

On the Psychological Basis of the Rule of Law: from Beccaria to Institutional Experimentalism

MARCO **SEGATTI**

University of Genoa, Italy.

E-mail: marco.segatti@edu.unige.it

ABSTRACT

This paper (tentatively) discusses, what it calls, the psychological basis of the rule of law. To do so, the paper begins with an analysis of Beccaria's influential arguments at the beginning of *Dei delitti e delle pene* on why legitimate sovereignty requires the separation of powers. Then, the paper proposes an alternative conception of political legitimacy, which it calls *Institutional experimentalism*, and which incorporates *both* Beccaria's central insights, *as well as* three classic critiques to key details of its overall project.

Questo articolo (in via provvisoria) discute ciò che definisce le basi psicologiche dello Stato di diritto. A tal fine, inizia con un'analisi degli argomenti influenti di Beccaria all'inizio di *Dei delitti e delle pene* sul perché una sovranità legittima richieda la separazione dei poteri. Quindi propone una concezione alternativa della legittimità politica, che chiama *Sperimentalismo istituzionale*, e che incorpora sia le intuizioni centrali di Beccaria sia tre critiche classiche ad alcuni dettagli chiave del suo progetto complessivo.

KEYWORDS

Beccaria, rule of law, institutional experimentalism, political legitimacy, political psychology

Beccaria, stato di diritto, sperimentalismo istituzionale, legittimità politica, psicologia politica

DIRITTO & QUESTIONI PUBBLICHE / CLEAR

Rule of Law: in Books, in Minds

Special Publication / February, 2026

© 2026, *Diritto e questioni pubbliche*, Palermo.

ISSN 1825-0173

Tutti i diritti sono riservati.

Questa Special Publication della rivista *Diritto & Questioni Pubbliche* è stata finanziata dall'Unione Europea - NextGenerationEU a valere sul Piano Nazionale di Ripresa e Resilienza (PNRR) - Missione 4 Istruzione e ricerca - Componente 2 Dalla ricerca all'impresa - Investimento 1.1, Avviso Prin 2022 indetto con DD N. 104 del 2/2/2022, dal titolo "Il concetto di Stato di diritto: prospettive analitiche ed empiriche (CLEAR)", codice proposta 20225TJJSY - CUP J53D23005150006.



On the Psychological Basis of the Rule of Law: from Beccaria to Institutional Experimentalism

MARCO SEGATTI

1. *Introduction* – 2. *Beccaria's Central Argument on the Separation of Powers: Genesis and Implications* – 3. *Three Arguments against Beccaria* – 3.1 *The Rawls-Nussbaum Critique* – 3.2 *The Mill-Dewey Critique* – 3.3 *The Chiassoni-Leiter Critique* – 4. *An Alternative Conception of Political Legitimacy: Institutional Experimentalism* – 4.1 *Elements of a Theory of Political Legitimacy: the Aristotelian Principle* – 4.2 *Segue: An Experimental Conception of Practical Intelligence* – 4.3 *Segue: Mob, People, and Public* – 4.4 *Segue: the Claims of a Legitimate Political Authority* – 5. *IE's Fundamental Advantages* – 5.1 *Thickening Beccaria's Conception of Liberty* – 5.2 *Experimental Arguments for Government by General Rules* – 6. *Three Objections to IE* – 6.1 *First Objection: on the Necessity of Judicial Interpretation* – 6.2 *Second Objection: the Problem of Insular Collectivism* – 6.3 *Third Objection: Political Legitimacy for Martians?* – 7. *Conclusion*.

1. *Introduction*

This paper (tentatively) discusses what I shall call the psychological basis of the rule of law. By psychological basis of the rule of law I mean this: the conception of human personality which is necessary to stabilize people's fidelity to the rule of law, relative to some specific political or normative argument on its importance.

To reconstruct this, the paper begins with an analysis of Beccaria's influential arguments at the beginning of *Dei delitti e delle pene*¹ (DDP, for short) on why legitimate sovereignty requires legislatures (and legislatures only) to govern by general rules (and general rules only), and magistrates and magistrates only, to decide on individual cases by applying those general rules (and those general rules only, with an explicit prohibition of interpretation).

For Beccaria's arguments to work, the paper finds, we need to assume three psychological principles: 1) *the principle of tradition* – namely, the idea that past activities (including past evaluations and past social interactions) are sticky, because they reduce people's cognitive effort and awareness in performing these activities, thus pushing them to repeat previous deliberations, even when contrary to their self-interest; 2) *the principle of love for liberty* – namely, the idea that people love their liberty, with such an intensity that they would disapprove a general rule which permanently eliminates an option from their choice-set, even when they do not expect to choose the option now, or in the future, unless the general rule itself is shown to be necessary to protect the extension of some other liberty; 3) *the principle of despotic taste for domination* – namely, the idea that people's love for liberty is purely self-centered, and only rarely (if ever) carries over to their fellowmen. On the contrary, people have a particular taste for restricting *other people's* liberties instead, because they have a despotic taste for dominating others.

Combine these three principles together, and, I argue, one can explain why Beccaria thinks that a society governed by the *principle of necessity*² will tend to guarantee the greatest happiness for the greatest number, and why a government which respects the separation of powers will tend to produce a society which respects the principle of necessity. Government by general rules, protected by sanctions in cases of violations, and impartially enforced by legal officials in individual

¹ See BECCARIA 1984 [all translations from the original Italian, and which appear below in the text of this article are mine]. For a contemporary English translation (based on the Italian edition which I used), see BECCARIA 1986.

² As we shall see in a moment, this is my interpretation of Beccaria's principle of necessity: A social state is just if and only if the only limitations to liberty which it imposes are those that are necessary for the protection of the maximum extension of everyone's equal liberties.

cases shall tame people's taste for domination and reduce people's reliance on unreflective tradition, while optimally balancing people's individual liberty with its tranquil and secure enjoyment by all.

Then, after pointing to three classic arguments for skepticism about Beccaria's overall project, the paper proposes an alternative conception of political legitimacy, which I shall call "*Institutional Experimentalism*" (*IE*, for short). As we shall see, this alternative conception builds on both Beccaria's central arguments, as well as on the concerns of his critiques.

This is *IE*'s fundamental thesis:

A political system is legitimate if and only if the people subject to its authority have good reasons to comply with the norms it produces, as a public experiment on the desirability of those norms.

At base, *IE* is built on an alternative conception of human social personality, informed by, what Rawls has called, the *Aristotelian principle* – namely, the idea that human beings are progressive beings, with a special taste for excellence and distinction, and whose practical intelligence is fallible and experimental. Beings of this kind, the paper argues, have an individual interest in the protection of their own, *as well as* other people's liberties, because they have an individual interest in the intelligent transformation of their own tastes and evaluations.

Put *IE*'s central political thesis and the Aristotelian principle together and, I shall argue, there you have novel interpretations of old and respected arguments on the importance of general rules in reasonable government, the legitimate scope of judicial interpretation of legal texts, the harms of insular collectivism and polarization, and the need for a thick conception of liberty.

2. *Beccaria's Central Argument on the Separation of Powers: Genesis and Implications*

At the beginning of *DDP*, Beccaria draws a few institutional consequences from the general political principles presented by Beccaria earlier in the book. This section begins by the former consequences and works its way back to the latter principles to tease out what I called the psychological basis of Beccaria's rule of law. This is the first consequence, which Beccaria discusses (BECCARIA 1984, 33):

«[L]aws alone can decree the punishments for crimes, and this authority can reside only with the legislator, who represents the whole society united by a social contract; no magistrate (who is part of society) can with justice establish³ punishments against another member of the same society».

