) over its subjects makes the relationship between institution and subject morally problematic, and takes legitimate institutions to be those whose relationships to their subjects are morally acceptable.³

This chapter proposes a third approach which, though it shares features with both of the more prominent views just mentioned, is importantly different from each.⁴ Legitimacy, on the proposal I sketch here, is centrally a *right to err*, or to make mistakes that set back interests of others that are ordinarily protected by rights. This may sound similar to a point commonly emphasized by those who focus on an institution's authority to impose binding or enforceable duties: The moral power to make the decision, they say, is effective even where the decision to impose the duty rests on a mistake. But legitimate institutions have a right to err that goes in important ways beyond authority so understood. In particular, reflection on our moral and legal practices reveals that institutions wielding legitimate authority are not merely empowered to impose duties, or lay down enforceable rules, even when the decision to do so is mistaken. They are also insulated from compensatory demands for

making substantively unjust decisions, at least as long as these decisions are made in the right way (where making decisions in this way is in turn a condition for the legitimacy of the institution's exercise of its power). More specifically, I suggest that legitimate institutions have a distinctive liberty right to set back others' interests that other agents normally lack; and these institutions' subjects in turn lack certain permissions to avoid, or redirect, the costs of the institutions' mistakes in ways that would be permitted if similar costs were imposed by agents who lack legitimacy. Legitimate institutions have this special liberty right because, and insofar as, they *act for* their subject (in a specific sense) and do so *only for the subject's sake*. As a matter of fairness, (some of) the costs of the institutions' actions ought to be borne by the subjects for whom they are undertaken, rather than by the institutions (or the officials acting on their behalf). In turn, where an institution fails to act for the subject in the relevant way, that institution (and those acting for it) may have to bear the costs of its errors, which the subject may thus be morally permitted to redirect by suitable acts of resistance.

LEGITIMACY AND ERROR

That there is a significant link between legitimacy and error is suggested by reflection on the moral rights of officials and others (such as parents or teachers) who exercise what we think of as legitimate power. To highlight this link, I discuss in this section a number of cases in which someone exercising power has a right to err of the sort I suggest is central to legitimacy. I begin with the relatively straightforward case of a judge adjudicating a civil suit, before I discuss the somewhat less perspicuous case of legislative authority. (The points I make here in principle also extend to executive action; but since executive action also gives rises to special problems, I won't discuss it in detail in this chapter.) Let me also flag that the following discussion is meant to capture what I take to be quite general moral features of the kinds of institutions I am describing. Each legal system will have its own way of institutionalizing some, or all, of these features, and reflection on how certain familiar legal systems have institutionalized them may occasionally be helpful for sharpening one's understanding of the general moral phenomenon. Yet my concern is not with these

(often quite parochial, and highly context-dependent) ways in which the general moral norms are legally implemented (or not, for that matter), and so I will say nothing about corresponding doctrinal matters.

Imagine Judge finds against Defendant in a tort suit, and holds that Defendant owes Plaintiff some amount (say, \$1,000) in compensatory damages. Often enough, this is sufficient to motivate the parties to pay up (assuming they can). If they don't, there is an elaborate system of enforcement procedures that ultimately lead to an executive official (a sheriff, for example) taking possession of Defendant's property so as to ensure the judgment is satisfied.

Let me begin with two features of this case that are familiar enough from philosophical discussion. First, there are right or wrong answers to the questions that Judge must answer in adjudicating the matter: Did Defendant indeed do what would make her legally liable? (Was she acting negligently, or otherwise tortuously? Did her tortuous action cause harm to Plaintiff?) And what remedy is Plaintiff entitled to? (How great a harm did Plaintiff suffer?) Etc.

Second, legal institutions (and those speaking for them) take it for granted that Judge's legitimate exercise of her adjudicatory power is not conditional on the correctness of her answer to these questions, or of the decision she ultimately makes (though it may be conditional on various other considerations). Her decision stands even if she made a substantive mistake, and Plaintiff ought not to have been awarded \$1,000 in damages. This is in principle true whether the mistake was one of law or of fact.⁵ We must not be misled here by observations about the grounds on which decisions by a trial court may be appealed in familiar legal systems. For if the court of final appeals ends up siding with the trial court, the appeal court's decision too is considered binding (or otherwise normatively effective) even if it is mistaken. Once a final court decision to that effect has been made, Defendant is obligated to pay \$1,000, even if the decision was in fact substantively incorrect; and if Defendant does not pay, then various officials may be permitted to take steps, including coercive measures, to ensure Plaintiff receives the awarded damages, even if this means that Defendant ends up losing \$1,000 (or more) that, but for Judge's mistaken decision, she would be entitled to.

All of this, I said, is assumed by our legal system and the officials speaking for it. But it is not only officials who take this view. Empirical research into citizens' attitudes toward legal-political institutions indicates that people generally grant such institutions significant leeway for error when they see these institutions as legitimate.⁶ (Indeed, it is this willingness of ordinary citizens to go along with decisions even if they disagree with them on the substance that makes what we may call "empirical legitimacy"—the citizens' belief that their governing institutions possess the moral right or status we associate with legitimate authority—so valuable to legal and political institutions: Empirical legitimacy enables them to pursue certain ends even in the face of substantive disagreement about the end's choice-worthiness.)

In line with many philosophers, I will call the court's capacity to create duties or permissions at will, simply by making and communicating a decision to create them, its "normative power." A similar power is also claimed by various other institutions, such as legislatures and administrative agencies. There are a number of interesting questions that can be asked about the normative power claimed, or held, by political and legal institutions. (Is it a normative power to impose duties? Or to create permissions for officials to enforce the institution's decision? What, if anything, distinguishes this power from other ways of bringing it about that such duties, or permissions, exist? And so on.)⁷ But these questions will not be the focus of the following discussion. For, though their claim to possess such normative power is indeed important for understanding central legal and political institutions that claim legitimacy, such institutions may possess this normative power and yet lack legitimacy as a right to err. And conversely, an institution or agent could in principle have a right to err, without having or exercising such normative power. Finally, leaving room for an understanding of legitimacy as a right to err is important for grasping central features of our legal and political practices. Or so I want to suggest now.

