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Gregory Jay Hall
University of Pennsylvania Law School

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Judicious Imprisonment

Does Current Sentencing for Non-violent Offenses Promote Political Legitimacy?

Gregory Jay Hall

ABSTRACT

Starting August 21, 2018, Americans incarcerated across the United States have been striking back—non-violently.¹ Inmates with jobs are protesting slave-like wages through worker strikes and sit-ins.² Inmates also call for an end to racial disparities and an increase in rehabilitation programs.³ Even more surprisingly, many inmates have begun hunger strikes.⁴ Inmates are protesting the numerous ills of prisons: overcrowding, inadequate health care, violence, disenfranchisement of inmates, abysmal mental health care contributing to inmate suicide, and more.⁵ While recent reforms have slightly decreased mass incarceration, the current White House administration could likely reverse this trend. President Donald Trump's and Attorney General Jeff Sessions's statements and policies that call for increased mandatory sentences, cracking down on illegal immigrants, and aggressively enforcing drug laws might be the iron fist that breaks the back of an already collapsing criminal justice system.⁶ Many, including judges currently sitting on the bench, believe that numerous unjust laws and their unjust penalties have brought the United States penal system to this breaking point.⁷ To those

¹ Amani Sawari, Jared Ware, & Incarcerated Workers Organizing Committee, *Strike Statement to the Press: Statement Regarding the Ongoing Nationwide Prison Strike*, INCARCERATED WORKERS ORGANIZING COMMITTEE (Aug. 28, 2018), <https://incarceratedworkers.org/news/strike-statement-press-august-28-2018>.

² *Id.*; German Lopez, *America's Prisoners Are Going on Strike in at Least 17 States*, VOX (Aug. 22, 2018), <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018>.

³ *Id.*

⁴ *Id.*; Sawari, Ware, & Incarcerated Workers Organizing Committee, *supra* note 1.

⁵ *Id.*; Lopez, *supra* note 2.

⁶ Gaby Galvin, *Underfunded, Overcrowded State Prisons Struggle With Reform: It Took a Correctional Officer's Death for Delaware's Legislature to Address its Prison Problem* (July 26, 2017), <https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership>.

⁷ THE ECONOMIST, *Rough Justice in America: Too Many Laws, Too Many Prisoners: Never in the Civilised World Have So Many Been Locked Up for So Little* (July 22, 2010), <https://www.economist.com/briefing/2010/07/22/too-many-laws-too-many-prisoners>; *see also* Anonymous & Beth Schwartzapfel, *My Friend Killed Himself in an Alabama Prison*, THE MARSHALL PROJECT (July 13, 2017), <https://www.themarshallproject.org/2017/07/13/my-friend-killed-himself-in-an-alabama-prison?ref=collections>.

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Americans outside of prison that think they will never be jailed, Tenth Circuit Court Judge Alex Kozinski warns them, “You’re (probably) a federal criminal.”⁸ Due to the proliferation of criminal laws, the criminal “justice” system subjects virtually all Americans to the possibility of imprisonment for conduct that does not even come close to meriting imprisonment.⁹ Amid this chaos, a deep and fundamental question brews: Can the state *justifiably* coerce an individual to comply with its unjust laws? Even if the penalties for breaking unjust laws are life in prison or death? If not, then society’s stability is threatened. This article negotiates a middle position. The government is justified in enforcing unjust laws *only if* these laws are democratically enacted and are *almost-just*. How much is almost-just? That depends on the kind of law at issue. Thus, lawmakers, prosecutors, and judges need to carefully distinguish crimes that directly affect only oneself, crimes that are violent, crimes that are primarily monetary-based, regulatory crimes, and others. To implement reforms, this article proposes new affirmative defenses for crimes, enhanced prosecutorial discretion, and more robust judicial review as viable mechanisms to invalidate laws and penalties that are not almost-just.

Introduction

Starting August 21, 2018, persons incarcerated across the United States have been striking back—non-violently.¹⁰ Inmates with jobs are protesting slave-like wages through worker strikes and sit-ins.¹¹ Even more surprisingly, many inmates have begun hunger strikes in their crusade.¹²

The problems inmates face have long been noticed but inadequately addressed. Regarding mass incarceration, Americans go to jail 10.6 million times each year, and the majority of individuals in jail have not been convicted.¹³ In 2011, in *Brown v. Plata*, the United States Supreme Court decided that overcrowding in California prisons constituted cruel and unusual punishment.¹⁴

⁸ Alex Kozinsky & Misha Tseytlin, *You’re (Probably) a Federal Criminal*, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” 43 (Timothy Lynch ed., Cato Institute 2009).

⁹ *Id.*; THE ECONOMIST, *supra* note 7.

¹⁰ Sawari, Ware, & Incarcerated Workers Organizing Committee, *supra* note 1.

¹¹ Lopez, *supra* note 2.

¹² Sawari, Ware, & Incarcerated Workers Organizing Committee, *supra* note 1.

¹³ Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, THE PRISON POLICY INITIATIVE (March 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>. This statistic counts as separate each time the same person goes to jail in a year.

¹⁴ *Brown v. Plata*, 563 U.S. 493 (2011).

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Shockingly, the inmate suicide rate in California has been almost double the national average, and a lack of access to basic health care has led to an average of one unnecessary death every week.¹⁵ While recent reforms have decreased some states' prison populations, jail populations remain relatively unchanged.¹⁶

In a 302-page ruling, in 2017, United States District Court Judge Myron Thompson revealed that, due to chronic, statewide overcrowding and understaffing, many Alabama prisons are “incredibly dangerous and out of control.”¹⁷ Judge Thompson found that the mental health care provided to inmates in Alabama was “horrendously inadequate.”¹⁸ He exposes how the mental health system continually fails in the way it screens, treats, and monitors inmates living with mental illness.¹⁹ Judge Thompson also lambastes Alabama Department of Corrections for its policies and practices regarding, among other things, imposing disciplinary sanctions on mentally ill prisoners for symptoms of their mental illness and placing seriously mentally ill prisoners in solitary confinement without adequately considering the impact of solitary confinement on their mental health.²⁰ Sadly yet expectedly, the inmate suicide rate in Alabama has more than doubled in the prior two years.²¹

Nationwide, from 2013 to 2014, the number of suicides among state prisoners increased by 30%, from 192 to 249 suicides in a year.²² In South Carolina, the number of inmates killed in the state's prisons more than doubled in 2017 from what it was in 2016 and quadrupled from 2015.²³

Due to all of these worsening trends, the recent non-violent strikes by persons incarcerated do not come as a surprise. Inmates are also protesting certain oppressive laws and the social and political problems that are rife in the criminal justice system. Specifically, their grievances include the following:

1. racist sentencing practices;
2. federal laws that enlarge mass incarceration;
3. disenfranchisement of inmates and released convicts;

¹⁵ Galvin, *supra* note 6.

¹⁶ Bureau of Justice Statistics, *U.S. Correctional Population Declined for the Ninth Consecutive Year* (Apr. 26, 2018), <https://www.bjs.gov/content/pub/press/cpus16pr.cfm>.

¹⁷ *Id.* at 1193-1200.

¹⁸ Anonymous & Schwartzapfel, *supra* note 7; *Braggs v. Dunn*, 257 F.Supp.3d 1171, 1268 (M.D. Ala. 2017).

¹⁹ *Id.* at 1267-68.

²⁰ *Id.* at 1240-42, 1267-68.

²¹ *Id.* at 1200.

²² Matthew Clarke, *Department of Justice Releases Reports on Prison and Jail Deaths*, PRISON LEGAL NEWS 28 (Jan. 8 2018), <https://www.prisonlegalnews.org/news/2018/jan/8/department-justice-releases-reports-prison-and-jail-deaths>.

²³ Lopez, *supra* note 2.

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4. recent federal laws that make it more difficult for inmates to successfully sue prison officials for rights violations; and
5. deficient rehabilitation programs in prisons.²⁴

Even though recent reforms have produced some decrease in mass incarceration, the current White House administration could likely stop this trend or drive it backwards. President Donald Trump's and Attorney General Jeff Sessions's statements and policies that call for increased mandatory sentences, cracking down on illegal immigrants, and aggressively enforcing drug laws could be the iron fist that breaks the back of an already collapsing prison system.²⁵ Many, including judges currently sitting on the bench, believe that numerous unjust laws and their unjust penalties have brought the United States penal system to this breaking point.²⁶

To those Americans outside of prison that think they will never be jailed, Tenth Circuit Court Judge Alex Kozinski warns them, "You're (probably) a federal criminal."²⁷ Due to the proliferation of criminal laws, the criminal "justice" system subjects virtually all Americans to the possibility of imprisonment for conduct that does not even come close to meriting imprisonment.²⁸ For example, federal agents arrested Mr. Norris, a 65-year-old importer of orchids for making a false statement to an undercover federal agent.²⁹ That federal crime is punishable by up to five years in prison.³⁰ The agent had ordered some orchids from Mr. Norris, and a few of the orchids arrived without the correct paperwork.³¹ Mr. Norris had communicated, regarding the orchid shipment, with his Latin American suppliers, who were sometimes sloppy about the paperwork. So, Mr. Norris was also charged with conspiracy, and with it came another potential five-year prison sentence.³² Mr. Norris made at most \$20,000.00

²⁴ Sawari, Ware, & Incarcerated Workers Organizing Committee, *supra* note 1; Lopez, *supra* note 2.

²⁵ Galvin, *supra* note 6.

²⁶ THE ECONOMIST, *supra* note 7; Timothy Head & Matt Kibbe, *Too Many Laws Means Too Many Criminals*, NATIONAL REVIEW (May 21, 2015), <https://www.nationalreview.com/2015/05/too-many-laws-means-too-many-criminals>; Edwin Meese III, *Too Many Laws Turn Innocents into Criminals*, THE HERITAGE FOUNDATION (May 26, 2010), <https://www.heritage.org/crime-and-justice/commentary/too-many-laws-turn-innocents-criminals>; Anonymous & Schwartzapfel, *supra* note 7.

²⁷ Alex Kozinski & Misha Tseytlin, *supra* note 8, at 43.

²⁸ *Id.*; THE ECONOMIST, *supra* note 7.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

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per year by importing orchids.³³ After legal bills exceeded his means, he reluctantly pled guilty and was sentenced to 17 months in prison.³⁴

In Virginia, Dr. William Hurwitz, who specialized in pain management, was sentenced to 25 years in prison for prescribing pills that a few of his patients resold.³⁵ Contrast this harsh sentence with the Virginia board of medicine's ruling that Dr. Hurwitz had acted in good faith.³⁶ Nevertheless, he still served almost four years in prison.³⁷

As it stands, on the one hand, a bloated menagerie of criminal laws turns normal Americans into imprisoned felons. On the other hand, the abusive and exploitative prison system makes prisons horrendously harsh leading inmates to strike from work, go on hunger strikes, and even commit suicide. Amid this chaos, a deep and fundamental question brews: Can the state justifiably coerce an individual to comply with its unjust laws? Even if the penalties are life in prison or death? If these laws are not enforceable, then society's stability is threatened.

This article negotiates a middle position. Requiring certain laws to be completely just before government can justifiably enforce them is utopian. Instead, the government is justified in enforcing unjust laws *only if* these laws are democratically enacted and are *almost-just*. How much is almost-just? That depends on the kind of law at issue. Thus, lawmakers, prosecutors, and judges need to carefully distinguish crimes that directly affect only oneself, crimes that are violent, crimes that are primarily monetary-based, regulatory crimes, and others. In the end, the government is not justified in enforcing many of the current unjust criminal laws and unjust penalties. Some of these laws simply need to be repealed, perhaps gradually. Others need modification; otherwise, they are invalid.³⁸

Whether the state may justifiably coerce an individual to comply with its unjust laws primarily concerns *injustice*, rather than justice. How much injustice should we tolerate in a democratic society? An efficient and enlightening way to tackle these issues is by examining, in detail, John Rawls's theory of political legitimacy.³⁹

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ While such laws are still legally valid, the point is that good reasons support changing these laws or lessening their impact.

³⁹ John Rawls's theory of legitimacy can be found primarily in JOHN RAWLS, *POLITICAL LIBERALISM* (1993) and John Rawls, *The Idea of Public Reason Revisited*, in JOHN RAWLS: *COLLECTED PAPERS* 578 (Samuel Freeman ed., Harvard Univ. Press 1999).

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Rawls contends that government is justified in enforcing a law if it is:

1. supported by public reason,
2. democratically enacted, and
3. not-too-unjust.⁴⁰

The third criterion is key because it places a substantive requirement on a law's legitimacy.⁴¹ If a law is too-unjust, then state coercion to enforce that law is invalid. Consequently, as long as the law is passed according to acceptable democratic procedures based in public reason, then Rawls argues that the state is justified in coercing individuals to comply with an unjust law provided it is not-too-unjust.

While Rawls's theory of legitimacy is attractive, this article contends that his theory needs to be more stringent. More specifically, a theory of legitimacy needs greater substantive constraints, especially for laws pertaining to criminal justice. The increased stringency that this article is advocating is that, in addition to the other requirements, to be legitimate a law must be almost-just instead of merely not-too-unjust.

Additionally, a theory of legitimacy for law needs a companion theory of criminal justice, which forgivably Rawls does not provide. In demonstrating how a more stringent theory of legitimacy would apply to the extant legal system, this article focuses on crimes involving certain non-violent conduct that directly affects only the perpetrator due to the extreme human suffering that has resulted from such laws. To implement reforms, this article proposes new affirmative defenses for crimes, enhanced prosecutorial discretion, and more robust judicial review as viable mechanisms to legally invalidate or lessen the impact of laws and penalties that are not almost-just.

Section One explicates Rawls's theory of legitimacy in more detail.⁴² Section Two highlights aspects of Rawls's theory of justice that are relevant to the issue of political legitimacy. Section Three argues for three main claims:

1. State coercion that involves only money is less severe than state coercion that limits one's freedom.
2. The more severe the state coercion is the greater the justification for that coercion needs to be.
3. Hence, most laws that limit liberty require greater justification than most laws that involve only money ("severity claim").

⁴⁰ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 128-29, 223-24.

⁴¹ *Id.* at 428-29.

⁴² I follow Rawls in only addressing legitimacy as it pertains to a democratic state. SAMUEL FREEMAN, RAWLS 324-26 (2007). Other kinds of states may require other theories of legitimacy.

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These claims above are premises to argue for three more claims in Section Four.

4. The not-too-unjust criterion may be sufficient to assess the legitimacy of a criminal law, the violation of which is punishable by only fines and restitution
5. However, the not-too-unjust criterion is insufficient to assess the legitimacy of a law, the violation of which is punishable by incarceration.
6. Hence, a theory of legitimacy needs to be more stringent by requiring (among other things) that a law, the violation of which is punishable by incarceration or worse, must be almost-just.⁴³

Analogizing in terms of letter grades, a just law earns an “A” grade. A not-too-unjust law earns a “B” grade. An almost-just law earns an “A-” grade. As advocated here, a law must at least earn an “A-” grade for the law to be valid.

A more stringent theory of legitimacy means that the state is not justified in enforcing many extant laws and penalties. To make this implication concrete, Section Five illustrates how implementing a more stringent theory of legitimacy would invalidate extant laws that criminalize certain non-violent conduct that directly affects only the perpetrator.

