Sweet Dissonance: Conflict, Consensus, and the Rule of Law

By Gerald J. Postema

According to Kant, reason holds all who speak in its name to a discipline of public argument, submitting their reasoned judgments to the verdicts of all others bound by the same discipline.\(^1\) I think Kant was right at least about moral reasoning in the context of politics. In fact, I am inclined to defend a particularly robust notion of public practical reason for political morality.\(^2\) I confess, however, that I have not convinced a lot of people to join my Public Reason Party. My skeptical friend, Fred Schauer, suggests that perhaps I should not be surprised by this. He wrote recently,

> It is a source of continuing astonishment for me that such a small percentage of even my soundest opinions command widespread assent. Indeed, my only source of solace in this is the knowledge that most others experience life in similar ways and thus must confront daily the obtuseness of their fellow citizens. For many of us, the resistance of other members of the community to even our strongest arguments is a continuing puzzling frustration.\(^3\)

From this cold-eyed observation of our daily dance with disagreement he concludes: “the political world we inhabit forces us to consider the possibility that serious disagreement even as to matters that the disagreers believe beyond disagreement is an endemic feature of modern political life.”\(^4\)

For a partisan of robust public practical reason this would seem to be disheartening, for the ideal seems to put great faith in the power of sweet deliberative reason to bring disputing parties into harmony. Realist-skeptics, however, fueled in part by observations like Schauer’s, think the faith is naïve if not dangerous. Politics, they say, is about conflicts of interests and struggles for power—“enough of deliberation.”\(^5\) Some of these hearty realists, taking their cue

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from Hobbes, insist that we look not to public deliberation but to law. Samuel Pufendorf, speaking for a long tradition of legal theorists extending well into our century, wrote: “The more Voices there are, the more harsh and unpleasant would be the Sound . . . so would human Life be Nothing else but Noise and Confusion, were not the jarring Dissonance compos’d and sweetened by Law, and turned into a Musical Agreement.” On this view, law sweetens the frustrating and dangerous dissonance that so troubled Schauer by resolving it into concord, returning all public thought and social interaction to the tonic key.

I want to challenge this view. I will challenge the view that disagreement is a fundamental threat to the project of robust public practical reason. Far from a threat, I will argue, it is a fundamental and invaluable component of it. I will also challenge the view of law, or rather of the rule of law, suggested by Pufendorf’s musical analogy. Law, I want to argue, provides the focus and forum for just such deliberative disputation.

For my text, I take the familiar story of the Tower of Babel told in Genesis 11: 1-9. The people of the earth gathered on the plain of Shinar, we are told, and in an act of single-minded arrogance set out to build a tower to the heavens, a tribute to their power and their claim to God’s admiration. God, of course, defeated the scheme by introducing a confusion of tongues and scattering the peoples to the four corners of the earth. I will not speculate about the theological moral of this story, but it offers an important lesson for those of us who theorize about morality and law. The arrogant and self-aggrandizing plan arose amongst people who spoke a single language; and therefore, we are told, they needed few words. Their consonance enabled them to hatch hopes of a cooperative scheme of heaven-challenging proportions; but they could only do so unreflectively and uncritically, because their experience was uniform and their moral imagination was homogeneous. They lacked the resources to articulate concerns about the project and the public spaces to give those concerns a public airing. The people on the plain of Shinar had no incentive to adopt the discipline of public practical reason, but there was good reason for them to do so. For us moderns, as we now gather in a confusion of tongues from the far corners of moral experience, the tools of public discourse, especially those provided by law, are even more critical to our lives together. Or so, at least, I intend to argue.

1. Robust Public Practical Reason
The task of practical reason is to provide rational grounding for normative judgments, especially moral and political judgments. My first thesis is that practical reasoning is public not just in the sense that it is practiced in public (out in the open), nor just in the sense that it is about public matters, but in the sense that it is addressed to, and necessarily, engages others in that public space. Bentham said moral justification is always “by a person addressing himself to the community.” Hume tells us that one who responsibly addresses himself to the community must “depart from his private and particular situation, and must choose a point of view, common to him with others.” As Hume sees it, the transcendence required of us when we reason and judge morally, is not transcendence to the point of view of some Ideal Observer, or of all rational agents as a Kantian might hold, but rather to a common point of view shared in some significant way with others.
of our community or our kind (which may and perhaps must, of course, include all humankind). The moral point of view is an intersubjective perspective from which people, who are thrown together and hoping to live successfully together, seek to articulate the outlines of their common moral world. This idea needs some fleshing out before I can turn to my main project. To do so I begin with a few remarks intended to make the thesis plausible.

A. Reciprocal Authority and Argumentum Inter Homines

Philosophers who defend the essentially public nature of moral reasoning typically appeal to a deep moral principle, like the principle of respect for persons. I will take a different tack. I start with some reflections on the nature of normative judgment and reasoning in general.9

The activities of making judgments and offering justifications for them are activities of creatures that are capable of taking responsibility for their actions and judgments.10 To take responsibility is to accept that one’s actions can be assessed by reference to a norm that is binding on oneself. Likewise, making a judgment and offering justification for it are themselves normative performances for which rational creatures also take responsibility. As normative performances, they are liable to mistake, that is, they are capable of being correct or incorrect. However, whether one’s performance meets or fails to meet the standard cannot just be up to one, for then it would not be possible to distinguish between following the norm and it seemingly to follow it. And if no conceptual distance can be put between the performance’s seeming to follow the norm and its actually following the norm, normativity is not possible. Thus, making judgments and offering justifications for them cannot rely solely on one’s own authority; one must cede authority to others to judge one’s performance relative to the relevant norm. I commit to the norm, but others must hold me to it. Therefore, my ability to take responsibility for my actions and judgments depends necessarily on others.

