Legitimate Agency Reasoning

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ARENA Centre for European Studies at the University of Oslo promotes theoretically oriented, empirically informed studies analysing the dynamics of the evolving European political order. The research is multidisciplinary and organized along four key dimensions: A European democratic order; the EU's executive order; expertise and knowledge in the EU; and European foreign and security policy.

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Abstract

The paper seeks to develop a framework for assessing the legitimacy reasoning in regulatory agencies. It starts by engaging critically with two prominent models. The first model sees the legitimacy of judgments as resting exclusively on their merits as sources of technical knowledge. By contrast, the second model acknowledges room for evaluative judgment, but construes this as a matter of specifying given policy ends. The paper argues that these models fail to capture how agency judgments should be governed by standards beyond both empirical science and ordinary politics. The proposal is to view the standards as flowing from the principle of reciprocity, familiar from public reason theory. The model advocated here highlights how responsiveness to policy ends is structured by a mandate and how fidelity to mandate requires 'political literacy', which is a distinct mode of disciplining evaluative judgments.

Keywords

The legitimacy question[1]

Countless aspects of our lives are increasingly coordinated, supervised and controlled by agencies that have been justified by legislators in terms of technical competence and independence from political processes.[2] Insofar as this means we are ruled by unaccountable experts, it appears to be an affront to democratic legitimacy. However, the spread of expert institutions can be interpreted differently. When designed with care, they may serve our politically defined ends and enable democratic rule (Christiano 1996: 169-78). Although we do not want the rule of experts as such, we need the rule of expertise in an appropriately constrained domain. This interpretation highlights the need for an institutionally attentive theory of potential legitimacy deficits, for example in terms of transparency and the preconditions for accountability. We need a grasp of how truth-sensitive mechanisms can be used to ensure that experts use their competencies in the right way (Holst and Molander 2017).

However, the idea that experts serve democratically settled ends faces us with a further legitimacy question. Suppose we have the appropriate forums to subject expert judgments to review, to what standards should we hold these judgments accountable? We need a theory of agency reasoning that shows what it means to be appropriately responsive to the political policy ends and values. Therefore, the goal of this paper is to identify a domain of legitimate reasoning in expert agencies. Given that unelected bodies are necessary for the effective functioning of a modern democracy, what principles should govern our verdict on the decision-making of experts?

This question has gained public prominence in recent years, for example in relation to the European Union's (EU) efforts to prevent future financial crises. It is worth taking a closer look at a concrete case here, before venturing to consider the general normative claims of legitimacy. In 2010, the EU established the European Market and Securities Authority (ESMA) as part of the new European System of Financial Supervision.[3] ESMA may adopt measures that are legally binding on member states when there is a threat to the orderly functioning and integrity of financial markets. The United Kingdom (UK) did not approve of this because it believed the powers of intervention gave ESMA political discretion that is prohibited by the principles of delegating authority in the EU.

Accordingly, the UK brought a case against the ESMA regulation before the Court of Justice of the European Union (C-270/12)[4]. The interesting aspect here is how the respective parties in the case argued. On the one hand, the UK argued that ESMA's

[2] For a particularly clear statement, see the communication from the European Commission 'The operating framework for the European Regulatory Agencies' (2002).

[3] See Everson (2014) for details, context and discussion of issues of legality.

[4] European Court of Justice (2014) (Case C-270/12) 'United Kingdom v Parliament and Council'.

mandate required it to 'make value judgments and carry out complex economic assessments'.[5] In particular, it held that the mandate to intervene on the basis of 'a threat to the orderly functioning and integrity of financial markets, or the stability of the whole or part of the financial system' necessarily rests on a 'highly subjective judgment'. These kinds of judgments, the UK said, 'cannot be categorized as decisions made on the basis of set criteria amenable to objective review.' The EU, on the other hand, was adamant that bodies such as ESMA are not involved in making policy choices 'but simply making a technical assessment in their field of expertise'. While the EU admitted that there is a need for judgment in the decisions of ESMA, these are 'complex professional considerations' separated from matters of policy. It claimed ESMA is designed to allow for 'swift intervention' based solely on 'technical and economic expertise and information'. In the end, the Court sided with the EU (against the legal advice of its advocate general).

Evidently, this case dragged the Court into a genuinely philosophical dispute concerning the possibilities of politically neutral, yet practically authoritative, expert judgment. This takes us back to the fundamental question of legitimacy. What kinds of reasoning can a healthy democracy delegate to experts? The EU argues that it is possible to constrain delegation to matters of technical judgment, whereas the UK questions whether professional decisions and policy matters can be neatly separated.