Having completed the main argument, Section Six responds to a possible worry that making a theory of legitimacy more stringent threatens the stability of a society because, under such, the state may not justifiably enforce many of its laws. After dispensing with that concern, the conclusion comments on the impact of this article’s more stringent theory on the extant legal system.

Section One: Rawls’s Theory of Political Legitimacy

Rawls’s theory of political legitimacy has many parts that address various purposes.⁴⁴ The following exposition of his theory of legitimacy addresses only those aspects that deal directly with the motivating question: Can the state justifiably coerce an individual to comply with its unjust laws? Specifically, this section will not address how Rawls’s theory of legitimacy solves problems with his earlier argument for his theory of justice nor will it address how his theory of legitimacy provides its own (political) argument for what justice requires through an overlapping consensus. To state the focus differently, this article explores how *unjust* the laws of a society can be and still be legitimate—meaning that the state can coercively enforce the less-than-just laws. To that extent, instead of justice,

⁴³ Below I will flesh out how these technical terms indicate different requirements. Note that Rawls’s not-too-unjust requirement may delegitimize a law that limits one’s basic rights.

⁴⁴ FREEMAN, RAWLS, *supra* note 42, at 324-25, 372.

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this article focuses on the independent (though related) question of political legitimacy.

In focusing on state coercion of just and less-than-just laws, Rawls seeks a theory of social cooperation.⁴⁵ Social cooperation involves “people more or less voluntarily engaging in activities and social relations according to terms of cooperation that they accept and regard as more or less fair, and from which everyone benefits in some manner.”⁴⁶ Rawls’s point is that a society should be governed by reason rather than force.⁴⁷ The whole point of constructing a theory of legitimacy then is to have a public justification for state action rather than merely making commands through laws and punishing violators without expecting those subject to the laws to be able to endorse the laws. State coercion is still part of a theory of legitimacy because one thing that requires public justification is the conditions under which state coercion may be used. To that extent, I am not trying to restructure Rawls’s theory into a *modus vivendi* as opposed to a theory of social cooperation that reasonable and rational people could endorse, although I focus on how to justify coercion of less-than-just laws.

To begin, we must clarify that state coercion should be considered broadly. State coercion means *threatening* penalties for violating the law as well as *enforcing* those penalties. State coercion also involves forcing a person to do something, such as when a bailiff physically removes an unruly, noncompliant person from a courtroom as well as forcing someone to pay a fine by garnishing her wages (before she receives them). State coercion includes the power to tax and the power to take away a person’s property. More subtly, the state can coerce individuals by taking away rights and privileges that they would otherwise have, such as when prisoners are denied the right to vote. Thus, when I use the concept of state coercion, I mean it in this broad sense, as I think Rawls does.⁴⁸

In considering state coercion in this broad sense, we can usefully distinguish two aspects of coercion. The first aspect is the action that the state either requires or prohibits, usually through law.⁴⁹ The second aspect is the

⁴⁵ I am not misinterpreting Rawls’s theory of legitimacy as a *modus vivendi*. RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 146-47. For Rawls, a *modus vivendi* denotes a workable way of organizing a society—mostly through law and sanction—without basing its laws and sanctions on any process or reasons that citizens can reasonably accept. *Id.* at 146-49. Rawls is not after such a theory; he seeks a theory of social cooperation. *Id.*

⁴⁶ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 217; FREEMAN, RAWLS, *supra* note 42, at 334.

⁴⁷ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 143.

⁴⁸ Note that not every law is coercive in nature. H.L.A. Hart emphasizes that some laws do not have penalties and some laws bestow benefits and rights. H.L.A. HART, THE CONCEPT OF LAW, chapter 3 (1961).

⁴⁹ I mean the distinction between laws that require action and those that prohibit action to be merely illustrative of how law affects individuals rather than a fundamental distinction.

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penalty the state enforces against those who refrain from doing the required conduct (e.g. paying taxes) or those who act in the prohibited way (e.g. rape). Included in the second aspects are penalties for not complying with the state's attempt to enforce other penalties (e.g. a longer prison term for escaping from prison). Examples of penalties are: fines, community service, performance of specific actions (like returning stolen property), imprisonment, and even death.⁵⁰ These two aspects of state coercion are important to keep in mind because they can be different kinds of coercion. For example, the state can coerce its citizens by requiring that they pay a tax on their income. The state can coerce the individual who does not pay the required income tax by fining him or putting him in prison. Both the income tax and the penalty for its violation are two (separable) aspects of state coercion.

Rawls intends his theory of legitimacy to apply to both aspects of state coercion that I have identified: the law and the sanction for its violation.⁵¹ However, Rawls does not insist that every law must meet his theory of legitimacy.⁵² Instead, Rawls argues that his theory of legitimacy definitely applies to “constitutional essentials” of the legal system *and* questions of “basic justice,” leaving open the application to other areas of law.⁵³ By constitutional essentials, Rawls means two aspects of the legal system:

- a. fundamental principles that specify the general structure of government and the political process...
- b. equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.⁵⁴

I think Rawls would include in constitutional essentials whether the society protects the rights in the United States Constitution that play a large role in the criminal justice system such as the right against self-incrimination and the right against cruel and unusual punishment, although Rawls is unclear on this point.⁵⁵ Such are plausibly part of a society's “equal basic rights and liberties of

⁵⁰ I omit corporal punishment (aside from the death penalty) since democratic states no longer use it. In terms of my classification, I would consider corporal punishment as part of liberty coercion because the penalized cannot choose to forego the corporal punishment. Torture is also liberty coercion.

⁵¹ FREEMAN, RAWLS, *supra* note 42, at 182.

⁵² RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 214-15.

⁵³ *Id.*

⁵⁴ *Id.* at 227.

⁵⁵ *Id.* at 218 (mentioning some of the constitutional rights pertaining to criminal procedure without explicitly tying them to what he refers to elsewhere as constitutional essentials). *But see id.* at 232.

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citizenship.”⁵⁶ Below I will argue that we should also include in constitutional essentials all core parts of criminal justice. For now, Rawls means his theory of legitimacy to apply at least to constitutional essentials (outlined above) and basic justice (provided by his theory of justice as fairness).⁵⁷

For laws involving the constitutional essentials and basic justice to be legitimate, Rawls believes that laws must meet three criteria. Legitimate laws must be supported by public reasons; they must be passed through an acceptable democratic procedure; and they must be not-too-unjust.⁵⁸ I will explicate each of these criteria in turn.

First, for a law to be legitimate, Rawls argues that the law must be supported by a public reason.⁵⁹ Rawls conceives of public reason as the kinds of reasons, inferences, and evidence that a society uses to deliberate about its laws.⁶⁰ Rawls exemplifies what he means by public reason through the way the U.S. Supreme Court usually defends their decisions.⁶¹ The Supreme Court does not (usually) employ controversial religious, moral, philosophical, or scientific doctrines in how it usually reasons through its decisions.⁶² Instead, the Court (usually) employs reasons including rules of inference and evidence that “all citizens as reasonable and rational might reasonably be expected to endorse.”⁶³ The Court’s methodology is essentially what Rawls means by his term public reason.⁶⁴

From the example of the Supreme Court, we learn that public reasons must not be controversial religious, moral, philosophical, or scientific reasons.⁶⁵ If reason is a public reason, then it counts (even minimally) in the public

⁵⁶ *Id.*

⁵⁷ *Id.* at 228-29.

⁵⁸ While these ideas are Rawls’s ideas partially filtered through Samuel Freeman’s work, FREEMAN, RAWLS, *supra* note 42, the presentation of them in this way is my creation. I provide textual support for each requirement below.

⁵⁹ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 223-24; *see also* FREEMAN, RAWLS, *supra* note 42, at 379.

⁶⁰ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 212-13, 223-24.

⁶¹ *Id.* at 231-40. The Court does not always exclusively use public reason. FREEMAN, RAWLS at 384. An infamous example is Justice Bradley’s concurring opinion in *Bradwell v. State of Illinois*, 83 U.S. 130 (1873), where he states, “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life....The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” *Id.* at 142. Fortunately, at least in recent history, the Supreme Court does not (usually) employ nonpublic reasons, such as controversial religious, moral, philosophical, or scientific doctrines, in how it reasons in its decisions.

⁶² RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 236.

⁶³ *Id.*

⁶⁴ *Id.* at 240.

⁶⁵ FREEMAN, RAWLS, *supra* note 42, at 404-05.

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deliberation.⁶⁶ Even if a public reason is not decisive on whether to enact a law, most everyone can reasonably acknowledge that the reason counts (even minimally) for or against a possible law.⁶⁷

Since public reasons do not include or rely on controversial religious, moral, philosophical, or scientific beliefs, then virtually all citizens can reasonably endorse these reasons despite their particular worldview ('comprehensive doctrine' in Rawls's words).⁶⁸ Rawls calls this phenomenon "overlapping consensus."⁶⁹ Individuals with different and conflicting religious, moral, philosophical, and scientific beliefs can come to a consensus about laws when they only employ public reason since public reason excludes the controversial beliefs about which individuals disagree.⁷⁰ Using public reason for public deliberation fosters social stability because what can cause deep divisions among citizens (controversial beliefs) is excluded from the discussion about the law.⁷¹ By excluding controversial beliefs from the law making process, Rawls thinks that a democracy can be *stable for the right reasons* over time because everyone can reasonably affirm the reasons supporting the laws.⁷² While the concept of public reason itself has more to it than I have stated, for brevity's sake, I turn to how public reason applies to the issue of legitimacy,

Rawls contends that a law cannot be legitimate unless supported by public reasons.⁷³ For example, the state cannot require that all individuals serve in the military for the reason that doing so helps individuals draw closer to God. The reason "serving in the military draws one closer to God" contains several controversial religious and philosophical beliefs. Instead, the state may be able to require that all individuals serve in the military (for a period) for the reason that universal military service would strengthen the country's ability to defend itself in times of war and emergency. Not everyone would agree that a law requiring universal military service was a good idea. However, virtually everyone could reasonably endorse that the reason behind the law— universal military service would strengthen the country's ability to defend itself in times of war and emergency—counts (even minimally) in favor of the law. This reason along with the implicit idea that strengthening the country's defense is a reasonably good goal to pursue are public reasons that could be used to support a law requiring universal military service. To the extent that a law is supported by one or more

⁶⁶ *Id.* at 405-06.

⁶⁷ As evident in Freeman's discussion of abortion and public reason. *Id.* at 406-09.

⁶⁸ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 226.

⁶⁹ *Id.* at 150.

⁷⁰ *Id.* at 152.

⁷¹ *Id.*

⁷² FREEMAN, RAWLS, *supra* note 42, at 390-93.

⁷³ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 217.

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public reasons, the law has met Rawls's first criterion in his theory of legitimacy.⁷⁴

Not every possible law supported by public reasons should become a law; some possible laws are better than others. Instead of assessing the strength of public reasons directly, Rawls relies on a democratic procedure (the second requirement) to choose among the possible laws supported by public reasons.⁷⁵ "Democratic decisions and laws are legitimate, not because they are just but because they are legitimately enacted in accordance with an accepted legitimate democratic procedure."⁷⁶ Without democratic endorsement, the law is not legitimate.

Rawls is not too specific on what democratic endorsement involves, though he requires that it be a procedure that "all may reasonably accept as free and equal when collective decisions must be made and agreement is normally lacking."⁷⁷ He imagines a process where the society debates the merits of laws through "critical and informed deliberation among equals."⁷⁸ Such a deliberation only allows public reasons to count for or against a law.⁷⁹ The process allows voting in some way based on what individuals think is the best law based only on the relevant public reasons.⁸⁰ While Rawls envisions citizens voting (at least for representatives), Rawls does not require a participatory democracy—where every citizen actively participates in the law making process.⁸¹ Since I do not intend to take issue with this democratic requirement of Rawls's theory of legitimacy, I will let the brief remarks I have made suffice.

Finally, the third requirement for a law to be just in Rawls's theory is a substantive requirement, which I refer to as the "not-too-unjust requirement."⁸²

⁷⁴ Due to Rawls's unclarity, when I say "one or more," I am interpreting Rawls to some extent.

⁷⁵ FREEMAN, RAWLS, *supra* note 42, at 403.

⁷⁶ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 428. Deliberative democratic endorsement is a requirement of a legitimate law, in part, because deliberative democracy is essential to public reason. FREEMAN, RAWLS, *supra* note 42, at 404.

⁷⁷ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 428.

⁷⁸ Samuel Freeman, *Deliberative Democracy: A Sympathetic Comment*, 29 PHIL. AND PUBLIC AFFAIRS 371, 398-99 (2000) [hereinafter Freeman, *Deliberative Democracy*].

⁷⁹ *Id.*

⁸⁰ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 216-20. I omit a discussion of the duty of civility because it seems to point us to the requirements of public discussion about laws. While important, I am focusing instead on how laws that have been passed impact individuals punished for violating those laws. For clarity, I keep the ideas separate.

⁸¹ Freeman, *Deliberative Democracy*, *supra* note 78, at 378-79.

⁸² I call it "substantive" (as Rawls does in POLITICAL LIBERALISM, *supra* note 39, at 428-29) to distinguish it from the other two requirements of legitimacy even though Rawls's theory of justice as fairness is itself a procedural theory of justice.

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Rawls requires, “laws cannot be too unjust if they are to be legitimate.”⁸³ Rawls does not provide much more content to this vague requirement except to say that “laws that clearly violate the basic liberties are then neither just nor legitimate, and should have no legal or political authority.”⁸⁴ Freeman characterizes the not-too-unjust requirement in terms of the laws needing to be “moderately” just.⁸⁵

Making this substantive requirement specific enough to apply to actual laws necessitates that I interpret (to some extent) Rawls’s vague not-too-unjust requirement, given other aspects of Rawlsianism. Since I am arguing that this substantive requirement needs to be more stringent, much of what I will argue below attempts to make the substantive requirement more specific. I do so by trying to draw some brighter lines about what would constitute a law being not-too-unjust.⁸⁶ Despite vagueness, the general idea Rawls has in mind should be understandable.

The role the third requirement plays in relation to the other two requirements is important. The requirements of public reason and democratic endorsement do not assess the substance of the law directly. In Rawls’s words, “the outcomes of a legitimate procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy and distinguishes it from justice.”⁸⁷ Specifically, the public reason requirement pertains to the kinds of reasons offered without assessing their merit. The democratic endorsement requirement relies on a *procedure* to produce substantively good laws. Only the not-too-unjust requirement assesses directly the substance of the laws themselves.⁸⁸ Due to its function, I often refer to this requirement as the “substantive requirement.” Since I am concerned about the substantive injustice that can result even when the public reason and the democratic endorsement requirements are satisfied, I focus mainly on making the substantive requirement more stringent.

Recall, the purpose of Rawls’s theory of legitimacy that I am focusing on is to tell us when state coercion is justified to enforce laws, even when the laws

⁸³ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 429. The requirement is not only vague but is also “undetermined.” *Id.* at 428. “Legitimacy allows an undetermined range of injustice that justice might not permit.” *Id.*

⁸⁴ FREEMAN, RAWLS, *supra* note 42, at 376. One qualification to this point is that, at places, Rawls allows basic liberties to be limited in order to strengthen the overall protection of basic liberties.

