

What Value Pluralism Means for Legal-Constitutional Orders

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I. INTRODUCTION: THE BASICS OF VALUE PLURALISM

The concluding section of Berlin's *Two Concepts of Liberty* helped to spark what may now be regarded as a full-fledged value-pluralist movement in contemporary moral philosophy.¹ Leading contributors to this movement include John Gray, Stuart Hampshire, John Kekes, Charles Larmore, Steven Lukes, Thomas Nagel, Martha Nussbaum, Joseph Raz, Michael Stocker, Charles Taylor, and Bernard Williams.²

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1. ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 167–72 (1969).

2. See JOHN GRAY, ISAAH BERLIN (1996); STUART HAMPSHIRE, *Morality and Conflict*, in *MORALITY AND CONFLICT* 140 (1983); JOHN KEKES, *THE MORALITY OF PLURALISM* (1993); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987); STEVEN LUKES, *Making Sense of Moral Conflict*, in *MORAL CONFLICT AND POLITICS* 3 (1991); THOMAS NAGEL, *The Fragmentation of Value*, in *MORTAL QUESTIONS* 128

During the past decade, moral philosophers have clarified and debated many of the complex technical issues raised by value pluralism as well as broader objections to the overall approach.³ For the purposes of this essay a few basics will suffice.

- (1) Value pluralism is not relativism. The distinction between good and bad, and between good and evil, is objective and rationally defensible.
- (2) Value pluralists argue that objective goods cannot be fully rank ordered. This means that there is no common measure for all goods, which are qualitatively heterogeneous. It means that there is no single *summum bonum* that is the chief good for all individuals. It means that there are no comprehensive lexical orderings among types of goods. It also means that there is no “first virtue of social institutions,”⁴ but rather a range of public goods and virtues whose relative importance will depend on circumstances.
- (3) Some goods are basic in the sense that they form part of any choiceworthy conception of a human life. To be deprived of such goods is to be forced to endure the great evils of existence. All decent regimes endeavor to minimize the frequency and scope of such deprivations.
- (4) Beyond this parsimonious list of basic goods, there is a wide range of legitimate diversity—of individual conceptions of good lives, and also of public cultures and public purposes. This range of legitimate diversity defines the zone of individual liberty, and also of deliberation and democratic decisionmaking. Where necessity, natural or moral, ends, choice begins.
- (5) The denial of value pluralism is some form of what I will call “monism.” A theory of value is monistic, I will say, if it

(1979); MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (rev. ed. 2001); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); MICHAEL STOCKER, *PLURAL AND CONFLICTING VALUES* (1990); BERNARD WILLIAMS, *Conflicts of Values*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980*, at 71 (1981); Charles Taylor, *The Diversity of Goods*, in *UTILITARIANISM AND BEYOND* 129 (Amartya Sen & Bernard Williams eds., 1982).

3. See *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Ruth Chang ed., 1997); see also Glen Newey, *Metaphysics Postponed: Liberalism, Pluralism, and Neutrality*, 45 *POL. STUD.* 296 (1997); Glen Newey, *Value-Pluralism in Contemporary Liberalism*, 37 *DIALOGUE: CAN. PHIL. REV.* 493 (1998).

4. See JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971) (asserting justice to be “the first virtue of social institutions”).

either (a) reduces goods to a common measure or (b) creates a comprehensive hierarchy or ordering among goods.

One must ask why value pluralism is to be preferred to the various forms of monism that thinkers have advanced since the beginning of philosophy as we know it.

To begin, monistic accounts of value lead to Procrustean distortions of moral argument. The vicissitudes of hedonism and utilitarianism in this respect are well known. Even Kant could not maintain the position that the good will is the only good with moral weight, whence his account of the “highest good,” understood as a heterogeneous composite of inner worthiness and external good fortune.

Second, our moral experience suggests that the tension among broad structures or theories of value—consequentialism, deontology, and virtue theory; general and particular obligations; regard for others and justified self-regard—is rooted in a genuine heterogeneity of value. If so, no amount of philosophical argument or cultural progress can lead to the definitive victory of one account of value over the rest. Moral reflection is the effort to bring different dimensions of value to bear on specific occasions of judgment and to determine how they are best balanced or ordered, given the facts of the case.

Many practitioners, and not a few philosophers, shy away from value pluralism out of fear that it leads to deliberative anarchy. Experience suggests that this is not necessarily so. There can be right answers, widely recognized as such, even in the absence of general rules for ordering or aggregating diverse goods.

