w reality and must ensure that they become – or remain – constitutionally rele-
ıt, even if not politically supreme. We hope that this book will assist legislatures
d those who think about them in this important mission.

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1 Principles of Legislation

Jeremy Waldron

A legislature is a place for making law, and because law is a serious matter affecting the freedom and interests of all the members of the community, legislating is an activity we ought to take seriously. It is like marriage in the *Book of Common Prayer*[1] – not to be enterprised nor taken in hand carelessly, lightly or wantonly, but discreetly, advisedly and soberly, duly considering the purposes for which legislatures have been instituted and considering also the harm and injustice that poorly conceived or hastily enacted legislation may do. In this chapter, I want to consider some principles that I believe ought to govern the activities that take place in and around legislative institutions.

My topic – "Principles of Legislation" – is a common one. But the sense in which I am using it may be unfamiliar. I want to distinguish the principles of legislation that I will be talking about from two other sorts of legislative principles – the principles of a utilitarian like Jeremy Bentham and the principles of a theorist of justice like John Rawls.

The year 1802 saw the publication of a work by Jeremy Bentham, whose first volume was called "Principles of Legislation."[2] Chapter 1 opened with the following ringing words, less familiar then than they are now:

> THE PUBLIC GOOD ought to be the object of the legislator; GENERAL UTILITY ought to be the foundation of his reasonings. To know the true good of the community is what constitutes the science of legislation; the art consists in finding the means to realize that good.[3]

For Bentham the pursuit of the general good was the key principle of legislation. His volume continued in a utilitarian vein, telling us how to determine the general good and instructing us to measure pleasure and pain in terms of their intensity, duration, certainty, proximity, productiveness, purity, extent, and so on. His account culminated in the startling claim that provided we keep the principle of utility in view and apply our minds rigorously to these measurements, "legislation . . . becomes a matter of arithmetic" and "[e]rrors . . . in legislation . . . may be always accounted for by a mistake, a forgetfulness, or a false estimate . . . in the calculation of good and evil."[4] Actually, there is much more to Bentham's "Principles of Legislation"

[1] *The Book of Common Prayer* (Cambridge: Cambridge University Press, 1928) at 391.
[2] Jeremy Bentham, *The Theory of Legislation* (London: Kegan Paul, Trench, Trubner & Co., 1931). This work was published originally in French as part of a larger work, *Traités de Legislation.*
[3] Ibid. at 1.
[4] Ibid. at 32.

in this: There are also excellent discussions of the difference between law and orals, the reasons for making or not making something an offense, the issues of erty that are almost always at stake when legislation is contemplated, and the mpromises that the legislative imposition of sanctions necessarily involves. The ume ends with a critique in Chapter 13 of principles that were actually used to aluate legislation by Englishmen in Bentham's time. The headings of this critique a delight: "Antiquity is not a Reason," says Bentham, "The Authority of Religion not a Reason," "Reproach of Innovation is not a Reason," "Metaphors are not asons," "An Imaginary Law is not a Reason," and so on.[5] This chapter reminds that although Bentham's principles were set out as principles for legislators, ey were not only for legislators. They were also principles for those who call for d oppose legislation. Bentham recognized that in the evaluation of proposed vs there is always a back-and-forth relation between the prejudices of the people d the fallacies of their representatives.[6] In the new world of law dominated by tute that Bentham helped usher in, the education of the public was as much an perative as the education of the legislators themselves.[7]

We owe a tremendous debt to Jeremy Bentham for embarking as he did on the ence of legislation. But we are not comfortable these days with the character of his ntribution. The arithmetic calculus of the general good seems one dimensional, d we object to the aggregative logic of general utility. It seems to us that by adding erything up, Benthamite utilitarianism does not properly address issues of the tribution of the goods and evils that are the currency of legislation: It "does not e seriously the distinction between persons."[8] To put it another way, we think nciples of legislation should include principles of justice.

The emphasis on justice has been characteristic of much recent political phi- ophy. In John Rawls's theory, for example, the basic work of evaluation is done egalitarian principles. Rawls tells us that legislators ought to be particularly pre- cupied with what he calls the Difference Principle and the Principle of Equal portunity:

> cial and economic inequalities are to be arranged so that they are both: (a) to the greatest nefit of the least advantaged, consistent with the just savings principle, and (b) attached to ices and positions open to all under conditions of fair equality of opportunity. . . . The sec- d principle of justice is lexically prior to the principle of efficiency and to that of maximizing sum of advantages.[9]

wls acknowledges that implementing this principle at the legislative stage will en involve disagreement and indeterminacy: "judgment frequently depends on speculative political and economic doctrines and upon social theory gen- ally."[10] But the task of the legislator – and, again, of those in the public who call or oppose legislation – is to do the best they can from this perspective. Also, wls's principles of justice as fairness are not just recipes for statesmen to use.

Ibid. at 66ff.
Ibid. at 77–8.
See David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (Cambridge: Cambridge University Press, 1989), Parts III and IV.
John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 27.
Ibid. at 302.
Ibid. at 199.

They help define a well-ordered society in which "everyone accepts, and knows that everyone else accepts, the very same principles of justice" (even if they disagree about their application) and in which this provides a common ground from which the claims that people make on their political institutions can be considered and debated.[11]

Rawls's opponents include modern-day Benthamites,[12] but he also has opponents who espouse alternative theories of justice (i.e., alternative accounts, rival to his, of why Benthamite utilitarianism is wrong).[13] I guess very few real-world legislators think of their tasks as being guided explicitly by either Rawlsian or Benthamite principles, or indeed by any principles stated at that level of abstraction. Legislators approach their tasks with much a less rigorously formulated approach to public policy and social justice than that. Still, they disagree with one another in rather the way in which Rawls disagrees with Bentham or in a very loose and informal version of the disagreement between Rawls and his other philosophical competitors. Legislation is a controversial business. The inevitability of disagreement, which I have tried to emphasize in all my work on the subject,[14] leads to the question: "Are there any principles of legislation that can be shared by the adherents of rival theories of justice or among rival agendas for public policy?"

