PUBLIC REASON AS A COLLECTIVE CAPABILITY

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I.

Philosophy is sometimes dismissed as the irrelevant musings of white men in ivory towers. It is not unfair to demand philosophy to account for itself. How, for example, might the principles of a political philosophy of justice be useful to us? In this article, I will explore a form of reasoning about what justice requires that is appropriate to people, like us, situated in less than fully just circumstances, amongst fellow citizens who may not be committed to justice. I will explore the nature and value of the opportunities we have to reason together in public about justice. I will do this by introducing and developing the idea of public reason as a collective capability.

Understanding public reason as a collective capability helps us to see that the demands of mutual accountability can be stringent—more stringent than they would be in a society that lacks a collective capability for public reason. We should resist skepticism about ethical accountability within politics and cynicism about the ethical content of public discourse. However imperfectly, a collective capability for public reason moves us in the direction of satisfying an ethically demanding notion of public justification.

II.

The Idea of Justice is a comparative approach to thinking about justice, or, rather, to thinking about injustice.1 Amartya Sen’s focus of study is the

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* Tufts University. I am grateful to Lionel McPherson, Ian Johnstone, and Amartya Sen for their valuable comments and suggestions.

removal of manifest injustice rather than a description of the perfectly just society. The advancement or retreat of justice is assessed through comparative judgments, judgments that track social realizations rather than unrealized ideals. In taking up a realization-focused, comparative approach to thinking about justice, Sen aligns himself with a philosophical tradition that includes Adam Smith, the Marquis de Condorcet, Mary Wollstonecraft, Jeremy Bentham, Karl Marx, and John Stuart Mill.  

Sen contrasts his comparative approach with what he calls "transcendental institutionalism"—an approach that aims to describe a perfectly just scheme, one that transcends all others by measures of justice. This perfectly just scheme is conceived as a set of institutions—a social structure of political, economic, and social institutions within which people are entitled to certain basic rights, liberties, and opportunities. Transcendental institutionalism is familiar to us in the political philosophy of Locke, Kant, Rousseau, and Rawls. These philosophers employ the device of a hypothetical social contract in order to specify the ideal institutional requirements of justice. While the contractual agreement is hypothetical, it is one, they suppose, to which reasonable persons would subscribe upon reflection.

Sen rejects the transcendental institutionalist's ambition to hypothesize the basis of potential agreement between reasonable persons on the ideals of perfect justice. Reasonable people will not agree on the ideals of justice, he argues, and even if they could, such ideals may not help us to make relevant comparative judgments among real possibilities. Still, he does not reject the aim of seeking agreement altogether. He writes, "What is needed instead is an agreement, based on public reasoning, on rankings of alternatives that can be realized." The alternatives to be ranked are more or less just scenarios that are real social possibilities. Sen maintains that to understand their social reality, these possibilities must be grasped in detail beyond a characterization of their institutional forms. Evaluating social justice involves looking carefully at what life is like within those institutions and, specifically, at the opportunities available to different segments of the population. Furthermore, a ranking of better and worse social realizations is not indifferent to how social arrangements have come about. Relatively unjust social possibilities
approach greater justice when they are shaped by procedures of public
deliberation and accountability—what Sen refers to as “public reason.”

My focus will be on two major themes of the book. The first is the role
of public reason in shaping less unjust social possibilities. I will focus on
Sen’s discussion of the relationship between public reason and democracy—
and, specifically, on the idea that we should understand democracy not
narrowly in terms of ballots and elections, but more broadly to involve the
value of political participation, dialogue, and public interaction. Sen writes
that if we understand democracy in these terms, there is an intimate
connection between justice and democracy. This connection follows from
Sen’s insistence that “the demands of justice can be assessed only with the
help of public reasoning.”

To be more concrete, Sen is asserting that a just society will have certain
“discursive features” that create a climate of open public discussion: freedom
of information and speech, an independent media, basic civil rights,
opportunities to participate in politics, and the possibility of political
dissent. He argues that these discursive features provide important
opportunities for citizens to exercise freedom and that the exercise of
freedom leads to better outcomes. Open public discussion reinforces values
that are tolerant of a variety of lifestyle and religious preferences, and it
enables people to hold their leaders accountable. A main focus of Sen’s work
over many years has been to show that the accountability of political leaders
via public criticism is an important source of pressure to protect vulnerable
populations from famine, to support minority rights, to increase gender
equity, and to provide basic education, health care, and child nutrition.
Discursive features that create a climate of open public discussion are not
merely procedurally just; they lead in the direction of substantive justice.