In this paper, I will first consider two models of reasoning for unelected bodies. The 'empirical knowledge' model sees expert reasoning as resting on a distinct form of legitimacy, namely a rigorous approach to empirical facts and neutrality regarding policy ends. Here, the criteria of legitimate judgment are the standards of science and any evaluative considerations beyond these standards should separately labelled as 'value judgments'. This contrasts with the 'specification' model, which sees the bodies as necessarily having to do normative work in specifying the broad ends set by the legislature. This makes the ends tractable for practical purposes and is considered legitimate if the specification is appropriately continuous with the larger the processes of popular will formation. The point of discussing precisely these two models is their suitability for explaining what is required of a theory of legitimate agency reasoning. Despite tensions between them, both models contain aspects that are necessary for adequate interpretation. Drawing on their respective merits, this paper develops a third model based on a conception of public reason. Specifically, the model foregrounds the standard of reciprocity and introduces an accompanying new concept of 'political literacy'.

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[5] All quotes used from the case are found in the judgment in European Court of Justice (2014) (Case C-270/12) 'United Kingdom v Parliament and Council'.

A new branch of facts

Let us begin by considering the idea of seeing the legitimacy of expert judgment as constrained to the domain of empirical facts. This model is systematically pursued in Frank Vibert's *The Rise of the Unelected* (2007). Part of Vibert's mission is to rid us of the idea that the legitimacy of expert bodies is due to a 'democratic overhead' where the elected legislature bestows authority. The unelected bodies are often seen as the agents of political principals, but this fails to respect the importance of having independent institutions of politically relevant knowledge. Vibert's claim is that expert bodies should be viewed more like the judiciary, which has its own standards for good judgment and thereby for assessing the legitimacy of decisions. In his vision of the new separation of powers, Vibert argues that politicians should not only respect the independence of the judiciary, they should also learn to 'stand back from the unelected [expert] bodies and to distinguish their judgments from political judgments' (Vibert 2007: 77).

On Vibert's account, the legitimacy of the unelected experts rests on a more rigorous approach to empirical knowledge, dissemination of information, and acknowledgment of uncertainty (Vibert 2007: 168). This is a strictly non-political foundation; it is about empirical facts and not political values. That is not to say that the account harbours any illusions that experts will remain completely neutral in terms of policy ends and make strictly technical assessments. Vibert is clear that unelected bodies will have to make political judgments. For example, an economic regulator trying to quantify the costs of proposed legislation will be guided by the 'normative assumption' of the social value of competitive markets (Vibert 2007: 122). However, the legitimacy of the expert authority depends on their ability to 'distinguish what is empirical and what are value judgments' (Vibert 2007: 166). The idea is that experts should be clear about when they are making 'normative assumptions' and make this transparent to the public. The model highlights a 'distinction between normative observations and factual', and the necessity of experts being 'constrained by facts' and attempting to be transparent about value judgments' (Vibert 2007:122).

This seemingly simple expectation of a clear and explicit separation between facts and political values leads to a dead end in terms of practical reality. The conceptual difficulties in drawing a clear separation between fact and value is one consideration (Putnam 2002), but even putting this aside, the model faces other challenges that require attention because they are instructive to our investigation. First, the idea that experts should publicly separate between political and technical assessments raises the question of what kind of speech act the flagging of 'value judgments' should be. A form of confession, perhaps?

The confessional aspect is suggested by the way the model restricts the sphere of valid agency reasoning to empirical observations and relegates 'value judgments' to the non-factual. That is, on this model 'fact' refers to non-moral observations backed by scientific methods and empirical data about events in physical space and time. This is of course a common way to narrow down the use of the concept

of a fact, but it creates problems when we are trying to uncover the legitimacy of agency judgments. That is because it makes the inevitable value judgments into something that is not amenable to objective review. However, a fact is simply a true proposition, and propositions can be about other things than the natural world, for example about what is good or reasonable. What makes a proposition true depends on the domain in question (cf. Scanlon 2014). The point now is not to settle any 'meta-ethical' scores. It is rather that for our purposes it is necessary to have a model that does not *a priory* preclude political and moral considerations from the facts to be tracked by agency reasoning.

The empirical knowledge model fuels the standard impression that in making value judgments experts are not merely venturing into the political sphere, but also beyond the domain of reasoning that can be rationally assessed in light of public standards. In general, being 'transparent about value judgments' appears to mean being candid about infusing decisions with something not appropriately assessable by common standards. It is something 'highly subjective,' as the UK argued in the ESMA trial. Consequently, whenever decision-makers think they have good reasons for their decision, they will be reluctant to add the qualifier that this decision is not merely backed by facts but also by 'normative assumptions'. In other words, the very model that excludes value judgments from the legitimate domain of agency reasoning undermines the normative expectation that experts submit their value judgments in separation from their empirical judgments.