One well-known answer looks to principles that govern certain abstract characteristics of legislation – Rule-of-Law principles or the principles of Lon Fuller's "internal morality of law."[15] In *The Morality of Law*, Fuller tells a story of how a legislator went wrong by failing to respond properly to the need for generality, stability, intelligibility, consistency, practicability, and publicity in the statutes he enacted. Quite apart from Rawlsian, utilitarian, or other "external" principles that compete to govern their content, Fuller argued that laws need to be enacted *in a certain form* to be effective, to be fair, and to respect the dignity and free agency of those to whom they are addressed. In regard to these principles, Fuller says:

> What I have called the internal morality of law is in this sense a procedural version of natural law. . . . The term "procedural" is . . . broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.[16]

I think this is a mischaracterization, born of the assumption that anything which is not substantive must be procedural. In fact, there are three kinds of principles that might be relevant to the legislative task: (1) substantive principles, like Rawls's or Bentham's; (2) formal principles, that is, principles having to do with the form of legislation, like Fuller's; and (3) procedural principles, having to do with the

[11] John Rawls, *Political Liberalism*, New Edition (New York: Columbia University Press, 1993) at 35.
[12] See, e.g., Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Cambridge, MA: Harvard University Press, 2002).
[13] See, e.g., Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974); Bruce Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980); and Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000).
[14] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999) and Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 1–10 and 105–6.
[15] Lon L. Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969) at 33–8.
[16] Ibid. at 96–7.

titutions and processes we use for legislation. Principles of all three kinds are portant, but in this chapter I shall focus mainly on (3) – procedural principles, ving to do with the institutions and processes we use for legislation. Just as Fuller ued that his formal principles were not just instrumental but in an important ise moral, so I shall argue something similar for my seven procedural principles. ough they do not go to substantive moral justifications of law, they address portant moral issues of legitimacy. And just as Bentham and Rawls argued that ir principles of legislation were principles to govern action and debate among mbers of the public as well as among those in power, so I shall argue that my ocedural principles should discipline the kinds of demands we place on our islators and the choices we make about the lawmaking we clamor for.

There is a temptation to think that procedural and formal principles are unimrtant, compared with substantive ones. Certainly substantive principles are portant because they go to the heart of the matter. But it has been the great ievement of modern Rule-of-Law jurisprudence to emphasize the importance formal principles, and I think the importance of procedural principles needs to understood as well. Procedures in politics are not just ceremonies or red tape or ndless bureaucratic hoops to jump through. They relate specifically to issues of itimacy, particularly in circumstances where there is deep-seated disagreement to what substantive principles should be observed. I mentioned legitimacy a oment ago, and I want to say that the importance of addressing issues of legitiacy cannot be overestimated. Suppose a citizen asks: "Why should I comply with support this law, when I think its content is wrong?" Appealing in response to substantive principle may be reassuring for the sponsors of the law, but it will rry no weight for this citizen. For this citizen, one has to appeal to something out the way the law was enacted in the circumstances of disagreement, so that can see its enactment as fair even if he does not see its substance as just. The ocedural principles of legislation that I shall identify are all related to that burden legitimacy in various ways. They concern the processes by which laws should enacted, the question of who should participate in those processes, the spirit in ich they should participate, and the various forms of care that should be taken th a process this important.

In summary, the principles I shall consider are the following:

1. The principle of explicit lawmaking, that is, the principle that holds that when law is made or changed, it should be made or changed explicitly.
2. The duty to take care when legislating, in view of both the inherent importance of law and the interests and liberties that are at stake.
3. The principle of representation, which requires that law should be made in a forum that gives voice to and gathers information about all important opinions and interests in the society.
4. The principle of respect for disagreement, and concomitant requirements like the principle of loyal opposition.
5. The principle of deliberation and the duty of responsiveness to deliberation.
6. The principle of legislative formality, including structured debate and a focus on the texts of the legislative proposals under consideration.
7. The principle of political equality and the decision-procedure it supports in an elective legislature, for example, the rule of majority decision.

There is not supposed to be anything sacred about this list of seven principles. Others may come up with different principles, organized in a different way.[17] But I hope this way of setting them out is illuminating.

Before proceeding to the detail of my seven principles, there are some general points to be made. Procedural considerations seldom stand on their own: They are usually predicated on some sense of the importance of what the procedures are used for or what they are supposed to produce. We do not argue for democracy, for example, because participation is valued as an end in itself. We argue for democracy in the light of what political systems do: They exercise power; they have an impact on people's lives; they bind whole communities; they impose costs and demand sacrifices. It is because of all this that we make demands about voting and enfranchisement: We say that each person is entitled to a vote, for example, because of the potential momentousness for him or her of the decisions that are being made. Apart from these considerations, an insistence on democratic enfranchisement would be frivolous. Something similar is true of legislation. It would not be worth taking so much care with legislation, paying attention in the various ways that I shall consider to the processes by which laws were made, if *law* were not an important mode of governance. If law were just a game, or if the realities of political power or political impacts had little to do with law, then principles of legislation would matter less and their content might be different. I shall begin my discussion therefore with an account of why law as such is important. If we understand *that*, then we will better understand why the making of law is important, and we will understand too why it is important to have a place dedicated to the making of law in the way that legislatures are dedicated.

The concept of law is not the same as the concept of governance, and a people do not enjoy the Rule of Law just because they are ruled. Of course, any ruling or being ruled is a serious matter: When people are ruled, freedom is limited, penalties are threatened, force is used, sacrifices are demanded, costs and benefits are allocated, people are elevated or degraded, and actions reputable and disreputable are undertaken in the name of the whole community. To be ruled by law, however, is to be ruled in a particular way. It is to be ruled under the auspices of what John Locke referred to as "settled standing Rules, indifferent and the same to all Parties,"[18] that is, general rules laid down, promulgated, and then applied impartially to particular cases. The function of these rules is, in the first instance, to guide and govern the conduct of members of the community in various regards for the sake of justice and the general good, and, secondly, to direct and govern official interventions, particularly official responses (like sanctions) to the situations to which the norms are directed in the first instance. The positing and promulgation of these rules establishes them as a sort of publicly recognized morality, laying down duties and creating rights. Citizens no doubt differ in their personal moral views, including their personal views about justice and the general good; but the promulgated rules of law are supposed to constitute a code to which we can all orient ourselves despite our differences. The sheer fact of law's public presence gives it salience for us in our dealings with one another, and it stands as a focal point of our allegiance and

[17] See Jeremy Waldron, "Legislating with Integrity" (2003) 72 *Fordham L. Rev.* 373, for a slightly different list.