Sen characterizes public reasoning and the rights and opportunities that
support it as democratic, but as Sen’s own discussion of global public reason
suggests, the public space appropriately ordered by the norms of public
reason is broader than the province of democratic forms of government.
Joshua Cohen emphasizes in his recent work on public reason that public reason “is not . . . confined to the setting of a democracy or to the setting of a

6. Id. at 326.
7. Id.
8. Id. at 327.
9. Id. at 337.
10. Id. at 349.
In what follows, I call attention to the value of public reason as it reaches broadly into public spheres within and across societies. Like Cohen, I will avoid equating the norms of public reason with democratic government and will instead refer to the discursive features of public realms and their association with the values of membership, participation, dialogue, and public interaction. Alternatively, I will simply refer to the discursive features of just (or less unjust) social arrangements.

A second main theme of the book that interests me is Sen’s claim about how exactly the public should assess and compare social realizations. According to Sen, social arrangements are best assessed by reference to the capabilities that people have under those arrangements, rather than in terms of welfare, happiness, or resources. Sen maintains that a capabilities metric appropriately extends the evaluative exercise beyond an assessment of the means of satisfactory human living to an assessment of the ends of good living, understood in terms of the things a person is free to do. Focusing on a person’s capability to do things he or she has reason to value, rather than on the level of welfare or happiness she enjoys, fits better with the value of individual freedom. Capabilities can be used to calibrate entitlements, but should some individuals choose not to utilize their capabilities, they are free to do so and hence to be less well off than they might have been. In this way, a capabilities measure emphasizes the scope of agency and is strongly associated with the value of having choices.

A capabilities measure seems to track social realizations more closely than does an approach that focuses on how institutions distribute resources. Since a capabilities approach directly links the prospects for justice to what individual people do or might do—what we might think of as people’s real opportunities—it must be sensitive to relevant differences between persons’ levels of need, disability, etc. Attention to real opportunities enables a capabilities approach to fill a gap between real and merely formal opportunities that a focus on institutions might open. I say “might” because it is not clear to me that an institutional approach (say, to the distribution of resources) could not effectively fill this gap. Still, the capabilities approach is especially sensitive to the individual conditions of real opportunities. Furthermore, an opportunity-focused approach forges links to a notion of accountability, opening up the possibility of exploring an agent’s

12. SEN, supra note 1, at 19.
13. Id. at 231–34.
14. Id. at 231. See also AMARTYA SEN, INEQUALITY REEXAMINED 39–42, 49 (1992).
responsibility for her choices. Accountability underscores the agency focus of a capabilities approach.

Thus far, I have called attention to two main themes of *The Idea of Justice*: (1) the nature and value of public reason, and (2) capabilities as the metric of social evaluation. I shall now concentrate on a certain intersection of these two themes, although not one explicitly developed by Sen. I propose that the discursive features of just social realizations can fruitfully be understood as what I call a “collective capability.” I will explore the nature and value of a collective capability for public reason—what makes it collective and how its collective nature bears on the achievement of greater justice. This introduces a further use for the concept of a capability, beyond the use to which Sen mainly puts to it. Sen insists on understanding capabilities as measures of individual advantage and disadvantage. This approach is overly individualistic. Capabilities provide a measure of justice not just by aggregating the capabilities of individual members of a society to achieve freedom, but also by assessing the collective capability of a social group to bring about changes that will enhance individual freedom. The concept of public reason as a collective capability extends the agency-focus of a capabilities approach. Relative (in)justice should be measured by reference to a society’s collective capability to achieve greater justice. The collective capability of a society to provide justice to its members is a significant achievement, even when justice is imperfectly realized and must battle parochial assertions of self- and group-interest.

The role of public reason as a collective capability for reducing injustice supports an institutional model insofar as institutions play a crucial role in establishing this capability. Still, participants in the collective exercise of public reason are not limited to institutional agents, and public deliberation may reach broadly into the realm of civil society. A society is fully capable of collectively exercising public reason—of its members thinking together about how to advance justice—when it is maximally inclusive. This means that all individuals must be members of political society and potential participants in public discourse. Members must be individually capable of

participating in public deliberation. Only then is the collective capability for public reasoning fully realized.

III.

The social arrangements that constitute a collective capability for public reason display the discursive features that Sen emphasizes create a climate of open public discussion: freedom of information and speech, a largely independent media, basic civil rights, the possibility of political dissent, and opportunities to participate in politics. With these discursive features in place, members of a society are capable of reasoning together about matters of substantive justice. A group of people reasoning together introduces normative dynamics that are not present when a number of individuals each reasons alone. This is true even though a collective exercise of reason depends on certain individual capabilities, specifically, a person’s capacity to formulate and to care about finding reasons that other people also have reason to accept. Public reason harnesses these individual capabilities and raises the stakes, ethically speaking, since persons who reason together are thereby made more accountable to one another.