So, the legitimate sovereign, and the legitimate sovereign only, can determine sanctions (that is, restrict liberties). Why? Because the legitimate sovereign, and the legitimate sovereign only, represents the whole society. Thus, an individual magistrate that inflicts a sanction beyond (or

³ In his translation (see BECCARIA 1986, 9), David Young chooses the more literal "inflict". I follow Francioni's advice (see BECCARIA 1986, 33 at nt. 1) and correct Beccaria's choice of words to avoid confusions: magistrates are clearly authorized to *inflict* punishments in individual cases, according to Beccaria – it would be contradictory to say that they are not. What they must *not* do is "establish", "determine", or indeed "create" the rule which legislates what these punishments are, and the conditions upon which they are inflicted. A further difficulty is that ultimately Beccaria seems to be concerned *only* with magistrates who inflict *larger* punishments than the ones determined by the legislature and calls *that* an abuse. But his argument should work, just as well, in situations in which the magistrates inflict *smaller* punishments than the ones determined by the legislature. Of course this may depend on Beccaria's assessment that, in his time, sanctions were generally larger than what optimal deterrence (given the principle of necessity) would recommend. But unless he has an argument that, by and large, *all* legal systems *everywhere* tend to err on the side of overdeterrence, something is amiss in his formulation.

below?⁴) what the sovereign has established is, in fact, usurping the sovereign's powers and prerogatives, substituting the *right* punishment with arbitrary domination.

But why do we need magistrates at all then? That is, if the sovereign, when legitimate, represents the whole society, why is it that we should want to preclude its right to punish in individual cases and delegate the relative power to individual magistrates only (and thus creating the problem of supervision and control of the latter's job as well)? This is the second consequence (BECCARIA 1984, 34):

«[...I]f every individual member is bound to the society, the latter is likewise bound to every individual member by a contract, which of its nature binds both parties. This obligation, which descends from the throne to the shack, which equally binds both the greatest as well as the most miserable men, only means that it is in the interest of everyone that all the pacts which are in the interest of the greatest number ought to be enforced. The sovereign, who represents the society itself, can only make general laws, which bind all members, but he cannot judge that someone has violated the social contract, because then the nation would be divided into two parts, one represented by the sovereign, who asserts the violation of the contract, and the other by the accused, who denies it. It is therefore necessary that a third party judge the truth of the fact. Hence the necessity of a magistrate, whose sentences are final and consist of mere assertions or denials of particular facts».

So, we need a third (i.e., an independent) party (the magistrate that is) to judge individual cases, because otherwise we would unnecessarily split society in two: the sovereign could not represent the whole society, because it would necessarily have to take sides in any individual conflict.

But notice: it is not just an abstract principle of social unity at stake, however. General laws, Beccaria says, bind everyone equally from the throne to the shack, because they ought to bind the greatest and the most miserable man alike. Splitting society in two, then, would mean to break law's promise of equal consideration. But how could that be? What difference does it make to rule by general rules or by individual orders? How could the sovereign respect social unity and equality while doing the former, and then throw everything away while doing the latter?

To unpack these arguments further, we need to work our way back to first principles and, first, identify the normative and political *desiderata* of a just society according to Beccaria, and then the psychological principles which explain why the separation of power is the best institutional technique to deliver those. Let's begin with the text again (BECCARIA 1984, 25, 26, 27):

«Laws are the conditions under which free and isolated men of this globe have united in society, tired of living in a continual state of war, and of enjoying a liberty rendered useless by the uncertainty of preserving it. They have sacrificed a part of it to enjoy the remainder with security and tranquility. The sum of all these portions of liberty sacrificed to the good of each forms the sovereignty of a nation, and the sovereign is their legitimate depositary and administrator.

[...A]ny authoritative act from a man to another, which is not justified by absolute necessity is tyrannical. Here then is the foundation of the sovereign's right to punish crimes: the necessity of defending the deposit of public safety from particular usurpations [...]. Let us consult the human heart, and there we shall find the fundamental principles of the true right of the sovereign to punish crimes; for no lasting advantage is to be hoped for from moral policy, if it is not founded on the indelible sentiments of man. Any law that deviates from these will always encounter a contrary resistance, which in the end prevails; in the same manner, that a force, however slight, if continually applied, overcomes any violent motion communicated to a body».

Notice that there are two things going on here. First, Beccaria establishes the political principle which ought to inform what a just social arrangement should look like – the principle of necessi-

⁴ See nt. 3 for an explanation of where the doubt comes from.

ty. And, he adds, the right to punish *coincides* with this just social arrangement. But what is this principle of necessity? Here is a proposal for a re-formulation:

A social state is just if and only if the only limitations to liberty which it imposes are those that are necessary for the protection of the maximum extension of everyone's equal liberties.

But there is something else that is going on here. A just social arrangement, Beccaria says, is the *only* arrangement which can be stable over time. Call this the *principle of social stability*: any law that deviates from the indelible principles of the human heart, shall find a contrary force, opposed to it. And notice how justice and stability are wonderfully intertwined here (BECCARIA 1984, 29):

«[...T]he more just are the punishments, the more sacred and inviolable is the security, and the greater the liberty, which the sovereign preserves for his subjects».

So far then, we have a political or normative principle, stating the conditions of a just social arrangement, which Beccaria calls the *principle of necessity*. We also have a sociological principle, which I called the *principle of social stability*, and which connects the latter with the former: only a *just* social arrangement is stable, at least in the long run. And we have principles of institutional technique, which are required to organize our political communities in such a way to guarantee justice and, thus, social stability over time. This is the *principle of the separation of power* (the sovereign makes general law, and general laws only; whereas magistrates, and magistrates only, apply them in individual cases) and a *principle of popular sovereignty* too (the legitimate sovereign derives its legitimacy from a social contract)⁵.

We only miss one thing to connect everything together: we need to look for psychological principles which can explain how the “indelible sentiments” of human beings push them to accept legitimate authority *only* and *reject* illegitimate authority all together (at least in the long run). Beccaria here is extremely quick and does leave some questions open to interpretation⁶. But we can speculate on three psychological principles: the *principle of tradition*; the *principle of love for liberty* and the *principle of despotic domination* (BECCARIA 1984, 23, 25, 26, 27, 31):

«Men for the most part abandon the most important regulations to the daily prudence or discretion of those whose interest it is to oppose the most provident laws, which by nature make advantages universal, and resist that effort, by which they tend to condense into a few, placing on one side the height of power and happiness, and on the other all weakness and misery. Therefore, unless after having passed through a thousand errors in the things most essential to life and liberty, after a weariness of suffering the evils reached the extreme, they do not bring themselves to remedy the disorders that oppress them,

⁵ On Beccaria's contractualism, see IPPOLITO 2022.

⁶ But am I reading too much in the text? As I will make clearer in a moment, I am interpreting Beccaria through the lens of British Utilitarianism (and of American pragmatism and of John Rawls too!), who were clearly and constitutionally interested in finding out what these “indelible sentiments of man” are, and went out to discover them in a more explicit and systematic way (than Beccaria himself). While it is clear and beyond any doubt that Beccaria was *not* influenced by people like John Stuart Mill, or the American pragmatists or John Rawls (given their respective dates of birth), it is an interesting, well researched, but extremely complex issue whether he was influenced, and how much, by people like David Hume, Francis Hutcheson, John Locke and Francis Bacon, all of whom, either directly or indirectly, through support or opposition, had an influence on British Utilitarianism (and its general interest in what Beccaria calls, referencing Montesquieu, the “indelible sentiments of man”). On these and related matters, see FRANCONI 2019, 1990 and IPPOLITO 2022. Either way, it is an undisputable fact that Beccaria thought that it was tremendously important for political theory to discuss the indelible sentiments of human beings, and that his normative arguments depend, in no small part, on what these are or can be thought to become after institutional reforms of one kind or another.

and to recognize the most palpable truths, which precisely because of their simplicity escape vulgar minds unaccustomed to analyzing objects, but to receiving impressions of them all at once, more by tradition than by examination. [...] It was not enough to form this deposit [of sacrificed liberties: i.e., legitimate sovereignty], it was necessary to defend it from the private usurpations of each man in particular, who always tries to take from the deposit not only his own portion, but also to usurp that of others. There needed to be sensible motives, which were sufficient to dissuade the despotic mind of each man from sinking the laws of society back into the ancient chaos. These sensible motives are the penalties established against the infractors of laws. [...] It was therefore necessity that forced men to give up part of their freedom: it is therefore certain that each one does not want to put into the public deposit, but the smallest possible portion, that alone, which is sufficient to induce others to defend it. The aggregate of these smallest possible portions forms the right to punish; everything more is abuse and not justice [...]».