[18] John Locke, *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988) at 324 (II, sect. 87).

obligation to the political community. Our primary political obligation is to obey he law, and the primary basis of legitimacy, in a society ruled by law, for any power hat is exercised upon us is its being authorized and governed by these "settled tanding Rules."

I do not mean that the claims of law *are* absolute or that their legitimating effect s unlimited: I mean that they offer themselves as the primary basis of obligation nd legitimacy, and the claim they purport to make on us and our rulers is that hey are to be treated with the greatest respect by those who have the well-being f the community in mind. Law, as we know, claims finality and supremacy in ocial affairs. What is settled in lawmaking is what finally is to prevail in our soci-ty, and that means that our laws present themselves as already taking account of verything that might be important about the matters they govern. Again, this oes not mean that they always succeed in doing so: A law may be criticized or imposing a prohibition or establishing a distribution that fails to take this r that into account. My point is that making law represents a particularly com-rehensive exercise of power, one that seeks to transform and redirect in quite a road and permanent way people's sense of what is required of them in society. n view of the sort of intervention it claims to be, lawmaking ought to be taken eriously.

Edward Rubin has argued that the image of law set out in the previous paragraph s obsolete.[19] Most law, he says, is not like this; certainly most legislation is not. Much of it does not aim to govern the conduct of ordinary citizens at all, at least ot directly. It does not impose obligations or establish rights. Instead, it gives irections to officials and agencies, indicating goals to be pursued and the broad ypes of rule-making that *they* should engage in. Rubin observes:

> We speak of legislative enactments as laws, as in the high school civics phrase about "how a bill becomes a law," and we refer to legislators as lawmakers. But this usage is quite old and bears the imprint of the pre-administrative state. . . . At present, a large proportion of legislation does things other than regulate human conduct, and many direct regulations of conduct are enacted by other governmental institutions, most often administrative agencies.[20]

Rubin thinks we need to "desanctify" the notion of law and not assume it has he sort of normative force or "metaphysical kick" that it seems traditionally to ave had. If we do this, we will be in a position to develop realistic principles to pply to lawmaking.[21] We should evaluate laws as mere instrumentalities, as policy nitiatives, Rubin says, and understand lawmaking as nothing much more than the nitial stage of the mobilization of public resources. It does not follow that law is nimportant. But if we take Rubin's advice, we will see lawmaking as less of a big eal from the moral point of view and attribute less importance to grand-sounding rinciples regarding its form or the procedures by which it is enacted.

Rubin has a point about much modern legislation. But I think he underestimates he traditional character of much modern law. Though much of it is directed in he first instance to officials, this aspect of it does not necessarily detract from its

[9] Edward Rubin, "Law and Legislation in the Administrative State" (1989) 89 *Colum. L. Rev.* 369 at 370–1.
[0] Ibid. at 377, n. 25.
[1] Much of Rubin's critique (ibid. at 397 ff.) is directed at Fuller's "internal morality of law."

effective public normativity. If a legislature increases the penalties for marijuana use or directs that officials shall no longer regard assisted suicide as an offense in certain circumstances, a literal reading will tell us that its primary addressees are prosecutors and judges; no one is literally being told not to smoke marijuana, nor is anyone actually being given permission to help their loved ones end their lives. *Still*, people will read the directions to officials as part of a code of publicly recognized morality on drug use and end-of-life issues. And they will be right to do so. They will debate the measures solemnly as though they were norms for citizens and they will treat them, once enacted, as settled standing rules on these matters, despite the point about their literal addressees. These are examples from criminal law, but the same is true of private law: People are aware that major changes in private law doctrine – a new set of rules on class actions or punitive damages, for example – have broad normative implications for the arrangements that structure our lives together.

Earlier, I quoted the Lockean formula: "settled standing Rules, indifferent and the same to all Parties." The last phrase is particularly important. Governance by law is governance on the basis of general rules, and that is what gives it its moralistic flavor. Jurists sometimes write as though the generality of law were simply a pragmatic advantage so far as administrability is concerned.[22] But it is more than that. Generalization across acts and across persons is a token or assurance that legal decisions are made and imposed for reasons (and that those reasons are being followed where they lead), rather than arbitrarily or on a whim. It is important, moreover, for its promise of impartiality and as an intimation of justice;[23] H. L. A. Hart observed that both law and justice embody the formal idea of "treating like cases alike."[24] Generality connotes reciprocity, and this may be valued as expressive of what Ronald Dworkin has called the *integrity* of a system of governance.[25] In all these ways, law presents itself in the image of morality. Though positive law can be morally misguided and though it is undeniable that unjust laws can also be general in form, there is something morally, not just pragmatically attractive about a determination to govern according to this form even when that is inconvenient for the purposes of those in power. To make law is not just to exercise power; it is (so to speak) to make a public morality for a particular community, something which purports to have the status among a people that moral principles have in their individual consciences.

What I have said so far is true of all law, common-law doctrine and customary law as well as statutes, treaties, and constitutions. We now need to consider the more particular question of what it is for law to be *legislated*, that is, created explicitly by an institution formally dedicated to that purpose. Bearing in mind all that has been said as to the general significance of law, it is time to turn to the principles that should inform our understanding of legislation, as a particular form that law may take.