A society begins to realize the potential for mutually responsive decision-making when participants have an opportunity to influence public opinion by offering reasons to convince others and thus present themselves as accountable to one another through a public exchange of reasons. In this way, participants take part in a collective enterprise—that of thinking together about what justice requires—even when participants disagree with one another in substantive ways. When participants in a public dialogue feel responsible for responding to one another by presenting arguments for their favored conclusions, entertaining challenges, and modifying their positions when supportive arguments cannot be found, social outcomes are the product of collective reasoning. Each person intends his or her contribution to have a place in a larger discussion. Others perceive and share that intention, and the implicit claim by participants to offer public justification signals each participant’s commitment to the relevance of assessing individual contributions by sharable standards. Political decisions potentially represent

18. See Margaret Gilbert, Sociality and Responsibility: New Essays in Plural Subject Theory 14–31 (2000) (analyzing a strong notion of joint intention that involves joint commitment to pursuing the same aim together). See generally Christopher Kutz, Complicity: Ethics and Law for a Collective Age (2000) (developing an account of complicity that depends on overlapping intention). Gilbert and Kutz’s work have been very helpful to me for understanding collective action and collective responsibility.
not merely the aggregated inputs of individual members or their representatives, but also the mutual responsiveness of participants. Thus, political decision-making that issues from an exchange of reasons purporting to satisfy the standards of public justification is a joint enterprise. Without open public discussion, by contrast, individuals might venture to influence public opinion or political decisions, but they lack an opportunity to publicly scrutinize each other’s reasoning, to hold one another to account, and to respond to one another’s challenges. They lack the opportunity to hold one another’s reasons up to a public standard of justification.

Political decision-making as a joint enterprise might seem inconsequential, in view of familiar understandings of the political realm as an arena of conflicting wills, bargaining, and compromise. The political process is largely adversarial, rather than cooperative; this seems to cast doubt on the normative significance of “joint” decisions. A model of politics as a matter of self and group-interest bargaining might seem to be deeply at odds with a public reason model of deliberation and decision. Skeptics might doubt whether there is any collective normative dimension to political participation. If there is not, then any description of policy as a matter of collective decision adds nothing to the notion that individual preferences are aggregated. Political outcomes would be collective only in the sense that without democratic participation, there could be no democratic process or outcomes from it. There would be no interesting normative implications that hold for persons *qua* members of a collective. For instance, people would not be more accountable to one another by virtue of their participation in a joint decision than they would be otherwise, say, if they expressed their political preferences without deliberating together, considering one another’s views, or attempting publicly to justify their favored positions.

This skepticism is not convincing, for the following reasons. When political decisions purport to be collective, their legitimacy depends on whether they are supported by public reasons that appeal to what are recognized as common interests. As a result, political decisions are open to criticism when they merely represent the will of some faction that controls the political realm, say, through their wealth or other forms of power. Apart from the content of the decisions, which may or may not be unjust, the decision-making itself would be illegitimate for its misleading self-representation: it would lack the collective authority it purports to have. Collective accountability through public reasoning raises the standards of legitimacy for political institutions. Even when institutions serve the interests of their subjects in other ways, for instance, by generating economic growth, enhancing collective security, or protecting some individual rights, they lack legitimacy when they are not authorized by the public. Collective authority is
not the only requirement for political legitimacy, but failure to demonstrate collective authority is a serious shortcoming for democratic institutions. It generates mistrust, cynicism, and bitterness. Furthermore, lacking authority may lead to other institutional failures, such as the failure to secure individual rights, liberties, or basic opportunities.

A collective capability for public reason, I argue, introduces a standard of collective accountability with its associated and morally significant concept of political legitimacy. The connection between public reason and mutual accountability also places normative demands on the content of public reason: public reasons should meet reasonable requirements of mutual justification. This normative pressure, I will argue, raises a society's prospects for satisfying these requirements. At the same time, however, an ethically demanding conception of public reason—one requiring citizens to offer reasons with a certain content—also provides traction for skeptical doubt about its possibility and relevance. Resistance to John Rawls's treatment of the notion of public reason provides some evidence of such skepticism.

IV.

Rawls understood the notion of public reason to set a robust standard of public justification. Public reasons, as he understood them, are reasons that could justify political arrangements to a wide range of moral and religious views because they represent a reasonable point of convergence amongst people who disagree deeply about broader questions of value and meaning. The content of public reasons is given by principles of justice, rather than by comprehensive moral or religious views. Rawls argued that comprehensive doctrines could not as such provide public reasons, since widespread compliance with any particular comprehensive doctrine—religious or secular—could be achieved only through a coercive and oppressive use of political power. A social order based on coercion, intimidation, social pressure, and the vulnerability of some groups is much different than a social order that could be justified to all of its members. Justification is based on


20. "[S]hared adherence to one comprehensive doctrine can be maintained only by the oppressive use of state power," something he refers to as the "fact of oppression." Id. at 34. Rawls observes that suppression of heresy under the Inquisition was needed to secure a shared religious practice and he supposes that the same holds for any comprehensive philosophical and moral doctrines, religious or secular. Id.
reasons, not the use or threat of force, or any other exercise of power. It must appeal to reasons that all members could reasonably accept. Only then do citizens treat one another fairly and as equals.

