# Democratic Defaults

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*Prominent analyses of contractual default rules are ex ante in orientation. According to economic accounts, default rules, like the rules of contract interpretation, should be designed to further the substantive objective of social welfare maximization either by filling gaps with terms that maximize the parties' joint welfare or by giving parties incentives to write such terms themselves. According to accounts that view the freely given assent of the parties as morally salient, what matters morally is that the filling of contractual gaps doesn't interfere with their procedural freedom to set their own terms for their relationship. So long as that constraint is satisfied, contractual default rules may be designed to further other values.*

*On my democratic conception of contract, by contrast, what matters is that default rules, like the rules of interpretation, help the parties to realize a plausible shared joint vision of justice for their relationship. The parties are the ones who are morally authorized to resolve morally uncertain matters of justice between them, but, because the ultimate ground of their moral authority is substantive justice, they are duty-bound to do so in good faith together. A morally valid contract is a product of such efforts. Thus, procedurally, it must reflect the parties' good faith joint effort to resolve moral uncertainty about justice, and substantively, it must constitute a plausible resolution of what justice between the parties requires.*

*Contract law ought to be designed to facilitate such efforts. Courts should elaborate the parties' agreement in a way that makes sense of it as a joint vision of justice for their relationship, while also ensuring that judicial judgments don't displace the parties' own joint judgments about what justice between them requires. In the realm of interpretation, this means that a robust duty to treat one another in good faith must be part of any morally valid agreement, but that courts must be suitably deferential to the joint judgments of the parties when determining what that duty entails. In the realm of gap-filling, it means that the defaults the law constructs ought not simply to try to approximate what the parties would have decided at the moment of contracting. Instead, they should design neutral benchmarks that facilitate the parties' ex-post deliberations about how gaps ought to be filled, while also ensuring that a reasonably just vision for the parties' relationship is*

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*implemented should such deliberations fail. The upshot is that the democratic conception supports the construction of "majoritarian default rules." This is not for the standard reason sometimes offered by economists that such defaults promote efficiency, a rationale that is unlikely to hold up when contracting parties are sufficiently heterogeneous. On the democratic conception, majoritarian defaults are desirable because they inform the parties about the typical case without second guessing relationship-specific matters of justice, thus setting a fair and neutral baseline for the parties' own deliberations about how gaps should justly be filled.*

**Introduction**

Economic accounts of contractual gap-filling rules are ex ante in orientation. Default terms that the parties would have likely agreed to anyway obviate the need for the parties to spend time and resources negotiating, while rules that the parties may want to negotiate around may encourage the revelation of information that makes it more likely that the parties devise optimal arrangements that courts can easily enforce. In these ways, default rules may be designed to maximize social welfare.[1]

Accounts of contract, like promissory accounts that view the moral validity of contracts as grounded in the freely given assent of the parties are also ex ante in orientation. But, in contrast to economic accounts, they suggest that anything goes as far as the choice of gap-filling rules goes. What matters morally is that parties make their agreements under procedurally free and fair conditions, thereby expressing their freedom or autonomy. But if what matters morally is only the freely given assent of the parties, default rules can have any content so long as the parties are free to modify them. There may be a live question about whether judicial gap-filling of any kind can be rendered compatible with the parties' freedom. But so long as it can, courts will have to appeal to other values to determine how gaps ought to be filled.[2]

In this essay, I derive implications for gap-filling rules of an account of contract—the "democratic conception"—that, like accounts that make the freely given assent of the parties morally central, is rights-based in orientation, but has more to say than those accounts about how gaps should be filled. On my account, contra economic accounts, agreements are not worthy of our respect only because enforcing them promotes some other value like efficiency or fairness. Agreements that meet the democratic conception's requisites of moral validity transform what the parties owe one another morally and so may deserve the law's respect for that reason. Contra assent-based accounts, however, the freely given assent of the parties is insufficient for moral validity, because moral validity depends on the agreement being oriented towards substantive justice in the right way: it must be the product of a deliberative process in which the parties were striving together in good faith to articulate a shared vision of justice between them, and it must successfully articulate a plausible joint vision of justice for their relationship.

While it may seem that such validity requirements will write freedom out of the picture entirely, the presence of considerable moral uncertainty about what justice between the parties demands means that the parties will

1. For an overview, see Ian Ayres, *Default Rules for Incomplete Contracts, in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585 (Peter Newman ed., 1998).

2. *See generally* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 515–16 (1989) (arguing that theories that justify contract law in terms of promissory morality have nothing to say about how courts should fill contractual gaps).

usually have considerable latitude to resolve morally uncertain matters of justice between them. Moral uncertainty is uncertainty about the content of the applicable moral principles of justice and their implications. It is thus distinct from uncertainty about the empirical world, though empirical uncertainty may complicate moral questions, as when we are uncertain about the morally correct way to respond to our incomplete knowledge of empirical facts. Moral uncertainty about justice is plausibly epistemic in origin in significant part: while there are truths about justice, figuring them out is a difficult task, and reasonable people will disagree about the answer. This moral uncertainty may also have a metaphysical component, because there might not always be a determinate answer about what justice requires.

I call my conception the *democratic* conception because it rests on a defensibly democratic allocation of moral authority to resolve moral uncertainty about justice. Like liberal egalitarian theorists of democracy, I suppose that the authority of democratic institutions inheres in the equal respect they accord to the views of all and the egalitarian relationships they facilitate and instantiate. I also suppose that authority to resolve moral uncertainty ought to be allocated only to those whose rights are implicated by its resolution, thus justifying the decentralization of such authority. These principles, I argue, justify a moral delegation to contracting parties to resolve matters of justice that are specific to their relationship because they do not implicate the rights of anyone else.

Contra the economists and proceduralists, the democratic conception prescribes an approach to gap-filling that is focused at least as much on the moment of dispute as the moment of contracting. While gaps are identified through processes of interpretation that necessarily look back to what the parties agreed to, when courts fill those gaps, they should not be trying to imitate what the parties would have agreed to, nor should they be devising rules that create incentives for information revelation for future parties. Instead, courts ought to be aiming to set a fair baseline for deliberations between the parties about what justice between them now requires.