It is true, as John Rawls pointed out more than thirty years ago, that pluralism on the level of values does not rule out in principle the existence of general rules for attaching weights to particular values or for establishing at least a partial ordering among them.⁵ But in practice these rules prove vulnerable to counterexamples or extreme situations. As Brian Barry observes, Rawls’s own effort to establish lexical priorities among heterogeneous goods does not succeed: “[S]uch a degree of simplicity is not to be attained. We shall . . . have to accept the unavoidability of balancing, and we shall also have to accept a greater variety of principles than Rawls made room for.”⁶ But, to repeat,

5. *Id.* at 42.

6. BRIAN BARRY, *POLITICAL ARGUMENT: A REISSUE WITH A NEW INTRODUCTION*, at lxxi (Univ. of Cal. Press reissue 1990) (1965). Barry goes on to suggest that

the moral particularism I am urging is compatible with the existence of right answers in specific cases; there may be compelling reasons to conclude that certain trade-offs among competing goods are preferable to others.

II. THE POLITICAL IMPLICATIONS OF VALUE PLURALISM

Even though value pluralism is not relativism, it certainly embodies what Thomas Nagel has called the “fragmentation of value.”⁷ But political order cannot be maintained without some agreement. It is not unreasonable to fear that once value pluralism is publicly acknowledged as legitimate, it may unleash centrifugal forces that make a decently ordered public life impossible. Within the pluralist framework, how is the basis for a viable political community to be secured?

In this part, I explore three kinds of responses to this question: the requirements of public order, the structuring processes of constitutionalism, and the force of ethical presumptions.

A. *The Minimum Conditions of Public Order*

Although pluralists cannot regard social peace and stability as dominant goods in all circumstances, they recognize that these goods typically help to create the framework within which the attainment of other goods becomes possible. They recognize, then, that anarchy is the enemy of pluralism and that political community is, within limits, its friend. Pluralists must therefore endorse what I shall call the minimum conditions of public order.

For modern societies, anyway, these conditions form a familiar list. Among them are clear and stable property relations, the rule of law, a public authority with the capacity to enforce the law, an economy that does not divide the population permanently between a thin stratum of the rich and the numerous poor, and a sense of membership in the political community strong enough, in most circumstances, to override ethnic and religious differences.

It follows that pluralists are also committed to what may be called the conditions of the conditions—those economic and social processes that experience suggests are needed, at least in modern and modernizing

something like the “original position,” understood as embodying the requirement that valid principles must be capable of receiving the free assent of all those affected by them, might nonetheless lead to general principles for balancing competing values. *Id.* at lxxi–lxxii.

7. NAGEL, *supra* note 2, at 128.

societies, to secure the minimum conditions of public order. Among these are a suitably regulated market economy, a basic level of social provision, and a system of education sufficient to promote not only economic competence but also law abidingness and civic attachment.

I do not mean to suggest that this public framework constitutes an ensemble of goods and values that always outweighs other goods and values. Under unusual circumstances, the moral costs of public life may become too high to be endured, and individuals may feel impelled toward conscientious objection or outright resistance. Nonetheless, pluralists will understand that in the vast majority of circumstances, reliable public order increases rather than undermines the ability of individuals to live in accordance with their own conceptions of what gives life meaning and value. This does not mean that each can live out his conception to the hilt. The ensemble of conditions of public order will typically require some modification of each individual's primary desires. In the absence of public order, however, the threat to those desires will almost always be much greater. It is rational and reasonable, therefore, for pluralists to incorporate a shared sense of the minimum conditions of public order into the ensemble of goods they value and pursue.

B. Constitutionalism

Constitutionalism offers a second kind of response to the challenge posed by the centrifugal tendencies of moral pluralism. Beyond the common foundation and requisites of public order, every political community assumes a distinctive form and identity through its constitution. A constitution, we may say, represents an authoritative partial ordering of public values. It selects a subset of worthy values, brings them to the foreground, and subordinates others to them. These preferred values then become the benchmarks for assessing legislation, public policy, and even the condition of public culture.

Various aspects of this definition require further elaboration.