In any case, insofar as there is a democratically supported interest in regulating financial markets at arm's length from legislative forums, making substantive evaluative judgments are inevitably genuinely part of the public mandate of agencies.[6] That is, the evaluative judgments are part of the mandated domain of reasoning for the agency and not something beyond the facts to which it is appropriately responsive. When the EU says, in the trial, that ESMA is mandated to make 'complex professional considerations,' it is *nolens volens* going beyond delegation of mere technical considerations. However, these considerations do not count against the basic idea of seeing the unelected as a separate branch with a distinct legitimacy foundation. Instead, they call for a more nuanced appreciation of what this foundation is. As it stands, the 'empirical knowledge' model considers 'value judgments' to be something foreign to the foundation. By contrast, we should supply the model with a more constructive account of the normative work done by the unelected branch. In the next section, I will investigate a potential model for this task.

The specification of political ends

Henry Richardson's *Democratic Autonomy* (2002) mounts an attack on the idea that expert agencies should be limited to the technical selection of means to the ends

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[6] I am abstracting from the special legal question of whether the EU has authority to delegate this kind of decision to an agency.

set by elected legislatures. Unavoidably, democratically specified ends will be have a significant degree of vagueness, which means that important evaluative decisions will have to be made by the unelected branch. Richardson seeks to deliver a theory of reasoning that explains how normative decisions made by unelected experts can be responsive to basic democratic principles.

The main thesis is that expert bodies ought to reason about how to specify the ends that have been set by the elected institutions. Richardson provides the example of how the Department of Transportation (DOT) had to interpret the broad idea of making transportation systems available to the disabled. Realising this democratically established intention required reasoning about how to understand the end itself, not merely determining the necessary means. For example, availability could be achieved by reforming the standards of the mainstream system, but one could also create a separate system for the disabled. This forced the agency to weigh considerations of cost-effectiveness against considerations of non-discrimination. Richardson argues that the role of expert agencies in such cases is to refine the broad mission into some more concrete and tractable idea while being 'appropriately constrained and guided by the statutes passed by democratically elected legislatures' (Richardson 2002: 217).

The merit of this account is that it acknowledges the legitimacy of normative reasoning in unelected bodies. It highlights how broad collective ends, such as protecting wildlife or stimulating small-business initiatives, cannot be delegated to agencies without also handing over a substantive responsibility to deliberate about how these ends should be interpreted. While it pays particular attention to cases from the US, it is similar in scope to this paper; it is intended as part of a general account of democratic governance and it uses the term 'agency' in a generic sense that is imprecise in distinguishing agencies from departments, bureaus, commissions, or offices (Richardson 2002: 11, 225). Despite its important focus on agency reasoning about political ends, I will nevertheless argue that the specification model fails to appreciate the lesson of Vibert's account, which is that the branch of unelected experts comes with distinct standards of judgment. That is, while the democratic pedigree of the legislative ends matters, we should not thereby conclude that the substantive evaluative standards of agency reasoning are determined by the 'democratic overhead' of the elected institutions.

The basic idea of the specification model is that the legislature does not have to set all the ends, as long as the reasoning about ends done by agencies is limited to specifying the statutory directives (e.g. Richardson 2002: 216-18). This constraint on deliberative processes is claimed to be justified in terms of precluding illegitimate political domination by the unelected. The relation is supposedly akin to the relation between a passenger and a taxi driver (Richardson 2005: 227). The passenger may decide upon some vaguely specified destination ('somewhere nice for a picnic') and the driver must give this some more determinate content. This image is revealing of the shortcomings of the model. It may be granted that legislators are often in the position of passengers asking agencies for a ride towards

some vague destination.[7] Nevertheless, when this is the case, this relation is structured by a mandate that disciplines the mode of responsiveness to legislative instruction. Agencies are to carry out their tasks in light of a broader public mission.

For example, the mission of the DOT is '[…]to serve the United States by ensuring a fast, safe, efficient, accessible and convenient transportation system that meets our vital national interests and enhances the quality of life of the American people, today and into the future.'[8] Note how this broader public duty requires a form of impartial concern for the welfare of all citizens, even beyond the constituency of the currently elected politicians. This statement does not offer a rule for decision-making, but rather a basis for a principled mindset to guide agency officials in their interpretation the specific directives. This mindset is required for what I will later call 'fidelity to mandate'.

This broader public mission indicates why it is misleading to speak of the authority delegated to agencies as grounded in a concern not to 'overwhelm' the deliberative capacities of legislators (Richardson 2002: 116). Being overwhelmed is associated with quantity—for example, by the amount of issues or interests that have to be considered and negotiated. However, the challenge for legislators is not so much one of being overwhelmed as of being unsuited for the tasks in question. In other words, legislative expert delegation is as much an act of deference to a special domain of deliberative authority as it is an act of instruction. In the next section, I will begin to offer an account of how the judgment of agencies can merit respect as something more than the refinement of legislative ends.

Giving purpose to directives

Good professional judgment is subject to standards beyond satisfying legislative intentions. Specification means narrowing down or focusing given directives in order to determine a way to achieve them (Richardson 2002: 104). However, the fact that agencies have broader public missions calls for more than specification; it calls for the more comprehensive deliberative process of transposing the directive to a new domain of practical reasoning and a distinct interpretive context.

