JUST

PUBLIC REASON

Li Sa Ng

UCL

PhD (Philosophy)

I, Li Sa Ng, confirm that the work presented in this thesis is my own.

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Abstract

This dissertation looks at the linked issues of justification and public reason – under what conditions do political authorities count as legitimate, and what is the appropriate mode of reasoning together in the public sphere? The main contender in the field currently is Rawls's political liberalism. His conception of justification gives a key role to the justifiability of political power to each citizen, based on shared (because mutually acceptable) reasons. This approach to justification affects how we reason in the public sphere – in discussing certain fundamental issues, Rawlsian public reason requires limiting our reasons to public ones (viz., those which others could reasonably endorse), and bracketing those based on disputed conceptions of the good. How we think about justification thus has concrete implications for how we live together in political society.

Rawls's political liberalism is commonly pitted against comprehensive liberalism. The disagreement tends to be cast as being about comprehensive liberals rejecting the need for justifiability. I argue that this is mistaken, and that Rawls shares more than we might think with the comprehensive liberal. Taking Raz as the modern champion of comprehensive liberalism, I show that both Rawls and Raz are deeply committed to justifiability, and trace the disagreement between the two to a metaphysical dispute about how to conceive of the project of justifying the implementation of political principles. In light of their shared commitment to justifiability, the question becomes whether justifiability requires shared reasons. I propose a heuristic reading of Rawls's requirement of mutually acceptable reasons, which explains how Rawls's and Raz's views on justification can be brought together without needing to bracket the truth of the principles of justice. This proposed reconciliation leads to a mode of reasoning in the public sphere that does not require setting aside non-public reasons in order to proceed.

Acknowledgements

Teach me, O LORD, the way of your statutes;
and I will keep it to the end.
Give me understanding, that I may keep your law
and observe it with my whole heart.

-Psalm 119:33-34

It was in search of wholeheartedness that I embarked on this philosophical journey; wholeheartedness as a public servant, a philosopher, and a citizen of faith.

I am grateful to God for the blessing of many extraordinary teachers along the way, who have not ceased to encourage me in my philosophical investigations. Without the help and encouragement of Allen Wood, Debra Satz and Rob Reich, I would not have dared to return to philosophy after such a lengthy hiatus. It is strangely fitting that Michael Bratman, who first started me thinking about intention and agency at Stanford, should be the source of a critical piece of the puzzle falling in place for this present work.

This project could not have been completed without the incredibly generous input of my teachers at UCL. If there are any helpful thoughts contained in the pages that follow, there is a good chance they began as discussions in Véronique Munoz-Dardé's office. I have benefited greatly from her and Jo Wolff's unerring ability to piece together the main thread in a philosophical narrative. Mike Otsuka, Rory Madden and Ed Lamb also provided useful comments in the early stages.

I would not be in London if not for UCL's generous funding, which has allowed me to focus on thinking, and the Government of Singapore's granting me time away from the rather different work of policy-making.

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Contents

Introduction

Rawls famously announced his aim in *Political Liberalism* as being to "appl(y) the principle of toleration to philosophy itself",[1] by constructing a "shared and public political reason" that, as far as possible, is "independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm".[2] His stated aim was to attempt to provide a solution to the question of how "deeply opposed though reasonable comprehensive reasonable doctrines may live together and all affirm the political conception of a constitutional regime"[3] by way of a strategy of avoidance, constructing a political liberalism that avoids taking sides between comprehensive doctrines.[4]

Following this planting of the flag of political liberalism, there has emerged a large, and still growing, literature, which pits political liberalism against comprehensive liberalism. This literature tends to portray the difference between the two as one of a disagreement about the importance of justifiability. For example, in a recent book devoted to defending political liberalism against the perfectionism of comprehensive liberalisms, Jonathan Quong says this: "Liberal perfectionists thus usually reject both of political liberalism's main claims: they reject the view that liberal philosophy is fundamentally about the public justification of political power, and they reject the view that the state may not permissibly act for reasons grounded in some particular view of the good life."[5]

In contrast, there has been relatively little serious study of the stretch of road Rawls and the comprehensive liberal walk together. My project is to explore this neglected path. The comprehensive liberal I have in mind is Joseph Raz, whom Rawls classes with Kant and Mill in the classical liberal tradition.[6] Given that it is the preoccupation with the fact of reasonable pluralism that gives rise to Rawls's drawing a line between his political liberalism and comprehensive liberalisms, Raz

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[1] John Rawls, *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005), 10.
[2] *Political Liberalism*, 9.
[3] *Political Liberalism*, xviii.
[4] *Political Liberalism*, xxviii.
[5] Jonathan Quong, *Liberalism Without Perfection* (Oxford: Oxford University Press, 2011), 3.
[6] *Political Liberalism*, 200, fn34.

is also the logical choice, since his affirmation of value pluralism furnishes us with a comprehensive liberal's answer to the same phenomenon of modern-day pluralism. By constructing a conversation that (for the most part) never took place between Rawls and Raz, I try to demonstrate that the political and the comprehensive liberal share more than one might be led to believe, despite the post-*Political Liberalism* literature which pits them against each other.

A public reason that is just: Justice requires justifiability

The first deep commonality between Rawls and Raz is a concern with justifi*ability* – with some normative standard of legitimacy. They approach the question of justifiability in different ways, using different questions – Rawls asks how principles of justice can be publicly justified; Raz asks what the conditions for legitimate authority are. Yet in both cases, they are concerned with the project of justifying the implementation of political principles,[7] and for both, the answer has, crucially, to do with *the reasons that there are* for those authorities to exist. Both Rawls and Raz hold an instrumental view of authorities. Governments, by their lights, are there to serve the purpose of doing good to citizens - to safeguard their liberties, to assure the provision of collective goods which would be otherwise beyond the reach of individuals, and so on. Importantly, in laying out their respective approaches to achieving justifiability, neither Rawls nor Raz is very much concerned with the actual consent of the governed. Rather, it is with the underlying reasons for authority that they are each primarily concerned.

Take a step back, for a moment, and consider what we want from an account of justifiability; an account of what it would take to justify the implementation of political principles? My suggestion is that there are four desiderata to be met:[8]

1. It must take seriously the deep and reasonable disagreements about value that exist in modern societies.
2. It must provide a way for us to get along together without bloodshed.

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[7] Though, as Raz notes, his interest is much broader than merely justice. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 2-3.
[8] These concerns are derived from Rawls's presentation in his 1992 Introduction to *Political Liberalism*. What I have called the fourth desideratum, about well-being and wholeheartedness, is framed in Raz's terms rather than Rawls's. In essence, however, it is as much a concern of Rawls as of Raz.

3. It must achieve (2) in a way that is moral, not merely convenient, so that it is stable.

4. It must preserve the well-being of the individual person, including individuals' ability to lead wholehearted lives in pursuit of their conception of the good.

My positive suggestion in these chapters proceeds by way of trying to separate out, from within Rawls's and Raz's approaches to justification, these four elements.

The strongest feature of Rawls's later work in *Political Liberalism*, is that it addresses (1) directly – his project in that work is precisely to provide an account of justifiability in light of reasonable disagreement. By comparing the overlapping consensus with a Bratman-style shared intention, I will argue that it is concern (2) which drives Rawls to come up with this innovation of the overlapping consensus. As for (3), it is the combination of Rawls's account of justifiability, combined with the overlapping consensus, which is meant to achieve the stability of his well-ordered society.

It is on (4) that Rawls's proposal of justifiability requiring shared reasons starts to show cracks. With Raz, I press on Rawls's epistemic abstinence with regards the truth of his theory of justice, which arises from his defence of a justifiability test that requires shared reasons. In particular, my concern is with the impact of such epistemic abstinence on the wholeheartedness and therefore the well-being of the individual citizen.

In part to address concerns about wholeheartedness (4), I suggest an alternative reading of Rawls's take on justifiability. Rawls's proposal, in brief, is that justifiability requires shared reasons (what in these chapters I call the "reasonableness requirement"). My take on this, which I believe can be supported by Rawls's own arguments, downplays the need for agreement on shared reasons, while conserving the core ideas of reciprocity and mutual respect. My suggestion is that Rawls's reasonableness requirement should be read as a heuristic device, designed to confront us with, and force us to take account of, the reasons that exist on the other side; the reasons of those who disagree with us. Reading Rawls this way still places substantive constraints on what is justifiable – it concludes, for instance, that coercive interference based on principles that cannot be defended by

reasons that could be accepted by those who disagree with us, would be unjust. At the same time, however, such a reading does away with the need for epistemic abstinence. Whilst we are compelled by justice to consider the reasons of those who disagree with us, there is no call to segment our own reasons into two separate classes of "public" and "non-public", in order to make justification possible. Whilst justice requires justifiability, justifiability does not require epistemic abstinence.

Not just "public" reason

The body of literature that pits political liberalism against comprehensive liberalism also tends to draw a straight line between the justificatory strategy of political liberalism and deliberative restraint. In a recent article, R.J. Leland and Han van Wietmarschen explain the link in this way: "Political liberals believe that when citizens keep (some of) their disputed views out of their political decision making, then those disagreements no longer pose a threat to the mutual justifiability of the resulting decisions."[9]

I look again at this line, drawn by so many, between the justificatory strategy of political liberalism and deliberative restraint, and conclude that there is no need for it. With my proposed heuristic reading of Rawlsian justifiability in place, the sort of deliberative restraint which requires bracketing a certain class of non-public reasons for the sake of rendering justifiable certain policy decisions is no longer necessary. Justifiability does not require restricting ourselves to shared public reasons.

This leads us to the very practical question of – what does all this mean for how reasoning in the public sphere should look like? While these chapters by no means furnish what Rawls calls a "full account of public reason,"[10] I try to draw out the lines of application from my heuristic reading of Rawlsian justifiability to what this might mean for how we should reason together in the public sphere. I attempt to show that, even without epistemic abstinence, we have reason to retain the *form* of what Rawls calls the "duty of civility"- those attitudes that ought to mark our

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[9] R. J. Leland and Han van Wietmarschen, "Reasonableness, Intellectual Modesty, and Reciprocity in Political Justification," in *Ethics*, Vol. 122, No. 4 (July 2012), 724.
[10] *Political Liberalism*, 214-5.

practice of reasoning together in public, such as a willingness to listen to others with whom we disagree, and a fair-mindedness in deciding when accommodations to their views should reasonably be made.

A final aspect of commonality between Rawls and Raz is their relative unconcern with the precise forms that political power takes. So long as authorities meet the conditions of justifiability, neither Rawls nor Raz are too concerned with how exactly they are organized. For Rawls, there could be many shapes which a just basic structure – the major institutions of a political society – could take. For Raz, even more than Rawls, his account of how justifiability is achieved is unconstrained by the form of political power. This means that their accounts of justification retain bite beyond the narrow confines of the world's liberal democracies. At the same time, their unconcern with the form of political power does not mean that either of them need hold back criticism of oppressive regimes – each theory places substantive constraints on what governments can legitimately do to their citizens. The case studies serve, I believe, to illustrate the hard-nosed pragmatism that a combined account of liberal justification could offer to the political realities of our world.

Orientation for the journey

Chapter 1 looks at Rawls's and Raz's approach to justification, and argues that the source of the divergence between their two views is a metaphysical difference of opinion as to *what constitutes the project of justifying political principles*. Subsequent chapters explore the downstream consequences of this difference in approach to justification. Chapter 2 draws out the implications of this difference in justification for how Rawls and Raz conceive of the type of reasoning appropriate to the public sphere. I suggest that Rawls's conception of public reason is vulnerable to the charge of undermining individual well-being by eroding the possibility of wholeheartedness.

Chapter 3 looks at two aspects of Rawlsian political justification, as modelled in the original position and the overlapping consensus. Using Michael

Bratman's intention-based theory of shared agency,[11] I argue that Rawls's overlapping consensus is best understood in terms of the practical matter of living together in a political community.

Chapter 4 pins down Rawls's argument for why justification requires the mutual acceptability of reasons. I argue that the concern for mutual respect is at the heart of why Rawls thinks justification needs to be in the form of reasons others could accept. I then propose an alternative reading of Rawlsian justifiability, where the condition on the mutual acceptability of reasons should be understood as a heuristic device which helps us to see the reasons that others have and thus to respect their moral personality. I show that my suggested heuristic reading removes the need for epistemic abstinence as an intrinsic requirement of justifiability.

Chapter 5 develops the implications of my proposed heuristic reading of Rawlsian justification for the question of how we should reason together in the public sphere. I outline a view of reasoning together in public that does not involve the segmentation of reasons into public and private, and which therefore avoids the charge of undermining wholeheartedness and therefore well-being.

Chapters 6, 7 and 8 form a linked set which tries to draw the connections between philosophical theory and policy implementation, by examining three case studies falling under the general rubric of toleration. Chapter 6 looks at how Raz and Rawls respectively formulate and defend a principle of toleration, and traces the differences in the reasons they give for a principle of toleration to their respective take on justification. I then use the heuristic reading of justification developed in Chapter 4 to demonstrate how Rawls's and Raz's arguments for toleration may be drawn closer together. Chapter 7 looks at the state of religious toleration in Malaysia, highlighting the common ground Rawls and Raz share in emphasising the moral importance of national sovereignty. Chapter 8 lays out the cases of the Muslim veil in France and Turkey, which I use to argue that a commitment to liberal justifiability does not require secularism.

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[11] Michael Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford: Oxford University Press, forthcoming).

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A Disagreement about Justification

One of the enduring concerns of political philosophy has been the justification of authority – under what conditions do political authorities count as legitimate? This chapter attempts to uncover the root of the disagreement between John Rawls and Joseph Raz, two prominent champions of a liberal answer to this question.[1] I argue that the source of the divergence between their two views is a difference of opinion as to *what constitutes the project of justifying political principles*. Raz sees this as a question of uncovering the truth about the conditions under which political authority would be legitimate. On his view, authority is only justified when complying with the authority's directives improves one's conformity with reasons which independently apply to one, compared to trying to respond to those reasons directly. The philosopher's job is to do the hard work of finding out what these reasons are. In contrast, Rawls conceives of justification as primarily a "practical social task" of providing a conception of justice that meshes with how we understand ourselves and our relation to society.[2] On Rawls's account, justification involves the philosopher in a search for *a set of reasons which reasonable citizens can share*, despite their deeply held, reasonable disagreements. Because he conceives of the task of justification in terms of agreement, the result is a recommendation of principled neutrality with respect to people's metaphysical commitments.

Why should this disagreement about justification matter to us? Raz, in his article on "epistemic abstinence" (his term for Rawls's recommendation of epistemic neutrality), suggests one reason. Raz points out that it is a novel idea in political philosophy, that governments should not be concerned with the truth *of the very doctrine of justice* which is supposed to guide their action. At the very least, then, epistemic abstinence as an approach to justifying authority requires some

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[1] In doing this, I have taken as a starting point Raz's article on what he terms Rawls's "epistemic abstinence," one of the few places where he directly addresses Rawls's work. See Joseph Raz, "Facing Diversity: The Case of Epistemic Abstinence" in *Philosophy & Public Affairs, Vol. 19, No. 1 (Winter, 1990)*, 3-46.

[2] John Rawls, "Kantian Constructivism in Moral Theory" " in *Collected Papers*, ed., Samuel Freeman (Cambridge, Massachusetts, Harvard University Press,1999), 306.

explanation.[3] We want to know if such epistemic abstinence is the right response to the fact of diversity in modern democratic political life, or, to use Rawls's term, to the fact of reasonable pluralism. Does the fact of reasonable pluralism indeed force the liberal philosopher into an "epistemic withdrawal from the fray"[4]? Raz would beg to differ, and his account offers an alternative response to the fact of diversity in modern politics. As becomes clearer through this chapter, which side of the argument we fall on shapes our understanding of the task of the political philosopher today, faced with the fact of reasonable pluralism in a democratic society.

Raz on Epistemic Abstinence

Raz's target is what he terms Rawls's "epistemic abstinence," viz., the latter's choice to refrain from claiming that his theory of justice is true.