People love their liberties, and their secure and tranquil enjoyment, then. So much so, that these are the chips that they trade among each other to institute governments and public institutions (this is the *principle of the love for liberty*). Whenever we build a public institution, we trade the extension of one or more of our liberties, against their secure and tranquil enjoyment. But people's love for secure and tranquil liberties is *not* a political ideal. In fact, people would be quite willing, if given a chance, to secure their liberty and its tranquil enjoyment *without* having to offer any fair deal in return and rather usurp the liberties of others through sheer despotism and domination (this is the *principle of despotic domination*). More generally, habituation to social practices (even when unintelligent, or otherwise unfair) counts more than enlightened reflection, or even smart decision-making, in human deliberations (this is the *principle of tradition*).

Combine these three principles together and there you have an explanation of why the sovereign ought to govern by general rules only, why these should be applied by magistrates, and magistrates only, in individual cases, and why when public institutions guarantee *both* conditions, they tend to converge on a just social arrangement, which respects the principle of necessity. If the sovereign were to govern by individual orders, one would be quite willing to approve the repression of somebody else's liberties, since one doesn't care about the liberty of others – in fact, one typically *enjoys* the possibility of despotically bossing people around. But so would everyone else, breeding anarchy and chaos (and «*the violation of even one [pact] begins to authorize anarchy*», BECCARIA 1984, 34).

Contrariwise, if the sovereign governs by general rules only, and these are applied in individual cases by *apolitical* magistrates, then one would *not* approve the infringement of somebody else's liberty beyond the principle of necessity because one would not approve the corresponding infringement of *their own* liberty. General rules, when equally enforced by impartial judges, enable everyone's (egoistic) love for liberty to tame their despotic taste for domination and push their behavior in a direction which is beneficial to all – namely, a social state specified by the principle of necessity.

And yet, when left to their own devices (and their own practical deliberations), people cannot be trusted to pursue the social benefits of government by general rules, because they cannot be trusted to pursue their enlightened self-interest when tradition and short-sighted advantages pull them in an opposite direction. That's why we need “sensible motives” (i.e., sanctions) to steer us in the right direction, by anticipating the costs of socially harmful behavior, or the benefits of socially beneficial one, within present decision-making (BECCARIA 1984, 27):

«[...] Experience has shown that the multitude does not adopt stable principles of conduct, nor does it depart from that universal principle of dissolution, which is observed in the physical and moral universe, except by motives which immediately strike the senses, and which continually present themselves to the mind to counterbalance the strong impressions of partial passions, which oppose the universal good: neither eloquence, nor declamations, not even the most sublime truths, have sufficed to restrain for a long time the passions excited by the vivid impressions of present objects».

3. Three Arguments against Beccaria

This section discusses three critical arguments against Beccaria's overall project: 1) the *Rawls-Nussbaum critique*, raising concerns with Beccaria's conception of liberty; 2) the *Mill-Dewey critique*, which offers an alternative (and more optimistic) reading of the principle of tradition; 3) the *Chiassoni-Leiter critique*, which questions the feasibility of Beccaria's strong prohibition of judicial interpretation. Neither one of these arguments is specifically targeted at Beccaria, nor is it meant to radically alter its defense of the rule of law. Moreover, each one of these arguments has different implications for, and is concerned with, different aspects of Beccaria's central arguments. Put together, however, they offer well-grounded reasons for skepticism about important details of Beccaria's overall strategy. This is why, as we shall see in section 4, 5 and 6 below, my alternative proposal builds both on Beccaria's arguments, as well as on the three critiques discussed in this section.

3.1 The Rawls-Nussbaum Critique

In short: a reconstruction of key moments of both Rawls and Nussbaum's respective conception of human liberty condemns Beccaria's conception of liberty as thin, non-ordered and comprehensive⁷. As such, the latter can neither provide a reasonable normative account of the importance of liberty for a well-ordered society, nor can it explain its stability-conditions⁸.

Following Rawls, we may distinguish between the extension of one liberty (i.e., the number of socially uninhibited options at one's disposal) and the worth of a liberty (one's actual capacity, given one's resources and specific "conversion-rates", to transform these options into valuable functioning)⁹. Adapting Rawls' vocabulary, Beccaria's human beings seem to care about the extension of liberty *only* (hence, this is what I called a *thin* conception of liberty), where any liberty whatever counts as any other (hence, this is what I called a non-ordered conception) and where liberty is the *only* politically valuable thing (hence, this is what I called a comprehensive conception).

But is it reasonable to assume that people care about their liberty to, say, throw cigarettes' butts on public roads just as much as they care about, for example, the liberty to peacefully associate with others, or speak their minds up, or act on their intimate understanding of who they are and what they want? Similarly, is it reasonable to assume that people should *only* be ready to trade a restriction to the extension of one liberty in exchange for the expansion of the extension of another, and *never* in exchange for an increase in the worth of the same, or another, liberty?

⁷ It is important to remember that Beccaria could have easily objected to this characterization: his primary interest in DDP is, quite clearly, in the criminal law, whereas I am taking him to suggest that his conception of liberty and justice should be applied across all legal and political domains. I culpably do not have arguments on the best reading of Beccaria on this point, but with respect to the introduction and the first few chapters of DDP I do not think it is quite an easy case to make either way. So I consider the more extensive interpretation plausible, with the important qualification that this should not be taken as an attempt to demolish Beccaria's arguments in a historically accurate way, but rather to isolate points of friction within them with the aim of helping contemporary discussions (i.e.: don't be so silly to dismiss Beccaria based on my account, but read him with an eye, *inter alia*, on how to thicken, order, and limit his conception of liberty). See IPPOLITO 2024 and ZUCCA 2022 for recent discussions of Beccaria's conception of liberty within the criminal domain. Thanks to Alberto Ramaccioni Marini for his help in navigating this literature.

⁸ See, for example, RAWLS 2005 and NUSSBAUM 2006. This is, to be sure, an oversimplification of a centuries-long debate on alternative conceptions of liberty (as well as of Rawls and Nussbaum's contributions to it). For a recent analysis of a pluralist account of freedom, see RIVA 2024. I should note, if only in passing, that Beccaria's account is not (or not necessarily) an account of negative freedom, so that criticism against Beccaria's underlying conception of liberty in DDP may, or may not, carry over to contemporary defenses of negative freedom as a political ideal. To say the least, a defense of negative freedom doesn't necessarily defend a non-ordered and comprehensive conception of freedom, as defined in the text.

⁹ See RAWLS 2005, § 32.

Practically speaking, answer in the affirmative to these questions, and the implication would be that people should *never* care about the distribution of valuable resources, including, for example, the distribution of social esteem and respect. And that they do *not*, in fact, care about these things at all. But, for one thing, how does this square with their despotic taste for dominating others, and, correspondingly, the need to protect oneself against unwelcomed domination?

Notice that there are *two* aspects to this line of criticism. A thin, non-ordered, and comprehensive conception of liberty may (or may not) be normatively or politically appealing, all things considered. But if people's actual tastes and preferences are not cut out in this exact way, because people, for example, *do* care about the distribution of valuable resources, including social esteem, then the principle of necessity and the principle of separation of powers (as they are specified by Beccaria) would *not* be enough to recruit people's loyalty to positive law, breeding chaos and anarchy (and thus ultimately producing suboptimal restrictions of liberty).

If people cared for distribution more than they cared about the extension of some of their liberties, then they should be willing to trade a restriction to the *extension* of one liberty in exchange for an increase in the *worth* of the same, or another, liberty. Similarly, if people's taste for domination were tied to their longing for social esteem (e.g.: dominating others is a means to attain social esteem), then we should not be able to prevent despotic domination *without also* assuring mechanisms to reasonably distribute social esteem as well. In both cases, the optimal balance between the extension of liberty and its tranquil and secure enjoyment should look very different from what the principle of necessity prescribes, possibly tolerating restrictions to the extension of some liberty that are *not* necessary to protect the equal extension of everyone's equal liberties.