By the same reasoning, the authority of others in this respect is not sovereign or unilateral. For their assessments of my performance relative to the norm are likewise normative performances, judged, again, relative to that norm and possibly others. Thus, normative authority, necessarily, is reciprocal. In such a reciprocal relationship, since no single party is sovereign, the determination of the content, scope, and binding force of the norms in view will have to be negotiated among those who are mutually bound to them. And the product of mutual adjustment will be governed by the aim of achieving common conviction. The aim of common conviction is not driven by any external goal of camaraderie, social cohesion, or mutual respect, but solely by the fact that the possibility of success or failure of one’s own normative performances depends on achieving, or at least continually striving for, such common conviction.

Salient familiar features of morality and the practice of moral justification fill out this picture.11 First, the ideals and norms of morality, typically, are not merely personal but interpersonal, matters that link us to other persons rather than distinguish us as individuals. Personal ideals are linked to important aspects of living successfully, but duties and rights are conditions of living successfully together. Second, rights and duties are claims we make against each other, warrants for demands we make on each other. Third, moral language is the language of
public accountability. It is the language in which we give an accounting of our actions to others and through them to ourselves. Morality holds us answerable for our actions and provides the language in which to formulate and utter our answers. This activity of public accounting also brings us into a thick network of reactive attitudes—resentment, outrage, gratitude, pride, and the like—and in this way powerfully implicates our selves and not just our actions.

These features strongly suggest that moral reasoning cannot be limited to self-clarification, personal vindication, or to reasons that have practical force only for oneself. Moral judgments reach beyond the person making them to others and especially to those implicated in or affected by those judgments. Moral judgments claim an authority that embraces both the person judging and the person judged and transcends the singular position of each. Any attempt I make to press such judgments on others, or to use those judgments to justify my actions affecting their wellbeing or persons, without attempting in good faith to offer reasons they can also affirm, will with reason be regarded by them as an illegitimate imposition—an exercise of will rather than a justification. Thus, moral reasoning must be addressed to others, must seek to offer them reasons they can recognize, assess, and affirm. In this respect, justification is essentially ad hominem.

But we must press the point further. To fulfill the task set by morality, it is not enough to offer reasons to subjects of one’s judgments to accept those judgments. It is not enough to be able to show what they are committed to. Accountability and reciprocal authority requires further that the reasons and principles I offer to others also be reasons and principles to which others can hold me. It requires that I offer reasons to others only if I can endorse them. Thus, the task of moral reasoning is to uncover, articulate, and utter reasons we can share; it involves not argumentum ad hominem but rather argumentum inter homines.

B. Strong Deliberative Consensus

These reflections on the nature of normative judgment and moral reasoning lead us to a robust notion of public practical reasoning. It has three defining features.

First, robust public practical reasoning is aimed at common conviction by fully public reasons. We can make the profile of this idea a bit sharper by contrasting it with two other interpretations of public reasoning. On one such interpretation, the aim of offering reasons and arguments in public is to convince others to agree to comply with rules or norms one is also willing to comply with. This agreement can be achieved by strategic bargaining, offering reasons others might have to comply with the norms that may not be one’s own reasons at all. This reasoning is not bound by any requirement of sincerity and its regulative aim is convergent behavior. This is argumentum ad hominem of an especially thin sort. A second and somewhat richer interpretation regards public justification as a matter of offering to one’s interlocutors reasons which one sincerely judges to be sound reasons for them to accept the norms or standards proposed for governance of common action or interactions. And justification of a proposal is public if, in one’s judgment, it offers reasons sufficient to ground the norm or judgment in question that sound for each of the members of the public, possibly different reasons for different members including oneself. This “distributive” conception
of public reasoning does not aim at common conviction even as a regulative idea, but only at convergence of widely differing reasons on the acceptance of some norm or judgment. It aims at convergence of conviction, not merely convergence of behavior, but it is convergence of individual conviction. Nothing more. While richer than the first interpretation, it still treats public justification as a matter of *argumentum ad hominem* only.

A reason is fully public in the robust sense I have in mind just when it is a reason *for each* member of the community in question (at least in part) *insofar as* it is a reason *for all* of them and individuals regard themselves members of the community. Critics sometimes complain that the imperative to seek consensus can be implemented only through one of two strategies: either we must seek to *convert* our interlocutors to our own opinions, or we must be prepared to capitulate and conform to the opinions of others.\(^\text{14}\) Evangelize or capitulate—these are the only options. But this is a false dichotomy. It fails to recognize the difference between two kinds of reasons: (1) reasons for each of us individually and (2) reasons *for us* and hence for each in virtue of being one of “us.” Conversion and capitulation keep one side of the equation fixed and forces all the movement on the other side. However, to seek common conviction is not to make it the case that everyone holds the same opinion, either mine or someone else’s, but rather to find ground common between us, opinions we together can hold, convictions that each of us endorses, because in part they are convictions of us all. The aim is not merely convergence of behavior or conviction but evaluative common ground.

The second defining feature of robust public reason is that it is essentially *discursive* and *deliberative*. It seeks to achieve common conviction by means of offering of reasons and arguments. The “negotiations” by which we shape together our common moral world involve articulating, offering, assessing, and revising reasons for alternative arrangements that give shape to our common world. As a mode of normative performance it presupposes a notion of correctness, and this notion has an important procedural dimension. It cannot be separated from the process of deliberative judging. Normative judgments make claims to correctness and those claims can only be redeemed deliberatively, that is, by offering further reasons and arguments to support them. A judgment is correct if but only if it is maximally supported by the arguments and the balance of reasons available for articulation and assessment by reasonable and competent persons in a fully public deliberative process. Correctness is manifested and tested in the process of reasonable persons offering reasons to *each other*. Thus, claiming that a judgment is correct invites a demonstration of the strengths of the reasons and soundness of the arguments available for it.