⁸⁵ *Id.* at 377.

⁸⁶ I do not pretend to give the range of injustice permitted by legitimacy; I draw some meaningful lines.

⁸⁷ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 428.

⁸⁸ “Neither the procedures nor the laws need be just by a strict standard of justice, even if, what is also true, they cannot be too gravely unjust. At some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy.” *Id.*

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are less-than-just. Rawls also has two related goals that focus on how citizens regard the law. First, Rawls aims to provide with his theory of legitimacy reasons why citizens should have general respect for political authority.⁸⁹ Closely related, the second goal is to show that citizens (and those within the ambit of the society) have a duty to obey the law.⁹⁰ These two goals relate to the main purpose (I focus on) of the justifiability of state coercion in the following way. If laws are legitimate according to Rawls's theory, then individuals in that state have a duty to respect and obey the laws *and* the state is justified in coercing individuals to obey the laws, including punishing those who violate the law.

The two goals of *general respect* and the *duty to obey* suggest that Rawls is trying to justify a general obligation to obey the law.⁹¹ The alternative would be to provide a theory that would examine whether each individual has a duty to obey each particular law. This alternative kind of theory directs us to assess the obligation to obey a law each individual at a time, assessing each law one-by-one.⁹² I think that Rawls is not doing either of these options in his theory of legitimacy despite the *appearance* that he wants to justify a general duty to obey all laws. Instead, he is doing something in between these two options. Although I have not space for a full defense of my interpretation of Rawls on this point, I think what Rawls aims to do is provide us with a theory that can be applied to particular laws to assess their legitimacy. The assessment is not specific to individuals like the alternative extreme above; if a law is legitimate, it is legitimate as far as everyone in the society is concerned. At the same time, Rawls seems to hope that his theory will show that enough of the laws in most democracies are legitimate such that individuals in these societies will have general respect for political authority. Furthermore, if Rawls's theory shows that most laws are legitimate, then the general perspective or the *prima facie* position that individuals should take is that they have a duty to obey the law. This *prima facie* duty to obey the law is defeasible, but defeating it requires persuasive argument. To that extent, Rawls thinks his theory of legitimacy provides a duty to obey the law where exceptions may occur but would be rare.⁹³

Rawls concerns himself with general respect for political authority and the duty to obey the law along with the justifiability of state coercion because he is

⁸⁹ In part because the law-making process affirms their political autonomy. FREEMAN, RAWLS, *supra* note 42, at 400-01.

⁹⁰ *Id.* at 377.

⁹¹ Rawls advocates a general obligation to obey law based on the duty of fair play. John Rawls, *Legal Obligation and the Duty of Fair Play*, LAW AND PHILOSOPHY: A SYMPOSIUM (S. Hook ed., New York Univ. Press 1964). See also A. John Simmons, *The Duty of Fair Play*, 8 PHIL. AND PUBLIC AFFAIRS 307 (1979).

⁹² Joseph Raz offers such an individualist theory of the duty of obey the law (a theory of "political authority" in Raz's terms). JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

⁹³ Rawls suggests such in RAWLS, *POLITICAL LIBERALISM*, *supra* note 39, at 393.

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worried about social stability.⁹⁴ Rawls thinks that a theory of justice is not an adequate theory unless it can provide for social cooperation that is stable (for the right reasons) over time.⁹⁵ Since any society is bound to have some laws that are unjust due to the difficulty of democratic political processes and the imperfect abilities of humans (“imperfect procedural justice”), Rawls’s theory of legitimacy helps show how a society can be stable over time even with less-than-just laws.⁹⁶

Without social stability, a society with less-than-just but legitimate laws cannot incrementally improve its laws to achieve greater justice. Without stability, the democratic processes that can improve laws may be disrupted and any social discord may stunt the society’s progress toward justice. Even worse, if societies with less-than-just but legitimate laws cannot maintain stability, they may lose the degree of justice that they have obtained falling into greater injustice or social chaos. To justify avoiding greater injustice, the ultimate aim of Rawls’s theory of legitimacy is to show that a less-than-just but legitimate society is justified in using state coercion to maintain stability and that citizens have a duty to obey the less-than-just and the just laws to foster stability.

As I mentioned above, the main worries about my argument for increased stringency in standards for legal legitimacy is that such undercuts social stability. While I argue that this worry has little force, I now prepare for my argument by highlighting how Rawls’s theory of legitimacy relates to aspects of his theory of justice as fairness.

Section Two: Highlighting Rawls’s Ideal Theory of Justice

To prepare for my argument, I must highlight a couple aspects of Rawls’s theory of justice as fairness.⁹⁷ Rawls’s theory of justice is important because Rawls develops his theory of legitimacy in contrast to his theory of justice.⁹⁸ Thus, to understand fully his theory of legitimacy we must understand certain aspects of his theory of justice.

The first important point to highlight is that Rawls’s develops his theory of justice within a theoretical construct that Rawls calls “ideal theory.”⁹⁹ (When I am referring to Rawls’s theory of justice, I mean primarily those aspects that justify

⁹⁴ FREEMAN, RAWLS, *supra* note 42, at 410.

⁹⁵ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 38, 140-43, 391.

⁹⁶ FREEMAN, RAWLS, *supra* note 42, at 377.

⁹⁷ JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION 18-19 (1999); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., Harvard Univ. Press 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS].

⁹⁸ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 428.

⁹⁹ Or, “strict compliance theory.” RAWLS, A THEORY OF JUSTICE: REVISED EDITION, *supra* note 97, at 8-9.

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and explain his two principles of justice. I am not referring to the stages in his theory where the assumptions of ideal theory are relaxed.) Ideal theory makes particular simplifying assumptions. One important simplifying assumption that Rawls makes in his theory of justice is that he assumes that “everyone is presumed to act justly and to do his part in upholding just institutions.”¹⁰⁰ To that extent, ideal assumes that individuals generally comply with the laws.¹⁰¹ For this reason, Rawls calls ideal theory “strict compliance theory.”¹⁰²

Rawls sees strict compliance as an important assumption to make in constructing a theory of justice. A reason why strict compliance is important to Rawls is that he wants to construct a theory of justice that is grounded in the legal apparatus of a society.¹⁰³ So, assuming that all people will obey the laws is tantamount to assuming that people will follow his theory of justice. Rawls wants to assume that people will follow his theory of justice because he thinks that how we should deal with partial-compliance depends on the theory of justice we endorse assuming strict-compliance.¹⁰⁴

My aim is not to fully explicate, defend, or critique Rawls’s use of strict compliance theory. Instead, I am pointing out this feature of Rawls’s theory of justice to show how it should relate to Rawls’s theory of legitimacy.

From Rawls’s use of ideal theory including his assumption of strict compliance with the law, we can notice the second aspect of Rawls’s theory of justice. Rawls’s theory of justice does not include a complete theory of criminal justice.¹⁰⁵ By a theory of criminal justice, I mean to include a theory of criminal procedural rights (What procedures must the state follow in enforcing criminal and regulatory laws?), a theory of criminalization (What should be criminalized?), and a theory of punishment (How and how much criminal acts should be punished?). Other areas of laws are also left out by Rawls’s assumption of strict compliance such as regulatory law, which at present in the U.S. straddles criminal law and administrative law.¹⁰⁶ While Rawls’s assumption of strict compliance occludes other important areas of law (e.g. tort law), I focus on the four areas I have mentioned: criminal procedural rights, criminalization, punishment, and regulation. These four areas of law (that Rawls leaves out) deal with how society

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.* at 245.

¹⁰² *Id.* at 8, 245.

¹⁰³ *Id.* at 7. The “basic structure” is essentially what I am referring to here without the Rawlsian jargon.

¹⁰⁴ *Id.* at 9; see also RAWLS, *POLITICAL LIBERALISM*, *supra* note 39, at 143-44, 284-85.

¹⁰⁵ Rawls is aware of this lack. RAWLS, *A THEORY OF JUSTICE: REVISED EDITION*, *supra* note 97, at 8-9, 575. Perhaps, a partial theory of penalties exists even in ideal theory, but Rawls does not provide it for us. *Id.* at 241.

¹⁰⁶ Such is implicit in *Id.* at 241. Again, a partial theory (not given by Rawls) may be required for ideal theory.

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should treat those who do not comply with the law. In sum, since Rawls assumes strict compliance with the law, his theory of justice as fairness does not address how to deal with instances where individuals do not comply with the law.

Rawls intentionally omits the theories that I am highlighting.¹⁰⁷ I am not criticizing Rawls's theory of justice for its use of ideal theory, its assumption of strict compliance, or its omission of theories of criminal justice and regulatory law. However, once we leave Rawls's theory of justice and move to his theory of legitimacy, we also need to leave the realm of ideal theory, abandoning the assumption of strict compliance.¹⁰⁸

The reason why we need to abandon ideal theory is that a theory of legitimacy is a question most relevant in non-ideal theory. The essence of the question of legitimacy is as follows: how far can we depart from justice with state coercion still being justified? Since the society does not achieve complete justice in its laws, something along the way has gone wrong, as it seems that it inevitably must go wrong in actual human practices.¹⁰⁹

An objector may argue that while working out a theory of legitimacy, we could still maintain the assumption of strict compliance. All individuals could still be assumed to obey both just and unjust-but-still-legitimate laws. Thus, even though we are allowing something to go wrong such that full justice is not achieved in the laws, we can still assume strict compliance with the laws.

In response, perhaps we could work out a *partial* theory of legitimacy with the assumption of strict compliance. However, we cannot work out a full theory of legitimacy without eliminating the assumption of strict compliance. As long as we assume strict compliance, the need for the criminal law is not fully appreciated. In particular, a theory of criminal procedural rights would be largely undeveloped under strict compliance because the procedure would not be used. Thus, to have a complete theory of legitimacy for the real world, we need to construct a theory of legitimacy outside of ideal theory—where the assumption of strict compliance is abandoned.¹¹⁰

Another aspect of Rawls's theory of justice that is important to my argument is the priority relationship between his principles of justice. Instead of addressing this issue here, I will highlight it below where it figures into the argument. To begin that argument, I now turn to the role stability plays in Rawls's theory of legitimacy.

¹⁰⁷ *Id.* at 8-9, 575.

¹⁰⁸ FREEMAN, RAWLS, *supra* note 42, at 324-25, 379.

¹⁰⁹ *Id.* at 377.

¹¹⁰ *Id.* at 324-25, 379.

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Section Three: More Severe State Coercion Requires Greater Justification

Recall that Rawls is interested in constructing a theory of legitimacy for state coercion because he is concerned about the stability of the government and the society over time. While a just society is preferable to an unjust society, Rawls does not want a society to be unstable if its laws do not completely meet Rawls's standard of justice. Rawls seems resigned to the possibility that no society can be completely just.¹¹¹ Rawls does not want the lack of justice in a society to lead to instability, law-breaking, and/or revolution, at least as long as the lack of justice is not that much.

To avoid instability, law-breaking, and/or revolution, the state often employs coercion. State coercion (including credible threats) can incentivize individuals to comply with the law.¹¹² Thus, through coercion, a state can maintain stability. For Rawls, the state's use of coercion must be justifiable. Rawls believes that coercion is justifiable to uphold just laws and just institutions. However, Rawls's theory of legitimacy is aimed at showing when coercion is justifiable to uphold laws that are less-than-just.

One reason Rawls needs a theory of legitimacy is due to the publicity requirement of his theory of justice. Rawls requires that his theory of justice is publicly known and hopefully publicly endorsed.¹¹³ If what is just is publicly known and the laws fail to meet that standard of justice, the people may become discontent. Such discontentment may lead to instability. So, Rawls adds his theory of legitimacy to his theory of justice to deal with the problem of stability that may result from a society failing to meet its *publicly* known standard of justice.¹¹⁴

Recall, the theory of legitimacy aims at showing when the laws are justifiably enforced even if they are less-than-just. If the laws are legitimate even if they are less-than-just, then individuals should respect political authority and individuals have a duty to obey the law. While Rawls recognizes that a just society is the ideal, a less-than-just society can still be worthy of respect by its citizens who are duty bound to obey the law, and that less-than-just society is justified in perpetuating itself even through coercion. The hope is that a legitimate though less-than-just society can be stable so that it can become increasingly just. Without stability, a less-than-just society may face revolution rather than

¹¹¹ *Id.* at 377.

¹¹² RAWLS, A THEORY OF JUSTICE: REVISED EDITION, *supra* note 97, at 241.

¹¹³ RAWLS, JUSTICE AS FAIRNESS, *supra* note 97, at 120-122.

¹¹⁴ See FREEMAN, RAWLS, *supra* note 42, at 352-353 for a related point.

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incremental progress toward justice; without stability, a less-than-just society is unlikely to achieve greater justice.¹¹⁵

While I agree that state coercion is necessary to maintain the stability of a legal system and a society in general, Rawls's theory of legitimacy is insufficient to justify state coercion in the criminal law. This claim is my main thesis.

To begin my defense of that thesis, note that the state uses various *kinds* of coercion. The kinds of coercion vary from taxation to fines to community service, to a deprivation of privileges or rights (e.g. the privilege to drive and right to vote) to parole to probation to imprisonment to death. These categories are different *kinds* of coercion rather than different *degrees* of coercion along a spectrum because they affect an individual along different dimensions. For my purposes, I do not need hard distinction between taxation and fines.¹¹⁶ I am making the modest distinctions: taxation is different *in kind* from imprisonment and the death penalty. More generally, the modest distinction is between state coercion that affects individuals monetarily and state coercion that affects individuals in terms of their liberties.

State coercion that affects individuals monetarily is primarily taxation and fines. I will refer to these mechanisms as "monetary coercion." State coercion that affects individuals in terms of their liberties is community service, imprisonment, and death.¹¹⁷ I will refer to these mechanisms as "liberty coercion." Imprisonment is the central example of liberty coercion because it is a common punishment and it is a substantial infringement on a person's liberty. When I speak of liberty coercion from now on, I primarily have imprisonment in mind.

It is true that all laws that command or prohibit action *affect* one's liberty; taxing an individual deprives that person of the liberty to spend the amount of money taxed as she wishes. This characteristic cuts across my distinction between monetary and liberty coercion. However, I think the modest distinction is still meaningful in that liberty coercion, whether in the law itself or the penalty of any law, involves a deprivation of a basic liberty. Monetary coercion decreases one's liberty to use one's money, but using all of one's (pre-tax) money as one wishes is not a basic liberty.¹¹⁸

¹¹⁵ I am not sure if Rawls specifically makes this point, but I think it consistent with his views even if legitimacy (or justice) is never completely obtainable.

¹¹⁶ In practice, fines and taxation are difficult to distinguish. Fines are usually associated with legal violations while taxation is not, but fines impact a person much like taxation. Though their theoretical justification may vary, the practice of taxation and fines may be more similar than different.

¹¹⁷ I group community service with liberty coercion because the person penalized with community service must do some action; he cannot (legally) buy his way out or pay someone else to do it.

¹¹⁸ RAWLS, *POLITICAL LIBERALISM*, *supra* note 39, at 227-230.

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I do not think the distinction between monetary and liberty coercion is that controversial. Another way to view the distinction is that monetary coercion does not restrict an individual's *legal* freedom (aside from what the law itself requires) while liberty coercion does restrict an individual's legal freedom. By legal freedom, I mean one's freedom to do what most citizens can do without legal restriction.