To begin, within the pluralist understanding, there is no single constitutional ordering that is rationally preferable to all others—certainly not across differences of space, time, and culture, and arguably not even within a given situation. Nonetheless, the worth of a constitution can be assessed along three dimensions: realism, coherence, and congruence. A constitution is realistic if the demands it places on citizens are not too heavy for them to bear. A constitution is coherent if

the ensemble of values it represents is not too diverse to coexist within the same community. A constitution is congruent if its broad outlines correspond to the moral sentiments of the community and to the situation that community confronts.

Nor, for the pluralist, is there a single account of how a given constitution comes to be authoritative. One model is covenantal acceptance: the people of Israel at Sinai. Another is public ratification of the work of a constitutional convention, as in the United States. A third is bargaining among representatives of large forces in a divided society—the process that led to the post-apartheid South African constitution. A fourth flows from the ability of a great leader to express the spirit of needs of a people in a practicable manner—the Napoleonic Code or the French Fifth Republic. It is even possible for a conqueror to establish an authoritative constitution for a conquered people, as the Allies did for Germany and the United States for Japan after World War II.

Authoritativeness, we may say, has two sorts of necessary conditions: the objective and the subjective. No proposed constitution can become authoritative if it falls below the minimum requirements of realism, coherence, and congruence. Nor can it be authoritative if it fails to gain broad acceptance within the community—perhaps not immediately, but within a reasonable period of time. Although the post-World War II German constitution met this condition, it seems clear in retrospect that the post-World War I Weimar Republic never did.

A constitution represents only a “partial ordering” of value in three senses. In the first place, there is no guarantee that a community’s distinctive constitutional values will always be consistent with the minimum requirements of public order, or that in cases of conflict public order must yield to constitutional values. Second, it is not the case that constitutional values will always dominate an individual’s ensemble of personal values. There are circumstances in which it is not unreasonable for individuals to place the values at the core of their identities above the requirements of citizenship.

Third, a constitution is only a partial ordering because the plurality of values that it establishes as preferred will unavoidably come into conflict with one another. Such conflicts are a familiar feature of U.S. constitutionalism. Public purposes understood in the consequentialist manner (domestic tranquility) may clash with individual rights understood deontologically (a fair trial). And individual rights may themselves come into conflict; consider the tension between the right to a fair trial and the freedom of the press.

From a pluralist standpoint, it is inevitable that many of these conflicts will have no single rationally compelling solution. Reasonable men and

women may well disagree about the relative weight to be attached to competing values, and many will be able to make legitimate appeal to different features of the constitutional framework. There are no strict lexical orderings, even in theory, among basic values.

In *Federalist No. 51*, James Madison poses a famous rhetorical question: “[W]hat is government itself but the greatest of all reflections on human nature?”⁸ And he continues: “If men were angels, no government would be necessary.”⁹ A philosophical pluralist must disagree. Even if every individual were in Madison’s sense angelic—perfectly capable of subordinating ambition and self-interest to reason and public spirit—nonetheless the incapacity of human reason to resolve fully clashes among worthy values means that authoritative mechanisms for resolving disputes remain indispensable. The more reasonable individuals are, the more clearly they will understand the need for such mechanisms. And this is true even if there is broad public consensus on constitutional matters—on the ensemble of values that are to be brought into the foreground.

From a pluralist standpoint, individuals vested with the power to make authoritative decisions—whether judicial, legislative, or executive—must understand that many of the controversies they are called on to resolve represent the clash, not of good and bad, but rather of good and good. This means that these individuals must carry out their duties in a particular spirit: to the maximum extent feasible, their decisions should reflect what is valuable, not only to the winners, but also to the losers. Sometimes this will not be possible. But when not required by the logic of the matter to be resolved, winner-take-all decisions needlessly, and therefore wrongfully, diverge from the balance of underlying values at stake.

C. Ethical Presumption

The third way in which the centrifugal tendencies of moral pluralism are moderated is through a structure of relationships among values that I shall call ethical presumption. To understand the nature of presumption, we must start further back.

