

Particularizing Obligation
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This paper addresses Richard Vernon's approach in *Cosmopolitan Regard* to the problems of legitimacy and obligation. Vernon argues that a successful theory of legitimacy particularizes obligation, and develops the idea of complicity in systems of risk exposure as connecting persons' obligations of justice to their own state. The paper begins by situating and comparing Vernon's approach to alternate conceptions he addresses, including both associative and general non-transactional accounts of political duties, as well as the transactional notion of fair reciprocity for benefits received, and largely endorses his critical treatment of them. It then presents Vernon's approach to legitimacy and the key idea of dynamic risk, and develops a set of critical thoughts on his approach. The final section suggests that the problems of theorizing legitimacy in the age of multiple levels of governance, including global governance, can be cleared up by separating legitimacy and obligation, and thinking of legitimacy as a range of supportive reasons to comply with and support justified political institutions.

I/ Non-Transactional Approaches – Associative and General Natural Duties

A non-transactional approach to obligations of justice treats them independently of institutions. They are in some way 'natural' and held first by persons in relation to each other. Institutions are valued instrumentally, as mechanisms by which we can discharge, though not absolve, what are not exclusively institutional obligations. They differ from transactional accounts of legitimacy, which treat obligation as a result of a political relationship mediated by something like participating, benefitting or complicity in institutional practice.

It is possible to treat the 'natural duties' of non-transactional theories as pertaining to either general or associative relations. Treated generally, they attach to our status as human and are owed to other humans, making their particularization challenging – how can the contingencies of membership end our more basic obligations? If they are treated as a type of associative obligation and unique to a certain kind of relation, they are more easily particularized, but face problems of conceptual ordering and consistency with liberal community.

i/ Associativism

If natural duties are associative, and the circumscribed identity in question is treated as pre-political in nature, there are significant problems in reconciling that conception of political community with a liberal theory of justice. In some sense, the liberal conception of political community is a voluntary one, or is justified ideally as such. Legitimizing political obligations as the institutionalization of pre-political associative obligations rests on an overly thick and involuntary account of community to work as the base of a liberal theory of obligation.

Of course, associative obligations need not be treated as part of natural or pre-political identity and moral requirements. With a political or civil account of associative duties, membership precedes obligation. The community in question can be theorized along more contingent and voluntary lines, which brings associativism closer to basic liberal justification while retaining the non-transactional component. Associative obligation does not motivate political society; obligation in political society, however, is treated as a non-derivative aspect of the relationship of members. Through subsequent experience of membership, formation of general expectations based on common conditions, and development of shared political identities and relations with fellow members, unique and affective ties develop and with them, non-derivative, particularized obligations unique to that relationship. While a tidy account of particularized obligation, there is reason to doubt the capacity of associative theory to particularize obligation.

Associativism draws too tight of a connection between the nature of solidarity and the nature of justice and is critical of more general or universalistic theories of what 'we owe the state', and ability to 'explain the moral force of *'my country'*' (Waldron 3-5). With associativism, the political obligations we have in our country are special and cannot be generalized to other sites of governance lacking the underlying relational element. As Vernon shows, there is a strongly 'phenomenological' dimension of associative theory, making much of the fact that non-derivative is how we largely feel our moral condition. Obligations are felt and acted upon as the result of the fact and experience of membership, not as mediated general obligations. In considering the idea that 'justification and motivation have to coincide' Vernon convincingly argues that associativism moves too 'tightly' from phenomenology, or motivation, to 'justification' and 'supportability' (32). As an account of moral experience it seems plausible enough although, as Vernon usefully demonstrates, exemplary moral behaviour in the particular is often motivated by a firm 'grasp' of the general (34). Nevertheless, the standards underlying our bounded moral relations must have more general application given their contingency and institutional determination – 'internal ideas of appropriateness are constrained and modified by wider moral considerations' (89). As suggested below, theories of justice can and should exploit the motivational resources of felt associations by constructing shared experiences and expectations through institutional design, without drawing on these instrumental functions as necessary conditions of normative standards of political legitimacy.

There is a further problem of ordering, and an overly one-sided conception of the formative relationship between justice and solidarity in a political account of associative obligations. For example, in David Miller's (2009) recent attempt to provide an associative account of justice, as an egalitarian, non-derivative, and bounded principle, beyond the state, one of the three pre-conditions is that persons 'acquire new identities' and 'shared social meaning' of the political practice (306). In this conception, 'justice presupposes solidarity', and the solidarity in question is associative in nature, as solidarity based on individual interest will not extend beyond mutual advantage (299). While it is the case that shared and principled identity possesses important instrumental value for justice, associativism is overly one-sided in its conception of their relationship, paying too little regard to the role

of justice in creating solidarity or, as Rawls puts it, the way justice 'generates its own support' (1999: 154). Justice should be treated as both output and input of solidaristic community; as Coicaud says, 'one's feeling of belonging to a collectively cannot be separated from the way in which individuals perceive their rights and duties' (205). Normative standards of legitimacy require political community, but are also in large part constitutive of it. Associativism is insufficiently sensitive to the two-sided formative dynamic of community and legitimacy. Solidarity makes justice possible but does not make justice.

ii/ *General Natural Duties*

A general conception of natural duties also faces difficulties in being particularized. On a straightforward application of natural duties to an instrumental or goal conception of institutions – i.e., a conception in which institutions are theorized as mechanisms designed for discharging our natural duties of justice – it is not clear how a fixed conception of political scale comes to be. At the least, it will not lead, unproblematically, to the state system, as a case can be imagined for more efficacious discharging of natural duties either above or below the state.