When one's legal freedom is restricted, the state prohibits a person from going certain places or doing certain things. (I distinguish below “legal freedom” from “actual freedom” the latter being what one can actually do.) Monetary coercion does not restrict a person's legal freedom because she can still go where she wants and do what she wants as most citizens are able to do provided she has the means (monetary or otherwise) to facilitate her action. Liberty coercion does restrict a person's legal freedom in that the state *prohibits* a person from going where she wants and doing what she wants (to some extent) no matter how much money or resources she may have. For example, an imprisoned individual cannot *legally* leave the prison, *ceteris paribus*, without permission regardless of how much money she has. The person may still be *actually* free to do as she wants; nevertheless, she is *legally* prohibited from doing so.

The distinction is based on *legal* freedom (not actual freedom) because some individuals will still be able to do what they want (actual freedom) because they are able to violate the governmental prohibition. Also, money talks. Some rich individuals are able to circumvent governmental restrictions of their legal freedom through illegal mechanisms such as bribes. Nevertheless, even if these individuals' actual freedom is not restricted as much as the government has required, their *legal* freedom is still restricted because their going beyond the governmental prohibition is illegal.

I take it I have said enough so far to make the distinction between monetary coercion and liberty coercion plausible.¹¹⁹ Instead of developing the distinction further, I turn to its implications for Rawls's theory of legitimacy.

The implication of the distinction between monetary coercion and liberty coercion has to do with the *justification* for each kind of coercion. Since liberty coercion is more severe than monetary coercion, the justification for instances of liberty coercion must be stronger than the justification for instances of monetary coercion. By “severe,” I mean to refer to how *burdensome* coercion is and how *important* the coercion-limited liberty is.

To clarify, I am not claiming that all instances of liberty coercion are more severe than all instances of monetary coercion. We need to keep in mind that both monetary and liberty coercion come in degrees. Fines and taxes can be large or

¹¹⁹ Rawls makes a similar distinction for a different purpose. RAWLS, A THEORY OF JUSTICE: REVISED EDITION, *supra* note 97, at 314.

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small. Moreover, prison terms can vary from a day to a lifetime. For some people, a large fine may be more severe than a weekend in jail. However, for most people most of the time, monetary coercion is not as severe as liberty coercion.

Not only do I not need a stronger claim than the generalization in “most-claim” for the remainder of my argument, but I only need the claim that *some* instances of liberty coercion are more severe than monetary coercion. I argue below that as laws involve increasingly severe coercion, these laws require increasingly stringent justification (compared to the laws involving less severe coercion). Consequently, my argument can be individualized to how each law affects each individual. However, for simplicity and because I believe the more general “most-claim” holds, I treat the claim in terms of the categories “liberty coercion” and “monetary coercion” instead of a spectrum.

Many reasons support the generalization that most instances of liberty coercion are more severe than most instances of monetary coercion; I mention only a few. First, since democracies have dispensed with debtor’s prison, laws involving *only* monetary coercion do not lead to liberty coercion.¹²⁰ Second, in democratic societies with a welfare system, monetary coercion in the form of taxes has a limit; the depth of one’s wallet. Those who are the worst off are often taxed very little or are even subsidized through redistributive payments from the taxes of others. Since fines also have a monetary impact, they too can be offset by redistributive payments from a welfare system. Nevertheless, for most people while taxation and fines affect them monetarily, the severity of this infringement is not as severe as liberty coercion.

The third reason why liberty coercion can be more severe than monetary coercion results from extant conditions in prison. Brutal violence including rape takes place in many prisons, often committed by the prison guards.¹²¹ Moreover, much of the prison population comprises people living with mental disabilities, racial minorities, and the poor. The preponderance of these groups in the prison population suggests that the criminal justice system unduly disfavors already vulnerable groups. Thus, liberty coercion can excessive harm vulnerable groups including the impacts that it has on the imprisoned’s family, especially their dependents.

The final reason (I mention) that liberty coercion is more severe than monetary coercion concerns the after-effects of imprisonment. After being imprisoned, often a social stigma haunts one leading to social ostracism from one’s family, friends, neighbors, and acquaintances. The social stigma can also

¹²⁰ Of course, the poor can be subject to liberty coercion if they cannot afford criminal fines. Yet, such pertains to criminal fines not taxation.

¹²¹ DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 5 (2008).

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impede acquiring a job or other social benefits such as adopting children.¹²² In contrast, monetary coercion—even when it takes the form of a criminal fine—often does not have as bad of a social stigma attached to it.

Due to the social stigma attached to liberty coercion and the way the welfare system ameliorates some of the effects on the poor of monetary coercion, most instances of liberty coercion are more severe than most instances of monetary coercion. Aside from these two reasons, the intuitive point that most people would rather pay a fine than go to jail also makes it plausible that for most people liberty coercion is more severe than monetary coercion.

Once again, I am not insisting that all instances of liberty coercion are more severe than all instances of monetary coercion for all people. My claim pertains to what is generally true for most people. In most cases, liberty coercion is more severe than monetary coercion. Furthermore, not only do I not need a stronger claim than this “most-claim” for the remainder of my argument, but the rest of my argument only needs the claim that *some* instances of liberty coercion are more severe than monetary coercion. I argue below that as laws involve increasingly severe coercion, these laws require increasingly stringent justification (compared to the laws involving less severe coercion). Consequently, this claim can be individualized to how each law affects each individual.

I have given some intuitive plausibility to: the distinction between liberty coercion and monetary coercion; and the claim that liberty coercion is often more severe than monetary coercion. I turn now to how these points suggest that liberty coercion requires greater justification for its legitimacy than does monetary coercion.

Since more severe coercion is more burdensome to those coerced, we would expect that the more severe coercion is the greater the justification must be for the coercion. Combining this point with the distinction between monetary and liberty coercion, *most laws that involve liberty coercion require greater justification than most laws that involve only monetary coercion*. I will call this claim the “severity claim.”

By a “greater justification” in the severity claim, I mean several things. (In fleshing out this concept, I also am providing intuitive reasons for the severity claim.) One thing that is included in “greater justification” relates to the quality of the purpose of the law. The more severe the coercion, the more worthy the purpose of the law should be. For example, we punish the crime of murder with life in prison or the death penalty because protecting innocent lives is a highly worthy purpose. Since a person's life is irreplaceable and the most valuable asset one has, punishing anyone who murders with a severe punishment such as life in

¹²² *Id.* at 6.

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prison is *arguably* justified. In contrast, life in prison for petty theft is unjustified as the legacy of *Les Miserables* indicates.¹²³

I am not arguing for the details of how to punish particular crimes. I am making the more general intuitive claim: since most instances of liberty coercion involve more severe coercion, we expect the purpose of such laws to be proportionally more worthy of achieving. I refer to this aspect of “greater justification” in the severity claim as the “proportionality constraint.”

Another aspect of the “greater justification” that we want included the severity claim has to do with our confidence about the justification of the law. Not only do we want the proportionality constraint satisfied, but we also want to be confident about *our beliefs* about the worthiness of the law’s purpose. Confidence comes in degrees. For example, we may think that unauthorized downloading of music on the internet should be illegal, but we may not be confident about how bad such a crime is. Perhaps, we would be comfortable with a modest fine for downloading music, perhaps a civil remedy on top of the modest fine. But, given the likely benefits for the artist and music industry of unauthorized downloading, we may not be confident enough to punish such a crime with heavy fines. We most likely would be unwilling to incarcerate someone over music downloading, not just because of the proportionality constraint, but also because we may not be that confident that we know just how bad of a crime music downloading is. Due to this issue of confidence, the greater the severity of coercion, we want to be more confident that the crime is worthy of punishing. In that sense, we want more justification the greater the severity of coercion.

Other considerations go into what I mean by “greater justification” in the severity claim. I will explore one of these in detail below. Mentioning it briefly, we want greater procedural safeguards the more severe the kind of coercion as indicated by many of constitutional rights dealing with how the state may enforce the criminal law.

All of the reasons I have given so far are supposed to support the claim that we have an intuition that due to their greater severity, most instances of liberty coercion require greater justification than most instances of monetary coercion (severity claim). I am not sure that I want to go so far as to say that the severity claim is a considered conviction in the Rawlsian sense, although I think it comes close.¹²⁴ Let me now turn to some contractarian and specifically some Rawlsian reasons supporting the severity claim.

¹²³ In the story, Jean Valjean merely steals a loaf of bread due to hunger for which he is imprisoned with hard labor for years turning him into a hardened criminal. Now, such appears to most people like a great injustice. VICTOR HUGO, *LES MISERABLES*, (Norman Denny trans., Penguin Books 1982) (1862).

¹²⁴ See RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 97, at 29 for Rawls’s definition of a considered conviction.

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The general contractarian reason supporting the severity claim has to do with the persuasiveness of the arrangement to be contracted. If individuals are going to agree to a social contract, they need to be persuaded that one particular contract is superior to any other social contract. My claim is that a social contract that requires greater justification for the state to use liberty coercion than with monetary coercion will be more persuasive or appealing of an arrangement to the contractors than a social contract that requires the same moderate level of justification for all kinds of state coercion.¹²⁵

This contractarian claim is meant to apply to most forms of contractarianism as long as the contractors doing the reasoning are situated roughly fairly.¹²⁶ Since all fairly-situated contractors would consider the chance that they or someone they care about could be accused of a crime, whether justifiably accused or not, most if not all contractors would want the justification (in my sense) of liberty coercion to be greater than monetary coercion, due to the greater severity of liberty coercion. The reason they would find the severity claim persuasive is that that they are risking being subjected to more suffering if they agree to a society with liberty coercion as opposed to a society that only uses monetary coercion. (I am assuming that the contractors would want the more severe liberty coercion to deter people from committing the core crimes.) Thus, to balance off the increased risk of suffering the more severe liberty coercion, social contractors would want each law involving liberty coercion to satisfy more stringent standards of justification than the standards applied to laws involving only monetary coercion.

I do not think I am begging the question in my general contractarian point. Like Rawls, I am using a contractarian apparatus to flesh out the reasoning of individuals who situated roughly fairly.¹²⁷ Instead of developing the general contractarian point, I turn to a reason for the severity claim that is specific to Rawlsianism.

In Rawls's two principles of justice, the first principle protects the basic liberties of individuals while the second principle relates directly to the monetary arrangement between individuals.¹²⁸ I need not go further into the details of the two principles; my point pertains to the relationship between Rawls's two principles of justice.

¹²⁵ I have not space to address whether contractors would prefer greater stringency for all kinds of coercion.

¹²⁶ Even Hobbesian-type contractors could advocate for the severity claim, assuming the sovereign could still effectively maintain peace (stability) with this constraint.

¹²⁷ RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 97, at 17.

¹²⁸ *Id.* at 42. For brevity, I ignore the social inequalities aspect of Rawls's second principle of justice.

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The relationship I am referring to is the priority of the first principle over the second principle. Part of Rawls's theory is that a society must satisfy the first principle first before it satisfies the second principle.¹²⁹ Perhaps more accurately for non-ideal theory, a society cannot improve its adherence to the second principle by lessening its adherence to the first principle.¹³⁰ The essential idea in the priority of the first principle over the second principle is that a society is unjust if it pursues greater wealth (even according to the difference principle) when doing so leads to the equal basic liberties being achieved to a lesser extent. Put simply, a society cannot pursue wealth by sacrificing equal basic liberties among all citizens.

Rawls allows basic liberties to be traded-off against one another as long as doing so is necessary to ensure *equal* basic liberties for all.¹³¹ By implication, Rawls may be committed to the possibility that even some individuals' equal basic liberties may be drastically limited, at least in the short term, in special circumstances where doing so is necessary to preserve the whole system of basic liberties such as when the government faces overthrow. In sum, Rawls allows basic liberties to be traded-off against other basic liberties in some cases. However, Rawls does not allow equal basic liberties to be traded off for greater monetary gain even when the greater monetary gain accords with the second principle of justice.

From this brief explanation of the priority of the first principle over the second, I want to draw support for the severity claim. Given the priority of basic liberties over monetary gain in the priority Rawls builds into his two principles of justice, we would expect a similar sort of distinction when it came to the state *taking away an individual's basic liberties* versus the state *taking away a person's money*. We expect such because to have basic liberties and money, an individual needs both the state to provide institutions to *provide* for basic liberties and monetary pursuit and the state needs to *refrain from taking away* one's basic liberties and too much of one's money.

More specifically, with liberty coercion, the state is taking away a person's basic liberty to freedom of association and freedom of movement (often in addition to other liberties such as rights of political participation). Rawls prizes freedom of association and freedom of movement highly among the basic liberties.¹³² Thus, liberty coercion is severe in that it deprives an individual some of her most important basic liberties.

¹²⁹ *Id.* at 43-46.

¹³⁰ Assuming, perhaps, that the two options are mutually exclusive.

¹³¹ RAWLS, A THEORY OF JUSTICE: REVISED EDITION, *supra* note 97, at 178-79.

¹³² RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 228.

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In contrast, while taking away a person's money is still coercion, I argued above monetary coercion is often not as severe as taking away a person's basic liberties. Back to Rawls, he attaches differential importance to the basic liberties over greater wealth in the priority Rawls gives to the first principle over the second principle. From this differential importance, we can infer that, in Rawls's view, the basic liberties are more important than greater wealth (assuming subsistence is met). Applying this aspect of Rawls's theory of justice to state coercion, we find support for the premise of the severity claim: liberty coercion is (often) more severe than monetary coercion.

Assuming I am right about Rawlsian commitments, we would expect Rawls to treat laws that involve liberty coercion differently from laws that involve monetary coercion. The differential treatment need not involve some sort of priority of one over the other because we do not *need* to trade-off one kind of coercion for the other. Instead, I am proposing that the differential treatment should be the severity claim: laws that threaten the deprivation of the basic liberties (liberty coercion) need greater justification than the laws that only threaten individuals' monetary situation (monetary coercion).

In summary, Rawls's theory of justice supports the severity claim. Due to the priority of the principle that protects the basic liberties over the principle concerned with wealth distribution, we see that Rawls finds basic liberties more important than greater wealth. To that extent, we would expect Rawls to agree that state coercion that deprives individuals of basic liberties is more severe (in most cases) than state coercion that deprives individuals of a portion of their money (assuming subsistence). If so, then the severity claim follows. The "greater justification" required by the severity claim is analogous to the priority that Rawls attaches to the first principle over the second. Since preserving equal basic liberties is so important, the state should have greater justification for laws that threaten to deprive individuals of those basic liberties than for laws that involve only monetary coercion.

Since the points I have made so far figure into my argument in the next section, I will be returning them below. Let it suffice for now that I have made plausible two claims (including support from Rawls's theory of justice). First, liberty coercion is more severe than monetary coercion in most cases. Second, due to its greater severity, most laws involving liberty coercion require greater justification than most laws involving only monetary coercion (severity claim). In the next section, I will argue that the severity claim indicates that Rawls's theory of legitimacy needs to be more stringent for it to properly assess the legitimacy of laws that involve liberty coercion.