3.2 The Mill-Dewey Critique

Beccaria's human beings are short-sighted, because habituation to entrenched traditions generally prevents thoughtful reflection on individual and social advantages. And they are egoists as well, since the only interest they have in protecting other people's liberties depends on *their own* interest in pursuing their individual goals and aims (which are assumed to be already given and firmly established).

But perhaps people can also be brought up, and educated, within a culture of respect for everyone's equal liberties and learn to sublimate and expand (if not completely repress) their egoistic concerns, by cultivating habits of social reflection and mutual understanding¹⁰. Traditions may not only preclude thoughtful judgment and evaluation but also train people's habits of critical scrutiny and anti-dogmatic questioning.

Again, notice that there are two aspects to this line of criticism. Traditions may (or may not) be a legitimate source of political authority. But if our take on human social personality is not quite as pessimistic as Beccaria's, and we allow a role for specific traditions of, for example, free inquiry and mutual understanding in developing and cultivating people's taste for free institutions and equal respect, then perhaps we may come to approve restrictions to the extension of some liberty (e.g., the liberty of one parent to decide on the amount of formal education their child should attend to), which is *not* justified by the protection of the maximum extension of everyone's equal liberty, but by the attainment of some socially specified level of some actual human functioning (e.g., the abilities to read, write, calculate, and generally be conversant in civil and political matters). Arguably, these restrictions to liberty (above what should be prescribed by the principle of necessity) may even work as (partial, at least) substitutes for sanctions, thus reducing the amount of pain which is necessary to stabilize an ordered society¹¹.

¹⁰ See DEWEY 1922a, sec. I and MILL 1991 for arguments about this possibility (and the difficulties of making it a reality).

¹¹ Of course, this point owes a great deal to Beccaria himself (see BECCARIA 1984, chs. XLII and XLV), given the most visible role which education plays in his own conception of the right to punish, and its point (see, for example,

3.3 *The Chiassoni-Leiter Critique*

Beccaria's explicitly prohibits judges from interpreting the law. In fact, any judicial interpretation of the law usurps the legitimate sovereign and thus violates the principle of necessity (see BECCARIA 1984, 36, 37, 38).

This assumes that *one and only one* meaning can be attributed to any legal text¹². Moreover, general rules (produced by the legislature) can enable people's love for liberty to constrain their taste for domination, *if and only if* people can attribute the *same* meaning that the legislator attributed to the relevant legal text, regardless of whether it applies to themselves, or to their friends, or to their enemies¹³. Whereas if people's collective affiliations (be they political, religious, racial, ethnic, cultural, or else) are strong enough to push them to, as the old saying goes, *interpret* the law when their friends are involved, while *applying* it to their enemies, then no love for liberty can ever compensate people's taste for domination (arguably, the former may ignite the latter even further, as love for the liberty of "my people" may increase the intensity of my taste for dominating *other* peoples¹⁴).

Push the argument a little further, and there you have a rather more pessimistic interpretation of the first two critiques. People do not have a thin, non-ordered and comprehensive conception of liberty, and tend to attribute pervasive political authority to entrenched social traditions, not just because they are short-sighted egoists attempting to reduce the pains of reflective deliberation any way they can, but (also) because they especially care about their collective affiliations. So much so, in fact, that these affiliations threaten any notion of impartial enforcement of general rules: insular collectivism¹⁵, and *not only* egoistic individualism or short-sighted and unreflective social conformity, is what threatens Beccaria's model of the separation of powers.

4. *An Alternative Conception of Political Legitimacy: Institutional Experimentalism*

This section presents the proposal of a particular (pragmatist) conception of political legitimacy, which I shall call "institutional experimentalism". It is an original formulation of a thesis that nevertheless runs through the work of many pragmatists (and not only). For the sake of simplic-

FRANCIONI 2019, 17 and ID 1990). It remains to be seen, however, whether Beccaria's reconstruction of the force of tradition in human deliberations is consistent with the enormous importance that he gives to education. At first sight it is, of course, but it is important to remember that the force of tradition is used *here* (i.e.: in the first few pages of *DDP*) as an explanation of the fact that contemporary public institutions are unjust, and appear to be stable, despite the sociological *principle of social stability* discussed above – so, traditions work here by lending *inertia* to existing institutions, rather than by training people to be attentive to some aspect or other of their shared existence. Also, as we shall see in a moment, the *Aristotelian principle* would arguably advise to redirect educational efforts from the exclusive focus of helping people to see the long-term, self-interested, benefits in respecting the Rule of Law, to developing an interest in cultivating sophisticated tastes, and to recognizing the role which other people's freedoms have in such development. I owe recognition of these points (and related difficulties) to criticism by Luca Malagoli and István Csabay.

¹² See CHIASSONI 2019, 125 ff. for skeptical arguments about this possibility. Again, I am oversimplifying significantly more complex theoretical arguments and debates on the role and extent of interpretation in judicial reasoning in a long tradition of philosophical scholarship on the law, from Giovanni Tarello to Riccardo Guastini and Pierluigi Chiassoni. None of them, it is important to add, is opposed to Beccaria's project. But their arguments do indeed put pressure on some of its key details. On these matters see, at least, CHIASSONI 2021 and GUASTINI 2021.

¹³ See LEITER 2021 for skeptical arguments about this possibility.

¹⁴ Pablo Navarro has pointed out to me a wonderfully obnoxious Peronist saying which captures the point very well: "To our friends, everything. To our enemies, not even justice".

¹⁵ By "insular collectivism" I mean this: one's propensity to be stimulated by altruistic sentiments toward other people, depending on the fact that these people share some specific characteristic (be it race, religion, class, national affiliation, sex, gender, sexual orientation, profession, common interests or else), with a corresponding limitation of *all* altruistic sentiments for everyone who *doesn't* share the relevant characteristic, in view of a collective interest imputed to its preservation.

ty, and to facilitate the clarity of the proposal, I relegate the discussion, however synthetic, of the pragmatist sources, primary and secondary, to the footnotes. In the text, I shall focus, first, on a general formulation of the central political thesis of *IE* and then, I shall discuss the conceptual and theoretical tools necessary for its understanding. The next two sections will then discuss few advantages of *IE*, relative to Beccaria's overall strategy, and the three critiques discussed above.

In short, and to anticipate the conclusion of the argument: *IE* provides workable criteria for both thickening and ordering Beccaria's conception of liberty and very strong reasons that give importance both to the generality of legal norms, and to the separation of powers, while recognizing the necessity of judicial interpretation and the harms of insular collectivism. As we shall see in a moment, *IE* is built around an alternative conception of human social personality, informed by, what Rawls has called, the *Aristotelian principle* – namely, the idea that human beings are progressive beings, with a special taste for excellence and distinction, whose practical intelligence is fallible and experimental. Beings of this kind, I argue, have an individual interest in the protection of their own, *as well as* other people's liberties, because they have an individual interest in the intelligent transformation of their own tastes, preferences and evaluations. This individual interest, section 6 will argue, is the key theoretical tool, which shall (tentatively) ground the psychological basis of the rule of law on a firmer basis.

Let's start with a first formulation of *IE*'s central political thesis:

A political system is legitimate if and only if the people subject to its authority have good reasons to comply with the norms it produces, as a public experiment on the desirability of those norms.

What is *IE*, then? It is a political, and therefore normative, thesis that interprets the requirements of an authority's political legitimacy as conditions for the experimental acceptability of its orders¹⁶. As a first approximation, this means that we ought to attribute political legitimacy to an authority as a public and shared means to verifying the desirability of its orders. Guaranteeing experimental acceptability as a requirement of political legitimacy means to try and cultivate the institutional ability to correct errors, given the set of past decisions, and their effects.

To present this political thesis in a less approximate way, four further steps are necessary. First, we need three falsifiable (but not yet verified) hypotheses about the social psychology of human beings. All three of these hypotheses prominently figure in the tradition of American pragmatism, but not only. We thus need: 1) a theoretical model of the structure of human evaluations, which a long philosophical tradition calls the "Aristotelian principle"; 2) a conception, derived from this, of the practical intelligence of human beings, based on an experimental attitude toward practical evaluations; 3) a distinction between three forms of social interaction: social interaction as a mob, as a people, or as a public.