More than three decades ago, the noted student of jurisprudence Chaim Perelman observed that few philosophers have explored

8. THE FEDERALIST NO. 51, at 262 (James Madison) (Garry Willis ed., 1982).

9. *Id.*

analogies between philosophy and law. Starting with Plato, many have suggested parallels between philosophy and mathematics. More recently, others have tried to refashion philosophy along the lines of natural science. But important structural similarities between philosophy and law have been neglected, Perelman suggests.¹⁰

In law, reasonable and honest people can reach differing conclusions, unlike mathematics, such that additional evidence cannot suffice to overcome their differences, unlike the sciences. The ubiquity of reasonable disagreement in the law suggests a conception of rational decision that is neither determined by truth nor driven by arbitrary will, and it makes necessary structures of decision that can give authoritative force to one reasonable view over others. Indeed, Perelman argues, the very coherence of the idea of authority rests on this conception of decisions that are consistent with but not required by reason.¹¹ Authority is superfluous, or at best derivative, in spheres in which reason compels a unique result.¹²

Perelman's account of reasonable disagreement is more than a little reminiscent of Aristotle's discussion of deliberation. Aristotle begins, and proceeds, by enumerating the matters about which we do not deliberate: mathematical truths, law-governed regularities of nature, matters of chance, or particular facts, among others. Instead, we deliberate about matters of human agency in which actions do not generate fully predictable results, matters in which though subject to rules that generally hold good, are uncertain in their issue.¹³ So deliberation is the effort to choose the best course, all things considered, in circumstances in which reason shapes but does not fully determine that course.

Perelman takes Aristotle's argument one important step further. The nature of law, and of practical deliberation more generally, points toward the necessary ground of human freedom:

10. See CH. PERELMAN, *What the Philosopher May Learn from the Study of Law*, in *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 163 (1980).

11. *Id.* at 163–66.

12. ARISTOTLE, *NICOMACHEAN ETHICS* 43–44 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000). For an outstanding discussion of Aristotelian deliberation influenced by value pluralism, see D. Wiggins, *Deliberation and Practical Reason*, in *PRACTICAL REASONING* 144 (Joseph Raz ed., 1978).

13. See ARISTOTLE, *supra* note 12, at 43.

Only the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom, a state in which a reasonable choice can be exercised. If freedom was no more than necessary adherence to a previously given natural order, it would exclude all possibility of choice; and if the exercise of freedom were not based on reasons, every choice would be irrational and would be reduced to an arbitrary decision operating in an intellectual void.¹⁴

In short, neither Spinoza's determinism nor Sartre's decisionism can explain human freedom as we experience and practice it. Freedom operates in a zone of partial but not complete regularity, a discursive arena in which some reasons are better than others but none is clearly dominant over all of the rest in every situation. If ethics and politics are part of this zone, as they evidently are, then their substance will reflect this ceaseless interplay of strong but not compelling reasons grappling with the variability of practical circumstances.

Perelman observes that every system of law embodies a presumption in favor of past decisions. The new and the old do not have to be treated in the same fashion; law teaches us to abandon existing rules only if good reasons justify their replacement. This presumption is not absolute, but the burden of proof falls on those advocating change.¹⁵ In a similar spirit, the nineteenth-century scholar Richard Whately, one of the founders of the modern study of argumentation, contended that although the majority of existing institutions and practices are susceptible of improvement, "the 'Burden of Proof' lies with him who proposes an alteration; simply, on the ground that since a change is not a good in itself, he who demands a change should show cause for it."¹⁶

The reasoning underlying this stance is straightforward. The merits and defects of the status quo are well known. Unless the status quo is so intolerable that any change would be for the better, or at least not for the worse, then there is a possibility that a proposed change could produce a state of affairs that is even less desirable than the admittedly defective status quo. That is why the burden of proof is on the advocate of change to show why the proposed reform is unlikely to make matters worse, all things considered, and that those at greatest risk of harm are situated

14. CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 514 (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) (1958); *see also* PERELMAN, *supra* note 10, at 169–70.

15. PERELMAN, *supra* note 10, at 170.

16. RICHARD WHATELY, *ELEMENTS OF RHETORIC* 91 (Scholars' Facsimiles & Reprints 1991) (1846); *see also* DOUGLAS WALTON, *ARGUMENTS FROM IGNORANCE* 214–17 (1996) (discussing this point).

well enough to take a hit without suffering a devastating loss that no one would reasonably accept.

