Unequal Before the Law: Moral Authority and Pluralism

by

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Class of 2008

A thesis submitted to the faculty of Wesleyan University in partial fulfillment of the requirements for the Degree of Bachelor of Arts with Departmental Honors in Philosophy and Government

Middletown, Connecticut April, 2008
Acknowledgements

I am deeply indebted to both of my thesis advisors for their careful assistance reading the (numerous) drafts of each chapter. Professor Lori Gruen was indispensable through the many revisions of Chapter One; without her careful attention to detail, this thesis would have suffered greatly. To Professor Peter Rutland, who stuck by me through all the changes that took us farther from his area of expertise, was nonetheless critical in the development of Chapter Three, and his suggestions for sources was both interesting and illuminating.

To Professor Moon and Professor Schwartz, I owe an additional debt for their useful suggestions. They took time out of what was undoubtedly a busy schedule of classes, papers, and other frantic thesis writers to comment (and assist) in the development of my argument.

My friends and family were, as always, there to listen and support throughout many long nights. There is a possible world where this thesis would have been completed without them, but it would have been much more unpleasant. To the Hinchcliff clan, as well as Annalisa Bolin, Cedric Bien, Lisa Miller, Holly Wood and Thomas Haydon I say only this: I will not tolerate such rubbish! Good day, sir.
## Table of Contents

Introduction................................................................. 4

I. The Source of Moral Authority................................. 7

1.1 Moral Obligations and Moral Epistemology
   1.1.1 Moral Obligations
   1.1.2 Moral Epistemology: Absolute
   1.1.3 Moral Epistemology: Fallible

1.2 The Moral Source of Law: Absolute Command
   1.2.1 Thomas Aquinas’ Summa Theologica
   1.2.2 Kant’s Categorical Imperative
   1.2.3 Infallibility and Reason

1.3 The Moral Source of Law: Discourse Ethics
   1.3.1 Discourse Ethics and Public Practical Reason
   1.3.2 Procedural Morality

1.4 Moral Psychology
   1.4.1 Moral Psychology: Absolute Commands
   1.4.2 Moral Psychology: Discourse Ethics
   1.4.3 Conflict of Moral Psychology

II. Pluralism and Moral Authority............................... 39

2.1 Defining the Liberal State

2.2 Cultural Pluralism in Liberal Democracies
   2.2.1 Moral Pluralism
   2.2.2 History: Pluralism and Minority Rights
   2.2.3 Theory: Group Rights and Individual Rights

2.3 Moral Authority and the Liberal State
   2.3.1 Requirements for Legitimacy
   2.3.2 Participation: Liberal Nationalism
   2.3.3 Participation: Constitutional Patriotism
   2.3.4 Habermas and Democratic Procedure
   2.3.5 Discourse Ethics in Practice
   2.3.6 Conflict of Moral Authority
III. Legal Pluralism in Practice............................................. 67

3.1 Legal Pluralism
3.1.1 Introduction to Legal Pluralism
3.1.2 Three Models of Minority Rights
3.1.3 Choosing Case Studies

3.2 Case Studies
3.2.1 Separate Communities: Native Americans
3.2.2 Separate Communities: Australia’s Aboriginals
3.2.3 Theoretical Examination: Separate Communities
3.2.4 Accommodated Arbitration: Sharia in Civil Law
3.2.5 Accommodated Arbitration: Australia
3.2.6 Accommodated Arbitration: Canada
3.2.7 Accommodated Arbitration: United Kingdom
3.2.8 Theoretical Examination: Accommodated Arbitration
3.2.9 Robust Pluralism: Family Law in India
3.2.10 Theoretical Explanation: Robust Pluralism

Conclusion................................................................. 94

4.1 Hierarchical Moral Authority

4.2 The Modern Nation State: Some Concerns

Works Cited.............................................................. 103
Introduction

“Inconsistency is simply a refusal once and for all to choose beforehand between any values whatever which mutually exclude each other. A clear awareness of the eternal and incurable antinomy in the world of values is nothing but conscious inconsistency, though inconsistency is more often practiced than proclaimed.”

– Leszek Kolakowski “In Praise of Inconsistency”

The problems of pluralism and tolerance in democracies are old problems, and not easily resolved. Liberal democratic states often find it difficult to balance between promoting cultural and ethical diversity and creating a moral paradigm that is able to condemn certain actions. This issue seems particularly problematic in a time of rising cross-border migration, and can create tensions between states interested in maintaining their civic identity and legal code and an immigrant group devoted to retaining their own culture and practices. These tensions contain the potential for conflict between a state that wishes to uphold certain laws, and a minority group within the state whose moral commandments order them to do the opposite of what the law demands. For example, while the French government banned the headscarf at state schools to maintain the principles of separation between church and state, some Muslim women believe that they cannot be moral individuals without their headscarves.¹

¹ There are a variety of liberal arguments that can be made in favor of the headscarf, for example, that it is unequal to deny Moslems this symbol, particularly since Christianity does not have similar restrictions. However, as I mention elsewhere, my main concern is the conflict between minority groups and the state, the majority group reaction to this conflict is important only insofar as it affects these issues.
I will argue that this conflict is one of moral authority: while a minority group may recognize that the laws of the state are important, they may also feel that their own moral commands supersede those of the state. This moral superiority has the potential to lead minority groups to assert that they should be exempt from the law, or generate the feeling that the law is unreasonable and ought be changed altogether. In such cases, there is a clash between the moral authority to which minority groups turn, and the moral authority of the state. I am primarily concerned with minority groups that follow religious or cultural laws, and will be discussing the conflict of laws with respect to those of the liberal democratic states.2

I portray the moral authority followed by religious-cultural minority groups as one of absolute command; that is, a source of moral authority that is infallible and universally intelligible. I will depict the alternate extreme as a moral authority based around discourse and consensus, or a discourse ethic. From these two opposing moral authorities, I discuss their instantiation into conflicting systems of law, using a Thomist natural law as characteristic of absolute command systems of law, and a Habermasian procedural ethic as characteristic of a discourse ethic.

To situate this conflict in the wider field of moral authority, I suggest that it can be derived from the opposing moral epistemologies of minority group and liberal state. Nevertheless, I am primarily interested in this paper in how two extremes of moral authority – which I characterize as absolute command and discourse ethic – relate to each other, and how this divide related to current debates on legal pluralism.

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2 As I will mention again later, discussions of positivist or naturalist jurisprudence are outside the scope of this paper. Generally laws will be identified as having normative impact, and group norms seen as a form of law. The definition of moral obligation is discussed in greater depth in Chapter One.
Chapter One will juxtapose two extreme positions: that of a moral authority based on absolute commands that are infallible and universally intelligible, and a discourse ethic that is based around fallibility, consensus, and procedure. This discussion will lead to a brief suggestion of the moral psychologies generated by these opposing moral authorities, which I use to highlight my arguments in Chapters Two and Three. In Chapter Two I bring my argument about moral authority into the realm of political theory, through its application to the liberal democratic state. I begin with a discussion of moral pluralism, following Chapter One’s analysis of multiple moral authorities and systems of law. My examination of moral pluralism will lead to a consideration of cultural pluralism, and its relation to the values of the liberal democratic state. I argue that to be legitimate, liberal states require participation in their institutions and procedures. Through this participation, the state constructs a moral authority that can be identified with the discourse ethic discussed in Chapter One. However, this construction appears to contradict the interests the state has in cultural (and moral) pluralism.

The project of this thesis is to offer a suggestion about how one might organize one’s thinking about the different sources of ethical obligations that surround membership in groups. The contradiction in a state’s construction of one morality and its interests in allowing the other appear to depict a philosophic inconsistency in liberal democracies. In the past, states have tried to resolve this

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3 Another inconsistency, which I will mention in passing in later chapters (but is not the focus of this paper) is the duality of liberalism not only in allowing both forms of moral authority, but its appeals to norms derived from different sources. For example, liberal states may sometimes appeal to natural right claims such as those embodied in the UNDHR, and simultaneously invoke the norms of due process proceduralism.
inconsistency and incorporate minority views through pluralistic institutions that selectively allow such contradictions.

In the third chapter I examine the different ways that states have chosen to accommodate groups with differing visions of moral authority. Given a commitment to multiple versions of moral truth and moral authority, I discuss three ways to promote legal pluralism, although not all methods are chosen with equal frequency. States can allow separate legal communities (or exemptions), a system of accommodated arbitration, or a system of ‘robust’ pluralism, where at least some types of law, like civil law, are applied selectively on the basis of identity. I present a series of case studies to illustrate each form of pluralism. For the purposes of my investigation, I will be exploring liberal democracies with similar legal systems (common rather than civil law) that have all been part of the British legal tradition. For the separate communities model I will use the cases of the Native Americans and the Maori, the problem of Sharia civil law for accommodated arbitration, and the case of Indian civil law for robust pluralism.

The project of Chapter Three is to investigate whether the inconsistency built into liberal democracies is pragmatic and even sensible, or generates problems practically as well as philosophically. If the conflict is practical as well as philosophic, how, by investigating the empirical solutions, can we resolve this philosophic tension?

While my argument will often refer to the division between sources of moral authority as one between states and minority groups, it is critical to remember that few groups (or nation-states) have laws that embody appeals to only one type of authority. Just as states may appeal to natural rights and proceduralism, religious groups may derive their laws from the divine or from natural law, but have some elements of discourse or proceduralism involved in determining outcomes. As Leszek Kolakowski might argue in his work *In Praise of Inconsistency*
I question if these exceptions have the potential to push so far such that the coherence of the liberal nation-state is brought into question.

I argue that the different moral standards to which groups are held in legal pluralism can be troubling for a society, but not always. There are ways to carry out a ‘successful’ pluralism, but such a project goes too far when there is no hierarchical normative ordering in plural societies. The liberal nation can allow other moral authorities within its sovereign borders; it can even institutionalize them through forms of legal pluralism. However, it must maintain its normative hierarchy; it is the issue of minority moral authority superseding that of the state that becomes problematic. When moral authorities clash, there must be a clear hierarchy in which their claims are followed; otherwise the state risks conflict irresolvable by its own institutions and procedures. That is, when the authority of the state is not taken to surpass that of the minority authority, the state will find it necessarily difficult to maintain its sovereignty. Using the case studies in legal pluralism, I argue the state can allow exceptions, but it must do so in a wider framework of state law, within the scope of a Habermasian discourse ethic institutionalized in the procedures of the liberal democratic state.
I. The Source of Moral Authority

I characterize the conflict between the laws of the state and those of minority groups as one of moral authority. Individuals have obligations to the legal code of a particular country, which are often in tension with their obligations to the laws of a different culture, religion, or ethical system. This paper will define law as a type of obligation or command, typically one set within a system of rules. A law may be a moral command, such as the prohibition “do not kill” from the Judeo-Christian holy texts, or it may be non-moral, such as the rule in baseball that three strikes equal an out. In this work I will be interested in the conflict of normative systems of law.

In the following section, I will divide moral authority into two contrasting sources, based on opposing moral epistemologies. For the purposes of this paper, I am only concerned with the contrasting epistemologies of ideal moral infallibility, or morality as metaphysical fact, and ideal moral fallibility, or morality as approximation. Based on these epistemologies, I will categorize the sources of moral

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I do not wish to give the impression that I am giving a comprehensive account of the sources of moral authority. While I am primarily concerned with contrast between the absolute commands (instantiated in forms such as natural or eternal law) and discourse ethics (instantiated through procedure), there are multiplicity of (sometimes overlapping) sources from which moral authority can be derived. In particular, I wish to briefly mention the beliefs of legal positivists. While I am not making a jurisprudential argument, the idea that the state has sovereign power to create law is one possible alternative to the sources of moral authority I discuss. Promoted by philosophers such as Hans Kelsen, this view holds that laws are ‘posited’ by the state, and have moral authority based on the state’s monopoly of legitimate force over its territory. Positivism, while it may seem like it belongs in the category I have defined as ‘absolute command,’ generates laws which are particular to a state, unlike those of, say, natural law.
authority into “absolute command”\(^6\) and “discourse ethic.” I will draw mainly on the writings of Thomas Aquinas on natural and eternal law to describe authorities of absolute command, in the same manner that I will use the theories of Jurgen Habermas to delineate a theory of discourse ethics, and the procedural systems of law in which discourse ethics is realized. Finally, I will briefly explore the moral psychologies suggested by these alternate sources of moral authority, and their contrasting systems of law. This discussion highlights the truly fundamental differences in the way that practitioners of each form of law consider important issues such as culpability of moral action. Perhaps more importantly, it will also be useful in my later application of this theory to the modern nation state. In Chapter Two, these contrasting conceptions of authority will be applied to the conflict between liberal nation-states and their cultural-religious minorities.

**Chapter One Argumentation:**

\[\text{Moral Authority} \]

\[\text{Infallible} \quad \text{Morality as Fact} \quad \text{Moral Epistemology} \]

\[\text{Absolute Command} \]

\[\text{Natural and/or Eternal Law} \]

\[\text{Character, Universal} \]

\[\text{Fallible} \quad \text{Morality as Approximation} \]

\[\text{Discourse Ethics} \quad \text{Source of Law} \]

\[\text{Procedure} \quad \text{Legal System} \]

\[\text{Narrative, Particular} \quad \text{Moral Psychology} \]

\(^6\) I have chosen to call this source of moral authority absolute command, based on its epistemology. However, it could as reasonably be called something like ‘external’ morality, indicating the metaphysical location of its source.
1.1 Moral Obligations and Moral Epistemology

1.1.1 Moral Obligations

Before I delve too deeply into the division of moral authority, I will first lay out what I mean by moral obligation. My definition of the term largely follows that of Susan Wolf, who argues for what she calls a ‘Social Command Theory’. Social command theory takes moral obligation to be grounded in a society’s declared moral values, or “the moral rules and principles that the society publicly endorses and asserts…[in] its schools…religious institutions, and in other vehicles of cultural expression”. In pure social command theory, the “existence of a social command, conceived by society as a moral command, is both necessary and sufficient to establish a moral obligation on the part of that society’s members”. In the social command theory of obligation, moral obligations can be roughly defined as the demands or expectations of society. If one defines oneself as a member of a particular community, the norms of that community will become moral obligations.

However, if moral obligations are to be understood as commandments, there is a question about who is doing the commanding. As Wolf points out, there are many different social groups which one might be a part. Indeed, one might be part of overlapping social groups. These social groups may have different commands, so determining which command is authoritative is a complex issue. I will discuss two different sources of moral command for societies - that is, two divergent sources from

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8 Ibid 22
9 Ibid 3
10 Ibid 2
11 Ibid 3
which moral authority can be derived. I will base this division on an epistemology of moral truth. I am not concerned with the deontological truth of such sources, but rather with the consequences based on their classification as moral fact.

1.1.2 Moral Epistemology: Absolute

Different moral laws have different sources; commands may originate from as varied sources as a religious text, a constitution, or a work of theoretical ethics. I will begin my investigation of moral authorities with a claim about moral epistemology. Clearly, minority groups who assert that their laws supersede those of the state see their own norms as a fundamentally different type of claim, as something that is more obligatory than what the state has determined. I am interested in those cases where a particular type of epistemological conflict arises. In these cases, minority groups claim their norms should supersede state law based on their status as originating from an infallible source, and thus equivalent to moral ‘fact.’ Because of their epistemological status as infallible, I characterize this source of moral authority as “Absolute Command.”

Of course, group members may strongly disagree about the interpretation of their codes. Indeed, religious groups often strenuously disagree with the manner in which their laws ought to be practiced. Some of these are disagreements are simply about the interpretation of the law, not about its status as metaphysical fact. Nevertheless, I do not wish to ignore the possibility that there may also be disagreements among groups about the issue of fallibility or infallibility. Some may see laws as moral facts, others may not. Because I am juxtaposing extremes in this paper, I am primarily interested in this certain type of conflict between the state and
the minority group who sees their laws as fact. Of course, it is also possible that groups who believe their laws are infallible will not believe they should supersede state law, an objection I will address in greater depth in Chapter Two.

My investigation of absolute commands as a source of law will focus largely on natural law, with some reference to divine law. I do not necessarily wish to say that every moral command whose status is identified as metaphysical fact can be properly classified as ‘natural law’ or ‘divine law,’ but rather use these categories because they seem the most intuitive and relevant to my broader questions regarding the clash of moral claims. That is, natural law is a readily discussed form of an absolute command authority that generates laws with the status of moral fact.12

I will primarily be using the writings of Thomas Aquinas to exemplify my arguments regarding natural law. Aquinas is not only a paradigmatic author of natural law, but his writings also usefully discuss divine law. Throughout the course of this discussion I will point to the common features of absolute commands as a source of authority.