Bearers of legitimate authority have, I think further reflection reveals, a right to err that is not exhausted by the normative power to impose duties (or create permissions to enforce) just mentioned. Consider again a court (including a court of appeals) that makes a mistaken decision. Grant that judge's verdict puts Defendant

under a moral duty to pay, or that, in case of non-payment, some official may permissibly enforce the judgment against Defendant, by executing against Defendant's wages, bank accounts, or personal property. Judge, in other words, makes a decision with the intended effect that \$1,000 of Defendant's money goes to Plaintiff, money which Defendant in fact ought not to be required to pay to Plaintiff (though Judge believes otherwise). In many circumstances, if A gives an order, or makes a decision, with the intention to bring it about that another person B loses control over \$1,000, money to which B is in fact entitled (or, if one cares to put the matter in a more neutral fashion, "money which B ought not to lose control over in this way"), then B would have a compensatory claim against A, even if A in good faith believed that B lacked the entitlement. Imagine you don't know that A is a judge. And imagine you hear that A orders B to hand over to C some property to which B would otherwise be morally and legally entitled, and that if B doesn't do so, D will come and make B do it against her will. A normal reaction would be to think that A is somehow on the hook, morally (and, one might hope, legally), for the loss in property that B suffers as a result of A's order. And yet Judge incurs no compensatory liability for mistaken decisions—decisions that require Defendant to pay money to Plaintiff though Defendant ought not to have been required to do so—if those decisions are made in the right way, pursuant to Judge's legitimate authority over the parties. Though Judge made a mistake and is in a straightforward sense responsible for Defendant's loss, Defendant has no moral right that Judge compensate her for the loss she suffered. Nor does Defendant in this case have a compensatory claim against the community in whose name the court speaks.⁸ To be clear, all of this is true only if the court's decision satisfied certain important procedural requirements (about which more later). But, crucially for our purposes, it is true even if, though the procedural requirements were satisfied, the court's decision was substantively unjust.

The feature just highlighted is not peculiar to judicial authority. Consider next legislative decision-making. Imagine, for instance, that a legislature, in the exercise of its legitimate authority, passes a law that imposes a tax on the sale of particular goods. As a result, various people's interests are set back: Some buyers end up still buying the good, but pay more than they otherwise would. Some

buyers end up not buying the good, though they would have benefited from buying it at the price it would have cost sans tax. And some sellers or producers end up selling less, and earning less, because the would-be buyers in the previous category abstain from purchasing the good. All of this may be justifiable: The benefits of raising taxes in this way may be great enough, and the distribution of burdens fair enough, to make adopting this tax objectively justified. (In saying this, I am assuming that, at least within certain limits, there is a right or wrong answer to the question whether the tax scheme the legislature adopts is fair, just, efficient, and thus ought, or ought not, to be adopted.) But at least sometimes legislatures get the matter wrong: Taxes are imposed that create greater burdens than benefits, or distribute the burdens and benefits unfairly among the members of the community.

Just as in the case of the court, so in the case of the legislature, the decision to impose a duty to pay taxes, or to create permissions to coercively enforce tax rules, is often normatively effective even if it is mistaken. And, importantly for the purposes of this chapter, as long as the legislature adheres to certain procedural standards, the legislature's mistake does not give rise to compensatory claims by those on whom it inflicts losses: Even if the tax rules it adopts are in fact unfair, imposing an undue burden on some citizens, the legislators making the decision are not required to somehow make whole those who are unfairly deprived of some benefits, or unfairly suffer particular burdens.⁹ And, I want to suggest once again, neither do the losers have straightforward claims to compensation against the community in whose name the legislature speaks.

What makes it especially easy to overlook this feature of legitimate legislative authority is that the legislature is under a moral duty to consider the distributive effects of its policies on the community as a whole, and to take into account these considerations in making policy choices. Whereas a court (for good reason) usually loses jurisdiction over the parties once the dispute has been disposed of, the legislature's authority over citizens is ongoing. A citizen can thus sensibly raise a complaint against a particular policy's distributive effects and demand that future policies make up for it; and if the legislature recognizes these distributive effects and yet fails—now knowingly—to consider them when making future policy, then the legislature has indeed failed to exercise its law-making

yet mistaken decisions create, but deny that this requires us to go beyond a conception of legitimate authority as a normative power. Protection against such liability, they may say, is already built into the very idea that the institution has the normative power to change the subject's rights and duties. In this section I argue that assimilating the right to err to authority understood as a normative power would be a mistake. Someone may possess the kind of normative power associated with authority and yet lack the right to err that is central to legitimate institutions (and vice versa). As a slogan: *Justified* authority, the normative power to change another's situation at will, does not amount to *legitimate* authority, a full-blown right to err when exercising one's normative power.¹⁰

The *conceptual* separability of a normative power and a right to err is obvious enough. One can easily imagine a contractual relation between A and B in which B promises to obey A's directives on certain matters in exchange for A's promise to compensate B for any costs that such obedience imposes on her. So A has normative power over B, and yet has no right not to compensate B for the costs that exercising his normative power imposes on her. Whether this conceptual possibility is realized depends, however, on how the authority relation is justified. Someone therefore may suggest that, though a conceptual gap between justified and legitimate authority exists, practically they go hand in hand, because standard justifications of political and legal authority establish both an institution's authority and its full-blown right to err.

But this too is mistaken, as reflection on an influential account of political authority reveals. On what is perhaps the most common view among those who do not insist on consent as a necessary condition of legitimate authority, bearers of political authority have the capacity to impose duties on others at will because their having and exercising such power enables the resolution of certain morally pressing problems, most obviously perhaps collective problems that require large-scale coordination among the members of our community.¹¹ (Such arguments could underpin views on which political authority involves a normative power to impose duties on the subjects, as well as those on which it involves a power to create permissions for—and perhaps simultaneously duties on—officials to enforce certain rules against the subjects. For simplicity's sake I focus here on the former.) Crucially, however, establishing

power legitimately. But, crucially, this does not mean that the legislature committed a compensable wrong by making the mistake in the first place. (Nor, for that matter, would it commit such a wrong by erroneously but in good faith concluding that the citizen's complaint about the past distributive effects is groundless.) It merely made a mistake that should figure in its future decisions about how to fairly distribute the burdens and benefits of collective policies among the citizens over time; but if it fails to correct its past mistake, and yet satisfies the various procedural conditions that make its decisions legitimate, then the decision it makes does not entitle the victim to compensation.