Given these first fundamental theoretical elements, we shall be able to take the fourth, and final step, and (4) clarify the minimal content of the political claims of a legitimate authority, according to *IE*.

¹⁶ Note that there is a slight, but important, shift from Beccaria's focus in his *principle of necessity*: whereas the latter is a thesis on what justice requires, *IE* is a thesis on political legitimacy *only*. So, while defending *IE*, I am not committed to any particular theory of justice (understood as a political theory of which procedures should be respected to produce which consequences so that a set of public institutions can count as just), but I am committed to a theory of political legitimacy (understood as a political theory of which conditions a set of public institutions should respect so that its decisions trigger obligations to comply on the part of its subjects). Whereas I take just institutions to be legitimate, legitimate institutions might not be just. At the same time, however, notice that *IE* has a few weightier (and more stringent) political implications than Beccaria's principle of necessity: as we shall see in a moment, *IE* tends to include some form of democratic government (as it should be, at least, *pro-tempore*, and allow for free and public feedback) to the necessary conditions for political legitimacy, whereas Beccaria's principle of necessity (arguably) might not.

4.1 *Elements of a Theory of Political Legitimacy: the Aristotelian Principle*

“Aristotelian principle” is the name John Rawls gives to a peculiar psychological principle that plays a fundamental role in the stabilization of a just society in Part III of *A Theory of Justice*¹⁷. Rawls elaborates a theoretical intuition common to a long (and plural) tradition of utilitarian and pragmatist thought, from David Hume¹⁸, John Stuart Mill¹⁹, William James²⁰ and John Dewey²¹ among the classics, to Martha Nussbaum²² and, perhaps, Gary Becker²³ among the contemporaries.

The fundamental intuition is that there is a very peculiar set of human skills, the development and accumulation of which does not *only* increase our productivity in carrying out some activity. Developing these skills also produces indirect and more remote effects, because it transforms our sensibilities and our taste (or preferences) in carrying out one or more activities. For example, when a child acquires and develops reading skills (superior to mere literacy), they do not *only* become more productive when they read something (they read more quickly, and/or retain and memorize better the information contained in what they read), but they *also* develop a more sophisticated taste for reading itself, as an activity that allows them to exhibit, to exercise and cultivate *further*, more sophisticated skills under their cognitive control.

As I mentioned already, the theoretical model underlying the *Aristotelian principle* is common to a long and plural tradition in social thought. This tradition itself displays several and deep disagreements about the practical and political implications of the existence and diffusion of the relevant principle in the social psychology of human beings. For my purposes, however, three further, and rather common, observations should be enough.

First, the *Aristotelian principle* allows us to elaborate a peculiar conception of practical learning, according to which the acquisition of at least *some* human skills is not simply limited to the satisfaction of already existing ends or desires but is aimed instead at transforming the latter as well, according to a standard of cultivation and personal development. Exemplifying the *Aristotelian principle* in one’s own activities means to display excellence and distinction in one’s own skills, and, at the same time, sensitivity and awareness in one’s evaluations. Human beings, Rawls had Mill say in the third part of *A Theory of Justice*, are progressive beings, with a peculiar taste for excellence and distinction.

Second, this conception of practical learning is a pluralistic conception, and imposes choices on the agent himself: there is no single list of activities capable of exemplifying the *Aristotelian principle*, incorporating and exhibiting the related skills. Therefore, the *Aristotelian principle* itself, understood as a psychological principle, admits multiple and, possibly, incompatible specifications – which therefore impose choices on the agents themselves.

Third, note the peculiar structure of the evaluations underlying the *Aristotelian principle* and, correspondingly, the structure of the objectives related to the completion of an activity, *once* the agent has acquired the skills that allow them to exemplify the *Aristotelian principle*. The goals of these activities have a fundamentally twofold structure. The agent formulates direct, or proxi-

¹⁷ See RAWLS 2005, § 65.

¹⁸ See HUME 1978. For the analysis of some relevant aspects of this tradition of interpretation in Hume’s thought, see CASTIGNONE 1964, 9 ff.; DELLA VOLPE 1933, 6, 7; KEMP SMITH 2005, 158-191 and GARRETT 1997, 237.

¹⁹ See MILL 1963 chs. III and IV, and MILL 1969, ch. IV.

²⁰ See, for example, JAMES 1891.

²¹ See DEWEY 1922a, sec. I and III, and DEWEY 1922b. See also SEGATTI 2024 for an attempt to further develop this account of the human personality and discuss its relevance for contemporary legal theory.

²² See, for example, NUSSBAUM 2001. This is an obituary in honor of Iris Murdoch, in which Nussbaum presents in a way, I believe, particularly clear, the kind of “moral athleticism” (This is Amartya Sen’s characterization), based on the exercise of paying attention, which runs through much of her ethical and political reflection, and which has certainly drawn inspiration from Murdoch’s own work.

²³ See BECKER 1996, the introduction.

mate, goals related to the production of more or less immediate results (achieving a specific goal, completing the activity, culminating one's efforts in a pleasant experience, etc.), and indirect, or more remote, goals, which are related to *the further* effects of one's choices, in relation to the maintenance, or further development of one's abilities.

4.2 *Segue: An Experimental Conception of Practical Intelligence*

From this formulation of the *Aristotelian principle*, we can easily derive an experimental conception of practical intelligence²⁴, through three further observations.

First, action oriented to carry out a practical experiment, like action governed by the *Aristotelian principle*, is directed to the expansion of one's sensibilities, and to increase one's awareness. An intelligent experiment, whether it fails or succeeds, is a paradigmatic example of an experience that transforms the sensibilities of those who participate reflexively in it, cultivating conscious control of their evaluations.

Second, the reasons supporting the choice to perform a practical experiment are second-order reasons (i.e., reasons about other reasons), *pro tanto* (i.e., reasons that can be defeated by other reasons), and exclusionary reasons (i.e., reasons that exclude the balancing of *other* reasons about what to do). If the reasons underlying a practical experiment were *not* second-order reasons, *pro tanto*, and exclusionary reasons they could *not* justify the experiment of anything!

Third, the goals of an action aimed at performing a practical experiment replicate the two-fold structure of the goals of an action governed by the *Aristotelian principle*: direct goals (which aim at the production of information about the consequences of one's evaluations and choices) and indirect goals (which aim at the modification of one's evaluations and choices). In this sense, the reasons that support an action aimed at a practical experiment are, as already mentioned, a clear example of exclusionary reasons. To run a successful practical experiment, one must withhold judgment on at least some subset of their reasons for acting *now*. And yet, the reasons for experimenting something do not *merely* exclude other reasons and certainly don't exclude other reasons in a *definitive* way. Rather, they *provisionally* exclude the *current* balancing of first-order reasons, to produce a *new* balancing in the *future*.

4.3 *Segue: Mob, People, and Public*

The third step consists in a distinction between three types of social interactions: social interaction as a mob, social interaction as a people, and social interaction as a public²⁵.

In social interaction *as a mob*, a collection of individuals acts independently of each other, in the absence of common awareness, and thus without controlling the aggregate effects of their individual actions.

In social interaction *as a people*, a collection of individuals recognizes and controls the aggregate effects of individual actions by merging the individual interests of each into the collective interest of the people, and, therefore, through the elimination of the former by the latter.

In social interaction *as a public*, a collective actor (the public) is provisionally constructed from individual actions, in response to the emergence of a common problem, to identify, evaluate, control and modify the indirect effects of individual actions.

Notice how individual action aimed at the creation of a public replicates the two-fold structure of the goals of an action governed by the *Aristotelian principle*. Like the latter, the former is directed at the expansion of individual sensitivity, and at increasing conscious control of one's own choic-

²⁴ See DEWEY 1922b.