1.1.3 Moral Epistemology: Fallible

I characterize the alternate ‘ideal form’ of moral epistemology as a fallible view of moral authority. Whether or not moral law exists as metaphysical fact, it is generally true that adherents to a fallible moral epistemology do not believe that

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12 The argument I am presenting in this work is one that deals with the interaction between beliefs about moral obligations, and does not require that these beliefs be based in fact. In general, the practice of laws does change. However, this change is typically not expected for religious laws until a systemic flaw forces the paradigm to change or become irrelevant. Insofar as the adherents of objective beliefs continue to believe they are correct, the conflict I discuss in later chapters will still occur.
humans will necessarily grasp its precepts. As Jean-Jacques Rousseau writes in Book II Chapter 6 of *The Social Contract*:

“All justice comes from God, who is its sole source; but if we knew how to receive so high an inspiration, we should need neither government nor laws. Doubtless, there is a universal justice emanating from reason alone; but…[A]s long as we remain satisfied with…purely metaphysical ideas…we shall go on arguing…[and] be no nearer the definition of a law of the State.”

Based on an unwillingness to identify their ethical beliefs and intuitions with moral fact, falliblists must seek an alternate source of moral authority. I suggest that the alternative path is to derive laws from consensus, a source of law I characterize as a ‘discourse ethic.’ If humans do not have the capacity to apprehend moral facts (or if moral facts are not believed to exist), the beliefs of individuals – so far as they are equally reasoned and justified – are all of equivalent moral status. If everyone is (ideally) of equal moral worth, one solution to the problem of moral authority is to follow the decisions made by consensus. Certainly there are other ways for a group to derive moral commands in cases where there is no infallible code. However, because I am primarily interested in liberal democracies in this paper, and their laws are (for the most part) built around consensus (direct and indirect), I have chosen discourse ethics as the most appropriate alternative source of moral authority.

For the purposes of my argument, I will be using the writings of Jurgen Habermas to exemplify the discourse ethic position. I will be concerned first with the characteristics of discourse ethics as a source of law, and secondly with the way that discourse ethics institutionalizes discussion to create a procedural morality that

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14 For example, an anarchical system would likely leave space for individuals to determine their own moral commands without reference to an infallible authority.
generates law. In Chapter Two I will identify this procedural morality with that the liberal democratic state.

1.2 The Moral Source of Law: Absolute Command

The first source of moral authority that I will discuss is that of absolute command. I identify the types or systems of laws derived from absolute command authorities as those that identify their precepts as moral fact. For this reason, I believe it reasonable to see the tradition of natural law as exemplifying an absolute command authority. The application of the term ‘natural law’ signifies its ‘natural’ or metaphysical status. While natural law refers both to a moral and a legal theory, the two do not bear a necessary logical relationship to each other.\(^\text{15}\) However, as Soper writes, the term is “used in both legal and moral theory, and…so often glide[s]…as if one position entailed the other?\(^\text{16}\) With respect to this paper, I am not interested in critical legal theory either as it relates to natural law or positive law. I am simply concerned with the way that sources of moral authority might be seen to categorize ethical systems, and the implications thereof.

The ethical tradition of natural law has a rich history, with proponents found among classical philosophers, medieval theologians, and modern and contemporary theorists. Most of these works “emphasize the analogy between discovering moral laws by reasoning about human nature and discovering the natural laws of science.”\(^\text{17}\) However, as Brian Tierney points out, this emphasis “allows us to extract at least one


\(^{16}\) Ibid 2396

\(^{17}\) Ibid 2394
of the characteristics that make a moral theory a natural law theory: namely, the insistence that moral principles are objectively true\textsuperscript{18} and discoverable by reason.\textsuperscript{19}

Explaining what is characteristic of natural law in general, apart from the claim of objectivity, is a topic that can itself generate considerable philosophical debate.\textsuperscript{20} I shall not attempt a precise definition of a particular form of natural law, although Thomist natural law will be my main example. Rather, I will be using natural law to exemplify the way in which absolute command as a source of moral authority can be instantiated in a system of law. In the course of this section, I will use primarily natural law theory (with some reference to divine law) to explain how legal systems that are epistemologically grounded as moral truths attain and view their laws.

Thomas Aquinas played a central role in the development of natural law theory, and thus it is “sensible to take Aquinas’s natural law theory as the central case of a natural law position.”\textsuperscript{21} I will examine Aquinas’ view in some depth, and then briefly relate his ideas of natural law to those of other infallible moral theories. Throughout this section I will identify the common features of absolute command authorities as (1) infallibility in the systems of laws it generates, and (2) universal

\textsuperscript{18} The prime characteristic of authorities I describe as absolute command.
\textsuperscript{19} Ibid 2394
\textsuperscript{20} Ibid 2395
intelligibility in its precepts.\textsuperscript{22} This latter point will be important in my later discussion of the moral psychology.

\textit{1.2.1 Thomas Aquinas’ Summa Theologica}

Aquinas’ thoughts on law are best formulated in his \textit{Summa Theologica}. He begins with the assumption that all metaphysical facts of the world emanate from the will of God. That is, both ideas and objects are in some way a product of the divine, since there is nothing without cause, and God is the First Cause.\textsuperscript{23} In discussing God’s law, Aquinas writes, “supposing that God’s providence rules the world, his reason evidently governs the entire community of the universe.”\textsuperscript{24} Thus, moral laws are in some way identified as universal truths. Because the world is governed by divine reason, if moral laws can be discovered, then they will have the status of metaphysical fact. For Aquinas there are two ways to obtain knowledge of these moral laws – directly, through knowledge of a thing in itself, or indirectly, by its effects.\textsuperscript{25} Knowledge of God’s law in itself is impossible without revelation, so it is only “the blessed who see God in his essence.”\textsuperscript{26}

This is not to say that divine law in without conflict of interpretation. While God’s word may be written in religious texts, clearly there is significant debate in the understanding of divine law. This conflict is carried across many religions – differing

\textsuperscript{22} In natural law theories commands are attainable through the use of reason, in systems of divine law commands are typically knowable through revelation and grace.


\textsuperscript{25} Ibid 180

interpretations of the Torah and the Koran have creating lasting divisions among their followers. Furthermore, the manner of interpretation may differ across religions; in Islam, for example, Qiyas, or the use of legal analogy, is often used to generate rulings for new matters. Using analogy, one might deem drugs impermissible based on the clear prohibition of alcohol in the Quran. 27 Nevertheless, as religious texts contain laws that are given to humanity through grace, their differing interpretations may still be identified as moral truths.

Aquinas’ second way of obtaining moral knowledge is indirect, through reasoning about the effects of things. For example, one can know about the sun from its rays. 28 In Summa of the Summa, Peter Kreeft writes that Aquinas starts with the premise that God is the ultimate end. Thus, whatever belongs to others accidentally belongs to God essentially. 29 The ‘various kinds of law’ are nothing but the commands of practical reason emanating from God. 30 But as God is perfect, divine reason cannot be grasped by the human mind. 31 In writing about eternal law, Aquinas can be paraphrased to say, “[E]ternal law is a type existing only in Gods mind, knowable only to God. But a thing may be known in its reflection…all men know the

30 Ibid 503
truth to a certain extent, at least as to the common principles of the natural law.”32 Aquinas identified the result of this reasoning about effects as natural law. As natural law as a system of absolute command applies more broadly than divine law (as it can have religious or secular origins), I will spend some time describing its major features.

In Question 94, Aquinas summaries the two main principles of natural law: first, that it is infallibly good, and second, that it is knowable to everyone.33 Natural law is infallibly good, as the outcome or effect of a thing must always in some way reflect the source.34 Because God is perfectly good, so too are God’s commands. Typically, secular natural law theorists will also identify their laws as perfectly good, if only because they are infallible. The second principle, which states that natural law is knowable to everyone, is also critical for most philosophers of natural law. It will also have some bearing on my later discussion of moral psychology.

Aquinas argues that moral virtues are intrinsically accessible to human beings due to humanity’s rational nature. For Aquinas, natural law “constitutes the principles…[by] which human action is to be judged as reasonable and unreasonable”.35 Aquinas defines law as “a rule of action put into place by…God…[Whose] choosing to put into existence beings who can act freely and in accordance with the principles of reason is enough to justify our thinking of those principles of

Rational, freely acting beings are able to grasp the precepts of natural law, justifying the obligation placed upon group members to follow it.  

Because humans are rational, they can access the laws of the universe. For example, humans are able to grasp mathematical concepts by virtue of rationality alone. Natural law argues that moral principles function in a similar manner, that they are accessible based purely on one’s ability to reason about the world that is designed by God. This reasoning contains an important teleological element; laws can be captured by reason because they are the effects of the First Cause, or God. However, neither the teleological nor religious aspects are necessary for natural law theorists, as I will indicate in my later discussion of Immanuel Kant and the categorical imperative.  

Before I move on, I wish to make one further comment about Aquinas’ categorization of law. Aquinas (and other natural law theorists) still allow that “in order than man might have peace…it was necessary for [human] laws to be framed.” Besides divine and natural law, society also requires a law of its own that is flexible for the common good. For Aquinas, human law may be derived “in two ways…[as] a conclusion from premises…[and as the] determination of certain generalities” The first way does not emanate from humans exclusively, and so has an element of natural law. The second way “[has] no force other than human law.”

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36 Ibid  
40 Ibid 524  
41 Ibid 524
Thus human law does not necessarily partake directly of God’s will, and can be fallible. In the modern context, human laws now often contradict religious laws, a conflict at the core of my larger argument. It is clear for natural law theorists which should take precedence; not so for those uncomfortable with an infallible epistemology of moral truth.

The Moral Hierarchy in Aquinas’ *Summa Theologica*

1.2.2 Kant’s Categorical Imperative

There are, of course, many systems of law that stem from infallible epistemologies. In the following section, I will offer a natural law theory that builds off secular premises, before discussing my conclusions about natural law as a system of absolute command. I hope to demonstrate how the infallible epistemology of absolute command generates systems of law that purport to be intelligible and universally true.
Perhaps the best example of a theorist who believes that morality is derived from secular reason is Immanuel Kant, who lays out the basis of his theory in *Grounding for the Metaphysics of Morals*. In this work, Kant writes, “There is an imperative which…commands a certain conduct…this imperative is categorical. It is not concerned with…the intended result.” For Kant, the goal of moral philosophy is to produce a will that is good in itself, and “the concept of a will estimable in itself…already dwells in the natural sound understanding and needs not so much to be taught as…elucidated.” Through the categorical imperative, one uses reason to discover truth, in the same way that the mind might come to a proof in a mathematical equation, Kant uses the categorical imperative to discover rules with the status of moral truths.

1.2.3 *Intelligibility, Infallibility and Reason*

As I have previously stated, the claims of many natural law theorists, and those who follow an absolute command source of moral authority, are that their laws are equivalent to moral fact. I will now discuss two main characteristics of this source of moral authority: their infallibility, and the principle that they are discoverable by reason. The first characteristic is evidence for my epistemological division of authority over the moral status of law; the second will be relevant to my later discussion of the moral psychology.

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42 I do not mean to suggest that Kant’s philosophy is atheistic; merely that he believes morality is discoverable on the basis of reason alone.
44 Ibid 396
45 Ibid 397
46 Ibid 396 – 397
I have made the claim that natural law theorists, as archetypical of the absolute command source of moral authority, hold their laws to be moral facts. As Strauss concurs, the “test for truth in a natural law theory is that a proposition is "self-evident," those who disagree seemingly must admit to being either immoral or mistaken.” Absolute command sources of authority are by their nature infallible. When the source is divine, the source of law is directly related to its status as a moral fact, and the content of these laws is thus infallible.

Aquinas and other religious theorists are focused on the divine as the giver of the law, but fundamentally any infallible source will do. In systems of religious law, norms become an aspect of divine providence. In the case of traditional law, they would be an aspect of the wisdom of forefathers. Although slightly less intuitive, the same is true for those who derive moral truth from reason alone, rather than religion or tradition. Natural law based on reason holds true that anyone using the correct form of reason could not fail to arrive at the moral truth. Thus moral authority stemming from absolute command leads to systems of law that are considered to be metaphysical facts. Because of its origins in providence, tradition, or human nature, natural law is indivisible with the commands of an infallible source, and thus its commands are binding by their very character. No one could then be at once both a member of the group and not bound by the precepts of that group’s natural law.

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48 Ibid 504, footnote 254
The second critical aspect of these absolute command systems is that they are universally intelligible to their adherents. When the source is divine, law are either known by grace or derivable through reasoning about the work of God. If laws are known by reason, then they are accessible internally. If a law were purely traditional, then one would know it by virtue of being a group member. An important point that follows from intelligibility observation is that there is a “universally authoritative character of norms.” Laws are infallible, and intelligible, and thus they are morally obligatory. Natural law has a universal and binding nature, although humans may do bad actions because they are thwarted by strong emotion or evil dispositions.

Natural law theorists do recognize some ways in which the dictates of law might be misinterpreted, and, as I have mentioned, religious texts are often subject to multiple interpretations. Despite its intelligibility, most natural law theorists do recognize this multiplicity, and thus the inevitability of mistakes is interpretation. Aquinas, for example, recognizes that ignorance (unless essentially voluntary) diminishes sin. When the will acts in accord with erroneous reason then the act is not blameworthy. However, right reason is still available, even if mistakes are possible. Moreover, there seems little to excuse one who is aware of what natural law

52 Thomas Aquinas. Summa of the Summa. Edited and Annotated by Peter Kreeft. San Francisco: Ignatius Press, 1990. Page 490. Aquinas also writes that there are two ways to judge action – one is by the reasoning about the act, and other is by their relation to ends. However, Aquinas writes that goodness/malice in the relation of external acts to ends depends on the will; that is, people are to some large extent morally praiseworthy for reasoning well and thus willing good things, and blameworthy if they do not.
53 Ibid 140-141
ought to dictate and does otherwise. Again, while there may be disagreements about how the norm or law is to be interpreted, the law’s status as true, accessible, and obligatory is not. I will use these characteristics to enlighten my discussion of moral psychology in later sections.

Of course, if no one has access to moral truths, laws would be derived elsewhere. In such an alternative system, even if a standard of objective morality is theorized to exist, it cannot generate laws unless its dictates are knowable. This leads me to my discussion of discourse ethics, the second source of moral authority.

1.3 The Moral Source of Law: Discourse Ethics

In opposition to a moral epistemology of infallibility is one of moral pluralism, which recognizes that reasonable people may have a variety of definitions and methods of determining right and wrong, good and bad. Rather than an authority of absolute command, an opposing source of moral authority may recognize that objective moral norms are either non-existent, or impossible to verify. In such a system, so long as each source is equally reasoned and justified, they appear to be of equivalent moral status.

From the standpoint of moral fallibility, some theorists will argue that if everyone is (ideally) of equal moral worth, it follows that decisions for a group ought to be made by rational consensus, and society should avoid the creation of a binding, unchanging system. Instead, ethical value is explicitly based on discussion within the group. I portray this source of law as one of ‘discourse ethics.’ For the purposes of my argument, I will be using the writings of Jurgen Habermas to exemplify the

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discourse ethic position. I will first discuss the major characteristics of discourse ethics as a source of law, and then demonstrate how such a discourse ethics might institutionalize discussion to create a procedural morality that generates law.

This position is not incompatible with one of absolute command, but there exists a significant potential for conflict between the alternate sources of moral authority. One could be firmly committed to one’s beliefs, and believe they are equivalent to moral fact, and yet see how reasonable people might come to an alternate conclusion. However, there is the potential for conflict between the conclusions of the individual (or group) who believes in an absolute command system of law, and the consensus decision of the larger community. I explore this tension further in Chapter Two, where I identify this procedural morality with the liberal state.

1.3.1 Discourse Ethics and Public Practical Reason

My characterization of discourse ethics will center largely on Habermas’ own theory of communicative action and discourse ethics. While the previous section made mention of multiple natural law theories (Christian, Jewish, Kantian), and drew on the common threads among them of infallibility and accessibility, I will be focusing much of my discussion in the following section on a single theorist. I will do so in part because the formal tradition of discourse ethics is still quite limited. I use Habermas’ theory because it is reasonably seen as “the best attempt that has been made to create a general theory of social action [in a discourse ethic].”