It is tempting but misguided to think of this denial of a right to compensation as a merely institutional (or legal) claim: "From the point of view of the institution, which fails to recognize that it made a mistake, the citizen is not entitled to compensation. But this does not bear on the moral issue of whether the citizen is in fact owed compensation." If this were all that denying the right to compensation amounted to, then the victim would be morally (though not institutionally) permitted to take steps to seek compensation from the institution and those acting for it. But then there would be nothing distinctive about legitimacy, for legitimate as well as illegitimate decision-makers purport to get the matter right and will adhere to their own assessment of the situation. If the institution is indeed legitimate, then it is not just the case that the institution claims to be getting the matter right. It is also the case that, when its legitimate decision is nonetheless wrong, the victim may not seek to unilaterally recover the cost of the mistake from the institution or its agents, or otherwise see to it that they fall on them rather than her. In practice, this means, for example, that the victim may not—morally, and not just legally—pursue self-help, either by evading certain costly demands that the institution makes on it or by redirecting the costs of the institution's mistakes on officials by, e.g., resisting them when they come to enforce the legitimate decisions of the legislature or court.

AUTHORITY AND LEGITIMACY

Someone may accept that those exercising authority do indeed escape compensatory obligations for the costs their legitimate

that a decision-maker has the relevant power grounded in the importance of coordination is not sufficient to establish that the decision-maker is insulated from bearing the costs her directives impose on the subjects.

On a coordination-based view, what justifies the decision-maker's power over the subjects is the need to resolve an urgent problem that requires coordination; such coordination can only, or best, be achieved if the subjects obey the decision-maker's directives; and the problem is urgent enough that the subjects are morally required to obey the directives despite the costs that this requirement imposes on them. But that the urgency of the problem is sufficient to justify imposing the cost of obedience on the subjects does not establish that this cost should be left lying with them if it could instead be redistributed. And whether it should be redistributed depends crucially on the origins of the problem that needs solving. If the decision-maker is also culpably responsible for creating the problem in the first place, then the decision-maker may both possess the power that solves the problem and bear liability for the costs that solving the problem imposes on others. This would, crucially, include the costs that the subjects incur when they obey the decision-maker's directives.

To make this more concrete, consider an example: A throws child C into the pond, and E, F, and G are bystanders. Realizing that his crime has been observed, A seeks to mitigate future punishment by now trying to rescue C. But rescuing C in fact requires cooperation among a number of people, who must act in a highly coordinated fashion. For some reason or another, among those present, only A knows what it takes to save C, and the only way in which E, F, and G can do their part in saving C is by following A's directives about what to do. Now if A directs E to do x, and F to do x*, and G to do x**, so that they jointly bring about C's rescue; if following A's directives is the only way of rescuing C open to E, F, and G; and if following A's directives isn't overly burdensome on them; then E, F, and G have duties to follow A's rescue-related directives. Crucially, E, F, and G may have to follow A's directives even if A makes a mistake and gives them directives that are distinctly suboptimal—directives, for instance, that make saving C harder, and more costly, for E, F, and G—as long as A's not giving any directives at all, or E, F, or G's not following A's directives,

would be worse still. But then A is very plausibly thought to have authority—the power to impose duties on the subjects at will—over E, F, and G.¹² And yet A is clearly under an obligation to compensate E, F, and G for the costs they incur when discharging their duty to rescue C, because A is responsible for creating the need to save C in the first place. And if A makes a mistake that increases the cost of rescuing C, then that additional cost also falls on A. So even though he has justified authority over others, he pays for his own mistakes when exercising his normative power.

This example highlights that even if authority is justified by appeal to coordination, a right to err of the sort held by fully legitimate authorities can be absent. But the example may seem farfetched and of limited importance for thinking about political and legal institutions: Even bad legal and political authorities, one may think, aren't usually responsible for the creation of the very problem they are now tasked with solving. I am somewhat less sanguine that political and legal institutions are not complicit in the creation of some of the problems that they are also empowered to solve. But setting that aside, it is important to recognize that the right to err is also absent in other scenarios—including, crucially, scenarios where the issue is not that the decision-maker culpably created the problem that needs solving, but that the decision-maker gives a directive that is mistaken in a particular way. The kind of mistake at issue in these cases does, I want to suggest, very plausibly arise in legal and political institutions on a regular basis; and so, such institutions too may possess authority and yet lack a right to err.

Consider the following example: C has once again fallen into the water, though this time the fault is C's own (rather than A's). The only way to save C is once again for A to give binding directives to E, F, and G. If A directs them to do x, x*, and x**, then E, F, and G will each bear some cost c, and A will bear some significantly smaller cost c-1. (For instance, each of E, F, and G have to wade into the water up to their thighs, and will ruin their shoes and trousers. A will have to get into the water just enough to ruin his shoes.) If A instead directs them to do y, y*, and y**, then E, F, and G bear a greater cost c+1, and A will bear no cost at all. (Each of E, F, and G now have to get into the water up to their neck, thus ruining all their clothes; but A need not get into the water at all.)

The likelihood of saving the child, C, is the same in either case. Thus, a fair distribution of benefits and burdens would require the adoption of policy x^* , x^* , and x^{**} .

Imagine all of this is known to A. Yet to avoid cost c-1 to himself, A chooses the second strategy, and directs E, F, and G to do y^* , y^* , and y^{**} , at cost c-1 to each of them. For the sake of saving C, they must obey A's directive. And yet they should not have to bear the cost of A's choice to pursue this policy, a choice A made for the sake of minimizing the costs to himself even if this meant imposing a greater, and unfair, cost on others. So, A ought to compensate them for his unjust directives. (And even though A would often be entitled to compensation from C for the costs associated with saving C from the emergency C culpably created, A would have no such entitlement here, at least with regard to the excess cost he created beyond what he himself reasonably recognized was necessary to save C.)

Matters would be quite different if A had directed E, F, and G to adopt the more costly course of action (y^* , y^{**}) because A reasonably but mistakenly believed that this course would be safer for C. In that case, A would have made an error—objectively, it would have been better if A had chosen the less costly, and equally safe, course of action (x^* , x^* , x^{**}). And yet A would not be responsible for bearing the cost of his good-faith mistake (which would instead properly fall on C, who culpably created the problem that A tried to help solve).

So whether A has normative power over another even where A's directives are mistaken is separable, not just conceptually, but even in a wide range of practically relevant cases, from the further question whether A must bear the costs of any mistakes he makes when giving directives to his subjects.