He acknowledges that Rawls's theory of justice avoids falling into a mere unprincipled search for consensus because it constitutes a *moral* doctrine of justice. It is a moral doctrine of justice because of its limited applicability to *reasonable* conceptions of the good,[5] which are likely to persist in nearly just societies,[6] and because the structure of Rawls's overlapping consensus involves citizens justifying the truth or validity of the political conception from within their own comprehensive doctrine.[7]

Raz traces Rawls's epistemic abstinence to his emphasis on the practical nature of his theory, and the need to ensure consensus-based social stability and unity. On Raz's reading, the need for such stability grounds the argument for the overlapping consensus.[8] Raz observes that in order for Rawls to explain why his

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[3] "Epistemic Abstinence," 4. Raz puts it thus: (N)ever before has it been suggested that governments should be unconcerned with the truth of the very views (the doctrine of justice) which inform their policies and actions.

[4] "Epistemic Abstinence," 4.

[5] Where the concept of the reasonable is already a moral notion.

[6] "Epistemic Abstinence," 12.

[7] "Epistemic Abstinence," 13.

[8] Accordingly, Raz outlines the argument on p.30 of "Epistemic Abstinence," and states his doubts that an overlapping consensus is necessary for securing social unity and stability. Rather, Raz thinks, affective and symbolic elements may be the "crucial cement" of society, in addition to individuals' power to affect societal affairs. (See "Epistemic Abstinence," 30-31 for the full argument). If Rawls's argument for the overlapping consensus were simply one from the need for stability, then Raz's hypothesis, if true, would be indeed a crippling blow. But as I try to show in what follows, Rawls's

philosophical enterprise should aim at the practical goal of social stability and unity, Rawls must presuppose the *truth* of something like the following statement: 'Social unity and stability based on an (unforced) consensus are valuable goals of sufficient importance to make them and them alone the foundations of a theory of justice for our societies.'[9] Raz says:

> If it is argued that what makes it the theory of justice for us is that it is built on an overlapping consensus and therefore secures stability and unity, then consensus-based stability and unity are the values that a theory of justice, for our society, is assumed to depend on. Their achievement – that is, the fact that endorsing the theory leads to their achievement – *makes* the theory true, sound, valid, and so forth. This at least is what such a theory is committed to. There can be no justice without truth.[10]

As I understand it, the force of Raz's argument against Rawls's epistemic abstinence is this. Rawls's argument for justice as fairness presupposes the objective value of consensus-based social unity and stability. In this way, it contains within it an implicit appeal to truth. Without this appeal to truth, Rawls's argument for his theory of justice would be incoherent. That is, it would not be able to make sense of its own project, which is to provide a theory of *justice*, rather than, say, a theory of political expediency. Thus, contrary to Rawls's claim that his doctrine of justice can bracket the question of truth, epistemic distance is not possible. Raz puts it thus in a footnote: "(Rawls) is committed to applying to the theory of justice whichever adjective is appropriately applied to moral propositions. There is no room for epistemic distance."[11] Furthermore, Raz thinks that Rawls is committed to saying that the achievement of consensus-based stability and unity is what "*makes* the theory true, sound, valid, and so forth."[12]

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main argument for the overlapping consensus is not primarily one grounded in the need for stability, but rather in the need for justification/political legitimacy.

[9] A paraphrase from "Epistemic Abstinence," 14.

[10] "Epistemic Abstinence," 15. Italics added.

[11] "Epistemic Abstinence," 15 (footnote 34).

[12] "Epistemic Abstinence," 15.

A Rawlsian answer from the nature of justification

I am not convinced that Rawls is committed to this. It seems to me that Rawls could resist Raz's interpretation of his project as that of showing that achieving stability is the truth-making condition for a theory of justice. Rather, Rawls's concern with stability has to do with political legitimacy. Rawls says:

> ...The problem of stability is not the problem of bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions if necessary – as if the task were to find ways to impose that conception on others once we are ourselves convinced it is sound. Rather, as a liberal political conception, justice as fairness relies for its *reasonableness* in the first place upon generating its own support in a suitable way by addressing each citizen's reason, as explained within its own framework.
>
> Only in this manner is justice as fairness *an account of political legitimacy*...A conception of political legitimacy aims for a public basis of justification and appeals to free public reason, and hence to all citizens viewed as reasonable and rational.[13]

For Rawls, the concern is not with stability as the be-all and end-all. Rather, the importance of stability stems from the need to *justify* the coercive power of government in a way that expresses the deeply-held intuition, widely shared in democratic societies, that society is a fair system of social cooperation over a complete life.

At bottom, Rawls and Raz disagree about *what constitutes the project of justifying political principles*. Raz sees it as a question of truth (Rawls would probably say that Raz considers the question of justification an "epistemological problem," a search for moral truth interpreted as a fixed and independent order of objects and relations which is distinct from how we conceive of ourselves.)[14] Rawls, in contrast, conceives of the project of justifying his theory of justice as having to do not with truth-seeking, but *primarily* as the "practical social task" of furnishing a

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[13] John Rawls, "The Domain of the Political and Overlapping Consensus" in *Collected Papers*, ed., Samuel Freeman (Cambridge, Massachusetts, Harvard University Press,1999) 488. Italics added.
[14] "Kantian Constructivism," 306.

conception of justice that is congruent with how we understand ourselves and our relation to society.[15]

In line with this difference of approach to theory-justification, and contrary to Raz's reading of him,[16] I think that there is evidence to show that Rawls does in fact see himself as replacing the appeal to truth with the idea of "reasonableness", where reasonableness consciously avoids reliance on the truth of any given comprehensive doctrine but instead makes reference only to political concepts.

> What justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most *reasonable* doctrine for us.[17]

For Rawls, the answer to the question of "why should I accept your doctrine of justice as fairness?" is a constructivist one – You should accept justice as fairness as the most reasonable doctrine for you because it accords with your deepest intuitions about society as being a fair system of social cooperation over a complete life. Agreement is important because such justification, to have bite, must be able to appeal to citizens who hold different reasonable comprehensive doctrines. Consensus-based stability is simply proof that justification has succeeded and political legitimacy achieved.[18]

Elsewhere, Rawls specifically rejects the idea that he replaces "true" with "reasonable" because he is proposing an alternative theory of *truth*.[19] Rather, he uses "reasonable" in contrast with the rational intuitionist's usage of "true", by which the latter refers to an independent moral order.[20] The usage of "reasonable"

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[15] "Kantian Constructivism," 306.

[16] "Epistemic Abstinence" 15, footnote 34. Raz says, "I have been equating 'true', sound', 'valid', and so on. Could it be that Rawls merely refuses to endorse truth, while being willing to apply one of the other adjectives? I think that the text suggests otherwise…"

[17] "Kantian Constructivism," 306.

[18] In contrast, for Raz, legitimacy and stability would be two separate issues – for him, political legitimacy is achieved when the normal justification thesis holds, that is, when submitting to the political authority allows one to better conform to reasons that independently apply to one.

[19] "Kantian Constructivism," 355.

[20] To be fair, Raz believes in moral truth but is not a rational intuitionist.

rather than true thus reflects Rawls's constructivist conception of theory justification.

Truth vs objectivity – a political conception of truth?

At this point, and before engaging in any further dispute at the level of metaphysics, Raz might justly point out that Rawls is, however reluctantly, committed to the truth of those claims on which he thinks people could reasonably agree. The very notion of agreement necessarily carries with it the concept of truth – to agree to a claim just is to agree *that it is true*.[21] Yet recall that Rawls's aim is a radical one – his objective is nothing less than to *do without* the concept of truth entirely, replacing it with reasonableness. Political constructivism, in Rawls's words,

> does not... as rational intuitionism does, use (or deny) the concept of truth; nor does it question that concept, nor could it say that the concept of truth and its idea of the reasonable are the same. Rather, within itself the political conception *does without* the concept of truth.[22]

At first glance, this seems to present a problem for Rawls even before we embark on any dispute at the metaphysical level.

Rawls's response – his 'replacement strategy' - involves trying to convince his reader that substituting truth with reasonableness will not compromise the objectivity needed for justice. In other words, you can have objectivity without truth.[23] First let us clear up an ambiguity about the concept of objectivity. On one hand, a phrase like "objective truth" would seem to refer to a metaphysical claim about truth, of a realist variety. However, in ordinary language, "objective" is also used to describe a person who is free from bias. Given Rawls's concern to steer clear of any disputed metaphysical claims, it is no surprise to find that he does not

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[21] I am grateful for Allen Wood for impressing this point on me.

[22] *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005) 94. Italics added.

[23] Rawls provides an extended account of his conception of objectivity in Lecture III of *Political Liberalism*, called "Political Constructivism". He says that this lecture is develops his earlier 1980 lectures on "Kantian Constructivism in Moral Theory". (footnote 1, *Political Liberalism* 90)

(indeed, given his other commitments, he *cannot*) defend objectivity in the first sense. Rather, Rawls's aim is to show that his conception of objectivity, which is satisfied by the notion of reasonableness, is *both necessary and sufficient* for a shared public basis of justification.[24] Importantly, in order for his idea of an overlapping consensus to be vindicated, Rawls also needs to show that proponents of other metaphysical persuasions (such as the moral realist) would also be able to grant that the sort of objectivity possessed by Rawls's political constructivism is both necessary and sufficient for his political and practical purposes.[25] To determine whether he succeeds in doing this is the goal of this section.

What is the conception of objectivity which Rawls believes his concept of reasonableness satisfies? This conception has six essential elements, as follows:[26]

1) First, a conception of objectivity must connect up with reasons in a public way. As Rawls puts it, it "must establish a public framework of thought sufficient for the concept of judgement to apply and for conclusions to be reached on the basis of reasons and evidence after discussion and due reflection."[27]

2) Second, for a moral and political conception to be objective it must specify a normative standard. That is, it must "specify a concept of a correct judgement made from its point of view," [28] whatever that correct judgement is termed – it might be "true", or it might be "reasonable".

3) Third, a conception of objectivity must specify an order of reasons, which serve as action-guiding for agents, regardless of whether the agents feel moved by them.[29]

4) Fourth, a conception of objectivity must "distinguish the objective point of view",[30] such that it is distinguished from mere agreement between a group of agents, or from the agent's point of view. In this way, an account of

[24] *Political Liberalism,*116.

[25] *Political Liberalism* 114. Specifically, Rawls here is speaking of rational intuitionism, which he argues "may grant that political constructivism has a kind of objectivity, one that is appropriate to its political and practical purposes."

[26] Rawls's account of objectivity can be found in *Political Liberalism*, Lecture III, §5 and 7, particularly p111-2 and 121.

[27] *Political Liberalism*, 110-111.

[28] *Political Liberalism*, 111.

[29] *Political Liberalism*, 111

[30] *Political Liberalism*, 111

objectivity would be able to explain why an agent might be mistaken.[31] On this point, Rawls says, "It is part of understanding the concept of objectivity that we never suppose that our thinking something is just or reasonable, or a group's thinking it so, makes it so."[32]

5) Fifth, a conception of objectivity has to have an account of how agreement in judgement can take place.[33]

6) Sixth and finally, a conception of objectivity needs to be able to explain disagreements, or failures to converge on the same judgement.[34]

How does Rawls's account of his political constructivism satisfy the essentials of objectivity listed above? The first essential is satisfied by the fact that that which is reasonable is intrinsically public, since it makes reference to principles that others could accept as fair terms of cooperation.[35] As for the second essential, Rawls's political conception of justice specifies that the normative standard – the benchmark for 'correct' judgements – is that which is reasonable,[36] "supported by the preponderance of reasons specified by the principles of right and justice issuing from a procedure that correctly formulates the principles of practical reason in union with appropriate conceptions of society and person."[37] That is, what is reasonable is supported by the balance of (relevant) reasons, which in turn are given by the appropriate procedure, namely, deliberation within the original position. On this point, Rawls emphasises that his political constructivism does not view a correct moral judgement as one that is true of an independent order of moral values.[38] The third essential – that an objective framework should specify an order of reasons – is satisfied by the fact that citizens in Rawls's well-ordered society must give priority to the reasons that emerge from deliberation in the original position, compared with reasons they might have from their own point of view, outside of the original position.[39] The fourth essential – distinguishing an objective point of view - is specified by the original position, which is "the point of view of free and equal

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[31] *Political Liberalism*, 113.
[32] *Political Liberalism*, 111.
[33] *Political Liberalism*, 112.
[34] *Political Liberalism*, 121.
[35] *Political Liberalism*, 114.
[36] *Political Liberalism*, 111.
[37] *Political Liberalism*, 111, 115.
[38] *Political Liberalism*, 112-3.
[39] *Political Liberalism*, 115.

citizens as properly represented", and distinguished from the point of view of any particular person by the veil of ignorance.[40] Concerning the fifth essential, Rawls's political conception of justice accounts for convergence on principles of justice because reasonable persons are able to learn and master the concepts and principles of practical reason as well as the principles of right and justice that issue from the procedure of construction.[41] Finally, the sixth essential is satisfied by Rawls's explanation of the failure of judgements to converge by appealing to the burdens of judgement, viz., the difficulties of surveying and assessing all the evidence, or the delicate balance of competing reasons on either side of an issue, resulting in reasonable people differing.[42]

While Rawls's account of objectivity seeks to unharness it from truth, which Rawls seems to understand in its metaphysical, realist sense, he is keen to demonstrate that his constructivist political conception "is not at odds with our commonsense ideas of truth and matters of fact".[43] To do this, Rawls distinguishes between two kinds of facts, both of which, Rawls says, are not constructed.

The first category of facts is the kind of fact we would cite as a right- or wrong-making characteristic in moral argument. For instance, in arguing that slavery is unjust, we appeal to the fact that it allows some to own other people as property and to control the product of their labour. What Rawls would want to say is the following:[44]

1) That slavery allows people to own other people and their labour is a fact (call this fact S), which is independent of the principles of justice, and independent of the procedure of construction.
2) Fact S is not intrinsically action-guiding, though it is morally relevant.
3) The constructivist procedure, of entering the original position to deliberate, allows us to come out with principles which no one could reasonably reject, among which principles which pick out fact S *as one which counts as a reason* against slavery.

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[40] *Political Liberalism*, 115-6.
[41] *Political Liberalism*, 112.
[42] *Political Liberalism*, 121.
[43] *Political Liberalism*, 122.
[44] *Political Liberalism*, 122 and footnote 30.

On this account, then, the wrong-making fact is not constructed. It exists independently of any constructivist procedure as a morally relevant fact, but it does not yet count as a reason (in this case, a reason against slavery). It is only when this fact is picked out as relevant by a principle emerging from the constructivist procedure, that this fact becomes a reason.[45]

A second category of facts are facts about the political conception itself. An example of this sort of fact is, for instance, that slavery is unjust. These facts, Rawls says, are also not constructed. He calls them (in an analogy to constructivism in mathematics) "facts about the possibilities of construction".[46] Rawls explains that what he means by "possibilities of construction" is that this sort of fact is "implicit in the family of conceptions and principles of practical reasoning that are the basis of the construction";[47] these possibilities about justice (such as slavery being wrong) exist before any construction takes place.[48] To take the case of the fact that slavery is unjust, Rawls calls this a provisional fixed point, something we take as a basic fact. But, he says, such moral facts form part of a "fully philosophical political conception" only when they are "coherently connected together by concepts and principles acceptable to us on due reflection".[49] But principles, on Rawls's account, come out from a reasonable procedure of construction. That the moral facts can be connected up by a principle which emerges from the constructivist procedure is not to say that the principle, or the construction, *makes* them true, but rather, that the constructivist procedure allows the "proof" of their reasonableness to be publicly stated.[50]

Rawls's comments about these two types of unconstructed, morally relevant facts are meant to reassure us that we can retain our commonsense notions of truth. We need not accept that even these facts are the products of some process of construction. At the same time, however, Rawls emphasises that the procedure of construction is indispensable, because in the case of the first category of facts, it

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[45] *Political Liberalism*, 122. Raz could dispute the point about the constructivist procedure making a fact into a reason.
[46] *Political Liberalism*, 123.
[47] *Political Liberalism*, 123.
[48] *Political Liberalism*, 125.
[49] *Political Liberalism*, 124.
[50] *Political Liberalism*, 124-5. Rawls puts it this way: "That the basic facts can be connected is not a fact behind all the separate facts; it is simply the fact of those connections now open to view and expressed by the principles free and equal persons would accept when suitably represented."

allows us to pick out which morally relevant facts get to count as reasons; and vis-à-vis the second category of facts, it allows us to connect up the many moral facts that are implicit in the model-conceptions that we all accept (for instance, that 'slavery is unjust', 'tyranny is unjust', 'exploitation is unjust', etc.).[51]

Does Rawls's replacement strategy succeed?