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Page 13
As in the previous section, I will be ignoring critical legal theory, although several theorists have discussed the relation of Habermas to the positive law tradition. Moreover, I will be circumspect regarding the more analytic and post-analytic discussion in Habermas’ theory of communicative action. In particular, I will not be discussing ideas surrounding speech act validity. I will only say that within the principle of communicative action, Habermas argues that speech acts inherently involve claims that are in need of reasons—that is, claims that are open to differences of opinion.

Successful speech acts, then, must be justified by reasons that are intelligible and acceptable to their audience. If one says that a particular action that one does is right, but does not offer empirical grounds or a persuasive moral argument for moral judgment, then one is unlikely to convince others of the legitimacy of one’s action. Applied to a community, the moral legitimacy of social commands is derived through their ability to seem just to the majority of people in the society they control. Thus through deliberation, decisions are morally justified because they can be explained by presenting a coherent argument for a moral action or cogent narrative of a moral act. Moral thought “emerges from the testing of...inclinations against one another...the universal-pragmatic meaning of truth...is determined by...rational

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57 Ibid 61
58 Ibid 67
In the following section I will draw the implications of these ideas for communicative action, and, more importantly, discourse ethics.

Habermas assumes that agents have available to them a set of different, often irreconcilable choices. Communicative action is, at heart, a theory of rationality, which states that when a choice must be made between two norms, actors are forced to turn to discourse to weigh between them. After all, communicative action is largely concerned with bringing the problems of the empirical lifeworld into the realm of rational debate, and the “rationality potential in action oriented towards mutual understanding can be…a medium for cultural reproduction, social integration and socialization.”

In his discussion of public practical reason, Gerald Postema explores this conception of moral action. He argues that the “moral point of view is an essentially common, inter-subjective, perspective that emerges from attempts of moral agents in…social interaction to articulate…the outlines of a common moral world.” When actors address one another with this sort of practical attitude, they engage in a cooperative critical discussion occurs regarding moral norms, free of social and. In Habermas's judgment, only an inter-subjective process of reaching understanding can

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62 Ibid 49.
give the participants the knowledge that they have become convinced of the necessity of some norm.65

1.3.2 Procedural Morality

Rather than looking for one universal standard, the project of public practical reason is more “reflective, more articulate and more deliberative”66 – and also thereby more tolerant of conflict and dissent. When the source of a norm is discussion, rather than command, moral obligations are based on consensus. Laws are legitimated because, after deliberation, some majority in the society in question will determine them to be the best normative ordering, given the current circumstances.67 The society agrees on particular laws because both they and the process used to determine them has emerged through consensus, not because they are necessarily good in themselves. The outcome of this discussion is termed moral, and Habermas denotes it as ‘U’, or the principle of universalization that every norm has to fulfill. Thus ‘U’ is realized when:

“[A]ll affected can freely accept the consequences and the side effects that the general observance of a controversial norm can be expected to have for the satisfaction of the interests of each individual.”68

However, Thomas Murphy argues that “no moral theory can afford to substitute a process of bargaining for a determination of what is just and good;

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65 It is important to note, however, that the decisions of consensus do not then become infallible law. Thomas F. Murphy. III “Discourse Ethics: Moral Theory or Political Ethic?” New German Critique, No. 62. Page 113
67 This claim is expanded on further in my discussion of liberal democracies in Chapter 2
consequently 'U', whatever else it may be, cannot be construed as the basis of a moral
theory. Habermas's formulation of 'U', or the universalization of a norm based on
discourse, provides “no basis for questioning the legitimacy of interests; to do so
would…comprise notions of the good.” A similar point is raised by Agnes Heller, in
"The Discourse Ethics of Habermas: Critique and Appraisal." Both call attention to
the difficulties stemming from Habermas's line between the just and the good.
Heller's critique begins by focusing on the fact that Habermas' 'U' principle can offer
no concrete guidelines for action because, she argues, in striving to avoid moral
ethnocentrism, Habermas’ theory does not generate objective norms.

These issues implicate the issues of consensus and competency in Habermas’
theory. Is consensus even a possible goal? Who is qualified to create this ‘U’, and
what is their personal moral vision? As Murphy points out, Habermas “never
addresses the question of competency…[yet] there is no shortage of instances where

69 Thomas F. Murphy. III “Discourse Ethics: Moral Theory or Political Ethic?” New
German Critique, No. 62. Page 125
70 Ibid 125. This critique is by no means unassailable. I am indebted to Professor
Donald Moon for his helpful suggestions on this point. Habermas would likely
respond to this objection that there is significant ground on which to question the
legitimacy of interests – in particular, the idea that one must examine what kinds of
needs or interests underlie the normative claims participants make in ethical
discourse. For example, a masochist might feel that spousal abuse ought to be
legalized, but the interests behind this claim are not those likely to be legitimized by
the society engaging in a discourse ethic.
71 Ibid 122
72 Ibid 124
73 Another critique can be aimed at Habermas’ formulation of the collective.
Habermas emphasizes consensus as a value; however, it may not always be possible.
But, as Murphy points out, “nothing could be more foolish, however, than to expect a
public discourse conducted on the basis of values to yield immediate results;
Habermas neglects the potential for transfiguration because he remains focused on
understanding justice as agreement.” But this is an argument against Habermas’
formulation of discourse ethics, not against the idea of discussion as a source of moral
commands. Ibid 132
justification was required to include certain classes of individuals.” Habermas might have argued that everyone should be considered equal for the purposes of discourse, but that again implicates a biased view of a particular moral tradition; that is, the implication that equality “has always been a fundamental presupposition of legitimate discourse.”

The strength of these objections can be somewhat lessened if one views discourse ethics as a source of moral authority that is instantiated in procedural institutions that generate law. It is true that U cannot easily be achieved through the disorganized interaction of society. The determination of consensus and requirements for participation all seem to require institutionalization. For this reason, institutions and procedures may be the best way to produce the types of outcomes Habermas describes. Indeed “Habermas insists that 'U' can provide a universal procedural basis for moral theory.”

After all, in Habermas’ theory of discourse ethics, the sole criterion for establishing the rightness or justness of a particular norm is whether each person accepts the consequences of the norm’s acceptance. Discourse centers on the acceptance of consequences and not in determining whether the norm is good and just. According to Habermas, an action is rational if it is licensed by a justifiable norm, and a norm is justifiable if it could be the object of a rational agreement among all

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74 Ibid 131
75 Ibid 131-132
76 Ibid 124, my emphasis
those affected. It is a *procedural* morality. Norms obtain their moral force because a community endorses them. This institutionalizing of discourse ethics helps answer the earlier objection of inequality as well, for functional equality is not a specious assumption to make in institutions such as the liberal democracies state.

Habermas often examines the relationship between social procedure and the norms of individuals. In Volume Two of *The Theory of Communicative Action*, Habermas describes law and morality as “two complementary systems of norms which work together to preserve social integration.” Moral argumentations supplies normative legitimacy, and while actual moral argumentation is plagued by problems of consensus and competency, legal procedures “translate moral insight into a legitimately enforceable regulation of the sphere of action.” Thus law bridges the gap between facts and norms, and offers some solution to Murphy and Heller’s critique of the good/just distinction. The relation of Habermas’ theory to state law will be discussed in greater detail in Chapter Two.

This vision of moral authority is diametrically opposed to a source of moral laws from absolute command. Under these two sources of authority, laws obtain their moral force in very different ways. In the following section, I will use these differing derivations of moral authority to briefly suggest opposing moral psychologies. These

81 Thomas F. Murphy. III “Discourse Ethics: Moral Theory or Political Ethic?” New German Critique, No. 62. Page 113
82 Ibid 113
83 Ibid 113
differing psychologies will help emphasize the conflict between the absolute command and discourse ethic authorities.

1.4 Moral Psychology

Thus far I have discussed two different sources of moral authority: absolute commands and discourse ethics. I suggest that under these authorities, different moral psychologies are generated. By moral psychology, I mean different moral beliefs and attitudes that are factors in moral decision-making. I am also interested in the way different systems of law consider issues such as culpability of moral action and the relationship between social law and the dictates of conscience. Perhaps more importantly, the discussion in the following section will be useful in my later application of my argument to the liberal state. I argue that, in their extremes, absolute command systems tend to generate moral psychologies that are character based and universal, and discourse ethic systems generate psychologies that are narrative and particular.

1.4.1 Moral Psychology: Absolute Commands

In the previous discussion, I have set forth two propositions as the relevant basis of absolute command systems of law. The first is that laws are infallibly good, and the second is that they are accessible to everyone in the group they regulate. I argue that absolute command systems of law lend themselves to 1) universal obligations, and 2) character-based explanations of moral action. The moral psychology is universal because the norm is identified as metaphysical fact. The law in which the norm instantiates itself will then be universally applicable – as long as one identifies as a member of the community, the law will apply.
In the extreme, this school of moral psychology lends itself to explanations from character. Because laws are both intelligible and binding, the responsibility to follow the law lies solely on the individual, rather than the religious, traditional, or ethical authorities to make themselves convincing. There are no legitimate excuses for failing to follow laws if one was not ignorant of them or mistaken in their interpretation. If one disagrees with the law, the fault is internal, because the creator of the laws is imbued with perfect infallibility. Thus, if one fails to follow the law, it is due to some character flaw – whether having the inherent flaw of being easily led by bad choices (such as laziness or gluttony) or simply being the sort of person who desires bad things. In most cases, then, there is no reasoning that makes failure to follow God’s law less blameworthy.

Of course, strict character explanations are an extreme position for groups to take. Most practitioners of divine and natural law theories probably do not immediately identify bad action with a corrupt soul. Some religions make exceptions for the weak, and Saint Augustine famously said to “hate the sin, but love the sinner.” However, while extreme, this position is not unpopular. Based on their interpretation of the Bible, many Christian fundamentalists view homosexuality as a serious moral transgression. These same individuals often view practicing homosexuals as intrinsically corrupt individuals. Similarly, a strictly devout Muslim woman who cannot get divorced in a Sharia court may face the difficult decision between living in an untenable marriage and damaging her soul. These conflicts will be particularly relevant in my discussion of the debates surrounding legal pluralism in Chapter Three.
1.4.2 Moral Psychology: Discourse Ethics

I have argued that the moral psychology stemming from absolute commands is universal and character-based. In contrast, I suggest the psychology arising from discourse ethics is particular and narrative-based. Because the instantiation of a discourse ethic occurs procedurally, its laws are bound to the jurisdiction of particular institutions. For this reason, I characterize the moral psychology arising from a discourse ethic as particular; changes in location and not belief change the laws one is obliged to follow.

A deeper investigation of the requirements of discourse and public practical reason will justify my characterization of the moral psychology of discourse ethics as narrative-based. In his writings on public practical reason, Postema argues that one’s moral self has four essential components. Moral selves must have these components in order to participate in a robust discussion of moral principle:

“1. They enjoy a capacity to distinguish immediate desires and impulses from stable and enduring elements of the self...[that] express who they are
2. They enjoy capacity to determine characters and shape of projects
3. They have the capacity to evaluate their aims...as worthy
4. They have the capacity to judge the legitimacy of their pursuit of...aims”

In order to participate in moral discourse, individuals must present reasons why they believe a particular action to be right or wrong. Discussion requires that the ‘moral selves’ of members of the community are kept independent from the community in order to participate as individuals. Individual’s views may be radically different from the outcomes of procedures, even if following this outcome then becomes obligatory.

For example, take the discourse ethicist who is placed into a new society. There is nothing that prevents them from becoming members of both communities. They can determine their own individual beliefs, and still follow the dictates of the community where they reside without becoming culpable, since obligations are determined by one’s governing institution. For example, a fundamentalist Christian living in the United States who believed abortion was morally wrong might choose to work through legal means to pass anti-abortion laws. They believe abortion is wrong, yet abide by their moral obligations to the state, rather they try to forcefully prevent others’ exercise of their rights protected by the law.\textsuperscript{85} Discourse ethics requires that one follow laws generated by consensus; it does not follow that these laws are immutable or infallible. Because of the emphasis on justified reasoning in discourse ethics, I characterize its moral psychology as narrative-based.\textsuperscript{86} This concept of disagreement and monopoly of truth will have further implications in the discussion of cultural and moral pluralism in Chapter Two.

1.4.3 Conflict of Moral Psychology

My division of moral psychology into character and narrative explanations is not unique, although I characterize it slightly differently. In “Having a Rough Story about What Moral Philosophy Is” Cora Diamond makes a similar distinction between the moralist and the moral philosopher, where the moralists ascribes terms such as “good” or “right” and the moral philosopher examines “facts on the one hand and

\textsuperscript{85} Of course, the very fact that an anti-abortion activist is not able to persuade a majority to their views may lead them to view others in the community in a particularly harsh and unforgiving light. This relation of moral psychology to case studies will be discussed in greater depth in Chapter 3.

\textsuperscript{86} Many of the ideas that follows were developed in an assignment for Professor Springer’s class “Evil, Blame, and Moral Understanding” during the Fall of 2006.
action and choice on the other.”87 Take, for example, a newspaper article about a murder.88 In the course of the article, there is some explanation about the unhappy early life of the murderer, and an implicit hypothesis about the way that an unhappy situation corrupted the character, such that the murderer was driven to violence. Importantly, the article gives a variety of reasons as to why the actor chose what he or she did. Now, presume that a novel was built from the article of this murder. The author of this work details the murderer’s early life, and gives anecdotes about the murderer torturing animals, and other sadistic activities. Assume that the both author of the novel and of the newspaper article make a hypothesis about the killer’s character, and both find the killer to be morally corrupt.

While on face one might expect both stories to share the same reality, the constructions of the world offered by the two stories are actually disparate. The article is an account of the empirical facts, with which the reader is able to disagree. The conclusion of the article is not absolute, and can be disputed in any number of ways, and constructs a narrative about the character’s life. The fictional construction constrains reality to the particular view of the author, giving privilege to the author’s interpretation of events. I analogize this type of construction to the one of an absolute command text, which depicts an infallible version of the truth.

Both systems of moral authority have some level of differing culpability based on the activity of the will (e.g. motivation, ignorance, etc). However, because

absolute commands can tend towards character explanations, I hypothesize that they are less likely to generate differing levels of culpability – if bad action means that one’s character is corrupt, than blame seems to be intrinsic to that judgment.

In the modern world, the two systems of moral authority (and their suggested instantiations and visions of moral psychology) seem to be in ever increasing conflict. Susan Wolf writes that an actor’s internalizing a society’s laws is the only way to prevent law-breaking, if fear of punishment is not sufficient.\(^8^9\) Indeed, this idea likely goes back as far as law itself. In the contemporary world, one often sees this lack of internalization in transplanted communities. The practice of female genital cutting (FGC), for example, is practiced in many traditional societies, particularly in Africa. However, FGC is met with widespread condemnation in most of the Western world.

Such a law would cause a dilemma for those groups living in these liberal-democratic states that believe such a practice is morally obligatory, and that the practice’s goodness is a moral truth. This conflict, between minority group and liberal state, has particular urgency given the differing moral psychologies suggested by the two systems of moral authority. When obligations are universal, and individuals in a group believe that their souls or characters are at stake, they may be ever more desperate to follow the dictates of their conscience. As I have argued in this chapter, that conflict is one between authorities derived from opposite moral epistemologies. In the following chapter, I will further discuss this clash of moral authority in the context of liberal democratic states.

II. Pluralism and Moral Authority

When there are two opposing systems of moral authority operating in the same society, how are actors within that community to resolve their conflicts? I have presented an argument about the source of moral obligations, and then depicted two separate sources of authority from which these obligation flow: absolute command and discourse ethics. I have argued that these two sources of moral authority suggest different systems of law; absolute command authorities suggest systems such as natural law and eternal law that are universal and infallible, and discourse ethic authorities suggest legal codes that institutionalize social discourse in a procedural manner. Furthermore, I have sketched out the resulting type of moral psychology that may emerge through engagement with each source of authority: the absolute command authority tends to generate a moral psychology which is universal and focuses on character, and the discourse ethic authority generates a moral psychology that is particular and based on narratives.