Third, we can sum up the first two points by saying that robust public reason is defined by the project aimed at *strong deliberative consensus*—that is, common conviction on the basis of the best reasons offered publicly. However, I hasten to add that consensus is neither the precondition of public deliberation, nor the regularly anticipated outcome (far from it). It is, rather, its *regulative ideal*. This ideal exerts its influence on the deliberative process and participants in it through the *distinctive discipline* that it imposes on them.
C. Public Reason’s Discipline

Let me highlight some of the elements of this discipline.\(^\text{15}\)

1. The discourse proceeds only by means of exercising the techniques of practical reasoning: articulation, argument, deliberation, and judgment, and not, for example, by force of arms or will.

2. Participants are bound by a relatively strong principle of *sincerity* to present proposals and evidence, arguments, and interpretations that they can fully endorse, or at least as arguments that one advances to test whether they are worthy of one’s endorsement.

3. Participants are also committed by a principle of *integrity* to accept the implications of the norms and judgments they endorse, and the arguments they advance, and are bound to fit them into reasonably coherent scheme for the domain in question.

4. Participants regard their own proposals, reasons, and arguments as *defeasible*, both with regard to their substantive claims and with regard to their claim to *speak for community*, and so accept the obligation to *integrate* the views of all other participants into their interpretations, reasons, and arguments.

5. Since closure of deliberation on an issue is achieved only when all parties have embraced the judgment or principle on the strength of the all the relevant arguments alone, deliberation is always in principle open. “[N]o amount of criticism is sufficient to place critical judgment beyond further challenge.”\(^\text{16}\)

6. However, since practical considerations can, of course, exert pressure to close debate well before this point, “premature closure” is reasonable, but it must be *temporary* and *conditional*. So, where devices for closure (for example, voting, authoritative decisions, et cetera) are introduced into the practice of public deliberation, they must be linked to devices and structured opportunities to reopen temporarily closed issues in a fair, timely, and orderly fashion.

7. Finally, the entire deliberative process is subject to the constraint of *reflexivity*, that is, any closure devices, and any other constraints on full and open exercise of public practical reason by all capable participants, must themselves survive critical scrutiny in a fully open public process of deliberation and argument governed by the discipline of consensus as a regulative ideal.

D. Public Reason and the Labor of the Negative

This robust conception of public practical reasoning is built on a notion of consensus, but the time has come to explain the relation between consensus
and conflict in this conception of public reason. It is important to recognize at
the outset that the notion of consensus in play—“strong deliberative consensus,”
that is, common conviction formed on the basis of arguments fully rehearsed and
assessed in an open deliberative process—is a complex notion. It does not merely
tolerate disagreement; it incorporates it into the discipline of practical reason.
Moreover, this notion functions as a regulative ideal. Actual consensus is neither
a precondition of public reason nor an expected outcome of any piece of actual
deliberative reasoning. Since this governing aim exerts its influence through
imposing a discipline on the deliberative process and participants in it, there
is room for a positive role for disagreement in the deliberative process. Indeed,
dissensus is essential to the process for two reasons.

First, strong deliberative consensus is an exacting standard: not just any
consensus, even if it is deep and stable, meets it. Schauer reminded us of how
easily we are impressed with the difficulty of achieving agreement on important
moral or political ma
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ters, but the fact is: consensus of belief and judgment is often
easy and cheap, and it can be brought about by forces other than the power of
reasons and argument. Agreement may be too complacent, too narrow; it may
be the product systematic bias, limited or unequal or inappropriately exclusive
participation, or various forms of false consciousness.

David Hume, a keen observer of human psychology, once wrote that “[s]
close and intimate is the correspondence of human souls, that no sooner any
person approaches me, than he diffuses on me all his opinions, and draws along
my judgment in a greater or lesser degree.”17 The fundamental human capacity
of sympathy, which enables us to receive by communication the sentiments
and emotions of others (“as in strings equally wound up, the motion of one
communicates itself to the rest”) also “communicates” opinions and judgments.18
Hume’s armchair observations have been amply confirmed by experimental
psychology. Cass Sunstein called attention to the large body of experimental
work exploring three such phenomena: conformity, social cascades, and group
polarization.19 Conformity and social cascading are very closely related to the
phenomenon Hume observed: people doing or thinking things because of what
they think others are doing or thinking. But for our purposes, “group polarization”
is even more interesting and troubling, since it is a product of group deliberation.
Researchers have discovered that, in absence of forcefully expressed contrary
opinions, deliberation among people not only tends to bring them into closer
agreement, but also leads them to relatively extreme positions, as measured by
their pre-deliberation tendencies. Extremism, of course, is not always a bad thing,
but neither is there reason to think that extremism is a reliable mark of positions
best supported by the available arguments. Group discussion in the absence of
strong opposition may not be a good way of securing agreement on the basis of
the best arguments.

The phenomenon of group polarization alerts us to the possibility
that consensus may be the product of deliberative dysfunction rather than
deliberative success, of complacent and uncritical acceptance of received views,
or of psychological forces that lead groups to judgments that individuals on their
own might not be inclined to take and that do not rest on the best of available
arguments. The results of modern experimental psychology confirm what we
learned from the Biblical story of the Tower of Babel: “social homogeneity can be quite damaging to good deliberation. When people are hearing echoes of their own voices, the consequence may be far more than support and reinforcement.”

Group polarization can also be socially destabilizing and dangerous if what might seem to be open deliberation goes on in distinct and relatively isolated enclaves. “Openness” of discussion—that is, discussion that is not formally limited in any way—is often not enough on its own to counter the effect of group polarization. The internet is a good example of a broadly “open” form of communication and it facilitates a certain form of group deliberation, but it may well encourage greater social fragmentation than reasoned consensus, because its radical openness makes it possible for enclaves of people to gravitate to centers of like-minded people without encountering the salutary friction of interaction with people of opposing views.