There is a further problem of reconciling a natural duty of justice with all of the things states do, and that we want justice to regulate, creating a gap between the scope of state functions and the scope of obligation. Natural duties of justice in a pre-political context presumably amount to a relatively small handful of negative duties and some positive duties of aid. No matter how expansive the conception is, it is unlikely to cover the full range of distinctly social subjects of justice that an adequate theory would. In political society, justice might require equality of opportunity in, say, members' education, health or even athletic capacities, as mediated through relevant systems. But without these systems in place, the natural duty does not straightforwardly cover (sustain, promote) obligations to support opportunity freedoms of this sort. Nor is design of these systems usefully theorized as efforts of fulfilling the requirements of one's natural duty of justice, or as demands of justice itself. Justice, rather, comes in once these systems are in place, raising the question – can a general natural duty of justice come in to particularize the host of obligations to support justice in a benefit-producing institutional structure, once in place?

Waldron's (1993) general conception of natural duties attempts to bridge this issue by not exclusively treating natural duties as the motivation behind institutional design, but as capable, nevertheless, of particularizing obligations once these systems are in place. In Waldron's conception, the motive behind social cooperation is interest-based, and quite thin. Persons living in proximity will design political institutions to prevent physical harm. The natural duty to respect others' negative entitlements (itself an appropriate conception of pre-political obligations of justice) creates the particular obligation to support the system we find ourselves in. This faces the problem, Vernon argues, that states do substantially more than protect against physical harm, creating concerns of the obligation-gap (60).

As a possible mode of closing this gap, it might be pointed out that there are other interest-based reasons to get to social cooperation, beyond physical

protection, that would cover a wider range of state functions. These include, as Heath (2006) develops, economic reasons of scale and trade, risk-pooling or insurance mechanisms, and self-binding mechanisms (319-326). Perhaps the general natural duty might be expanded to include particularized support for these systems, once in place, bridging in large part the obligation gap.

Against the full success of this expansion covering the range of justice, the motives for support of these, essentially efficiency enhancing, institutions is not the same as the motivation behind extending justice to the operation of them, which as Rawls holds, sometimes requires non-efficient changes (1999: 69). There is significant plausibility to this approach in expanding the covered functions of the state, but it is a less direct path than Waldron takes from the negative natural duty of justice to refrain from harming, to institutions protecting persons from harm. Under the expansive conception of cooperative benefits, the notion of proximity remains relevant (e.g., spatially circumscribed spheres of risk-pooling), however, the fairly direct link between interest and justice is weakened, certainly compared to the case of physical harm. We have, for example, no coherent natural duty of justice to create institutions of trade, though we would want justice in the functioning of such systems. Risk-pooling is perhaps trickier as we may have a natural duty of assistance that could be discharged through insurance mechanisms, but justice is a more twisting path to insurance systems than efficiency (though we would want justice in the operation of insurance systems that may go beyond and violate the principle of efficiency). Once the conception of social cooperation is appropriately expanded to cover things states do beyond preventing physical harm the path from natural duties to localized transactional obligations becomes increasingly thorny. This is the realm of benefits received, and the production of cooperative benefits is not always, or even often, best treated as motivated by justice.

An alternate sort of approach, a transactional conception, attempts to ground political obligation by distinguishing between the motivation of social cooperation and the nature of justice, and responsibilities for it, in political society. Vernon's approach is of this nature in treating political obligations of justice as responses to uniquely social determinants of life chances. It is a novel approach in parting from the conventional transactional understanding of political obligation as fair reciprocity for benefits received, focusing instead on complicity in exposing other members to risk-enhancing social systems. The following presents benefits received and Vernon's treatment of it, before moving to his account of dynamic risk as the basis of legitimacy.

II/ Transactional Approaches I – Benefits Received

A transactional, or contractual, conception of political community, Vernon suggests, can more easily reconcile general duties with particularized obligations 'arising from the contingency of membership' (39). The contingency of membership is justified as though it is voluntary – resulting from 'some past event in which the citizen has (or is said to have) participated' – linking us with a specified political society. This improves on the natural duties approach by clearing away some of the

difficulties involved in attempting to move directly from pre-political obligations of justice to an institutional system, theorized as motivated by these natural duties. Instead, social cooperation is, in the main, an interest-based endeavour. According to James (2005), 'it is now understood, at least in societies such as our own, that organization as a basic structure, is, by its very nature, the coordination of activity in order to produce otherwise unavailable 'primary social goods'' (289). Social institutions are generally thought to be valuable because they secure the production of cooperative benefits that individuals acting on their own would be unable to produce. Justice concerns subsequently arise with respect to the distribution of benefits (and burdens and advantages in their production). A central claim of the benefits received conception of political obligation is that citizens should accept the burdens of justice as a type of reciprocity for their share of social benefits, acknowledging their mutual dependence on the shared social structure.

One possible problem concerns the viability of the distinction between receipt and acceptance of benefits. In certain cases, citizens might receive benefits as an outcome of living in a political society, but some may be unasked for, or seen as unbeneficial (e.g., the daily DJ's preferred music wafting from the town's loudspeaker) – how can we be obligated by passive, unsolicited receipt of benefits, which may not even be seen as beneficial(42)? If some degree of acceptance is required to create obligations, then, based on the presence of non-acceptors, benefits-received creates issues of 'asymmetry' of obligation.

Vernon notes that in certain cases – the production of pure and core public goods – the distinction between receipt and acceptance blurs. Here coercion is justified, as the basic point of institutions is to secure cooperative gains by overcoming collective action problems of free-riding. Against the improbable view of the spontaneous emergence of public goods – 'manna from heaven' – enforced restraint is a pre-condition of the benefits of social cooperation. As Heath argues, in the justification of social cooperation, 'all of the individual advantages come from the reciprocation of the other' (2006: 321). In the case of non-excludable public goods, Vernon argues that it is reasonable to coerce 'unwilling beneficiaries to contribute' (43).