[22] H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) at 21: "[N]o society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do."
[23] See also Jeremy Waldron, "Does Law Promise Justice?" (2001) 17 *Ga. St. U.L. Rev.* 759.
[24] Hart, *supra* note 22 at 157–67.
[25] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), chap. 6.

My first principle refers to the very idea of legislation. The idea of legislation is not the same as the idea of law. Others have drawn this distinction ideologically;[26] here I am drawing an institutional distinction. The idea of legislation is the idea of making or changing law *explicitly, through a process and in an institution publicly dedicated to that task.* The distinction takes notice of the fact that legislation is not the only means by which law is made or changed. Law is also made and changed by the decisions of judges as they interpret existing legal materials, including the work of other judges. This is unavoidable and no doubt in some cases it is also desirable. But it has drawbacks. Although the lawmaking role of the courts is well known to legal professionals, judicial decision making does not present itself in public as a process for changing or creating law. Quite the contrary: Any widespread impression that judges were acting as lawmakers, rather than as law-appliers, would detract from the legitimacy of their decisions in the eyes of the public. And this popular perception is not groundless. Courts are not set up in a way that is calculated to make lawmaking legitimate. Legislatures, by contrast, exist explicitly for the purpose of lawmaking, and they are known to exist for that purpose. Sure, they also have other functions. But lawmaking is their official *raison d'être,* and when we evaluate the structures, procedures, and membership of legislatures, we do so with this function very much in mind.

So our first principle embodies a commitment to explicit lawmaking. Underlying any theory of legislation is the idea that on the whole it is good, if law is to be changed, that it should be changed openly in a transparent process publicly dedicated to that task. When courts change the law, this transparency is often lacking. Courts perform their lawmaking function under partial cover of a pretense that the law is not changing at all. The English positivists put this rather well, when they distinguished between oblique and direct lawmaking. Judge-made law, according to John Austin, is an "oblique" form of lawmaking. The judge's "direct and proper purpose is not the establishment of the rule, but the decision of the specific case. He legislates *as properly judging,* and not *as properly legislating.*"[27]

How important is this principle commanding explicit rather than oblique lawmaking? It is not just a matter of giving notice to those who are to be bound by a given law. Publicity is important for the whole community, for it indicates what is being done in their name and gives them information regarding the appropriate deployment of their political energies. It is also a matter of the general liberal principle of publicity: People should not be under any misapprehension about how their society is organized, and the legitimacy of our legal and political institutions should not depend on such misapprehensions.[28] This has particular importance in the case of law, because of the connection between law and a certain ideal of political autonomy. The law of a people is often presented as something to which they have committed themselves, rather than as something thrust upon them.[29] No doubt this is partly mythology. But the demand for explicit lawmaking, along with the demand that legislation be a democratically representative process, pays tribute to the importance of these ideas.

I noted at the outset that principles of legislation are for citizens and not just for legislators. This is particularly true of my first principle, which is *primarily* a principle for citizens. Those who advocate changes in the law have a responsibility to orient that advocacy to a forum where their proposal can be explicitly discussed for what it is, rather than to other forums where it will be presented under the guise of a matter of interpretation. A forum such as a constitutional court may be politically more promising for a given group, but that is only because less care has been taken with the legitimacy conditions of lawmaking in that forum (precisely because it has not been thought to be a forum for lawmaking). There is a responsibility not to try and "steal a march" on one's political opponents in this way but to submit one's proposals for honest debate and evaluation in a forum that everyone knows as the place to go to reach decisions about whether and how the law should be changed.

2. THE DUTY OF CARE

In view of the inherent importance of law and the interests and liberties that are at stake in their decision making, lawmakers have a duty to take care when they are legislating. We want our laws to be efficient devices for promoting the general good and we want them to be fair in the burdens they impose and solicitous of the rights as well as the interests of all whom they affect. Reckless or hasty lawmaking may impose oppressive constraints or unfair or unnecessary burdens on people. Lawmaking is not a game: The consequences of failure to satisfy this second principle are real harms and injustices to real people.

This principle has a number of implications. The general duty of care in this regard means that those who in a position to modify the law have a responsibility to arrive at a sound view about what makes a legal change a good change or a bad change. They need principles of legislation in the very first sense I identified – a theory of the sort that Rawls offered or a theory of the sort that Bentham offered; or, if those theories are thought inadequate, a better alternative theory of justice and of the general good.

Beyond that, responsible lawmakers ought to pay careful attention to the relation between their own individual decisions and the eventual effects, on citizens and on society, of the law that they make (or fail to make). Laws are seldom made by a single Solon or Pericles: Lawmaking is collective action, in two dimensions. First, laws are often made and changed by a collectivity, so individual lawmakers have to consider the relation between their participation – their proposals, their speeches, their votes – and the eventual outcome of the lawmaking process. Second,

[26] F. A. Hayek, *Law, Legislation and Liberty – Volume I: Rules and Order* (Chicago: University of Chicago Press, 1983).

[27] John Austin, *Lectures on Jurisprudence,* 5th ed., ed. by R. Campbell (Edinburgh: John Murray, 1885) at 266–7 and 315.

[28] Rawls, *Political Liberalism, supra* note 11 at 66ff.

[29] This idea has deep roots in Rousseau's political theory and in Kant's ethics. See Jean-Jacques Rousseau, *The Social Contract,* trans. by Maurice Cranston (Harmondsworth: Penguin Books, 1968) and Immanuel Kant, *Groundwork of the Metaphysics of Morals,* ed. by Mary Gregor (Cambridge: Cambridge University Press, 1997).

he making or unmaking of any particular law affects the whole body of laws, so ıttention needs to be paid not just to the particular measure under consideration ɔut also to the way in which that measure will affect the broad impact of the legal ;ystem on the interests and rights of citizens.[30]

In principle this applies to all lawmaking, not just legislating. But aspects of it ıre worth particular emphasis in the legislative context. Unlike judges, legislators ıre not necessarily versed in the background law that they are changing or adding ɔ. And legislators also have other distractions that perhaps judges do not have. \fter all, lawmaking is just one among many activities performed in legislatures, ınd, from the point of view of political power or prestige, it may not necessarily ɔe the most important. Members of the legislature may be preoccupied with other 'unctions such as the mobilization of support for the executive, the venting of ;rievances, the discussion of national policy, processes of budgetary negotiation, he ratification of appointments, and so on. It is easy for them to regard lawmak-ng as a distraction. Legislatures have hundreds of members, but often you would ɔe hard put to find ten or twenty on the floor of the chamber during the middle ;tages of an average legislative debate. For these reasons, we need to place partic-ılar emphasis on the duty of care that is associated with the lawmaking part of a egislator's business.