The examples discussed here also shed light on why this is so: The considerations that determine whether A has authority diverge in important respects from those that bear on whether or not A must bear the costs his mistakes create, and thus whether A has the full-blown right to err that we attribute to *legitimate* authorities. The answer to the first question—whether A has *justified* authority over B—depends on how well (or badly) B would do, with regard to the urgent moral problem at hand, if A's directives were absent or were not obeyed by B. By contrast, whether A

must bear the costs of B's following these directives—whether A has a full-blown right to err, or (for short) whether A's possession and exercise of authority are *legitimate*—depends on other considerations, including who could reasonably have avoided, and been expected to avoid, making choices that created the costs in the first place, and what a fair distribution of these costs consequently amounts to.

It is, finally, worth pointing out that sometimes political institutions exercise power, not by giving authoritative directives, nor even by making coercive threats, but by directly changing the world around us in certain ways, or by providing services—other than the service of giving useful directives—to us. For instance, they build roads for us, or set up rescue services. These exercises of power too involve claims to legitimacy and may be covered by a right to err. Still, given the centrality of authority relations to our legal and political institutions, it is on power-as-authority that I focus throughout this chapter.

GIVING CONTENT TO THE RIGHT TO ERR

A legitimate authority, it is sometimes said, has a right to rule.¹³ Philosophical discussions of this right to rule often focus on the authority's normative power: whether it is the power to impose duties, or just that to create permissions to enforce; whether the duties created are owed to the decision-maker, if they are owed to anyone; etc.¹⁴ But the discussion up to now suggests that, even if we focus on institutions that act by making purportedly binding or enforceable decisions, the right to rule they claim to possess is not exhausted by a normative power. It also includes a right to err when exercising this power.

But what does this right to err precisely consist in? What (to put the matter in the language of legal philosophers) is the proper Hohfeldian analysis of the moral relation (or relations) that make up this right? On one interpretation, the right to err is, first and foremost, a claim right that others not interfere with the authority's making and implementing its decisions even if these decisions erroneously burden the subject. This could, among other things, include a claim right against being forced to compensate the victim of one's mistake, or even against being made to account for

one's mistake before another authority, such as a court. (In practice, this would then usually be institutionalized as an immunity to another's legal claims. But the immunity would derive from the underlying claim right, rather than being self-standing.)

On another interpretation, the legitimate authority's right to err is, centrally, a liberty right (or what is sometimes also called a Hohfeldian privilege, or moral permission) that others lack. This liberty right would in turn explain why a legitimate authority has various claim rights against outside interference. Agents are ordinarily protected (at least within certain limits) by claim rights against certain forms of interference with their actions, though that protection falls away (frequently, if not always) when they violate moral requirements that apply to them. Because a bearer of legitimate power may permissibly act in ways that would be morally impermissible if done by others, certain actions she undertakes are also protected by claim rights that would not protect others undertaking the same actions. The legitimate authority's special claim rights thus derive from special liberty rights, rather than being explanatorily independent or self-standing.

I think this second understanding of the right to err is preferable. The first misleadingly assimilates a legitimate authority's right to err to what Jeremy Waldron famously called a "right to do wrong": a claim right against outside interference with one's action even where that action violates a moral duty one has.¹⁵ We have, for instance, a right to do wrong (in Waldron's sense) where our intentional or negligent promulgation of racist stereotypes is protected by our freedom of speech: we have a moral duty not to intentionally or negligently promulgate such stereotypes, and may be blamed and criticized for it, and yet may have a right that others not interfere with our speech so as to enforce our compliance with the duty.

But the right to err held by those exercising legitimate power is not best understood as a "right to do wrong" of this sort. The errors that the right to err covers are, even though morally *regrettable*, not ones for which we can morally *criticize or blame* the person making them. If they were acting legitimately, then the judge and legislators discussed earlier did what they could reasonably be expected, or asked, to do. Indeed, they often did what they were required to do. And yet their doing so ultimately led to a morally suboptimal

outcome. They committed, I think we should say, an error that set back another's interest-protected-by-a-right, and yet they did not wrong the victim, because the right that ordinarily protects the victim's interest was not a right held against judges or legislators when they are engaged in a legitimate exercise of their power. (Our moral response to the error is similar, in some respects, to how we treat moral wrongdoing for which the agent has an excuse. But we must not overemphasize this similarity. Most important, excuses do not usually insulate us from compensatory obligations: I may be excused, or even justified, in taking your car without your consent if I need it to drive my wife to the hospital in an emergency. Yet I still owe you compensation for my non-consensual use of your property. So the sole purpose of highlighting the similarity to excuses is to resist the assimilation of a legitimate authority's right to err to the "right to do wrong" Waldron analyses.)

Focusing now on the right to err understood in this second way, what more can we say about it? Two points are worth highlighting. First, we can easily explain the legitimate authority's insulation from compensatory demands for (some of) its mistakes: Bearers of legitimate power have an underlying liberty right which undercuts such compensatory claims, rather than a self-standing claim right against being forced to compensate victims who nonetheless retain a moral right to compensation. (This is not to deny that there are also cases where the latter is the more plausible explanation. Certain instances of sovereign immunity are best understood as involving, not the genuine absence of an obligation to compensate the victims of one's errors, but instead a claim right against enforcement, or immunity against legal proceedings, grounded in institutional considerations about the separation of powers. Immunity so justified seems to me to be sufficiently different from the "right to err" that I set it aside here.)

Second, we can say more about the precise content of the liberty right. In a related context, Thomas Christiano has suggested that legitimate authorities have a liberty right to "make decisions as [the authority] sees fit."¹⁶ Yet this does not seem to capture how we think about standard instances of political and legal authority. Just consider again a court exercising its legitimate authority over the parties before it. Clearly there are limits to the considerations on the basis of which the judge may make a decision. And though

matters are once again less perspicuous in the case of legislative authority, the same is true there. Where, for instance, a democratic legislature fails to even treat as a reason for or against a policy its effects on the interests of certain of its subjects, or fails to make an adequate effort to get these reasons right, and its erroneous policy decision harms these subjects, the decision lacks moral insulation from these subjects' compensatory demands.