As the specification model agrees, this domain of reasoning cannot be understood in terms of technical competence alone. What the model leaves out, however, is the importance of seeing the agencies as normative orders in their own right. In this regard, it is worth drawing attention to how their normative structure resembles

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[7] It fits EU governance in the sense that '"framework goals" (such as full employment, social inclusion, "good water status", a unified energy grid) and measures for gauging their achievement are established by joint action of the Member States and EU institutions. Lower-level units (such as national ministries or regulatory authorities and the actors with whom they collaborate) are given the freedom to advance these ends as they see fit' (Sabel and Zeitlin 2008: 271).

[8] U.S. Department of Transportation (2016) 'About DOT'. Available at: https://www.transportation.gov/about [Accessed 5 April 2018].

that of the professions. In addition to having similarly broad public missions, public agency officials are bound by ethical principles that guide the application of knowledge to the mandated tasks. Their commitment to these principles manifests itself in several ways, for example in the form of public assurances in deliberative forums and in the form of formal declarations. Concerning public assurances, agencies are prone to affirm their allegiance to principles of, for example, independence and impartiality in response to accusations of industry bias. That is, they have a 'direct line' to the broader public in addition to the legislature.[9] These assurances often appeal to the same principles that are articulated in codes of ethics for agency staff. Such codes highlight duties of justification, fairness, non-discrimination, courtesy, lawfulness, and more. In the EU, the main principles of the codes are legally grounded in a 'right to good administration' in the Charter of Fundamental Rights (Art. 41).

The specification model highlights how legislation provides the normative content of deliberation. The new ends set by agencies are supposed to be the outcome of a process of specifying broad ends. The point of the current section is to show how there is normative substance that is legitimately part of agency deliberation yet not derived from any particular policy legislation. Like professions in general, the agencies generate 'promissory' commitments to the public through various normatively significant acts (cf. Eriksen 2015). This is part of their publicly recognised mandate and thereby a legitimate ground of reasoning. Therefore, in addition to making vague legislative ends more concrete, the deliberative task is also to interpret the ends in light of a conception of how the agency can best respond to a broader political mission.

Those who are to realise the directives need to have some general and common mission that can give sense and direction to their activities. It may be hard to pin down this mission when it has become ingrained in organisational culture and part of the background framework for interpretation, but when it is threatened it can compel role holders to express their feeling of agency disunity. A recent case from the US Foreign Service institute shows how a perceived lack of sound political directives creates a need to speak truth to power. The director left office because of what she regarded as lack of political respect for the mission of the Foreign Service. In her farewell speech and subsequent interviews, she highlighted the agency's duty to subject instructions to general moral and legal principles, and to demand an appropriate vision and clarity from the political leadership about what the agencies of the State Department should be doing.[10]

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[9] See for example the response to accusations of conflicts of interest in controversial herbicide decisions by the European Chemical Agency. Available at: https://echa.europa.eu/-/reply-to-ngos-on-the-independence-and-transparency-of-echa-s-risk-assessment-committee.

[10] See the op-ed Cohen, R. (2017) 'The Desperation of our Diplomats', New York Times, 28 July. and the podcast *The Daily,* 20 Oct. 2017.

The practice of imposing purpose on directives in order to unearth their meaning and claim to allegiance–what Ronald Dworkin calls 'constructive interpretation' (1986)—is not a matter of filling out a blank normative space with personal conviction. When legitimate, the imposed purpose is derived from the mission of the agency itself. This constructive dimension gets lost in the specification model. It tends toward claiming that the standards of agency judgment do not involve subjecting the given legislative directive to a broader duty to the public good. For example, there was allegedly no 'lapse' in the professional role of the official in the Small Business Administration who tried to favour chemical wholesalers and gasoline distributers by pushing for weakening environmental standards regulating petroleum storage facilities (Richardson 2002: 226). The justification for disregarding environmental interests is, supposedly, that there are special concerns for each agency to promote and specify, and this one-sided pursuit of business development counts as valid form of specification. On this view, the members of the US Congress who called for an ethics investigation into the official's mode of promoting business interest did not fully understand what it means for an agency to be especially concerned with the goods under its purview.

If we see professional judgment as being appropriately governed by a broader public mission, however, it is indeed fully possible that there was a lapse on the part of the official. While arguing for weakening environmental standards may not culpably violate the task of promoting small business development, it can nevertheless reveal a faulty understanding of how the agency should be serving the community. As it happens, when Richardson attempts to steer his model away from an untenable form of agency monomania, he comes close to suggesting a constraint that seems to require something like the constructive interpretation gestured at in this section: 'The special concern and responsibility that each agency has neither frees it from a generalised responsibility to the public good in general nor precludes it from keeping the general public good in mind' (Richardson 2002: 226). What we need, then, is a way to conceptualise that claim as more than an external addendum to a model of legitimate agency reasoning.