Many of the structural and procedural attributes of legislatures embody a sense ɔf the need for care in making law. Proposals for new laws are not just introduced ınd voted on in the legislative assembly. Usually they are debated and voted on ;everal times – sometimes on their general character, sometimes clause by clause. Often there are public hearings; almost always there is consideration by a ded-.cated committee of the legislature. Many legislatures, moreover, are bicameral. They comprise different assemblies, in some cases appointed as well as elective, in ɔthers cases elected on different schedules from one another. Usually a bill must ;atisfy majorities in both houses. Now, we may see all this simply as an opportunity for politicking and delay, and citizens sometimes call for a more efficient legisla-tive procedure that would eliminate these features. Such proposals, however, are almost always reckless to the duty of care that I have been talking about.

3. THE PRINCIPLE OF REPRESENTATION

A new law may be *formulated* and *drafted* by an elite – by the political executive, for example, or a Law Reform Commission, or by specialist parliamentary counsel. However, we expect these officials will not try simply to impose their ideas in virtue of their own expert assessment. However important the innovation is perceived to be, and however well-drafted the measure, we expect it to be submitted for scrutiny, debate, and decision by a large representative assembly, comprising hundreds of representatives drawn from all sectors of society.

This is partly a reflection of our commitment to democracy: We want lawmaking to be democratic, and accordingly, we expect it to take place in an institution whose members have been elected by the people. I shall consider the democracy aspect under principle 7. But the principle of representation in lawmaking is older than democracy.[31] Elsewhere I have written on the sheer *numbers* of persons that deliberate lawmaking involves. Supreme courts have eight or nine voting members; legislatures have hundreds. I think these numbers are valued not just because more is better for, say, the reasons elaborated in Condorcet's jury theorem,[32] but because more gives us the opportunity to diversify the membership, to have legislators from a variety of places, representing a diversity of interests and opinions. Legislatures are formally structured to ensure diversity, and the modern idea of legislation rests philosophically on an insistence that society, being pluralistic, is in essence incapable of representation by a single voice or by reference to a single set of interests. Of course, there are disputes about what the axes of legislative diversity should be. In almost all countries, geographical diversity is represented; sometimes there are formal structures to ensure ethnic or religious diversity; but increasingly political diversity is valued in a sense that seeks some sort of rough comparability between the proportion of a given body of opinion in the legislature and the proportion of people who support that opinion in the community.

Why is this diversity so important for *lawmaking*? Partly it is informational. We hope that representatives will come from different parts of the country, bringing with them knowledge of the special needs and circumstances of different groups. We want to ensure an adequate representation of the diversity of *interests* in society. (Even if the legislature is passing general laws, universalizable in form and applicable to all, it may not need information about particularities although it will need information about how particular provisions affect different sectors of the society, in order to determine a fair allocation of benefits and burdens.) But the value of diversity also has to do with heterogeneity of opinions. The legislature is a place where we argue and debate, and we want to ensure a hearing for the largest possible variety of opinions concerning the issues that are raised when a change in the law is being contemplated. The idea is that new law emerging from this institution cannot claim its authority on the basis of any cozy consensus among like-minded people (whether in the community or in the legislature). Instead, its claim to authority must make reference to the controversies surrounding its enactment. If a citizen, who disagrees with the new law, asks why she should obey it, we want to be able to say to her that disagreements (along the lines that she is expressing) were aired as fiercely and as forcefully as possible at the time the law was considered and that it was enacted nevertheless in a fair process of deliberation and decision.

4. RESPECT FOR DISAGREEMENT AND THE PRINCIPLE OF LOYAL OPPOSITION

Few legislative proposals are likely to meet with unanimous agreement. John Rawls wrote about "the many hazards involved in the correct (and conscientious) exercise

[30] See John Stuart Mill, *Considerations on Representative Government* (Buffalo: Prometheus Books, 1991) at 109. See also Rawls, *Theory of Justice*, supra note 8 at 7–11, on the importance of considering, from the point of view of justice, the basic social structure as a whole.

[31] See Waldron, *Law and Disagreement*, *supra* note 14, Ch. 3, esp. pp. 56–67.

[32] Marquis de Condorcet, "Essay on the Application of Mathematics to the Theory of Decision-Making," in Keith Michel Baker, ed., *Condorcet: Selected Writings* (Indianapolis: Bobbs-Merrill, 1976) 33 at 48–9.

of our powers of reason and judgment in the ordinary course of political life," which make it likely that we will disagree with one another on important issues.[33]

> Different conceptions of the world can reasonably be elaborated from different standpoints and diversity arises in part from our distinct perspectives. It is unrealistic . . . to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain.[34]

Rawls used this account to characterize ethical and religious disagreements. But the idea of the burdens of judgment might characterize disagreements about justice and public policy as well.[35] Of course, what distinguishes justice and public policy is that we need settlement on these issues, whereas we do not need settlement on all the ethical and religious issues that Rawls associates with the burdens of judgment. But the need for settlement does not make disagreement evaporate; instead, it means that settlements have to be forged in the heat of disagreement and not on a basis that wishes disagreement away.