This conception of public reason is ethically demanding because it emphasizes the priority of political values in the event of their conflict with religious and moral values. Rawlsian public reason requires those who are subject to its demands to subordinate their comprehensive doctrines or to amend them so as to render them compatible with the demands of political justice. But the depth of people’s comprehensive commitments—religious, moral, and metaphysical—challenges the ideal of public reason. When political and comprehensive values conflict, many people would give priority to their comprehensive values. This threatens the prospects for public justification.

Rawls recognized that the criterion he presents sets a high standard and, accordingly, he restricted it as an ideal model to questions of basic justice, rather than to all matters of political choice. Why not subject all political questions to the demands of justification by public reason? Rawls answers, “My aim is to consider first the strongest case where the political questions concern the most fundamental matters. If we should not honor the limits of public reason here, it would seem we need not honor them anywhere.” With some ambivalence, he also argues that only public officials and not citizens generally, should be held to this standard. Citizens, Rawls suggests, are subject to the demands of public reason more indirectly; they “fulfill their duty of civility and support the idea of public reason by doing what they can to hold government officials to it.” To this end, Rawls argues, “Citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact . . .”

These remarks suggest that Rawls thinks there is substantial ethical pressure on citizens to have public reasons that would justify the political

22. Id. at 215.
23. Rawls writes, This ideal [of public reason] is realized, or satisfied, whenever judges, legislators, chief executives, and other government officials, as well as candidates for public office, act from and follow the idea of public reason and explain to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as the most reasonable.
   Rawls, supra note 16, at 768.
24. Id. at 769.
25. Id.
positions they take on matters of basic justice, whether or not they actually advance these reasons publicly. At the same time, citizens as such appear not to be accountable for the reasons they harbor, since they do not legislate or otherwise directly exercise political power coercively on matters of basic constitutional importance, which is where questions of legitimacy most fundamentally arise. So understood, the relationship of ordinary citizens to the requirements of public reason is unsteady and hardly seems to be settled by “as if” thinking in which citizens project themselves into the position of legislators.

The ambivalence Rawls expresses in restricting the scope of his ideal of public reason can be traced to a sense of urgency about resolving conflicts between political values and comprehensive doctrines that pervades his later writings. The central question of Political Liberalism is, as Rawls puts it: “how is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?” In answering this question, Rawls argues that the ideal of public reason must be strict, even if its scope is narrow, making the priority of political values clear. Only thus, Rawls believes, is “political” (vs. comprehensive) liberalism possible. A sense of urgency about the importance of a strict ideal is conveyed by Rawls’s presentation of the ideal of public reason as all or nothing: public reason should dominate the public sphere and reasonable citizens will make it a priority. An “overlapping consensus” amongst reasonable citizens would affirm the importance of public justification in terms that all could accept, and reasonable citizens would affirm that only when public justification takes priority over their more comprehensive commitments is the exercise of political power legitimate. This idealized portrait of public political discourse sets a high standard indeed, one that some critics have resisted. For

26. RAWLS, POLITICAL LIBERALISM supra note 21, at 4.
27. Rawls writes:

Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of cooperation according to what they consider the most reasonable conception of political justice; and when they agree to act on those terms, even at the cost of their own interests in particular situations, provided that other citizens also accept those terms.

Rawls, supra note 16, at 770.

28. Rawls writes, “Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.” Id. at 771.
example, Bernard Williams writes, "As an account of how one’s strongest convictions and values should be related to politics, this seems to leave a very narrow space between there being either no politics or no convictions."29

Underlying Rawls’s ideal of public reason is a concern that without establishing the clear priority of political values, political commitment to open and reasonable public discussion is fragile. When a political society falls short of attaining an overlapping consensus on reasonable terms of justice, Rawls suggests that its political arrangements reflect a mere modus vivendi (mode of living) or contingent balance of power among proponents of a range of comprehensive doctrines, some of which are unreasonable. A mere modus vivendi is unstable: some parties effectively bide their time until the day when they might successfully dominate those with whom they compete for power. There is no mutual commitment to giving one another justice. This might be disguised by social agreements and the practice of peaceful dispute resolution. A society characterized by a modus vivendi, Rawls argues, "might well have a constitution resembling that of the United States, fully protecting the religious liberties of sharply divided religions more or less equal in political power. The constitution is, as it was, honored as a pact to maintain civil peace. In this society, political issues might be discussed in terms of political ideas and values so as not to open religious conflict and arouse sectarian hostility. The role of public reason here serves merely to quiet divisiveness and encourage social stability. However, in this case, we do not have stability for the right reasons, that is, as secured by a firm allegiance to a democratic society’s political (moral) ideals and values."30

Rawls’s emphasis on the crucial importance of attaining an overlapping consensus is an invitation to skeptics to reject the prospects for attaining political liberalism and, with those prospects, the relevance of a Rawlsian notion of public reason. Skeptics might accuse Rawlsian liberals of political naïveté in construing democratic politics (even ideally) as a joint enterprise of mutual attempts to justify political preferences with reason. Liberal public reason, according to this skeptical view, is but another disguise for the workings of politics as a Hobbesian bargain of power positions—the rational negotiation of self- and group-interest on an unequal field of power.31