The model of public reason

The critical engagement with the two models of legitimate agency reasoning has brought out the desiderata for the third model. We need a model that sees evaluative judgments as part of the genuine domain of agency reasoning, not something that should be flagged as beyond the 'facts.' Furthermore, these evaluative judgments do not simply specify directives, but rather interpret them in light of a broader public mission that can include, for example, the interests of future generations. My suggestion now is that we use the model of 'public reason' and the concept of 'political literacy' to determine the domain of legitimate agency judgments.

Plain rightness and acceptability

The idea of public reason has been most influentially developed by John Rawls (2005). He held that all matters that touch on constitutional essentials or basic questions of justice should be settled by a political conception of justice that all citizens can be reasonably expected to endorse (Rawls 2005: 137). His conception therefore highlights legitimate reasoning as governed by the standard of reciprocity, which calls on legislative discourse to seek common normative ground in the face of reasonable disagreement. Justification should appeal only to reasons acceptable to all motivated to find fair terms of cooperation and rely exclusively on shared sources of knowledge.

Applying this standard to agency reasoning requires facing some objections that have been levelled at the general conception of public reason. Note first, however, how agency reasoning is initially a more plausible candidate than the broad public sphere to which the idea of public reason is sometimes applied. That is, some interpret it as meant to apply to all citizens *qua* citizens.[11] This explains part of the controversy it still attracts concerning restrictions on religious or publicly inaccessible arguments. Rawls, however, restricted his conception primarily to what he called 'the public political forum'[12] of judges, public officials, and candidates for public office (Rawls 2005: 442-43). This forum also covers citizens *qua* voters on matters touching on constitutional essentials and basic justice. The restriction of scope is important for the democratic merits of political debate. We should not expect participants in the broad public sphere ('the background culture') to bracket their deepest convictions in the belief that they are inaccessible to others, because the point of the public sphere is to discover what is accessible and acceptable. On the other hand, it is part of the very idea of professional judgment that it be supported by public reasons such as laws and generally accepted principles (Molander et al. 2012: 219-20).

Nevertheless, it is not obvious how to apply the criterion of reciprocity even within the more limited 'public political forum,' let alone to agencies that are primarily justified in terms of expertise. The aim here is not to defend the Rawlsian conception of public reason as such, but to use its standard of reciprocity as a point of departure for a conception of legitimate agency reasoning. On the model to be developed here, adequate justifications must be responsive to some basic elements of political morality. In particular, drawing on Barbara Herman's notion of 'moral literacy' (Herman 2007), I will argue that the public reasoning of agencies requires a capacity to read and respond to political ends in a way that registers the normative salience of competing interpretations of values. It will be useful to develop this conception in response to a criticism of the idea of reciprocity. The

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[11] For example, Eric Beerbohm (2012) believes the theory of public reason requires an inhumanly demanding idea of 'philosopher-citizens'.

[12] As Charles Larmore (2008) has noted, the term 'public political forum' misleadingly resembles the 'public sphere' (Habermas' term for the open arena of political debate) and the confusion created by this misnomer may be part of why Rawls does not adequately respect this restriction himself.

objection is that the doctrine of public reason is empty, even in the case of judges, because believing something to be obviously correct seems to entail a belief in acceptability:

> If I believe that a particular controversial moral position is plainly right—for example, that individuals ought to take charge of their own lives and bear the financial costs of the mistakes they make themselves—then how can I not believe that other people in my community can reasonably accept the same view, whether or not it is likely that they will accept it?
>
> (Dworkin 2006: 252)

Dworkin's criticism is important because it forces us to specify what goes into the constraint of appealing exclusively to considerations that all reasonable members of the community can accept. It is also useful because it challenges wider or more permissive notions of public reason that do not use the somewhat obscure Rawlsian notion of 'comprehensive doctrines' in determining constraints, but prefer to speak more plainly of accessibility as grounded in reciprocity (cf. Gutmann and Thompson 1996). What counts as a legitimate reason is not something we can answer by labelling theories and positions as 'comprehensive' in advance, but something that must be worked out in context. As we will see in the case of agencies, the legitimacy of invoking controversial political considerations depends on the question and the normative situation at hand. The strategy now is to use Dworkin's objection as an invitation to elaborate how an idea of public reason can structure the democratically responsible execution of political ends by agencies.

Political literacy in agencies

Dworkin's objection holds that public reason is asking the impossible of role holders, because the attitude of believing some controversial moral proposition to be plainly right allegedly precludes holding the belief that it is also reasonable to reject this proposition. However, the persuasiveness of this objection stems from the fact that it does not pause to detail what 'controversial' is supposed to mean. Why is it controversial? Reasonable people do not disagree on vague, context-independent claims such as 'people should take responsibility for their own mistakes.' Rather, they disagree on *when* it is fair to say that something is a person's own fault; how *harsh* the doctrine of responsibility should be in terms of consequences; how to *balance* individual responsibility against other concerns, for example for children who depend on the individual, and so on.