²⁵ I reconstruct this distinction, which is not at all original, starting from the arguments of John Dewey in DEWEY 1927. I owe the recognition of this theoretical point to Hans Joas, and to his discussion of MEAD 2015.

es and their effects. This means that we can assess whether the creation of a public through the internalization of social rules favors, or inhibits, the development of the *Aristotelian principle* in individual actions. If we add at this point the experimental conception of practical intelligence, we can evaluate the intelligence of a social rule in relation to its ability to produce publics that enable, and do not inhibit, an experimental attitude toward the effects of the social rule itself.

None of the above means, however, that any public is, by definition, compatible with the *Aristotelian principle*, nor does it mean that any mob or people is incompatible with it or that social behavior as a mob, or as a people, by virtue of social rules internalized in such a deep way as to remain implicit, or below the level of conscious action, is necessarily unintelligent. The critical question lies, instead, in the ability of such social behavior to leave *open* the possible formation of publics, under what conditions, and with what results. An unequivocal sign (not the only one, to be sure), for example, of the lack of intelligence of social rules that assign specific social roles in relation to sex, gender, wealth, sexual orientation, religion, race, etc. lies precisely in the fact that they inhibit the creation of publics which can experimentally and reflexively collect, and discuss, the most relevant information to evaluate the very desirability of such rules.

In general, and *ceteris paribus*, the more inclusive the public created and maintained by a set of social rules is, the more such social rules will protect, without inhibiting, the development of the *Aristotelian principle* by its members, and an experimental attitude in individual actions. As one public becomes more inclusive, there will be more occasions of frustration of individual expectations about the consequences of one's actions, the opportunities to try and intelligently test alternative patterns of conduct will correspondingly increase, and individual sensitivity and awareness of the indirect effects of individual actions in interactions with others will increase as a result.

4.4 *Segue: the Claims of a Legitimate Political Authority*

Combining the first three steps, we can assert that, according to *IE*, a legitimate political authority does not demand compliance in virtue of its epistemic superiority, nor in virtue of the moral superiority of some definitively established decision-making procedure, and regardless of the results it allows to achieve. Nor does it demand compliance in virtue of a perfect fusion between collective and individual interests.

Rather, a legitimate political authority demands compliance, because it considers socially coordinated compliance *as a means to* carrying out public experiments, to attributing effects to its decisions, and, therefore, to being able to publicly evaluate their merits. At the same time, a legitimate political authority invites and recruits the widest variety of criticisms and objections to its decisions, to collect and then evaluate the widest variety of information about the desirability of the effects of its choices.

This implies that the necessary conditions for a political authority to be legitimate are that there are solid *feedback* mechanisms about the effects of past decision; information on these effects is publicly available and reliably recorded, and the authority itself is *pro-tempore*. We have reasons to perform one action (or to avoid performing another) as an experiment, *if and only if* we are willing to collect relevant information on its effects, and we are willing to be sensitive to the evaluation of such information when choosing in the *future*.

A political authority that inhibits the collection of information about the consequences of its decisions and is not willing to test its entitlement to govern in relation to the evaluation of such information, is, thus, an illegitimate authority. Such an authority does not provide good reasons to accept compliance with its orders as a public experiment around the desirability of such orders.

5. *IE's Fundamental Advantages*

So, what do we gain by introducing *IE* as a conception of political legitimacy, relative to Beccaria's arguments on the separation of powers, and its psychological basis? We shall begin by discussing

two general advantages. Then, the next section raises two objections and, in replying to these, discusses a few more advantages.

5.1 *Thickening Beccaria's Conception of Liberty*

The first advantage of *IE* is that while it does *not* offer a full conception of liberty, it does propose intelligent criteria for thickening, ordering as well as specifying Beccaria's thin, non-ordered and comprehensive conception. This is precisely what the *Aristotelian principle* can do. By identifying sets of abilities which intelligently transform and cultivate people's tastes and sensitivities, it can produce political arguments to recruit institutional support for their development.

Our political communities, we may say, have a duty to *directly* support people's development of the *Aristotelian principle*. Or, we may alternatively say, our political communities have a duty to *remove* the political, social or economic obstacles which preclude people's development of the *Aristotelian principle*. Or, and perhaps most minimally, we may say that our political communities ought *not* to impose political and social duties on us, which preclude our development of the *Aristotelian principle*.

Admittedly, these three alternative formulations may deliver incompatible plans of political action. And they are too vague to specify concrete political goals anyhow. But perhaps this is how it should be: a conception of political legitimacy shouldn't rule out alternative conceptions of justice, but rather screen their apparent reasonableness, and wait for public deliberation (and expediency) to sort things out.

Notice that this takes care of the *Rawls-Nussbaum* critique, as well as the *Mill-Dewey* critique. Combine the *Aristotelian principle* with the experimental conception of practical intelligence, that is, and there you have a more productive (and more optimistic) conception of people's implicit bias toward tradition. According to *IE*, tradition ought not to be a source of political authority, as we have seen. Rather, we should look at tradition as a public record of past practical experiments, waiting, if chance arises, to be overruled when we have reason to doubt either its reliability or its replicability. Our political communities, thus, ought to guarantee the effective conditions for thoughtful public evaluation of the reliability and the replicability of past attempts at coordinating social behavior.

5.2 *Experimental Arguments for Government by General Rules*

The second general advantage of *IE* is that it adds one strong argument for the importance of government by general rules, uniformly applied in individual cases by independent magistrates. According to Beccaria, we have seen, government by general rules guarantees an optimal balance between the extension of equal liberties and their tranquil and secure enjoyment, because it enables people's love for liberty to tame their taste for despotic domination.

But *IE* can *add* that is a good idea to govern by general rules because *without* general rules we could not accept compliance as a public experiment on the desirability of public policy. To accept compliance with an authoritative order as a public experiment, we need authoritative orders to function as common protocols of intervention. If these protocols were not general and uniformly applied, then, we would compromise both the reliability of pieces of information collected in individual cases, as well as the replicability of public interventions themselves. Without general rules, compliance with authoritative orders would offer neither reliable, nor replicable, experiments on these orders.

And notice: this much gives us strong reasons both for committing judges to the fidelity to positive law, as well as for committing legislatures to a strong principle of judicial independence. If judges were not independent, or if they were authorized to simply disregard positive law altogether, judicial application of law in individual cases would neither offer reliable information on the effects of general rules, nor would it allow for intelligent replication.

6. Three Objections to IE

So far, we have said nothing on how to help Beccaria meet, what we called, the *Chiassoni-Leiter* critique. In fact, we can easily reconstruct three objections to the first two general advantages of IE, by elaborating a bit further on such critique.

The first objection is that IE merely adds an argument about the importance of social governance by general rules, but it does not solve one its central problems: how to limit judicial discretion, given the relevance of interpretation in the production of general rules. It would be nice indeed if we could use general rules as protocols for public intervention, if only legislatures could produce a unique correspondence between legal texts and valid normative meanings and thus control judicial activity with the mere production of words. But is it possible to do that?

The second objection builds on IE's reply to the first objection. As we shall see in a moment, public experiments do *not* require a unique correspondence between legal texts and normative meaning. They *do* require uniform coordination between legislative and judicial officials, however. But how can there be uniform coordination between legislative and judicial officials, if legal interpretation is largely conditioned by insular collectivism – and, thus, one's belonging to one's group largely pre-determines one's interpretation of legal texts in controversial cases?

If this second objection went through, the only solution would seem to be to substitute insular collectivism with a more universal form of collectivism, radically transforming people's motivation-sets. But is this possible at all? And, relatedly, are we ready to forego Beccaria's egoistic love for liberty, and its resulting emphasis on the social benefits of individual rights?

The third objection is the most troubling of all: is the *Aristotelian Principle* a credible reconstruction of human social psychology? Or is it not rather a beautiful perhaps, but too idealistic and thus ultimately unworkable account of what drives people's interactions with others? Correspondingly, is IE an account of political legitimacy for Martians – some alien, very possibly nonexistent creatures who may even share some passing resemblance with us, but who are ultimately very different from us too?²⁶

6.1 First Objection: on the Necessity of Judicial Interpretation

The reply to the first objection consists in two further specifications of IE's argument on the importance of government by general rules. First, recall that, according to Beccaria, judges are prohibited from interpreting the law because the legislature, and the legislature only, represents society as a whole. This fits with a traditional view of popular sovereignty, which conceives legislatures (at least when elected by universal suffrage), as the chief (if not the sole) interpreters of the general will. This is why on Beccaria's argument, government by general rules requires a unique correspondence between legal texts and normative meaning. *Without* such unique correspondence, judges could not apply an *already existing* general will in individual cases.