There is, however, the more difficult case of the provision of what Klosko (1992) calls 'discretionary goods', that may or may not be non-excludable, but are not on their own terms constitutive of a basic definition of political society. While accepting the legitimacy of coercion in the case of unreasonable refusal to contribute to public goods, Vernon does argue that there are cases in which not contributing because of non-acceptance of even non-excludable good is reasonable, raising the problem of asymmetry. Three grounds are suggested as reasonable for withholding contribution, or objecting to forced contribution: objection to the good in question (e.g., a pacifist's objection to supporting the military establishment); objection to paternalism (e.g., the rugged self-reliant individualist's objection to idleness-promoting social services); and, objection to priorities (e.g., objection to levels of spending on generally accepted goods) (44). In the cases of reasonable refusal to contribute, 'the familiar doubts about deriving obligation from receipt still apply, and the reciprocity argument remains open to strong objections' (45).

Klosko gives 'institutional' arguments for the legitimacy of coerced contributions to discretionary goods that one either does not receive or would not accept given a choice. It points to the dependency of core, or 'presumptive', public goods that are constitutive of political society on the provision of a wide range of ostensibly discretionary goods. To the provision of, say, defence, there is a '*practical* indispensability of certain discretionary public goods', and the need for 'extensive government involvement in transportation and communication, heavy industries, education, and other aspects of society' (87-9). Provision of core public goods triggers obligations that extend to the 'basic societal infrastructure, the individual components of which are not themselves presumptively beneficial' (88). This certainly extends the scope of obligation but will still leave out substantial areas of state functioning that cannot be reduced to pre-conditions of core public goods. Klosko addresses this in the case of 'charity' for the 'hungry', 'homeless', 'sick' and 'destitute' (91). These might be treated as conditions of 'social stability and harmony' that are 'practically indispensable' to the provision of 'law and order' (90). In another, 'humanitarian', justification, Klosko suggests that further non-transactional principles are needed, specifically the natural duty of justice (91). A case can be made that both of these arguments do not support a robustly egalitarian conception of justice, but lean towards a more baseline, sufficiency argument, leaving many functions of advanced welfare states beyond the theory's scope. Moreover, a baseline, or sufficiency, approach to justification, given the importance of relative equality to persons' life chances in a given society, particularly those in advanced states of development, fails to account for the interests of the worst off in justification (Barry: 172-4).

Klosko (1992) argues further that wide-spread compliance is itself an important pre-condition of public good provision – 'compliance with laws falling outside the core range is indirectly good in itself, because it works to strengthen presumptively beneficial law and order' – and so can be enforced outside of core areas of provision (103). This is presumably true but does not establish that general compliance need be obligation-based, and absolute, as that motivation suggests. As Raz (1986) argues, it is a 'melodramatic exaggeration' to suppose that for the 'survival of the government', persons need to relate to law in an obligatory manner. The requirement of 'perfect compliance' obscures a more plausible 'systemic' understanding of general compliance (Green). The natural duty of justice and fair reciprocity both give reason to support adequately just institutions, but this need not take the form of universal obligation, and the requirement of authoritativeness itself may prove too demanding to bring stability to justice.

Perhaps a better way to deal with the problem of non-acceptance in the provision of discretionary goods involves the idea of reciprocity, but builds it deeper into the foundations of political community. Rather than treating reciprocity as a condition of fairness that arises following benefit receipt or acceptance, reciprocity can be treated as a more basic condition of cooperative schemes themselves. Ripstein offers a useful approach in asking – what sort of respect does the state owe citizens in coercing them into legal relations? He identifies two liberal conceptions. The first conception is 'respect as deference to subjectivity'. Under this idea, 'nobody can be forced to do anything except in terms that he or she accepts' such

that the person has 'a veto of sorts regarding the ways in which he will be treated' (352). The second conception is 'equal respect', under which the 'demands of respect are always relational, so that respecting one person must be compatible with equal respect for others' (352). Under this conception, '(t)o suppose that coercion is illegitimate unless the wrongdoer accepts the standard by which he or she is judged is to give up on the idea of fair terms of interaction, for it is to allow wrongdoers to set the terms of their interactions with others unilaterally' (355). According to Ripstein, 'respect as deference' fails on empirical and moral grounds. Empirical reasons concern its shortcomings as a way of dealing with disagreement and the likelihood of stability and safety concerns (357). Morally, because allowing for unilateral setting of the terms of interaction would 'undermine our very reason for worrying about the wrongdoer's attitude toward his deed. It is only if we care about interacting with him on terms of respect that his opinion counts for anything' (357). Liberalism aims to legitimate coercion with the 'fact of pluralism' and disagreement in full view – 'as such it cannot claim that coercion is legitimate only when it is necessary' (i.e., when there is agreement on the requirements of contributions). This still leaves open the problem of reasonable disagreement (disagreement over the demands of reciprocity as equal respect) but as Ripstein holds these must be settled democratically (359). Vernon points out that there are likely to be serious procedural shortcomings, such as when 'dissenters had no realistic chance of persuading the majority' (45). This is problematic, but the solution cannot be rejecting reciprocity as equal respect, and accepting 'respect as deference' as the standard for legitimate coercion.

It might be accepted, then, that benefits received can support enforcing some conception of justice. There is a further concern, however, as to the kind of justice it supports enforcement of. On one rendering, the conception of justice is limited by the principle of efficiency that motivates the provision of public goods and, perhaps, further supportive discretionary goods. This is largely the idea of justice as mutual advantage, which limits justice to efficient exchange. This effectively gives persons a 'veto' over the terms of social cooperation and is widely criticized for violating some core intuitions about justice, notably that the vulnerable, though non-contributors, have justice-based entitlements. As an account of particularizing obligation, Vernon argues that mutual advantage produces 'asymmetries of obligation' in a political society, as it does not generate obligations towards non-contributors (41).