Hume and modern psychology teach us an important lesson about the dynamics of deliberation: deliberation must not only be open (formally unlimited), but it must take place in a heterogeneous public, in which contrary opinions and arguments are inescapable. Dissent, disagreement, and vulnerability to challenge are all essential to the integrity of the public deliberative process.

But there is a second reason why disagreement and challenge are important for the practice of public reason. They are not just instrumentally valuable for public practical reason as external checks on the integrity of the deliberative process; they are essential to the process. J. S. Mill once argued, “[c]omplete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action. . . .” This is surely correct, and important, but it too does not capture the critical role of criticism in the public deliberative process. Hegel came closest to capturing this role, I think. Reasoned judgment, exercised and embodied in historical communities of rational creatures, he argued, proceeds only “by looking the negative in the face, and tarrying with it.”

We have seen that to utter normative judgments is necessarily to accord authority to others to hold one’s performance to the norms invoked. Normative expressions without submission to reciprocal authority amount to nothing more than declarations of will. But to accord such authority is to invite challenge. To offer a reason or argument in justification of an act or judgment is to claim correctness for the judgment and the argument on which it rests. These claims to correctness are redeemed dialectically. Only through articulation in contrast with other different and possibly conflicting claims are proposals and principles clarified. Only through weighing arguments and reasons against the full force of contrary arguments and reasons are their merits tested. The process of practical reasoning is a process of criticism; dialectic—the “labor of the negative”—is the lifeblood of the process.

Thus, structured opportunities for dissent, disagreement, and challenge are functionally necessary if the deliberative practices of ordinary reasonable persons acting in good faith are to be appropriately disciplined by the regulative ideal of strong deliberative consensus. Opportunities for challenge, structures inviting disagreement and dissent, and a willingness on the part of participants in the deliberative process to unsettle and disrupt an existing consensus are all essential features of the process. Challenge, vigorous dissent, and articulate,
dogged disagreement are the analogues of tough love in practices and institutions governed by the ideal of strong deliberative consensus. It is often said that there is no disputing tastes—*de gustibus non disputandum*. The opposite is true for moral judgments rooted in the discipline of public reason. *De moribus*, we may say, *disputandum est*—especially, *in civitatem*.

E. Self-Correction and the Presumptuous “We”

There is one more reason why disagreement is critical to deliberative practices governed by the regulative ideal of strong deliberative consensus. Good faith participation in a public deliberative process approximating the constraints mentioned above is no guarantee that personal or systemic biases will not distort appreciation of relevant reasons and arguments, nor will it necessarily block entirely the influence of inappropriate factors. Salvation, however, lies in the requirement of reflexivity and a correlative requirement of alertness on the part of all participants in the deliberative process to the influence of distorting factors and a willingness to entertain challenges from others that may expose the failures of existing processes or their products. The openness of every aspect of the deliberative practice—from the most mundane to the most abstract, including critical challenges to the standards of relevance of reasons and scope of participation in the deliberative process—is essential to the integrity of the process. But this reflexivity is an empty promise unless there are places to stand, models to follow, and resources to draw on to mount challenges. Opportunities, resources, and public spaces for challenge of even the most well settled principles of a domain fund the hope that the deliberative process can be self-policing and self-correcting.

This openness and a robust requirement of reflexivity are the best—and maybe only—adequate antidote to the problem of the presumptuous “we.” Public justification, as I have understood it, involves an implicit claim to speak for all, but this strikes many as presumptuous. A wonderful folksong captures this presumptuousness.

> When we go to the fair, Ô!
> We’ll both go together, Anthony,
> We’ll both go together!
> We’ll buy a cow…
> We’ll buy it together!
> But the cow will be mine…
> The horns will be for you!]

This kind of presumptuousness is surely objectionable, but it is has no part in the script written by the regulative ideal of strong deliberative consensus. On the contrary, rather than imposing a norm or demand on all in the name of “us,” judgments and arguments uttered in the language of public justification issue an *invitation* to challenge the very presupposition of a “we” for which it speaks. The discipline of public justification provides the context and resources for testing and challenging the scope and validity of any such “we” claims. In truly open public deliberation, participants are bound to *explore* and *uncover* the scope of the “we” implicit in the judgments. Contest and confrontation are essential to this
learning process. (Sunstein argued, plausibly, that it may also be necessary to provide for some degree of protection for “enclave deliberation” — that is space where members of low-status groups in society can deliberate together for a time out of the wider public space.\textsuperscript{25} Such opportunities may be necessary in order to enable such groups to formulate positions and challenges that would otherwise be invisible or silenced in general debate.) Confrontations arising from very different experiences, understandings, and perspectives bring forcefully to the attention of deliberators who are committed to articulating reasons “we can share” the degree to which their own understandings are limited and partial. Any attempt to judge for us without including some part of “us” in the justification will correctly be viewed as an arbitrary imposition or a cynical manipulation of the implicit “we,” as a case of buying the cow together and leaving them the horns.

2. Public Practical Reason and the Rule of Law

A. Institutional Articulation of Robust Public Practical Reason

I HAVE MAINTAINED THAT THE IDEAL OF PUBLIC PRACTICAL REASON IS BEST UNDERSTOOD as a regulative idea. Thus far I have described the discipline generated by this regulative idea in rather abstract terms, but it is available to ordinary people only in concrete practices and institutions of their political communities. I propose now to consider the institutional articulations of the regulative idea.