Real-world legislatures differ in the extent of disagreement that is aired in their debates. Whenever any large group of people gather together to perform a civic function, there will be pressures of various sorts to conform, to refrain from rocking the boat, and to show solidarity with widely accepted ideas. For example, American legislatures are often overwhelmed by enthusiastic consensus of one sort or another, and dissenting views are often informally suppressed so that law can be made quickly before the public face of the consensus dissolves. My fourth principle, the principle of respect for disagreement, aims to combat those tendencies. It conceives of legislatures as institutions set up specifically to enable rival views to come together and confront one another in debate, so that all of those involved in lawmaking hear all that is to be said against, as well as all that is to be said in favor of the legislative proposals in front of them. Various things can facilitate expressions of dissent. In some circumstances strong party structures can help, by giving dissenting views a solid presence in politics that is not simply identified with the conscience or opinion of particular individuals. Even with minority status, a socialist party is much less vulnerable to the pressures of national consensus than one or two members each of whom happens to hold socialist views. (On the other hand, where parties are few – e.g., where there is a simple two-party [or worse, a one-party] system – then some other basis needs to be found whereby dissident members can give voice to their views without fear of intraparty retaliation.)

Above all, what is indicated under this fourth principle is the need for a pervasive doctrine of *loyal opposition*. A person is not to be regarded as a subversive or as disloyal to the society merely on account of his or her public disagreement with some social consensus. A party is not necessarily to be regarded as a threat, because it establishes and makes solidly present in the society, views on public policy that most people regard as undesirable. Loyal opposition is not just a matter of free speech guarantees. There are all sorts of ways in which legislative structures can give the principle some real embodiment, including the establishment of an officially recognized "Opposition" (say, in a Westminster-style system) with established and paid posts like "Leader of the Opposition" and "Shadow Minister," as well as the official majority/minority arrangements that are associated with American legislatures. These are structural embodiments of the principle I have been discussing, establishing the legislature as a place where dissenting voices must be heard and given an opportunity to test their persuasiveness and the extent of their support.

[33] Rawls, *Political Liberalism*, *supra* note 11 at 56.
[34] Ibid. at 58.
[35] See Waldron, *Law and Disagreement*, *supra* note 14 at 151–3.

5. THE PRINCIPLE OF RESPONSIVE DELIBERATION

In a well-known article, Lon Fuller argued that courts are distinguished from other political institutions as forums of reason, not because reasoning does not go on in other institutions, but because courts are set up specifically to ensure that the reasoned argument of advocates are heard and responded to. A judge has not only a duty to let each side present its case; he or she also has a duty, which (on Fuller's account) a legislator does not have, to stay awake and listen and respond to the presentation.[36] I am not sure whether Fuller is right about the formal structures: The debating rules of legislatures often allow members to put questions to one another in debate and elicit a response. But assuming he is mostly right, then it is all the more important that the *ethos* of legislation be suffused with a principle of responsiveness in deliberation. It is not enough that voice be given to a variety of conflicting views. The legislature is a place for debate not just display, and as recent theories of "deliberative democracy" have emphasized, debate requires an openness to others' views and a willingness to be persuaded.

It is important therefore that the views voiced in the legislature not be held as frozen positions, with no possibility of change or compromise. Opinions must be held as opinions, and therefore open to elaboration, arguments, correction, and modification. If (as I have been arguing) the basic argument for the legitimacy of an enacted statute is that all the alternatives had the opportunity to put their case and failed to win majority support, then we are presupposing at least in principle the possibility that people might have their minds changed through argument. This does not mean that people must be willing to change their interests or give up their principles.[37] They might be persuaded to take a different view of the respect required for their interests in relation to the interests of others, or a different view of what follows from their fundamental principles insofar as particular legislative proposals are concerned. But I am not saying that political opinion must be fickle for deliberation to work. The point is that opinions should be held and defended in a spirit of openness to argument and consideration. Sometimes this will mean that individuals must be prepared to abandon positions they have taken; other times it will mean that parties of legislators must be willing to reconsider positions to which they have committed themselves.[38]

The requirement of responsiveness is directed in the first instance to the legislators themselves. But Edmund Burke is famous for having directed it also to the people who elect the legislators, reminding the electors of Bristol that they ought

[36] Lon Fuller, "Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353 at 366.
[37] Cf. Cass R. Sunstein, "Beyond the Republican Revival" (1988) 97 *Yale L.J.* 1539 at 1548–51.
[38] The principle of responsiveness does not condemn that second, more ponderous and collective mode of reconsideration. On the contrary, reconsideration by a party may take the reevaluation of a public political position more seriously than the faltering uncertainty of an individual member.

ot to demand that their representative sacrifice "his unbiased opinion, his mature ıdgment, his enlightened conscience" to the views of his constituents:

> ırliament is not a congress of ambassadors from different and hostile interests; which inter- ;ts each must maintain, as an agent and advocate, against other agents and advocates; ıt . . . a deliberative assembly of one nation, with one interest, that of the whole; where, not cal purposes, not local prejudices, ought to guide, but the general good, resulting from the :neral reason of the whole.[39]

ertainly, it is reasonable for electors to expect their representative to communicate) the legislative body important facts about their interests, especially if those would therwise be overlooked. And it is also important that if there are opinions peculiar) a particular constituency, then the system of representation should be such that ıese are heard. But Burke is right too that the whole point of those demands is to .low for a process of deliberation in which views may be formed about the merits f legislative proposals that would not have been formed apart from the *bringing)gether* in the legislature of all this peculiar information and all these distinctive)ices.

. THE PRINCIPLE OF LEGISLATIVE FORMALITY

t the end of my discussion of principle 2, I referred to those large structural features f legislatures like bicameralism that respond to the duty of care incumbent on any roup that takes it upon itself to make law. My sixth principle is concerned less ith structures and more with the microfeatures of legislative debate and with ıeir sometimes exasperating formality.

Legislation is not supposed to be an informal process, and under the heading f this sixth principle I want to explain why.