The conventional move from mutual advantage to justice as fair reciprocity (in the post-benefit receipt sense, and not as a conception of equal respect) goes quite far in severing the link between entitlement-through-contribution and obligation in way that helps generalize obligation across a political society. Justice as reciprocity, however, still creates problems of asymmetry of obligation. Under reciprocity protection is not given solely in return for contribution, but recognizes the restraint and submission of those denied contribution opportunities but who nevertheless do their bit in maintaining the cooperative system. Like mutual advantage, justice as reciprocity draws deep connections between the interests behind social cooperation and the motives of justice, but extends strategic consideration from positive acts of contribution to negative acts of restraint in

harming the cooperative scheme, even when one is excluded from contributing or directly benefiting from it (Heath 2006b: 27-30). To hold justice-based entitlements, one does not need to contribute but to refrain from harming the system – justice as a reciprocal ‘thank you’ from those benefitting most from social cooperation to those who are not, but nevertheless accept the burdens (e.g., loss of freedoms) that come with exposure to the system. This is an improvement on mutual advantage and widens the scope of entitlement considerably but does not do away, entirely, with the problem of ‘asymmetry’ in obligations. While there are some who are perhaps unable to contribute but could nevertheless harm the social order, there remain those for whom the reason underpinning their inability to contribute also underpins their inability to harm, and are thus left out of justice-based entitlements. This is even less intuitively appealing than mutual advantage as those excluded are, to a person, more vulnerable than those mutual advantage leaves out of the scope of justice (i.e., non-producers with an unused threat advantage).

To patch up these counter-intuitive gaps in a theory of justice, a fuller severance of the motives behind social cooperation from the role of justice in systems of cooperation is needed. This is an explicitly two-step approach to theorizing justice, largely severing the interests motivating cooperation from a free-standing, ‘subject-centered’ conception of justice (Buchanan). It is captured in Vernon’s distinction between contractarian and contractualist approaches (67). For contractarian theorists, such as Gauthier (1986), morality is created, and limited, by a self-interested agreement. In a single swipe, agreement creates both institutions and their regulatory principles – mutual advantage is the motive of social cooperation and the nature of social justice. A contractualist approach, in contrast, presumes background morality (some basic conception of moral equality) and develops political morality by sorting out the requirements of background moral equality in different political areas. This allows for a separation of the motives behind social cooperation and its regulatory principles. Justice can be treated as impartiality, without the strong presumption that justice of this type motivates social cooperation. In addition to eliminating counter-intuitive abandonment of the vulnerable as a requirement of justice, the contractualist conception of a background moral status, as Vernon argues, makes sense of the need for political justification whatsoever, or, establishes the need for legitimacy rather than domination.

Vernon’s approach to obligation in *Cosmopolitan Regard* proceeds in this manner, rejecting both the natural duties and transactional benefits-received approaches. The natural duties approach largely theorizes institutions as mechanisms of justice, raising problems of coverage in the obligations of justice in a political society with a plausible account of the scope of pre-political obligations of justice. The transactional benefits-received approach moves a good distance from justice as the motivation behind institutions to an interest-based efficiency conception, but both the mutual advantage and reciprocity conceptions draw a straight line from an interest in efficiency to an interest in justice, generating problems of asymmetry in obligation, and leaving the vulnerable outside the scope of justice. In Vernon’s approach, institutions create free-standing and distinctly

subject-centered, rather than strategic, obligations of justice; obligations apart from the motivation behind social cooperation, owed nevertheless to those with whom we share membership. Institutions in this regard alter 'the normative terrain' (Cohen and Sabel). As presented, Vernon's account of particularized obligations of justice does not draw on the distributive implications of the social production of cooperative benefits, but on rather, social risks.

III/ Transactional Approaches II – Background and Dynamic Risk

Following Vernon, both the antecedent risks of pre-political situations and the benefits produced by political societies fail to create obligations of sufficient scope (the fact states do more than prevent physical harm) and symmetry (cover only contribution and threat capacities). Reasonably successful performance of these functions justifies the 'practice' of political society. Moreover, the background institutional structure of these practices establishes the boundaries of political society. But, the particularity problem is left unsolved and states satisfying the standards of justification are not automatically legitimate

Justification of political society proceeds by creating standards according to which we can 'assess the justice of a political order in terms of its systemic features, whether the features that interest us concern its net consequences, or a principle of organization that it embodies' (49). A just state, under this conception, is a justified state. It is tempting, upon making a positive judgment regarding the justification of a particular society, to say that it is also legitimate and deserving of support from those subject to it. So long as a political society maintains the standards of justification, its use of coercion and other types of power is legitimate, and members have good reasons to comply. Vernon argues, however, that making the quick move from justice to legitimacy 'is to commit something like a distributive fallacy' (49). This is so, because justice is taken as systemic whereas legitimacy is individualistic. The overall level of benefits and the background dimensions of their distribution may be sufficient to justify the practice of that political society, but this does not automatically entail that 'the benefits rendered to each individual within it are sufficient to render it legitimate' (49). This, again, raises the problem of asymmetry of obligation, given that a political society makes a 'claim to obedience on the part of all its citizens' (43).