In the following section I will examine the ways that a particular type of society – the liberal-democratic state – might consider its laws. The chapter will first discuss the liberal-democratic state, and then touch on issues of moral and cultural pluralism before arguing that the requirements of a liberal democracy suggest a moral authority that can be best identified with a procedurally bound discourse ethic. In doing so, my second chapter will demonstrate why Chapter One’s clash of moral authority is relevant to the liberal-democratic state. In the third chapter, I will conduct a case study investigation of the way that different forms of legal pluralism have been
employed to alleviate this clash. This chapter will also make some evaluative remarks about the effectiveness of different forms of legal pluralism.

2.1 Defining the Liberal State

Liberal democracies have a few defining characteristics which are important to note before I launch into my broader argument. While there may be problems with the definition I set out, I am going to bypass these concerns for the time being. My hope is that resolving them is not critical for my project.

In a liberal democracy, it is the people who have the “undisputed right to determine the framework of rules, regulations and policies within a given territory and govern accordingly.”\textsuperscript{90} This statement sets out the principle of popular sovereignty upon which liberal democracies are based. Popular sovereignty is fundamentally the principle of political legitimization of the established authority. A liberal democratic state will be legitimate insofar as it enacts the people’s will and is responsible and accountable to the public;\textsuperscript{91} political authority will be legitimate only if the citizens of a state bestowed it.\textsuperscript{92} Liberal democratic states also have mechanisms of representation in place to allow for a translation of social will into political decisions. This mechanism must be some form of public contestation for representative positions.\textsuperscript{93}

\textsuperscript{91} Ibid 12
\textsuperscript{92} Ibid 15
\textsuperscript{93} Ibid 11
Furthermore, classical political liberalism holds that the law applies equally to all members of a society, and that the manner in which the government may interfere with lives of its subjects is limited. Liberal democratic states also typically have a strong separation between the public and private spheres. Individuals in these sorts of states are considered more than citizens with political interests – they are also seen to possess capacities and interests of a non-political nature, and the state gives them the liberty to express these sentiments.\(^\text{94}\) The expression of sentiments is closely interrelated with the issues of cultural pluralism. Because of its importance for later sections of this thesis, I will now treat this issue in some depth.

### 2.2 Cultural Pluralism in Liberal Democracies

Issues of law and belief in liberal democracies are complicated by the presence of multinational states (states which are host to two or more distinct ethnic groups, or nations) and poly-ethnic ones (which contain multiple non-indigenous ethnic groups). Historically, liberal democracies have hoped that individual protections would also accommodate ethno-cultural minority groups.\(^\text{95}\) However, in many multination states, component nations often demand some form of political autonomy to ensure the development of their cultures.\(^\text{96}\) These demands are accommodated in a number of ways, including various forms of federalism. Controversially, some ethnic groups may also demand to be exempt from laws and

\(^{94}\) Ibid 17
regulations; for example, Jews and Muslims in Britain have sought exemption from animal slaughtering legislation. These issues are complicated by the fact that the patterns of diversity in different liberal democracies vary greatly. For example, Israel, and the United States, which are both home to national minority populations,\(^{97}\) face very different issues.\(^{98}\)

2.2.1 Moral Pluralism

Theories of cultural pluralism explore how people of different nations and differing values can live together. The field of cultural pluralism is, however, part of the wider field of ethical pluralism, which is the general view that there are multiple values that may be sought or multiple moral theories that are correct.\(^{99}\) Ethical or moral pluralism can be sub-divided into:

“structural pluralism (the idea that different values and principles govern different spheres of society), cultural pluralism (the idea that different societies are structured in accordance with different systems of value) as value pluralism (the idea that value as such is inherently plural, in the sense of being incommensurate) and the perspective pluralism (the idea that there can be a basis for reasonable disagreement among adherents to different ethical perspectives).\(^{100}\)


\(^{98}\) Ibid 231


The relationship between different forms of moral pluralism is quite complex, although there are broad similarities and differences among perspectives. Each ethical perspective “has significant implications for the patterns of structural pluralism that are morally acceptable, and, by implication, for the acceptable range of cultural diversity across societies.” A liberal nationalist, for example, particularly one with a strong moral psychology attached to narratives and individual choice, would likely belong to the school of egalitarian liberalism, which precludes the assignment of different rights and duties to ascriptive groups, a position mutually exclusive with some forms of pluralism.

Pluralism will not necessarily solve disagreements about the rights and duties of citizenship. Indeed, state policy can at times be inconsistent; classical liberalism has typically been against monopolies of moral truth, but nevertheless has rarely endorsed same sex marriage. Despite its contradictions, the liberal’s moral perspective can generally be seen as partial or limited, which stands in opposition to comprehensive perspectives such as those represented by natural law, Christianity and Islam; all absolute command authorities. Conversely, a comprehensive picture would be one that seeks to answer robust questions about the nature of human life and human good. Nevertheless, comprehensive perspectives may have elements of

101 Ibid 343
102 Ibid 343
103 Ibid 348
104 Ibid 352
105 Moon suggests that there can solutions to the problems created in societies marked by significant ethical pluralism. There are areas of “mutual overlap and compatibility,” and groups and individuals can use tools such as dialogue “aimed at enlarging understanding rather than resolving differences.” Ibid 356 - 358
106 Ibid 343
moral pluralism contained within them; for example, a religion may call upon a moral pluralists’ perspective when facing disagreement within its ranks, particularly as involved with a confrontation of modernity.107

Thus both religious or cultural minority groups and liberal democracies can be morally plural – indeed, and individual or collection of individuals can be termed as such, insofar as they accept what Donald Moon characterizes as “humankind’s extreme fallibility.”108 Of course, there are a number of reasons why one might belong to one of these minority groups, yet oppose institutionalized pluralism. One, as I have mentioned, is a sense of fallibility. Others might be as simple as a lack of concern with the fate of other’s souls, or an enjoyment of the goods one reaps from the present social arrangement. I have merely indicated one way in which cultural pluralism gets its philosophical onus; the fallibility divide.

Nevertheless, moral pluralism is a useful backdrop from which to discuss the institutions of cultural pluralism. In the following section I will briefly discuss some historical precedent cultural pluralism, which will be important for my later discussion of legal pluralism. As in the rest of this thesis, I will be focusing on cultural pluralism as it occurs in the Western political-philosophic tradition. Next, I will explore the relation of group rights to individual rights. As Will Kymlicka argues, there is an important distinction to be made when liberal states discuss group protections in the context of cultural pluralism: a state might either protect the group from internal dissent, or protect it from the impact of external decisions. Can a liberal

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107 Ibid 347
108 Ibid 347
democracy allow minority groups to restrict the individual rights of their members, if this restriction is necessary for the group to survive?  

2.2.2  History: Pluralism and Minority Rights

Kymlicka writes that the history of minority rights suggests little or no correlation between meta-ethical debates and support for the rights of national minorities. Such was the policy of the Ottoman Empire, which, at its height, allowed Christian and Jewish communities to live under their own laws, although they did not acknowledge that law as equal to Islamic law. Roman administrators also recognized the laws of some local cultures, and accommodating them on a case by case basis, thus making pluralism a matter of policy. During the medieval period regional law was predominant, although in Europe during the fifteenth century the rising power of centralized nation-states stepped in to override local law with growing success. The model of citizenship-as-common-rights was deeply connected to ideas of national integration, and the eighteenth and nineteenth centuries saw increasing demands by individuals for moral and political equality. The Enlightenment, and the writings of scholars such as Thomas Jefferson, worked

110 Ibid 129
113 Ibid 13
against unequal rights based on social status, while simultaneously recognizing individual rights and freedom of conscience.

However, the seeds of later pluralistic traditions may have already been sown. Defenders of the tolerance-based views often argue that liberalism emerged out of religious pluralism. In the United States, for example, had some original colonies formed for reasons of religious dissent. Of course, this tolerance was based in individual freedom, and had not yet become the incarnation of pluralism seen in modern group rights.\textsuperscript{115}

Isaiah Berlin writes that in the late twentieth century western world was “disenchanted with theories that purported a particular teleology of human nature.”\textsuperscript{116} Rather, the philosophers of liberalism felt that one need not commit to either pluralism or skepticism.\textsuperscript{117} Instead, liberalism attempts to be neutral about values, regarding multiple paths as leading to human flourishing.\textsuperscript{118} Of course, as I have mentioned previously, this general belief has been applied within limits. Freedom of conscience and action is permitted within the bounds of social acceptability and functionality.\textsuperscript{119} Nevertheless, in the following section I will use Kymlicka and other

\begin{itemize}
\item[\textsuperscript{116}] Isaiah Berlin \textit{Four Essays on Liberty}. Oxford: Oxford University Press 1969 Page 103
\item[\textsuperscript{117}] Ibid 103
\item[\textsuperscript{119}] I do not think this is a particularly contentious point; two modern examples are the limits on abortion and gay marriage.
\end{itemize}
liberal theorists to identify some key concepts that should be taken into account in conflicts between the state and the moral codes of its minority groups.

2.2.3 Theory: Group Rights and Individual Rights

There are a variety of claims made by ethno-cultural groups. These claims differ from the set of common civil and political rights protected in liberal democracies.\textsuperscript{120} The task facing liberal democracies is to distinguish between “bad minority rights that involve restricting individual rights from good minority rights that can be seen as supplementing rights.”\textsuperscript{121} As stated previously, a group can either be protected from internal dissent, or preserved from external pressure. Both types of protection are labeled as group rights, but raise very different issues.\textsuperscript{122} External protections raise issues of unfairness between groups, internal restrictions raise worries about illiberal behavior toward group members.\textsuperscript{123} Kymlicka argues that minority rights are (simplistically) consistent with liberal cultures if “they protect the freedom of individuals within the group, and promote relations of equality (non dominance) between groups.”\textsuperscript{124}

Even if these contentions are true, one might ask why a government ought not to legislate its own morality. What is the positive value of institutionalizing pluralism? Dworkin writes that “it is implausible to think that someone can lead a better life against the grain of his profound ethical convictions, rather than at peace with

\textsuperscript{121} Ibid 340 – 341
\textsuperscript{122} Ibid 340-341
\textsuperscript{123} Ibid 341
\textsuperscript{124} Ibid 342
them.” 125 Indeed, the very reason liberal democracies place a value on individual freedom is because they assume that no one has a monopoly of truth. The liberal view I am defending insists that people can “assess moral values…and should be given not only the legal right to do so, but also the social conditions that will promote this capacity.” 126

Kymlicka argues that the liberal value of freedom of choice has specific cultural preconditions. 127 He writes: “societal cultures emphasize not just shared memories and values, but also common institutions and practices.” 128 Liberties enable citizens to judge what is valuable and to learn about other ways of life. 129 Cultural membership provides meaningful options; familiarity with a culture may create “boundaries of the imaginable,” 130 but “a sense of identity can depend on criteria of belonging rather than on those of accomplishment.” 131 In the same vein, Dworkin argues that members of a culture “have a shared vocabulary of tradition and convention.” 132 T.H. Marshall argues that, as citizenship is an expression of one’s membership in the political community, expanded citizenship rights would promote a common sense of membership in that community. 133 In a related note, Joseph Raz insists “that the autonomy of individuals - their ability to make good choices - is intimately tied up

127 Ibid 76
128 Ibid 76
129 Ibid 81
130 Ibid 89
131 Ibid 89
132 Ibid 76
with access to their culture.” Access to one’s culture may be a precondition to the ability to make meaningful choices, choices that are closely connected to liberal freedoms. This point – that the very values of choice and free conscience that liberalism rests on depend on pluralistic institutions – is critical to many of the claims of minority groups. Unless they have certain rights or freedoms, these groups maintain, they cannot sustain their cultures. If one follows the points made in the above paragraph, this disintegration of cultural values is damaging to the liberal agenda on the whole.

Of course, this is not the only reason that minority groups strive for exceptions from or protections under the law. Furthermore, it is not the only reason liberal states have for granting such rights. As I have stated previously (and will discuss in greater detail as applied to case studies in Chapter Three), minority groups may also desire protections out of a feeling of moral necessity. Even if a practice is forbidden in their host state, individuals or groups who follow absolute command authorities may still feel highly motivated to follow their cultural or religious laws. Particularly if the moral psychology I suggested is a factor, an actor may feel they will become fundamentally corrupted without the ability to complete certain practices.

Furthermore, states may have a variety of reasons to justify differential rights and pluralist practices. While the argument about choice may be a factor, states may also allow pluralist practices out of a sense of obligation (as I will discuss later in reference to the indigenous peoples’ case study), or because it is pragmatic for them

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134 Ibid 339
135 Ibid 340
to do so. They may even allow such practices because out of tradition, because that is the way that the institutions of their country have been formed.\textsuperscript{136}

After all, states are not value neutral. Public neutrality on all issues of inclusion takes too many significant issues off the public agenda.\textsuperscript{137} While liberal states do classify some topics as within the private sphere, and thus outside the oversight of the state, contentious issues are often de-facto part of the public sphere. That is, when a contentious issue arises, inevitably such an issue would be either brought to court or subject to a democratic mandate (such as an election). In such a way, the institutions of democracy make normative decisions.\textsuperscript{138}

These decisions are not made easily, however. Contemporary liberal theory still struggles with the problems posed by incompatible values and conceptions of the

\textsuperscript{136} While pluralism must be institutionalized and thus subject to procedural guidelines, some of the justifications for pluralism invoke language that seems similar to that of natural law or absolute command authorities. Berlin’s theories contain a strong concept of universal rights. However, for the purposes of this thesis, all theorists need not agree with my characterization of the issues involved. Simply because Berlin is grounding his theory in an objective moral theory does not mean this is the way the liberal-democratic state has functioned in relation to the issue. In discourse ethics, for example, one may use any arguments to convince others engaged in discourse, including appealing to moral authorities that are not discourse based. What is critical, however, is the need to convince in a discourse ethic, and the instantiation of norms in democratic institutions. Baghramian and Ingram. “Introduction” \textit{Pluralism: the Philosophy and Politics of Diversity}. Ed. Ingram/Baghramian. USA: Routledge, 2000. Page 9


\textsuperscript{138} This distinction calls on the wider field of discourse theory and specifically on Habermas, making Habermasian discourse “real, participatory, and informal as well as formal.” Consensus in Habermas’ moral decision-making or discourse ethics occurs in this public sphere, making moral commands out of the consensus decisions. Ibid 161
good held by minority groups and the state.\textsuperscript{139} States may attempt to solve the problems of value conflict through some form of institutional pluralism.\textsuperscript{140} Kymlicka argues that this relationship between group-differentiated citizenship and individual rights can be quite nuanced.\textsuperscript{141} There are different sorts of minority rights that ethnic and national groups may demand. For example, a group might demand:

[S]elf government rights (forms of federalism), poly-ethnic rights (financial support and legal protection for certain practices associated with particular ethnic or religious groups) [or] special representation rights (guaranteed seats for ethnic and religious minorities within the central institution of the larger state).\textsuperscript{142}

I will discuss issues of to legally institutionalizing cultural pluralism, or legal pluralism, in Chapter 3.

Liberal theorists have also tried to solve the problems of minority demands through involving citizens in a sense of civic identity, which often clashes with the opposing value of group identity. Is it unrealistic to believe that national identity will cease to be an important aspect of self-conception? Or, conversely, ought one to expect that citizens from different national groups will withhold their allegiance to a state unless their national identity is respected?\textsuperscript{143} I will discuss the idea of allegiance – as related to legitimacy - further in the following section.

\textsuperscript{141} Ibid 35
\textsuperscript{142} Ibid 6
\textsuperscript{143} Ibid 189
2.3 Moral Authority and the Liberal State

2.3.1 Requirements for Legitimacy

As Andrew Levine writes in his *Critique of Liberal Democracy*, liberal democracies can only be sustained if they incorporate certain features.\(^{144}\) If legitimacy of law requires that they be based on the will of the people, it must also then be legitimated by a procedure of deliberation in which free individuals (as citizens) participate on an equal footing with each other.\(^{145}\) As Ceasar notes, one of the distinctive aspects of liberal democracy is the active engagement of society in a certain kind of competitive political system that facilitates discussion and debate.\(^{146}\)

Liberal democracies must also generate participation to be legitimate.\(^{147}\) Of course, participation does not necessarily mean that every person is required to vote (although some states do require voting by law). Rather, there are a number of ways for citizens to participate in a state – for instance, they might have gainful employment, and thus pay taxes to the state. Any participation in state institutions seems to be a political act. Essentially, by living in a state and following its laws, one participates in the legitimacy discourse. Of course, this is not specific to liberal democracies; most states rely on participation for legitimacy. However, in democracies, where representing the will of the people is critical to their function, legitimacy through participation is particularly crucial.