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Section Four: Legitimate Liberty Coercion

In this section, my main objective is to develop the points from above to suggest that Rawls's theory of legitimacy needs to be more stringent when assessing laws involving liberty coercion. To begin, recall, Rawls's theory of legitimacy is supposed to show how the state may acceptably use coercion to enforce the law. Enforcing the law is important because, according to Rawls, enforcing the law is necessary to maintain stability of a society over time.¹³³

Of course, Rawls does not want a law enforced regardless of its merit.¹³⁴ Rawls's theory of legitimacy is supposed to tell us which less-than-just laws may still be justifiably enforced. Recall that for Rawls, laws have to meet the three requirements: supported by public reason, endorsed democratically, and not-too-unjust. Thus, as long as the laws meet these three requirements, states can justifiably enforce their laws, even if some laws are less-than-just, to ensure social stability.

The question is whether Rawls's three requirements (public reason, democratic endorsement, and not-too-unjust) for a law to be legitimate are adequate to the task of justifying the use of state coercion. I am not sure how to *decisively* answer this question. In this paper, I want to make a more modest claim that while the legitimating requirements Rawls uses may be sufficient for laws involving monetary coercion, it is dubitable that these legitimating requirements are sufficient for at least some laws involving liberty coercion. In other words, I contend that Rawls's requirements for legitimacy are not stringent enough for laws involving liberty coercion. Note, how much is "enough" is always hard to measure. I hope to stack up the reasons so that the case for making Rawls's theory of legitimacy more stringent for laws involving liberty coercion is more persuasive than leaving the theory as it is.

First, I want to grant for the sake of argument that Rawls's requirements of legitimacy (public reason, democracy, and not-too-unjust) are enough to justify laws that involve only monetary coercion.¹³⁵ While I do not defend this claim, I will offer one reason why I think Rawls theory of legitimacy may justify laws involving only monetary coercion to contrast why his theory does not justify laws involving liberty coercion.

One reason why Rawls's theory of legitimacy may be sufficient to justify the laws involving *monetary coercion* results from the substantive requirement that the laws be not-too-unjust. While I stated above that this requirement is vague, I do not think it is hopelessly vague. One minimal standard Rawls draws from this requirement is that the law cannot put individuals below subsistence

¹³³ FREEMAN, RAWLS, *supra* note 42, at 248.

¹³⁴ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 429.

¹³⁵ This claim may be dubitable by an external critic of Rawls.

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(while others are above subsistence).¹³⁶ Hence, for Rawls, if individuals are below subsistence, the society is too unjust.

Requiring that laws involving monetary coercion (taxation and fines) does not put an individual below subsistence is a reasonable requirement for a law's legitimacy. As long as one is at or above subsistence, one can make use of one's basic liberties to a meaningful extent. Since many of life's meaningful activities do not require more wealth than subsistence, especially with many state-provided goods such as libraries, parks, and museums, a person with subsistence can live a minimally decent if not meaningful life. Hence, Rawls's requirement that the laws involving monetary coercion does not put one below subsistence is reasonable to assess their legitimacy. At least, such is granted.

In contrast to monetary coercion, Rawls's theory of legitimacy is not stringent enough to assess the legitimacy of laws involving liberty coercion. I think the main requirement that is not stringent enough is the not-too-unjust requirement. To see why I focus on this substantive requirement, let me point out how the public reason and democratic endorsement requirements do not *necessarily* prevent unjust laws.

Above I pointed out that Rawls's theory of legitimacy does not directly use the *strength* of public reasons directly to justify the legitimacy of a law. At most, the strength of a public reason only plays a role *indirectly* in the democratic deliberation where the society determines whether to enact the law relevant to that public reason.¹³⁷

Since Rawls's theory of legitimacy does not directly use the strength of public reasons to justify the legitimacy of a law, then it is possible that laws that involve liberty coercion can be legitimate (according to Rawls) even if the laws are supported by only weak public reasons. By weak public reasons, I am referring to the reasons in favor of the law being either weak in themselves or weak compared to the reasons against the law.

Given the severity of many instances of liberty coercion, it is at least surprising that Rawls thinks that laws that involve liberty coercion can be made legitimate even supported by only weak public reasons. Below I will argue it is more than surprising but actually problematic for Rawls's theory. I will also develop some examples of laws that are at best supported by weak public reasons but are arguably illegitimate. As a preview, these laws are those that prohibit certain non-violent conduct such as laws against drugs and prostitution. The essence of these examples is that weak public reasons support them, yet they are illegitimate, at least in so far as liberty coercion is used to enforce them.

¹³⁶ Subsistence is a constitutional essential. RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 228-29; *see also* FREEMAN, RAWLS, *supra* note 42, at 234.

¹³⁷ RAWLS, POLITICAL LIBERALISM, *supra* note 39, at 428.

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Before we get to these examples, let's not forget that laws supported by weak public reasons still have to be democratically endorsed and the substance of the law itself must be not-too-unjust. Nevertheless, these two additional requirements are not stringent enough for Rawls's theory of legitimacy to justify laws involving liberty coercion.

Consider first the democracy requirement. It is possible that laws supported by only weak public reasons can be passed democratically. Representative democracies are infamous for such laws when legislators vote swap, make pork-barrel laws, and follow the fervent of the masses. Direct democratic law-making can also make laws based on weak public reasons when the masses are biased, misinformed, fooled by propaganda, mesmerized by celebrities, selfish, incited by extreme events, and so on.

If the law passed democratically is not supported by *any* public reasons, then that law is not legitimate according to Rawls's theory of legitimacy. But, as long as the democratically endorsed law is supported by a public reason, even if weak in itself or weak compared to the countervailing public reasons, then that law meets the public reason requirement *and* the democratic endorsement requirement of Rawls's theory of legitimacy. So, the democracy requirement of Rawls's theory of legitimacy does not guarantee that laws only supported by weak public reasons will not be enacted.

The extent to which the not-too-unjust requirement delegitimizes a law is complicated. I mentioned above that despite the vagueness of the not-too-unjust requirement, we could safely assume that monetary coercion would be too-unjust if it made an individual fall below subsistence. Unlike this fixed point with monetary coercion, the not-too-unjust requirement is harder to pin down with liberty coercion. I am not claiming that liberty coercion will always fail to meet the requirement of being not-too-unjust. Life in prison for vandalism is clearly too-unjust. Yet, less obvious is what is too unjust in cases not so extreme. Life in prison may or may not be too-unjust for murder; intuitions among people and across cultures will vary on such issues. For example, the U.S. has prison terms that are 5 to 10 times longer than those in France and Germany for similar crimes.¹³⁸

My guess is that many individuals have moderate to strong intuitions about the appropriate punishment for murder, though these intuitions differ among people and across cultures. However, I think our intuitions are less strong with other severe crimes such as rape. Is ten years in prison too-unjust for rape? When it comes to other crimes that do not involve physical harm such as white collar crime, robbery, and tax evasion our intuitions about what is too-unjust are even weaker. Some empirical data suggests that Americans ordinarily rank the

¹³⁸ HUSAK, *supra* note 121, at 19.

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severity of core crimes similarly.¹³⁹ Yet, attaching specific prison terms to each crime has been more judicial art(ifice) than science.

The problem of vagueness in the not-too-unjust requirement sketched in the preceding paragraph indicates the beginning of a solution. I mentioned in section two that Rawls's theory of justice lacks a companion theory of criminal justice (i.e., theory of criminalization, theory of punishment, and a theory of regulation). A companion theory of criminal justice would help mitigate the vagueness of the not-too-unjust requirement because we would see, more clearly, what justice requires regarding liberty coercion. I say "companion" theory because Rawls's theory of legitimacy need not create its own theory of criminal justice. Rather, it needs a theory of criminal justice to draw upon for the not-too-unjust requirement to have any actual content pertaining to liberty coercion.

To be fair to Rawls, he may have had in mind a theory of criminal justice included in his not-too-unjust requirement. To my knowledge, Rawls does not clarify this point. Regardless, I think I have demonstrated the need for a theory of criminal justice in order for Rawls's theory of legitimacy to apply to large sections of the legal system including the penalties for any law. To that extent, we should read Rawls's theory of legitimacy as assuming a substantive requirement for constitutional essentials, basic justice, and criminal justice.

The extent of my thesis is not merely Rawls's theory of legitimacy needs to include a theory of criminal justice. While I think that emphasizing the need for a theory of criminal justice is an important addition to Rawls's theory of legitimacy, I think it is not enough to deal with the concerns I have raised. Once we see the need for a theory of criminal justice, Rawls's theory of legitimacy needs to be made more stringent.

The increased stringency consists in greater scrutiny of the substance of laws and their penalties especially when such involve liberty coercion.¹⁴⁰ The tricky question is how much more stringent do laws involving liberty coercion need to be compared to laws involving only monetary coercion. I will try to draw such a distinction. I call the more stringent version of the substantive requirement to replace Rawls's not-too-unjust requirement the "strong version."

Strong version: for most laws involving liberty coercion to be legitimate the laws and their penalties must be *almost-just*.

How much more just is almost-just than Rawls's not-too-unjust is obviously a hard distinction make. Recall the analogy to letter grades. Rawls's theory of

¹³⁹ PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH* 11 (2008).

¹⁴⁰ There are other ways to make Rawls's theory of legitimacy more stringent, which I omit.

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legitimacy requires that a law earn a “B” grade (not-too-unjust). The strong version requires an “A-” grade (almost-just) for the law to be legitimate.

Put differently, by almost-just, I mean that the laws can only be a hair’s breadth below justice. To put the distinction in other words, almost-just means that the laws are just, plus or minus a small margin of error. Once again, if we had a persuasive theory of criminal justice, the distinction between almost-just and not-too-unjust would be easier to make. In lieu of having such a theory, below I identify some fixed points where we can meaningfully distinguish the strong version from Rawls’s moderate version.

Before doing so, I use the severity claim to defend the strong version. Recall, since liberty coercion is often very severe, we would expect greater justification for imposing liberty coercion than we do for monetary coercion (severity claim). The severity claim supports (something like) the strong version because the strong version requires a higher standard of justice for laws involving liberty coercion.

Since the severity claim supports the strong version, the Rawlsian reason in favor of the severity claim also supports the strong version. The importance of this reason merits repeating it quickly. From the priority Rawls gives to the first principle, we can infer that the protection of equal basic liberties is more important for Rawls than incremental greater wealth beyond subsistence. Since the protection of equal basic liberties is more important, most laws involving liberty coercion require greater justification than most laws involving only monetary coercion.

The strong version is also supported by the intuitive point that leads to the severity claims. Most forms of punishment involving liberty coercion are quite severe. With imprisonment in particular, we are depriving the imprisoned the freedom to self-regulate basic aspects of his life such as what, when, and where he eats. The imprisoned are controlled and governed in ways that livestock are governed, even though most of the imprisoned still have some basic rights such as the right to life. To justifiably subject a person to such a severe punishment as imprisonment, the laws should be just or, at least, almost-just. Using such severe coercion as imprisonment without the relevant law and its penalty being almost-just seems indefensible.

A further point in support of the strong version comes from the U.S. Constitution. We have evidence that the beliefs embodied in U.S. Constitution endorse the strong version. As I mentioned earlier, the U.S. Constitution has stringent requirements that the criminal justice system must meet in order to inflict a punishment on an individual. The rights to trial by jury, habeas corpus, non-self-incrimination, no double jeopardy, and only reasonable searches and seizures are some of *procedural* requirements that the state must meet in using

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coercion to enforce a law. In contrast, the right against cruel and unusual punishment is *substantive* requirement of the criminal law.

In many instances, if one or more of the criminal procedural requirements are not met, the Constitution forbids convicting and punishing the accused to any extent. For example, if the state obtained all of the evidence against the accused via unreasonable searches and seizures, then the evidence would be inadmissible and the accused would be neither convicted nor punished. These stringent constitutional rights governing the procedures for enforcing the law indicate that, to a large extent, we would rather err on the side of not punishing some violators of the law rather than administer punishments through an *unjust* procedure. Since these constitutional procedural protections are highly valued and, in many ways, most U.S citizens take them for granted, they seem to be considered convictions or approaching such.

These constitutional rights concerning the procedure for enforcing the law are likely to be part of a persuasive theory of criminal justice. It is this theory of criminal justice that I pointed out is missing from Rawls's theory of legitimacy. Since we seem committed to not using liberty coercion unless the procedural rights in the Constitution are met, I want to extrapolate from that to the whole theory of criminal justice needed in Rawls's theory of legitimacy.

If we are not willing to use liberty coercion because we value the procedural rights in the Constitution, then we should similarly be unwilling to use liberty coercion if other aspects of a persuasive theory of criminal just are not also met. Perhaps, not every minute aspect of a theory of criminal justice would be so important to override the legitimacy of a law involving liberty coercion. However, at the core aspects of the theory of criminal justice will be that important such that not meeting them will delegitimize the law and its enforcement. Consequently, the rights protected in the Constitution are not the only aspects of a theory of criminal justice that would need to be met to avoid delegitimizing a law involving liberty coercion. Rather, many other aspects including principles on what can be criminalized and how and to what extent can the violation of criminal laws be punished, the substantive constitutional right against cruel and unusual punishment being one of them. While I will not defend the claim here, I think that the substantive aspects of criminal justice are just as important, if not more important, than the procedural rights of criminal justice protected in the Constitution.

All of the arguments I have given so far for increasing the stringency of Rawls's theory of legitimacy for laws involving liberty coercion support the strong version of the substantive requirement. The main reasons are as follows:

1. Liberty coercion involves a more severe form of coercion than monetary coercion

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2. The greater the severity of coercion, the greater the need of justification for a law.
3. Liberty coercion as a punishment involves a severe deprivation of basic liberties. Hence, we must have strong reasons to deprive individuals of their basic liberties.
4. Many Constitutional rights require procedural criminal justice for the state to justifiably punish. Similarly, substantive criminal justice should be (at least) *almost* met before the state can justifiably punish with liberty coercion.

I think I have said enough about these four reasons to make them plausible. Instead, of developing them further I want to illustrate some ways that the strong version would delegitimize extant laws that Rawls's theory may not delegitimize.

Section Five: Delegitimizing Certain Non-violent Criminal Laws

One difficulty with Rawls's theory of legitimacy, which I mentioned previously, is the vagueness of the not-too-unjust requirement. I do not claim to have solved this difficulty. Until we have a persuasive theory of criminal justice to add to Rawls's theory of justice as fairness, vagueness still remains to some extent even with the strong version of the substantive requirement. In this section, I hope to combat some of this vagueness by identifying a fixed point in the realm of criminal justice where we can gauge how the strong version (compared to Rawls's moderate version) of the substantive requirement would evaluate part of the extant criminal law in the United States.

As I mentioned in passing above, certain existing criminal laws violate criminal *justice*. One illuminating set of examples pertain to certain non-violent crimes such as drug use and prostitution. I aim to argue that Rawls's theory of legitimacy, as it stands, justifies the extant criminalization of such conduct.

Furthermore, this justification of criminal sanctions against such conduct should trouble us. As a solution, I contend that the strong version of the substantive requirement that I am proposing would not justify the extant troubling laws pertaining to such conduct. To that extent, we should prefer that the strong version of the substantive requirement replace Rawls's not-too-unjust requirement.