The Essay is organized as follows. Parts I describes the economic approach and problems posed for it by heterogeneity of party preferences and circumstances. Part II describes the assent-based approach, highlighting problems with it that help to motivate my construction of an alternative. Part III sets out my alternative approach, the democratic conception. Part IV derives implications of the democratic conception, according to which processes of interpretation that are predominantly ex ante in orientation set the constraints on a process of gap filling that focuses on the situation of the parties at the moment their dispute occurs. The final part concludes.

## I. Economic Accounts and the Hypothetical Bargain

Economic analysts contend that the rules of contract (and legal rules more generally) ought to be designed to ensure that parties take actions that maximize social welfare—a function of the subjective well-being of all members of the polity.[3] They also standardly assume that contracting parties are rational and self-interested. Like *homo economicus*, contracting parties rationally seek to further their own welfare even when this comes at the expense of another's welfare. They are therefore indifferent to effects of their actions on social welfare.[4]

Despite this indifference, under conditions of symmetric information, even rational self-interested actors will, in the absence of externalities, agree to transactions that maximize aggregate welfare, so long as the legal system stands ready to enforce them. A failure to do so leaves possible gains at the bargaining table: the parties could have changed the terms of their agreement to increase the expected utility of at least one of them without making the other worse off.[5] And symmetric information eliminates incentives for gamesmanship that could prevent the parties from realizing those gains. Thus, self-interested rational actors will imitate socially minded actors as far as the maximization of joint welfare is concerned. If the social welfare function is a simple sum of everyone's utilities, they will (in the absence of externalities) thereby maximize aggregate welfare. If the social welfare function has a distributive component, they might not, because self-interested rational actors care only about their own share of the pie and will take a greater share for themselves when their relative bargaining power enables them to do so. But if other institutions are better placed than contract law to do the necessary redistributive work, welfarist analysis recommends that contract law focus exclusively on maximizing aggregate welfare, leaving it to those other institutions to ensure it is optimally distributed.[6]

Designing a joint-welfare-maximizing transaction, however, is often a complicated task because of uncertainty about the transactional environment and how the future will unfold. It takes time and resources to design a joint-welfare-maximizing transaction, and it is unrealistic to suppose contracting parties can anticipate every contingency and determine the courses of action that ought to be taken in each. Thus, it is likely that agreements will end up imperfectly specified. Either the parties will omit to specify what is to be done in some contingencies, rendering their agreement obligationally incomplete or they will specify what is to be done without

3. Louis Kaplow & Steven Shavell, *Economic Analysis of Law, in* 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1666 (Alan J. Auerbach & Martin Feldstein eds., 2002).

4. Gary S. Becker, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976).

5. Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 277 (1992).

6. Kaplow & Shavell, *supra* note 3, at 1762–63.

conditioning their prescription on relevant differences rendering their agreement insufficiently tailored to the circumstances that may emerge.[7] Although only the former type of imperfection creates a literal "gap," both types of under-specification are equivalent from the standpoint of economic analysis, because each results in the failure to identify the joint-welfare-maximizing course for some contingency.[8] In the former case, the agreement fails to state what is to be done. In the latter case, it appears to make prescriptions for uncontemplated contingencies that may not reflect what the parties would have wanted had they considered what should happen in those contingencies.

Courts might accordingly further the goal of social welfare maximization by efficiently filling in gaps in the parties' agreement and more finely tailoring contracts to unanticipated contingencies. In doing so, they do for the parties what the parties would have done had they considered what should happen in the relevant contingencies. This not only helps the parties who wouldn't invest the time and energy into such contemplation regardless or who inadvertently fail to fill the gap, but also those who would fill the gap themselves. The former group benefits because the court solves a problem for them as they would have done had they been willing or able to do so. The latter group benefits because they can rely on courts to complete their contract without spending time and energy themselves.[9]

We have yet to account for the problems that heterogeneity of preferences among contracting parties poses for such a gap-filling project. Ideally courts would fill each gap, contract-by-contract, with the terms that the parties before them would have agreed to when they were negotiating their agreement. But courts (and other lawmakers) might not be good at doing this given that parties often lack self-interested incentives to share relevant information about their preferences and circumstances. Courts might instead construct compromise rules that many will like enough not to spend time and energy contracting around. But as Alan Schwartz and Robert Scott explain, constructing optimal compromise rules requires the lawmaker to know a lot about the distribution of preferences of contracting parties and the costs some parties will incur in attempting to contract around rules they don't like.[10] It might turn out that it is better simply to punt the problem to the parties by declining to enforce incomplete agreements given the informational constraints the lawmaker is operating under.

The picture is further complicated when parties are neither symmetrically informed nor intrinsically motivated to selflessly share relevant private information. Under these conditions, a party who is asymmetrically in

7. *See* Ayres, *supra* note 1, at 585–90, 585 (drawing this distinction).

8. Schwartz, *supra* note 5, at 273.

9. *Id.* at 277–78.

10. Alan Schwartz & Robert E. Scott, *The Common Law of Contracts and the Default Rule Project*, 102 VA. L. REV. 1523, 1553–60 (2016).

possession of relevant information may not share it with their contracting partner during negotiations in the hope of extracting a greater share of the transaction's surplus for themselves. Then a default rule that gives the asymmetrically informed party an incentive to share such information, by forcing an undesirable outcome on that party if they don't—a so-called "penalty default"[11]—may be preferable to one that tries to solve the parties' contracting problem directly. Again, however, the design of the optimal default is complicated by heterogeneity because the effectiveness of a default in inducing the revelation of private information and the associated benefits and costs of doing so will depend on the parties' preferences and the costs they would incur were they to contract around it.[12]

Finally, courts ought to be mindful of the ways in which parties may rationally desire courts to construct their contracts in light of frictions created by the litigation process. If courts are bad at figuring out what parties to an agreement would have wanted or will lack the information needed to do so, the parties might rationally prefer that courts enforce their agreement as written or decline to enforce it when it is silent on an important matter. If, for example, there is a state of the world in which the parties' ex ante joint welfare is maximized by performance, and another close but unlikely state in which it would be maximized by cancellation of their agreement, the parties might rationally contract for performance in both states if verifying to the court that the latter state has in fact occurred would be very costly.[13]

## II. Rights-Based Proceduralism and its Pitfalls

Accounts of contract that ground contractual rights and duties in the moral significance of mutual assent have less to say about how to fill contractual gaps than economic accounts. Anything goes so long as the parties assented under procedurally free and fair conditions. Such accounts may be criticized as paying insufficient heed to considerations of substantive justice.[14] But even setting aside direct challenges of this sort, it is more complex than first appears to specify what counts as free and fair assent to a contract whose gaps have been filled by courts without substance creeping into the inquiry.