Justice, then, justifies political practice in 'terms of its systemic features'. With justice functioning this way, the world may consist of numerous more or less justified political orders. According to Vernon, this scenario only raises the 'particularity problem' – it is the 'pre-condition' of legitimacy. With a set of justified political orders, nothing binds particular persons to the one they happen to live in, compelling them to discharge their obligations of justice in their state, rather than in some other state with more need of support. Legitimacy functions to identify some feature of *our* justified state that makes its commands binding on us. Whereas justice creates the conditions for the question of particularity to emerge, legitimacy address the particularity problem, and shows 'why it is one order rather than another that can issue binding commands, of an exclusive kind, to particular persons' (49).

To move from a justified political society to a legitimate one, Vernon shifts the focus of the relevant features of political society away from protection against antecedent risk and production of benefits, to the subsequent risks of political membership. States are justified by reducing the vulnerability of persons by mitigating the 'risks of isolation' through collective protection (52). This retains the transactional features of the benefits received arguments, and theorizes political society as the result of persons waiving their 'background entitlements'. Justification of political society flows from the contractual notion of reasonableness; we ask, do the new arrangements enhance our agency? A justified political society passes the 'on-balance' test relative to isolation (68).

Even with a positive answer we have not arrived at legitimacy. Political society goes a good distance in diminishing natural risks faced by isolated persons, but creates new 'risks of association' that result from the vulnerability created by the waiving of background entitlements and freedoms that creates political society itself (52, 72). Moreover, members of a political society are 'complicit' in the vulnerability and subsequent risk-exposure of their fellow members in a way they are not in the same exposure of members of other political communities. Complicity is not a 'strained form of consent' as acceptance, which would raise the problem of asymmetry (83). Complicity in the risk-enhancement of fellow members is a 'strict-liability argument' – '(a)s a member of a political order, one lends support, passively and/or actively, to a system of arrangements that imposes costs on others...(and the) costs in question are those that arise from involvement in a system of collective decision-making, both social and public, that unpredictably imposes burdens, of varying severity' (51).

Social cooperation, as Vernon nicely develops, is a two-sided affair. Cooperation yields security and benefits while creating new bases and types of vulnerability and domination. The question arises, what is the nature of subsequent risk and why does it require legitimacy, as special concern, in ways that reduction of antecedent risk and benefit production do not? A theory of social justice, it would seem, addresses institutional downsides, given its status as an institutional virtue, indeed in the Rawlsian account, the 'first virtue of institutions' (1999: 3). If so, then the distinction between justification and legitimacy developed by Vernon is significantly diminished, such that the burdens of justice amount to the scope of political obligations. Vernon holds, however, that 'costs imposed' through complicity in political practice cannot be fully addressed by justice, and so legitimacy entails obligations beyond the 'constraints of justice'; and indeed must, if the theory is not 'to revert to an argument about fair reciprocity, and thus to lose track of particularity once again' (51).

To maintain the line between the constraints of justice and political obligation, Vernon develops a compelling distinction between two kinds of 'subsequent risk'. The first is 'background risk', and is covered by justice, and must be so for a political order to be justified. The second kind is 'dynamic risk'. This kind of risk is not covered by the general requirements and restraints of justice, and is what requires the special obligations that bind members and establish legitimacy. The following presents the distinction and goes on to question its success in maintaining the distinct stages of justification and legitimacy.

Background risks are predictable outcomes of political order, and are addressed by justice as the condition of justification, and the pre-condition of legitimacy. Vernon's analysis breaks down background risks into three types, that essentially track on to the three major subjects of Rawlsian justice (civil, political and economic entitlements). First, states create concerns of 'civil risk' (life, liberty and property, as it were). Arguably, the most notable way the new reality of living with a state creates new risks, is the state's capacity to cause violent harm to its citizens, who are essentially defenceless against its coercive capacities. States are profound 'definers and guarantors of personal security' and represent a 'sort of juridical surrender of self-sufficiency, magnified...by processes which constantly increase our reliance on the predictability and restraint of others' (54-5). Furthermore, being a citizen 'exposes one to a much closer set of controls and more far-reaching demands, than any state can legally impose upon citizens of other states' (55). These concerns, Vernon argues, can, to a certain extent, be addressed as a matter of justice, that is, through constitutional arrangements that 'contain provisions intended to guarantee personal security, while in part they also contain some provisions intended to restrain and manage the use of power' (68-9). And, moreover, these arrangements are necessary to tip the reasonableness-balance in favour of the risks of institutions over the risks of isolation.

Moving from 'civil' to 'political' types of risks, as members of a democratic state, persons 'have only limited opportunities to escape from the preferences of majorities', particularly their legislative preferences that may 'conflict with their own conceptions of justice' (55). These risks, too, are addressable through background constitutional arrangements that protect minorities from majority tyranny, and as a requirement of justice. Under majority-minority dynamics, however, there are certain aspects of 'informal politics' (Scanlon's term) concerning the majority's 'preferred use of public space, (that) constrain the kind of life that is possible for us to lead' (56). These risks begin to push the boundaries of the capacity of constitutional arrangements, and begin to drift into dynamic risk.

Further blurring of the line between background and dynamic risk is also notable in the case of economic justice. As has been developed, constitutional protections against predictable background risks are required as part of the justification of political society. This leaves open the role of economic justice in political justification. Few contemporary liberal theories of justice create firm distinctions between their civil and political dimensions, and their economic dimensions, and want to include economic inequality along with state 'crime or tyranny' under the broader notion of institutional mediation of persons' life chances. But their inclusion raises questions concerning the justification of political society entailing protections against predictable background risk through constitutional settlements. While there are some theoretical defences of including economic entitlement in constitutions (Fabre) and actual cases of their formal coverage by constitutions, as well as less direct constitutional jurisprudence in this area, the advancement of economic justice has occurred primarily through the informal politics of the welfare state, and in response to emergent and changing risks and interests.