But IE's argument on the importance of government by general rules doesn't require to establish a unique correspondence between legal text and normative meaning, because it doesn't require to conceive the application of these general rules to individual cases as the enforcement of an *already existing* general will. According to IE, government by general rule is a necessary condition of its political legitimacy, because general rules guarantee the reliability and the replicability of authoritative orders. Without general rules, authoritative orders cannot function as common protocols for public intervention. On the contrary, when authoritative orders can function as common protocols for public intervention, the application of general rules to individual cases en-

²⁶ I owe a better understanding of this objection to comments by, and discussions with, Marianela Delgado, Luca Malagoli, Marco Mazzone, Giuseppe Rocchè, Corrado Roversi and Michele Ubertone.

ables the citizenry to form an intelligent public, because it enables the citizenry to impute *causal* effects to its normative evaluations.

And the citizenry doesn't need to believe on any unique correspondence between legal text and normative meaning to do that. All we need to believe in is that the *same* norm, however it has been produced, is applied to a *relevantly similar* class of cases. In fact, interpretative *choices* on the textual material of law can themselves be object of intelligent experimentation, if legal argumentation in a court of law is candid and explicit on the reasoning behind such choices themselves.

In sum, according to *IE*, fidelity to positive law doesn't require a strong prohibition against judicial interpretation, because *IE* doesn't require belief in (some would say, the fiction of) the existence of a well-defined general will, *before* the application of law to individual cases. Fidelity to positive law is a means to the formation of intelligent publics, which can experimentally evaluate the desirability of their normative evaluations. Or, if you will, fidelity to positive law is a means to the progressive formation of an intelligent general will.

Second, *IE* easily recognizes the legitimacy of several traditional argumentative strategies, which authorize judicial deviations from positive law. First, because the results of any experiment are cumulative, and depend on previous experimentation as well. Therefore, the criteria that grants acceptability *now* to a public experiment may not be sufficient in the *future* as requirements of legitimacy. It should not be surprising, therefore, that even starting from the same textual material, the evolution of judicial practice may accumulate interpretative stratifications to any legal text, both by adding new criteria of legitimacy as well as by discarding some older criteria. Second, because compliance with an order can be accepted as a public experiment if and only if there are minimally reasonable instrumental connections, between compliance and the hypothesis on trial²⁷. Third, because, as we have said, the existence of feedback mechanisms to public decisions is a necessary condition for the acceptability of any public experiment. And this means, conversely, that procedural limitations in the selection of elected public officials, relative to the political representation of specific groups *and* to specific political issues and concerns, may justify greater judicial supervision, restricting legislative prerogatives themselves²⁸.

6.2 Second Objection: the Problem of Insular Collectivism

The reply to the second objection is far less developed, and significantly more speculative. If legal interpretation is largely determined by, what I have called, insular collectivism, then general rules can neither enable people's love for liberty to tame popular taste for domination, nor can they function as common protocols for public intervention. This may put us in the uncomfortable position of trying to come up with a more universal kind of collectivism, and thus try and reform, instantly and radically, people's motivation-set in hope of forming an inclusive people, while putting individual rights at risk of obliteration by some superimposed collective interest.

IE's alternative (and still tentative) strategy begins by recognizing an individual interest in the protection of other people's liberties, tied to an individual interest in the intelligent transformation of one's own tastes, preferences or evaluations. *Given the Aristotelian principle*, people have an individual interest in the formation of intelligent publics, and in protecting the social conditions which enable such formation. This is so because by participating in intelligent publics, people have an opportunity to develop those abilities which exemplify the *Aristotelian principle* and thus cultivate their taste for excellence and distinction. And the recipe for contributing to the formation of intelligent publics is striving for the recognition and protection not only of one's own liberties, but of *other people's liberties too*.

²⁷ For a development of this point, see, *a contrario*, the argument in Justice Harlan's dissent in *Lochner v. New York*, 198 U.S. 45 (1905) in favor of the state of New York.

²⁸ See, for example, the classic argument in *ELY* 1980.

The key point then is that this individual interest in protecting other people's liberties is *not* an egoistic one, because it is not tied exclusively to one's *existing* tastes, preferences and evaluations. It can thus recruit more powerful argumentative resources than Beccaria's egoistic love for liberty to justify the imposition of social and political obligations – particularly, obligations to exert restraint in promoting one's own comprehensive values and affiliations in political affairs, while aggressively defend the social conditions which enable the formation of intelligent publics.

And yet, this individual interest does *not* easily collapse into any form of collectivism either and can thus avoid the superimposition of some collective interest, over and against everyone's individual interests themselves.

6.3 *Third Objection: Political Legitimacy for Martians?*

For all its limitations, the account of Beccaria's social psychology which I gave in this paper seems reasonably straightforward and unassuming. The upshot of this is that if his arguments hold water, then we have strong reasons to support the Rule of Law and the separation of powers, without having to assume (or even demand) too much about (or to) people's social psychology.

And yet, there are visible wrinkles in this account of Beccaria's social psychology: if people's insular collectivism is stronger than their love for liberty, Beccaria's institutional proposals are not enough to guarantee the stable protection of the principle of necessity. In and of itself, this observation doesn't lend any credibility to the *Aristotelian principle*, however. In fact, as we have seen in the second objection, if insular collectivism carries some weight in people's psychological make-up, *IE* seems on a par with Beccaria's principle of necessity: nice abstract formulations perhaps, but no real traction in people's political deliberations.

So, which is the best account? Is the intensity of insular collectivism stronger or weaker than people's love for liberty, their taste for despotic domination or their taste for excellence and distinction? To be as candid as possible, I have no good answer to this question. In fact, I am not even sure which fact (or, rather, collection of facts) would either prove or disprove definitive answers to the question²⁹. What's interesting, however, is that the *Aristotelian principle*, far from being a completely alternative account of human social psychology, actually helps explanations of people's love for liberty (in fact, even in the rather intense version which is necessary for Beccaria's argument to go through), their despotic taste for domination, as well as their longing for affiliation within some collective identity or other – but then adds an all-important qualification.

Consider: people love their liberty and may even come to rebel against inhibitions of options they don't plan to select, because they realize personal development means, at least in part, to allow oneself to change one's taste, even beyond one's current expectations. That doesn't mean that people might not be willing to dominate others, when given the chance. On the contrary, domination of others (either individually, or through some collective sublimation) could very well be a means to show excellence and distinction – and possibly even a *cheaper* means than doing the actu-

²⁹ But perhaps some of the empirical results of the research project to which this paper contributes (see ROVERSI et al. 2026), can be interpreted as being at least congruent with the *Aristotelian principle*. Consider: if, given two different activities (say, playing catch in your backyard, as opposed to playing proper baseball, in one of Rawls' examples), and the same level of understanding of their dynamics (indeed, a very tough measure to crack), people can be predicted to prefer the more complex one (in this case, baseball), then this preference could be interpreted as a sign that people do in fact have a weighty preference for excellence and distinction. If that's true, then perhaps the often-observed preference for "simplification" of political processes (usually attributed, in turns, as an explanation for the popular success of authoritarian populism) is not a preference for simplicity *per se*, but a preference for understanding over confusion. Help people understand the point of one political institution or other (help them form intelligent publics, that is), and the more complex and sophisticated its dynamics, the more they will be inclined to support it – just as they are more inclined to choose complexity over simplicity, given a similar level of understanding, in any other area of their lives.

al work (and corresponding sacrifice) of bettering oneself, without holding anyone down (and notice: laws and public institutions, especially when supported by entrenched social traditions might even lend a hand to make domination cheaper than personal development, *at least for some people*).