Consider first the most straightforward scenario for proceduralist accounts: When they entered the agreement, the parties knew exactly how any gaps in their contract would be filled and they had (and declined) the opportunity to fill those gaps with different terms at minimal cost. While it

11. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989).

12. Schwartz & Scott, *supra* note 10, at 1560–66.

13. Schwartz, *supra* note 5, at 279.

14. *E.g.*, Aditi Bagchi, *Contract as Exchange*, 113 CAL. L. REV. (forthcoming 2025); Rebecca Stone, *Putting Freedom of Contract in its Place*, 16 J. LEGAL ANALYSIS 94 (2004).

is natural to conclude that in assenting to the contract, the parties also freely assented to whatever terms result from the application of the gap-filling rules, this is a trivial win for procedural accounts. There is no need for courts to fill any gaps, because the parties can easily fill them themselves anyway.

If, by contrast, the parties don't know that courts will fill gaps in their contracts or how they will do so, it's hard to see how the proceduralist can deem the parties to have freely assented to the default terms that get imposed upon them. The same seems true even if the parties know that courts will fill gaps but are ignorant about how courts will do so. The proceduralist might suggest that by assenting to the contract they willingly delegated authority to the court to fill gaps in their agreement. But to make this plausible on a proceduralist picture, the parties must have at least had the opportunity to opt out of judicial gap-filling. They must, that is, have been given the option to render their agreements unenforceable in the event that a court must fill a gap. If they haven't been given such an opportunity, it is hard to see how the proceduralist can deem them to have assented to the subsequent filling of any gap. The proceduralist cannot straightforwardly assert that the parties would have preferred that the gap be filled to non-enforcement, because that is to appeal to substantive considerations—the subjective preferences of the parties—to justify enforcement of the contract.

Now suppose that the parties know of the gap-filling rules in advance but aren't willing to incur the time and resources needed to fill any gaps themselves, even though they prefer different terms to the legal defaults. There remains a sense in which the parties' assent to the resulting contract is procedurally valid because the parties fully understood what they were assenting to. But their assent to the default terms reflects their concern about minimizing negotiation costs rather than their endorsement of their content. In effect, they assented to a larger package that includes their reduced negotiating costs alongside a contract that includes the default terms. The question then becomes whether the unchosen circumstances that created the negotiation costs the parties are trying to avoid eviscerate the moral significance of their assent to the terms on a proceduralist picture. What seems morally salient here is the parties' preferences to have the gap filled by the court rather than incurring costs to fill it themselves in those circumstances. But if that's the justification for the imposition of the default terms, it rests not merely on the quality of their assent to the terms, but rather the substantive value associated with satisfying their preferences in the circumstances the parties found themselves at the moment of contracting.

Problems for the proceduralist deepen when the parties' reasons for leaving the gap in their agreement are asymmetric: the gap-filling rule favors one party while the other party has no interest in incurring the negotiation costs required to come up with a mutually agreeable alternative.

The latter party might negotiate compensation for the unfavorable term through adjustments to the dickered terms of the contract. But if that's the reason for downplaying the asymmetry, it matters whether in fact the party negotiated such compensation. Once again, substance has crept into the inquiry.

The analysis becomes more fraught still when the parties are asymmetrically informed about relevant facts. Suppose the default makes Seller liable for all consequential damages that Buyer will suffer should Seller breach the contract. Seller doesn't appreciate how high Buyer's consequential damages are likely to be, though Seller knows there is a risk they might be high. Buyer chooses not to reveal private information about those consequential damages to Seller, knowing that it would likely prompt Seller to seek an adjustment of the terms of their agreement. Seller decides not to renegotiate the default to minimize negotiation costs. Has Seller's assent to the default rule been given under procedurally free and fair conditions? On the one hand, Seller knowingly took the risk that it was negotiating with a buyer whose consequential damages would be high and went ahead anyway. On the other hand, the risk is not outside the parties' joint control. It arises from Buyer's unwillingness to disclose information to Seller for the sake of extracting a better bargain for itself.

Perhaps the proceduralist can respond by insisting that Seller's assent was procured through a breach of a duty on the part of Buyer to disclose relevant information to Seller resulting in assent that wasn't freely and fairly given. But then the proceduralist owes us an account of when such disclosure duties exist. The problem for the proceduralist is that it will be hard to supply one without appeal to a notion of substantive fairness between the parties as the Second Restatement of Contracts does when it asks whether non-disclosure would amount to "a failure to act in good faith and in accordance with reasonable standards of fair dealing."[15]

The proceduralist might respond by insisting that there are no such disclosure duties. Each party's assent should be evaluated in isolation from the conduct of the other, unless the other has breached a general moral duty like the duty not to lie. Thus, Seller's assent was freely given because Seller willingly took the risk that Buyer's consequential damages would be higher than Buyer disclosed. But this is a highly individualistic conception of procedural fairness. It entails that parties can together determine the duties that they owe one another through contract, even when one party's assent to the deal is secured by the other's self-interested refusal to reveal pertinent information. Given that a contract is a way for the parties to achieve something together, there is something jarring about insisting that the moral quality of one party's assent to it can be evaluated in isolation from the conduct of the other.

15. Restatement (Second) of Contracts § 161(b) (Am. L. Inst. 1981).

## III. The Democratic Conception

The arguments of the previous section suggest that it will be difficult for proceduralists to defend legal gap-filling without substantive considerations creeping in. Economic analysts face no such problem, because the requirement of mutual assent is ultimately subordinated to a substantive objective—the maximization of social welfare. For those of us who think that agreements are a source of genuine relational moral rights and duties, however, an appeal to the instrumental value of mutual assent won't suffice, because it suggests that duties created by contracts are owed to the community at large as the repository of social welfare rather than to other contracting parties and potentially subject to override whenever breaching the contract would better further the goal of social welfare maximization than performing.