One of the reasons we take such care with the electoral system, the composition f legislative chambers, the rules about parties, and the debating- and decision- rocedures, is that these features enable a political system to make use of the iversity represented in the legislature. Legislatures are large gatherings of dis- arate individuals who do not understand one another particularly well. This is a ormative and not just a factual observation. It follows partly from what we said bout principle 3: Whatever differences of ideology, value, culture, opinion, and ıterests are found in the community are also supposed to be represented in the :gislature. If this normative expectation is fulfilled in a diverse society, it follows ıat the potential for mutual misunderstanding in any interaction among legis- ıtors is great. No doubt it is mitigated to some degree by the collegiality of the :gislators as they go about their business and their common experience of a life ı politics. But if there is too much of that, we start to lose exactly what we value bout diversity.

How then is it possible for legislators to interact in the institutional mechanics f legislation? The answer lies in the highly stylized rules of procedure that govern ıe formal details of their interaction: *These are rules for people who have very little else in common.* Unless it is structured by tight rules of order, deliberation is always liable to fall into futility, as people misunderstand one another, talk past one another, or lose the thread of the discussion. Formal rules of procedural order go a long way toward mitigating these dangers, and I believe they are therefore entitled to respect, not just as any old formalities might be, but as formalities that make possible precisely the debate-among-diversity we value among our lawmakers.

I have argued elsewhere that there is an important connection between procedural formality and the formal respect that is accorded to a legislative text. In any deliberative context, the key to rules of procedural order is a tight focus on a particular resolution under discussion – a resolution formulated clearly and publicly, established as a criterion of relevance in a particular debate, amended only in a carefully controlled way, and subject in the end to formal voting. Without that reference to a given form of words, a disparate body of representatives of the sort we have postulated would find it difficult to share a view about exactly what they have been debating, exactly what they have voted on, exactly what they have done, as a collective body, acting in the name of the community.[40]

This principle should make a difference not only to the way legislators behave, but also to the way in which legislative outcomes are received and understood. In the United States, lawyers sometimes look behind the text to what was said in debate for evidence as to how a statute is to be interpreted. When legislative history is used in this way, certain interventions in debate are given authority even though the procedural rules of debate never made them the focus of deliberation. So we see lobbyists urging representatives to insert language into the debate that will be useful for later interpretation,[41] and we see judges and lawyers according interpretive authority to speeches in debate even though that authority has not been acquired through voting or deliberation focused on those speeches. Now these practices depend for manageability on the text of the statute remaining the formal focus of deliberation and voting; they depend on legislators proceeding in debate as though the text of the bill were all that mattered. For if it were openly acknowledged that speeches given in debate were potentially authoritative also, and if an attempt were made – through deliberation and voting – to determine which of them should *be* authoritative, the whole process of deliberation would degenerate into something unwieldy. Those who use legislative history in this way need to think about the procedural implications of what they are doing (and about the extent of their free-riding on conventions that formally facilitate debate on a different basis altogether).

7. POLITICAL EQUALITY AND THE PRINCIPLE OF MAJORITY DECISION

My seventh principle is ultimately the most important, for it governs the procedures by which binding decisions are finally made concerning controversial legislative proposals. Sometimes we need law in an area even though we disagree what that law should be; in these circumstances, we need a decision-procedure, one that will

[9] Edmund Burke, "Speech to the Electors of Bristol" (Nov. 3, 1774) in *The Works of the Right Honourable Edmund Burke*, vol. II (Boston: Little Brown, 1865) at 95–6.

[40] See Waldron, *Law and Disagreement*, supra note 14 at 69–87 for a more detailed version of this argument.

[41] See the account of this practice in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) at 34.

volve a mode of participation like voting and a decision-rule such as the rule of ajority-decision (RMD). Of course, voting in a legislature should not be sharply parated from debate. But, equally, the importance of deliberation should not scure or sideline the need on most occasions for voting.[42] Deliberation does not ways eliminate disagreement and eventually decisions need to be made.

Legislatures, I have already said, are not the only lawmaking entities in a modn state. Courts also make law. But modern legislatures, much more than courts, ganize their decision-procedures around the ideal of fairness and political equal-. The legislature is set up to respect the fact that, in principle, each permanent ember of the community likely to be bound by its laws is entitled to participate, rectly or indirectly, in the processes by which the laws are made. It is the respecting this entitlement that gives legislation its special claim to legitimacy in modern emocratic societies.

RMD is used in most legislatures for determining whether a bill is adopted finally law or not.[43] Political theorists have posited alternatives to it,[44] but a plausible ternative would have to satisfy a number of important constraints that seem to be tisfied by the rule of majority-decision: It is neutral between outcomes, it gives qual weight to each participant's input, and it gives each participant's input as uch weight as possible in the direction that their input indicates as is compatible ith equality.[45] It seems fundamentally fair; it satisfies the principle of political quality. The point of my seventh principle is not to defend RMD in particular but insist that some such rule, satisfying conditions like these, must be used in order respect the principle of political equality in regard to legislation.

The application of RMD in legislation needs to be understood carefully. Legdatures, we know, are far from fully inclusive. Though, as I have said, they are rge bodies compared (say) to courts, they are still minuscule compared to the opulations of the societies they govern. A few hundred participate directly in ne actual business of lawmaking; the other tens of millions do not. So when we re talking about the application of political equality in legislature, we must not alk as though the equality *of the representatives* was ultimately what mattered. The epresentatives have a derivative claim to be treated as one another's equals, but hat arises only because their individual constituents – the millions of them – have n *ultimate* claim to be treated as one another's equals, and only because their wn status as legislators rests on the votes of their constituents in a certain way. Ve design the representative structure, the system of elections, and the procedures f the legislature so that *as a package* they satisfy political equality. Neither RMD mong the electors nor RMD among the legislators does it by itself; it is the package hat works.

[42] See the discussion in Jeremy Waldron, "Deliberation, Disagreement and Voting," *Deliberative Democracy and Human Rights*, ed. by Harold Koh and Ron Slye (New Haven: Yale University Press, 1999) 210, at 211–14.

[43] The matter is complicated by bicameralism and by occasional supermajority-requirements for terminating debate or moving from one legislative stage to another.

[44] See, e.g., Matthias Riesse, "Arguing for Majority Rule" (2004) 12 *Journal of Political Philosophy* 41.