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Yael Tamir presents two problems with this idea of legitimacy. First, she argues that liberals have no response to calls for political demarcation, or the idea of national self-determination. If a community wishes to freely leave their formal contract and form a new community, the original liberal model must defend itself using nationalist ideals about the sovereignty of the state’s territory. The problem of “opting out” implicates another problem; that of continuity. In order for a rule of law to obtain, the liberal state must view itself as a continuous community rather than a casual association that might be ended at any point.\textsuperscript{148} I discuss two broad ways in which states can respond to this objection and generate participation and/or feelings of loyalty to attain legitimacy. The first response is a liberal nationalist claim, which follows Tamir’s objection, and argues that the state must invoke the idea of community. The second is Habermas’ theory of constitutional patriotism. I will use this discussion to demonstrate how the liberal state constructs a vision of moral authority that is most similar to a discourse ethic.

\textsuperscript{148} Yael Tamir. \textit{Liberal Nationalism}. Princeton, NJ: Princeton University Press, 1993. Page 141. I would argue that there is another third problem for legitimacy, the problem of ‘invested’ participation. Members of a rule of law society must not merely debate the laws, but, also, once representatives determine what the law is to be, citizens agree to be bound by it. It seems at first that a state would only need to instill a fear of punishment in its citizenry to avoid widespread lawlessness, but I suggest that perhaps something more is required. Without this sense of investment or loyalty in the state, a society will not fulfill its crucial role of self-policing, which is part of what keeps individuals following the rule of law. That is, preventing lawlessness is not merely the work of the state; the people of a state also play a crucial role in making criminals fear repercussions. When citizens are invested in laws and will turn to the authorities those they see breaking them, societies will function far better than if the people and the state are antagonistic. This desire might stem from an interest in securing social cooperation through democratic institutions, or simply because expectations for a reasonably just state are fulfilled: in either case, this investment in the laws of the state are all centered around a procedural community based on consensus.
2.3.2 Participation: Liberal Nationalism

According to most theorists of nationalism, nations exist insofar as their members share a feeling of community. This feeling does not have to indicate real similarities among citizens; as Gellner points out, 'Nationalism is not the awakening of nations to self-consciousness: it invents nations where they do not exist'. Because nationalism is "primarily a political principle that holds that the political and the national unit should be congruent," it implicates the desire of individuals to be ruled by institutions that are meaningfully informed by their culture.

Ronald Dworkin is cited by Tamir to argue that deep and important obligations flow from identity and relatedness, which he calls associative relationships. Two conclusions can be drawn from view of political obligations as a type of association. The first and most important is that individuals assume obligations to a state not only because it is an effective mechanism of coordination and a protector of rights and interests but additionally because it serves as an object for their identification. Michael Sandel makes a similar point when he writes that “the liberal vision we have considered is not morally self-sufficient…we should expect to find that…political practice…must draw on a sense of community.”

149 Ibid 66
151 Ibid 1
153 Dworkin qtd. Tamir, Ibid 99
Liberal nationalism argues that social bonds create a nationalist feeling of membership around a civic political community. The concept of liberal nationalism thus recognizes liberalism’s commitment to personal autonomy and individual rights, as well as nationalist appreciation of the importance of membership in human communities.\textsuperscript{155} Thus, there are two aspects of membership – the formal inclusion of Citizen X as a member, and the internal sentiment that X feels she is a member.\textsuperscript{156}

Nevertheless, according to Rawls, citizens “may regard it as simply unthinkable to view themselves apart from certain religious, philosophical, or moral convictions, or from certain enduring attachments and loyalties.”\textsuperscript{157} Dworkin’s associative identifications are not just conducive to liberal nationalism; if the state issues laws and policies that its citizenry believe to be unjust, associative obligations to a minority group may persuade individuals to disobey the law. The “associative nature of political obligations does not imply unconditional obedience and loyalty, but rather suggests that feelings generated by membership play a central role in one’s decision making.”\textsuperscript{158} The individual becomes loyal because she or he sees in the law certain values and benefits to which they are attached. If the law does not confer values that the individual believes in, it is unlikely they will be invested in the state such that they would participate in debate or feel invested in following state laws.

2.3.3 Participation: Constitutional Patriotism

The liberal nationalism that Tamir writes of is not the only way in which one might reconcile the necessity of participation with a multiplicity of identities and

\textsuperscript{155} Ibid 35
\textsuperscript{156} Ibid 135
\textsuperscript{157} Ibid 19
\textsuperscript{158} Ibid 137
loyalties. The theory of constitutional patriotism, which was developed in large part by Habermas, is another. While liberal nationalists hold national identity as primary (indeed, it is a political morality based on fellow feeling), advocates of constitutional patriotism “aren’t really clear what comes first – attachment to universal values realized in a particular setting...or [a] particular polity, which as long as it meets these universal standards of liberal democracies should qualify for loyalty.” Nevertheless, the thrust of the theory, as Habermas writes of it, is a “conscious affirmation of political principles”.

Constitutional patriots take their onus from the complex division of different spheres of value in the modern world. To confront the multiplicity of views, individuals are expected to adopt as impartial a point of view as possible, and step back from their own desires and the conventional social expectations that confront them. Traditional and religious value are not prohibited, but are reinterpreted in light of universalist claims and perspectives expressed in constitutional procedures. Territorial sovereignty and monopoly of legitimate violence as justifications are replaced by an emphasis on the process of communication. In a system of constitutional patriotism, loyalty is given to states that fulfill the guidelines for a discourse ethic - qualities such as equality and freedom of conscience. This theory need not rely on an affective loyalty in the same manner as Tamir’s liberal

160 Ibid 12
161 Ibid 26
162 Ibid 27
163 Ibid 28
164 Ibid 31
nationalism. Rather, it may be seen as an alternate way to solve some of the problems inherent in the liberal state’s requirements for participation.

I have demonstrated that democratic states require participation for legitimacy\(^{165}\), and that the state needs its members to identify its laws as moral obligations, that is, as rules they are required to follow, or face punishment and censure. The conclusion that the state needs actors to identify laws as obligatory implies that the state constructs a certain picture of moral obligation, what it means to act morally in one’s role as a citizen. While his discussion of liberalism centers on Rawls, rather than Habermas, Michael Sandel also argues that liberal states construct a vision of morality through participation in their institutions. He writes, “practices and institutions are themselves embodiment of theory, and to unravel their predicament is…to seek after the self-image of the age.”\(^{166}\) That is, institutions describe more than “a set of regulative principles, [but] also a view about the way that the world is, and the way we move within it.”\(^{167}\) The organization of a state is also a claim about the way communities should act together, and its participants are thus moral actors. This claim is one that I will explore in the following sections, where I will argue that the liberal constructs (and requires) a discourse ethic moral authority.

\(^{165}\) As I referenced earlier, this is likely true of all states. Of course, not all systems of government need be equally desirous of legitimacy. Nevertheless, it does seem to me that autocratic states also construct a picture of moral authority – one in which the autocratic is the source of an absolute command morality. In much the same way as I will argue in the coming section that liberal democracies construct a discourse ethic authority, autocracies construct the opposite. It seems to me that autocracy and democracy are opposites in their placement of political power, and that they also construct opposing sources of moral authority.


\(^{167}\) Ibid 83
2.3.4 Habermas and Democratic Procedure

In applying discourse ethics to liberal democracies, Habermas writes that the principles of democracy create a “procedure of legitimate lawmaking, where statues meet with the assent of citizens in a discursive process of legislation that in turn has been legally constituted.” 168 Institutionally speaking, Habermas believes that discourse, encouraged by democratic procedures, represents the best means for retaining the moral element of law. And, in “Deliberative Politics: a Procedural Concept of Democracy” Habermas writes that the democratic process presumes that fair results are obtained if procedure has not been obstructed.169

Oftentimes, however, “legal validity supplants social validity, legal enactment replaces moral justification, and the political expectation of obedience to law takes precedence over the moral expectation of legal justification.”170 Consequently, he believes that there exists a desperate need for legitimate procedures, which for Habermas lies at the heart of moral reasoning.171 Habermas argues that laws aren’t considered normative in a legal sense until tested through discussion.172 His argument

170 Ibid 114
171 As Professor Peter Rutland suggests, Habermas’ concern with legitimacy likely comes from the lack of such legitimacy in the post-1945 West German state (and hence the fragility of their new constitutionalism). Thomas F. Murphy III “Discourse Ethics: Moral Theory or Political Ethic?” New German Critique, No. 62. Pages 117-118
states that discourse, democracy, and the rule of law are internally related. Modern legal norms “require outward compliance regardless of individual motivation, but should have a rational basis that make it possible for persons to accept them as legitimate.”

However, Habermas holds that legal and moral rules are “two different but…complementary kinds of action – a moral issue on one hand, or a democratic principle on the other.” The problems of justification and interpretation often overtax individuals, and so legislatures determines which norms count as law, and the courts settle contests of interpretation in a judicious and definitive manner. For the requirement of legitimacy to obtain, a state needs the actor to feel that democracy is legitimate, with the expectation that if they do so, they will also participate in it though discussion, employment, or other action that integrates them as a member of the community. I argue that the state seems to require a moral actor that obtains their obligations based on consensus created after discussion in the society, not one that necessarily identifies laws as moral truths; in other words, the procedural generation of law arising out of a discourse ethic authority. Habermas’ argument thus identifies the procedural morality that arises from a discourse ethic as that of the liberal state.

The separation between the authority of proceduralism and that of natural law is, as I have mentioned, not always a strict one. For example, a state may mandate a Bill of Rights, which states that its citizens have certain inalienable rights.

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174 Ibid xxv
175 Ibid 104 – 105
176 Ibid 115
Nevertheless, this Bill of Rights cannot require that its citizens believe that they and all others have these rights (although the US does have citizenship tests, which test individuals’ knowledge of what the state puts forth as moral).

In the same vein, liberal states are not always founded entirely on lay principles. Indeed, as I have mentioned at various points throughout this paper, the justification for certain laws in the modern nation state is not always faithful to the separation of church and state. In the United States, the quotation “One Nation Under God” in the pledge of allegiance or the clear influence of Judeo-Christian ideals in the laws are often cited as a religious influence in the political institutions of the state. I wish to briefly propose some further ways to think about this objection, with the understanding that I do not expect the state to accord to my division of moral authority in all ways.

Whatever the origins of laws may be, the democratic will is open to change and revision, although change is typically kept within the limits of maintaining democratic institutions. Indeed, many democracies have changed their stance on moral issues over time, and citizens in democracies have the understanding that this is possible and expected.\textsuperscript{177} Laws are obligatory because they are tested by the democratic will indirectly in courts and directly in elections. While some laws are justified in absolutist language (e.g. “we hold these truths to be self evident”), they are still institutionally codified.

\textsuperscript{177} Some states may drastically choose to curtail democratic institutions, such as the Weimar Republic in Germany, and even elect an autocrat (although Hitler’s dissolving of the Republic was not within the typical limits of democratic procedure).
Moreover, an important distinction in liberal democracies is their continued reliance on procedural morality and non-religious justifications. Religious arguments may be made, of course, if they are found convincing. That is, in a system of public practical reason, laws must be convincing to a rational audience. In liberal democracies, laws are typically justified as legitimate based on their ability to provide for the common good. Of course, it is over the particulars of the social good; and what it means to be good, that the very conflict of moral authority arises. Liberal democracies allow many conceptions of what it means to be moral; this paper is merely a limited investigation of conflict in these conceptions.

Nevertheless, this emphasis on procedure leads some to question the ability of discourse ethics to function as a moral theory for liberal democracies.178 Jean Cohen, in her article "Discourse Ethics and Civil Society," depicts discourse ethics as blurring the boundary between “public and legally binding norms and private moral concerns.”179 Cohen contends: “the extension of discourse ethics to the private-moral sphere…compromises the autonomy of participants.”180 However, Cohen overlooks a crucial point: Habermas does preserve a space for a private realm, but he designates this the evaluative (or ethical-political) realm, rather than the moral realm. Discourse ethics simply “distinguishes it from those questions which he feels are more deserving of the term moral”181 a claim which Cohen does not challenge. Whether or

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178 Ibid 165
179 Thomas F. Murphy III “Discourse Ethics: Moral Theory or Political Ethic?” *New German Critique*, No. 62. Page 118
180 Ibid 120
181 Ibid 121
not someone believes that abortion is morally wrong, such an issue is only legislated on if it is deemed critical enough to become part of the public agenda.

Furthermore, Murphy argues that discourse ethics cannot simply be refashioned as a political ethic, because Habermas’ strict delineation between the good and the just would remove most practical issues from the arena of debate; and secondly that debate, rather than consensus, is the proper activity of politics. However, he does recognize that Habermas might agree that the prospects for legitimate consensus are extremely slim and that his model is actually oriented to the production of compromises.\(^{182}\) That said, perhaps discourse ethics is best interpreted as a model for legal debate and regulation within liberal society.\(^{183}\)

Of course, Habermas is not the only theorist who has advanced proceduralist models in relation to the liberal democratic state. While he is the primary theorist that I use to outline discourse ethics, proceduralism has a rich body of supporting literature. Liberal texts such as Joseph Schumpeter’s *Capitalism, Socialism and Democracy* are prime examples of proceduralist philosophy, although Schumpeter’s version of proceduralism differs dramatically from that of Habermas. Schumpeter proposes that democracy “is just a method, neither valuable in itself nor necessitating right action or good ends.”\(^{184}\) Moreover, the will of the people, is not genuine, but

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\(^{182}\) Ibid 135


generated by the leader. Of course, there are responses to Schumpeter; Gerry Mackie writes that at minimum, the popular will is realized through retrospective voting.\textsuperscript{185}

Nevertheless, my point here is not to delve into the disagreement between Habermas’ theories and Shumpeter’s; rather, but rather to gesture at the robust literature surrounding proceduralist philosophy. Beyond the application of Habermas’ theory of discourse ethics, I wish to briefly explicate two further points that suggest a discourse ethic moral psychology. As I have previously argued, such a psychology is focused on the narrative explanations for moral action. The first is about judicial reasoning, and the second is about the recognition in liberal democratic states that humans make moral mistakes. After all, there are ways that the justice system in liberal democracies recognizes that actors have differing levels of culpability for their moral errors. Two examples the rights and privileges given to said actor, and the concept of mitigating factors in the determination of punishment.

2.3.5 Discourse Ethics in Practice

Some argue that this “notion of public reason lies at the heart of our notion of law.”\textsuperscript{186} Indeed, judges do not have moral authority merely by being (directly or indirectly) elected by the people. Because they must also engage in public deliberation to be legitimate, the source of public law’s moral content is equally based in deliberation as it is in representative election. Habermas describes democratic legitimacy in just such terms. Citizens may regard laws as legitimate insofar as the democratic process is presumed to create reasonable outcomes; a court that is

\textsuperscript{185} Ibid 3 - 4
empowered illiberally or decides without discussion would fail this litmus test. Democratic institutions, if properly designed and executed, are supposed to ensure that the law does not take this form but is subject to the deliberation of citizens, directly or indirectly, as moral judgment requires discussion and debate. Because debate is a necessary process of moral judgment, it seems reasonable to characterize civic justice systems as falling into the discussion model of moral authority.

Most justice systems in liberal democracies allow for the possibility of moral mistakes. One might see the rights and privileges granted to the defendant as evidence for my assertion that the moral actor in liberal states is a fallible one. These protections recognize that judges and juries are made up of fallible moral actors, and that protections should be built in to help them arrive at the best (‘most just’) decision. Again, the idea of fallibility in interpreting the law is clearly present; an idea which is implicated in the narrative school of moral understanding.