I thus reject both economic and proceduralist approaches in favor of my "democratic conception," a non-instrumental account of morally valid agreements in which substance and procedure are deeply entwined. The mutual assent of the parties when validly given transforms what the parties owe one another. But it is not sufficient for moral validity that their assent be given under procedurally free and fair conditions: the parties must be striving together to articulate a joint vision of justice for their relationship, and they must successfully articulate a substantively plausible vision of justice between them that doesn't encroach on the rights of non-parties.[16]

An essential premise of the democratic conception is the existence of considerable moral uncertainty about what justice between potential parties to a contract requires. This uncertainty might be in part metaphysical: morality might not always tell us the answer, making what justice requires indeterminate in part. Purely procedural accounts of justice such as Nozick's might be understood as claiming the substantive content of justice is entirely up for grabs, such that justice simply is whatever results from procedurally free and fair choices.[17] But on a liberal egalitarian picture, there are truths about substantive justice that constrain us, albeit truths that are difficult for us to ascertain and that therefore generate reasonable disagreement in diverse and complex societies like our own.[18] The content of justice, on such accounts, is epistemically uncertain. In line with this tradition, my working assumption is that the content of justice between persons is primarily epistemically uncertain.

What I mean by "justice" has a wide domain of application: all rational conflicts between moral agents about what is to be done with resources (broadly understood as encompassing physical resources as well as

16. What follows is a sketch of my conception. For a more detailed elaboration, see Stone, *supra* note 14.

17. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1975).

18. THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS 56–60 (2008).

human capital) ranging from the trivial to the profound. Rational conflicts arise because each person has commitments and responsibilities that others don't share, which sometimes lead them rationally to prefer different outcomes. Justice solves these moral conflicts by determining whose rational perspective or "standpoint" governs choices that must be made with available resources.

Whereas the economic model aggregates individual preferences to determine a moral ranking of states of affairs from which a set of prescriptions can be derived, justice in the sense deployed here tells us whose standpoints control which choices. The prescriptions that emerge thus reflect the considerations that comprise the standpoint that is allocated to each choice, giving rise to a system of rights at the moral level. If A's standpoint controls a choice by B (a choice that may have a significant impact on A's person, say), B ought to make their choice in accordance with A's standpoint no matter the degree to which A or B or anyone else might subjectively prefer a different outcome.

How, morally speaking, ought we to respond to moral uncertainty? While it might seem, at first glance, that we should respond in a way that maximizes the likelihood our choices end up being the right ones, such an instrumental approach stands in tension with liberal egalitarian commitments to principles of respect for agency and equality. It might mean, for example, that its resolution must be placed in the hands of a small group of moral experts. Especially when it comes to resolving moral uncertainty about the content of persons' standpoints, it seems important that the possessor of the standpoint be the one to resolve it, regardless of their level of "moral expertise." Giving the possessor of the standpoint such authority makes them the author of their life in an important sense, thus instantiating a principle of equal respect for their agency, so long as each person is accorded the same right of authorship over their own standpoint. When it comes to moral uncertainty about matters of justice, however, matters that by their nature always affect more than one person, it is less obvious that the instrumentally best response is the wrong one even when it entails an inegalitarian allocation of moral authority, given that the justification for choosing such an allocation is the likelihood of greater substantive justice. But, as I argue elsewhere, an instrumental approach downplays the moral significance of deliberating together about morally uncertain questions of justice.[19] If moral uncertainty about justice is a pervasive feature of our lives, then we ought to actively participate in resolving it together for much the same reason as each of us ought to be centrally involved in the resolution of moral uncertainty about the content of our own standpoints. The

19. For a more detailed elaboration of my account, see *id.*; Rebecca Stone, *Rights, Remedies, and Normative Uncertainty about Justice*, 31 LEGAL THEORY 114 (2025) [hereinafter Stone, Rights, Remedies, and Normative Uncertainty]; Rebecca Stone, A Democratic Conception of Tort Law (unpublished manuscript) (on file with author) [hereinafter Stone, Democratic Conception].

authorship involved when it comes to matters of justice must be joint authorship because matters of justice always affect more than one person. But this means only that we must be appropriately mindful of the input of those others when we are in the process of resolving moral uncertainty about justice together.

In justifying majoritarian decision procedures that operate at the community level, contemporary liberal egalitarian scholars have emphasized the importance of according equal respect to the views of all and/or instantiating relationships of non-subordination among members of the polity (even when doing so would not be instrumentally best).[20] I've argued elsewhere that if we think that responding to moral uncertainty about justice is an essential part of how we relate to others morally, it is also important that morally uncertain questions of justice be resolved by those whose rights may be affected by their resolution. Those are the people who owe morally uncertain duties to one another and thus ought to take responsibility for responding to the uncertainty.[21] Accordingly, I assume that moral authority to resolve moral uncertainty about questions of justice is appropriately allocated in an egalitarian fashion to those whose rights may be implicated by its resolution. Agreements deciding relationship-specific matters of justice involving the parties can then be seen as continuous with decisions that are made democratically for larger groups of people: the parties to an agreement are morally authorized to resolve matters of justice between them in an egalitarian fashion so long as they can do so without impacting the rights of non-parties. The parties, in effect, constitute a community of two.

The picture just sketched leads to a conception of morally valid agreements as substantively and procedurally bounded. The existence of considerable moral uncertainty about what justice between parties requires means that contracting parties will usually have considerable latitude to articulate their own joint vision of justice for their relationship. But their agreement cannot transparently do injustice. It must resolve moral uncertainty in a plausible way. And procedurally, the parties must be seeking in good faith to articulate a joint vision of justice for their relationship. When agreements satisfy these requirements, the parties are duty-bound to conform to them, and there is therefore a rights-based justification for their legal recognition.