For this purpose we should note a few distinctive features of modern political societies. They are usually large, territorially bounded, social groups and membership in them is for all practical purposes non-voluntary. Moreover, relations amongst citizens typically are distant, non-intimate, and nearly one-dimensional. Common experience, where it exists, is mediated through participation in a wide variety of social, economic, and political institutions and associations. More important for citizens of political societies than the texture of personal relations are the structures of social interaction and mutual dealing, the coordination of the efforts of large social groups, the institutionalized constitution of power, and the modes and limits of its exercise. Also, modern political societies tend to be morally and culturally heterogeneous to a high degree. Modern political societies tend to gather under a single roof a wide array of traditions and moral visions, all competing for space, resources, standing, and especially power. Because of this pluralism, conflict in modern political societies tends to involve not only conflicts of interest, but also deep and pervasive conflict of vision and principle. Political societies must continually work to create unity in the face of rival claims, unequal power, and conflicting interests, principles, and moral visions. Finally, political societies are pervasively coercive. Behavior, relationships, arrangements, and institutions are coercively enforced, or at least underwritten by coercive institutions. Hence, politics operates in an environment of power and is always concerned, explicitly or implicitly, with a struggle over the exercise of power and over the standards by which this exercise is politically legitimated.

In these societies, citizens demand justice of their institutions and social arrangements, yet they disagree deeply over what justice requires. In view of such disagreement, it may be too much for individuals or groups to demand now that political and social institutions meet their best judgments regarding the
requirements of justice. Still, they can reasonably demand that these institutions take justice for their governing aspiration. In such societies, the institutions and practices that best articulate the idea of robust public practical reason, I have argued, are those that embody the ideal of deliberative democracy. 26 I will not discuss here the theory of deliberative democracy. I mention it only to situate my remarks about the rule of law in the larger context of this rapidly developing theory.

To understand the role of the rule of law in democratic governance on the model of deliberative democracy, we need to grasp two related principles of institutional design at the heart of this theory. First, democracy is not the responsibility of any single institution, but of a network of interrelated, mutually supporting and mutually checking institutions and practices. Henry Richardson recently introduced the notion of “distributed popular sovereignty,” which seeks to integrate the bureaucratic institutions of the modern administrative state into the structure of deliberative democracy alongside legislative institutions. 27 This is on the right track, but we also need to look beyond even the legislature, courts, and executive agencies of government to the less formal institutions of political parties, the public press, local governing counsels and boards, civic organizations, and the like. All have a vital role to play. Second, deliberative democracy requires that we look to the operation and interactions of these various and varied institutions and practices as a whole and ask how they can be designed such that, working together, they articulate and structure the discipline of public practical reason. Deliberative democracy calls for a complex division of public deliberative labor which seeks to embody and express, in the conditions of real politics, the regulative idea of robust public practical reason.

My thesis is that law is an integral part of the institutional articulation of this regulative idea. The key notion for our purposes is that of the rule of law.

B. The Rule of Law

The concept of the rule of law, Waldron has recently observed, is a “contested” — perhaps an “essentially contested” — concept. 28 Competing conceptions offer “not different accounts of what there is, but different kinds of striving,” 29 a complex ideal by which legal systems are assessed. It is complex both in the precepts it lays down and the values it is thought to serve. This complexity invites competing accounts of its nature and significance. But, Waldron has argued, it is also contested for a further reason. The rule of law is seen as a solution to a certain deep problem of social ordering, a response to a fundamental challenge. The notion is contested because there is disagreement about the nature of the challenge, the features of law that hold out the promise of meeting this challenge, and the values thereby served. Even more fundamentally there is debate over whether law can meet the challenge. As Waldron says, “[w]e disagree about the ailment, the medicine, and the character of the cure.” 30

However, if we construe it broadly enough, we can give a relatively uncontested statement of challenge. The challenge is that, although social life is possible only through order and stability, and though order and stability require the organized exercise of political power, nevertheless, the exercise of this power is also the focus of endless and destabilizing contestation, in no small part because
the concentration of political power is extremely dangerous, but also because there is deep disagreement about how it should be used. Governance through exercise of political power must itself be governed. Law is seen as a solution to this problem. Aristotle expressed the founding idea of the rule of law: “he who bids law rule may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of the beast.”

The rule of law has a vertical and a horizontal dimension. In the vertical dimension it seeks to govern political power by requiring it to govern through law, subjecting governance to the demands of law. In its horizontal dimension it seeks the mutual subjection of citizens to common, impersonal law. However, an obvious question arises at this point: is it ever possible to replace the rule of men with the rule of law? There is good reason for skepticism, for law rules just insofar as it is understood, used, interpreted, enforced, and followed by people. The Aristotelian distinction between rule of man and rule of law appears to be a false dichotomy. At most, what we can hope for is the rule by men with law.

The seriousness of such skepticism about the rule of law depends on how we understand the root problem to which law is proposed as a solution. I want to suggest that we understand this problem in light of the idea of public practical reason, and its corollary, the idea of deliberative democracy. The problem from this vantage point is that political power is bound to the aspiration of serving justice in political communities in which justice itself is contested. Under such conditions, political power is legitimately exercised only if it can be justified publicly. The critical need for a framework of public justification—for both the exercise of power by government and the invocation of that power for the private purposes of individual citizens—brings the regulative idea of public practical reason to bear on this problem of politics.

I will sketch here two competing conceptions of the rule of law that propose to explain the nature and value of law’s promise as a solution to the problematic of governance which is at the heart of the notion of the rule of law. For reasons I will suggest presently, I strongly favor the second conception. Its attractiveness, I shall argue, lies in large part in its giving institutional expression to the idea of robust public practical reason—an idea that has room not only for consensus but also for dissent and disagreement.