In keeping with the example of the objection, suppose Jane believes that it is plainly right that citizens should bear the costs of the financial mistakes they make themselves. More specifically, she believes this in a strictly 'luck egalitarian' sense.[13] Hence, her conception does not recognise reduction of economic

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[13] This a label put on theories that hold (roughly) that adverse circumstances brought about by choice do not generate claims of distributive justice. Elizabeth Anderson (1999) introduced the term in her criticism of a family of distributive theories.

inequalities as in itself a genuine social purpose, because some inequalities are the result of a *choice*. For example, a person may have less because of decisions to forego opportunities, make risky gambles, and so forth. Therefore, great inequalities may be morally in order. On Jane's view, a redistribution that is not highly sensitive to choice is viewed as a blatant misunderstanding of what moral respect of free and equal citizens requires. She considers this understanding of the limits to social justice as 'plainly right' and she is convinced that it is accessible and acceptable to all reasonable members of the community.

However, Jane has an agency role that requires her to make decisions that are relevant to this creed. She works for ESMA and now has to help prepare advice to the European Commission on how to realise the end of promoting 'social business.' This end concerns the promotion of enterprise that has the common good and social justice as primary mission.[14] According to the idea of public reason, preparing this advice requires Jane to interpret terms like 'social justice' and the 'common good' in a way that includes enterprises that are governed by principles that conflict with her view that people should bear the costs of their financial mistakes.

Public reason does not seem to be asking the impossible of Jane, but simply to presuppose what I call 'political literacy.' As developed by Herman, 'moral literacy' means a form of minimum moral capacity in understanding and responding to normative facts (Herman 2007: 98). The *political* subcategory of moral literacy, to be developed here, concerns competence in decision-making in the name of a community in which there is reasonable disagreement on how we should conceptualise and realise basic values. It is important to first distinguish the idea of political *literacy* from having a store of political *information*. That is, the idea refers to a form of knowledge distinct from what is measured 'Voter Achievement Exams' or the 'The News IQ Quiz.'[15] Knowing the name of the finance minister or the chairperson of an official committee is not evidence of political literacy unless one is also responsive to the values of political morality that constitute such roles. Someone who sees such roles merely as opportunities for private or parochial interests lacks an understanding of what they represent.

This form of literacy is about a sensitivity to values that is familiar from the aesthetic and moral sphere. As Herman points out, naming and dating the great nineteenth-century operas does not make one musically literate, one needs to appreciate the difference between Mozart and Verdi as well (Herman 2007: 80). Musical literacy requires a responsiveness to what the music is conveying. Similarly, knowing a list of sound moral imperatives does not make a person morally literate unless it governs her sense of what is worthwhile. Psychopaths have moral knowledge in a purely intellectual sense (they use it instrumentally),

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[14] See the consultation paper 'ESMA's Technical Advice to the European Commission on the implementing measures of the Regulations on European Social Entrepreneurship Funds and European Venture Capital Funds'.

[15] Caplan, B. (2013) 'A Cheap, Inoffensive Way to Make Democracy Work Better' and Pew Research Center (2018) 'The News IQ Quiz'.

but they lack the literacy that allows people to appreciate the gravity of moral situations.

The threshold for what counts as literacy will depend on the requirements of the practice. The most important practice-transcending criterion is the ability to participate in a way that allows for mutual respect. As applied to citizens *qua* voters, the threshold of competence will not reach to levels of complexity beyond such examples, but we must raise the bar when it comes to acting in the name of a political body (elected or not). Political literacy is a basic competence that enables people to understand value terms in a way that is sensitive to the institutional context of concern. It is partly to acquire what Lars Blichner (2007) calls a 'political language,' which makes 'communication across apparently different value and norm systems possible through the creation or discovery of common values and norms' (Blichner 2007: 158-59). For example, understanding what 'social justice' means in the context of giving advice on behalf of an agency involves the competence to include a range of reasonable conceptions as opposed to merely one's own favoured idea. Even though the political term 'social justice' may cover Jane's luck egalitarian conception, the term is not politically defined by this particular idea.

Political literacy in agency roles involves an understanding of what kind of authority the role has. There is nothing in this idea of political literacy that suggests a requirement of epistemic modesty or that it is unreasonable to believe that one has evidence that others do not appreciate. Suppose Jane restricts 'social justice' to the standards of luck egalitarianism. The problem is not that she is too confident in her own judgment. We can even assume that she is justified in her strong conviction concerning the general question of distributive justice, because the justifiability of this conviction is not directly pertinent. Having the correct conception of the link between responsibility and social justice does not mean having the political authority to implement it *qua* agency official. A moral conviction can be correct yet, politically speaking, not rise above the class of reasonable conceptions.