On its face, this is a demanding conception of what it takes to make a morally valid agreement. Not only does the agreement have to be reasonably just given the prevailing moral uncertainty, but the parties have to be

20. On the former, see Christiano, *supra* note 18; Laura Valentini, *Justice, Disagreement and Democracy*, 43 BRIT. J. POL. SCI. 177 (2012). On the latter, see Niko Kolodny, *Rule Over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287 (2014); Daniel Viehoff, *Democratic Equality and Political Authority*, 42 PHIL. & PUB. AFFS. 337 (2014).

21. Stone, Rights, Remedies, and Normative Uncertainty, *supra* note 19; Stone, Democratic Conception, *supra* note 19.

motivated in the right way—committed to articulating a joint vision of justice for their relationship. But such demandingness is not implausible given that morally valid agreements alter the parties' rights and duties. My contention is just that the parties have to deliberate in the right way and produce terms with the right kind of content to have such a morally transformative effect. If the parties' agreement fails to satisfy these requirements, there might still be an instrumental justification for enforcing it if enforcing such agreements tends to produce more justice overall; but any such justification couldn't simply appeal to the rights and duties of the parties.

In any case, the demandingness of the vision depends on the institutional environment. When, for example, the polity is doing a good job of ensuring that justice is done at the community level, parties don't have to worry about the import of unjust disparities in their starting positions when deliberating about what justice between them requires. And when, in addition, the polity is doing a good job of ensuring that markets are reasonably competitive, the parties may be able to use the market price as a proxy for a reasonable price for their own transaction.

Of particular significance here, contract law itself can ease deliberative burdens on the parties by interpreting them in a way that makes sense of them as plausibly joint visions of justice for the parties' relationship and filling in gaps in a way that facilitates the parties' ability to articulate such a vision together. On the democratic conception, agreements are and must be understood by the parties as provisional to the extent that the moral uncertainty they resolve is epistemic in nature: the parties ought to revise them as their understanding of what justice between them requires evolves. In other words, their validity is not something that is fixed at the moment of agreement but is rather something that must be preserved over time as the parties' circumstances and/or understandings of justice between them change. Thus, the ex post perspective matters at least as much as the ex ante, especially where the parties have left gaps in their contracts that now need to be filled. In such cases, the parties have failed to completely determine what justice between them requires, and the parties ought to fill the gaps they left in a way that is compatible with their joint vision of justice for their relationship. Courts can assist this process as they interpret parties' agreements and fill their gaps.

## IV. Interpretation and Gap Filling

We should at this point distinguish interpretation from gap filling, though on the democratic conception the difference between the two is more a matter of degree than kind. This is because in doing either, courts must mediate between two countervailing forces. On the one hand, courts must make the best sense of the parties' agreement as a joint vision of justice for their relationship. This requires courts to look back at what the parties agreed to and were seeking to achieve through their agreement. On the other hand, courts must acknowledge the inherent provisionality of the parties' agreement as a resolution of moral uncertainty and the parties' associated duties to revise it together as their understandings evolve. This requires courts to support their efforts at modification going forward. While courts must always balance these dueling pressures, interpretation is focused primarily on making sense of the parties' agreement as a joint resolution of what justice between them requires, while gap filling is focused primarily on reflecting the parties' evolving understandings and facilitating deliberations directed towards elaborating their vision of justice over time.

### *A. Interpretation, Implication, and the Duty of Good Faith*

Consider interpretation first. On the democratic conception, a morally valid agreement must reflect the parties' joint vision of justice for their relationship. Thus, transparently unjust agreements are not morally valid. And interpretation ought to be directed in the first instance towards making the best sense of the parties' agreement as a vision of justice between them, which means implying terms that are necessary to make sense of the parties' agreement in these terms and resolving ambiguities in a way that is compatible with the parties' joint vision. Thus, contra Craswell's view of assent-based accounts of contract,[22] the terms that the parties have expressly agreed upon will have implications for both the resolution of ambiguities and matters on which the agreement is silent. In particular, a robust duty of good faith and fair dealing in performance and enforcement is a non-disclaimable part of every agreement.[23] "[F]aithfulness to an agreed common purpose and consistency with the justified expectations of the other party"[24] along with "honesty in fact and the observance of reasonable commercial standards of fair dealing"[25] are required of parties seeking to articulate and honor a vision of what justice between them requires.

Scholars have expressed frustration with the doctrine of good faith because its nebulous nature makes it difficult for courts to operationalize.[26] But the fluidity of the doctrine is inescapable once we view agreements as embodiments of parties' resolutions of moral uncertainty about justice for their relationships. What the duty of good faith requires of parties in any given instance and thus of courts engaged in interpretation where the parties disagree about their agreement's content, is a matter of both "fit" and

22. Craswell, *supra* note 2, at 515–16.

23. Both the Second Restatement of Contracts and the Uniform Commercial Code specify that every contract within their ambit imposes upon parties a duty of good faith and fair dealing in its performance and enforcement. Restatement (Second) of Contracts § 205 (Am. L. Inst. 1981); U.C.C. § 1-304 (2022).

24. Restatement (Second) of Contracts § 205 cmt. a (Am. L. Inst. 1981).

25. U.C.C. § 1-201 (2022).

26. *See*, *e.g.*, Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 619–20 (1981).

"justification" in a roughly Dworkinian sense. Much like a principle that a Dworkinian judge declares is "instinct in law" because it "fits and justifies some complex part of legal practice"[27] so the specific content of the parties' duties of good faith is instinct in the agreement insofar as it makes sense of their agreement as their joint resolution of what justice between them requires. On the dimension of fit, courts should strive to give effect to what the parties have together decided, because on the democratic conception the parties are the ones who are morally authorized to resolve moral uncertainty about justice. On the dimension of justification, courts ought to do this in a way that makes the parties' agreement make sense as their joint resolution of what justice between them requires. Courts might even nullify or limit terms the parties expressly agreed upon in trying to make sense of their agreement in these terms. But they should only do so when the only way to make sense of the parties' agreement as their joint resolution of what justice between them requires a limitation of such terms. Courts must be attentive both to the substance of the term (does it plausibly express what justice between them requires?) and the extent to which it reflects the parties' careful joint deliberations. If, for example, an express term pertains to a remote contingency, a court might discount it where it runs contrary to any plausible vision of justice between them, especially if the parties gave it minimal thought, or it was imposed by one of the parties with minimal consultation of the other. But courts must proceed cautiously because of the risk that they end up imposing their own vision of justice on the parties where the parties have reasonably decided a matter. Fit with the express terms is important when it helps to ensure that it is the parties' own vision that gets implemented, even if the court's vision is superior to that of the parties.