[45] For the theorem (in social choice theory) that majority-decision alone satisfies elementary conditions of fairness and rationality, see Kenneth May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision" (1952) 20 *Econometrica* 680.

People will say that even conceived in this complicated way, political equality is a utopian ideal. I admit that it is an ideal, but it has undoubted real-world influence. It is what we appeal to when we worry that campaign finances or first-past-the-post electoral systems undermine one-person-one-vote. We need the idea of fair representation in a legislative assembly, along with the ideas about democratic enfranchisement and basic political equality that go with it, in order to think sensibly about the apportionment of legislative constituencies, about redistricting, about the electoral system itself, and about the rules, particularly the voting rules of the legislative process. We need all of this in order to relate what happens in the legislature to the fair conditions of decision for a society whose ordinary members disagree with one another about the laws that they should be governed by.

In all of this, I have talked about *principles* of legislation rather than *rules*. Of course, legislation is a minutely rule-governed enterprise, and there is a dense procedural thicket of rules on all sorts of things that go on in the legislature. Elsewhere I have discussed the theoretical relation between this thicket of rules and principles of legislation of the sort I have been talking about.[46] Briefly, the principles underlie the detailed rules and explain why the detailed rules are important. An analogy with the rules that govern criminal trial proceedings may help here. What happens in the courtroom is minutely governed by rules of evidence and rules of procedure. These rules do not just constitute a game. They serve deep and complex principles about truth-seeking, fairness, and respect for persons, and they are supposed to be imbued with a suitable awareness of what the parties have at stake in the matter. As we frame the rules of courtroom procedure, we have these underlying principles in mind; they determine the way in which we evaluate the rules and urge changes in them; and they should also inform the spirit in which we conform our behavior, and demand that others conform their behavior, to the rules. The same – I want to suggest – is true of legislation. The principles I have mentioned may not be mentioned in the detailed rulebooks that govern the legislative process. But they help explain the point of the rulebook; they provide a basis for evaluating and criticizing the rulebook; and they offer an account of why holding ourselves and others to the requirements of the legislative rulebook should be regarded as something more than mindless proceduralism.

It is worth mentioning, finally, an even deeper value that underlies not just the rules but also the principles I have mentioned and that pervades them all. That is the value of legitimacy – the importance of the political legitimacy of the final output of the legislature, the laws that it enacts. By legitimacy, I mean the laws' claim to acceptance and compliance even by those who oppose them so far as their contents are concerned.[47] Of all the modes of making law – the emergence of custom, the development of doctrine by courts, the framing of a constitution, the enactment of statutes – it seems to me that legislation is the one that takes legitimacy most seriously. This is evident not just in the pains that are taken to establish

[46] See Waldron, "Legislating with Integrity," *supra* note 17.

[47] Legitimacy in this sense contrasts with substantive justification, but it is still a normative concept.

decision-procedures that respect political equality. It is evident also in our principle of explicitness in lawmaking and our insistence on the representation in the legislature of all substantial competing opinions. We cannot understand the work that these principles do or the detailed rules that they support without understanding the importance of legitimacy. Any laws that we enact must do their work in a community of people who do not necessarily agree with them and who will therefore demand that something other than the merits of their content – something about the way they were enacted – be cited in order to give them an entitlement to respect. The explicit and articulate process of legislation in the modern state responds to that demand and takes seriously the demand for legitimacy. And it is with an eye to that demand – as well as to the general norm of fair and responsible conduct in the discharge of this most important civic function – that I have developed my suggestions about principles of legislation and about the distinctive features of this way of making law.

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2 An Exact Epitome of the People*

Russell Hardin

The core of liberalism is the decentralization of initiative. This is its great value if knowledge and creativity are diffused through the population and not subject to aggregation in some central authority. On this view, the compelling fact about liberalism is that, as Friedrich Hayek and others in the Austrian school of economics might say, it fits the epistemology of a creative social order. It does this because it gives autonomy to individuals and their own spontaneous, changing organizations. One might take such autonomy to be the central value of liberalism, or one might take the autonomy to be a means to other things, such as, especially, welfare. Nevertheless, as virtually all agree, we need government to secure our liberty. This generally means democratic government, and in the modern era of large states, it means representative democracy. Indeed, already in the days of the colony of Massachusetts, representation was necessary because the whole community could not possibly have met to govern. Each Massachusetts community of at least 120 citizens had one representative, and an additional representative was added for each additional 100 citizens.[1] Today, the people of Massachusetts have one representative in the U.S. House of Representatives for roughly 640,000 citizens.

The Austrian vision of distributed knowledge is consistent with John Stuart Mill's grounding for his principle of liberty[2] – that individuals have the best knowledge of what their interests are.[3] This claim can be qualified, of course, in ways that the individual would allow. For example, you would likely defer to judgment by medical professionals on some things that might be in your interest but that you could not understand adequately without professional advice. The Austrian, Millian vision coupled with the seeming fact that people place very high value on welfare, often especially their own welfare, yields a welfarist political theory that is essentially a mutual advantage theory. Mutual advantage is not imposed or assumed, however, as it is in ordinal utilitarian theory[4] or in contractarianism. Rather, it results from the aggregation of individual values.

* This phrase is supposed to describe any acceptable form of democratic representation. See Gordon S. Wood, *The Creation of the American Republic: 1776–1787* (New York: Norton, 1972) at 172.

1 Gordon S. Wood, *The Creation of the American Republic: 1776–1787* (New York: Norton, 1972) at 186.

2 John Stuart Mill, "On Liberty" (1859) in J. M. Robson, ed., *Collected Works of John Stuart Mill*, vol. 18 (Toronto: University of Toronto Press, 1977) at 213.

3 This discussion is drawn from Russell Hardin, "Rational Choice Political Philosophy" in Irwin Morris, Joe Oppenheimer, and Karol Soltan, eds., *From Anarchy to Democracy* (Stanford, CA: Stanford University Press, 2005) 95–109.

4 Russell Hardin, *Morality within the Limits of Reason* (Chicago: University of Chicago Press, 1988).