Despite some fairly significant formal differences between the politics and institutions of civil and political justice and socioeconomic justice, Vernon includes the latter in the justification stage of mitigation of predictable background risks. Against limiting justification to constitutional restrictions on abuse of formal authority Vernon holds, 'everything one wants to say about those topics can be repeated in the context of economic life' (69). To leave economic justice outside of justification undercuts the reasonableness of the social waiver; to be reasonable, 'arrangements must be justifiable to those whose profit least' (70).

Inclusion of the welfare state, treated as a 'quasi-constitutional' settlement, somewhat further blurs the line between background and dynamic risk as sustained by the social waiver model of obligation particularization. Under the social waiver model, the 'waiving of background rights initiates what is at once an enhancement of risk and a risk reduction project, the justice of which must be the subject of ongoing evaluation' (71). In the case of abuse in the wake of waived freedoms concerning physical protection and integrity, the model holds up – subsequent enhancement of physical risk in political society at the hands of tyrannical authority or majorities can be traced back to the waiving of certain freedoms of self-defence, punishment and maybe pre-emption, even if these on the whole are likely futile in any case of reasonably effective and organized offensives in a state of nature. But, there seems to be more difficulty in tracing the socioeconomic vulnerability and risks one encounters in social life back to a waiving of prior entitlements – entitlement to what? In civil society, one can presumably still gather and, perhaps to a lesser extent, hunt.

The broader point in identifying cases of blurring between the background risk, addressed as part of justification of political society through the development of constitutional and quasi-constitutional settlements, and dynamic risk, is not to discount those risks at the margins, as they are crucial to egalitarian justification of the practices of a political society. The idea illustrates a more basic critique that there is little leftover after justification for legitimacy as a unique set of protections against dynamic risk. Moreover, what is left in dynamic risk, given a fairly expansive conception of background risk, might, for the most part, be slid over to that category. The upshot to be suggested, is a closer connection, though not conflation, of justice/justification and legitimacy.

To sum up: Vernon's account of justification of political society entails addressing 'risks of isolation' and taking steps through constitutional and 'quasi-constitutional' (a welfare state) mechanisms to limit social enhancement of 'risks of association'. Justice in this regard is not constitutive of, nor the 'basis for', legitimacy; justice is the precondition of legitimacy, for we still lack reason to support our own risk reducing and enhancing project. The particularity problem remains unsolved.

The feature of political society that warrants particularized obligations is what Vernon calls 'dynamic risk' – 'that is, risks emerging from a society's political and socioeconomic development that fall through the constitutional net' (72). As such, mitigation of dynamic risks cannot be treated at the justification stage, as they are 'over and above the effects that can be constitutionally constrained'. Dynamic risks are the product of informal politics and facts of civic membership. As a citizen,

we face 'constant exposure to the effects of others' judgments' (72). As a citizen, 'one is constantly vulnerable to the possibility of acute discomfort, and painful demands may be made on one's sense of tolerance' (56). As a complicit participant in a justified political society, exposure of others to dynamic risk '*legitimizes* special concern for one's fellow-citizens' (72). The limits of institutional justice gives us the requirement of special concern for those with whom we share a political society, on top of, and in a way that particularizes our general obligations of justice.

The following presents four related lines of criticism of Vernon's conception of complicity in exposure to dynamic risk as the basis of legitimacy: i/ the 'limits of spillover in single-trigger' arguments; ii/ the 'what is left' argument; iii/ the 'justice as inclusive of dynamic risk' argument; and, iv/ the 'stretching of obligation' argument. The relation in question is that each works towards watering down the justification/legitimacy distinction, and towards a conception of legitimacy without obligation.

i/ Spillover

Special concern is, frequently, meant to capture a distinction between obligations of justice (egalitarian) owed to insiders and 'humanitarian' obligations (baseline, absolute) owed to outsiders. With this distinction in mind, there is room to question the capacity of a single distributive concern – i.e., dynamic risk – to trigger egalitarian requirements of justice across a social system; that is, to have wide-ranging egalitarian 'spillover effects' in other areas of cooperation so as to require justice where, without the trigger in question, justice is not normally required. Justice in a political society covers substantially more than the distribution of dynamic risk. The difficulty in question is that of expanding from justice in the distribution of dynamic risk to a conception of justice with wider range than dynamic risk, but the scope of which is nevertheless settled by the political boundaries set by complicity in dynamic risk exposure. While certainly important, it may be too heavy of a burden for dynamic risk to function as the trigger for broader obligations of justice in areas that do not on their own generate dynamic risk, but are suitable subjects of justice based on the looser standard of impact on life chances.

This concern of the capacity of dynamic risk to create wider reaching obligations of justice is a one of a general kind of concern with 'single-trigger' approaches to the obligations of justice. A single-trigger approach (also, e.g., Blake's (2001) coercion argument) treats one aspect of political organization as the trigger of obligations of justice across all others, which without the external concern do not establish requirements of justice on their own. Why, it might be asked, does dynamic risk, or coercion, require justice in, say, the health care system? This concern indicates in the direction of the broader conception of impact on life chances as triggering the demands of justice (Rawls 1999; Cohen 2008). This is general enough to capture a host of distributive subjects, without reducing the value of justice in any to the justification of a more basic part of political society.

ii/ *What is Left?*

Vernon suggests that justice matters in the justification of political society, prior to the work done by dynamic risk in generating legitimacy. Although, in certain instances justification seems to lean away from the strong egalitarian requirements of justice and towards a more baseline, sufficiency conception of risk reduction. If this is the case, then the first criticism (spillover) comes in, in questioning the capacity of emergent dynamic risk to spillover and generate wide obligations of justice as special concern, on top of a general requirement to support justified political societies somewhere. If, however, it is an egalitarian conception of justice that justifies political society then the second criticism arises – what is left for the special obligation to cover?