C. Law as Surrogate

On one very familiar analysis, the problem of social order can be traced not so much to conflicts of interest, but to conflicts of principle; not to failures of altruism, fellow-feeling, or good will, but to failures of deliberative reason. It is said that practical reason, no matter how conscientiously it is exercised, cannot hope to generate common public standards for behavior and judgment, standards without which social order, not to mention public justification, is impossible. Hobbes, of course, is the most familiar and probably the most extreme representative of this approach. According to Hobbes, if a polity lacks a sovereign head (an “arche”), social life will lack all common public standards (nomoi) and all resources to construct them. That is, for Hobbes, an-archy entails anomy.

This view has attracted many recent defenders, for example, David Gauthier. This view has attracted many recent defenders, for example, David Gauthier. Hobbes differs from the vast majority of those attracted to the standard
view of the rule of law only in the unqualified pessimism about the possibilities of achieving working common standards of behavior through exercise of deliberative reason. Others might accept that some degree of consensus on workable standards is possible for cooperative, public-spirited people, but they agree with Hobbes that law has a role just when and to the extent that such public deliberation fails. Neil MacCormick offers a typical formulation of this view: “one vital point of legal institutions is exactly that they exist (inter alia) to settle authoritatively for practical purposes what cannot be settled morally. . . . Law settles what moral consensus cannot, whether through absence or through silence.”

On this view, the deliverances of law are deemed standards of public reason for the purposes of practical politics. Conflict, disagreement, dissent are seen uniformly as the problem to be solved, and law’s aim (at least in this respect) is, in Hume’s phrase, “to cut off all occasions of discord and contention.” Law seeks to mediate between the reasons and principles that govern citizens and officials, on the one hand, and their decisions and actions in the public domain, on the other. To accomplish this task, law displaces the practical reasoning of citizens and official onto the artificial reason of the law and isolates legal reasoning from the broader context of practical reason where conflicts and dissent is rife and disagreements are irresolvable. Law is seen as a form of executive, rather than deliberative, reasoning. Legal reasoning executes the results of deliberation done elsewhere. Following Pufendorf, law is seen as a surrogate for deliberative public reason. Conflicts and disputes are not resolved; they are moved “off-line” out of the domain of the public and political. In the public domain, public reason is a matter of consensus, both as terminus a quo and terminus ad quem, reasoning from common rules to agreed judgments and to decisions and actions flowing from them. “Off-line” there is little hope for consensus; “on-line” there is no room for dissensus.

On this view, law is able to accomplish this because (or to the extent that) law is a matter of peremptory rules that close off further debate. The exercise of power, on this view, is contained and governed, and social order maintained in the face of potentially undermining disagreement, by constraining all exercises of power to the rule of general rules that are publicly accessible, explicitly formulated, peremptory, and formally validated; and to procedures that are authoritative and final for determining that which the rules leave undetermined. Exercise of political power is legitimate just when it is warranted by such rules and determinations. For this conception of the rule of law the central values are univocality, determinacy, finality, and the kind of equality and freedom that a regime of general, determinate, and authoritative public rules can offer.

D. “A Little Rebellion Now and Then Is a Good Thing”

Objections to this conception of the rule of law come easily to mind. It is often argued that the pursuit aim of determinacy and finality is a fool’s errand. Not only is determinacy of legal norms impossible to achieve, but often it is clearly undesirable. Pursuit of full determinacy of a legal norm risks replacing one form of arbitrariness (ungoverned official power) with another (pointless and unintelligible prescriptions). Moreover, it is a commonplace that we want law to be no more determinate than our considered aims and objective are; there
is often great value in leaving matters undecided for resolution on another day. But these objections are in one respect too easy and in another they miss their target. They assume that advocates of this conception of the rule of law insist on utter and unqualified determinacy, but they usually do not. The deeper worry is that this understanding of the rule of law rests on a mistaken understanding of the fundamental problematic to which the rule of law is addressed and hence offers a mistaken strategy for addressing that problematic.

The analysis of the problem of social order on which the standard conception of the rule of law rests is flawed because it fails to recognize the vital role of disagreement and dissent in the practice of public reason. Rousseau once wrote:

The more harmony reigns in the assemblies, that is to say, the closer opinions come to unanimity, the more dominant too is the general will. But long debates, dissensions, and tumult betoken the ascendance of private interests and the decline of the state.38

But I think Alexander Hamilton had the better grasp of the matter when he wrote: “The differences of opinion, and the jarring of parties in [the legislative] department of the government . . . often promote deliberation and circumspection, and serve to check excesses in the majority;” to which Thomas Jefferson added: “[turbulence can be] productive of good. It prevents the degeneracy of government, and nourishes a general attention to . . . public affairs. I hold . . . that a little rebellion now and then is a good thing . . .”39 From the point of view of the regulative ideal of robust public practical reason, disagreement is both the spur to efforts at public justification and an essential element of the discipline of public reason. Conflict can, of course, be socially disruptive and even lead to disintegration—Hobbes was not all wrong—but the proper response is not to suppress it, but rather to channel and discipline it.

Hence, it is an ill-conceived strategy to seek to displace deliberative reasoning because it threatens to encourage and prolong disagreement. Devices for temporary closure of debate—for immediate practical purposes—are, of course, very important. But the aim thereby to settle with finality matters on which debate has not achieved deliberative closure is inconsistent with the underlying governing ideal of public practical reason. Moreover, it is unlikely to succeed without deploying an unacceptably high level of coercive repression. For the strategy of authoritatively settling disputed matters through decisive determinations and peremptory rules can succeed—without abandoning law and resorting to imposition of excessive force—only if those engaged in the disputes take the determinations as authoritative for them and their dispute. Because Hobbes recognized this, he grounded the sovereign lawmaker’s authority in universal consent. Consent, strictly speaking, may not be necessary, but what is essential is that citizens take the determinations of court and legislature as authoritative for their practical reasoning. But this is unlikely in a society where serious issues of political morality are regularly disputed, if law provides no institutional devices by which the conditions of its own legitimacy can be assessed. Law conceived as surrogate for deliberation and disputation cannot meet this vital condition of legitimacy.