A legitimate authority's right to err is, I want to suggest, best understood as constituted by the *absence* of a duty to get the matter right, but the *presence* of a duty to *take due care* to get the matter right, and to make the decision *based on the right considerations*. Consequently, a bearer of legitimate authority is, in an important sense, not *less* restricted than someone who acts without legitimacy; she is, rather, restricted *in different ways*, subject to different moral requirements. In particular, she is usually under various constraints about how to deliberate, and on the basis of what reasons to act, that do not apply to others; and it is the satisfaction of these constraints that insulates her from the alternative duties that those others are under.

WHENCE THE RIGHT TO ERR?

Can we say more about the bases of legitimacy understood as a right to err? How can we explain that someone has a liberty right to engage in pursuits even if she sets back interests of others ordinarily protected by (claim) rights, but is in turn under a deliberative constraint to act on the basis of certain considerations only? In this section I sketch what I think is the most plausible answer (without, however, being able to defend the proposal in anything like the detail that the issue deserves). I begin by saying something about the kinds of cases with which I have (mostly implicitly) contrasted the actions of legitimate authorities: cases, familiar from our everyday interactions with other private citizens, in which agents must generally bear the costs of their own mistakes. Only then will I turn to cases—if not less familiar, then at least much less discussed among philosophers—of agents who are insulated from such costs. Before I begin the discussion proper, let me note that I will say nothing here about consent, even though it is one basis on which an agent can avoid compensatory obligations for costs her

actions impose on another. Our concern is ultimately with explaining how legitimate political and legal institutions (and those acting for them) can have a right to err; and all the familiar arguments against consent-based justifications of political authority apply equally to justifications of a political institution's right to err.

On a familiar view of central moral norms governing our interactions (and, especially, our right to compensation where interactions go wrong), these norms strike a balance between the interests each agent has in pursuing her own projects and aims, and the interests others have in not being inhibited in their own, similar, pursuits. Put somewhat grandly, these norms enable us to live alongside each other as free and equal persons. Let me offer some examples to make this thought more concrete.

As an embodied agent, most (if not all) of my pursuits require use of my body. So I have a corresponding interest in controlling my body and what happens to it. This interest explains why others must generally not touch or use my body without my consent. "Generally" only because the prohibition might be lifted where allowing another to touch or use my body without consent would impose a small burden on me, while disallowing it would impose a great burden on them. (If you are about to be crushed by a Boulder, and the only way to escape it is to jump out of its path and onto my foot, you may do so even if without my consent.¹⁷) But even then, it will often be the case that, though what you did was justified, you must compensate me for the setback to my interests that I suffer as a result. (Your bruising my foot was justified, yet you still have to pay for my visit to the doctor.)

Similarly, since the pursuit of our projects requires the use of external resources, my corresponding interest in using, and more generally controlling the use of, objects in the world explains why I have property rights; and others' interests in pursuing their own projects explain why my property rights must be limited (including by their property rights). Normally others must not use my property without my consent; but sometimes they are permitted to do so (say, in case of an emergency). Yet when they do, they will usually have to compensate me for the use they made of what is properly mine.

And (to mention one last example) my interest in pursuing my own projects, without being overly dependent on the projects of others, explains why I am permitted to take actions that impose

some not unreasonable risks on others. But their interests in not being overly dependent on my choices explain why I must not take unreasonable risks, and negligently impose harm on them. When someone does engage in action that violates these duties, and thus oversteps the boundaries that strike a fair balance between her interests and those of others, then she must compensate those she has wronged, and put them back in the position to which they were entitled as a matter of justice or fairness.

Much more would have to be said to fill in this (very partial) picture of some of the central moral norms governing our interactions. Still, I think what I have said may suffice to motivate two thoughts. First, it is plausible that the norms this particular account explains normally regulate only what we do, not why (for what reason) we do it. This reflects the asymmetric interests that the different parties have with regard to an agent's permission to act. The agent herself has an interest in freely pursuing her own aims and projects. These aims and projects provide specific reasons for the actions she undertakes, or give her actions their particular point or purpose. So it matters greatly to her *on what reasons* she may act, because limiting these reasons would limit the aims and projects she can pursue. Others, by contrast, have an interest, first and foremost, in being insulated from the effects of the agent's actions on their own autonomous pursuits. But these effects depend on *what* the agent does, not on *why* she does it. So, others' interests justify imposing restrictions on the agent's freedom to engage in certain actions (those that would unduly interfere with or set back others' endeavors), but do not justify imposing restrictions on the reasons for which she may act.

Second, the account just sketched also suggests an answer to the question how the costs of mistakes—including some reasonable mistakes—are to be distributed. The rights others have against me insulate them from bearing the costs associated with the pursuit of my projects and aims. My making mistakes about the proper limits of my sphere of freedom is among the costs of these pursuits. As long as I make a mistake, but my mistake does not lead me to overstep the boundaries set by others' rights, the cost of the mistake falls on me. (If I mistakenly think that the property line runs closer to my house than it does, or that an action is riskier than it in fact is, and I therefore abstain from a course of action that would have

been more valuable to me than the one I take instead, then this is a cost that I must bear.) And if my mistake leads to my overstepping these boundaries, and I thereby create costs on others, I owe them compensation. Why? Because the mistake is part of my pursuing my own projects, and the very point of the boundary drawn by others' rights is that it insulates them from bearing (certain) costs associated with these pursuits.

It is against the background of this (to philosophers I believe reasonably familiar) picture of central moral norms governing interactions and compensation that I want to explain the seemingly special case that has been the focus of this chapter: the case of an agent who, acting legitimately, is at liberty to engage in actions that set back interests of others ordinarily protected by rights, and thus does not owe compensation where her actions do set back these interests. Here is the basic idea: The picture just sketched assumed that each agent acts in the free pursuit of her own projects and aims, and must bear the burden of the mistakes she makes in that pursuit if she oversteps the boundaries set by others' rights. But sometimes an agent acts, not in the free pursuit of her own projects and aims, but *for another* (in a sense yet to be clarified). And where the agent acts for another in this way, and does so for the other's sake (in a sense that also requires further clarification), there the costs of (at least some of) her mistakes properly fall on the person for whom the agent acts, rather than on the agent who in fact commits the error.