This requirement of judicial caution helps to explain and justify the apparent divergence between aspiration and reality when it comes to the duty of good faith. As Paul MacMahon explains: "courts often assess defendants' conduct under deferential [to the defendant] standards of review; they sometimes require plaintiffs to establish improper motive or near-dishonest conduct; they impose heightened burdens of proof on plaintiffs [at least when the defendant is the government]; and they sometimes allow pro-defendant norms [like the rule of at-will employment] to trump good faith and fair dealing."[28]

MacMahon finds a justification for the divergence in the comparative incompetence of courts at figuring out what counts as and sanctioning unfair conduct: "Unreasonable behavior by contracting parties is usually checked by self-help by the victim, who may refuse to deal with the other party in future, and by reputational sanctions. Compared with these

27. RONALD DWORKIN, LAW'S EMPIRE 228 (1986).

28. Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2066 (2015).

mechanisms, litigation is both expensive and in more severe danger of error. Litigation requires lawyers and judges. These outsiders require payment for their time, and they must also contend with informational deficits about the parties' relationship before they can participate usefully in adjudication of the dispute."[29]

MacMahon's explanation and justification seems to rest implicitly on some non-ideal assumptions about contracting parties' motivations. Parties who are motivated to conform to justice—and hence to their agreement as an articulation of what justice between them requires—would engage in dispute resolution in a cooperative way. Their individual aims would be aligned with one another and that of the court—namely, to figure out how to elaborate their agreement as an articulation of what justice between them requires. They would readily share relevant information and perspectives with the court, leaving it well positioned to articulate a vision of fairness for their relationship at minimal cost.

Yet once we are assuming imperfectly motivated actors, it's not clear that the exercise of self-help and reputational sanctions will be more effective at enforcing true norms of fairness than courts given that powerful parties can use self-help and deceptive tactics to pursue personal advantage rather than justice. In some relatively close-knit commercial contexts, self-help and reputational sanctions may serve as effective disciplining devices even when many of the relatively powerful actors are self-interested.[30] And in some circumstances, legal enforcement might even crowd out decentralized modes of enforcement.[31] But even if there are circumstances in which non-legal enforcement mechanisms are effective and would be undermined rather than enhanced by legal enforcement, we have arrived at a highly contingent justification of underenforcement—one that is applicable only in some contracting environments.

In any case, the law ideally ought to speak to morally motivated people not just those who resemble Holmes' bad man, especially when morally motivated people find it hard to figure out what their duties are. Much is lost when we give up on the project of guiding and supporting the exercise of moral agency as Seana Shiffrin has persuasively argued.[32]

MacMahon suggests that courts can allay such concerns through candor in underenforcement.[33] But for courts to be able to credibly signal the

29. *Id.* at 2094.

30. *See* Lisa Bernstein, *Social Norms and Default Rules Analysis,* 3 S. CAL. INTERDISC. L.J. 59, 67–69 (1993) (arguing that social norms may induce contracting parties to perform).

31. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1789–90 (1996); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 614–15 (1990); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1685–92 (2003).

32. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

33. MacMahon, *supra* note 28, at 2101.

ongoing existence of the robust norm while at the same time being unwilling to police it to its full extent, we need a justification for underenforcement that doesn't view it merely as a concession to the bad motivations of some contracting parties—a justification that morally motivated actors can embrace as a principled response to moral uncertainty about its content.

The democratic conception offers such a justification. Deference is owed to the parties' resolution of the moral uncertainty, because they are the ones who are morally authorized to resolve matters of justice in their relationship. Thus, while courts must intervene when a party's conduct is clearly inconsistent with the parties' joint vision of justice, they must also leave enough space for the parties to articulate and revise their own vision of justice without fear of second guessing by courts.

### *B. From Implication to Gap-Filling*

Whereas the processes of implication, including the fleshing out the content of the duty of good faith, involve the imputation of terms that are needed to make sense of the parties' agreement as their plausible joint resolution of what justice between them requires, the filling of a gap involves a selection among multiple ways that the parties might have filled it compatible with construing the agreement as the parties' joint vision. The requirement of compatibility with the parties' joint vision means that the parties' agreement constrains without determining the process of gap filling, unless the constraint limits the possibilities to one, in which case we are back in the realm of implication. Implication, is, in effect, the extreme end of a continuum, operating to determine terms in a way that is compatible with the parties' agreement constituting their plausible joint vision of justice when there is only one plausible way of filling the "gap."

How should a court choose among multiple alternatives that meet the compatibility constraint? The key here lies in an appreciation of the inherent provisionality of the parties' agreement as a resolution of morally uncertain matters of justice between them. Because the parties' understandings of what justice between them requires may evolve over the course of their relationship, gaps should be filled in a way that reflects the parties' contemporary understanding, so long as that can be done without violating the compatibility constraint. But the democratic conception prescribes judicial caution here. Ideally, the dispute should have been avoided by the parties modifying their agreement to fill the gap (and perhaps other terms of their agreement) to render it compatible with their current joint vision of justice for their relationship. That we have ended up with a dispute instead is an indication that they haven't yet arrived at a new or more complete joint vision of justice for their relationship (assuming they are both acting in good faith). One might think that courts should therefore simply fill the gap in a way that best accords with justice as the court sees it. But if parties anticipate that courts will do this, their good faith attempts to modify their agreement to fill the gap are likely to be influenced by the projections of the court's vision of justice rather than their own, which may undermine their attempt to articulate their own joint vision of justice for their relationship.