30. RAWLS, JUSTICE AS FAIRNESS, supra note 19, at 781.
Both Rawls and his Hobbesian opponent emphasize a contrast between an overlapping consensus and a mere *modus vivendi*. Both of these views threaten to underappreciate the importance of a partial space for public reason: the realization of public discussion imperfectly organized by the norms and values of public reason. A partial space represents an uncertain or wavering social commitment to the values and principles of public reason. It is a virtue of Sen's discussion of justice that he calls attention to the significance of an imperfect, partial realization of justice. Sen's notion of public reasoning as open public political discussion is broad, characterizing public political discussion, generally speaking, and describing active citizens as full participants. Moreover, Sen's notion of public reasoning describes not an ideal type, but a range of actual and imperfect social arrangements. Accordingly, his characterization of the content of public reasoning is loose. Yet it does not describe a mere *modus vivendi*.

I submit that a social realization that falls short by measures of justice may well meet the standard of achievement for a collective capability. Achieving a collective capability for public reasoning about matters of justice represents a significant advance, even when that capability is imperfectly deployed.

V.

Three related points highlight the importance of achieving a collective capability for public reasoning: (1) A collective capability for open public discussion raises the standards for political legitimacy and the likelihood that these standards will be met. (2) A collective capability for open public discussion broadens relevant notions of accountability, without relying on ethics of communal obligations or special concern. (3) A collective capability for open public discussion is an important source of normative pressure to change social arrangements in the direction of greater justice.

Departing from Sen's notion of public reason as open public discussion, I have introduced the idea that the discursive features of liberal institutions mark out a collective capability for public reason, a capability that is on display even when imperfectly realized. The reasons offered by some parties who enter the public debate might fall short by public reason's evaluative standards. Some reasons—appealing to comprehensive religious, moral, or metaphysical views not all persons can reasonably be expected to accept—fail to meet standards of public justification. Still, participants are free to hold each other to that standard and participation in public discussion suggests a mutual recognition that coercing others without adequate reason would be wrong. While participants might not share reasons, they can
publicly challenge and criticize one another. If they are responsive to one another’s criticisms—by modifying their claims, extending their reasoning, compromising, explaining, etc.—the outcome signals a collective process, or so I have claimed. Although the parties may still disagree, the terms of their disagreement are being negotiated through a public discourse that, however imperfectly, is mutually responsive and aims at justification.

The imperfections might be stark. Persons who participate in open public discussion might give voice to their religious and moral views, ignoring the dim prospects for mutual justification. Still, they offer reasons in favor of their view. By offering reasons to back up what they think, persons who participate in open public discussion aim to express their views and purport to influence others by convincing them rationally. The reason-giving nature of public discussion implies that public discussion aspires to public justification. This works to confer legitimacy on the outcome of the deliberative process, even when its outcomes are not fully justified, provided that decisions reached are not egregiously unjust or corrupt. Public discussion confers legitimacy partly because of its professed aspiration to facilitate rational exchange and influence. In this sense, the domain of public reason—understood as the social realization of a public space characterized by certain discursive features—falls in between the ideal of public reason and a mere modus vivendi. A less than fully actualized social capability for public reasoning is much better than a modus vivendi.32

Public reason so understood approximates a notion of political legitimacy that has two basic features: (1) political decisions are not egregiously unjust and (2) political decisions aspire to collective authority, even if they do not fully achieve it. By virtue of the second feature, public reason emphasizes an idea of political legitimacy as procedural justice. It does this without bringing in the troublesome notions that members of a political society are mutually accountable because they identify with one another or experience special concern for one another.33 Mutual identification and concern might be lacking, yet accountability in the public sphere has a solid foothold that renders participants open to challenge, criticism, rebuke, and perhaps liability in moral and material terms. Persons

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32. It describes what Rawls refers to as the evolution of an overlapping consensus from a mere modus vivendi. See Rawls, Justice as Fairness, supra note 19, at xxxix–xl, 158–68. For a criticism of norms of deliberation as biased toward more powerful agents, see Iris Marion Young, Activist Challenges to Deliberative Democracy, 29 Pol. Theory 670, 670–690 (2001). See generally Iris Marion Young, Inclusion and Democracy (2000).

who present public justifications by reason make themselves accountable to answer to other people in a variety of ways.

My main interest in the joint enterprise of public reason as a collective capability is the potential this capability brings for social change. The prospects for greater justice are enhanced when public discussion enables people to influence each other's thinking and values and to hold one other accountable. I will support this claim with two examples that I think illustrate the evolution of a public space characterized by a collective capability for public reason. In both cases, a collective capability for public reason is established, although the norms of public reason are imperfectly realized. Public reason is imperfectly realized because power is unequal and some participants attempt to manipulate public discussion to enhance their self- or group-interests and comprehensive values. Each case represents an imperfect, partial realization of justice.