To make this thought intuitively plausible, consider a simple example. Imagine once again that C has fallen into the water (having ignored a warning sign against playing on the bank), and A is available to rescue C. To rescue C, A borrows B's boat, which gets damaged in the process. It seems intuitively clear that C is morally required to bear the cost of the rescue mission: Even though A in fact damaged the boat, C must compensate B for it. (This will in practice often be institutionalized as a duty to indemnify A against B's demand for compensation.) C must do so even if A could, in fact, have rescued C without using B's boat, and even if the damage to the boat is due to a mistake A made (say, he didn't see a buoy in the water, and collided with it, thereby denting the boat).

Under what conditions would we want to say that A *acts for C* in cases like this, so that C is on the hook for what A did (including

A's mistakes)?¹⁸ There are at least two such conditions. The first is a *deliberative* condition: A must be acting on the basis of certain reasons only—in the example just mentioned, reasons tied to the project of rescuing C. For, imagine that A borrows B's boat, not to rescue C, but for his own pleasure. Yet once A is out on the water (and after he has collided with the buoy), he sees, and rescues, C. Even if taking B's boat would have been necessary to rescue C, and so A ought to have borrowed the boat had he seen C's predicament from the shore, the fact that A in fact took B's boat for another reason (and dented it while pursuing the project associated with those reasons) is sufficient to put A, rather than C, under a duty to compensate B for the dent.

What explains this judgment? I want to suggest that, where A deliberates in the right way, A acts for C, not just in the sense of benefiting C, but in the sense of adopting C's practical position. A adopts C's practical position by acting only on the reasons that C has¹⁹—in light of C's aims and projects, and of the rights of others insofar as they limit their pursuit—and foregoing the freedom he, A, would ordinarily have to act on whatever reasons he sees fit in light of his own projects and aims. In practice, this means that A must, for instance, choose what course of action to take by considering only how different courses affect C's projects and aims, not by how they affect A's own.

But why should the fact that A acts for C in this way suffice to make it incumbent upon C to bear the costs of A's action? By itself, it does not. For the deliberative condition is only the first of two that must be met. There is also a second, *justificatory*, condition: A's acting for C (in the way just described) imposes a duty on C to bear the costs of A's so acting only if A's so acting is itself *in C's interest even if it makes C liable for the costs of A's so acting*. In other words, whether A acts for C, constrained by C's reasons, may be up to A. (It may just happen to be one of A's projects.) But whether A's acting for C is such that C must bear the costs of A's action is not up to A, but depends on C's interests only. It is only if A's acting for C (even if this means C has to bear the correlative costs) can be justified by appeal to C's interests alone, independently of any additional interest A has in doing what he is doing (or that anyone else has in A's doing so), that A's acting for C is compatible with C's not being unfairly put on the hook for A's projects or aims.

Notice that what matters here is whether C's interest justifies A's acting for her, not whether it imposes a duty on A to do so.²⁰ C's interest may not suffice to put A under a duty to rescue C, because A's countervailing interests in not being subject to excessively costly requirements prevails.²¹ But that A is free not to act for C does not show that A is not justified in acting for C solely on the basis of C's interests; and when A does, then A is indeed fully acting for C, with all of the consequences this has for the proper distribution of the benefits and burdens of A's mistakes. To see this, imagine that the rescue mission is in fact dangerous: The water into which C has fallen is quite treacherous, so that the risk to any would-be rescuer is too great to make the rescue mandatory. Yet A, in an act of supererogation, goes ahead anyway, and saves C, though once again at the cost of denting B's boat. It would seem odd to suggest that C would owe no compensation here, just because A had a choice, morally speaking, whether to rescue C, when he exercises that choice solely on the basis of the reason that it is in C's interest to be rescued.

If A's action satisfies the two conditions, A has a right to err when rescuing C—A is at liberty to take actions (like use C's property, touch C's body, or even break C's arm) that would ordinarily be impermissible, and thus does not owe compensation for them. Why? Because if A abandons his ordinary freedom to pursue his own projects and instead acts solely in the pursuit of C's projects and aims, and his doing so is good for C (and that is why A does it), then it seems fair that C, for whose sake A's action is undertaken and in whose interest A's undertaking the action is, also bears the burdens associated with it. Put differently: Where the relevant conditions are satisfied, A's action is counterfactually dependent on the benefits that it provides to C. It is if, and only if, A's acting for C (that is, pursuing C's project) is good for C, and A in fact acts for C (that is, makes his choices based solely on the basis of C's reasons for action), that A's acting for C also puts C on the hook for the potential downside of A's so acting. And when A acts for C under these conditions, then (i) making A liable to bear the costs of his own mistakes threatens to put him on the hook for another's projects and aims in a problematic fashion, whereas (ii) making C liable to bear the costs of A's mistakes, though it makes C dependent on A's actions, does not put C on the hook for

another's projects and aims (since the aims and projects that A is pursuing are necessarily C's, in the sense that A's actions are subject to a deliberative condition tied to the reasons that derive from C's projects and aims).

This account also explains which of A's mistakes C is indeed liable for, and which ones A must bear. C is liable for those of A's mistakes that someone with A's capacities would make when properly guided solely by C's reasons. For instance, when deciding whether to spend more time on getting the matter right, or instead acting now based on more limited information, the costs and benefits of either option must be weighed from C's point of view, in light of C's projects and aims. And if A's capacities are such that the likelihood of mistakes is so great that the likely costs of A's acting for C exceed the benefits, then the justificatory condition is not satisfied, and A's action cannot in fact be attributed to C.

The general structure of the argument sketched here straightforwardly extends to institutions and their actions.²² They (and those acting for them) are at liberty to engage in certain otherwise wrongful actions vis-à-vis their subjects, and insulated from compensatory demands that would otherwise apply to agents committing such acts, if these institutions act for their subjects (the institutions satisfy certain deliberative constraints tied to the subject's projects and aims) and if their acting for their subjects in this way is itself in the subjects' interest (the institutions satisfy the justificatory constraint).

That the legitimacy of legal and political institutions is structurally continuous with the distinctive rights of certain individuals—those suitably acting for another—may seem surprising. But I think it simply reflects the fundamental unity of the moral domain. There is, however, one important feature of legal and political institutions that makes the account offered here especially apposite, and a concern with legitimacy as a right to err especially pressing.

Both authoritative directives and coercive threats—the two forms of power most central to legal and political institutions—involve one agent's intentionally changing another's reasons for action.²³ What is more, these exercises of legal or political power are normally intended not just to provide a minor change in the subject's reasons, but to practically *settle* how the subject ought to

act—to create a conclusive reason for a particular course of action. If A has such *directive* power over S, then A is enabled to effectively settle what S will do (at least if S is rational), and thus to *direct* S's rational agency at will. And just as A's touching S, or harming S, is acceptable only if A's doing so is respectful of their asymmetrical relation to S's body, so A's having and exercising directive power over S is acceptable only if it respects their asymmetrical relation to S's agency.