I think not. Rawls does not succeed in doing away with the need for truth. He does demonstrate that his notion of reasonableness achieves some measure of objectivity, but this is not enough to remove the need for a concept of truth. Certainly his notion of reasonableness succeeds admirably in separating wishful thinking from objectivity (see the fourth essential). But that is only one part of the role that the concept of truth plays in our mental life; reasonableness is not capable of *replacing* truth entirely. One might think that some notion of reasonableness is necessary, without agreeing with Rawls that it is *sufficient*. Even if one were to accept the *objectivity* of a reasonable political conception, it would still make sense to ask of it, when deliberating about whether one should adopt this conception as one's own, "Is it true?" After all, it is perfectly coherent to think that a reasonable conception may be mistaken, because it relies on having false beliefs, even if we acknowledge that the conception is reasonable.

What this begins to show us is that the concept of truth is so deeply embedded in our thought and reasoning that even by Rawls's own lights, there may be reason to reconsider its exclusion from political justification. Consider Rawls's first two essentials for a conception of objectivity. From these we can see that he is concerned with some shared basis for reasoning and judgement. But reasoning and judgement depends on a concept of truth. For instance, an account of reasoning requires the concepts of belief and meaning. But these in turn make use of the concept of truth. The relevant normative standard for belief is truth, not reasonableness – when we deliberate whether we should believe that *p*, we try to determine whether *p* is true. As for truth being implicated in the concept of meaning, Donald Davidson observes that how we often work out what someone's utterances mean is by assuming that they are saying something true about the

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[51] *Political Liberalism*, 124.

publicly observable surroundings.[52] Judging, one of the attitudes that Rawls is explicitly committed to preserving, is intimately tied up with judging whether *p* is *true*. Assertion, likewise, is commonly taken to involve presenting the asserted content *as true*.[53] As mentioned before, agreement, too, is commonly understood as agreement that a proposition is *true*. To do without the concept of truth, then, involves a far more radical change in our notions of reasoning, judging, believing, meaning, asserting, and agreeing, than Rawls would himself want. I see Rawls's acknowledgement of the two categories of unconstructed facts as revealing a crack in his argument. What are these facts, if not true? Without any *concept* of truth, it is hard to make sense of these facts.

Joshua Cohen suggests, in a Rawlsian vein, that, rather than doing without the concept of truth altogether in political justification, we could use instead a political conception of truth.[54] Using much the same strategy as Rawls does for objectivity, Cohen proposes a non-metaphysical (rather than anti-metaphysical) conception of truth.

Would a political conception of truth satisfy the moral realist? If we leave aside the issue of whether public reason is needed at all (which requires separate arguments on either side), it seems that Cohen's extension of the Rawlsian framework of justification to include a concept of truth would at least keep Rawls's moral realist (and other) interlocutors in the conversation for a while longer. They would no longer be able to say that Rawls is being incoherent by refusing to admit to using a concept of truth. Nonetheless, what this addition of a political conception of truth does, I think, is to push the debate to the metaphysical level, as I go on to explore.

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[52] As quoted by Joshua Cohen in "Truth and Public Reason," in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Massachusetts: Harvard University Press, 2009) 359; he refers to Donald Davidson, *Truth and Predication* (Cambridge, MA: Harvard University Press, 2005), Chapter 3. Cohen's essay was originally published in *Philosophy & Public Affairs* 37,1(Winter 2009):2-42.

[53] These points about the implication of the concept of truth in our practices of thought and reasoning are taken from Joshua Cohen, "Truth and Public Reason," 359.

[54] Joshua Cohen,"Truth and Public Reason," in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Massachusetts: Harvard University Press, 2009).

The metaphysical disagreement about justification

But perhaps one could understand Raz's objection to epistemic abstinence as applying to Rawls's conception of theory-justification. One can imagine Raz saying to Rawls: You (Rawls) say that truth is only one of the (multiple) things which are of value in a method of ethics, and that we value other things apart from truth, for instance, the social role of morality. [55] But by conceiving of justification as primarily a practical social task, you are claiming that the value of achieving the social role of justice (viz., enabling all members of society to make mutually acceptable to one another their shared institutions and basic arrangements, by citing what are publicly recognised as sufficient reasons, as identified by that conception[56]) is more valuable than the goal of basing a theory of justice on true principles. This amounts to a truth claim about what the project of theory justification should be. Without this claim being true, the Rawlsian constructivist project of justifying the theory of justice as fairness would be incoherent.

How could Rawls respond to such an objection without arguing on Raz's terms and appealing to truth? I think Rawls could acknowledge that he and Raz disagree at a metaethical level, but then he could also say the following:

First, Rawls might try to demonstrate how it is that on his constructivist approach, epistemic abstinence is not incoherent. To do this, he would draw on the idea of wide reflective equilibrium as a theory of theory acceptance. The test of wide reflective equilibrium is the test of whether a moral theory "meshes with and articulates our more firm considered convictions, at all levels of generality, after due examination, once all adjustments and revisions that seem compelling have been made".[57] To show that his theory of justice as fairness would pass the test of wide reflective equilibrium, Rawls would point to how his proposed principles of justice are in accord with a set of relevant background theories (both moral and non-moral, including the conceptions of a "well-ordered society", "moral persons", "freedom" and "equality"), as well as our considered moral judgements (such as "slavery is

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[55] "Kantian Constructivism," 342.
[56] "Epistemic Abstinence," 8.
[57] Kantian Constructivism," 321.

wrong").[58] Because of the wide reach of this web of belief, Rawls can explain that it is not the case that he needs to assert the *truth* of the overwhelming importance of the social role of morality. While this claim of the importance of the social role of morality gets to count as a background theory which feeds into wide reflective equilibrium and therefore contributes towards justifying the theory of justice as fairness, it is not immune to revision. For instance, the public culture could change such that people no longer feel the need for public justification of principles of justice. Thus it is not the case that the whole constructivist project of justification rests on the truth of the claim about the importance of the social role of morality. [59]

Moreover, Rawls could point out that his constructivist approach has the advantage of being able to accommodate Raz's realist meta-ethics in his well-ordered society. Thus Rawls might say to Raz, while my constructivism does not allow me to assert that the theory of justice as fairness is true, *you* are free to do so - my constructivist approach to theory-justification leaves it open for you, the meta-ethical realist, to affirm justice as fairness as *true* by your lights, so long as you are able to justify it from within your comprehensive liberal worldview. In fact, that is precisely the attraction of the overlapping consensus – each citizen is able to affirm the conception of justice as true (according to whichever meta-ethical view he holds) from within his own comprehensive doctrine. Accepting your (Raz's) meta-ethics, on the other hand, would lead me to exclude from the justificatory project those who, for instance, do not share your meta-ethical theory, and thus undermine the success of justification.

At this point, Raz might say to Rawls, if you think that the price of epistemic abstinence is truth, then you, Rawls, mistake the task of the philosopher. The philosopher's task is to discern truth, not to find a way for people to get along. Part of what it means for someone to believe in an independent order of moral truth is for him to think that what is true is true *for everyone, for the same reasons*. What you (Rawls) are suggesting, is that I (the comprehensive liberal moral realist) engage in

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[58] Norman Daniels in "Two approaches to theory acceptance in ethics," in *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge: Cambridge University Press, 1996), 82. The reference to a web of belief is Quine's.

[59] In elaborating on Kantian Constructivism, Rawls emphasises that the parties in the original position do not agree on what the moral facts are, "as if there already were such facts"; revisions can take place at all levels of generality. "Kantian Constructivism," 354.

a conversation about political legitimacy with my fellow-citizens, where I know in advance that we are going to be speaking at cross-purposes rather than having a genuine debate. You are asking me to accept that I cannot speak the same language as my fellow-citizens, and to assent to a surface agreement under the cover of what is "reasonable".

I think Rawls's concluding remarks to *A Theory of Justice*, which address head-on the nature of justification, contain a possible response to Raz's charge:

> (J)ustification is argument *to those who disagree* with us, or to ourselves when we are of two minds. It presumes a clash of views between persons or within one person, and seeks to convince others, or ourselves, of the reasonableness of the principles upon which our claims and judgements are founded. Being designed to *reconcile by reason*, justification proceeds from what all parties to the discussion hold in common. Ideally, to justify a conception of justice to someone is to give him a proof of its principles from premises that we both accept, these principles having in turn consequences that match our considered judgements. Thus mere proof is not justification. A proof simply displays logical relations between propositions. But *proofs become justification once the starting points are mutually recognised,* or the conclusions so comprehensive and compelling as to persuade us of the soundness of the conception expressed by their premises.
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> It is perfectly proper, then, that the argument for the principles of justice should proceed from some consensus. *This is the nature of justification.*"[60]

Rawls's contention is that finding agreement, under certain conditions, *is precisely* the philosopher's task. Specifically, agreement has justificatory force in the context of a democratic society characterised by the fact of reasonable pluralism. The fact of reasonable pluralism is the result of the exercise of human reason in a context of free institutions, because reasonable people will disagree on their comprehensive doctrines due to the burdens of judgement (viz., the "many hazards" involved in the correct use of our reason and judgement, such as conflicting and complex evidence, differing views about the weight of various considerations, indeterminacy of

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[60] John Rawls, *A Theory of Justice (Revised Edition)* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999), 508-9. Italics added.

concepts, etc.[61]) The upshot of reasonable pluralism in a democratic society is that we cannot simply assume that those who disagree with us are wrong. They do not disagree with us because they are looking at the problem in the wrong way. Rather, reasonable disagreement persists even under the most favourable circumstances (absence of duress and stress, possessing all the relevant information, etc). *Even looking at the problem of justice aright*, reasonable people will disagree. And because they cannot be dismissed as irrational or unreasonable, we owe fellow citizens who reasonably disagree with us a justification for the principles of justice on which the basic structure is built.

For Rawls, then, justification *looks for a set of reasons which reasonable citizens can share*, even though they may (reasonably) disagree deeply. This is why Rawls wants a form of justification that is neutral with respect to people's metaphysical commitments. Given the fact of reasonable pluralism, which goes very deep and extends into all areas of life, the shared set of reasons is relatively small in scope; it is limited to the political. What reasonable people who hold divergent comprehensive doctrines can agree on - the overlapping consensus - is limited to a purely political conception of justice. Because reasonable pluralism extends to people's metaphysical commitments, the overlapping consensus also has "shallow foundations" (to use Raz's term)[62] – it does not attempt to enforce any one metaphysical view, but seeks to remain neutral by neither asserting nor denying any metaphysical view. On Rawls's account, it is possible that there should be a true metaphysical view; but political liberalism as he conceives it stays out of that particular fray, for fear of compromising the project of justifying the principles of justice.[63] Rawls says:

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[61] See *Political Liberalism,* 56-7 for Rawls's list of the "more obvious sources" of disagreement between reasonable persons.

[62] "Epistemic Abstinence," 8-9.

[63] Rawls comments on the limited objective of justification this way: "Should we think that any of the reasonable doctrines present in society are true, or approximately so, even in the long run? **The political conception itself does not speak to this question**...With that done, the political conception is a reasonable basis of public reason, and **that suffices**." (*Political Liberalism,* 128, bold font added.) It is important to note (as Raz does in "Epistemic Abstinence" 3-46) that Rawls leaves open the possibility that there *is* a true (metaphysical, etc) doctrine. In such an eventuality, this is what Rawls says: "Thus, the truth of any one doctrine in the consensus guarantees that all the reasonable doctrines yield the right conception of political justice, **even though they do not do so for the right reasons as specified by the one true doctrine. When citizens differ, not all can be fully correct, for some are correct for the wrong reasons**; yet if one of their doctrines should be true, all citizens are correct, *politically speaking*: that is, they all appeal to a sound political conception of justice."

Many if not most citizens may want to give the political conception a metaphysical foundation as part of their own comprehensive doctrine; and this doctrine (I assume) includes a conception of the truth of moral judgements...These further claims political constructivism *neither asserts nor denies*. As I have said, here it does not speak. It says only that for a reasonable and workable political conception, no more is needed than a public basis in the principles of practical reason in union with conceptions of society and person.[64]

For Rawls, therefore, the test for justifiability (of principles of justice) contains a requirement that candidates for principles of justice *can be endorsed by reasonable people who do not share your conception of the good* (call this the "**reasonableness requirement**").

Rawls's device of the original position is meant to "reconcile by reason" by abstracting from the things on which reasonable persons disagree, and to find a common point of view from which to start a conversation. The fact of reasonable pluralism, combined with the need for justification, explains why the veil of ignorance in the original position is thick rather than thin; in particular, the thick veil of ignorance excludes knowledge of the parties' comprehensive doctrines.[65] Rawls elaborates:

...And so we arrive at a thicker rather than a thinner veil of ignorance*: the parties are to be understood so far as possible solely as moral persons* and in abstraction from contingencies. To be fair, the initial situation treats the parties *symmetrically*, for as moral persons they are equal: the same relevant properties qualify everyone. Beginning with a state of no information, we allow in just enough information to make the agreement rational, though still suitably independent from historical, natural, and social happenstance. Considerably more information would be compatible with impartiality but a Kantian view seeks more than this.[66]

(*Political Liberalism,*128, bolded lettering and italics mine.) To this, I expect that what Raz might say that as a philosopher, our concern should not be whether "politically speaking" citizens are correct. Rather, we should be concerned with truth.

[64] *Political Liberalism,* 126-7. Italics added.

[65] Rawls says in a footnote in *Political Liberalism,* 24-25,"to give the rationale of the thick veil of ignorance, we invoke the fact of reasonable pluralism and the idea of an overlapping consensus of reasonable comprehensive doctrines."

[66] *Political Liberalism,* 273. Italics added.

The common ground which the original position tries to model is "the fundamental idea of equality as found in the public political culture of a democratic society"[67] – this is seen in the "symmetrical"[68] situation of each party in the original position.

The original position does not guarantee actual agreement when the veil of ignorance is removed. Rather, it is a device of representation that, by bracketing disputed questions, allows the parties to "get on with the task of developing a substantive theory of justice"[69] and making sure it is justifi*able* who those who reasonably disagree with us.[70] It does this by *delineating the class of relevant reasons which can be offered in justification*, given the fact of reasonable pluralism. Thus, Rawls might say to Raz, the notion of "reasonableness" is not merely a notion of truth in disguise.[71] Rawls adds:

> The advantage of staying within the reasonable is that there can be but one true comprehensive doctrine, though as we have seen, many reasonable ones. Once we accept the fact that reasonable pluralism is a permanent condition of public culture under free institutions, the idea of the reasonable is more suitable as part of the basis of public justification for a constitutional regime than the idea of moral truth. Holding a political conception as true, and for that reason alone the one suitable basis of public reason, is exclusive, even sectarian, and so likely to foster political division.[72]

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[67] *Political Liberalism,* 79.
[68] *Political Liberalism,* 273.
[69] *Theory of Justice,* 507.
[70] In both Rawls's and Raz's account, there is a gap between justifiability and assent to the reasons offered. Even if a political authority, for instance, is fully justifiable on either Raz's or Rawls's account, there remains the possibility that the person to whom justification is addressed will not recognise or acknowledge the (valid) reasons given in justification. The person in question might not have access to all the relevant information, or stressed and not thinking clearly, etc. Given the evidence of normal human experience, I think it is safe to say that this is a virtue of both accounts.
[71] The notion of reasonableness, as Rawls uses it, is tied up with the idea of reciprocity. People are reasonable when they are ready to propose principles as fair terms of cooperation and to abide by them (even if this is sometimes against their own interests), given the assurance that others will likewise do so (*Political Liberalism,* 49). Rawls says, "reasonable persons... are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others *on terms all can accept.* They insist that reciprocity should hold within that world so that each benefits along with others." (*Political Liberalism,*50)
[72] *Political Liberalism,* 129.

Raz on well-being and the separation of justification from agreement

In response to all this, Raz could say that in fact, Rawls makes a mistake by linking justification and agreement so closely together. Why think that justification requires agreement of any sort? If, as Raz elaborates in *The Morality of Freedom*, political legitimacy and consent can be dealt with separately, then there is no imperative towards seeking agreement.