What exactly might this mean for the selection of default rules? Plausibly that courts should construct default rules that reflect what average or typical contracting parties would choose, much in the way that the standard of care in tort law is indexed to the reasonable person of average capabilities.[34] Courts see many contract disputes, giving them a comparative epistemic advantage at figuring out what is likely to approximate a just result in a typical case. And a default that reflects the typical case doesn't prejudge idiosyncratic relationship-specific matters between the parties. Thus, such a default can serve as a neutral baseline for the parties' own deliberations about justice between them while also giving them useful information about the just result for typical parties and implementing a reasonably fair outcome when they are unable to agree how to fill the gap themselves. Thus, the democratic conception favors the construction of "majoritarian default rules," not for the standard reasons of efficiency that economic analysts often offer—the reduction of transaction costs at the moment of contracting—but because by informing the parties about the typical case without second guessing relationship-specific matters such defaults set a fair and neutral baseline for the parties' own deliberations about how the gap should be filled.

Because it isn't important on the democratic conception that the default be designed in a way that is optimal from the standpoint of maximizing social welfare, the heterogeneity of contracting parties doesn't create the same epistemic demands that it does for courts seeking to implement economically optimal defaults.[35] Accordingly, the democratic conception offers a justification of majoritarian default rules that isn't undermined by the heterogeneity of contracting parties in the way that such heterogeneity undercuts the economic justification of such defaults.[36] Thus, on the democratic conception Schwartz and Scott's pessimism about contract law's default rules project isn't warranted.

Consider, for example, the Uniform Commercial Code's injunction to fill an open price term in a sale of goods contract with "a reasonable price at the time for delivery."[37] Such a default serves as a fair and neutral starting point for the parties' negotiations if courts determine the "reasonable price" with reference to the market price at that time for the good in question and the market is reasonably competitive. This is not because the

34. *See* Stone, Democratic Conception, *supra* note 19.

35. On the latter, *see* Schwartz & Scott, *supra* note 10, at 1553-60.

36. *Id.*

37. U.C.C. § 2-305 (2022).

parties before the court would have agreed to such a price, but because it is a fair price for typical contracting parties.

Courts should proceed more cautiously, however, in filling price gaps when there is market power on one side of the market that makes it more likely that the market price reflects the powerful party's interests and/or conception of justice. When parties anticipate that a court will fill the gap with such a market price, their deliberations are likely to be skewed in the powerful party's favor, making it less likely that the parties fill the gap in a way that reflects a truly joint vision of justice between them.

Courts should also proceed cautiously when conditions make it hard to identify a market price, as when the parties' transaction has unusual features. If a court attempts to fill a price gap under such conditions, the imputed price is likely to reflect the court's own sense of justice, intruding on the parties' moral authority to construct their own vision. In such cases, the court is more likely to honor the democratic vision by declaring the agreement unenforceable for lack of definiteness, thereby forcing the parties to fill the gap themselves.

A similar analysis applies to agreements that have failed to specify the quantity. In such cases there will generally be no way a court can fill the gap without imposing its own vision of justice on the parties' relationship given how idiosyncratic the quantity term is to the parties' relationship. Thus, a failure to specify the quantity should usually lead a court to decline to enforce the agreement.[38]

Economically minded analysts sometimes describe applications of the indefiniteness doctrine as implementing "penalty defaults."[39] But while it is true that they give rise to outcomes that the parties may not have wanted, the aim of non-enforcement on the democratic conception is not to penalize the parties for failing to fill the gap themselves at the outset so as to encourage future parties to write more complete contracts. The aim is rather to provide a fair and neutral default for parties who have entered incompletely specified agreements to fill gaps in line with their own joint vision of justice for their relationship.

While non-enforcement is neutral in the sense that it doesn't second guess the substantive content of missing terms, it may fail to be neutral in a second sense, because it implements a no-contract baseline, which may run contrary to the parties' carefully considered joint determination that justice requires them to transact with one another (on terms that have been incompletely specified). When the missing term is a term that must be specified for the parties to understand themselves as bound by justice to transact with one another and there is no neutral way for a court to fill the gap because it is too idiosyncratic to the parties, it's clear that an application of

38. Under Article II's statute of frauds, sales of goods agreements are enforced only up to the quantity shown in the writing evidencing the agreement. *Id.* § 2-201.

39. Ayres & Gertner, *supra* note 11, at 94.

the indefiniteness doctrine is required. But such a conclusion is not warranted when the parties clearly believe justice to bind them to transact with one another no matter which of the plausible ways of filling the gap is chosen.

For an example of a case that may lie in the first category, consider the facts of *Varney v. Ditmars*.[40] Defendant agreed with Plaintiff, an architect employed by Defendant, that he would pay Plaintiff $5 more a week and a "fair share of [Defendant's] profits" for the year if Plaintiff finished three uncompleted projects for Defendant. But the agreement failed to specify what the parties understood a fair share of Defendant's profits to mean. Given the apparent centrality of this term to Plaintiff's overall compensation and the absence of any indication that Plaintiff would have agreed to do the work without receiving the fair share of Defendant's profits, it is reasonable to conclude that the parties had resolved that Plaintiff's duty to do the work was dependent on Defendant's promise of a fair share of his profits alongside the promised pay rise. If that is so, a court should decline to fill the gap and hold the agreement unenforceable absent a way of resolving what "fair share" meant to the parties. This is what the majority did concluding that an essential element of the agreement, the price, hadn't been specified with enough definiteness.[41]

The case was complicated by the fact that Plaintiff had partially performed. But, as the majority held, that problem could be dealt with by allowing Plaintiff to pursue an unjust enrichment claim against Defendant for the value of work already performed if it exceeded the amount he had already been paid for it.[42]

In dissent, Judge Cardozo argued that the contract should have been enforced by giving Plaintiff his expectation for the duration of the contract, filling the gap with a wage equal to the component that the parties had clearly specified—the promised remuneration less the vaguely specified "fair share" of profits—on the grounds that the problem was a mere evidentiary one: "plaintiff failed to supply the data essential to computation" of the "fair share."[43]

But from the court's vantage point there was no clear basis to conclude that the parties had resolved that justice required an exchange of Plaintiff's labor for a wage that didn't include the "fair share," nor was there a basis for the court to conclude that the parties' had even resolved what would constitute a fair share of the profits. Better then to punt matters back to the parties by declining to fill the gap, at least assuming an absence of bad faith on the part of Defendant when they entered the agreement. Of course, if Defendant, anticipating that the vagueness of the term