But suppose we consider law as a component in the larger division of
deliberative labor that as a whole gives institutional articulation to the idea of robust public reason. It might then be argued that the deliberative tasks, including that of challenging and reshaping the conditions of law’s legitimacy, are best assigned not to courts, nor to citizens (once the law is authoritatively settled), but rather to legislative institutions which can be held to robust conditions of democratic composition, procedure, and perhaps even a substantive bill of rights. The rule of law has an important role to play in a fully worked out institutional embodiment of deliberative democracy, it can be argued, but its task is, as the standard model specifies, execution, not deliberation.

However, the problem with this suggestion is that the burden of deliberative labor it puts on legislative institutions is too great; they are not well-equipped to handle them. Genuine deliberative reasoning on the model of robust public practical reasoning is possible in legislative institutions of modern democracies, but these institutions have other tasks as well. They are simultaneously engaged in not only deliberative public reasoning, but also hard-nosed political bargaining, serving constituency interests, and a host of other activities, many of which are vital to proper functioning of a democracy. The problem is not that legislative bodies are not capable of genuinely deliberative public reasoning, but that we cannot reasonably expect those institutions to shoulder that burden entirely. The principle of division of deliberative labor distributes that burden in ways that are consistent with their structural and institutional capabilities. Other institutions, especially courts, can take the lead in some dimensions of genuinely public deliberative reasoning.

Further exacerbating the problem of overburdening legislative institutions with deliberative labor is the fact that, according to the standard conception of the rule of law, law has absolutely nothing to offer to aid, focus, or structure public deliberation. It seeks to displace deliberation, so it offers nothing to those engaged in the practice of public reasoning outside of law. Viewed as a proposal for the institutional articulation of the idea of robust public practical reason, this silence signals failure. On this view, courts are empowered to settle disputed matters, using their best judgment, but we cannot suppose that their reasoning any more suitably approximates the ideal of public practical reasoning than the reasoning of private individuals.

However, there are in fact resources within the ordinary institutionalized practice of law to contain and structure the exercise of governmental power in a way that embodies the idea of robust public practical reason. In its exclusive focus on the law’s institutional devices for authoritative and final determination of issues, the standard conception removes from the field of vision the discursive—what Dworkin called the “argumentative”—dimensions of ordinary legal practice. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims.
This argumentative dimension is not merely a marginal feature of law; it has roots in the core of rule of law concerns. As we have seen, at its undisputed core is the idea of the rule of people only through law. As Bracton, the first great Common-Law jurist, put it in the 13th century: “... law [lex] makes the king [rex]. ... for there is rex where will rules rather than lex.” All legitimate exercises of governmental power must be warrantable by rules or norms of law; all claims that citizens make against each other and against governing authorities must be warranted in the same manner. So, when officials or citizens act under color of law they can do so only if they make credible claims of such a warrant. However, these claims are not self-validating. If law is to protect us from the arbitrary exercise of power, as the rule of law insists, then these claims of warrant must be susceptible to challenge in an open proceeding. The demand of warrant in law is the demand for a certain kind of public justification and that demand necessarily carries with it a right of challenge. The idea of the rule of law, MacCormick argues, “insists on the right of the defense to challenge and rebut the case against it. There is no security against arbitrary government unless such challenges are freely permitted.” Recognizing this right has an important implication, according to MacCormick:

Whatever care is lavished on the source materials of law by legislators, drafters, or judges writing opinions that attempt to state a holding or ratio with exemplary clarity, the rule statements these yield as warrants for governmental action aimed at vindicating public or private right are always defeasible, and sometime defeated under challenge by the defence. Law’s certainty is then defeasible certainty.

These reflections, by a staunch defender of the law as surrogate conception of the rule of law, bring us to the threshold of a different, more nuanced conception, one that makes room for concerns of published determinacy and decisional finality, but that also accords ample room, and an important functional role, for law’s argumentative, discursive dimension.

E. The Rule of Law as the Rule of Disciplined Deliberation

In the words of Justice Brandeis, we look to law to help us govern ourselves because we want “deliberative forces [to] prevail over the arbitrary” in our society and its government. This suggests a conception of the rule of law that puts deliberative and discursive elements of law at its center. On this view, a political community is ruled by law when political power is exercised only as warranted through open use of public deliberative reason in public forums designed to facilitate and model it.

On this conception, the problem to which law is proposed as a solution is to contain and constrain political power necessary for social order and stability and invest it with the ambition of serving justice and the good of the political community in circumstances in which justice and the terms and conditions of membership in the community are themselves widely disputed. The problem is, in part, the absence of common, public standards, but the correct strategy to solve the problem is not to fill this void with norms that will settle artificially what cannot be settled through unstructured public deliberation, but rather to enable a political community through the exercise of public deliberative reason to fashion and refashion such standards, and in doing so to build a genuine public, in a
context of rival claims, deep diversity, unequal power, and conflicting interests.

To this end, silencing disagreement and conflict is not an adequate means. It cannot secure essential legitimacy of the surrogate norms and it denies to disagreement its essential role in public reason. The solution, on this view, is not to silence disagreement, but to domesticate it, to give it focus, structure, and discipline. Hobbes was correct: principled disagreement in the absence of common standards is a serious threat to social order. Law may be a promising answer to this threat, but not by eliminating conflict or repressing it, but rather by giving it a form and a forum, a language and a discipline. Law makes principled conflict socially and politically feasible, by holding out the promise of a depth of legitimacy that secures social order in the face of fundamental disagreements over justice, public good, and the terms and conditions of membership in the political community.