S's body is not simply available for use by others to pursue their own aims and projects; and neither is S's agency. So if S has no duty to contribute to A's projects and aims, or to bear any burden to enable their pursuit, then A's exercising directive power over S in their pursuit is incompatible with S's status as an independent moral agent.²⁴ In turn, if A's directive power over S is to be compatible with S's moral independence, and the relation between A and S morally appropriate, then A's having and exercising directive power over S must be suitably conditioned on S's own projects and aims. As a slogan: When it comes to A's power to direct S's agency, A must have and exercise that power *for* S.

And so we are also in a position to better understand the relation between the different conceptions of legitimacy that I sketched at the opening of this chapter, which focus, respectively, on the possession of a normative power, the existence of a morally appropriate relationship between ruler and subject, and an institution's right to err. That an institution has authority (and, more generally, directive power) over subjects raises the question whether the institution stands in a morally appropriate relationship to the subjects, one that is respectful of the subjects' status as independent moral agents. To ensure that its authority is compatible with the subjects' moral independence, the institution must have and exercise its authority for, and for the sake of, the subjects. And if the institution acts in this way, its reasonable, good-faith errors need not, as a matter of fairness, be borne by the institution or its agents rather than by the subjects for whom the institution acts.

CONCLUSION

By way of conclusion, let me return to one of the examples from which this chapter began. Consider again a court adjudicating a

dispute. Such a court has directive power—the power, for instance, to impose on Defendant a duty to pay Plaintiff \$1,000, even though Defendant would otherwise have been morally free to choose what to do with that money. Why does Judge not owe compensation to Defendant for the loss Defendant suffers as a result of the erroneous decision? Because Judge is, in the relevant sense, acting *for* Defendant: Defendant has reason, and perhaps an obligation, to resolve the dispute with Plaintiff in a certain way, peacefully and fairly. Judge helps Defendant—and Plaintiff—to achieve this, by adjudicating the dispute in light of the considerations that properly bear on the question at issue between them. And so Judge, acting on the basis of the appropriate considerations, acts for them, even where the ultimate decision is erroneous.

The matter would be different, however, if Judge's decision-making did not satisfy the deliberative or justificatory condition. At times this may effectively undermine Judge's authority and leave Defendant without a duty to obey the verdict. But often it will not have this effect: Defendant will still be under a duty to obey Judge's decision, because that is, say, the best way to effectively settle the dispute with Plaintiff in a way that is suitable to their relationship. In that case, Judge has the power to impose a duty on Defendant, yet lacks a liberty right to exercise that power even where doing so sets back the Defendant's interest in keeping the \$1,000, which is ordinarily protected by Defendant's property rights.

Defendant therefore might be morally permitted to seek to recover the loss from Judge—if not via the legal system, then by acts of self-help. What if Judge sends a sheriff to enforce the verdict? If the sheriff enforces the verdict conditional on its actually imposing a duty on Defendant, then sheriff might in fact be acting for Defendant in the relevant sense, and act legitimately even where the decision enforced was made illegitimately. But if the sheriff's action is not suitably counterfactually dependent on Defendant's duty, and instead simply depends on the sheriff's beliefs about his own obligations, qua executive official, to obey Judge's order, then the sheriff's action would be illegitimate too. And if the enforcement action would unjustly burden Defendant (as is likely the case if the judgment it enforces is erroneous), then Defendant may be morally permitted to redirect the cost of the illegitimate enforcement toward the sheriff, and impose, for instance, defensive harm

on the sheriff to ensure that she is not deprived of what is, by right, her own. So the issue of legitimacy as a right to err also bears, in crucial ways, on our right to resist government actors who abuse their power, and treat it as if it were available to them for purposes other than the sole legitimate one, of serving those over whom the power is exercised.

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NOTES

1. For a useful articulation of this distinction, see Richard Fallon, "Legitimacy and the Constitution," *Harvard Law Review* 118, no. 6 (2005): 1787–1853. Notice too that I treat an institution's legitimacy as conceptually, and practically, separate from its overall justifiability. For an influential discussion of this distinction with which I am in outline (though not in its details) sympathetic, see A. John Simmons, "Justification and Legitimacy," *Ethics* 109, no. 4 (1999): 739–771.

2. For approaches fitting this characterization, see, e.g., Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); Simmons, "Justification and Legitimacy"; Arthur Isak Applbaum, "Legitimacy without the Duty to Obey," *Philosophy and Public Affairs* 38 (2010): 215–239.

3. For otherwise quite different theories that nonetheless all focus on the quality of the relationship between ruler and subject, see, e.g., John Rawls, *Political Liberalism*, Paperback ed. (New York: Columbia University Press, 1996); Niko Kolodny, "Political Rule and Its Discontents," *Oxford Studies in Political Philosophy* 2 (2016): 35–68; Amanda Greene, "Consent and Political Legitimacy"; Daniel Viehoff, "On Authority, Legitimacy, and Service: Discussion of the Morality of Freedom," *Jerusalem Review of Legal*

against Plaintiff. On the other hand, if Plaintiff comes to realize that Defendant did not in fact wrongfully harm him, then it is conceivable that Plaintiff has a moral duty to return the damages award to Defendant.

9. There is an ambiguity here worth flagging: I mean to say both that the legislators qua individuals do not owe such compensation, and that the legislators qua legislators—or, better, the legislature as a body—does not owe compensation, though it does (as the next paragraph explains) have an obligation to seek a fair distribution of benefits and burdens over time, and so must seek to include, among the considerations on which it makes future decisions, facts about past decisions and their distributive effects.

10. In fact, justified authority differs not just from legitimacy as a right to err, but also from the third sense of legitimacy mentioned earlier, according to which it is a matter of the moral appropriateness of the (power) relation between ruler and subject. For discussion, see Viehoff, "On Authority, Legitimacy, and Service."