For Raz, an authority is legitimate if it meets the normal justification thesis (NJT). The NJT states that authority is only legitimate when complying with the authority's directives improves one's conformity with reasons which independently apply to one, compared to trying to respond to those reasons directly. Raz lists five types of considerations that make the NJT plausible[73] – first, the authority is wiser; second, the authority has a steadier will and is less easily distracted from right reason by temptations or pressures; third, individuals directly acting in an attempt to follow right reason is likely to be self-defeating, and the best indirect strategy is to be guided by authority; fourth, deciding for oneself what to do involves a variety of costs in time or resources and in certain circumstances, it is appropriate to follow authority instead; fifth, in some cases, the authority would be in a better position to achieve what the individual has reason to want but could not individually achieve (this would especially apply to cases involving coordination problems).

This notion of justification rests on a conception of dependent reasons. The authority's directives should be based on reasons which already independently apply to the subject of the directives and are relevant to their action in the circumstances covered by the directive[74] (Raz's "dependence thesis"). In all the five scenarios listed in the previous paragraph, the authority is merely the best available means for the subject to comply with the reasons that she already has. What makes the legitimacy of a would-be authority even *possible* is the fact that its directives purport to reflect reasons which already independently apply to the subjects.

For Raz, it is important that the NJT does not lead to any *general* justification of authority; what legitimacy is granted to an authority is piecemeal, depending on whether or not, in a particular area, an individual subject really does

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[73] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986)*,* 75.
[74] *Morality of Freedom,* 47.

better conform to reason by complying with the authority's directives. For Raz, then, the test of justifi*ability* consists in the question, "Does complying with the directives of this (would-be) authority help me to better conform to reason than if I tried to directly respond to reason on my own?"

Unlike Rawls, Raz does not think that anything like the reasonableness requirement is necessary for justifiability. Raz, unlike Rawls, is not interested in neutrality. Why is this, given that Raz would agree with Rawls on the fact of reasonable pluralism (though he would not cast it in those terms)? I think there are two aspects to answering this question.

First of all, Raz appears to be more pessimistic about the role neutrality could play, given the fact of reasonable pluralism. He says, "Rawls's route seems barren in pluralistic societies, like ours. The degree of existing diversity is just too great."[75] Raz's assessment seems to be that *neutrality cannot do the job* of ensuring that the principles of justice are justifiable to people; they are too deeply divided by their various conceptions of the good. Contrary to Rawls's claim, there are not enough shared intuitive ideas in the political culture of stable democracies to make agreement on a conception of justice possible. Yet this objection would seem to ignore the fact that the whole of *Political Liberalism* is an attempt by Rawls to demonstrate that an overlapping consensus around a political conception of justice is plausible. Raz would have to say quite a bit more in order to make this line of argument work, given that Rawls goes to some trouble in his work to try to show how an overlapping consensus might be feasible.

Second, and more fundamentally, I think Raz would say that Rawls is making a mistake as to the philosopher's task in justifying the principles of justice. Justifiability, Raz might say, is not about trying to find a shared set of reasons. That is an approach that leads to a dead-end. Rather, the philosopher should be working hard to uncover the dependent reasons which could justify authority, since authority is only legitimate when complying with its directives improves one's conformity with reasons which independently apply to one, compared to trying to respond to those reasons directly (the NJT).

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[75] "Epistemic Abstinence," 45.

Raz does not use neutrality to obtain justifiability. Rather, he posits that the well-being of individuals is intrinsically valuable.[76] With a fully fleshed out conception of well-being, Raz's view no longer needs neutrality to get justifiability off the ground. The intrinsic value of well-being gives rise to reasons for certain types of actions;[77] and these are the same sorts of reasons which constitute the dependent reasons that justify authority. To put this in Rawlsian terms, for Raz, the principles of justice which are justifiable are simply those which protect and promote the well-being of citizens. Because Raz sees the problem of legitimacy as separate from the question of stability, he would say that a Rawlsian overlapping consensus centring on a shared political conception of justice is simply *not necessary* for legitimacy.[78]

Situating the conception of the good - another view of the two routes to justification

Another way of seeing the two different routes taken to justifiability taken by Rawls and Raz is by looking at the placement of their conception of the good within their respective theories. In laying out his theory of justice, Rawls's account of the well-ordered society and the way in which it is good comes in only after he has already established the principles of justice, although in order to get the principles of justice off the ground in the original position, he does need to presuppose a *thin* theory of the good.[79] What Rawls terms the 'thin theory of the good' is a notion of goodness as rationality; the idea that citizens have (at least in an

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[76] In his chapter on personal well-being in *Morality of Freedom*, Raz takes himself, in giving an explanation of personal well-being, to be describing "general features of human experience"; "pervasive and unshakeable feature of human practical thought" which "need no justification, though they call for an explanation" (*Morality of Freedom,* 288-9).

[77] For instance, providing the conditions under which people will enjoy the basic capacities they need to engage with the opportunities available in their society for leading a successful life. (Joseph Raz, "Duties of Well-Being," 18 in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994))

[78] In addition, Raz disagrees with Rawls on what is required to generate stability. Raz says, "Symbolic and affective identification and a partial cognitive overlap may be a very firm foundation for social unity and stability, especially when we remember that individuals find it both prudentially and morally undesirable to undermine the status quo, or even to try to evade its consequences, given the small chances of success...Rawls's overlapping consensus...is neither necessary nor sufficient, and even were it to exist it would play only a partial, perhaps a merely subsidiary role in security unity and stability." ("Epistemic Abstinence," 31)

[79] *Theory of Justice*, see Part Three, "Ends". In *Political Liberalism*, Rawls addresses this under Lecture V, "Priority of Right and Ideas of the Good, especially §7,"The Good of Political Society".

intuitive way), a rational plan of life in light of which they prioritise their main endeavours and allocate their resources over the course of their life.[80] Goodness as rationality is then combined with a political conception of citizens as free and equal, in order to get the framework for an account of primary goods.[81] The account of primary goods in turn provides a way for Rawls to talk about citizens' needs in the original position, without relying on any particular fully-fleshed conception of the good.

In contrast, for Raz, the conception of well-being is at the very centre of justifying authority. Raz's NJT relies on the idea of a legitimate authority acting on dependent reasons. It is the subject's well-being which provides the content of these dependent reasons. Raz explains that his notion of individual well-being concerns the evaluation of the success or failure of a person's life from his point of view. On Raz's account, personal well-being consists in the *whole-hearted and successful pursuit of valuable activities*.[82] This conception of well-being sees life as active, and reckons that one's evaluation of one's life as a whole will be based on the quality of one's activities. The idea is that for someone to count his life as an overall success, he must have been generally successful[83] in engaging in valuable activities, without being mistaken as to their value,[84] and without negative attitudes such as self-hatred, pathological self-doubt, and alienation from one's life.[85]

Rawls could quite rightly point out that reasonable people will disagree on Raz's conception of well-being. Raz would, I think, readily agree. Raz says in one article, "Whether or not people care about their well-being depends partly on whether their culture made the concept available to them, and partly on whether

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[80] *Political Liberalism,* 177.

[81] *Political Liberalism,* 178.

[82] Joseph Raz, "Duties of Well-Being,"3. This is also elaborated in Chapter 12, "Personal Well-Being" of *Morality of Freedom*.

[83] Raz says that failure detracts from and success adds to one's well-being, and gives the example of a person who has set his heart on being a painter, and turns out to be a lousy one. This person has, says Raz, other things being equal, a lousy life ("Duties of Well-Being," 5).

[84] On Raz's account, it is important not to be mistaken about the value of the activities one is engaged in, because such a mistake would undermine the reasons for engaging in that activity in the first place. (See Section 3, "Goals and Reason", of Chapter 12 "Personal Well-Being" in *Morality of Freedom*, which explains in more detail how our goals are our goals only if we approve of them.

[85] "Duties of Well-Being," 5-6. Raz notes that his view of wholeheartedness departs from Frankfurt's notion of second-order reflective endorsement, in that his view does not require such reflectiveness.

they came to focus their concerns in that way. Many people do not."[86] That is, Raz acknowledges that some people in certain cultures might not even *possess* the concept of well-being as Raz understands it. However, Raz can also say that making well-being the focus of discussion gives the philosopher a starting point for the task of rational persuasion, because whether or not someone has the conception of well-being (as Raz describes it), everyone must acknowledge that having a good life is a good.[87] And no part of this process of rational justification, Raz would say, requires the sort of neutrality that Rawls attempts.

Taking stock

Where does all this leave us? This chapter's investigation of the disagreement between Rawls and Raz reveals that Rawls's understanding of what justifiability requires lies at the root of his insistence on epistemic abstinence.

In effect, the back and forth between Rawls and Raz about the question of the true metaphysical doctrine masks a deeper divergence about the correct approach to justification. My strategy for the remaining chapters is to take seriously these diverging views about justifiability, to examine the consequences of their different approaches, and ultimately to propose a reconciliation. The question of truth, as predicated of comprehensive doctrines, is set aside, since the study of justifiability does not require it.

Rather than dwelling on the truth of any metaphysical doctrine, my focus is on what justifiability demands in terms of the permissibility of certain categories of reasons into public debate. Thus much of the rest of this thesis goes on to grapple with the question of whether justifiability indeed requires epistemic abstinence, as Rawls suggests. Ultimately my answer to this question is in the negative. Without pre-empting that conclusion, however, and because it is also my objective to highlight the shared ground between the political and the comprehensive liberal, it is useful at this stage to ask - to what extent are these two approaches to justification compatible? I sketch below some possibilities which are picked up in later chapters.

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[86] "The Role of Well-Being,"in *Philosophical Perspectives*, vol.18 (2004), 269-294. See p.286. The article cited addresses a slightly different question (viz., whether people *care* about their well-being).
[87] "The Role of Well-Being," 286.

The first thing to say is that there is much that is intuitively appealing in each view. A common sentiment in both approaches is what Raz calls a "service conception" of authority.[88] Both Rawls and Raz would hold that the governments are there to *serve* the governed – to protect their rights, to achieve collective goods which are beyond the ability of any single individual to achieve, and so on. The striking appeal of Raz's NJT is that it lays this out in bold colours. Meanwhile, Rawls's picture of justification is compelling for his description of reasonable pluralism as our modern predicament. It is to the extent that we agree with his description of modern democratic society that we find his approach to justification (via the original position) attractive, because it holds out the hope that we can, collectively, move past the deep reasonable disagreements that divide us.

Can these two approaches to justification be combined? If we start with the fact of reasonable pluralism, one possibility is to say that justification should be neutral in Rawls's sense but also meet the NJT. It is hard to see Rawls objecting to the principle that the role of government is to serve citizens. Raz, however, would probably object that such a starting point is ill-chosen, on the grounds that it sets as its ambition the (he would say) impossible task of reconciling our deep and reasonable disagreements.

What if we flip things over and start with the NJT? Does Rawls's conception of justifiability supply any missing gap in Raz's conception of legitimacy? One possible way into this is to ask the question – "How are we to know the dependent reasons that legitimate authorities are supposed to help us act upon?" After all, on Raz's account, there is an epistemic condition attached to being a legitimate authority – to be a legitimate authority, the legitimacy of the authority must be knowable to its subjects.[89] Raz's answer to this question seems to be that it is the philosopher's role to think hard about well-being and its constituents, and to uncover the dependent reasons we have and to lay all that out for others to consider. On Raz's account, deciding the scope of the government's authority is the

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[88] For Raz, the service conception of the function of authorities is just the dependence thesis combined with the normal justification thesis. (*Morality of Freedom*, 56)

[89] The line of reasoning here goes: since the point of legitimate authority is to improve one's conformity with reason, one can reliably conform only if one can reliably believe that an authority will help one conform better to reason than one can oneself. (See Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," in *Minnesota Law Review* 90:1003-1044, 2006, 1025-6, for Raz's detailed argument for this epistemic condition.

individual's task, and would vary according to one's stock of expertise, etc.[90] In contrast, Rawls has the philosopher setting the stage for citizens to find out dependent reasons for themselves, by stepping into the original position to deliberate *together*. In *A Theory of Justice* he describes the question of justification as "settled by *working out a problem of deliberation*,"[91] viz., by choosing principles of justice in the original position. So perhaps we could say that the Rawlsian route to justifiability supplies a mechanism for collective discovery of the dependent reasons which justify authority.

What of the metaphysical status of the resulting principles of justice? On a reconciled hybrid view, would they be true, as Raz would have it, or would they comprise a reasonable political conception of justice, with no settled metaphysical status? I confess that at the metaphysical level I find it harder to see how the two views could cohere – it is difficult to see how the metaphysical realist about truth could agree with the constructivist, if such is the reading of Rawls.[92]

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[90] Thus, for instance, if I go to the trouble of making myself an expert in the domain of food safety regulations, then it may be the case that the government does not have legitimate authority over me in this area, because obeying government regulations on food safety would not improve my conformity with reason.

[91] *Theory of Justice*, 16. Italics added.

[92] It is surprisingly difficult to pin down Rawls's meta-ethical views – sometimes he seems tempted to anti-realism, as when he says things like "…there are no such moral facts to which the principles adopted could approximate" ("Kantian Constructivism," 350.). Elsewhere, and more usually, he seems to want to avoid the discussion altogether, which for the purposes of the project of justice, I think might be the best available strategy.

2
Two Approaches to Reasoning
in the Public Sphere

What is the mode of reasoning appropriate to the public sphere? This chapter traces out how the different approaches to justification taken by Rawls and Raz result in two quite different answers to this question. Rawls explicitly addresses this question in his work, terming his answer the ideal of public reason. In contrast, Raz does not set out to detail his positive view of the type of reasoning appropriate to the public sphere. This chapter thus tries to sketch the outlines of a Razian picture of what public reasoning might look like.

In the previous chapter, we saw tests for justifiability which lie in the realm of reasons. That is, neither Rawls's nor Raz's test for justifiability requires that any actual conversation take place between citizens. Rather, the constraints with which we emerge from Chapter 1, are restrictions on the *reasons* one might marshall to justify principles of justice or their implementation. They do not require that actual citizens, having real conversations, come to any historical agreement on those reasons. In contrast, when dealing with the question of the appropriate mode of reasoning in the public sphere, we are forced to confront (at least some) actual instances of communication between citizens. Because reasoning in the public sphere necessarily implicates actual instances of communication among citizens, this is where we start to see the two approaches to justification worked out in practice. In other words, looking at the question of how we should reason together in the public sphere gives us one way to discern the first-order implications of the metaphysical disagreement we explored in Chapter 1.

Rawls on public reason

Rawls tells us that the reason of a political society is its "way of formulating its plans, of putting its ends in an order of priority and of making its decisions

accordingly".[1] He makes clear that his ideal of public reason has the *same basis* as his principles of justice – both have their roots in his principle of liberal legitimacy, which states that our exercise of political power is justifiable only when it is exercised in accordance with a constitution which satisfies the "reasonableness requirement", that is, which can be endorsed by reasonable people who do not share the same conception of the good.[2]

In Rawls's theory of justice as fairness, this means that the parties in the original position, "in adopting principles of justice for the basic structure of society, must also adopt guidelines and criteria of public reason for applying those norms."[3] These guidelines and criteria of public reason are "companion parts" of the same political conception, needed to make it complete, since the principles of justice must be applied in a manner that does not undermine their justifiability.[4] Specifically, these guidelines and criteria of public reason are "guidelines for public inquiry"; "principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them".[5] The same constraints of justifiability (viz., the reasonableness requirement) which applied to the choice of the principles of justice, also apply to the choice of the guidelines of public reason. Rawls argues that these justifiability constraints would result in the parties in the original position choosing only "presently accepted general beliefs and forms of reasoning found in common sense,"[6] and "the methods and conclusions of science when these are not controversial"[7] to be used in public reasoning. Equally, they would rule out appeal to "comprehensive religious and philosophical doctrines", and to "elaborate economic theories of general equilibrium...if these are in dispute".[8]

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[1] *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005) 212.
[2] *Political Liberalism,* 217. See page 28 of Chapter 1 for the introduction of the reasonableness requirement in the context of justifying principles of justice. Specifically for Rawls's own theory of justice as fairness (which he sees as just one in the family of acceptable political conceptions of justice), the guidelines and criteria can be shown to be legitimate if the following question can be answered in the affirmative: would these be the guidelines and criteria for public reason adopted by parties in the original position? (*Political Liberalism* 225)
[3] *Political Liberalism,* 225.
[4] *Political Liberalism,* 224-5.
[5] *Political Liberalism,* 224.
[6] *Political Liberalism,* 224.
[7] *Political Liberalism,* 224.
[8] *Political Liberalism,* 224-5.