To begin my argument, "self-regarding" conduct is one way of characterizing the conduct I have in mind. The problem with that term is that most conduct can and does affect other people. Not all conduct does. My favorite is scratching my leg when no one else is around. Such scratching clearly need not affect other people, although we could imagine bizarre circumstances in which it did.

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Nevertheless, the types of criminalized conduct, which I am targeting, in the extant law can and often do affect other people. The point of the conduct, with which I am taking issue, is not that such conduct does not ever affect other people. Rather, the point is that in their direct effects, they only affect the person performing the conduct. If such conduct affects other people, they do so indirectly. By indirectly I mean that, in most instances, such conduct affects the person performing the conduct (directly) and then the person who was affected directly may do something that affects another person as a result of the direct effects of the “self-regarding” conduct. These indirect effects of “self-regarding conduct” are worth distinguishing from the direct effects because the indirect effects may not happen, vary greatly among people, are often separated from the direct effects by a significant stretch of time, and can often be ameliorated/avoided by planning or third-party intervention. Without a more apt term, I reluctantly use “self-regarding conduct” as I have just explained.

To illustrate, consider an argument that people opposed to drug use often employ to contend that drug use is not self-regarding. They contend that drug use causes child neglect and/or abuse (child abuse, for short).¹⁴¹ Set aside the fact that not all drug use causes child abuse since not all drug use leads those who have or are around children to abuse them. Let’s grant the minimal claim that at least some people who use drugs end up abusing their children some of the time in part because of the drug use.

Even granting such a minimal claim, the drug use that leads to child abuse is still self-regarding conduct. The direct effect of the drug use is an alteration of the psychological state of the person who ingests the drug. This psychological effect on the person using the drug is a direct effect. In certain circumstances for certain people, the psychological effect of the drug on the user will lead that person to abuse a child. However, the child abuse is an indirect effect. The abuse of the child only resulted because of certain circumstances obtaining such as the child being present after the drug was ingested and the child abuse could have been avoided by planning to have the child in another location or under the care of another competent adult who could protect the child. Even if one is not convinced that drug use is self-regarding conduct, the concept is still cogent because there are other examples of clearly self-regarding conduct that has been criminalized in the past such as masturbation, homosexual sex, and sodomy.

Once again, I am not mounting a thorough defense of the concept of self-regarding conduct. I hope what I have said has explicated the concept of self-regarding conduct along with making the concept plausible. From now on, I will assume that the concept of self-regarding conduct is coherently applied to the examples use.

¹⁴¹ James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENTARY 24 (1990).

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One further clarificatory point concerning self-regarding conduct is that self-regarding conduct need not involve only one person. Some of the above examples involve more than one person such as prostitution. Conduct involving more than one person is still self-regarding as long as all involved are consenting, adults.¹⁴²

Once again, for illustrative purposes, prostitution can have indirect other-regarding effects—both positive and negative. Prostitution can have positive indirect other-regarding effects in that by fulfilling a person’s basic sexual needs, in reducing that person’s stress, and in providing companionship to the lonely, that person may be better able to meet other people’s needs and function better at work. At the same time, prostitution can have negative indirect other-regarding effects such as causing conflict and even violence between married people and transmitting disease. Even with these possible positive and negative indirect effects, prostitution is still a self-regarding conduct because the direct effect of the conduct in terms of physical sensation only affects the prostitute and the customer.

With these clarificatory remarks, I offer some reasons why if we amend Rawls’s theory of legitimacy to include the strong version of the substantive requirement, laws involving liberty coercion that criminalizes self-regarding conduct would be illegitimate. To make this claim, let me first say why I think that Rawls’s theory of legitimacy, as it stands, would justify some of the extant laws against self-regarding conduct.

Many extant laws criminalizing self-regarding conduct meets Rawls’s three requirements of legitimacy.¹⁴³ This result of Rawls’s theory of legitimacy should trouble us because these extant laws are troubling. I will use the drug laws as the primary example to make this claim, even though a similar argument could be made with other criminalized self-regarding conduct such as prostitution and gambling. While states are starting to modify laws against drug possession, the reform is by no means complete.¹⁴⁴ Additionally, criminal laws against drug production and trafficking are in force in the entire United States. I will refer to all of these laws as “drug laws.”¹⁴⁵

Drug laws meet the public reason requirement of Rawls’s theory of legitimacy. Some of the public reasons in favor of drug laws are as follows: drugs harm physical and mental health; drugs involve destructive addictions. I think

¹⁴² This point may make the concept of self-regarding conduct excessively broad; I side-step that concern.

¹⁴³ I am not claiming that Rawls’s theory would justify the criminalization of any self-regarding conduct. For example, the former criminalization of homosexual sex is too-unjust to be legitimate.

¹⁴⁴ HUSAK, *supra* note 121, at 80.

¹⁴⁵ I do not have in mind prescription drugs or other legal drugs such as alcohol except where specified.

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these are weak public reasons in both senses that I stipulated above; the public reasons themselves are weak and the countervailing public reasons against drug laws are strong.

For example, the claims about the ill effects of drugs are overstated. What is especially grossly exaggerated (most notably in popular opinion) is the incidence of drug addiction among drug users. The popular idea that drug use always leads to drug addiction is a myth.¹⁴⁶ Another exaggeration is the difficulty of going through withdrawal. A reliable description of heroin withdrawal has likened it to the unpleasantness of a moderate flu; such does not seem that bad.¹⁴⁷ Since many think drug withdrawal is intensely painful, the extent of withdrawal is also exaggerated.

I am not denying that drugs can destroy some people's health and lead to some deaths. I am also not denying that overcoming drug addiction is hard and that drug addiction can lead people to destroy their relationships and employment. However, many of these negative aspects of drug use could be ameliorated through education on how to use drugs safely and through medical care for those who have become addicted. These ameliorative programs are either too few or not sought after largely because of the drug laws themselves. Quite possibly, if the drug laws were repealed the negative effects drugs have on many people's lives would be substantially mitigated. Keep in mind though, as I mentioned above, drugs do not always have negative effects on people's health. For these reasons, public reasons in favor of drug laws exist, but are weak.

Let me quickly note that one of the main reasons that people in favor of the drug laws offer in support of them is not a public reason. James Q. Wilson, former head of the National Advisory Council for Drug Abuse Prevention, states, "Cocaine alters one's soul."¹⁴⁸ Wilson and others claim that drug use is so immoral that it must be criminally prohibited.¹⁴⁹ They do not offer much more explanation of their moral claim beyond stating it. I am merely flagging that this moral claim is not a public reason because it depends on highly controversial moral beliefs that are not widely held.

In addition to the public reasons supporting drug laws being weak in themselves, the countervailing public reasons against the drug laws are strong. The strongest public reasons have to do with the freedom to manage one's own body and health. While this public reason is moral in nature, it is so universally

¹⁴⁶ FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 27-29 (1992).

¹⁴⁷ Interview with Stephen J. Morse, Ferdinand Wakeman Hubbell Professor of Law and Professor of Psychology and Law in Psychiatry, University of Pennsylvania Law School, in Philadelphia, Pa. (Apr. 8, 2008).

¹⁴⁸ Wilson, *supra* note 141, at 26.

¹⁴⁹ ZIMRING AND HAWKINS, *supra* note 146, at 8-9.

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accepted, at least in the abstract, that it is not controversial. Just the opposite. This commitment to freedom in one's body and health is presupposed by the commitment to allow people to pursue, even minimally, a diversity of lifestyles and conceptions of the good (freedom to eat what one wants).

There are some controversial exceptions to the nearly universal commitment to freedom in one's body and health. The most notable exception is abortion. But note that abortion has a direct effect on another living entity. Therefore, for most people who oppose abortion, it is not self-regarding conduct since they assume that the other living entity, the fetus, is not consenting to the abortion. To that extent, it seems that the freedom for a person to manage her body or health is only challengeable when it conflicts with the life of another (purported) person (and even this limitation is controversial).

Another controversial exception to the commitment to freedom to one's body and health is the legal limitation on how one can end one's own life. For brevity, suffice it to say while the right to die is still controversial, the actual practice of medicine in hospice care and with living wills indicates that attitudes about how much control individuals should have over their death seem to be changing.¹⁵⁰ The change is in the direction of giving individuals and their families more freedom over their body and their health even when it comes to their own death. Since the freedom to manage one's body and health is a widely recognized freedom, this freedom counts as a public reason against drug laws.

Another public reason against drug laws contends the exact opposite of the main public reason in favor of drug laws. While for some people drugs can have negative effects on their health, for others just the opposite is the case. Using drugs helps their physical and mental health.¹⁵¹ Marijuana is the best known drug for possibly having healing properties not found in even prescription drugs.¹⁵² Heroin has obvious palliative uses.¹⁵³ Aside from these specific cases, a more general point can be made. Drugs make people feel good; that is one major reason people use them. To the extent that drugs make people feel good, people receive benefits at least to their mental health.¹⁵⁴ Better mental health can spill over to physical health as well as other areas of one's life. Remember many people use drugs without addiction or any of the horror stories that the "War on Drugs" campaign portrays as imminent.

¹⁵⁰ Telephone Interview with Dr. M. Nathan Starr, D.O., Physician, Intermountain Healthcare (July 16, 2009).

¹⁵¹ ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, & PLACES 110 (2001).

¹⁵² *Id.*

¹⁵³ *Id.* at 197.

¹⁵⁴ Interview with Stephen J. Morse, *supra* note 147.

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From the analysis above, we can conclude that there are public reasons on both sides of the controversy over the drug laws. Since Rawls's theory of legitimacy does not assess the strength of public reasons, having merely some weak public reasons in favor of the drug laws is sufficient to meet the requirement of public reason. Therefore, Rawls's theory of legitimacy does not allow us to evaluate the public reasons for and against drug laws to determine whether the drug laws are legitimate.

Moving on, I will not spend time arguing that the extant drug laws have satisfied the democratic endorsement requirement of Rawls's theory of legitimacy. The fact that they have been passed through an arguably democratic process and that most of the citizenry support them should suffice to establish that the extant drug laws have been democratically endorsed.¹⁵⁵ Instead, I will just reiterate that Rawls relies on the democratic process (and perhaps implicitly J.S. Mill's "marketplace of ideas") to correctly assess the strength of public reasons and balance out the public reasons for and against a law.¹⁵⁶ If the democratic process does not do this assessment and balancing correctly, the only check against unjust laws that Rawls's theory legitimacy has is in the third requirement concerning the substance of the law.¹⁵⁷

Turning to that substantive requirement, determining whether the drug laws are too-unjust is difficult because of the reasons already stated: the vagueness of the standard and the lack of a complete theory of criminal justice. Nevertheless, the majority of Americans seem to think that the drug laws are roughly just, *exceeding* Rawls's requirement of that laws be not-too-unjust.¹⁵⁸ I will contest this point later. But, it is an interesting social phenomenon that so many Americans think that the drug laws are just.

Of course, a minority of Americans think the drug laws are unjust. Yet, this minority has not been able to garner enough political momentum even to bring the drug laws under serious reconsideration. One success in modifying the drug laws has been a change from incarcerating those convicted of drug possession to requiring those convicted to go into a drug rehabilitation program.¹⁵⁹ This change in the form of punishment has likely been motivated by

¹⁵⁵ For over 20 years, 70% or more of Americans have opposed marijuana legalization. MACCOUN & REUTER, *supra* note 151, at 48-49.

¹⁵⁶ John Stuart Mill, *On Liberty*, in ON LIBERTY AND OTHER WRITINGS (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).

¹⁵⁷ Note that Rawls has no direct substantive check for laws that are bad in other ways such as inefficient laws.

¹⁵⁸ Again, for over 20 years, 70% of Americans have opposed marijuana legalization. MACCOUN & REUTER, *supra* note 151, at 48-49.

¹⁵⁹ HUSAK, *supra* note 121, at 80.

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the prisons being overcrowded.¹⁶⁰ In other words, the change in sentencing for drug possession may have resulted from the practical problems of the penal system rather than a burgeoning awareness that criminalizing drug possession is unjust. The overwhelming majority of Americans who think the drug laws are just lends some support to the minimal claim that drug laws may be not-too-unjust.

Some reasons support that extant drug laws are not-too-unjust given their actual impact in their current context. In other words, the drug laws are part of a social system with both formal and informal parts that combine to cause many social ills. Since they are a part of a social system that would be worse, at least in the short run, without the drug laws, the drug laws may not be too-unjust. Let me clarify what I mean.

Drug laws interact with a complex system of drug production, drug trafficking, and drug use. Currently, the drug production, trafficking, and use causes or reinforces many social problems including organized crime, gang warfare, spreading disease, violence, and exploitation of racial minorities, women, the poor, and children. Even though the drug laws and the war on drugs in general have created or exacerbated many of these social ills, eliminating the drug laws altogether in a short period may make these social ills along with other public health concerns worse. To decriminalize drugs without making the status quo worse, the legal change would have to be incremental and accompanied by many programs in education and public assistance to help transition the status quo to a legal regime where drugs are legal.¹⁶¹

Since we have neither these programs nor the political will to create them, the drug laws may be necessary to avoid an even greater social disaster than they have currently created. In an ironic sense, the American social system is “addicted” to the drug laws. The system is not willing to “quit” the drug laws through well-funded programs, and the sudden “withdrawal” from the drug laws may be more unjust than the status quo. Thus, given the current social system and political climate in which the drug laws function, the drug laws may not be too unjust.

Even though the drug laws (as well as other criminalized self-regarding conduct such as prostitution and gambling) may be not-too-unjust given the current social contexts in which they function, I do not think these laws are almost-just, especially when violators are punished with liberty coercion. In other words, even considering the social context of extant laws that criminalize self-

¹⁶⁰ As indicated by California being one state to push for rehabilitation programs instead of prison. Solomon Moore, *California Prisons Must Cut Inmate Population*, NEW YORK TIMES (August 4, 2009).

¹⁶¹ MACCOUN & REUTER, *supra* note 151, at chapter 15.

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regarding conduct, these laws fail the strong version of the substantive requirement because they are not almost-just.

To begin, I first will say briefly why criminalizing self-regarding conduct through liberty coercion is unjust. After doing so, I will give some reasons why drug laws in particular and laws criminalizing self-regarding conduct in general are not almost-just—even considering their social context.

The main reasons why justice requires the freedom to engage in self-regarding conduct are similar to the reasons I gave above concerning why liberty coercion is a severe form of coercion. Recall, parties to a social contract want to be able to pursue their diverse, conflicting conceptions of the good. One reasonable step to obtaining this goal is ensuring that everyone is at least able to engage in self-regarding conduct. To that extent, the general contract perspective in general seems to support the freedom to engage in self-regarding conduct.

The other reason I gave above was that liberty coercion is severe because it restricts basic liberties, liberties that are given priority over greater wealth in Rawls's theory of justice. Similarly, as I pointed out when discussing the public reasons against drug laws, the freedom to manage one's body and health is a widely endorsed freedom. Combine that with the freedom of association and movement that Rawls explicitly protects as basic liberties in his first principle of justice and we have support for the freedom to do most if not all self-regarding conduct. In other words, freedom to engage in self-regarding conduct is part of the basic liberties (not necessarily "constitutional essentials" or "basic justice" which even Rawls's moderate theory of legitimacy would protect). If I am correct, then Rawls's justice as fairness in particular requires as a matter of justice that individuals be free to engage in self-regarding conduct.