40. 111 N.E. 822 (N.Y. 1916).
41. *Id.* at 231–32.
42. *Id.* at 232.
43. *Id.* at 234 (Cardozo, J. dissenting).

would trigger an application of the indefiniteness doctrine, had been purposefully vague to avoid paying Plaintiff a just price for his labor, Cardozo's solution may well be the right one. Doubts should be resolved against such a Defendant as a remedy for bad faith of this sort, not because the parties had a morally valid agreement that Plaintiff would work for Defendant for the specified wage less the fair share of profits.[44]

For an example of a case where the parties seemed to be committed to transacting with one another no matter which reasonable way of filling a price gap was chosen, consider the facts of *Oglebay Norton Co. v. Armco, Inc.*[45] The dispute arose part way through a very long-term shipping contract during the course of which the parties had made substantial investments in their relationship. It was triggered by the failure of the pricing mechanism specified in the contract. Rather than void the agreement for indefiniteness, the Supreme Court affirmed the trial court's decision to fill in the missing price term as neutrally as it could by choosing prices that fell within the extremes proven at trial for seasons past and ordering the parties to negotiate about the price for subsequent seasons.[46] In the terms of the democratic conception, the parties had clearly determined that justice required them to continue their contractual relationship, despite their failure to specify a mechanism for determining a crucial term in the unanticipated circumstances they found themselves in. Thus, even though it wasn't obvious how to fill the gap, doing so as neutrally as possible was better than the alternative of invalidating the contract for lack of definiteness.

Here we see something of a continuity here between the indefiniteness doctrine and the principles that limit the scope of unjust enrichment liability. Unrequested benefits voluntarily conferred don't give rise to an unjust enrichment claim "unless the circumstances of the transaction justify the claimant's intervention in the absence of contract."[47] Courts, in other words, generally don't force a recipient to pay for a benefit received, even when it may otherwise seem just to do so, when the parties have failed to contract in circumstances when they easily could have done so. The baseline is no contract, which supplies a neutral baseline for the parties to decide together whether and how to contract—to figure out together how to resolve moral uncertainty about what justice between them requires. One party cannot preempt this process by conferring a benefit on the other without the other's assent, regardless of whether the other party wanted the benefit and would have been willing to pay for it.

44. For a case finding an employer liable to an employee on a promissory estoppel theory for a vague (and likely bad faith) promise of future employment that was too indefinite to create a contract, see *Blinn v. Beatrice Community Hospital and Health Center, Inc.*, 270 Neb. 809 (2006).

45. 556 N.E.2d 515, 519 (Ohio 1990).

46. *Id.* at 520–21.

47. Restatement (Third) of Restitution and Unjust Enrichment § 2(3) (Am. L. Inst. 2011).

The doctrine of indefiniteness, by contrast, enters when both parties have clearly decided to transact with one another and attempted to articulate a vision of justice for their relationship but have failed to specify a vision completely enough for a court to enforce it without risking putting a thumb on the scale of a controversial conception of justice. The result is non-enforcement of the agreement (albeit non-enforcement that may leave the parties free to pursue claims in unjust enrichment for benefits they have conferred on one another under the now unenforceable agreement).[48] The stronger are the indications that the parties judged that justice requires continuation of their relationship, the more willing courts ought to be to fill such gaps, more so still when there may be a plausible way of doing so in a relatively neutral way. The importance of honoring the parties' commitment to transact with one another on *some* reasonable terms may thus come to outweigh the importance of the court remaining neutral on how any gaps are to be filled. In other words, courts applying the indefiniteness doctrine must be sensitive to the degree to which the parties' commitment to transacting with one another depends on the content of the terms of their relationship.

## Conclusion

According to my democratic conception of contract, courts should fill gaps in incomplete contracts with a view to supporting the parties' joint deliberations about what justice between them requires. This requires in the first instance respecting the parties' original agreement. That agreement, if morally valid, reflects the parties' joint vision of justice for their relationship as they envisaged it when they created it. Courts should elaborate the content of the agreement accordingly—in a way that makes sense of it as the parties' joint vision of justice. When gaps remain, courts should choose defaults not to try to approximate the choice the parties would have made at the time of agreement had they thought about the matter, but to encourage post- formation deliberations about how gaps should be filled (and possibly the rest of the agreement modified) to implement a current joint vision of justice for their relationship. Because the parties are the ones who are morally authorized to resolve moral uncertainty about what justice between them requires, courts should strive to provide a fair and neutral baseline for the parties' deliberations to minimize the risk that they intrude on the parties' ability to do this themselves.

Sometimes courts can achieve this by filling gaps in accordance with terms that typical parties would likely choose. But they should not do so with the aim of maximizing joint welfare by reducing parties' transaction

48. *Id.* § 31(1)(a) (2011); *see also* Varney v. Ditmars, 111 N.E. 822 (N.Y. 1916) (finding that an agreement to pay an employee a fair share of the profits was too indefinite to be enforceable but that the employee might still have a claim in quantum meruit).

costs, but rather to avoid prejudging the resolution of relationship- specific matters. Where an objective indicator is lacking, the missing term is material and it is likely that the parties' willingness to deal with one another depends on both being satisfied with the term's content, it may be preferable to invalidate the agreement on grounds of indefiniteness. But when the parties are more committed to continuing the relationship than to a particular way of filling the gap, a court should fill the gap even if there is some risk that it does so non-neutrally—that is, in a way that puts a thumb on the scale of a controversial conception of justice that may get in the way of the parties' articulation of their own joint vision.

Thus, even though the democratic conception of contract has substantive justice at its foundation, it is nonetheless able to offer guidance to courts adjudicating disputes arising out of incomplete contracts. Indeed, the guidance it offers courts is clearer than the guidance offered by economic analysis insofar as figuring out social welfare maximizing defaults requires much more information about the population of contracting parties than courts could feasibly acquire given significant heterogeneity of preferences and circumstances in the subject population. This is because the democratic conception recommends that default rules should not be striving to approximate what justice between the parties requires but rather setting fair and neutral defaults for the parties' own deliberations about justice. Such a cautious approach is, on my conception, the appropriately democratic response to moral uncertainty about justice.