Thus it is because we want the exercise of political power within a democratic society to be legitimate, that

> the ideal of citizenship imposes a moral, not a legal, duty – the duty of civility – to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fair-mindedness in deciding when accommodations to their views should reasonably be made.[9]

On Rawls's account, practising the ideal of public reason involves citizens bracketing those reasons grounded in their comprehensive conceptions of the good, and instead conducting their fundamental discussions[10] within the framework of what each regards as a political conception of justice which is based on values that the others can reasonably be expected to endorse.[11] Rawls defines a political conception of justice as one which is framed to apply solely to the basic structure, presented independently of any wider comprehensive doctrine, and elaborated in terms of fundamental political ideas implicit in the public political culture of a democratic society.[12] Moreover, as the quotation above indicates, the ideal of public reason also encompasses attitudes such as willingness to listen to others and a fair-mindedness in deciding when accommodations to their views should reasonably be made.[13]

In shifting from a comprehensive doctrine of justice in *A Theory of Justice* to a "strictly political conception of justice"[14] in *Political Liberalism*, Rawls is

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[9] *Political Liberalism,* 217.

[10] Specifically, discussions concerning "constitutional essentials and matters of basic justice" (*Political Liberalism,* 214-215, with the content of constitutional essentials spelt out on 226ff.

[11] In "The Idea of Public Reason Revisited," Rawls adds a *proviso* to the conception of public reason, which states that citizens are allowed to introduce into political discussion at any time their comprehensive doctrine, religious or nonreligious, provided that, in due course (viz., within a time frame to be worked out in practice), we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support. ("The Idea of Public Reason Revisited," in *Political Liberalism,* 453,462.

[12] *Political Liberalism,* 223.

[13] *Political Liberalism* 217.

[14] *Political Liberalism,* xv, xvi.

responding to an internal problem within *Theory* - that of congruence. [15] The final part of Rawls's argument in *Theory* involved showing that there was congruence between a person's conception of the good and affirming justice as fairness. In doing this, he encountered objections from Nagel and Scheffler[16] which cast doubt on the possibility of congruence – they pressed that the original position was not, in fact, neutral between different conceptions of the good, and that the parties in the original position were in fact "Kantian people".[17] Rawls's solution to these criticisms, in *Political Liberalism*, is to maintain that a thick veil of ignorance is needed – one that excludes both morally arbitrary information such as social status, as well as knowledge of one's conception of the good,[18] so that public justification for a society marked by reasonable pluralism may be achieved.[19]

To what sort of society does public reason apply?

Rawls sees the idea of public reason as being inherent in the idea of democracy, driven by the fact that reasonable pluralism is a permanent feature of modern democracies. Democratic citizens desire to use their collective power legitimately, and understand that legitimacy requires that coercive power be used only according to principles that all could reasonably accept. At the same time, they realise that their (reasonable) comprehensive doctrines are irreconcilable, and can form no basis for the reasonable agreement that would render the exercise of power legitimate. They are therefore concerned with "what kinds of reasons they may

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[15] *Political Liberalism,* xv, xvi. With Rawls, I take it that there is no dramatic shift in his position between *A Theory of Justice* and *Political Liberalism*, as he explicitly states in the Introduction to *Political Liberalism*: "these lectures take the structure and content of Theory to remain substantially the same." *Political Liberalism*, xvi.

[16] Thomas Nagel, "Rawls on Justice," in *The Philosophical Review*, Vol. 82, No. 2 (Apr., 1973), 220-234 and Samuel Scheffler, "Moral Independence and the Original Position," *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, Vol. 35, No. 4 (May, 1979), 397-403. Rawls refers to Scheffler at *Political Liberalism*, xxxii, and to Nagel in "Fairness to Goodness," in *John Rawls: Collected Papers,* ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 2001) 267.

[17] This is Scheffler's term, in "Moral Independence and the Original Position," 400.

[18] "Kantian Constructivism in Moral Theory," *in John Rawls: Collected Papers*, 336. See also *Political Liberalism*, 24-25 and fn27.

[19] *Political Liberalism,* 24-25, fn27.

reasonably *give one another* when fundamental political questions are at stake,"[20] and it is this concern that gives rise to the idea of public reason.

To which fundamental questions does public reason apply?

On the account Rawls offers, the application of public reason is specifically restricted to "questions of fundamental political justice".[21] He makes clear that these constitute only a subset (and possibly a minority) of all possible political questions which might need to be addressed by a democratic society, and clarifies that his is not meant to be a full account of public reason. A full account, he says, would take up questions outside of constitutional essentials, and explain how they are different from the constitutional essentials, and why restrictions imposed by public reason may not apply to them, or if they do, not in the same way, or so strictly.[22]

The fundamental questions to which public reason applies are of two kinds, namely:[23]

    i.   Constitutional essentials. These are of two kinds, viz.,

          a.   Fundamental principles specifying the general structure of government and the political process, e.g. the powers of each branch of government, etc.

          b.   Equal basic rights and liberties of citizens, e.g. the right to vote and participate in politics, liberty of conscience, freedom of thought and of association, and protections of the rule of law.[24]

        and[25]

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[20] "Public Reason Revisited," 441, 445. Italics mine – phrases such as that italicised in this quotation indicate that Rawls had in mind some actual communication between citizens.

[21] "Public Reason Revisited,"442.

[22] *Political Liberalism* 214-5. In defence of his limited account of public reason, Rawls appears to think that so long as public reason is able to help a society come to firm agreement on just the fundamental questions, a sufficiently resilient system of social cooperation would be secured, such as to withstand the pressures of having the many other social and economic issues discussed outside of the constraints of public reason. *Political Liberalism,* 230.

[23] "Public Reason Revisited,"442, *Political Liberalism,* 214-215.

[24] *Political Liberalism,* 227.

[25] Rawls comments in a footnote (*Political Liberalism*, 229 footnote 10) that although the difference principle and the principle of fair equality of opportunity do not count, on his view, as constitutional essentials, they nonetheless remain questions of basic justice, and as such are to be decided by the political values of public reason. As far as I can tell, public reason does not prescribe different treatment for constitutional essentials compared with matters of basic justice. Rawls seems to make the distinction between the two only to point out that constitutional essentials are those matters which can be "reasonably included in a written constitution" (see "Public Reason Revisited,"442 footnote

ii. Matters of basic justice, which "relate to the basic structure of society, and concern questions of basic economic and social justice and other things not covered by a constitution."[26]

On what occasions, and to whom does public reason apply?

Which fora?

Rawls further specifies[27] that the idea of public reason does not apply to all political discussions of fundamental questions, but only to discussions of these questions in the "public political forum", which is a subset of the public discussion as a whole. He divides the public political forum into three parts:

a. the discourse of judges in their decisions, especially the Supreme Court;
b. the discourse of government officials, especially chief executives and legislators; and
c. the discourse of candidates for public office and their campaign managers.

Laying out his taxonomy of the public sphere, Rawls distinguishes the public political forum[28] from the background culture, which is "the culture of civil society"[29] and which includes the culture of various types of associations such as churches, scientific societies, professional schools and universities,[30] each of which would have their own way of reasoning about fundamental political questions. In the background culture, Rawls thinks that there should be full and open discussion, free of the constraints of public reason.[31] Mediating between the public political forum and the background culture is the media, which Rawls terms the "nonpublic political

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7). He explains that another distinguishing characteristic between constitutional essentials and matters of basic justice is that the satisfaction of the former is easier to discern than the latter, and thus we can expect more agreement about whether they are realized. (see *Political Liberalism* 229-230)

[26] "Public Reason Revisited,"442 footnote 7.

[27] He emphasises this distinction as "imperative". "Public Reason Revisited,"442.

[28] By "public political forum," Rawls seems to want to refer to the same thing as what he terms the "public political culture of a democratic society" in *Political Liberalism* Lecture I, §2.3, 13-14, which is defined as follows: "This public culture comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge." In Lecture I, the public political culture was also contrasted with the background culture.

[29] "Public Reason Revisited,"443.

[30] *Political Liberalism* 215, "Public Reason Revisited,"443.

[31] "Public Reason Revisited,"444.

culture".[32] As in the case of the background culture, Rawls thinks that the media should not be subject to the limits of public reason.

Which actors?

On Rawls's account, public reason always applies to officers of the government speaking and acting in their official capacities. These would include judges, legislators, chief executives and other government officials.[33]

The question of who is subject to public reason does not always line up neatly with his three-fold division of the public political forum, however. On Rawls's account, non-government officers may sometimes stray into the public political forum. Thus in addition to government officials, he also counts candidates for public office and their campaign managers as falling under the ambit of public reason.[34] Ordinary citizens, too, have the duty of civility, though it is worked out somewhat differently from the case of government officials and candidates (for whom it affects chiefly their official speech and conduct)[35]. The difference in what public reason entails in the various cases seems to be due to how democratic systems work – Rawls notes that ordinary citizens are unlikely often to be voting on constitutional essentials or matters of basic justice.

In the case of citizens, adhering to the ideal of public reason involves:

a. doing what they can to hold government officials to the idea of public reason. This involves "repudiat(ing) government officials and candidates for public office who violate public reason".[36]

b. On a constitutional essential or matter of basic justice, "think(ing) of themselves *as if they were legislators* and ask(ing) themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact."[37]

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[32] "Public Reason Revisited,"444.
[33] "Public Reason Revisited,"444, *Political Liberalism* 215-6.
[34] "Public Reason Revisited,"443 and footnote 9, *Political Liberalism* 215.
[35] "Public Reason Revisited,"444, *Political Liberalism* 252.
[36] "Public Reason Revisited,"445.
[37] "Public Reason Revisited,"444-5, 448, 478.

c. On a constitutional essential or matter of basic justice, voting according to public reason rather than their own comprehensive doctrine.[38]

    i. Rawls's argument in *Political Liberalism* for why public reason applies to how citizens vote appeals to the need to avoid hypocrisy, since otherwise citizens would be talking publicly one way and voting another.[39] Note that this argument assumes that citizens are morally obliged to (d), below.

    ii. In "The Idea of Public Reason Revisited," his argument for citizens voting according to the political values of public reason calls on the criterion of reciprocity instead.[40]

d. On a constitutional essential or matter of basic justice, making their case before other citizens on the terms of public reason rather than their own comprehensive doctrine.[41]

Conversely, citizens are *not* required to observe the limits of public reason in

e. their "personal deliberations and reflections"[42] about constitutional essentials and matters of basic justice; or

f. their reasoning about constitutional essentials and matters of basic justice as members of associations such as churches and universities. Such reasoning, Rawls notes, is a "vital part of the background culture".[43]

But there is potential for tension between (b), (c), (d) on the one hand, and (e) and (f) on the other, which arises from trying to understand the relationship between a reasonable comprehensive doctrine and a reasonable judgement in its related political conception. This leads to the question of our next section.[44]

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[38] "Public Reason Revisited,"478-9.

[39] *Political Liberalism* 215.

[40] "Public Reason Revisited,"479.

[41] For Rawls, this seems to fall under the heading of "citizens when they engage in political advocacy in the public forum" – thus putting them into the "public political forum", in the same way as candidates for public office and their campaign managers are. See *Political Liberalism* 215.

[42] *Political Liberalism* 215. Here, "personal" is contrasted with "in the public forum".

[43] *Political Liberalism,* 215.

[44] "Public Reason Revisited,"483.

Why should citizens agree to appeal only to a public conception of justice and not to the whole truth as they see it?

Rawls tells us that his proposal of public reason, with its idea of the politically reasonable addressed to citizens as citizens, is supposed to *replace* comprehensive doctrines of truth or right as a basis for discussions on fundamental matters.[45] But this replacement proposal naturally gives rise to what Rawls in *Political Liberalism* terms a "paradox".[46] The nature of this paradox becomes clear when we consider Rawls's definition of a comprehensive doctrine. A comprehensive doctrine, Rawls tells us, is a moral conception which "includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole."[47] The paradigm case of a comprehensive doctrine is one of the major religions, such as Christianity or Islam. But comprehensive doctrines also include non-religious doctrines such as utilitarianism, which, like religious doctrines, would encompass *both* political *and* nonpolitical values and virtues.[48] Comprehensive doctrines claim the authority to determine what is of value and how to conduct oneself in life, *including in the political arena*. Because of this general scope, comprehensive doctrines run into conflict with the ideal of public reason, which on Rawls's account, requires that *political* values, independent of any comprehensive doctrine, should be the benchmark for deliberation in the public sphere. Public reason rules as *irrelevant* those reasons belonging to one's comprehensive doctrine which cannot be cast as political reasons. This presents a problem because of the importance of comprehensive doctrines to those who hold them, combined with the importance to everyone's life of the political issues which are supposed to be decided by public reason. If one considers the case of one of the traditional religions, we can see that the tenets of the faith would form the organizing principle for a believer's life; the reasons which, on Rawls's account of public reason, one is supposed to bracket, could very well be same ones that form the core convictions which make sense of

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[45] "Public Reason Revisited,"441.
[46] *Political Liberalism,* 216.
[47] *Political Liberalism,* 13, 175.
[48] *Political Liberalism,* 175.

one's life. Equally, the political issues which are to be decided by public reason are non-trivial ones – for instance, ones to do with our constitutionally protected liberties, which have deep implications for how we live together in society. Rawls expresses the paradox as follows: "Surely, the most fundamental questions should be settled by appealing to the most important truths, yet these may far transcend public reason!" [49]

Rawls's solution to the paradox is his idea of the overlapping consensus. In explaining how the overlapping consensus is supposed to dissolve the paradox, he returns to the principle of reciprocity which undergirds legitimacy in a democratic regime. Recall that the liberal principle of legitimacy states that our exercise of political power is proper and justifiable only when exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. Given a commitment to the liberal principle of legitimacy, there is no reason why any citizen, or association of citizens, should have the right to use state power to decide constitutional essentials as his/their comprehensive doctrine directs.[50] Reasonable comprehensive doctrines, by definition, are those that acknowledge and uphold the liberal principle of legitimacy, and thus accept the limitations on public reason that follow on from it. Being committed to reciprocity means that adherents of reasonable comprehensive doctrines stand ready to offer fair terms of social cooperation between equals, and to abide by these terms if others do also, even should it be to their advantage not to (for instance, should the balance of power in society change).[51]

The dissolution of the paradox that Rawls envisages comes about when citizens affirm the ideal of public reason not as a result of political compromise (as in a *modus vivendi*), but *from within* their own reasonable doctrines.[52] Rawls's claim is that "a true judgement in a reasonable comprehensive doctrine never conflicts

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[49] *Political Liberalism* 216. Note that in "The Idea of Public Reason Revisited", Rawls does not cast this puzzle in the form of a paradox. Rather, he addresses the question with specific reference to citizens of faith, asking "How is it possible for citizens of faith to be wholehearted members of a democratic society who endorse society's intrinsic political ideals and values and do not simply acquiesce in the balance of political and social forces?" ("Public Reason Revisited,"458-9) In both cases, the solution is the same – it is found in Rawls's explanation of the overlapping consensus.
[50] *Political Liberalism* 225-6.
[51] "Public Reason Revisited,"446, 488.
[52] *Political Liberalism* 218.

with a reasonable judgement in its related political conception" (call this the **no-conflict claim**).[53] One example he gives is the Roman Catholic argument for rejecting a right to abortion.[54] This is a case where the Roman Catholic citizen can give a public argument against the right to abortion, in a form that accords with the constraints of public reason, while knowing that this argument is grounded in transcendent values. But because the Roman Catholic faith is a reasonable doctrine and can affirm "a constitutional democratic society whose principles, ideals and standards satisfy the criterion of reciprocity",[55] the Roman Catholic citizen would equally accept that the result of a vote which ends up permitting a right to abortion is legitimate law, and that forceful resistance is unreasonable. To illustrate the plausibility of his conception of public reason, Rawls gives the example of criminal cases, where we do not appeal to the whole truth, but abide by the rules of evidence, etc.

Rawls's no-conflict claim is critical, because if conflict were to occur between a true judgement in a reasonable comprehensive doctrine and a reasonable judgement in its related political conception, then commitment to reciprocity would mean that the political conception effectively trumps the comprehensive doctrine.

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[53] "Public Reason Revisited,"483.
[54] "Public Reason Revisited,"480, and footnote 82.
[55] "Public Reason Revisited,"483.