Now that I have made plausible the claim that that (criminal and/or Rawlsian social) justice forbids the criminalization of self-regarding conduct, I will now give some reasons why the extant laws that criminalize self-regarding conduct are not almost-just, even when we consider the social system in which they operate. Drug laws again are the focus of my analysis, but similar claims can be made for other criminalized self-regarding conduct. I realize I am riding a fine line because I argued that the social system in which the drug laws operate make these laws not-too-unjust. Yet, I think that holding the extant drug laws to the standard of not-too-unjust is too lax. Aspiring to drug laws that are just or almost-just would provide a more persuasive standard to justify the legitimate use of liberty coercion.

One reason to believe that the extant drug laws are not almost-just, even considering the system in which they function, is the excessive amount of punishment attached to violations of drug laws. The three-strikes laws are the best

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example of excessive punishment.¹⁶² If one is convicted of three felonies, even if they are non-violent drug-related crimes, one is automatically sentenced to life in prison. Life in prison for non-violent felonies related to either the production, trafficking, or possession of drugs cannot be almost-just.

It is true that keeping some people involved with the drug world in prison benefits (to some minimal extent) the social system in which the drug laws function. Perhaps, as I argued in general above, life in prison for three drug-related felonies is not-too-unjust given the violence that is *risked* in many of these felonies. If so, then the laws would meet Rawls's moderate standard of legitimacy. However, such an excessive punishment as life in prison for three non-violent felonies cannot be almost-just. If so, then the extant drug laws with excessive punishments such as the three strikes laws are not legitimate according to the strong version of the substantive requirement.

Another related point to the excessive punishment that indicates that the extant drug laws are not almost-just is that less severe yet effective punishments are available for drug law violations. Violations of most drug laws are punishable by liberty coercion usually imprisonment. These punishments for violations of the drug laws could be made less severe by using other forms of liberty coercion (house arrest, drug rehab, community service) and by using more often only monetary coercion. It is beyond the scope of this paper to revise in detail the penal code concerning drug laws. The basic idea is that fines and less severe forms of liberty coercion can be used as drug laws penalties.

Another modest reform indicates that the current drug laws are not almost-just concerns marijuana. Marijuana could be completely decriminalized but still regulated through monetary coercion, primarily taxation. Decriminalizing marijuana and regulating it through taxation would accomplish three goals. First, those who use more harmful drugs would have incentive to switch to using marijuana to avoid criminal sanctions. Second, given that marijuana has few harmful health consequences (less than alcohol), is non-addictive, and has healing properties, the health of users of other drugs (including alcohol) who switch to marijuana would likely improve. Finally, the funds derived from taxing marijuana could be used for public programs to ameliorate any negative effects of marijuana itself and also to ameliorate the negative effects of other drugs. Thus, decriminalizing marijuana would make the drug laws, as a whole, less severe. Since the extant system refuses to completely decriminalize marijuana, does not opt for less severe liberty coercion as penalties for drug laws, and does not use monetary coercion only to penalize some drug laws, the extant drug laws seem to fail the strong substantive requirement; extant drug laws are not almost-just.

¹⁶² Solomon Moore, *Number of Life Terms Hits Record*, NEW YORK TIMES (July 22, 2009).

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It is worth mentioning briefly that even a persuasive theory of criminal justice would probably allow state *regulation* of some self-regarding conduct. Self-regarding conduct that is criminalized currently can lead to extreme social problems if they were decriminalized without regulation. So, decriminalizing self-regarding conduct such as drugs, prostitution, and gambling does not mean that the state would not have a continued role in these areas. That role may only be to provide education about their potential dangers and how to avoid them. Additionally, like alcohol and tobacco, the state's role may be primarily taxing the conduct to deal with any negative social effects and discourage *excessive* use. One important difference between regulation of self-regarding conduct and the current ways such conduct is criminalized is that regulation would primarily involve only monetary coercion through taxation while the extant law primarily uses liberty coercion. Since taxation allows the self-regarding conduct to be done legally (at a price), individuals are not legally denied their basic liberty to engage in self-regarding conduct. As long as the taxation is reasonable, then a legal system that only regulates self-regarding conduct would be almost-just if not completely just.

The greater justice involved by shifting from criminalizing drugs to taxing drugs is an example of my earlier point about difference between Rawls's theory of legitimacy and the strong version. If drugs were only regulated through taxation, then the coercion involved would be only monetary coercion. Recall I granted above that Rawls's theory of legitimacy is adequate to justify laws involving monetary coercion. To that extent, drug laws using only monetary coercion would likely be not-too-unjust, meaning they would be legitimate according to Rawls's theory. The problem is that criminal laws against drugs involve liberty coercion in their substance and often involve liberty coercion in their punishment. To deal with these more severe forms of state coercion, we need to adopt the more stringent substantive requirement of the strong version.

Another reason that the extant law is not almost-just concerns reciprocity. Rawls values reciprocity considerably in his theory of justice and his theory of legitimacy.¹⁶³ Reciprocity should lead to rough consistency in the legal system that concerns self-regarding conduct; each person should allow each other person to whatever self-regarding conduct each prefers. In fact, no such consistency exists.

In the extant legal system, some self-regarding conduct is unregulated, some are regulated, and some are criminalized. No meaningful distinctions clearly justify treating various self-regarding conduct in these separate legal categories. The degree of risk to health and bodily integrity does not distinguish among self-regarding conduct. For example, I am legally permitted to climb a dangerous

¹⁶³ RAWLS, JUSTICE AS FAIRNESS, *supra* note 97, at 122-24; *see also* FREEMAN, RAWLS, *supra* note 42, at 374.

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mountain greatly risking serious bodily injury and death *to myself* even if I am under-skilled and unprepared for the climb. In contrast, I am legally prohibited from ingesting drugs even if the risk is negligible and the risk is primarily a risk only to myself.

Another example that I have alluded to is that adults are legally permitted to consume alcohol even though such is regulated. At the same time, adults are not legally permitted to consume marijuana even though science now indicates that alcohol is addictive and destroys one's health while marijuana is not addictive, has negligible health risks, and even some health benefits. Other examples abound. We are not able to excuse these examples as we did above given the current social system in which they function because to some extent all self-regarding conduct will exist in such social systems. Thus, we should still expect similar treatment of self-regarding conduct given that they all function in less than ideal circumstances. Consequently, the legal system treats self-regarding conduct differently without meaningful distinctions to justify such.

Since the legal system treats self-regarding conduct differently without meaningful distinctions, the legal system does not embody reciprocity for self-regarding conduct. Since the legal system does not embody reciprocity in this area, at least some the laws involving self-regarding conduct are unlikely to be almost-just. I am not sure how to make this reciprocity claim more precise. Consider it another reason indicating that holding the extant laws to the strong substantive requirement, as opposed to Rawls's moderate requirement, would likely reveal that many of these laws are illegitimate.

Finally, many of the extant laws involving self-regarding conduct are not almost-just because there are laws that target specifically the indirect, other-regarding effects of self-regarding conduct. As I mentioned earlier, one key aspect of conduct that makes it self-regarding is its other-regarding effects may not occur, vary among instances, occur only after a long stretch of time, depend on contingent circumstances, and can be nullified by planning or third-party intervention.

My example above was when a person abuses a child while on drugs. The point here is that criminalizing drugs in part because they lead to child abuse is unneeded because other laws already prohibit child abuse regardless of what caused the adult to abuse the child. Since the laws against child abuse include child abuse resulting from the adult using drugs, the other-regarding effect (child abuse) from drug use would still be criminalized even if drug use itself were not criminalized. Since we do not even want to risk child abuse resulting from drug use, a compromise legal approach would be decriminalize drug use in general, but to criminalize drug use when children are nearby.

From the child abuse example, we see that we can separate out the self-regarding conduct with no negative indirect other-regarding effects from instances

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of the self-regarding conduct that *risk* negative other-regarding effects. Drug use would be legal; drug use with children nearby would be illegal. This point about drugs is generalizable to many types of self-regarding conduct. We could only criminalize an otherwise self-regarding conduct when done in circumstances where other-regarding effects are likely (e.g. individuals could be prohibited from gambling with more than 2% of the annual income). Thus, we can use the criminal law to target only the indirect, other-regarding effects of self-regarding conduct without criminalizing all instances of the self-regarding conduct. The narrower the criminal laws are when they pertain to self-regarding conduct, the greater the freedom to engage in self-regarding conduct.

To the extent that the criminal laws involving self-regarding conduct are not narrowly tailored to the circumstances where such can lead to negative other-regarding effects, the criminal laws are too broad. The excessive breadth of these laws unjustifiably infringes the freedom of individuals to manage their own body and health, their freedom of movement, and their freedom of association. Since we can still get the benefits of criminalization by narrowly tailoring the criminal laws to the other-regarding effects, even if the criminal laws that broadly prohibit self-regarding conduct are not-too-unjust, these laws are not almost-just.

So far, I have suggested some of the effects of strengthening the substantive requirement of Rawls's theory of legitimacy to the strong version. Employing the strong version would indicate that many extant criminal laws especially those involving liberty coercion for self-regarding conduct are illegitimate. To the extent that these criminal laws are illegitimate, state coercion to enforce these laws is unjustified.

In response to my suggestion that many of the extant criminal laws are illegitimate, an objector may worry that making more stringent Rawls's theory of legitimacy may frustrate Rawls's stated goal of his theory. Recall that Rawls aims to show how a society with a less-than-just legal structure can still justifiably use coercion to maintain stability. If my strengthening the requirements of the legitimate use of state coercion ends up showing that enforcing many of the state's laws is unjustifiable, then the strong version of theory of legitimacy fails to show how a less-than-just society, at least one like the United States, can justifiably use state coercion to maintain stability. The worry is that many extant societies cannot justifiably perpetuate themselves. If so, then those states on their way to becoming more just cannot justifiably use state coercion to maintain their current level of justice. In the next section, I respond to this worry.

Section Six: Illegitimate Law and Stability

Let me explicate further the worry I am responding to in this section. Rawls's theory of legitimacy aims to tell us when state coercion is justifiable so

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that the state can maintain the stability of the society over time. By making more stringent Rawls's theory of legitimacy through adopting the strong version of the substantive requirement, many more of the extant laws would be illegitimate. If these laws are illegitimate, then the state is not justified in enforcing these laws. Without being justified in enforcing many of the laws, the state may not be justified in enforcing enough of the laws to maintain social stability (even if the state in fact maintains stability unjustifiably anyway). Thus, the worry is that strengthening Rawls's theory of legitimacy may make the theory unable to justify what it set out to justify. Related to this worry is a concern that the strong version would not promote respect for political authority and would undermine the duty to obey the law. Both of these possible implications could also threaten social stability.

The objector launching this worry could take it in at least two different directions. One direction is to reject the strong version of the substantive requirement, maintaining Rawls's theory of legitimacy as it stands. To take this direction, the objector would have to reject my arguments above affirming that Rawls's (moderate) version of the substantive requirement is sufficient to justify state coercion to maintain stability. The other direction is that the objector could be persuaded by my arguments above that Rawls's theory of legitimacy is not strong enough. The objector could then either reject Rawls's theory of legitimacy altogether or propose an alternative way to strengthen the theory different from adopting the strong version of the substantive requirement. Having identified the diverging directions the objector could go, I will not explore them. Instead, I aim to cut off both options by showing that the stability worry has little force.

To disable the stability worry I will use the same argumentative approach that I employed above. I hope to supply many reasons on the side of why the stability concern has little force outweighing the reasons for the contrary claim.

The first reason I offer is that even if a law is illegitimate such that the state is not justified in enforcing the laws does not mean that individuals are justified in violating the law. Individuals may still have moral obligations to obey a law even if the state is not justified in enforcing the law. Thus, I am pointing out that the objectives that Rawls wants to obtain with his theory of legitimacy are separable. Rawls is correct to think that if a law is legitimate, an individual has a duty to obey that law. However, just because a law is illegitimate, it does not mean that an individual has no duty to obey the law. All it means is that the individual has no duty—*derived from the legitimacy of the law*—to obey the law. The individual's duty to obey the law despite its illegitimacy may derive from another moral source.

The moral sources for such duties are plentiful. The most relevant reason to this discussion is that individuals may have a duty to obey the illegitimate law to maintain the stability of the society. If so, then an individual's obligation to

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obey illegitimate laws would depend on how their violation of the law would affect the stability of the society.

Consider an example. Suppose Framed is imprisoned because he was convicted of a law that he did not commit *and* the law Framed supposedly violated was illegitimate such as drug trafficking. Despite the injustice in Framed's wrongful conviction and the illegitimacy of the liberty coercion in the law itself and its use of imprisonment, Framed's friend, Vigilante, may not be justified in breaking Framed out of prison. The possible reasons are many. Such a prison break may cause a credible threat to social stability. Such a prison break may require violence against innocents morally prohibiting it.

Alternatively, if Framed could escape from prison without violence or much fanfare, Framed would be committing no injustice because on multiple fronts the enforcement of the imprisonment was unjustified. Vigilante would not be committing injustice if she assisted Framed in such an escape for the same reasons; it is a move toward justice without countervailing moral considerations. The point is that an individual may avoid an illegitimate use of state coercion, even by breaking other laws such as those against prison escapes, if no other moral considerations (such as the risk of social stability or violence) forbid avoiding the illegitimate coercion.

I will point out below that often no direct correlation exists between violating a law and social stability. For now, assuming that a violation of a law would lead to social instability, individuals may be morally obligated to obey even illegitimate laws to maintain social stability. Thus, making more stringent Rawls's theory of legitimacy need not lead to instability. Even if making more stringent Rawls's theory demonstrates that in fact more laws than we thought were illegitimate, individuals are not justified in violating these illegitimate laws at will. Instead, they may still be obligated to obey illegitimate laws to maintain social stability, although it is unlikely that violating many of the self-regarding laws at issue here would threaten social stability. All that failing to meet the strong version of theory legitimacy may mean is that the state is not justified in enforcing the illegitimate laws.¹⁶⁴

While the obligation to obey illegitimate laws is still injustice (in some sense) to those who would rather not comply with the law, this injustice is outweighed by the greater injustice that would occur from social instability. In this situation, we are choosing the lesser of two injustices. Doing so is not surprising in non-ideal theory; obeying illegitimate laws at times can be the burden of social life. Such burdens must be born if the alternative is a greater injustice.

¹⁶⁴ This implication may be defeasible too if social stability were highly threatened.

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Just because individuals may be obligated to obey illegitimate laws for the sake of stability does not leave these individuals powerless victims of injustice. These individuals can use various mechanisms to redress their grievances with the aim of getting the illegitimate laws changed and illegitimate punishments overturned. Using the political process to redress their grievances about illegitimate laws can maintain stability because it validates the political system in place. Stability can also be maintained because the discontent individuals comply with illegitimate laws while they are making their case to the public and the government that the illegitimate laws should be changed.

The next reason why the stability objection has little force is that the legal system has mechanisms that could be employed to accommodate the violation of illegitimate laws without leading to instability. Two mechanisms are prominent: legal justification and judicial review. A legal justification is an affirmative defense where the defendant argues that even though she did the crime, she should not “do the time;” she was justified in the way she acted. The most well known of such defenses is the justification for killing in self-defense.