The phenomenon of legal presumption has a broader philosophical implication, Perelman suggests. Specifically, the Cartesian prescription for universal doubt makes no sense:

What normal man would put any of his convictions into doubt if the reasons for doubt were not more solid than the opinion to which they were opposed? To shake a belief there is need, as with a lever, for a point of leverage more solid than what is to be moved. . . . One could formulate the principle of inertia as a directive: One should not change anything without reason. If one maintains that our ideas, our rules, and our behavior are devoid of an absolute foundation, and that for this reason, the pros and cons are equally worthy, and that one must therefore in philosophy make a *tabula rasa* of our past, one expresses an exigency that comes from utopia and to which one can only conform fictitiously.¹⁷

Whether or not universal doubt is a feasible strategy for theoretical philosophy, many follow Perelman in arguing that it is not. It is notable that Descartes does not extend it, or the quest for certainty, to practical life. In Perelman's formulation, he distinguishes between "our ideas" and "our behavior."¹⁸ This suggests an important distinction between theoretical and practical reflection. The decision to accept no merely probable metaphysical or scientific proposition as true may leave the mind suspended in a state of permanent agnosticism. The consequences for practice are very different: the decision to accept no merely probable moral or political proposition as valid calls the status quo into question without being able to put anything in its place. But practical life does not wait for ethics and political philosophy to arrive at certainty. Decisions must be made, here and now, on the basis of limited—or complex and confusing—evidence and argument. The practical analogue of theoretical agnosticism, namely indecision that leads to inaction, is itself a decision that affects, and usually but not always sustains, the status quo.¹⁹ Although the presumption in favor of the status quo may appear conservative, the willingness to make practical decisions on grounds well short of certainty opens the door to changes that a more stringent standard would rule out.

The reasons advanced to justify decisions typically include general maxims tacitly, or less frequently explicitly, derived from moral or political theory. The absence of certainty is not confined to the empirical dimensions of decisionmaking but reflects its normative dimensions as well. In this respect, among others, Perelman's suggestion that philosophy could fruitfully take its bearings from law seems plausible, at least for

17. PERELMAN, *supra* note 10, at 169–70.

18. *Id.*

19. *See* WALTON, *supra* note 16, at 214–17.

practical philosophy. This is why moral and political philosophy may have something to learn from the role presumptions play in jurisprudence.

In an important article, Judge J. Harvie Wilkinson III elaborates the conception of presumption in a legal context. As a backdrop, he sketches two opposed pure notions of judging: strict adherence to rules, without exception; and equity-based jurisprudence that takes its bearings from the facts of each case.²⁰ The problem with strict rules is that they will inevitably run up against exceptional cases in which their application will appear harsh and unreasonable. The problem with unfettered equity is that it provides little predictability or uniformity, diluting the principal advantages of the rule of law.²¹ For purposes of this discussion, I will follow Wilkinson in presupposing that the result or meaning of applying rules to particular cases is not in doubt. The frequent uncertainty of interpreting rules raises other questions that I want to set aside for now.

Against this backdrop, the jurisprudence of presumptions emerges as an attempt to combine the advantages of rules—clarity, predictability, uniformity—with those of flexibility, prudence, and common sense. The strength of a legal presumption, Wilkinson declares, lies in its rootedness in the rule of law; its vulnerability lies in the inability of the drafter of any legal rule to anticipate all of the factual circumstances to which it may be applicable.²²

In a famous discussion, Aristotle suggests that this combination of strength and vulnerability is inherent in the nature of law and lawmaking itself:

The reason is that all law is universal, and there are some things about which one cannot speak correctly in universal terms. In those areas, then, in which it is necessary to make universal statements but not possible to do so correctly, the law takes account of what happens more often, though it is not unaware that it can be in error. And it is no less correct for doing this; for the error is attributable not to the law, nor to the law-giver, but to the nature of the case, since the subject-matter of action is like this in its essence.

So when law speaks universally, and a particular case arises as an exception to the universal rule, then it is right—where the law-giver fails us and has made an error by speaking without qualification—to correct the omission. This will be by saying what the lawgiver would himself have said had he been present, and would have included within the law had he known.²³

20. J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. REV. 907 (1992).

21. *Id.* at 908–10.

22. *Id.* at 908.

23. ARISTOTLE, *supra* note 12, at 100.

Because the tension between generality and particularity is inherent in the nature of law, there are, Wilkinson suggests, no exceptionless absolute principles in law.²⁴ Those that may appear absolute are in fact strong presumptions that may be overcome in specific circumstances. Not that rebutting a strong presumption is easy: one may understand it as a well-defended fortress that would require a powerful assault to conquer. Some presumptions are stronger than others. In American constitutional law, the presumption in favor of free political speech can be overcome only by the most compelling public interest; in criminal cases, the presumption of innocence can be overcome only by evidence of guilt beyond a reasonable doubt, a difficult standard to meet. The burden of proof in civil cases is less stringent—the preponderance of the evidence is required to sustain the plaintiff’s claim.