The concept of having mitigating factors in sentencing is another idea that points to a narrative understanding of moral psychology. Rather than assigning one ‘level’ of blameworthiness to all those who commit crimes, liberal democratic laws can have different ways of assigning blame, often based on the background or intentions of the actor. By recognizing that people commit crimes for a variety of reasons, courts can make the history of a criminal important. The reasons for bad action are important because in some way the state recognizes that people can disagree regarding the justice of laws or be to varying degrees at fault for their violation. In recognizing a plurality of beliefs, the state may choose to assign less blame or make exceptions for someone who breaks laws for reasons of familial love.
or religious ties. Moreover, the state recognizes that laws are not set in stone, an idea implicated by the aforementioned concept of a body of law that changes through interpretation.¹⁸⁷

2.3.6 Conflict of Moral Authority

Previously in this chapter I discussed the value states may place on pluralism. However, theories of pluralism are in conflict with the vision of a moral authority that I have just demonstrated that states implicitly employ. It appears that a state requires its citizens adhere to one vision of moral authority, while placing at least a political-philosophic value on the availability of the other. That is, liberal democracies require their citizens to be actors engaged in a procedural discourse ethic, while recognizing that these citizens may follow moral codes that come from absolute command authorities. At once these states recognize the legitimacy of holding religious beliefs, and thus also implicitly recognize that groups may be unable to act morally without certain practices. Nevertheless, if the practices that uphold these beliefs run contrary to democratic consensus, states may also ban them. When a liberal democratic state

¹⁸⁷ Thus, as long as we recognize the ability of humans to make mistakes, it seems reasonable to admit to the idea that different types of ‘mistakes” (e.g. wrong action) deserve different levels of censure, or varying degrees of absolute deviance from Proposition X. To explain further, we might see a positive law proposition X “thou shall do X”, directly opposed by opposition X-prime, the doing of the opposition of X, with knowledge of X. But we could also imagine action B, which is doing of X while in a state that does not admit to full knowledge and thus not full violation. For example, one might suggest that a contract signed while drunk does not have the force of will behind it, mitigating the application of proposition X, which is that contracts that are signed are valid. As jurisprudence increasingly looks to other fields - such as sociology and psychology - for input, increasing mitigations may be drawn from biographical experience in addition to the momentary facts. All these things are connected to the idea that a system of law that is mutable, fallible and discursive is essentially an actor that is constructed through narrative, and flows from a discourse ethic authority.
wants to outlaw some practice that is morally obligatory for a particular religion or culture, the two views of a moral authority conflict - one view that says “I have to do this or I will be a bad person”, and the other which says “consensus could legitimately tell you not to follow through with your beliefs. You must engage in public discussion/protest against them about your disbelief rather than breaking laws.”

In many liberal democracies, states will try to accommodate the conflicting moral dictates of their citizens through legal pluralism. Ideally, a system of legal pluralism would allow some people to be exempt from their obligations as actors in a procedural legal system in order to fulfill their obligations in a system of absolute command authority. I question, however, if legal pluralism has to have the potential to push so far that the coherence of the liberal state is brought into question, given its requirements for institutional participation.

The model of the liberal democratic state may seem to many to be ideal, but it is also facing increasing strain. The influx of immigrants (particularly to Western Europe) with radically different beliefs and traditions is creating increased conflict alongside the developing norm of inclusion and acceptance. Are contemporary liberal democracies able to have a dialogue about these issues, and how do they couch their appeals? I will move now to my case studies, where the angry reactions on both sides of these debates about legal pluralism seem to show that dialogue is flawed, at best. At worst, this conflict of moral authority is hinting at real cracks in the liberal system. Is there a resolution to be had?
III. Legal Pluralism in Practice

The main conflict I have discussed is one between the liberal nation and its minority groups, a conflict I have characterized as one of moral authorities. In Chapter One, I discussed two alternate sources of law, based on a division in moral authority between absolute commands and discourse ethics. I have suggested that this division is based on a difference in moral epistemology. I have used a Thomist natural law theory and a Habermasian proceduralism to typify the systems of law that the two moral authorities generate. I have inferred two alternate moral psychologies based on this division. In Chapter Two, I applied this argument to the liberal state. I argued that liberal nations have an investment in moral and cultural pluralism; a commitment with the potential for conflict with the moral commands generated by its structure and institutions. The moral authority of the liberal nation state I have argued is one of discourse ethics, instantiated in the procedures of the state. I argued that this moral authority is necessary due to the requirements of participation in liberal democracies, which I explored through the lens of liberal nationalism and constitutional patriotism.

Thus the liberal state constructs a vision of moral authority that has the potential for conflict with the moral authorities of minority groups living within that state. This conflict has both a philosophic dimension (that the liberal state requires adherence to its vision of moral authority, while allowing others) as well as a practical one. I will use the following section to investigate both dimensions of conflict. I will first discuss legal pluralism as a theoretical venture, setting out three
different types of accommodation between state and minority group. Each of the three types has a different relationship between eternal/natural and secular law. I will then use a series of test cases for each of the three systems, to investigate how my theory is carried out in practice. Are some types of accommodation more problematic than others? If so, are they only problematic theoretically, or do these philosophic difficulties create practical problems for the liberal nation?

3.1 Legal Pluralism

3.1.1 Introduction to Legal Pluralism

In a broad sense, any country with a multiplicity of judicial systems can be said to be engaging in legal pluralism. Anderson states: "In its simplest form, legal pluralism posits that more than one legal order inhabits the same physical territory". As stated previously, the origins of legal pluralism are found at least as far back as the Ottoman and Roman empires. The Holy Roman Empire also allowed religious courts to operate simultaneously with secular ones, as did the Victorian empire over the Maori and Indian peoples. Often a divided system will come about through a particular colonial heritage – such as the Aboriginals of Australia. In the modern context, legal pluralism has been common as a form of minority accommodation, particularly of religious customs in liberal democracies.

Legal pluralism is often concerned with the intersection between official and unofficial law, often referred to as state law and folk law. John Griffiths defines state law as “an exclusive, systematic and unified hierarchical ordering of normative

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propositions, which can be looked at either from the top downwards as depending on a sovereign command or from the bottom upwards as creating obligations.”\(^{189}\) Folk laws, conversely, is often not systematic or unified; but are rather legal systems that are popular or customary in nature; their normative propositions are typically not derived from either state or (indirectly) the people, but rather from some combination of tradition, religion, or non-sanctioned justice. Such systems often coexist with, or contradict, state or official law. In Holland and Great Britain, for example, some non-Western family law is accepted under certain conditions as of equal status with their own laws.\(^{190}\) This raises an important question for the investigation of pluralistic legal systems: how does the legal system under investigation recognize the minority law? To what guidelines or restrictions is the minority laws subject?\(^{191}\)

However, the literature on legal pluralism has been expanding. As the study of legal pluralism develops, the designation of folk law has been usefully split into customary law (based on the traditions of a local community) and religious law (based on the postulates of a religious text). Of course, some cases may blur the line between religious or customary law; for example, the command for some Native Americans to use peyote may be rooted in local custom, but despite non-codification it is practiced for its religious importance.

The University of Ottawa, one of the premier institutions for the study of legal pluralism, denotes six world legal systems; two secular (civil law, common law), two

\(^{189}\) Ibid 11

\(^{190}\) Though in regard to particular institutions like polygamy difficulties still exist. RD Kollewijn. “Conflicts of Western and Non-Western Law.” *Folk Law.* Ed. Renteln and Dundes. USA: University of Wisconsin Press, 1994. Page 792

\(^{191}\) Ibid 776
religious, (Muslim law, Talmudic law), one ‘folk’ (customary law) and, finally, mixed law systems, which refer to some combination of the above. There are many combinations for mixed systems; for example, one might have a state that follows Muslim law, but where customary law is still practiced, such as Sudan or Oman. One might also have a combination of common law and customary law, such as Nepal or Myanmar. However, the mixed systems that I am concerned with are those that combine a secular state (civil or common law) with sanctioned religious courts (Talmudic, Muslim, or customary law).

Theorists of pluralism often argue that group-differentiated rights can be exercised by individuals, which would allieviate much of the liberal fear of group repression. The model of poly-ethnicity in Canada, Australia and the US supports the ability of immigrants to choose whether they wish to maintain their ethnic identity. Typically, there is no suggestion that ethnic groups should have any ability to regulate individuals’ freedom to accept or reject that identity. However, in some cases a group will impose internal restrictions, which the state will allow, as in United States and Canadian exemptions of the particular religious communities laws regarding mandatory education. For reasons I will discuss, the model of national minorities is


I feel it’s important to note that I am only looking at states where pluralism is codified by the state. In weak or failing states, legal pluralism is often practiced without the knowledge or sanction of the state.

Ibid 45
Ibid 37 – 38
Ibid 41
Ibid 41
someone different, in that they often occupy a different moral standing from the rest of a citizenry.

Internal restrictions are often defended as unavoidable by-products of external protection of a group culture, rather than desirable in themselves.\textsuperscript{198} Does allowing choice for minorities become problematic for their inclusion in a civic culture? How have states’ thought about these issues, and do these sentiments change over time, or with reference to particular minorities? Finally, is there evidence of a fundamental conflict in the way that groups and states think about their moral obligations?

\subsection*{3.1.2 Three Models of Minority Rights}

I see three main ways in which a secular, liberal-democratic state can choose to accommodate a religious minority law. These classifications generally follow Kymlicka’s disambiguation discussed in Chapter Two, of self government rights (forms of federalism), poly-ethnic rights (legal protection for certain practices), and special representation rights (guaranteed seats for minorities within a larger state).\textsuperscript{199}

The first way is through an exemption model, which I can one of ‘separate communities.’ The state can set aside a judicial space for a religious group by allowing a particular subgroup to have its own laws over a particular territory or to have special rights in the state legal system. I have grouped Kymlicka’s self government rights and poly-ethnic rights together is that both are part of an ‘exemption model’, where an area or a person is intentionally exempt for the laws of the state and are free to practice a different type of moral code.

\textsuperscript{198} Ibid 44
The second major way I envision legal pluralism is through partial accommodation, where the secular judicial system can allow an “opt out” for willing participants. Unlike the exemption model, which gives certain people a separate moral status, partial accommodation allows all civilians the option for pluralism. In a way, however, this method might also be classified under Kymlicka’s poly-ethnic rights model. I see this model exemplified in a sort of ‘accommodated arbitration.’ If both parties agree, states may allow parties to a (typically civil) suit to have their dispute settled by a non-state arbitrator, such as a religious authority.200

Finally, the state can simply allow separate legal standards for its citizens, where individuals are held to different legal codes depending on what group they are a part of. These are special representation rights, although not precisely the way that Kymlicka imagines them. However, they do grant minorities an entirely separate status within the legal umbrella of the state. Rather than an exception or an opt-out, this third way delineates (at least) two equally privileged, competing systems both under the onus of the state.

What follows is an investigation of each of my three types of legal pluralism in reference to a case study. In these discussions I will include some reference to the way the state has chosen to deal with the problems of pluralism and moral authority. After each case I will discuss how the model of accommodation fits into my theoretical paradigm of the differing sources of moral authority and their instantiations in systems of law.

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200 I am using the term arbitration in the binding or legal sense.
3.1.3 Choosing Case Studies

I chose my case studies for a number of reasons. The first, and perhaps least important, was familiarity. Having lived in the United States, and being fluent in English, it was far easier to examine predominately English speaking nations with Anglo-Saxon legal traditions. This bias, while random, did seem likely to produce better material than explorations into systems I was utterly unfamiliar with. On a more general note, my case studies were chosen because they have fairly established histories (with the possible exception of India).

Furthermore, they share at least a broad similarity in legal traditions: they are all common law countries (with exceptions including some Indian civil law, the US state of Louisiana, and the Canadian province of Quebec). Moreover, all the states incorporated into my case studies (the US, Canada, Australia, the Britain and India) were all at one point or another part of the United Kingdom/British Empire, and are thus tied together by more than their reliance on common law.

Finally, these case studies are facing some similar issues, and thus are amenable to transnational comparisons; both Australia and the U.S. (and Canada as well, particularly recently)\textsuperscript{201} face the problem of accommodating indigenous peoples. Furthermore, Australia, Britain, the U.S. and Canada are all currently confronting (although to different degrees of urgency) a growing issue of Muslim immigrants who seek some particular legal accommodations.

3.2 Case Studies

3.2.1 Separate Communities: Native Americans

For my study of separated communities, I will be using indigenous populations in Australia and the United States. In both countries, states have created pluralistic systems in which the indigenous populations have been given differential recognition. American Indian reservations are areas established by treaty, statute, executive or court order. There also exist Tribal jurisdiction statistical areas (TJSAs) where federally recognized tribes no longer have a reservation but over which a tribal government has jurisdiction. On reservations, the Assimilative Crimes Act makes violations of state criminal law a federal offense. However, barring Congressional action, only federal and tribal laws apply to members on the reservation. Many tribes have tribal court systems for those convicted of certain offenses within the boundaries of the reservation, setting up a pluralistic system.

Indeed, tribal councils in the US have historically been exempted some constitutional requirements, including, occasionally, respect for the Bill of Rights. Under the 1968 Indian Civil Rights Act, tribal governments required to respect most but not all of these rights. Moreover, there are limits to the judicial review of tribal councils, as only under extreme circumstances can claimants seek redress from the Supreme Court. On this point, many tribal councils argue that they need protections

on issues such as land and group representation, and that the Supreme Court is likely
to interpret certain rights in culturally biased ways.\textsuperscript{205}

Kymlicka writes that most Indian tribes do not oppose external review, and
have expressed a willingness to answer to international tribunals for complaints of
eights violations. What they wish to avoid, Kymlicka goes on, is being subject to the
stitution of conquerors, and specifically answerable to courts of non-Indian judges.
Indeed, Kymlicia argues that “many national minorities would accept a system of
review by international courts if it skipped domestic courts,”\textsuperscript{206} giving the example of
multilateral human rights commissions.\textsuperscript{207}

As U.S. citizens, when not on reservations, Native Americans are subject to
ederal, state, and local laws, which some exceptions made by the American Indian
igious Freedom Act of 1978.\textsuperscript{208} Four areas of religious protection are outlined
nder the AIRFA:\textsuperscript{209}:

1) to cultural and religious sites
2) to the ceremonial use of peyote
3) to practice ceremonies and wear long hair when serving a sentence in federal
enitentiaries
4) to the ceremonial use of eagle feathers and other animals parts or plants.

Page 38 – 39
\textsuperscript{206} Ibid 169
\textsuperscript{207} Ibid 169
\textsuperscript{208} The Supreme Court developed a three-part test to evaluate the limits that the state
The test states that claims of religious exemption must prove that:
1) The claim is religious and that the practice at issue is central to that religion
2) The state limitation is burdensome to the religious practice
3) There is some compelling interest that merits the state's burden on the practice
Susan S. Gooding. “At the Boundaries of Religious Identity: Native American
eligious and American Legal Culture.” \textit{Numen} Vol. 43, No. 2 Pages 166-167
\textsuperscript{209} Ibid 165 - 166
Susan Staiger Gooding writes that “each of these rights exceed the boundaries of Native American sovereignty and identity understood territorially.” Thus, while reservations may be seen as a “state within a state”, Native Americans are also legally pluralistic through exemptions built into the legal system, in addition to a community separate from it. Nevertheless, in *Lyng* (1988) the Supreme Court upheld the right of the US Forest Service to complete construction of a project despite its acknowledged effects on American Indian sacred sites. It would seem, then, that AIRFA ultimately protects Native Americans only from punishment for violations of their cultural or religious beliefs, and does not necessarily place burdens on the state to facilitate their practice. This point is important as it relates to different moral systems. Just because a ‘separate communities’ model acknowledges differing moral standings for groups based on past treaties, this does not mean that the state must promulgate the minority system at the expense of its own interests.

This point is made particularly clearly by the case of The Religious Freedom Restoration Act, which states that in the US federal government ought not to restrict religious activities except to meet a compelling interest. That is, the government should be limited until the practice of religious freedom interferes with its ability to function.  Because the functioning of a state involves propagating its moral authority (as I have discussed in Chapter Two), there is a clear hierarchy in the prioritization of norms. This hierarchy will be explored in greater detail in my theoretical discussions and conclusion.

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210 Ibid 171
3.2.2. Separate Communities: Australia’s Aboriginals

Australia’s 'Mabo' decision, on the other hand, recognized elements of traditional Aboriginal criminal law, setting up a form of parallel sentencing. On December 8, 1988, the High Court of Australia determined in *Mabo v. Queensland* that the Queensland Coast Islands Declaratory Act, which attempted to abolish native title rights, violated the Racial Discrimination Act 1975. The decision upheld the claim that Aboriginal and Torres Strait Islander peoples occupied Australia (and had their own laws and customs) before Western discovery and settlement. The indigenous people’s 'native title' to land survived annexation by the British Crown, and thus some of their laws became a legitimate part of Australian common law.\(^{212}\)

The content of native title is determined according to the traditional laws of the titleholders. Depending on the context of the traditional law, native title may be possessed by communities, groups, or individuals.\(^{213}\) Native title is a legal right, and will be extinguished where the traditional titleholders lose their connection with the land.\(^{214}\) In other words, Australia’s common law recognizes Aboriginal practices as an alternative source of law.\(^{215}\) Australia, then, seems to also fall into a “separate communities” model,\(^{216}\) with rights are tied to a particular territory. Ownership of this territory confers a special moral standing on Aboriginals that allows them to construct a separate legal system from that of the Australian state. In the following section, I


\(^{213}\) Furthermore, it is inalienable (that is, it cannot be transferred) other than by surrender to the Crown or pursuant to traditional laws and customs. Ibid

\(^{214}\) Ibid


\(^{216}\) Although the timelines for recognition of territorial sovereignty are quite different.
will discuss the implications of these case studies on my theoretical discussion. What seems to be the justification for the accommodation? What are the implications for state constituents, and the legitimacy of state laws?