VI.

The first example concerns an evolving international human rights discourse and the role of this discourse in shaping a variety of actions by international and transnational agents to protect and promote human rights. While power and national interest are clearly factors that have influenced and limited the evolution of international human rights norms, an imperfect commitment to international public reason has opened significant prospects for the promotion of human rights.

International public reason about human rights is structured by international human rights law and by the practice of international politics. In fact, the boundaries between international law and politics are porous. The international legal system is decentralized and its institutional structure is relatively undeveloped in comparison with domestic law. There are no supreme legislative, executive, or judicial institutions. International law lacks a basic rule of recognition by reference to which the validity of the other rules of the system is assessed. The rules of human rights law have come to be accepted as international standards of conduct by agreement and through practice. Legal standards are inter-subjective norms shaped by accepted

34. The origin of human rights law (post-World War II) was largely aspirational. See CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 18–22 (2009) (discussing how the framers of the UN Declaration of Human Rights envisaged a process of evolution from a mere declaration to mechanisms that could compel compliance).

criteria of inter-subjective justification. Justifying reasons refer to the content of treaty agreements and such general principles as the presumption of equal standing before the law and the requirement of formal justice by which like cases are treated alike. Convention and treaty-based rules limit how agents who make a legal case can explain and justify their actions.

While the rules of international law are in some ways indeterminate and open to conflicting interpretations, some behavior and certain types of reasons are clearly ruled out. Power does not formally exempt subjects from the reach of international law. Treaties equally bind all signatories. Wars of national expansion are forbidden. State sovereignty is limited by human rights.

International human rights law is animated by a broad base of public participation. In a recent book, Ian Johnstone argues that international law is shaped by an "interpretive community," centering on international organizations and "as incubators of coalitions, IOs [international organizations] are places where transnational advocacy networks of non-governmental organizations (NGOs), social movements, and activists go to make their influence felt." International organizations function, he argues, as "sites for discursive interaction among member states and interested nonmember and non-governmental actors." For example, non-governmental organizations, regional associations, legal scholars, and politically active citizens have contributed to an ongoing debate about whether the UN Charter affirms that its members share an obligation to promote human security, a "responsibility to protect," broadly understood. UN Security Council decisions and resolutions have been publicly scrutinized and criticized by a multitude of agents attempting to articulate international legal standards for understanding the nature of global obligations to protect and promote human security. A "protection of civilians" mandate characterizing several UN peacekeeping operations in the past decade leaves considerable discretion regarding the scope of this mandate to the peacekeepers themselves, enlivening public


38. Johnstone, supra note 36, at 43.

39. Id. at 26.
debate about the relationship of this peacekeeping mandate to a potentially more interventionist global "responsibility to protect."

I submit that the evolution of human rights norms via sites of discursive interaction traces the development of a collective capability. In particular, it marks the emergence of a transnational collective capability to promote the cause of human rights. A transnational public sphere provides the context within which international law operates largely through the discursive interchange of reasons that aspire to serve as public justifications. The effectiveness (i.e., the force and legitimacy) of international human rights law both relies on and enables the collective capability of a broad range of agents—state and non-state actors—to utilize its resources. This emergent capability provides opportunities for the public justification of human rights—affecting behavior, criticism, and demands. The capability to engage in public reasoning about human rights is collective: it empowers participants to reason in public together about how to understand, to uphold, and to promote human rights norms.

The possibility of public reasoning depends, of course, on the capabilities of individuals (and groups) to participate in public political discourse. Legal instruments, international organizations, and non-governmental organizations play an important role in enabling individual agents to scrutinize, publicize, criticize, and influence the human rights policies and practices of states. These individual and group-based capabilities are important ingredients in the collective enterprise of joint deliberation about whether individual states satisfy human rights norms, and they are a source of joint pressure on states to satisfy those norms. International organizations coordinate the exercise of individual capabilities to facilitate collective agency. Scrutinizing, publicizing, criticizing, and influencing become achievements of the human rights community. In turn, international legal norms gain legitimacy because they have enabled participants in the "interpretive community" to use those norms to justify or

40. Id. at 151–55.
41. Id. at 22.
42. The evolution of human rights law in the last sixty years represents, as Charles Beitz put it, the acceptance of measures by which states have "limited their sovereign authority and committed their influence to protect certain interests of individuals, effectively placing what had been treated as aspects of the domestic jurisdiction of states under one or another form of international supervision." BEITZ, supra note 34, at 15. The boundaries of state sovereignty have, in effect, been negotiated internationally using the language of human rights. This is perhaps a surprising accomplishment by an international human rights community whose founding document in 1948 was a mere declaration with no binding legal force. See U.N. Charter.
to challenge one another's behavior and to hold one another accountable in the realm of international politics.