Claims that public reason requires undue epistemic modesty are sometimes provoked by a misreading of the status of the 'burdens of judgment.' Rawls introduced this term as to cover 'the many hazards involved in the correct (and conscientious) exercise of our moral powers of reason and judgment in the ordinary course of political life' (Rawls 2005: 56). The fact of such burdens of judgment may help justify the standards of public reason, but that does not mean that it prescribes an agnostic attitude on the part of those who are to comply with

the standard.[16] Thomas Nagel helpfully frames it as a matter of observing 'a certain constraint in calling for the use of state power to further specific, controversial moral or religious conceptions' (Nagel 1987: 216). There is a difference between thinking that a moral or religious claim is correct and thinking that it is legitimate a political power to enforce it.

Hard cases and content-independent reasons

The standard of political literacy may seem fair enough in terms of prohibiting specific conceptions of a political value from subjugating broader notions that are at work in legislative discourse. However, critics might say this is not helpful in the interesting examples where it is necessary to act on more specific conceptions of value. That is, agency officials will also have to decide hard cases and must inevitably take a controversial stand; there will be no default position or broad conception of value to fall back on (Dworkin 2006: 253). For example, agencies are bound by the 'precautionary principle' in making opinions and decisions that can affect human and animal health or the environment. Taking a closer look at this principle will quickly reveal how it requires agencies to draw on controversial moral considerations.

The precautionary principle has become a standard of international law and its most commonly stated definition is the Rio Declaration: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[17] We can assume that the principle as such meets the criterion of reciprocity. It would be unreasonable to demand full scientific certainty before implementing cost-effective measures to protect health or the environment. However, there will always be reasonable disagreement as to what counts as sufficient scientific consensus, serious damage, or cost-effective measures. Therefore, it may seem that public reason runs out of guidance in the cases where good judgment matters. On the face of it, acceptability sets a bar that impoverishes the normative landscape and thereby paralyses the process of moral reasoning that is required to make the necessary agency decisions.

This appearance of paralysing incompleteness is misleading. Public reason armed with the idea of political literacy readily accounts for how such cases should be approached. Public reason, as understood here, does not exclude controversial moral reasons. Rather, it disciplines their mode of entering the justificatory process. The requirement of political literacy does important work here because it

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[16] David Enoch thinks that public reason judges it to be unreasonable for a citizen to believe that others disagree because they are deprived of the full range of evidence (Enoch 2017: 139, 162). However, his impression that we are asked to hold evaluative commitments with a degree of uncertainty is founded on a misapplication of the idea of public reason: the subject is not the modal of status citizen beliefs but rather the role of these beliefs in justifying coercive authority. Having strong convictions and being epistemically immodest does not preclude a sense of respect for diverging viewpoints.

[17] Rio Declaration on Environment and Development, Principle 15, June 13, 1992, 31 I.L.M. 874, 879.

implies an understanding of the contested nature of normative concepts. This understanding enables agency reasoning to be responsive to the need to support controversial moral judgments with content-independent reasons. A content-independent reason speaks in favour some judgment because it is part of a shared commitment or choice (Hart 1982: Chapter 10). The paradigm case of a content-independent reason is a promise; a promise counts in favour of performing some action because one has generated an expectation and not because of the intrinsic merits of the action.

In the case of the precautionary principle, public reason requires an appreciation that this normative concept has two faces. The content face delivers morally substantive reasons. For example, lack of certainty is not an excuse, health and environmental interests increase culpability for negligence or recklessness, and considerations of cost-effectiveness are appropriate. Public reason appeals to the invocation of such substantive moral claims on the presumption that they are part of the shared normative space of reasonable persons. The content-independent face, however, delivers reasons that can enter by way of procedures or practices that are themselves grounded in the shared normative space of reasonable persons. Content-independent reasons are generated by procedures and practices that enable decisions to be made on terms of moral equality (cf. Sciaraffa 2009: 252). There are, in principle, many sources of content-independent reason reasons (existing practice, stakeholder input, legislative and administrative documents, etc.). Any particular mode of risk assessment may be controversial, but it can enter the shared space of justificatory reasons by being part of a generally accepted framework (e.g., the *Codex Alimentarius*).

The 'hard case' critic will object that the content-independent reasons do not provide sufficient guidance. There will often be a residual space of discretion that can only be filled by controversial moral judgments that are not directly validated by any formal procedure or existing practice. A recent controversy surrounding the US Environmental Protection Agency (EPA) is a case in point. In light of rule revisions that, in effect, amount to a deregulation of toxic chemicals, prominent agency officials have protested and spoken of the need to 'err on the side of safety' while others appeal to a need to reign in overly permissive notions of risk.[18] This controversy is not about whether to comply with the precautionary principle or matters of legality. It is about how to best realize the precautionary principle using whatever leverage can be gained from the possibilities afforded by the mandate.