	True judgement in a reasonable[56] comprehensive doctrine (a)	*Can (a) be cast as an argument adhering to the demands of public reason, viz., as a reasonable judgement in its related political conception*	*Rawls's view of how the citizen should vote, and what the duty of civility requires (assume a vote is called for, and that this is a constitutional essential or matter of basic justice)*
"No conflict" scenario	YES	YES	Vote in accordance with both. No conflict.
"Conflict" scenario	YES	NO For instance, a case where the evidence/reasons are wholly based on revealed truth, and there is no known way of making the argument in a way that accords with the strictures of public reason	Vote in accordance with public reason, which puts one in conflict with one's comprehensive doctrine.

Consider the second scenario in the table above. Such a "conflict" scenario would put citizens in a very difficult position. Either they vote in accordance with public reason, which puts them in a conflict of conscience with their grounding beliefs (part of their comprehensive doctrine), or else their comprehensive doctrine would be classified as "unreasonable" by political liberalism, on the issue in question.[57]

Rawls might respond that even in such a "conflict" scenario, the reasonable comprehensive doctrine's affirmation of the constitution would sustain stability -the citizen would still be bound to refrain from forceful resistance, because her comprehensive doctrine affirms the constitution along with its voting procedures,

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[56] By Rawls's definition, this means that the comprehensive doctrine is able to affirm the principles of justice of the society (as enshrined in the constitution), and would abide by the constitution's rules even if it is to the doctrine's disadvantage.

[57] Rawls remarks that "a comprehensive doctrine can be unreasonable on one or several issues without being simply unreasonable" - "Public Reason Revisited,"479, footnote 80.

etc. Yet the citizen's cognitive attitude here would be one that is divided against itself, frustrated in expressing her transcendent beliefs in her political life.

Perhaps it is in view of these potential cases of conflict between reasonable comprehensive doctrines and public reason that Rawls allows for an "inclusive view" of public reason.[58] The inclusive view of public reason allows citizens, in certain situations, to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided that they do this in ways that strengthen the ideal of public reason itself.[59] This allows Rawls to classify the abolitionists and the leaders of the civil rights movement as on the side of public reason, because on reflection they *could have* given public reasons for their actions, in addition to the comprehensive reasons which they in fact cited.[60]

In "The Idea of Public Reason Revisited," Rawls extends the inclusive view, by adding what he calls the *proviso* to the conception of public reason. The *proviso* states that we are allowed to introduce into political discussion *at any time* our comprehensive doctrine, religious or nonreligious, provided that, *in due course,* we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support.[61] The time frame for the *proviso* to be satisfied, Rawls says, must be worked out in practice.[62] Rawls acknowledges that there may be positive reasons for introducing comprehensive doctrines into public political discussion[63]– for instance, citizens' mutual knowledge of one another's religious and nonreligious doctrines expressed in the wide view of public political culture recognises that the roots of democratic citizens' allegiance to their political conceptions lie in their respective comprehensive doctrines, both religious and nonreligious, thus strengthening allegiance to the democratic ideal of public reason.[64]

The addition of the proviso might decrease the cases of conflict between a true judgement in a reasonable comprehensive doctrine and a reasonable judgement in its related political conception, by giving the adherent of a comprehensive

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[58] *Political Liberalism*, 247, fn36. Rawls credits Amy Gutmann and Lawrence Solum for persuading him to this, rather than the "exclusive view" of public reason.
[59] *Political Liberalism* 247.
[60] *Political Liberalism* 251.
[61] "Public Reason Revisited,"453.
[62] "Public Reason Revisited,"462.
[63] "Public Reason Revisited,"462.
[64] "Public Reason Revisited,"463, 465.

doctrine[65] more time and room to manoeuvre, but then it gives rise to problems of its own. But by allowing reasons grounded reasonable comprehensive doctrines 'free entry', as it were, into the realm of public reason, one might worry that the proviso undermines Rawls's account of public reason, by giving the citizen too much leeway to argue from his comprehensive doctrine, to the extent of compromising the duty of civility. Or, at the other end of the spectrum, one might worry that a strict adherence to the ideal of public reason, without the proviso, could undermine trust in fellow citizens, as citizens suspect their compatriots of hiding their true reasons behind a cloak of civility.

Raz's argument against Rawls's ideal of public reason

In line with Raz's rejection of Rawls's epistemic abstinence, I argue in this section that the Razian objection would be to the restricted *content* of Rawls's ideal of public reason. Rawls's ideal of public reason calls for epistemic abstinence, requiring that explanations that fall under public reason are to be based on only the political values of public reason rather than on one's comprehensive doctrines. In contrast, nothing in Raz's writings indicates that he would have any in-principle objection to the *form* of Rawlsian public reason. By this I mean to refer to Rawls's description of the duty of civility as a democratic virtue, comprising the willingness to explain one's reasons to others, willingness to listen, and fair-mindedness in deciding when accommodations to others' views should reasonably be made.[66]

The negative argument

The Razian negative argument against Rawls's account of public reason is of a piece with Raz's disagreement with Rawls over the correct approach to justification. This is unsurprising, given that Rawls clearly states that his account of public reason and his principles of justice both have their source in his principle of liberal legitimacy,[67] a principle which Raz would reject. Thus the principal Razian

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[65] This could be either the citizen of faith, or the believer in a secular comprehensive doctrine.
[66] *Political Liberalism,* 217.
[67] The principle of liberal legitimacy states that the exercise of political power is proper and justifiable only when exercised in accordance with a constitution the essentials of which all citizens

objection against Rawls's account of public reason would be that it is *not needed*. On Rawls's account, the need for public reason arises from accepting the principle of legitimacy. But if legitimacy has to do with conformity to reason rather than with finding reasons which could be reasonably accepted by others, then Rawls's chief argument for the duty of civility is undermined.

Raz's secondary charge against public reason would, I think, be that one possible[68] cognitive attitude it presupposes is incoherent, and undermines personal well-being. We saw already in Chapter 1 that Raz thinks trying to maintain neutrality at the level of metaphysics is incoherent. With regard to the practice of public reason, which on Rawls's account requires a "public point of view" that is "impartial... between the points of view of reasonable comprehensive doctrines,"[69] Raz could make a similar sort of argument. In his article "Liberalism, Scepticism, and Democracy,"[70] Raz has a section entitled "Semi-Scepticism and Neutrality," which I think fits as a depiction of what I have called the "Conflict" scenario in the previous section. Here, Raz looks in detail at the epistemic attitude presupposed by one conception of reasonable disagreement. This is how he describes it:

> Consider an example. John believes in a life of change, variety, and free experimentation. Joanna disagrees. She believes that people should be loyal to the traditions, tastes, and practices they were brought up on. But Joanna regards John's view as a reasonable one. To be precise, she thinks that these are matters over which it is impossible to find conclusive arguments either way. John has strong arguments to support his view. Though she disagrees with him, she thinks that he is as likely to be right as she is. She does not think that anything follows from that by itself. But she also believes that all people are entitled to be respected. The combination of people's right to respect with the fact that their views on the meaning of life, even those she believes to be wrong, are equally likely to be right, implies that they should be left to conduct their lives each by his or her own light.

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may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational (*Political Liberalism* 217), that is, which passes what I have termed the "reasonableness requirement" (See Chapter 1 page 28).

[68] As I will elaborate below, this charge may not, strictly speaking, be aimed at Rawls's own picture of what public reason involves.

[69] *Political Liberalism,* xix.

[70] In *Ethics in the Public Domain: Essays in the Morality of Law and Politics (Revised Edition)*, 106-7.

Normally the proper reaction to such a situation is to suspend belief. If two mutually exclusive views are equally likely to be right, then we do not have adequate reason to accept either of them. One may argue, however, that given that one has to carry on with the business of life (we assume that suicide is not an acceptable option), one is more likely to have a good life if guided by some conception of the good than by none. Since one has no reason to change from the conception one has, it is best to remain faithful to it, even while realising that it is not more likely to be correct than the next person's.

Is this cognitive attitude logically possible? The difficulty is that having a certain belief commits one to disbelieving its contradictory. Joanna is supposed to believe in a certain conception of the good but also to believe that its contradictory is as likely to be true as it is. To assume that one believes a proposition (i.e. believes it to be true while one regards it as no more likely to be true than its contradictory is to allow a radical rupture between belief and belief that one's belief is justified. This may be logically impossible. The best way to understand Joanna's attitude is to say that she acts as if a certain conception of the good is correct, but without believing it to be correct.

This is an unstable state of mind, full of internal tensions."[71]

Note that, given Raz's account of well-being as the whole-hearted and successful pursuit of valuable activities, the problem with the cognitive attitude described above is that it *undermines well-being, by violating the wholeheartedness condition*. Wholeheartedness, on Raz's account, requires the absence of negative attitudes such as self-hatred, pathological self-doubt, and alienation from one's life.[72] In the scenario described, Joanna's well-being is undermined because she is unable wholeheartedly to identify with her conception of the good, because she seems to be forced into holding at the same time the belief that another conception is just as likely to be true.

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[71] "Liberalism, Scepticism, and Democracy," 106-7. Compare this with Rawls's description of the adherent of a reasonable comprehensive doctrine: "The doctrine any reasonable person affirms is but one reasonable doctrine among others. In affirming it, a person, of course, believes it to be true, or else reasonable, as the case may be….We recognize that our own doctrine has, and can have, for people generally, no special claims on them beyond their own view of its merits…When we take the step beyond recognizing the reasonableness of a doctrine and affirm our belief in it, we are not being unreasonable. Beyond this, reasonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own. This is because, given the fact of reasonable pluralism, a public and shared basis of justification that applies to comprehensive doctrines is lacking in the public culture of a democratic society." (*Political Liberalism*, 60-61)

[72] Raz, "Duties of Well-Being," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Revised edition) (Oxford: Clarendon Press, 2001), 5.

Clearly, this is not the cognitive attitude to which Rawls would want his theory to entail. After all, the whole point of the overlapping consensus is that it is a device to preserve wholeheartedness,[73] to use Raz's terminology of well-being – so it would be a rich irony if practising public reason resulted in the alienation of the citizen from her conception of the good.

So what could Rawls say about Joanna, assuming that we take her as an example of a citizen of a well-ordered society trying to adhere to the ideal of public reason? In order to give the example some bite, let us assume that the set-up of this description is a prelude to a vote that Joanna is preparing to make on a constitutional essential that would have impact on John's freedom to live out his conception of the good. We might begin by observing that Rawls's account of public reason is compatible on many points with Raz's description of Joanna. Rawlsian public reason would happily accommodate Joanna's classification of John's conception of the good as "reasonable", although she disagrees. On Rawls's account, this would mean that Joanna grasps the distinction between truth, which is singular, and reasonableness, which is plural. Joanna's thinking that "these are matters over which it is impossible to find conclusive arguments either way" is, on Rawls's terms, an acknowledgement of the burdens of judgement. Rawlsian public reason is also entirely compatible with Joanna's belief that all people are entitled to respect. To put this in Rawlsian terms, Joanna would be demonstrating her understanding of the notion of "equality" implicit in the public culture of her society.

The point at which Rawls could, I think, seek to resist Raz's description of Joanna's cognitive attitude is where Raz describes Joanna as believing that John's conception of the good is as likely to be true as her own. Rawls could deny that accepting the burdens of judgement entails this step. What he might want to say instead, is this: The burdens of judgement put limits on is *what Joanna considers reasonably justifiable to John*. As far as judgements of truth go, however, Joanna is free to judge John's conception of the good however her own beliefs lead her. For instance, she could quite reasonably believe that, based on her own individual

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[73] Recall that for Raz, well-being involves wholeheartedness, which is defined as the absence of negative attitudes such as self-hatred, pathological self-doubt, and alienation from one's life. ("Duties of Well-Being," 5-6. See also my Chapter 1, page 33).

experience, her way of life is the true one, and John's is false, and that he would be better off following her conception of the good.

But these judgements are *ruled out for use as relevant reasons in the public sphere*, because they could not be reasonably endorsed by John. At this point, the principle of liberal legitimacy kicks in. Joanna, from within her own conception of the good, is committed to the principle of liberal legitimacy (in keeping with the scenario as described by Raz, she might believe that this principle has a long and venerable tradition in her society which should be respected), and accepts that the principle sets limits on how she makes use of her vote to exercise coercive power over fellow citizens.

Thus the commitment to the principle of liberal legitimacy effectively rules out some of what Joanna considers true judgements (e.g., "John's conception of the good is false, and he would be better off following my way of life"). Since Joanna cannot find an argument that John could reasonably accept, she should therefore not make use of the coercive force of law to compel him to give up his way of life, or to make its practice harder.

This description of Joanna, unlike Raz's original one, seems much more plausible. But Raz is right about it being "full of internal tensions".[74] Joanna's conception of the good gives rise to two conflicting prescriptions. On one hand, the judgement that John's conception of the good is false, and he would be better off following Joanna's way of life, might give rise to the conclusion that he should therefore be encouraged, including using legal sanctions, to abandon his way of life. On the other hand, Joanna's commitment to the principle of liberal legitimacy is forbidding her to draw that practical conclusion in her decision on which way to vote. Notice the critical role of the principle of liberal legitimacy in this scenario. It plays the role of a trumping argument, a sort of higher-order policy, in Joanna's practical reasoning.

Rawls gives two considerations for why this trumping takes place.[75] First, he tells us that "the values of the political are very great values and hence not easily

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[74] "Liberalism, Scepticism, and Democracy", 107.

[75] Rawls phrases the question differently. He asks, "how can the values of the special domain of the political – the values of a subdomain of the realm of all values – normally outweigh whatever values may conflict with them? Put another way, how can we affirm our comprehensive doctrine and yet

overridden"[76] – they govern the basic framework of our social life together.[77] The idea is that, these political values, like the virtues of reasonableness and fairness, constitute the conditions that make fair social cooperation possible,[78] so other values which conflict with them tend to be outweighed. Second, he points to history as demonstrating that reasonable comprehensive doctrines are such as to make an overlapping consensus possible. Specifically, this is because there is enough "slippage"[79] in most comprehensive views to allow them to cohere with liberal principles of justice. This in turn means that severe conflicts between political and other values are much reduced.

Raz's positive picture

For the sake of argument, take it that we accept Raz's approach to justification, and hence accept that political legitimacy does not result in a moral duty to practise public reason. Still, one might ask – what is Raz's positive account of how a society is supposed to deal with reasonable disagreement? At the very least, Rawls's account of public reason offers guidelines for how citizens could learn to speak to one another in terms of mutual respect. What does Raz propose instead?

One key difference in the thinking of Raz and Rawls, which in turn shapes their conception of the appropriate mode of reasoning in the public sphere, is that for Raz, there is no partition between the political and the rest of morality. This means that when arguing for and deciding on public policies, there is no higher-level filter operating to rule out certain reasons as inadmissible for public debate because they cannot reasonably be endorsed by other citizens. Raz's view of what is appropriate to reasoning in the public sphere falls out of this picture:

> (T)he true grounds of [political] decisions...are considerations of what
> does and what does not contribute to people's well-being, which options

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hold that it would not be reasonable to use state power to gain everyone's allegiance to it?" (*Political Liberalism*, 139)

[76] *Political Liberalism*, 139.
[77] *Political Liberalism*, 139-140.
[78] *Political Liberalism*, 157.
[79] *Political Liberalism*, 160.

and what aspects of the common culture are valuable and to be encouraged and which are ignoble and to be discouraged. No value judgements are discounted. In voting for political measures one gives full weight to all one's beliefs. The idea that I should apply my beliefs about the good life to the conduct of my own life, but not to public policies which affect the fortunes of others, does not find any support in the arguments we have canvassed.[80]

To what sort of society does this approach apply?

Because Raz's account of legitimacy, unlike Rawls's theory of justice, is not meant to apply only to constitutional democracies, a Razian account of the right way to reason in the public sphere also is not limited to democratic societies, but rather is applicable to any society for which the question arises.

The content of public reasoning

Instead of a family of political conceptions of justice being the content of public reason, for Raz, well-being is both the substance and the goal of reasoning in the public sphere. Having looked in the previous section at the potential for internal tensions in the "conflict" scenarios on Rawls's account of public reason, the immediate appeal of the Razian picture is that there is no inherent potential for conflict. A citizen's reasons might pull in different directions (a familiar feature of any sort of reasoning), but on Raz's picture there is no *structural* reason for tension to arise within the cognitive attitude of a citizen, because *all* of one's beliefs about what well-being consists in come into play when one reasons in the public domain.