What the *Aristotelian principle* adds at this point is an explicit recognition that substituting personal development with domination might be cheaper in the short-run (thanks to contingent social conditions, or unintelligent traditions and legislation) but is not completely *free* either – what the dominating party foregoes is the satisfaction of sharing more thoughtful, cultivated and sophisticated tastes with their relevant others.

Can we make this theoretical recognition visible enough to permanently weigh in on Beccaria's *indelible human sentiments*? I genuinely do not know, but perhaps the *relative* success and stability of societies which managed to at least approximate their institutional set up to the ideals of the rule of law, and the separation of powers, is evidence that this is not entirely beyond the reach of a realistic human psychology. Indeed, perhaps even apparent frustration with these ideals, their relative success notwithstanding, is a sign that nothing is ever good enough for human beings³⁰: people's constant longing for personal and social improvement, regardless of past improvements and success, might be understood as a direct consequence of their taste for excellence and distinction. *If* this is true, then *IE* has a decent chance to intelligently guide practical and political thought on how to transform frustration at current conditions into a genuine commitment to shared improvement³¹.

7. Conclusion

This paper argued that for Beccaria's arguments on the importance of the Rule of law (and of the separation of powers in particular) to go through, we need to assume three psychological characteristics of the human personality – namely, what we called, the principle of tradition, the principle of love for liberty, and the principle of despotic domination. Put these principles together, and one can explain why Beccaria believes that legislatures ought to govern by general rules, and general rules only, why he believes that magistrates, and magistrates only, ought to apply the law in individual cases, and why he believes that by guaranteeing these institutional conditions, human societies tend to converge on a just, and stable, social arrangement, specified by the principle of necessity. Government by general rules enable people's love for liberty to tame their despotic taste for domination, while sanctions, if equally and impartially enforced by apolitical magistrates, provide the sensible motives to steer people away from short-sighted reliance on entrenched traditions.

After having reconstructed three classic critiques to key aspects of Beccaria's overall project (based, respectively, on his thin, comprehensive and non-ordered conception of liberty, his pessimistic conception of people's short-sighted reliance on entrenched social traditions, and his explicit prohibition of judicial interpretation of law), the paper proposed an alternative conception of political legitimacy, which it called *Institutional experimentalism*, built both on Beccaria's insights, as well as on the former three critiques. At base, *IE* supports a conception of political legitimacy which identifies legitimate authority with the conditions of the experimental acceptability of its orders.

This political conception itself, the paper argued, is built on a peculiar conception of the human personality, informed by what Rawls has called the *Aristotelian principle* – namely, the idea that human beings are progressive beings, with a special taste for excellence and distinction, and whose practical intelligence is fallible and experimental. Beings of this kind, the paper argued, have an individual interest in the protection of their own, *as well as* other people's liberties, because they

³⁰ And quite appropriately so, I should emphasize: *relative* success and stability is *not* justice.

³¹ I owe this point to comments by Marianela Delgado.

have an individual interest in the intelligent transformation of their own tastes, preferences and evaluations. It is this latter individual interest, the paper tentatively concluded, which offers our best shot to protect the rule of law and the separation of power, as it advises both *restraint* in promoting one's own comprehensive values and affiliations in political affairs, as well as *aggressive defense* of the social conditions which enable the formation of intelligent publics.

References

- BECCARIA C. 1984. *Dei delitti e delle pene*, in FIRPO L., FRANCONI G. (eds.) *Edizione Nazionale delle Opere di Cesare Beccaria*, Mediobanca (1764).
- BECCARIA C. 1986. *On Crimes and Punishments*, D. Young (ed.), Hackett Publishing.
- BECKER G. 1996. *Accounting for Tastes*, Harvard University Press.
- CASTIGNONE S. 1964. *Giustizia e bene comune in David Hume*, Giuffrè.
- CHIASSONI P. 2019. *Interpretation without Truth*, Springer International Publishing.
- CHIASSONI P. 2021. *Is Realism at odds with Constitutional Democracy?*, in CHIASSONI P. and SPAIĆ B. (eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Springer International Publishing.
- DELLA VOLPE G. 1933. *La filosofia dell'esperienza di David Hume*, Vol. 2, Sansoni.
- DEWEY J. 1922a. *Human Nature and Conduct: An Introduction to Social Psychology*, Henry Holt and Company.
- DEWEY J. 1922b. *Valuation and Experimental Knowledge*, in «Journal of Philosophy», 31, 1922, 325-351.
- DEWEY J. 1934. *The Public and Its Problems*, Henry Holt and Company.
- ELY J.H. 1980. *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press.
- FRANCONI G. 1990. *Beccaria filosofo utilitarista*, in ROMAGNOLI S. and PISAPIA G.D. (eds.), *Cesare Beccaria tra Milano e l'Europa*, Cariplo-Laterza, 69 ff.
- FRANCONI G. 2019. *Beccaria e l'Inghilterra*, in «Diciottesimo Secolo», 4, 2019, 11-18.
- GARRETT D. 1997. *Cognition and Commitment in Hume's Philosophy*, Oxford University Press.
- GUASTINI R. 2021. *An Exercise in Legal Realism*, in CHIASSONI P. and SPAIĆ B. (eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Springer International Publishing.
- HUME D. 1978. *Treatise of Human Nature*, NIDDITCH P.H. (ed.), Oxford University Press.
- IPPOLITO D. 2022. *La società degli individui. Beccaria filosofo contrattualista*, in «Diritto & Questioni Pubbliche», XXII, 1, 2022, 103-117.
- IPPOLITO D. 2024. *The Legal Artifice of Liberty: on Beccaria's philosophy*, in «Criminal Law and Philosophy», 18, 2024, 727-742.
- JAMES W. 1891. *The Moral Philosopher and the Moral Life*, in «International Journal of Ethics», 1, 1891, 330-354.
- KEMP SMITH N. 2005. *The Philosophy of David Hume: A Critical Study of its Origins and Central Doctrines*, Palgrave Macmillan (1941).
- LEITER B. 2021. *The Role of Judges in Democracies: A Realistic View*, in CHIASSONI P. and SPAIĆ B. (eds.), *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, Springer International Publishing.
- MEAD G.H. 2015. *Mind, Self and Society*, in MORRIS C.W. (ed.). *The Definitive Edition*, University of Chicago Press (1934).
- MILL J.S. 1963. *On Liberty*, in ROBSON J. (ed.). *Collected Works of John Stuart Mill*, XVIII, Toronto University Press (1859).
- MILL J.S. 1969. *Utilitarianism*, in ROBSON J. (ed.). *Collected Works of John Stuart Mill*, X, Toronto University Press (1861).
- MILL J.S. 1991. *The Subjection of Women*, in ID., *On Liberty and Other Essays*, Oxford University Press (1869).
- NUSSBAUM M. 2001. *When She Was Good*, in «New Republic», 225, 2001, 28-34.
- NUSSBAUM M. 2006. *Frontiers of Justice*, Harvard University Press.
- RAWLS J. 2005. *A Theory of Justice*, Belknap Press (1971).
- RIVA N. 2024. *Individual Freedom. A Pluralist Account*, in «Diritto e Questioni Pubbliche», 24, 2024, 133-151.
- ROVERSI C., BRIGAGLIA M., KRISTAN A., LUGLI L., SCAVUZZO N., ROSSI A., RUWETT F., DE MUYNCK G. 2026. *The Rule of Law and Its (Cognitive) Load: Experimental Jurisprudence on the Internal Point of*

View over the Rule of Law, in ROVERSI C., BRIGAGLIA M., KRISTAN A. (eds.), *Rule of Law: in Books, in Minds*, *Diritto e Questioni pubbliche / CLEAR* (Special publication), 201-228.

SEGATTI M. 2024. *Norme, abitudini, e metodo sperimentale. Una rilettura di Logical Method and Law di John Dewey*, in «Ragion Pratica», 63, 2024, 509-531.

ZUCCA L. 2022. *Beccaria's Political Theory of Criminal Justice*, in DU BOIS-PEDAIN A. and ELDAR S. (eds.), *Re-Reading Beccaria: On the Contemporary Significance of a Penal Classic*, Hart Publishing, pp. 21-38.