I am arguing that the norms of human rights practice, together with the possibility for a broad set of agents to shape and use legal instruments in their discursive interaction, establish the collective capability of an international public to promote the cause of human rights. This collective capability encompasses multiple domains of agency: governmental and non-governmental. The collective exercise of this capability—the social realization of a public exchange of reasons in support of human rights law, policy, and action—aspires, explicitly and implicitly, to meet standards of public justification.

The explicit and implicit aspiration to public justification entails that legal argument has a disciplining force—some reasons (e.g., naked self-interest) cannot plausibly be passed off as meeting the inter-subjective standard of legality. True enough, powerful players in the international field of politics sometimes break the rules with relative impunity, yet open declarations of disregard for international law are scarce. Even the Bush regime, hardly a proponent of international law, claimed legality for its military actions and treatment of detainees in the so-called war on terror. As Secretary of State in the Bush administration, Colin Powell appeared before the UN in a now-infamous attempt to stamp the veneer of legitimacy on Bush's pending 2003 decision to invade Iraq.

States attempting publicly to justify their human rights record are under pressure to reckon with the evidence. The legal recognition of human rights has generated an entire industry of monitoring and gathering information, reporting, contesting, and publicizing the human rights records and policies of governments. There are hundreds of international governmental organizations (including the U.N. and the E.U.) and non-governmental organizations (such as Amnesty International, Human Rights Watch, and Doctors without Borders) that assist and induce governments to protect human rights. Even if not all do this successfully or within the bounds of public reason, these agents of the human rights industry have helped to create a climate of open concern for and critical scrutiny of human rights. I am claiming that this represents the emergence of a collective capability to

43. JOHNSTONE, supra note 36, at 25.
44. Powell's speech to the UN Security Council was delivered on February 5, 2003. Powell stated, "there can be no doubt that Saddam Hussein has biological weapons and the capability to rapidly produce many, many more." This claim turned out to be unsubstantiated. The full text of Powell's speech can be found at: http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript.05/index.html.
advance the cause of human rights, despite the dynamics of power in international politics and resistance by powerful states. Human rights norms are often manipulated in the service of national interest. Still, international law as a collective capability for public reasoning about human rights is established and this marks an important advance toward greater justice.

VII.

A second example of the exercise of a collective capability for public reason is the evolving (national) public debate in the United States on the rights of same-sex couples to marry. The capability of Americans to reason together about the nature and content of our basic rights is enabled by our constitutional legal structure and by various possibilities for participation in the political process and the broader public sphere. Participation in the debate about gay marriage has been effected through legal challenges, public protest, ballot initiatives, community organizing, opinion pieces, and other public statements by elected representatives, community leaders, and ordinary people. The participation of individual and group actors in a broad-based public discussion has shifted public opinion on the divisive question of gay marriage. A 2011 ABC News/Washington Post poll showed that 53% of Americans now think same sex marriage should be legal, up from 36% in 2006. Other polls reveal a similar trend. I venture that this shift has come about partly because attempts to justify opposition to gay marriage with contested religious and moral views have weak standing as public justifications. A Christian ideal of marriage as only between a man and a

48. Id.
49. Demographics has a role in explaining shifts in attitudes, as younger people are more accepting of homosexuality. See ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 402–06 (2010). Still, generational differences
woman, or a moral principle maintaining that the purpose of marriage and sex is procreation, fail to provide reasons that their subscribers could reasonably expect non-believers to accept.

In August 2010, California’s Proposition 8, forbidding same-sex marriage, was overturned in Federal District Court. In his opinion, Judge Walker wrote, “Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, as excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest.” He considered and rejected the numerous arguments proponents of Proposition 8 offered in its support, including the view that tradition supports restricting marriage to opposite-sex couples, that Proposition 8 “promotes stability and responsibility in naturally procreative relationships,” that California has an interest in encouraging sexual activity to occur within marriage, that Proposition 8 protects the First Amendment freedom of those who disagree with allowing marriage for couples of the same sex, and that the state should proceed with caution in implementing social change. Rejecting all of these arguments, Judge Walker claimed, “The evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples . . . . Th[is] evidence fatally undermines any purported state interest in treating couples differently . . . .” He continues:

Many of the purported interests identified by proponents are nothing more than a fear or unarticulated dislike of same-sex couples . . . . In the absence of a rational basis, what remains of proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus

in attitudes (whatever their cause) do not fully explain significant shifts in attitudes toward same-sex marriage over a short period of time. Poll analysis by the Pew Research Center holds the generations constant and tracks changes in attitude through 2010. Noticeably, support for gay marriage by the silent generation (born 1928–45) increases 45% in the 14 years between 1996 and 2010 (from 20% to 29%), and “boomer” (born 1946–64) support also increased by a similar amount. See Gay Marriage Gains More Acceptance, PEW RESEARCH CENTER PUBLICATIONS, Oct. 6, 2010, http://pewresearch.org/pubs/1755/poll-gay-marriage-gains-acceptance-gays-in-the-military. I am grateful to William Tadros for very helpful discussion and analysis of this point.