Who should take part in public reasoning

It is significant that for Raz, the government is as much a party to this no-holds-barred public debate about well-being as any citizen. On his account, the government is not meant to just 'hold the ring', but rather must act to protect and promote citizens' well-being, by acting on its conviction of what that is. Raz himself starts the ball rolling by proposing a conception on well-being on which he thinks

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[80] "Liberalism, Scepticism, and Democracy," 117-8.

government should be based. In his autonomy-based account of well-being, he fleshes out in detail what well-being consists of, and the resulting duties that government and citizens have to (fellow) citizens.

At the same time, Raz addresses head-on the two fears that this picture of no-holds-barred debate might give rise to.[81] The first fear is that the government taking a stand on well-being will lead to "a government fired by ideals trying to reshape people for their own good and imposing a uniform pattern on life on all"; the second is the "fear of a bureaucratic, dogmatic, insensitive, and inefficient big brother trying to lead our lives for us". Raz's answer to these two fears, in a nutshell, is to say that "(a)utonomy...is incompatible with any vision of morality being thrust down people's throats." [82] In addition, autonomy grounds the harm principle, which provides principled limits to when the government can infringe upon individuals' autonomy.[83]

As for how Raz's picture deals with the problem of reasonable disagreement, there are a couple of things to say. First, if the worry about reasonable disagreement is to do with the fear that disagreement renders a regime illegitimate, then Raz's normal justification thesis (NJT)[84] contains a separate argument for legitimacy which does not require agreement of any kind, but rather conformity to reason. Second, if the worry is anarchy, and the annihilation of ways of life because people disagree, then Raz's solution is strong value pluralism, which gives him a principled basis for toleration. Strong value pluralism holds that there are many ways of life which are both incompatible and valuable. Because ways of life are *incompatible*, they are inevitably going to come into conflict with one another. To return to the example of Joanna, it is an intrinsic part of holding to her conception of the good of upholding traditional practices – that she must reject John's way of life (that of change, variety, and free experimentation). This is why Raz is not overly troubled by the presence of conflict, in contrast to Rawls, for whom disagreement raises the spectre of illegitimacy. Furthermore, strong value pluralism also holds the solution to this inevitable conflict. Because different ways of life are *valuable*, a principle of toleration is needed. The principle of toleration regulates collective life, ensuring

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[81] "Liberalism, Scepticism, and Democracy," 118.
[82] "Liberalism, Scepticism, and Democracy," 120.
[83] "Liberalism, Scepticism, and Democracy," 124.
[84] See Chapter 1, page 30.

that different valuable ways of life can flourish in society. I will discuss the derivation of the principle of toleration in more detail in Chapter 6.

The form of public debate

A final reservation about the Razian account might be that the conversation we imagine is of something resembling a fishmarket, where voices shout across the room, trying to drown out other voices without real engagement in conversation. Raz could, I think, reject this picture. Raz could acknowledge that allowing everyone to marshall the whole complement of their beliefs in engaging in public debate makes for a messier conversation than that which Rawls envisages.[85] But messiness does not rule out engagement with reason.

I think Raz might point out that there are natural forces within the democratic process which would help to regulate the discussion. Given that the public debate is supposed to be about society's understanding of well-being and what it consists in, a key objective would be to persuade others to come round to one's way of thinking about well-being. This may well involve trying to find ways of arguing one's case that are able to appeal to shared premises.

Also, nothing in Raz's theory rules out the other attractive aspects of Rawls's duty of civility, such as the willingness to listen to others, or fair-mindedness in deciding when accommodations to others' views should reasonably be made.[86] Indeed, Raz's comments on the appropriate attitude of critical rationality points squarely in the direction of reasoned debate à la Rawls. He says:

> Recognition that fallibility is part of the conditions of ordinary knowledge underpins the attitude of critical rationality. It includes realisation of the corrigibility and revisability of all ordinary beliefs, precisely because of our fallibility, and a *readiness to re-examine our beliefs as necessary*. Critical rationality has political implications. Its desirability argues for political institutions which adopt that attitude, and

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[85] That is, without the proviso at work. It is not clear that, with the proviso, Rawls's picture is any neater than Raz's.
[86] *Political Liberalism* 217.

which allow adequate opportunities for periodic re-evaluation of public policies.[87]

The sort of recognition of fallibility which leads to re-examine our beliefs as necessary would, one imagines, be conducive to the give-and-take of honest debate in the public sphere.

So what?

Having taken a quick tour of these two approaches to reasoning in the public sphere, one might ask, what hangs on the different views of the appropriate mode of reasoning in the public sphere? Consider the following two quotations, which provide some indication of how Rawls and Raz respectively regard the significance of this debate:

Rawls:

> The answer we give to the question of whether a just democratic society is possible and can be stable for the right reasons affects our background thoughts and attitudes about the world as a whole....will *shape the underlying attitudes of the public culture and the conduct of politics*. If we take for granted as common knowledge that a just and well-ordered democratic society is impossible, then the quality and tone of those attitudes will reflect that knowledge.[88]

Raz:

> Fear of uniformity and of the denial of individual autonomy has led many liberal writers to insist that the state should have nothing to do with the promotion of ideals of the good life. This in turn has led to the *impoverishment of their understanding of human flourishing and of the relations between individual well-being and a common culture*. Instead, one should denounce the rejection of autonomy and the embracing of uniformity as misguided conceptions of individual well-being. Only through a conception of well-being based on autonomy and value pluralism can we *restore the true perspective of the role of morality in politics*.[89]

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[87] "Liberalism, Scepticism, and Democracy," 101. Italics added.
[88] *Political Liberalism*, Introduction to the Paperback Edition, lix. Italics added.
[89] "Liberalism, Scepticism, and Democracy," 118. Italics added.

Rawls seems to be hinting that the consequence of giving up on agreement for the right reasons, symbolically expressed in a commitment to practise public reason, is the risk that our society collapses into an unprincipled struggle for power. For Raz, on the other hand, Rawls's approach – to justification and to public reason – entails giving up the rightful place of morality in political matters. He is arguing, in effect, that if we let Rawls convince us to carve out the political sphere as freestanding, we thereby do violence to our understanding of the proper role of morality.

Where Rawls and Raz agree, is that what is at stake in this issue of how to reason in the public sphere, is our common understanding of the public culture. Specifically, what is at stake is society's shared conception about what it is right for people to argue about. Do we see the most important public debates about fundamental questions as a very specifically defined debate over political conceptions, with clear rules of engagement where only a specified class of relevant reasons are admissible? Or do we plump for a wider and messier debate, where all our "baggage" of beliefs is let into the fray and we argue about morality as of a piece with politics?

3

The Overlapping Consensus and

Shared Intention

This chapter looks at two aspects of Rawlsian political justification, as modelled in the original position and the overlapping consensus. Using Michael Bratman's intention-based theory of shared agency,[1] I argue that the overlapping consensus is best understood in terms of the practical matter of living together in a political community. The chapter ends with a puzzle about why Rawls thinks justification intrinsically requires the sharing of reasons, given that the intention model satisfies the functions Rawls wants the overlapping consensus to play.

The original position and political conceptions

As we have seen already in Chapter 1, justification, on Rawls's account, requires that reasons be shared. The original position isolates those reasons which are relevant to generating fair terms of social cooperation. This 'sifting' of reasons is achieved by means of the veil of ignorance, which removes distorting considerations such as knowledge of one's social and economic position inside one's society, thus ruling out inadmissible reasons and arriving at fair conditions under which to derive principles of justice.[2] Rawls says that the original position models "what we regard as acceptable restrictions on reasons available to the parties for favouring one political conception of justice over another".[3] The original position does not merely sift out relevant reasons, however; it also ensures that the reasons arrived at in the original position are *shared* by the parties – Rawls tells us that the reasoning of each party behind the veil of ignorance is the same as any other.[4] He says:

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[1] Michael Bratman, *Shared Agency: A Planning Theory of Acting Together*, forthcoming from Oxford University Press.
[2] *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005) 23-26.
[3] *Political Liberalism,* 26.
[4] Rawls also notes that the veil of ignorance is essential for a unanimous choice of a particular conception of justice. See *A Theory of Justice (Revised Edition)* (Cambridge, Massachusetts: The

it is clear that since the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the agreement in the original position *from the standpoint of one person at random*.[5]

The fact that the reasons in the original position are shared is crucial to Rawls's project of justifying his theory of justice. It is because the reasons are shared that the principles of justice pass Rawls's "reasonableness requirement" of justifiability, viz., the candidate principles are capable of being endorsed by reasonable people who do not share your conception of the good.[6]

In *Political Liberalism*, where Rawls sets himself the task of explaining how a just and stable society is possible, given that citizens remain profoundly divided by reasonable religious, philosophical and moral doctrines,[7] the picture of justification becomes somewhat more complicated.[8] Because of the casting of the problem in terms of reasonable pluralism, the sifting of reasons modelled in the original position needs to be repeated for each reasonable person in that society. This is the process by which citizens, who hold a variety of different reasonable comprehensive doctrines,[9] formulate *political conceptions* of justice. Political conceptions of justice have three features – their principles apply to society's basic structure; they can be presented independently from comprehensive doctrines of any kind; and they can be worked out from fundamental ideas implicit in the public political culture of a constitutional democracy, such as the conception of the citizen

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Belknap Press of Harvard University Press, 1999) 121, Chapter III, "The Original Position," *§24*, "The Veil of Ignorance".)

[5] *Theory of Justice*, 120, Chapter III, "The Original Position," *§24*, "The Veil of Ignorance". Italics mine.

[6] See Chapter 1, page 30.

[7] *Political Liberalism,* 4.

[8] To my mind, Rawls's re-working of his theory of justice as fairness from a (at least partially) comprehensive doctrine of justice to a political one does not represent any dramatic shift in position between *A Theory of Justice* and *Political Liberalism*; the changes respond to an internal inconsistency in *Theory* (to which I have earlier referred – see Chapter 2, page 39-40). Rawls tells us that "these lectures [*Political Liberalism*] take the structure and content of Theory to remain substantially the same." (*Political Liberalism*, xvi).

[9] I am limiting the discussion to reasonable comprehensive doctrines as a simplifying device; this seems to be the central question of *Political Liberalism*; it remains a separate question as to what is to be done with unreasonable doctrines.

as free and equal, and of society as a fair scheme of cooperation.[10] Political conceptions are thus 'modules'[11] that fit into and can be supported by various reasonable doctrines, though they are presented without referring to their connected comprehensive doctrines.

What pushes citizens to formulate political conceptions? Rawls gives two sorts of answer to this question – one normative, and the second, pragmatic.

The first, normative, answer, is that *reciprocity requires that reasons be shareable*. This goes to the heart of Rawls's understanding of the reasonable person – the reasonable person is ready to propose, and willingly to abide by, principles that specify fair terms of cooperation, if they are assured that others will likewise comply. Crucially, the reasonable person believes that principles specifying fair terms of cooperation are those that are "reasonable for everyone to accept and therefore... justifiable to them".[12] That is, the reasonable person accepts the criterion of reciprocity, or as I have termed it, the reasonableness requirement on justification. Political conceptions meet the criterion of reciprocity because political conceptions, by their nature, are expressive of reasons that you think others who are free and equal citizens might reasonably endorse along with you.[13] Rawls's picture of public reason in a well-ordered society is that of citizens appealing to political conceptions when debating fundamental questions. He says that "the limiting feature of these forms [of public reason] is the criterion of reciprocity".[14] Rawls presents the original position as just one way to identify reasons which meet this criterion of reciprocity; he does not rule out the possibility that there might be other means to the same end.[15]

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[10] *Political Liberalism,* 453. One of the restrictions Rawls puts on the conduct of public reason is that we cannot proceed directly from our comprehensive doctrine to a selected political principle which supports our case for a particular institution, say. Instead, citizens are required first to work out a *complete political conception* and from there to elaborate its principles and ideals, and to use the arguments they provide. Otherwise, he says, public reason would allow arguments that are too "immediate and fragmentary". (*Political Liberalism,* 455)

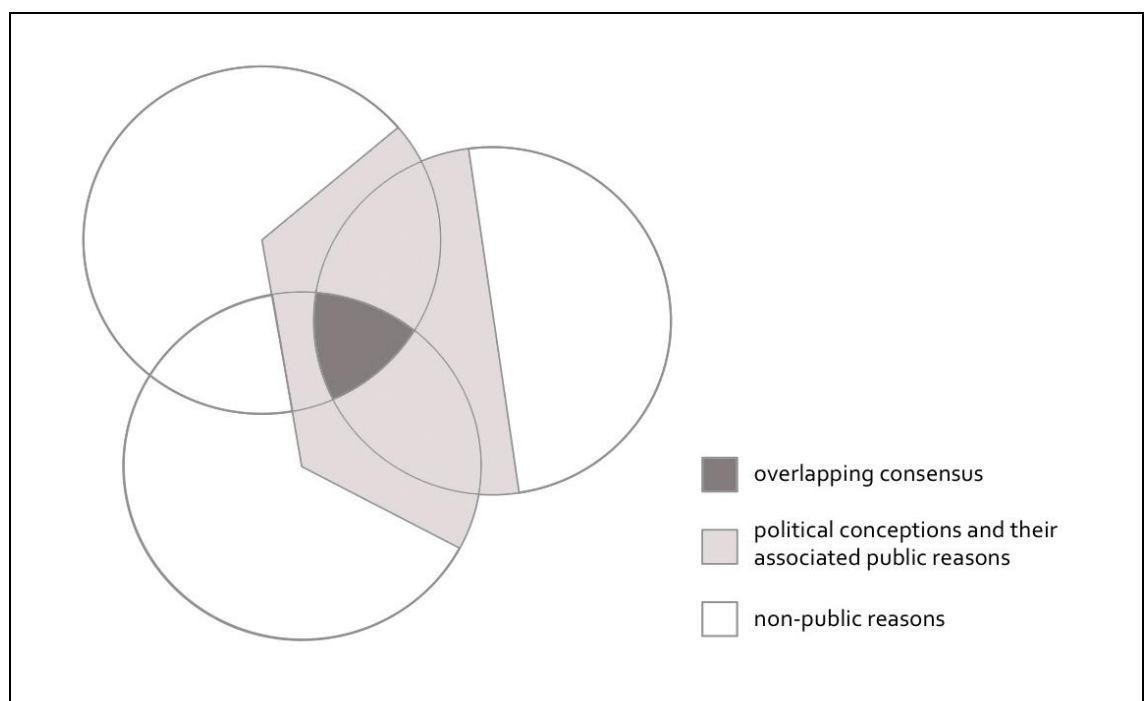[11] *Political Liberalism,* 12.

[12] *Political Liberalism,* 49.

[13] *Political Liberalism,* 226-7, 450.

[14] *Political Liberalism,* 450.

[15] *Political Liberalism,* 226-7. He says that each of us must have, and be ready to explain, a criterion of what principles and guidelines we think other citizens (who are also free and equal) may reasonably be expected to endorse along with us. We must have some test we are ready to state as to when this condition is met. Rawls's own criterion is agreement in the original position, but he makes clear that this is not the only possible criterion. Also see *Political Liberalism,* 450.

The second, pragmatic, reason for formulating political conceptions can be found in Rawls's narrative of how a constitutional consensus might become an overlapping consensus over time. Rawls starts by imagining a constitutional consensus arising as a *modus vivendi*. A constitutional consensus exists when a society has a constitution establishing electoral procedures for dealing with political rivalry, and there is agreement on certain basic political rights and liberties necessary for democratic procedures to take place, but where there is still disagreement as to the precise content and contours of the scheme of rights and liberties.[16] He then says that because political groups must enter the public forum to try to persuade others who do not share their comprehensive views to back their preferred policies, they will be led to formulate political conceptions of justice which function as the "common currency of discussion" between disparate groups.[17] That is, the pragmatic pressures for an overlapping consensus are constituted by the need to persuade others to one's point of view, as part of the democratic process of decision-making.

overlapping consensus

political conceptions and their associated public reasons

non-public reasons

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[16]*Political Liberalism,* 158-9.
[17] *Political Liberalism,* 165.