11. See, for example, Raz, *The Morality of Freedom*; Perry, "Political Authority and Political Obligation." It also plays a central (though in some ways less direct) role in recent theories of democratic authority, including Thomas Christiano, "The Authority of Democracy," *Journal of Political Philosophy* 12, no. 3 (2004): 266–290; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008); Daniel Viehoff, "Democratic Equality and Political Authority," *Philosophy and Public Affairs* 42, no. 4 (2014): 337–375.

12. For a more detailed discussion of examples of this sort, and why we should still consider them instances of practical authority properly understood, see "On Authority, Legitimacy, and Service."

13. See, e.g., Raz, *The Morality of Freedom*.

14. See, e.g., Enoch, "Authority and Reason-Giving."

15. Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92, no. 1 (1981): 21–39.

16. More specifically, he says that a right to rule (as contrasted with a mere permission to coerce or a mere power to impose duties at will) "includes a liberty right on the part of the authority to make decisions as it sees fit [as well as] a power to impose duties on citizens." Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008), 240–241. Christiano also suggests that a right to rule includes a claim right to obedience. As mentioned earlier, I simply set this issue aside here.

17. I borrow this example from Victor Tadros, "Independence without Interests," *Oxford Journal of Legal Studies* 31, no. 1 (2011): 200.

Studies 14, no. 1 (2016): 113–124; Viehoff, "The Truth in Political Instrumentalism," *Proceedings of the Aristotelian Society* 117, no. 3 (2017): 273–295. Notice that asking about the moral acceptability of the relationship does not settle whether the institution is justifiable all things considered, and thus legitimacy so understood need not collapse into justifiability.

4. Let me flag that I do not take these approaches to be competitors so much as alternative, and in principle compatible, attempts to articulate normative claims central to familiar legal and political institutions and practices. So, in offering this third account of legitimacy, my aim is not to supplant but rather to supplement existing discussions of the normative features that are central to, and important for understanding the structure of, such institutions and practices.

5. Whether it also extends to cases where the applicable law fails to properly reflect the parties' moral entitlements depends on whether that law is morally authoritative for the subjects.

6. Studies by Tom Tyler and others find that people who view a judicial institution as fair, and therefore legitimate, also accept its adjudicative decisions even if these decisions are (the subject believes) substantively mistaken or unjust, and harmful to the subject's own interests. See, e.g., Tom R. Tyler, *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 2006).

7. See, e.g., David Enoch, "Authority and Reason-Giving," *Philosophy and Phenomenological Research* 89, no. 2 (2014): 296–332; Stephen Perry, "Political Authority and Political Obligation," *Oxford Studies in Philosophy of Law* 2 (2013): 1–74. For Hohfeld's original account of normative powers, and their relation to other normative incidents, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. David Campbell and Philip A. Thomas, Classical Jurisprudence Series (Albany, VT: Ashgate/Dartmouth, 2001). It is common in discussions of authority to speak of the subject's duty to obey. As Perry points out, the proper counterpart of a Hohfeldian power is a Hohfeldian liability, rather than a duty. But since the duty to obey is a conditional duty (a duty to do x if directed to do x), it is easy enough to see how duties of obedience can often (though perhaps not always) be theorized as a matter of normative power and liability. Sometimes it is suggested that legitimate authority involves, not just such a duty, but a corresponding claim right to obedience. I think this is implausible as a general condition on authority (legitimate or other), and so just set it aside here, for the reasons discussed in Enoch.

8. I leave it open here whether Defendant has a moral claim against Plaintiff. On the one hand, I think it is clear that Defendant has a duty to pay up, and also a duty not to enforce whatever claim she may have

18. In answering this question I am, as I said earlier, setting aside cases where C has consented to A's acting for C.

19. And, ordinarily, only on some of these: Legitimate power tends to be circumscribed by subject matter, for reasons that I cannot discuss here.

20. Someone might in fact suggest that C does not owe such compensation precisely because A had a duty to rescue C. The duty reflects the fact that A could be asked to bear a certain burden for the sake of rescuing C; and so A is not entitled to have the burden relieved by subsequent compensation. But, as discussed earlier, that A must bear the burden of rescue if the alternative is to impose a much greater burden on C (letting C drown) does not show that A must bear it if the alternative is to impose that very same burden on C (by requiring C to compensate A for his loss). Whether A has a duty to rescue, and whether A is entitled to compensation for the loss borne when fulfilling the duty, are separate questions.

21. It is worth mentioning here that, though we commonly speak of a "duty to rescue," what we plausibly have in mind is usually a *duty to try to rescue*. This is easy enough to overlook because, in many of the cases commonly taken to give rise to a duty to rescue, what a successful rescue requires is sufficiently straightforward that there is no significant gap between (seriously) trying and succeeding.

22. This is not to say that working out the details of its application to institutions does not pose a number of challenges. To mention just one: Institutions serve many people simultaneously, and so one needs an account of what an agent ought to do when acting for several beneficiaries at once, especially when their interests aren't neatly aligned.

23. This and the next paragraph draw on Daniel Viehoff, "The Truth in Political Instrumentalism," *Proceedings of the Aristotelian Society* 117, no. 3 (2017): 285.

24. Notice that the problem just described arises even if the exercise of power imposes no further costs on the subject. Using me to pursue another's projects (absent some of the special conditions discussed earlier) disrespects my status as an independent moral agent, quite apart from any more concrete harm I suffer as a result.

OFFICIAL INTENTIONS AND POLITICAL LEGITIMACY

THE CASE OF THE TRAVEL BAN

MICAH SCHWARTZMAN

Seven days after his inauguration, President Donald Trump signed an executive order suspending entry into the United States of citizens from seven countries with Muslim majorities.¹ National security officials were caught off guard by the order, and its hasty implementation resulted in chaos and confusion at airports in the United States and around the world. The order was immediately challenged in federal courts on both statutory and constitutional grounds. A court in Washington State blocked its nationwide enforcement, and after a federal Court of Appeals upheld that decision, President Trump tweeted, "SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!"²

Instead of challenging the appellate court's decision, however, President Trump revoked his first executive order and issued a second one that largely resembled the first.³ This order, too, was purportedly justified on grounds of national security. And it, too, was immediately blocked by federal courts, which held that the second order, like the first, was motivated by hostility toward Muslims in violation of the Establishment Clause of the First Amendment, which prohibits religious discrimination.⁴ This time, President Trump appealed and was rebuked in the strongest terms. Writing for the Fourth Circuit Court of Appeals, Chief Judge Gregory declared that the order "drips with religious intolerance, animus,