One way to implement this legal mechanism would be to have a generic justification for self-regarding conduct. The justification would be: even though the person committed the crime, the person was justified in doing so because the conduct was self-regarding without even minimal risk of indirect effects on others. So, regardless of what is criminalized, if the defendant proves she never risked (even minimally) harm to others, then she would be acquitted of the crime due to this self-regarding justification.

This particular justification does not exist in the extant legal system. My point is that justifications to crimes do exist in the extant legal system. So, using the mechanism of justification to allow individuals to combat illegitimate laws such as those that criminalize self-regarding conduct, the legal system itself can evaluate individual violations of the law to see if enforcing the law is justified. Using the legal system to evaluate individual violations of illegitimate laws reinforces the legal system leading to stability rather than instability.

Judicial review is another legal mechanism that could be used to deal with illegitimate laws while affirming the legal system’s stability. Currently, judicial review is used to invalidate laws that conflict with state constitutions or the United States Constitution. Judicial review could be expanded to include the power of the courts to invalidate illegitimate laws. Judges could invalidate laws if the laws are not supported by any public reason, if the democratic process was not adequate, or if the laws are not almost-just. As with legal justifications, using

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judicial review to deal with violations of the purported illegitimate laws would generally reinforce the legal system as a whole rather than lead to its instability.¹⁶⁵

Even though legal justifications and judicial review exist in the status quo, to apply them to deal with illegitimate laws would require modifications to the extant legal system possibly even constitutional amendments. With such modifications, using legal justifications and judicial review as a check on illegitimate laws would counteract destabilizing effects of the strong version. My point is that these modifications would reinforce the legal system by allowing these mechanisms to protect individuals against illegitimate laws. With these modifications, the strong version would not threaten social stability. Additionally, since Rawls's own theory of legitimacy would invalidate some of the extant laws, even his theory would benefit from these mechanisms to deal with illegitimate laws in order to promote stability.

Another reason that a more stringent theory of legitimacy may not lead to instability is that individuals may be justified in using certain forms of civil disobedience to protest illegitimate laws. While in some cases, as I argued above, individuals may be obligated to obey illegitimate laws for the sake of stability or other moral reasons, such an obligation may not always hold or may have exceptions. The exception may be that individuals may disobey illegitimate laws through public civil disobedience.

Public civil disobedience involves violating laws, but it does so in a way that tries to convince the public and the government that the law is unjust. While civil disobedience can lead to social discord, civil disobedience also can reinforce the legal system. The message of civil disobedience is not that we should revolt and overthrow the government. Rather, the civilly disobedient can send the message: *the legal system is worth preserving except for this one illegitimate aspect*. The civilly disobedient can actually express their confidence in the justice in general in the legal system by doing their disobedience publicly. The civilly disobedient rely on the justice of their cause and society's general commitment to justice to persuade the government and the public that the laws should be changed.

In Rawls's early work, he advocated civil disobedience as a justified mechanism to deal with state infringements on basic liberties.¹⁶⁶ If we extend this idea to his theory of legitimacy, we have another mechanism to deal with the

¹⁶⁵ Rawls did not think that judicial review should be used to enforce some aspects of his theory of justice such as the difference principle because he thought that such issues would be too complex for the judiciary. FREEMAN, RAWLS, *supra* note 42, at 235. I doubt these concerns because courts frequently deal with complex economic issues especially in anti-trust cases. Nevertheless, applying judicial review to non-economic, self-regarding laws would not be problematic because the judiciary has extensive experience evaluating such issues.

¹⁶⁶ RAWLS, A THEORY OF JUSTICE: REVISED EDITION, *supra* note 97, at 371-72.

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stability concern. With the proper use of public civil disobedience, individuals can exercise their freedom to do what the illegitimate law forbids while at the same time garnering support for changing the illegitimate law. Since the illegitimate law is violated in a public manner, history suggests social stability is not likely to be highly threatened. Instead, the issue is thrust into the public square for reconsideration. The political process is affirmed by giving it another chance to assess the legitimacy of the law being publicly and civilly disobeyed.

So far, in this section, I have been granting that disobeying the law in general and disobeying illegitimate laws in particular can lead to social instability. Obviously, in some cases this claim is true. Mounting a powerful revolution, committing a significant form of treason, and instigating widespread violent riots are legal violations that can lead to instability. If the state were not justified in using coercion to quash these activities and penalize them, then state coercion to maintain stability would be hampered. Note that even the strong version of the theory of legitimacy does allow the state to use liberty coercion (properly proportioned) to enforce these laws. I now want to suggest that aside from these obvious cases of violations of the law that lead to instability, other legal violations usually are not directly correlated to social instability.

The first point to make is that most if not all societies with a legal system are able to maintain stability despite some level of law breaking. Societies do not even need to catch and penalize *all* law-breakers in order to maintain stability, even though the populace may have to feel that the state is acceptably effective at catching and penalize *some* of the law-breakers. How much law breaking a society can tolerate and how effective in the eyes of the populace the state needs to be at combating crime in order to maintain stability will vary among societies and over time. Let me refer to both of these aspects as the society's "crime threshold." As long as a society is at or below its crime threshold, the society will not become unstable through crime (though it could become unstable through other means such as external attack). This point assumes that the inherently destabilizing crimes (revolution, treason, and riots) are not part of the law breaking that is taking place below the crime threshold.

The point about the crime threshold suggests that the strong version of the theory of legitimacy need not lead to instability. As long as the crime—resulting from public awareness that more laws (than they previously thought) are illegitimate—does not push the society over its crime threshold, increased crime will not make the society unstable. Before the worry about instability can get off the ground, the objector would have to show that the strong version of the theory of legitimacy would lead to crime that would cause the society to exceed its crime threshold.

The objector may think that the crime threshold point does not adequately address her concern. The objector's concern is that with the more stringent theory

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of legitimacy, state coercion cannot justifiably maintain stability by enforcing the laws *if the state needs to do so*. The last if-clause is key. The crime threshold point may indicate that the state coercion may not be needed most of the time, but *if* state coercion is needed to maintain stability, the strong version of the theory of legitimacy indicates that such state coercion is not justifiable. Consequently, the strong theory of legitimacy fails to justify state coercion to enforce the laws *if* such is needed for stability, or so an objector may contend.

In response, I do not mean the crime threshold point to demonstrate that the strong version of the theory of legitimacy will always justify state coercion to maintain stability if needed. If all of a state's laws are illegitimate, then the state may not be justified in enforcing its laws to maintain stability (though I think other issues not addressed here would need to be examined such as how likely would a more just society replace the increasingly unstable one). The same point would be true if all of the laws of a state were illegitimate according to Rawls's theory of legitimacy. However, the crime threshold point makes it plausible that the strong version of the theory of legitimacy would not nullify the justifiability of state coercion enough to make instability a significant worry. Let me explain.

As I argued above, the strong version of the theory of legitimacy indicates that state coercion cannot justifiably enforce more extant laws than Rawls's theory of legitimacy indicates. I will refer to the laws that are justified by Rawls's theory of legitimacy but would be invalidated by the strong version the "problematic laws." The stability concern would only have force if the law breaking that threatens the stability of a society resulted from the "problematic laws." As long as the stability was not threatened by the violation of the "problematic laws," then the state would be as justified in using coercion to maintain stability under the strong version of theory of legitimacy as it would be under Rawls's version.

Additionally, as long as the populace did not highly value the problematic laws, it is unlikely that upon learning that the laws are illegitimate large amounts of people would lose their respect for political authority in general and abandon their duty to obey legitimate laws. Most individuals can understand that a system that is not perfect can still be worth maintaining in part so that it can be improved.¹⁶⁷

Furthermore, it is unlikely that violation of the "problematic laws" would need to be enforced in order to maintain stability. First of all, the main "problematic laws" in the United States that I have identified are already frequently flouted. The laws prohibiting self-regarding conduct (drugs, prostitution, and gambling) are widely flouted in the status quo without the stability of the society threatened.

¹⁶⁷ Rawls makes a similar point in RAWLS, JUSTICE AS FAIRNESS, *supra* note 97, at 393.

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In fact, the opposite may occur. If the state were able to figure a way to enforce most violations of the laws concerning self-regarding conduct, the enforcement of such widely sought after conduct may cause instability due to its oppressive effect.

Not only is it likely that widespread enforcement of frequently flouted illegitimate laws could lead to instability, but it is also likely that even less enforcement of these illegitimate laws could better maintain stability. Less enforcement of the illegitimate laws would maintain stability for two reasons.

First, those who flout these laws do not think they are legitimate. By letting these people do as they please without state intervention, these individuals may have less reason to be angry with the government and cause other destabilizing problems. They may prefer that the illegitimate laws were rectified, but an unenforced illegitimate law has little real impact on the individuals who disagree with and violate the unenforced law. The examples I have in mind are possession of small amounts of drugs (indicating they are for use rather than for sale), prostitution between independent (no pimp), consenting adults, and individuals gambling in their residences. If the state were not to pursue people engaged in such conduct, these people are less likely to be angry at the state and do other activities that are disruptive of social stability such as breaking other legitimate laws.¹⁶⁸ Non-enforcement of these laws would actually make these people have more respect for political authority and more likely to fulfill their duty to obey legitimate laws.

The second reason why less enforcement of illegitimate laws can help maintain stability is that enforcing the law is expensive. Providing police, courts, lawyers, juries, municipal buildings, prisons, prison guards, subsistence to prisoners, and the supportive staff for each of these functions can take many resources. The “war on drugs” in particular has been vastly expensive.¹⁶⁹ Despite the vast expense, drugs in general have become cheaper and more readily available on the streets.¹⁷⁰ In short, the vastly expensive war on drugs has failed on many fronts. Instead of spending so many resources enforcing illegitimate laws, these resources could be reallocated to apprehending violators of core criminal offenses (murder, theft, rape). Better enforcement of the core of the criminal law instead of the illegitimate self-regarding laws would likely yield much greater returns on social stability.

¹⁶⁸ Note a novel strategy where individuals accused of minor drug offenses are not prosecuted in exchange for their DNA sample, hoping that knowing the police have their DNA discourages them from committing worse crimes. Schott’s Vocab, *Spit and Acquit*, NEW YORK TIMES (April 16, 2009).

¹⁶⁹ Some (dated) estimates put the federal and state spending annually at \$15 billion or more. ZIMRING AND HAWKINS, *supra* note 146, at 42.

¹⁷⁰ John Tierney, *Handcuffs and Stethoscopes*, NEW YORK TIMES (July 23, 2005).

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I have offered two reasons why less enforcement of illegitimate laws could yield greater stability: the state does not incite those who disagree with the law to cause other destabilizing problems, and the state can reallocate resources to enforcement of laws more vital to social stability. Thus, for many illegitimate laws, the state does not need to be able to justifiably enforce the law to maintain stability. Instead, the state merely needs to stop enforcing these illegitimate laws. To that extent, the strong theory of legitimacy would not lead to instability because the state can better maintain stability by not enforcing many illegitimate laws than by enforcing them. The bonus of not enforcing illegitimate laws (in addition to greater stability) is that not enforcing illegitimate laws means that the legal system better approximates justice.

A point I mention in passing above should be emphasized regarding the issue of stability. Many factors in addition to the society's crime threshold influence the stability of a society. I am not just referring to whether the society faces external threats such as invasion. Less salient are the ways that citizens can threaten social stability by performing certain activities or refraining from other activities, all of which is legal.¹⁷¹ Widespread non-violent protests, boycotting integral parts of the economy, or refraining from voting in large numbers could lead to social instability. Also, the government failure to regulate the economy or provide other public goods such as affordable health care could destabilize a society.

The point here is not that Rawls's theory of legitimacy needs to be modified or augmented to deal with these other factors of social stability. Rather, to maintain stability a state's best options may not be enforcing illegitimate laws but rather bolstering the economy and bestowing benefits on the citizenry. These non-coercive elements may be able to maintain stability better than the state rigorously enforcing all of the laws in the society. The essential idea is that meeting people's needs may produce greater social stability than punishing violations of the law.

For these reasons, the strong theory of legitimacy does not pose a significant threat to social stability. Just the opposite could be the case. By having a more stringent standard for legitimacy, the criminal law could be reformed—through the stability producing mechanisms or legal justifications and judicial review as well as other democratic processes—such that greater justice is enjoyed. Such a step toward greater justice would produce a better society, one worth maintaining. As the society progresses towards justice by adopting the strong theory of legitimacy, the society may be more stable because the citizens appreciate the state's efforts to protect important liberties by reforming the criminal law.

¹⁷¹ Joseph Raz, *The Problem of Authority*, 90 MINN. L. REV. 1003, 1004 (2006).

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Conclusion: Points to Remember

I want to emphasize two things. First, although my primary examples of extant laws that are illegitimate under the strong theory of legitimacy but legitimate under Rawls's theory are laws involving self-regarding conduct, such should not be taken to mean that these laws are the only ones. There are laws involving other-regarding conduct that would also be delegitimized by adopting the strong version of the substantive requirement. Examples are trespassing laws, laws against lightly touching another person in a non-taboo spot (now considered battery), and property laws that give too much leniency to freeloaders. Also, while some laws would still be legitimate under the strong theory of legitimacy, their penalties may be illegitimate at least at the extreme ends of the possible sentences. Space has prevented a fuller discussion of these other laws that would be delegitimized under the strong theory of legitimacy. But, my not exploring them should not be construed to imply that they do not exist.

The second thing worth emphasizing is that the laws prohibiting self-regarding conduct are not a trivial part of the criminal justice system. In fact, the "war on drugs" has made drug law enforcement alone a significant part of the criminal justice system. Nearly 20% of the people in prisons are non-violent offenders of drug laws.¹⁷² Aside from the vast expense from the enforcement of drug laws, we should also not forget the human suffering that has resulted—not from the ingesting of drugs or what intoxicated people have done—but from the *enforcement* of drug laws. Even vociferous supporters of drug laws admit that the *enforcement* of drug laws causes much suffering and crime.¹⁷³

Some commentators have projected that the enforcement of the drug laws as they are currently done could lead to the collapse of the criminal justice system.¹⁷⁴ The criminal justice system cannot handle for much longer the number of people currently prosecuted and imprisoned for drug crimes.¹⁷⁵

Other laws involving self-regarding conduct are not causing as much problems to the criminal justice system as the drug laws are. But, we should not forget how many women engaged in prostitution must rely on pimps to avoid being prosecuted, pimps who beat and rape these women continuously. Pimps also take much of the money the women earn so that the pimps can keep the women dependent on them.

¹⁷² HUSAK, *supra* note 121, at 16.

¹⁷³ Wilson, *supra* note 141, at 25.

¹⁷⁴ Sara Podell, *Confronting the Crisis in the Criminal Justice System*, AMERICAN BAR ASSOCIATION 2-3 (2009), <http://www.abanet.org/publiced/tab5.pdf>.

¹⁷⁵ *Id.*

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Due to these reasons, I focused on laws criminalizing self-regarding conduct as those laws that would be delegitimized under the strong version of the theory of legitimacy. Reforming these laws are not just about letting aging hippies smoke doobies on the weekends. These laws involving self-regarding conduct have created multiple social tragedies. The strong theory of legitimacy seeks to make the state do better in its laws and use of coercion so that the state can stop ruining so many people's lives.