Dynamic risk is a distinctly social conception of the risks that develop in a political society, constituted by formal and informal institutional settlements. As such, these systems need to be stable and reproduced over time prior to consideration of their legitimacy. Stability of justice before legitimacy entails persons have been performing the requirements of membership from non-obligatory grounds (prudential concerns, solidarity, custom, natural duties of justice, and so on). Legitimacy, at this point, becomes somewhat negligible.

With what seems to be the distinct possibility of justified political societies that are stable but not legitimate, the possibility of an alternate view of legitimacy emerges. In the alternate view, justice is not a pre-condition of legitimacy, but is, against Vernon, the basis of legitimacy. According to Vernon, the ‘overall benefits of a society make it just’ (63). Under the alternate view, justice itself plays a reduced role in the formation of political society as a cooperative system of benefit production. Rather than motivating cooperation and the production of benefits, justice comes in at a later stage to regulate the distributive functioning of an institutional system (i.e., the distribution of cooperative benefits and burdens, including dynamic risk). Justice is the basis of the normative legitimacy of systems of governance that are primarily motivated by efficiency not equality. Justice is the means by which a political society treats its members with equal respect and acquiring normative legitimacy. Vernon, however, argues that obligations to limit and off-set dynamic risk should not be reduced to the burdens of justice. The third criticism addresses this exclusion.

iii/ *Justice as Inclusive of Dynamic Risk*

In Vernon’s approach to particularizing obligation, justice concerns predictable and general background risks of a political society, that can be addressed through a (quasi-) constitutional ‘net’, whereas legitimacy concerns those somewhat more specific risks that are unique to one’s membership in a particular political community, and that cannot be fully dealt with through background justice. The third criticism, ‘justice as inclusive of dynamic risk’, raises the possibility of bringing dynamic risk into the subject of justice.

Dynamic risk seems to brush up against the implications of membership for one’s self-esteem or self-respect (e.g., the citizen’s ‘constant exposure to the

judgments of others'). Nancy Fraser, using the notions of redistribution and recognition, makes a compelling case that there is a 'false antithesis' in the view of mutually exclusive injustices rooted, respectively, in socioeconomic structures and in 'cultural domination' or 'social patterns of representation, interpretation, and communication' (7). She argues that most forms of oppression are 'bivalent' and composed of 'both economic differentials and culturally constructed distinctions'. An adequate theory of justice must address material inequality as well as inequality of status that produces barriers to self-respect.

Rawls (1999), too, makes strong claims on the social bases of self-respect as part of a theory of justice. He argues, for instance, that 'perhaps the most important primary good is that of self-respect', and as such, 'the parties in the original position would wish to avoid at any cost the social conditions that undermine self-respect. The fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for them to adopt it' (386). He argues further that 'our self-respect normally depends on the respect of others' and that justice itself is an expression of persons' 'respect for one another' (155-6). While the 'social bases of self-respect' is, to be sure, a somewhat ambiguous notion in the abstract, it acquires substance in specific cases, and will inform evaluations of justice in those cases. There are, then, at least plausible grounds to question the distinction between requirements of justice and obligations in the case of dynamic risk, when treated as a concern regarding the social conditions of self-respect.

iv/ Stretching Obligation

If we accept the distinction between justice-based requirements and obligations of dynamic risk, the question of what sort of obligations these are arises. Are they obligations to support the institutional structure designed to mitigate background risk? If so, then a certain redundancy emerges, as the presence of dynamic risk presumes stable formal and informal institutions (ii). They might be treated as requiring support for the move from sufficiency to justice in background institutional settlements, which raises the problem of spill-over (i). Or, they may be treated as more focused obligations to create and support institutions specifically targeting dynamic risk. Maintaining a distinction between the obligations with respect to these institutions and the sort of requirements of justice applying to other background institutions seems tricky, and is perhaps treatable through general inclusion (iii).

There is though, another, distinctly non-institutional quality to Vernon's treatment of dynamic risk as part of informal politics and the relational dimensions of membership. So perhaps the relevant obligations are not exclusively institutional compliance, and concern informal requirements of something like 'civility'. While this seems plausible in light of the extra-institutional quality of dynamic risk, it begins to stretch the idea of obligation beyond the conception that frames the particularity problem at the outset of Vernon's discussion, namely the attempt to 'ground an obligation to comply with and support a citizen's own state' (39). Moreover, the issue of compliance seems to be largely exhausted in the case of background risk.

Concerning the ideas of compliance and political obligation, Parekh distinguishes between 'civil obligations' (compliance) and 'political obligations' (something like civility and participation). He argues that the civil obligation of compliance does not account for the broader connection between institutional effectiveness and the required actions and orientations of members, what we might generally call political obligations (243). In addition to formal compliance, Parekh suggests that there are important responsibilities to abide by basic norms of decency and public reason, to participate in public affairs, and to stand against corruption and injustice. Moreover, these types of responsibility cannot, or perhaps should not, be required by law and yet, the effectiveness of institutions requires the regular and broad discharge of political obligations beyond formal compliance. If complicity in dynamic risk exposure triggers unique political obligations they are of a different kind than the more conventional notion of legitimacy as the right to issue binding commands, and the correlative obligation of formal compliance.

IV/ Legitimacy Without Obligation in Domestic and Global Governance

The above criticisms are not primarily of the underlying animating ideas themselves, such as the importance of economic justice in political justification and of political obligations beyond formal compliance. Both of these are central concerns in an account of political legitimacy. What the critical treatment is meant to set up is that legitimacy is plausibly and usefully theorized apart from the issue of obligation, and taken to concern the broader array of 'the beliefs and attitudes that members have towards the society they make up' (Taylor: 64).