3.2.3  *Theoretical Examination: Separate Communities*

The “separate communities” model delineates a specific relationship between the community and the state. Through recognition of the different moral status of a particular community, the state acknowledges a) the legitimacy of different legal system for said minority, and/or b) exemptions from the laws of the state. The state has determined that due to a particular history, a minority community ought to have differential rights than the majority of citizens.

Indeed, a feeling that a particular community is justifiably separate, or has had a separate history that deserves special protections may often play a role in the sentiments of a citizenry or a state governing body. One may look to the recent trend of political apologies on behalf of states towards their indigenous communities for evidence of this separation. In February of 2008, Australia’s Prime Minister Kevin Rudd apologized to all Aboriginals for previous Australian laws that "inflicted profound grief, suffering and loss." 217 February 2008 also saw the passage of the Indian Health Care Bill in the United States, which contained an amendment that offered an official apology from the federal government of the United States to Native Americans. As Senator Brownback said, in support of the Bill, “Hopefully, this apology will help restore the relationship between the United States and Native Americans."

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However, the very fact that a state is speaking as itself in relation to a separate group demonstrates the philosophical separation between the state and the minority community. As states are typically identified as their citizens, this separate address seems to indicate something fundamentally different about the status of these separate communities.

Due to this different moral status, differential rights the state can create a separate community where the rights of the minority are preeminent, such as Native American reservations or the areas ruled by Native Title in Australia. The separate communities’ model may also allow for exemptions from the laws of the State. As seen in the AIRFA, a minority might, under certain cases of legal pluralism, be allowed to follow local norms in direct contradiction to the laws of the Federal government.

What are the implications for this model on the division of moral authority? In both the separate communities and exemption model, actors who derive their moral codes from areas other than the state are non-problematic, as the state deliberately recognizes the ‘differentness’ of the actor’s moral status in such a system. Thus, even if the laws of the minority group are in conflict with those of the state, there need be nothing arbitrary or illegitimate in allowing exceptions. While the minority’s loyalty to the authority of its own laws may be stronger than its loyalty to the state law, the state recognizes this competing loyalty as justified. That is, the state does not expect
participation and adherence to the law from the particular minority group in the way it might of its general citizenry.

It is important to recognize, however, that there are not two equally privileged laws at stake. The state allows the separate community to operate by virtue of the State laws. In such cases, the highest court (the High Court of Australia or the US Supreme Court) has determined the way in which the separate community can operate and the limits of the exemption from state laws. Rather than an alien community within its borders, the separate community is still in some sense within the jurisdiction of the state code for both civil and criminal law. Conversely, with two equally privileged legal standards, there is no means by which one standard might judge another. There is a real philosophic difference between the state recognizing that Native Americans have a different legal code – and continue to have a right to such based on treaties – and a state having no determining principle for one legal code in relation to another.

3.2.4 Accommodated Arbitration: Sharia in the Common Law

Many countries in the Middle East and North Africa maintain a dual system of secular courts and religious courts, in which the religious courts mainly regulate marriage and inheritance. However, some commentators (including the European Court of Human Rights) consider the punishments prescribed by Sharia as cruel – at times, the sentence carried out may seem to deviate significantly from established standards of international human rights. Even civil law can seem problematic. Islamic divorce laws, for example, have been criticized for the differential ease of divorce between the sexes.
Nevertheless, in a variety of Western secular states, there have been calls to incorporate different types of Islamic law into the state legal system. As is the case with some other religious courts – exemplified by the Beth Din court of England – it is sometimes the option of people in liberal states to take civil claims (such as divorce proceedings) to a religious council or court. If both parties agree to a binding arbitration, it may be possible to “opt in” to another type of court. Different liberal democracies have taken different approaches to this type of accommodated arbitration.

I will further examine the way that Sharia has been treated in Australia, Canada and the England. These cases were chosen because of the similar challenges they face with regards to a recent influx of Muslim immigrants. Nevertheless, they have taken different approaches to the problems of pluralism. It is these differences that will exemplify the variety of paths liberal-democratic states have taken in the establishment of moral authority.

3.2.5 Accommodated Arbitration: Australia

In April 2005, Muslim leaders in Perth planned to set up a special court under Sharia law to settle in divorce proceedings. The Islamic Council of Western Australia stated that because anyone whose was in a Muslim marriage had to go to an Islamic court to obtain a divorce, this burden necessitated a Sharia court in Australia. At the time, the Council emphasized that such a court would not be a replacement for the Australian legal system. When asked if the proposed Sharia court would be able to adjudicate on other aspects of Sharia law (besides divorce law), ICWA President Abdul Jalil Ahmad stated: “[O]nly in areas where we are legally allowed to

implement our Islamic teaching [would] we do [so]…it doesn't extend to…criminal law or something like that, because you have to follow the law of the land”.  

However, Peter Costello, Australia’s Treasurer (1996-2007) said that he was against a “mushy multiculturalism” in reaction to calls for minority legal accommodations.  

Costello defined mushy multiculturalism as “the kind of multiculturalism that says it is important for migrants coming to Australia to retain the love of the country of their origin and their culture…but…makes no demand on such people to show a similar loyalty or a higher loyalty…to Australia.” Rather, the Treasurer explicitly stated, “Australia asks of its citizens first of all loyalty to this country. We ask them to pledge their loyalty to this country and we expect that …they will give it.” When asked specifically asked about the push for Sharia courts as a method to solve domestic disputes within Muslim families, Costello stated: “there is no second source of law in Australia. The source available is the law that is made by Parliament which are elected under our democracy…you don’t have the Australian law run to one extent and then the Sharia law…supplant or rival it”.

While the views of the Australia government are certainly not unitary, Costello’s comments demonstrate the national flavor of moral authority – different states have different rhetoric that they employ to establish their authority, which may be changeable depending on the political climate the state is trying to foster. There is nothing inherent to a common law system that makes it inimical to accommodated.

\[\text{\textsuperscript{220} Ibid} \]
\[\text{\textsuperscript{221} Peter Costello. Interview by Paul Murray. } \textit{Interview with Paul Murray}. \textbf{Australian Treasury} 24 February 2006 \texttt{www.treasurer.gov.au/tsr/content/transcripts/2006/017} \]
\[\text{\textsuperscript{222} Ibid} \]
\[\text{\textsuperscript{223} Ibid} \]
\[\text{\textsuperscript{224} Ibid} \]
Sharia courts, but, in the Australian case, the state has determined it to be critically damaging to a creation of a certain type of sentiment towards the state. While such sentiments may be based in liberal nationalist rather than constitutional patriot approach to participation and loyalty, I do not see such rhetoric as necessarily inimical to a Habermasian debate. Nevertheless, the conservative reaction exemplified by Costello is particularly interesting in light of Australia’s acceptance of Native Title rights in the separate communities model. Clearly Australia is not totally against legal pluralism. Rather, a particular type of moral standing appears to be required in order to qualify for an alternative justice.

3.2.6 Accommodated Arbitration: Canada

Canada is another illuminating example of the way different states have approached the issue of legal accommodations. Canada, sometimes seen as a paragon of multiculturalism, rejected a proposal for a Sharia arbitration court to be established in Ontario. That province's 1991 Ontario Arbitration Act allowed disputes to be settled in alternative courts to avoid congestion and delays in the normal judicial process. Christian and Jewish courts had been carrying out binding arbitrations in family matters without public controversy since the statute’s enactment. However, on September 11, 2005, the premier of Ontario, Dalton McGuinty, declared an end to the religious arbitration of family law matters.

McGuinty’s announcement was in reaction to a recommendation by attorney general Marion Boyd to allow Muslims to establish Sharia-based tribunals similar to

Jewish and Catholic arbitration bodies.\textsuperscript{227} The issue had been debated heatedly. The Muslim Canadian Congress, a prominent Muslim organization in Canada, protested the recommendation and urged the Ontario government to reject the tribunals, describing Sharia as un-codified, racist, and unconstitutional. In turn, the Canadian Council of Muslim Women argued that there is no such thing as purely voluntary arbitration. Of course, these groups are both large organizations that advocate for the awareness of and appreciation for minority group culture – in this case, Muslims.

While arguments were made on both sides\textsuperscript{228}, McGuinty’s action demonstrates an important principle in the creation of moral authority in a discourse ethic: pluralisms are changeable. States may determine it is in their interest at some points to allow pluralistic systems, and reverse this decision as future events unfold. Unlike a system of natural law, where laws are infallible (although open to interpretation), in a system in which morality is embedded into procedure, the legal outcomes can change as the procedures do.

3.2.7 Accommodated Arbitration: United Kingdom

Nevertheless, if Sharia is being rejected in Australia and Canada, the UK presents a different picture. While Sharia has no binding status in Britain,\textsuperscript{229} institutions such as the Islamic Sharia Council establish Mosques, schools, and universities to prevent young members from being swallowed by the non-Islamic

\textsuperscript{229} Joshua Rozenberg. “Sharia law is spreading as authority wanes.” \textit{The Telegraph}. 30 November, 2006 http://freerepublic.com/focus/f-news/1745531/posts
The main activities of these Sharia councils are the giving of religious advice and the dissolution of Muslim marriages. One Sharia council, the Mahkamah Council of Jurists, also settles civil law disputes on matters such as contract and negligence. Court decisions are recognized as enforceable in British law as long as they are reasonable, which is the same standard to which the Jewish courts in Britain (Beth Din) and to other courts of arbitration are held.

In February 2008, the Archbishop of Canterbury created a storm of controversy when he stated that the adoption of some parts of Sharia into Britain’s legal code "seems unavoidable." This statement carries particular importance because of the Archbishops’ position as the symbolic head of the global Anglican community. Initially, the archbishop's statements seemed to suggest to some that Muslims should be able to opt out of significant portions of the common law for separate arbitration in Islamic religious courts – that there would be one law for Muslims and another for everybody else.231

While the Archbishop was referring only to the use of Sharia to resolve marital disputes (which, as I mentioned, has occurred informally), this step is still controversial, as many believe that Sharia family law is among the least modernized.232 As in other states, there is also the fear that women could be pressured into using the courts.233

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233 Ibid
Indeed, popular opinion is often biased. Some in Britain see Sharia law as different from other religious laws, even when only applied to civil law. However, this view may not be entirely accurate. In "Crimes of the Community: Honour-Based Violence in the UK," written by James Brandon and Salam Hafez, women of similar organizations, such as Orthodox Jewish courts or councils for British Sikhs tell comparable stories of the difficulties of divorce in these courts.234

Yet in Britain there are many situations where equality before the law no longer exists.235 Examples are not hard to find. Thirty years ago, the British parliament gave Sikhs the right to wear turbans rather than helmets when riding motorbikes. Indeed, Britain recognizes Islamic marriages and divorces conducted out of the country.236 There are an estimated thirty Sharia unofficial civil courts in Britain.237 Moreover, the Jewish Beth Din court has been respected by many, and, as a possible Sharia court would, operates within British law and never seeks to supersede it, and deals only with civil disputes.238

Nevertheless, some in Britain believe that the Archbishop, in bringing up the idea of communities “sharing the same space but leading separate lives…fractures any conception of a common good binding all citizens.”239 This kind of thinking is

236 Ibid
that which prompted Gordon Brown's official spokesman to quickly respond with rhetoric about British law based on British values.\textsuperscript{240}

As Reverend Martin Reynolds said, “From the reactions to Rowan's speech it is clear everybody has been waiting to talk about this.”\textsuperscript{241} It seems the language employed even in a Habermasian procedural discourse ethic has the tendency to become non-rational in highly charged situations. For, with highly charged situations comes the tendency to extremes in public discourse;\textsuperscript{242} “ever since the 7 July bombings, I feel there has been a new culture in this country, which fears Islam,” said one Muslim respondent.\textsuperscript{243} Some fear the archbishop’s statements will create community tensions. 'I think the speech will have an impact on social cohesion,' said Dr Irfan al Alawi, International Director Centre for Islamic Pluralism.\textsuperscript{244}

The case study of Britain brings up an interesting point about the robustness of a democratic will to allow pluralism. It appears possible that the consensus decision made in liberal democracies will often create philosophic contradictions – such as allowing rights for some minorities but not others, even if both presumably have equal moral standing. I posit that the existence of this form of differential rights is particularly in times of highly emotional political discourse, such as that following the July 7, 2005 attacks in Britain.

\textsuperscript{240} Ibid
\textsuperscript{242} Ibid
\textsuperscript{243} Ibid
\textsuperscript{244} Ibid
3.2.8 Theoretical Examination: Accommodated Arbitration

Clearly, different states have different attitudes towards systems of accommodated arbitration. To varying degrees they will decide how important loyalty to a legal system is – and, particularly in Australia – make unitary loyalty an important qualification for citizenship. On an analytic level, accommodated arbitration as a pluralistic strategy works somewhat differently from the separate communities model. The way that the different moral authorities interact is not necessarily in contradiction; state law may be different, but not contradictory, with the laws of the religious-cultural group. The state allows parties to ‘opt out’ to a different legal system (under a different moral authority), under the oversight of the state. There is thus a clear normative order: the state law is preeminent because it has oversight, and the obligations of the minority group are subservient. Minority group arbitration may be disallowed or reviewed if courts see it as somehow unlikely to produce just outcomes, where the concept of justice is within the definitional purview of the state.

3.2.9 Robust Pluralism: Family Law in India

Indian family law [I will largely hereafter refer to family law merely as ‘law’] is complex, with each religion having its own specific laws.\(^{245}\) The exception to this rule is the state of Goa, where a uniform civil code is in place. Typically, Hindus, Sikhs, Jains and Buddhists come under Hindu law, whereas Muslims and Christians

have their own laws.\textsuperscript{246} The laws of all communities are determined by acts of Parliament, the exception is Muslim law, which is based on the Shariat.\textsuperscript{247} Many problems remain between the stated goals of the Indian constitution and the existence and enforcement of different religious codes.\textsuperscript{248} This state of affairs is particularly clear in the controversial Shah Bano judgment, which I will use to exemplify many of the critiques of the Indian system.

Shah Bano was a deserted first wife in her sixties, divorced two years later by her husband after many decades of marriage. She filed a complaint regarding the amount of her alimony in the district court, which increased her awarded amount. Her husband appealed, arguing that according to Muslim Personal Law Shah Bano was entitled to maintenance only for the period of Iddat, that is, for three months following divorce. The Supreme Court dismissed the husband’s appeal, and upheld the High Court’s judgment that the Code of Criminal Procedure (CPC) was applicable where Personal Law failed to make adequate provisions, and, in this case, the governing Personal Law had failed to provide the appropriate redress.\textsuperscript{249} In the absence of a governing common civil code for all citizens, the court was required to use statutory criminal code in its decision to increase Shah Bano’s alimony.