However, this residual space of discretion does not by itself challenge the constraint of reciprocity. That is, it does not necessarily force role holders to issue justifications that reasonable people could reject or to methods and knowledge that are inaccessible to citizens' common reason. This becomes clear when we consider the justificatory form of what citizens are asked to accept in a public justification. Let us first consider what they are *not* asked to accept. They are, of course, not

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[18] See Lipton, E. (2017) 'Why has the E.P.A. Shifted on Toxic Chemicals? An Industry Insider Helps Call the Shots', *The New York Times*, 21 October.

asked to accept that a controversial issue was decided according to mere preference or personal conviction. But neither are they are asked to believe that the judgment is absolutely correct in its grasp of the scientific data or perfectly just in its responsiveness to political implications. Moreover, they are not asked to accept the matter as conclusively settled without a prospect for challenge in light of public standards.

Rather, they are asked to accept a judgment as an exercise of fidelity to a mandate in what may be called 'the circumstances of expertise.' Rawls (following Hume) famously spoke of the 'circumstances of justice' that obtain when individuals must coexist under conditions of moderate scarcity and limited altruism (Rawls 1999: 109-10). Similarly, we may speak of the circumstances of expertise when individuals must coexist under conditions of moderate uncertainty and limited agreement. There is no point in instituting an authority on matters where the truth is plain and agreement on measures is settled. Nor is there much prospect of establishing an institution with sufficient authority on matters where there are no established methods for arriving at the truth and there is no basic agreement on what to do with the eventual information. The circumstances of expertise arise when the matter falls under some recognised professional competence and there is sufficient agreement to acquiesce in the judgment.[19]

The circumstances of expertise call for what Gerald Gaus calls 'the umpire model of authority' (Gaus 1996: 188-89). The umpire model mixes practical and epistemological concerns. On the one hand, people who disagree on what to believe may need a *practical authority*; they need way to proceed in cooperation despite their disagreement. On the other hand, they do not want a decision to be made for arbitrary reasons; they need an authority that *tracks the epistemological concerns*.[20] For example, we may disagree on whether some pesticide is too harmful for the consumer market. While we agree that there must be some decision on this (there can be no neutral default position), we do not want this to be decided by a procedure that is ignorant of the competing considerations. Hence, we prefer to acquiesce jointly in the judgment of an institution that treats the matter fairly, even though its conclusions diverge from our own. One party may think that the judgment grants too much to business interests, but accepts the judgment as *within a reasonable conception* of the precautionary principle.

This account of what the public is asked to accept reflects on how we should judge the merits of agency judgments. The legitimacy of appeals to controversial considerations depends on whether the circumstances of expertise obtain and on whether the considerations fall within the bounds of reasonable viewpoints.

[19] Klemens Kappel believes that it is a problem for the liberal principle of legitimacy that we are not guaranteed to succeed in agreeing to delegate a question to a mutually recognized group of experts (Kappel 2017: 327). The idea of the circumstances of expertise is meant to show how it is no challenge to the liberal principle of legitimacy that it does not work where it does not belong.

[20] Jason Brennan (2014:196) claims that a 'coin flip could be an "umpire" on Gaus' definition', but it is important to note how this misses the point of the model: an umpire does not merely coordinate but adjudicates with sensitivity to the underlying epistemological concerns.

Although the legitimacy of a controversial consideration may be reasonably rejected as a standalone claim, it may nevertheless be acceptable as when made as a good faith response to a democratically settled mandate.

In keeping with the argument of the previous sections, it is clear that the bounds of reasonable viewpoints will range from matters of technical evaluations to interpretations of principle. Part of the mandate of agencies is to structure their judgments according to a responsibility for the public good. This has implications for how we determine what counts as unwarranted political activism in an agency. Advocacy of a general turn towards deregulation can be part of the agency role insofar as it is sincerely guided by a reasonable conception of the mission of the agency. For example, fighting the alleged tendency of the EPA to create overly burdensome rules in response to phantom risks could be a valid cause in light of an overall mission that includes business and trade interests. Of course, the reasonableness of such claims is doubted if they are systematically biased towards business interests or lacking in appreciation of precautionary value of existing regulatory practices.

Conclusion

This paper has sought a model that can both accommodate evaluative judgments as part of the genuine domain of agency reasoning and also structure them in a way that respects the basic principles of democratic legitimacy. It was argued that public reason's principle of reciprocity provides a useful standard for developing such a normative framework. The framework was developed in response to objections that the principle cannot deliver suitable and substantive criteria. The model answers these objections by highlighting the need for politically literacy and for backing controversial considerations with content-independent reasons. The model is explicitly tailored to the circumstances of expertise and does not support expanding expert authority beyond these.

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