51. Id. at 997.
52. Id. at 130–31.
towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate . . . . Moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians. The evidence shows conclusively that Proposition 8 enacts, without reason, a private moral view that same-sex couples are inferior to opposite-sex couples.53

I will not attempt to judge whether Judge Walker succeeds in showing that Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment. What interests me is that Judge Walker strongly criticizes attempts to legislate contested moral and religious doctrines and argues for the importance of understanding the state’s interests in the terms of public reason: the state’s interests must be supported by reasons that do not presuppose the truth or unique value of any particular comprehensive doctrines and must instead be understood in terms of political values that all reasonable citizens could be expected to accept.

In February 2012, the Ninth Circuit Court of Appeals upheld Judge Walker’s ruling, although they narrowed the principled basis of support. Writing the decision, Judge Reinhardt said, “Proposition 8 singles out same-sex couples for unequal treatment by taking away from them alone the right to marry.”54 This constitutes a “distinct constitutional violation,” he said, in that it subjected a minority group to “the deprivation of an existing right without a legitimate reason.”55 The ruling emphasizes that the Proposition 8 movement demonstrated animus against gay men and lesbians. Thus, the court cites the actual conduct of public discussion as evidence that legitimate standards of reason were not satisfied. The failure of public discussion to satisfy standards of public reason, despite its purported aspiration to the contrary, was counted by the court as a basis for invalidating Proposition 8. As Nan Hunter summarizes the relevant evidence: “the framing of the issue, the text of the question put to voters and of the state’s official explanation, and the primary campaign materials relied on to persuade voters to adopt it, [were] all factors that Judges Reinhardt and Hawkins cited extensively in their opinion.”56 The conduct of the public

53. Id. at 132, 135.
54. Perry, 671 F.3d at 1076.
55. Id. at 1076.
campaign, the court ruled, demonstrated animus against gays and lesbians, and the court counted this as evidence that Proposition 8 is unconstitutional.

*Perry v. Brown* is currently under appeal, and we don't know how the case will turn out. Clearly, there are strong currents of resistance in the U.S. to permitting same-sex marriage. My point, admittedly controversial, is that public pressure on opponents of same-sex marriage to offer justifications for restricting the right to marry to opposite-sex couples has weakened opposition to same-sex marriage, and the failure of opponents of same-sex marriage to demonstrate acceptable public reasons for their opposition has affected the content of law. This is an achievement of collective reasoning in public space.

**VIII.**

The two examples I have introduced bring out the sense in which a collective capability for public reason spans multiple agents, individual and collective. Public reason is a collective resource that can be deployed in a variety of contexts to justify existing political arrangements or to argue for political and social change. I have focused on possibilities for change, as I have been interested in a capability-focused account of an evolution of social forms in the direction of greater justice. A climate of open public discussion—representing, I have argued, a collective capability for public reason—puts pressure on those who participate in politics to offer justifications for the positions they advocate. This calls out participants whose motives and reasons are not consistent with the requirements of public reason. In this way, a *modus vivendi* might evolve into an imperfect overlapping consensus. A society's collective capability for public reason may comprise an imperfect, partial space for the realization of justice.

I am not claiming that evolution from a *modus vivendi* to an overlapping consensus is inevitable. Public discourse might sometimes disguise a recalcitrant *modus vivendi*, with its inherent instability. The apparent public resolution of a disputed question of justice might be accompanied by an underlying shift in the focus of dispute, like an unconscious ripple of anxiety that surfaces somewhere else. Questions of racial justice in the U.S. might be of this nature. Legal desegregation following the civil rights movement of

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57. Cohen writes, "Public reason is not the reason of a distinct agent or agency—a collective personified—but a terrain of communication and argument suited to political circumstances . . . " Cohen, *supra* note 17, at 23. While I agree that public reason is not the reason of any one particular agent, I think the public reason of collective agents is worth signaling for its potential to advance the cause of justice.
the 1960s and accompanied by limited social mandates, such as busing, has been followed by persistent de facto segregation in housing and by de facto resegregation of public education so extreme Jonathon Kozol has described it as "America's educational apartheid."\textsuperscript{58} Greater political inclusion achieved through the Voting Rights Act of 1965 is threatened by an explosion in other deep channels of political exclusion. The past forty years reveal continuing and, in some respects, growing inequality in wealth across the racial divide, and also a striking rise in the incarceration rate of African Americans, especially for non-violent drug offenses, an incarceration rate that is now of staggering proportions. These are stark indicators of racial injustice that display dynamics—of inequality, coercion, and social exclusion—that undercut the work of public reason. Indicators of persisting racial injustice suggest the presence of a mere \textit{modus vivendi} concerning the division of social goods across black and white. Public reason is no easy remedy, even when its discursive features are socially established.