The ensuing deliberations of the Supreme Court are part of the on-going debate about the status of Personal Law. A change of this kind is always troublesome (as was the case with criminal codification of sati), as the affected community can

\textsuperscript{246} Bilimoria, Dr. Purushottam “Muslim Personal Law in India” \textit{Emory Law School} Accessed 18 March 2008 www.law.emory.edu/ifl/cases/India.htm
\textsuperscript{247} Ibid
\textsuperscript{248} “Some argue that the debate over Personal Law has become almost exclusively a debate about Islamic Family Law.” Ibid
\textsuperscript{249} Ibid
always retaliate that the sanctioned or protected customary law should classify these practices as religious and necessary. However, rather than attempting to criminalize an aspect of family law, the courts merely wished to recognize a trope as not being consistent with current circumstances.\textsuperscript{250}

In the case, the Supreme Court interpreted Muslim Personal Law to mean that the position (of three months alimony) would apply only if the estranged wife was able to maintain herself. However, the judgment also argued that in cases where the divorced wife is destitute, her claim to maintenance is a moral claim and not a religious one. The court was not arguing for abolishing Personal Law with regards to family and private space; rather, the court was arguing for an interpretation of a customary practice which would be consistent with current ethical and moral thinking, and would respect the rights enshrined in the Constitution.\textsuperscript{251}

As a moral claim, the defendant’s welfare would be governed by the Code of Criminal Procedure (CPC), and not by the civil laws of the Hindu Adoption and Maintenance Act, the Shariat Act 1937 (which institutionalized Muslim personal law) or the Parsi Marriage and Divorce Act 1936.\textsuperscript{252} The judgment argued that the neglect of a spouse's need cannot be denied in law, and religious affiliation should not be a reason to outweigh the rights of citizens.\textsuperscript{253}

There are two important consequences that I wish to draw from this example. Particularly interesting in this decision was that the judiciary felt it legitimate to extend its deliberations to the scriptural sources of Muslim Personal Law, including

\textsuperscript{250} Ibid
\textsuperscript{251} Ibid
\textsuperscript{252} Ibid
\textsuperscript{253} Ibid
the Hanafi, Shariat Act of 1937, Hadith, and the Qur'an, with regards to the different circumstances in which dissolution had been recognized. Thus, just as judges in some other liberal democratic courts are obliged to "interpret" the Constitution (although some U.S. jurists reject judicial intervention), Indian judges felt themselves able to interpret religious law.\textsuperscript{254}

The second note was the case’s divisiveness.\textsuperscript{255} Many Muslims saw themselves under attack, believing their laws to be an essential part of their culture. Attempts to dismantle the Personal Law, Muslims feared, would destroy their culture. However, non-Muslims claimed that Muslims must reform their Personal Law, and the case also created popular support for a uniform civil code. Proponents of the Uniform Civil Code argue on two lines – first, that the constitution is ambiguous about the nature of religious personal laws (indicated by the fact that arguments for and against reform are both based in Constitutional text). Second, the constitution does not resolve the difficult questions about whether the secular state can interfere in religious law or whether the personal nature of these laws (as distinct from territorial laws) ought make them immune to State review.

However, Congress responded to this ruling by passing Muslim Women (Protection of Rights on Divorce) Act, 1986. The Act essentially vitiated the Shah Bano judgment, by giving a Muslim woman the right to maintenance for the period of Iddat after the divorce, after which time she became the responsibility of relatives. The Act was seen as discriminatory, as women of other faiths still had the right to

\textsuperscript{254} Ibid
\textsuperscript{255} It is still seen as a turning point in the question of Muslim Personal Law in India, for it proved that despite the high courts call for equality, the legislature would do everything in its power to preserve Personal Law. (Ibid)
maintenance under secular law. Judges in some Indian states have been fairly activist in interpreting the meaning of ‘maintenance’ in Iddat, often giving a large lump sum to divorcees. This activism may be seen in the broader context of nationalist mobilization in India during the 1990s.

3.2.10 Theoretical Explanation: Robust Pluralism

The Shah Bano case has interesting theoretical consequences. First, it seems problematic that state (and, presumably, secular) judges would be required to interpret religious law. However, when the civil law of a state is religious, this problem seems inevitable. There appears to be a contradiction inherent in the ability of a secular judge to adjudicate religious disputes using a religious text. Because these texts use natural (or eternal) law, it seems reasonable that they would formulate a different picture of how laws ought to be interpreted, given their epistemological status and the type of moral authority from which they stem.

The divisiveness of this case demonstrates another important issue. Popular problems with Personal Law point to its ambiguity, and the resulting arbitrariness of decisions and judicial interference. These seem to be problems of fairness, which in turn implication problems of legitimate authority. If citizens see state laws as illegitimate, and immune to the types of review detailed in public practical reason, then the goals of the liberal nation are thwarted. Furthermore, the extremely divisive nature of the issue of how Personal Law should be interpreted (or if religious personal law ought to be permitted) hint at differing moral psychologies; one that judges what

widows deserve based on the facts of a case and on their present situation, and the other that judges based on a less circumstantial interpretation of religious law.

Fundamentally, a perfect case of robust legal pluralism would allow participants to choose either of two equally sanctioned courts, neither of which had oversight over the other. There is then no sense of ‘sameness’ or equality between citizens, because the differing visions of moral authority make it impossible to adjudicate disputes when neither civil nor religious court is morally prioritized, as when a secular court is forced to adjudicate disputes over religious texts.

It seems clear that the various forms of legal pluralism have very different implications. The methods of separate communities, accommodated arbitration and robust pluralism create different tensions for the nations that employ them. What, then, can one say in conclusion about the project of this paper, and about the resolution of the tension created by multiple moral authorities in pluralist democracies?
Conclusion

4.1 Hierarchical Moral Authority

In the first chapter I delineated two sources of moral authority, and several systems of law that are characteristic of each form of authority. The first source I described was one based on absolute commands, which are infallible and universally intelligible. I used Thomist natural and eternal law as paradigmatic of this type of moral authority. The second type of moral authority I discussed was a discourse ethic, instantiated in Habermasian proceduralism. I further suggested that each source of law and moral authority gives rise to different moral psychologies.

In the second chapter, I explored some of the requirements and interests of a liberal democratic state, including the interest in moral and cultural pluralism, and the requirement of participation. I suggested that to generate participation, states may turn to an affect-based liberal nationalism, but they may also invoke Habermas’ constitutional patriotism. Nevertheless, from the requirement of participation, I argued that liberal democracies construct a picture of moral authority similar to Habermas’ discourse ethic. Thus liberal states contain a contradiction in their commitment to pluralism and their construction of a particular picture of moral authority. It is this contradiction that legal pluralism is invoked to solve.

In the third chapter I laid out three forms of legal pluralism. The first form sets up a separate legal community through a form of partial sovereignty over a territorial jurisdiction, or through exemptions to state laws. This form is not incompatible with
the moral authority constructed by the liberal nation-state, because the state recognizes the moral claims of a particular group as legitimately different, typically based on the status of the minority group as (in Kymlicka’s terms) a national minority, such as the indigenous people’s of Australia and the United States. In such cases, there are ways to institutionalize pluralism that do not appear philosophically contradictory or practically difficult. If the state sets up a separate community or makes specific exceptions based on the separate moral status of a group, then the state retains the power of moral decision making, and legal pluralism remains just another facet of the plurality of beliefs in liberal states.

The second form of legal pluralism that I discuss is accommodated arbitration. In systems of accommodated arbitration, parties can choose to use legally binding agreements to opt into an alternate judicial proceeding. However, in the instances discussed, the state still retains oversight (and the ability to declare void) the decisions of these separate courts. Thus two systems of law based on opposing moral authorities can operate simultaneously without contradiction, because one form retains oversight over the other. That is, secular judges can use a secular standard to label particular outcomes unjust. In such a case one need not see the system’s moral outcomes as being contradictory and thus the system as a whole as unintelligible or illegitimate. Because decisions still pass the moral test of the state; decisions both follow the absolute command authority for participants, and discourse ethic authority based on the institutions of the state.

Furthermore, the case study used in the discussion of accommodated arbitration emphasizes the historical contingency of opportunities for legal pluralism.
Whether or not the discourse is a) completely rational or b) explicit (as Habermas might hope), the democratic will of liberal states may choose at some times to allow pluralist institutions for their minority populations, and not in others. My example of Sharia courts demonstrated that the move to pluralist institutions does not occur without reference to major global events and national sentiment. In a way one might see these feelings as part of the democratic will, but some of the more radical sentiments do not describe the ideal Habermasian discourse ethicist.

The third form of legal pluralism that is discussed is what I term robust pluralism. Robust pluralism places two systems of law (such as Hindu law and secular law) as equal; in such a case, one is subject to certain laws based on one’s identity. Philosophically, this case is the most problematic; it creates a structure where neither system of law (generated by opposing moral authorities) takes precedence, and the procedural instantiation of a discourse ethic has the potential for break down. In the case study, secular authorities judged religious law - perhaps arbitrarily – and congress essentially voided that decision. Resolution has proved more difficult when citizens who follow absolute command authorities are placed in direct conflict with those who follow a procedural ethic in the interpretation of law.

It seems, then, that legal pluralism becomes problematic when the moral authority generated by the liberal democratic state is held to be of equal moral status as the moral authority of the cultural-religious minority group. The conclusion to which this argument seems to lead is the necessity of a *hierarchical normative ordering* in plural societies; whether discourse or command is prioritized (in the case of liberal states, discourse), one form or other of moral authority must be seen as
(legitimately) preeminent. This normative ordering would resolve the fundamental issue that I am concerned with: the moral conflict involved when groups feel their own laws ought supersede those of the state, and states’ dual commitments in the face of this conflict to both pluralism and lawfulness. Such a hierarchy would help ameliorate (although likely not eliminate) the philosophical – and, as we saw in the case of India, practical – conflict over moral authority. This is no mean goal: accommodating legal pluralism can mean the difference between loveless marriage, penury, or even damnation for some minority groups.

There may still be cases, of course, where minority groups are compelled to be non-practicing; certain sacrifices for belief are commonly accepted as part of living in the modern nation state. However, this system would allow for the most accommodation possible, while preserving the possibility of legitimacy for the state, and, possibly, a functioning liberal nationalism or sense of constitutional patriotism as well.

I will now examine my argument in reference to a few major objections.

4.2 The Modern Nation State: Some Concerns

My argument that a nonhierarchical ordering of norms leads to a conflict of moral authority is dependent on the perception of the nation state as the arbitrator of moral conflict. There are two objections to this idea that I wish to briefly discuss: that of global community, and of international government. In recent years, the communications revolution has drastically changed the nature of sovereignty. There are many examples of this change, not the least the growing influence of non-citizens
through use of the internet and media such as videos and blogs. These same elements allow non-native citizens the option to remain in far greater contact with their native communities. Of course, this change has several serious implications for my argument. The idea of a discourse ethic breaks down when the community of individuals is not exclusive. When individuals can participate in the discourse about institutions, but not necessarily be bound by the outcomes of debate, it is unclear if they ought to have a voice in the discourse. Foreigners need not be bound by loyalty or constitutional patriotism, and, indeed, probably cannot be assumed to. Furthermore, the ties between minority immigrant groups and their home communities certainly have implications for the idea of affective identity. When strong ties are able to be maintained, it is reasonable to conclude that assimilation will be hindered, as too would feelings of belonging or loyalty to the new country. In the coming years this problem is likely to accelerate, and I imagine that its consequences for the identity and moral claims of minority groups are not yet known.

Still, I believe there are a few responses one can make to this objection. The first response deals directly with the influence of foreign media. Except in a few extreme circumstances or states of emergency, liberal democracies typically have broad freedom of information regimes. Because the right to freedom of information is already present, the issue of foreign influence through media does not seem so troubling philosophically.\textsuperscript{257} Practically, however, it can pose a serious problem. For example, many of the more radical mullahs in England have their origins in Saudi

\textsuperscript{257} Unless what is meant by influence is something more akin to bribery of officials, in which case the problem seems a problem of corruption and not a claim of illegitimate influence.
Arabia and other radically different societies. However, if the government allows the right to certain material, it seems reasonable to posit that they accept the incumbent risks involved. Liberal democracies in general are wary of limiting rights like freedom of speech and press, so while foreign individuals may have more influence now than in the past, the ultimate shape of institutions will continue to be up to the citizens of a state.

In previous sections I have already touched upon the issue of immigrants retaining loyalties to nations or groups. Indeed, one might see this phenomenon at the heart of the conflict over moral authority that is the central concern of this paper. I believe that as long as the minimal conditions for participation and the normative hierarchy over laws in the public sphere is retained, the attendant problems of immigration can be minimized.\(^{258}\) Of course, practices in the private sphere (outside the authority of the state and its laws) might be retained without being necessarily problematic. Nevertheless, it is true that immigration has the potential to change the ‘character’ of a state, and influence its conceptions of justice and its institutions. It is a problem worth taking seriously.

The issue of migration implicates another concern. Immigrant populations may not only change the character of a state, they may actively resist assimilation, and engage in violent protest against existing institutions. The feasibility of liberal nationalism or constitutional patriotism is thrown into doubt by events of the past two decades, including and certainly not limited to ethnic conflict in Eastern Europe and Africa, not to mention the racially motivated riots of Paris 2005. Indeed, ethnic

\(^{258}\) Illegal immigration, as it is directly contrary to the laws of the state, is a problem outside the scope of this paper.
nationalism, a concept grounded in attachment to a community of descent, religion or other affective identification seems to be an ever more believable thesis. Ethnic nationalism claims that an individual's deepest attachments are inherited and that it is the national community that defines the individual, rather than the reverse. While perhaps contradicted by the idealist documents of the Declaration of the Independence or the Rights of Man and the Citizen, this thesis has support in the writings of modern political theorists of nationalism.

Much, as I have stated earlier, will depend on how the citizenry of a nation feels about pluralistic institutions, and how strong their own ethnic nationalism may be. However, history does have some promising examples; while the United States has a shaky history with ethnic nationalism (one need only look to the conservative response to Irish immigration in the early 19th century), its rhetoric tends to invoke the principles of procedural justice and civic pride, rather than ethnic sentiment. The United States’ history of multiculturalism is fairly robust, however, and not all states, even if they are democracies, are so culturally inclusive. Fundamentally, however, over time the demands of minority groups will be incorporated or rejected, typically through democratic institutions. Hypothetically, this process will be part of a longer sublimation of norms into the moral hierarchy that I have proposed is active in most liberal democracies.

The second objection related to the nation state is the growing trend towards world government. Treaties such at the UNHCR or the Geneva conventions are meant to have tangible effects over the policies of individual nation states. These treaties are unquestionably normative, and thus this objection directly affects the moral authority
of the nation state. By contracting into forms of global governance, states’ give up some of that authority for other interests, such as mutual protection and defense. In some ways, it almost seems as though the world government is ordered hierarchically above individual states, although it is equally true that states often fail to live up to the international treaties they sign. World government is a complicated issue for moral authority, and not dealt with easily.

However, the very non-compliance of nation states to their treaties means that perhaps this objection is premature. While governments do contract into international obligations, they are unlikely to follow them to the detriment of national policy. Examples such as the United States’ unpaid UN membership dues demonstrate the reticence with which many national governments treat their international obligations, and US’ reaction to the proposed Kyoto Protocols suggest even under intense international pressure, obligations are not necessarily forced on nation states. These examples indicate that, at least in my opinion, that the nation-state is still dominant. Of course, this response belongs in the context of a much broader debate about sovereignty and the nation-state in general; I mean only to show here that the objection is not necessarily fatal to my argument, although it may retain the potential to become so.

At heart, I am engaged in the question of the ethical obligations surrounding membership in multiple groups. In the course of this paper, I have characterized the conflict between religious-cultural minority groups and the liberal nation state as one of moral authority, between a system of absolute command and discourse ethics. These authorities generate different systems of law, and I have used natural law and
procedural democratic institutions to indicate two such systems that would arise out of these differing sources of authority. I have tried to explore how these two extremes of moral authority relate to each other, and how this divide related to current debates on legal pluralism.

I have attempted to explore this characterization in a way that will help one think about why this conflict occurs, and what is at stake in debates over pluralistic institutions. My case studies will, I hope, give the theoretical chapters both the emphasis and empirical background needed to generate practical thinking. Of course, the debates over the proper place for cultural, legal, and moral pluralism have existed for centuries, and will likely continue to exist as long as there are political organizations. Nevertheless, my hope is that these ideas are a useful, if small, contribution to the ongoing debate about the place of pluralist institutions in liberal democracy.
Works Cited


--- “Muslim second wives may get a tax break”. The Sunday Times December 26, 2004 http://www.timesonline.co.uk/tol/news/uk/article405864.ece


Bilimoria, Dr. Purushottam “Muslim Personal Law in India” Emory Law School Accessed 18 March 2008 www.law.emory.edu/ifl/cases/India.htm


Gooding, Susan S. “At the Boundaries of Religious Identity: Native American Religions and American Legal Culture.” Numen Vol. 43, No. 2 Pages 157-183


Murphy, Thomas F. III “Discourse Ethics: Moral Theory or Political Ethic?” *New German Critique*, No. 62. Pages 111-135


Sandel, Michael J. “The Procedural Republic and the Unencumbered Self” *Political Theory*. Vol 12 No. 1 Pages 81-96