In part, the variation among standards governing the burden of proof in different categories of cases reflects differences among the goods and values at stake. In criminal cases, for example, individuals’ lives and liberty are at stake. The prosecution’s burden of proof beyond a reasonable doubt is designed to minimize the chances that individuals will be wrongfully deprived of these very great goods, which enjoy the status of natural as well as civil rights in American civic philosophy. The system cannot wholly eliminate the possibility of such wrongful deprivation, however. The only way to do so is never to convict anyone of a felony, which would deprive the entire society of the advantages of the rule of law. In a universe of plural and competing goods, highly demanding protections for accused persons may impose excessive costs along other key dimensions of public value.

We can go further, Wilkinson suggests, towards a precise account of how the jurisprudence of presumptions operates in practice. First, the adjudicator must identify the relevant rule of law. Second, the “presumptive strength” of that rule must be identified. As we have seen, some rules enjoy a preferred position in our constitutional system, while others are secondary or tertiary. Third, the adjudicator must assess the “degree of stress” that an unforeseen circumstance imposes on that rule. In the case of political speech, for example, not only must the countervailing state interest be powerful as a matter of principle, but the facts of the particular case must clearly bring that interest into play. Fourth, the adjudicator must specify, so far as possible, the costs of departing from the rule laid down, including not only the costs in the particular case but the longer term damage to the credibility of the rule

24. Wilkinson, *supra* note 20, at 907.

itself. Finally, the decisionmaker must explain why the result achieved by making an exception to the rule is preferable to following the rule.²⁵

I want to underscore two features of this schema. First, it does not identify some neutral point of equipoise between the jurisprudence of rules and the jurisprudence of equity. Legal rules enjoy a status very different from that of, say, propositions advanced in a dialogue. If laid down by those duly empowered to create them, the rules have presumptive authority flowing from their source. There is a presumption, stronger in some cases than others, but always powerful, in favor of applying the rules laid down. The burden of proof lies on those who would relax the rules or carve out exceptions to them. In these circumstances, it would not suffice to show that making an accommodation would yield an outcome just as good, all things considered, as following the rule. A preponderance of considerations must point toward the exception being sought. Just how strong a preponderance will depend on the nature of the rule in question.

Second, the process of justifying the exception often takes place in a context of multiple values. The rule in question, let us say, seeks to promote a particular public value. The case for granting an exception will typically appeal to a different value: if allowed to operate without modification in pursuit of its intended value, it may be alleged, the rule will exact too high a price as measured along another important dimension of value that the system of law cannot reasonably ignore.

I began this discussion of legal presumptions with Perelman's suggestion that philosophy should take its bearings from law and jurisprudence. I now want to apply this suggestion to the special case of practical, that is, moral and political, philosophy. My hypothesis is this: like legal rules, moral and political principles act as rebuttable presumptions. The more entrenched the principle, the more central it is to our understanding, the weightier the considerations that will be needed to override it. But no principle is absolute, that is, exceptionless.²⁶

Two examples from applied ethics will clarify this conjecture.

Sissela Bok's analysis of lying takes its bearings from a "presumption against lying"—the premise that

25. *Id.* at 914.

26. For a clear discussion of the comparative strength of arguments, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 25–28 (1975). See also PERELMAN & OLBRECHTS-TYTECA, *supra* note 14, 465–71.

[T]ruthful statements are preferable to lies in the absence of special considerations. This premise gives an initial negative weight to lies. It holds that they are not neutral from the point of view of our choices; that lying requires explanation, whereas truth ordinarily does not.²⁷

Bok explores, but ultimately rejects, the thesis that one should never lie; in certain extreme but hardly unknown situations, the consequences of truth telling are simply unacceptable. The inquiry then turns to the nature of valid excuses—considerations of value sufficient to rebut the presumption against lying. Grotius offers one important argument—that in some circumstances an agent bent on doing evil forfeits his right to truth. For example, you are not morally obligated to tell the truth when the secret police of a tyrannical regime ask whether you are harboring refugees from persecution.²⁸ Another important suggestion is that in circumstances in which it is justified to use force in self-defense or to protect innocent third parties, it would also be acceptable to use forms of deceit, including lies.²⁹ There are several other categories of excuses that are potentially valid in specific circumstances. Nonetheless, the presumption in favor of truth telling remains powerful, and the grounds for rebutting that presumption remain stringent.