Waldron captured the central idea when he wrote, “A society ruled by law . . . is a society committed to a certain method of arguing about the exercise of political power.” Fidelity to law, commitment to the rule of law, is demonstrated not by compliance with, or enactment of, explicit rules, nor following one’s own best moral judgment, but by participating in disciplined practice of public reasoning, modeled by argument in the public forum of the court, in which the fundamental governing question is: what are we committed to as a community in view of what we have already done as recorded in the body of legal materials available to us.

Law offers a distinctive form of practical reasoning that enables it to serve this task well. It is distinctive in at least three important respects. First, it anchors the public justification of decisions and actions of officials and citizens alike to past decisions and actions of the community. It imposes on attempts to justify public decisions and actions a constraint of normative coherence or intelligibility. This may be expressed in terms of a vision of justice or a related notion of political morality, but always as an interpretation of the particular political community’s commitment as demonstrated in its decisions and actions over time. Law’s task is to maintain the integrity of the community not at each point in time (synchronic integrity), but rather over time (diachronic integrity). While law is, surely, the memory of the political community, it is not just that, and its mindfulness of time is not exhausted by, or even properly exercised in, merely repeating the past. Legal reasoning is charged with the task of constantly forging and reforging an intelligible unity of action and commitment that integrates the community’s present and past and anticipates its future.

Second, the form and structure of legal reasoning are decisively shaped by the fact that it is designed to be presented in a public forum in which legal claims are assessed and routinely subjected to critical challenge. Legal arguments typically take the form of reasons for extending or delimiting a rule used and established by a past decision or enactment. The reasons are developed through the exploration of analogies with competing lines of cases (and relevant hypothetical cases). Public matters, then, are decided, and disputes in the present are resolved, by arguments drawn from analogies to past decisions or established rules. It is a highly refined device for the exploration and exploitation of the guidance provided by these past decisions.
Essential to this process and its claim to legitimacy is the fact that, before a decision is officially and authoritatively extended or dramatically restricted, competing cases are extensively explored in a fully public forum. Edward Levi offered a classic description of the process of legal argument:

The law forum is the most explicit demonstration of the mechanism required of a moving classification system. . . . [This forum] requires the presentation of competing examples. The forum protects parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged.51

Vigorous presentation of competing analogies and interpretations of past decisions are essential to the proper progress of this form of reasoning. Clashes in public over the proper and reasonable understandings of past decisions are not signs that “anything goes” and that standards of sound argument and rational deliberation have been abandoned. Rather, they are signs that products of the system can claim the right to be taken seriously as products of a credible structure of public practical deliberation. As Christopher Kutz has observed, “inerradicable conflict and divergence in a complex legal system is not a sign that things have gone awry, but that things are going well, that the legal regime is taking seriously plural claims of value. . . . Divergence [of opinion and argument] . . . signals that the techniques of reason and argumentative insight are playing a vigorous role in the law.”52

Third, law seeks and makes possible authoritative resolution of disputes. It provides a measure of finality that is practically essential for social life. However, it also provides the structure and forum for systematic reassessment of matters that, for immediate practical purposes, have to be taken as settled. As MacCormick observed, the finality offered by law is defeasible. Law provides the ways and means for reassessment of its own rules and arrangements, even fundamental ground rules. It has the capacity for reflective self-criticism. In this way, it represents and models a form of institutionalized dissent. Indeed, from the point of view of the Rule of Law this is key to its claim to legitimacy—a claim it can make good even when its claim to justice fails in the eyes of many. The rich opportunities to challenge, to re-open and re-assess, matters regarded officially as settled, creates spaces, both literally and figuratively, in which forms of bias, prejudice, exclusion, and unreason can be publicly exposed. But more, it provides space and discipline for the practice of honorable dissent that, as we have seen, lies at the heart of the regulative idea of robust public practical reason.

3. Conclusion

Thus, committed to the ideal of public practical reason and charged with finding a solution to the problem of constraining appropriately the exercise of socially necessary, but potentially dangerous, political power, we have reshaped our understanding of the rule of law. Law is to be regarded not as a surrogate for deliberative public reason, but rather as a form and forum for disciplined deliberation. This alternative conception is offered as part of the larger project of deliberative democracy to give institutionalized expression and articulation in
circumstances of politics to the regulative idea of robust public practical reason. Pufendorf was mistaken; dissonance in the public domain has its own essential sweetness. Law at its best offers not to silence the dissonance of public life or resolve it into artificial concord, but to discipline its expression and to give it a forum in which it can be heard to good effect.

Notes


18 Hume, Treatise, 2000, 2.1.11, 3.3.1


Sweet Dissonance

22 Hegel, Phenomenology, 1977, ¶32.
24 From Chants d’Auvergne, collected and arranged by the composer Joseph Canteloube. I have taken the verse from liner notes to an EMI recording by Jill Gomez and Vernon Handley, CDM 7 62010 2. The translator is not credited in the liner notes.
29 L. L. Fuller, Law in Quest of Itself (Boston: Beacon Press, 1966; first published 1940), 12.
32 When the rule of law obtains in a political community, law rules (as Aristotle put it); it fails to obtain when those in power rule by wielding, when it is convenient for them, the instrumentality of law. For further discussion of this distinction between the rule of law and rule with law see “Law’s Ethos,” pp. 109-11.
35 D. Hume, Treatise, 3.2.3.2, (p. 322).
49 See G. Postema, “Integrity: Justice in Workclothes,” Iowa Law Review 82 (1997): pp. 821-857, 851f; see also R. Dworkin, Law’s Empire (Cambridge, MA: Harvard University Press, 1986), 93. This is a pervasive feature of legal reasoning, true not only for common-law reasoning, but also for much legal reasoning dealing with statutory or constitutional materials. For purposes of illustration I will consider only common-law reasoning.