Such an approach shares with Vernon's conception the idea that justification establishes the efficiency-enhancing value and justice of cooperative institutions. Legitimacy, however, is not an account of particularized obligation in justified political societies, but concerns processes of their stability. To a large extent, this will concern the attitudes, motives and expectations of those connected in a political relationship by the shared institutional structure. Legitimacy is a certain type of stability of justified institutions, and therefore has certain sociological dimensions. Legitimacy, in Rawls's (1993) formulation is 'stability for the right reasons'; reasons, that is, that are connected to principles of justification. As Taylor writes, a 'society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails' (64). Support of institutions from a range of 'reasons' is a different conception of stability and compliance than 'obligation', in which objectively legitimate law is its own reason to be obeyed.

It may be argued that there are, fundamentally, two different senses of legitimacy – sociological and philosophical, or descriptive and normative – and that we simply have to choose which we are talking about, and should not allow one conception to infect consideration of the other. It is possible, though, to attempt to combine the two approaches. In this respect, legitimacy is treated as a normative concept and is distinguished from stable domination, by the requirement of basic justice-based justification. Legitimacy is not reducible to justice or justification – that is, it is not simply a 'term of objective evaluation of regimes' (Taylor: 65) – but

concerns appropriate modes of support and stability for socially valuable institutions. The social function of legitimacy is bringing stability to socially valuable institutions (Buchanan and Keohane). The normative and descriptive functions of legitimacy are connected as it concerns the relationship between a society and its 'central justifying principles' (Taylor: 65). Given the role of efficiency and justice in egalitarian justification, legitimacy will draw on a range of reasons, including material expectations and interests, in addition to natural duties, and a general sense of justice.

Some theories of legitimacy explicitly combine the two, through the idea that obligation is needed for stable social cooperation. Klosko (2007), for instance, argues, that legitimacy without obligation is 'sociologically thin' and that political forms without binding-authority would be unable to secure the public goods required for 'acceptable lives' (60). The absence of binding-authority creates dysfunctional governance by generating the downward dynamic of voluntary compliance allowing for opting out, in turn raising the costs of membership, furthering opting out; 'if citizens are allowed to go their own ways...essential good will not be provided' (64). This may be so, and is the principal reason persons are not allowed to go their own way, which would undo the benefits of social cooperation. Enforced compliance is the basic aim of governance, and is the subject of political justification.

Of course, enforcement alone, even very pervasive and efficient enforcement, is not sufficient to secure effective and stable governance, which raises the concern of legitimacy; legitimacy, though, as reasons, not obligation, to support justified institutions, other than, or in addition to, prudential concerns of sanctions avoidance. It is here where associative motivations fit in as the end of nation-building functions by the state. These can be treated, broadly, as ongoing projects of overlapping the justifying norms of institutions and the contours of identities, interests and relationships of members. Legitimacy secures stability and support for just institutions by identifying a range of self-interested, solidaristic, and principled reasons, that are connected in some loose way to the terms of justification. Justice provides a baseline for legitimacy but, with its political dimensions, its specific requirements are variable and open to agency, creating both opportunities and hurdles for the emergence of justice. As such, institutional argument in egalitarian theory should proceed, as Van Parijs (2003) puts it, in a 'motivation conscious' way. That is, in a way that keeps in view the effects of different institutional forms on the development of legitimacy-sustaining associative identities and motivations.

This conception of legitimacy is extendable to emergent institutions of global governance in a continuous manner from domestic governance, though without the requirement of the same constellation of operative norms of justice in the two levels. It shares with Vernon's conception that institutions are pre-conditions of requirements of justice – in Cohen and Sabel's (2006) phrase, institutions alter the 'normative terrain' – while somewhat broadening the institutional features that 'trigger' these requirements. It identifies the moral significance of institutions as pertaining to their impact on life chances, covering both the benefits and burdens, or risks, of social cooperation.

Under this view, the state retains instrumental value as a justice-advancing institution in mediating both domestic and global sources of disadvantage (Vernon: 53). Nascent institutions of global governance are also opportunities as new sites of justice as the requirements of their legitimacy develop up from the baseline normative conditions of their justification. As Slaughter argues, 'justice requires order, and order requires at least a measure of regulation (and thus) as supranational institutions (become) far more effective than those we know today' a deepened global order creates the conditions for substantive global justice (84-5). While the general process of legitimacy can be treated continuously from domestic to global governance, the standards will vary based on institutional differences and differential impacts on persons' life chances. The application of justice to institutions of governance, in this sense as regulative legitimating principle, proceeds in two steps. First is what Sangiovanni calls, 'institutional interpretation'. Institutional interpretation identifies political practices as defined distributions of 'social opportunities and advantages in the competitive struggle for resources' through institutionalized 'rules, norms and decision-making procedures' that claim *de jure* authority in the 'imposition of duties and conferring of rights' (142). The second step is 'institutional evaluation' in which 'justice becomes relevant' as 'practice dependent' normative conditions of legitimacy.

Justice in both cases of domestic and global governance is the basis of legitimacy, but given its 'practice-dependent' character, the standards of legitimacy will vary in relation to the ways in which institutions affect life chances through the distribution of different kinds of benefits and burdens of social cooperation. In Rawls' pithy formulation, 'the correct regulative principle for anything depends on the nature of that thing' (1999: 23). The underlying connection is that justice results from working out the demands of the background moral idea of equal respect for the interests of relevant, subjected, persons in particular practices of governance. This is a continuous theory of the basic dynamic of legitimacy across domestic and global governance without the requirement that the same specific standards are in place in the different cases.

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