Michael Walzer's exploration of just and unjust wars deploys the classic distinction between the justice of war—the valid or invalid reasons for which wars are fought, and the justice in war—the permissible or forbidden means by which wars are conducted. Justice in war is delimited by what Walzer calls the war convention. At the heart of that convention is a sharp distinction between combatants and noncombatants. The latter are “men and women with rights [who] cannot be used for some military purpose, even if it is a legitimate purpose.”³⁰ Even just wars must be fought justly; the ends of wars do not suffice to justify the means of war.

Or do they? In the end, Walzer cannot quite defend the thesis that the rights of noncombatants are inviolate, regardless of the circumstances. Although he resists utilitarianism, theories of proportionality, and even sliding scale justifications of means relative to the justice of ends as insufficiently stringent, the weight of human experience moves him to offer instead a thesis that falls just short of absolutism: instead of *fiat justitia ruat coelum*, act justly unless the heavens are really about to fall.³¹ The war convention is overridden in cases of “imminent catastrophe”

27. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 30 (1978).

28. *Id.* at 40–41.

29. *Id.* at 41.

30. MICHAEL WALZER, JUST AND UNJUST WARS 137 (4th ed. 2000).

31. *Id.* at 230–31.

or supreme emergency—credible threats to the very existence of a nation or a people, or the likely victory of a murderous tyranny.³²

From this perspective, had the terror bombing of German cities during World War II been absolutely necessary to defeat Hitler, it would have been justified. Similarly, if the Israelis were faced with imminent defeat and probable genocide at the hands of Arab military forces, they would be justified in using atomic weapons against Damascus and Baghdad if there were no other way of averting catastrophe. Rights have great moral weight, but they do not function as trumps in every shuffle of the deck. Rights have enormous value, but they are not the only things of value in our moral universe.

The maxim that practical principles function as powerful but rebuttable presumptions applies to two arenas that are important for our purposes. The first may be called ordinary universal morality—the principles of conduct that are embedded in different forms in the world’s great religions and in the normal social practices of humankind. Strictures against lying, theft, murder, sexual anarchy, and the oppression of the weak, among many others, constitute this realm.

The maxim of practical principles as presumptions also applies, less obviously, to the arena of public culture, by which I mean the ensemble of practical principles that gives to each political community its distinct identity. In the case of the United States, for example, a kind of social egalitarianism, libertarianism, commitment to equal opportunity and personal responsibility, and mistrust of authority, including governmental authority, help to define a public culture that differs from that of other democratic nations. The wind is in the sails of those who deploy these principles in defense of specific public policy proposals. By contrast, those who employ opposed principles, say sociological determinism rather than personal responsibility, bear a heavy burden of proof.

I do not want to be misunderstood as suggesting that principles of public culture are immune to skeptical questioning. On the contrary, skeptics have a number of dialectical tools ready at hand. The skeptic may suggest, first, that there are cases in which it makes no sense to apply the dominant principles. For example, do we really want to attribute personal responsibility to someone laboring under a severe cognitive distortion? Second, the skeptic may suggest that the public culture is incoherent, that some of its principles contradict others when

32. *Id.* at 232.

applied to particular cases, and that in regarding such cases we have no choice but to think for ourselves. Third, the skeptic may suggest that the strict application of a particular principle will lead to results that a morally decent person of common sense would find hard to accept. This possibility reflects the fact that a particular public culture always functions in relation to, and sometimes stands in tension with, the background code of universal ordinary morality.

III. CONCLUSION

Let me now return to my point of departure. It is not unreasonable to fear that pluralism's dispersion of value makes the maintenance of political community difficult at best. In response, I have explored three sources of commonality that are consistent with pluralism: the minimum demands of public order, constitutionalism understood as the selection of preferred goods and values, and the ethical presumptions of both universal ordinary morality and of specific public cultures. Taken together, these sources ask each individual to consider what it means to be a member of the human species, to be an individual whose conception of a good and valuable life can only be realized within the framework of public order, and to be a social being embedded in, though not determined by, a specific constitution and public culture. The political meaning of moral pluralism emerges in the unending dialogue between the differentiating force of individuality and the organizing tendencies of commonality.