The overlapping consensus

With the different political conceptions and their associated, potentially
shareable reasons in place, there is another sifting of reasons, which results in the
overlapping consensus. As the name indicates, Rawls thinks that that which will
yield the family of political conceptions to regulate a constitutional democracy will
be constituted by the *area of overlap of citizens' political conceptions* (see diagram
above). Specifically, the focus of the overlapping consensus is "a class of liberal
conceptions that vary within a certain more or less narrow range,"[18] determined by
the range of views that can be plausibly elaborated from the fundamental ideas of
person and society.[19] Rawls considers it a necessary condition for an adequate
political conception of justice for a society that it can gain the allegiance of
reasonable citizens who affirm reasonable comprehensive doctrines, i.e., that it is
able to win the support of a reasonable overlapping consensus within that society.[20]
Again, the reasoning behind this goes back to Rawls's conception of what justifying
a conception of justice requires. What Rawls is after is a political conception of
justice capable of serving as a "public basis of justification".[21] Given the persistence
of a diverse set of reasonable but irreconcilable doctrines, however (the fact of
reasonable pluralism), and given that imposing (by force) any one comprehensive
doctrine is off the table, Rawls thinks that "an enduring and secure democratic
regime" can only exist when it is regulated by a family of conceptions of justice
which form the focus of an overlapping consensus.[22] For now, focus on the role of
the overlapping consensus in justification.

Here is Rawls's description of successful public justification of a political
conception by a political society:

> Public justification happens when all the reasonable members of
> political society carry out a justification of the *shared political
> conception* by embedding it in their several reasonable comprehensive
> views. In this case, reasonable citizens take one another into account as
> having reasonable comprehensive doctrines that endorse that political

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[18] *Political Liberalism,* 164.
[19] *Political Liberalism,* 167.
[20] *Political Liberalism,* 36
[21] *Political Liberalism,* 38.
[22] *Political Liberalism,* 38.

conception, and this mutual accounting shapes the moral quality of the public culture of political society. A crucial point here is that while the public justification of the political conception for political society depends on reasonable comprehensive doctrines, this justification does so only in an indirect way. That is, the express contents of these doctrines have no normative role in public justification; citizens do not look into the content of others' doctrines, and so remain within the bounds of the political. Rather, they take into account and give some weight to only the fact – the existence – of the reasonable overlapping consensus itself.[23]

Given that each citizen affirms both a political conception and a comprehensive doctrine to start with,[24] the process of public justification would involve the individual citizens engaging in the process of reflective equilibrium for themselves, since the shared political conception of the society may not be identical with their own starting political conception.[25] Thus Rawls describes this process of coming to the "common ground" of the "shared political conception" as "general and wide reflective equilibrium".[26] The focus of the overlapping consensus, then, would exclude some parts of various individuals' initial political conceptions and their supporting reasons. That is, the overlapping consensus would *exclude* even some of those reasons that *already met the criterion of reciprocity*.

Focussing on the overlap

It is clear that the subset of reasons picked out by the overlapping consensus has a special status, for Rawls. But what is special about them? In particular, are the reasons represented by the overlapping consensus *special because they are shared* by reasonable citizens? Or is it the other way round - are these reasons *shared because they are special*?

At one level, Rawls is fairly clear - it is the former. Consider the passage on public justification quoted above. Rawls says explicitly that "the express contents of these doctrines have no normative role in public justification" – the important thing

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[23] *Political Liberalism,* 387, italics added.
[24] *Political Liberalism,* 386.
[25] The process, as Rawls describes it, involves the political conception shaping the reasonable comprehensive doctrine, as well as vice versa. (*Political Liberalism,* 160-161 and 389)
[26] *Political Liberalism,* 388.

is the *fact of*, the *existence of*, the overlapping consensus – in short, *that it is shared*. On the other hand, we are also told in the same passage that public justification depends "in an indirect way" on the content of citizens' comprehensive doctrines being reasonable.

In this section, I wish to attempt to explain *why* it is the case that we should choose the first option (viz., that the reasons represented by the overlapping consensus are *special because they are shared*). Specifically, I argue that the most helpful way of conceiving of Rawls's overlapping consensus is by considering its role in the practical matter of living together as a political community.

Consider it this way. Instead of thinking of the overlapping consensus as a special sub-set of shared reasons with particular justificatory significance (a common reading of Rawls's view), think of it as representing a Bratman-style shared intention[27] instead. This suggestion places the emphasis on figuring out the practical matter of getting along together, rather than on the sharing of reasons.

To see how this would work, let us start a step before the overlapping consensus, where Rawls himself starts. In the remainder of this section, I try to show that a Rawlsian constitutional consensus is a near perfect fit for a Bratman-style shared intention/policy.

In a constitutional consensus, there is, plausibly, already a shared cooperative activity in place.[28] The shared cooperative activity citizens would be engaged in is something like "living in a political society together". This characterisation of the state appears to be in line with what Rawls calls the "fundamental idea" of "society as a fair system of cooperation over time".[29]

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[27] Michael Bratman's planning theory of intention puts the focus on how human beings being planning animals shapes the practical role that intention plays in our lives. The references to Bratman's theory of shared agency which follow are from Michael Bratman, *Shared Agency: A Planning Theory of Acting Together*, forthcoming from Oxford University Press, where he extends his planning theory of action to cover shared deliberation as itself a shared intentional activity, in which common ground constructed from shared policies about the weighting of various considerations plays a central role.

[28] That governing ourselves is a shared activity is, of course, a controversial claim in itself, but let us grant this for the sake of argument. I think some such assumption forms part of Rawls's background picture of what goes on in liberal democracies, to which his argument is addressed. As an example, in *Political Liberalism* 204, Rawls tells us that a well-ordered society is a social good, realised through *citizens' joint activity*.

[29] *Political Liberalism,* 14.

In such a context of shared cooperative activity, the constitutional consensus would be a *shared policy about weights* regulating the deliberation of the political society in question. On Bratman's account, shared policies about weights are *general intentions* in favour of giving weight to certain considerations[30] (or in favour of discounting certain considerations)[31] which are public, interlocking and inter-dependent, and which normally extend over time rather than only being applicable to a one-off action.[32] Some examples Bratman gives of such shared policies include – an admissions committee having a shared policy of giving weight to legacy considerations in its admissions decisions; a group building a house together, who deliberate about sub-plans in a way that reflects their shared policy of giving weight to specified standards of earthquake safety; a gang having a shared policy of giving weight to terrorizing the local population.[33] Having shared policies about weights helps unite a group in the face of divergent opinions concerning particular courses of action,[34] and provides a stable common framework for the group's thought and action.[35]

On a Bratman-style account, the content of the shared policy represented by the constitutional consensus would involve giving weight to democratic electoral procedures, including basic political rights and liberties including the right to vote, to free political speech and association as well as other substantive political rights required for running a democracy.[36] Such shared policies help us coordinate our lives together so that we can be said to be participating in a shared activity – in this case, living together in a democratic society. Having a shared policy about weights

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[30] For Bratman, "considerations" encompasses more than just individual reasons – "considerations" may include categories as broad as 'environmental concerns', or something as specific as taking a norm of consensus in decision-making to be a binding procedural constraint on how we deliberate together. Bratman says that he draws on (among others) the spirit of Raz's appeal to exclusionary reasons.

[31] Bratman 177, 182, 184, 193 where he gives the example of a jury and rules of evidence, an example also used by Rawls in his discussion on public reason.

[32] Bratman, 179. Bratman's choice of the word "policy" to describe this sort of intention is meant to capture their action-guiding nature, generality and continuity over time. It is also meant to distinguish such intentions from shared *judgements* of value leading to shared commitments to certain weightings in shared deliberation.

[33] Bratman, 175-6.

[34] Bratman, 179.

[35] Bratman, 179.

[36] *Political Liberalism,* 159.

defines the identity of the group, making it possible to explain what 'we' as a polity stand for, without positing a metaphysically mysterious corporate body.[37]

Bratman's account of how a shared policy about weights might come about looks very similar to Rawls's account of how a constitutional consensus might evolve (see Rawls's account of the historical emergence of the principle of religious toleration[38] as an example of how pragmatic pressures might lead to a constitutional consensus, or, in Bratman's terms, to the acceptance of a shared policy in favour of giving weight to religious toleration).

From constitutional consensus to overlapping consensus: comparing the two approaches

So far, we have seen that Bratman's account of shared policies about weights seems to fit neatly into Rawls's description of a constitutional consensus. The next question to ask is this: given a constitutional consensus, why does Rawls think that an overlapping consensus is still needed? Further, can the overlapping consensus, too, be described as a shared policy about weights?

An important difference between conceiving of the overlapping consensus as a shared policy about weights rather than thinking of it as a set of shared reasons, is that on the shared policy view, there is no restriction on the sort of reasons people may bring to the shared intention[39] (though even on the Bratman account citizens would need, minimally, some sort of pro-judgement in favour of the shared political conception of justice). Bratman's shared intention view does not require, as Rawls does, that the affirmation of the political conception of justice at the heart of the overlapping consensus be affirmed on moral grounds.[40] Rather, that which gives rise to shared policies on weights are simply practical pressures for interpersonal

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[37] Bratman, 176, 186.
[38] e.g. *Political Liberalism,* 159 where he uses the acceptance of the principle of toleration as a *modus vivendi*, as an example of the emergence of a constitutional consensus.
[39] Bratman, 178-9.
[40] *Political Liberalism,* 149.

convergence on modes of shared reasoning,[41] against the backdrop of what is possible.[42]

In making the case for the need to move from constitutional consensus to overlapping consensus, Rawls argues that a constitutional consensus would be unstable. His first set of arguments for moving from the constitutional consensus to the overlapping consensus has to do with the depth of the overlapping consensus. The overlapping consensus, according to Rawls, requires agreement deep enough to reach such fundamental ideas as those of society as a fair system of cooperation and of citizens as reasonable, rational, free and equal.[43] Rawls thinks that a constitutional consensus, where such fundamental ideas are *not* shared, is unstable because it is too shallow. The shallowness of a constitutional consensus results in three lacunae, all of which push the society towards overlapping consensus. Rawls claims:

(a) A constitutional consensus lacks a "common currency of discussion". The society in question is a democracy, committed to democratic procedures. Groups within the society thus need other citizens who do not share their comprehensive doctrine to be persuaded of their preferred policies in order to put together a majority and successfully implement their preferred policies. This moves groups to formulate political conceptions of justice, which are underpinned by reasons which other citizens who have divergent comprehensive doctrines can share.

(b) Linked to (a), a society with a constitutional consensus "lacks the conceptual resources to guide how the constitution should be amended and interpreted."[44] Rawls cites the example of the Reconstruction amendments to the US Constitution following the Civil War as an example of how competing groups were forced to go deeper in their search for a shared basis for amending the Constitution. He describes this as follows "Debate over those and other fundamental amendments forced competing groups to work out political conceptions that contained

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[41] Bratman 181.
[42] Bratman 192.
[43] *Political Liberalism,* 149.
[44] *Political Liberalism,* 165.

fundamental ideas in the light of which the constitution as so far understood could be changed".[45]

(c) In a constitutional consensus which has some form of judicial review, those doing the reviewing would not have "a reasonable basis for their interpretation of the values and standards the constitution ostensibly incorporates".[46] This would push them to develop a political conception of justice according to which they would interpret the constitution and decide cases.[47]

(a), (b) and (c) have in common the assumption that only shared *reasons* can serve as the benchmark for societal decision-making about important matters concerning how to live together.

Rawls's second set of arguments for the movement to the overlapping consensus has to do with breadth. He thinks that a constitutional consensus will be too narrow, because it is "purely political and procedural".[48] He therefore predicts that this will lead to conflict regarding the remaining constitutional essentials and basic matters of justice which are not covered by the constitutional consensus. The argument seems to be that, because the society with only a constitutional consensus is insufficiently "unified and cohesive", it will not be able to enact the legislation that will plug these gaps. This lack will push groups in that society to develop broader political conceptions which cover the basic structure as a whole, which both builds the requisite unity (because it involves constructing a set of shareable reasons), and which is a key first step towards an overlapping consensus.[49]

In response to Rawls's arguments from depth and from breadth, we can question the truth of his assumption that only shared *reasons* will serve the twin purposes of serving as the standard for societal decision-making about how to live together, and sufficiently unite society to address conflicting claims regarding constitutional essentials and basic matters of justice which are not addressed by a constitutional consensus. Specifically, I want to ask the question: *can a set of*

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[45] *Political Liberalism,* 165.
[46] *Political Liberalism,* 165-166.
[47] *Political Liberalism,* 165.
[48] *Political Liberalism,* 166.
[49] *Political Liberalism,* 167.

Bratman-style shared policies fulfil the purposes which Rawls thinks only an overlapping consensus of shared reasons succeeds in addressing?

Suppose we are in a constitutional consensus. For the sake of argument, regard the constitutional consensus as a set of shared policies to give weight to democratic procedures and protected rights.

Consider first Rawls's 'depth' arguments for the overlapping consensus. Instead of constructing a "common currency of discussion" out of shared (political) reasons, one might imagine the constitutional consensus (understood as a set of shared policies to give weight to democratic procedures and protected rights) as being extended to include a commitment to exclude evaluative judgements about the right and the good.[50] To take one of Rawls's favourite examples, a train of historical events such as the European religious wars of the 16th and 17th centuries might well lead to practical convergence on such a policy, which rather than being about sharing reasons, is much more focused on the practical necessity of getting along as a society without bloodshed.

As for Rawls's claim (b), that a constitutional consensus, because of its shallowness, will lack the conceptual resources to (re-)interpret the constitution, the key question here is whether a shared policy about weights may successfully be extended. Rawls's own solution to the problem is to work out shared reasons based on fundamental ideas in the public culture. We can accept that this is one way to arrive at a further agreement concerning what should have weight within the context of shared deliberation, without admitting that it is the only way for this to happen. Whether this sort of agreement on substantive reasons which Rawls describes is feasible will depend on the historical circumstances of the society in question. Take his example of the Reconstruction amendments to the US Constitution following the Civil War. In a nutshell, Rawls's take on how these amendments came into being is that political groups with divergent comprehensive views were forced to look deeper for shared ideas of society and persons in the light of which the Constitution could be amended. The amendments were thus supported by shared reasons – in this case,

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[50] Bratman, in passing, uses this as one of his examples (Bratman 184). One can however imagine that such a "common currency of discussion" might evolve into a quite different practice – for instance, where citizens come to a shared policy to provide one another with both Rawlsian public reasons and their comprehensive grounds for a given decision.

based on the value judgement that ethnic extraction should not be a relevant factor in determining citizenship. Let us suppose, for the sake of argument, that this is this is the correct account of history. Even so, it is entirely possible to imagine that America might have come to the Reconstruction Amendments by way of a *modus vivendi* instead[51] - particularly if the Civil War had lasted for longer than the four years it did. Similarly with judicial review (c), there may be agreement on hard cases even if judges do not agree on the reasons for their judgement.[52]

On Bratman's account, what is essential to continuing to engage in shared cooperative activity is only the *acceptance* of shared policies on weights. While having shared reasons for that acceptance might prove an advantage in settling disputes on hard cases, the bare fact of sharing a policy on weights will already satisfy the demand to get along together, and there is nothing to stop such policies on weights from being extended to cover different substantive areas of concern.

Thus far, considering the overlapping consensus as a Bratman-style set of shared policies on weights seems to allow us to achieve *all the same functions* served by Rawls's account, but *without the need for the sharing of reasons*.

Firstly, the shared intention narrative allows us to explain the role of the overlapping consensus in getting on with the practical task of living together, and choosing principles/policies by which to govern our lives together.

Secondly, the intention-based account models a non-moralised form of reciprocity. Sharing policies about weights effectively gives us rules which allow citizens to demonstrate reciprocity, while diverging on the reasons they have.[53] One aspect of reciprocity is a doing-likewise to others. This is reflected in the

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[51] Such a story could be told in much the same way as Rawls tells the story of the European wars of religion ending in a consensus about toleration - sheer weariness of devastating civil conflict leading to a consensus that allows disparate groups to coexist peacefully.

[52] Bratman refers to a Cass Sunstein article on incompletely theorized agreements, fn305 on 191, Chapter 7. Cass R. Sunstein, "Incompletely Theorised Agreements," 108 *Harvard Law Review* 1733, 1994-1995.

[53] Bratman 183, where he notes the importance of modelling forms of shared agency and deliberation that do not require convergence in belief or judgement. Bratman (fn 292) refers to an unpublished manuscript by Blain Neufeld, which touches on the same idea. See also Sunstein 1741, fn23, where she quotes Raz, *Morality of Freedom,* 58, where he says, "[T]he practice [of proceeding through the mediation of rules] allows the creation of a pluralistic culture. For it enables people to unite in support of some 'low or medium level' generalisations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or Liberalism, etc."

interdependence of shared intention. Take, for instance, the example of sharing a commitment to giving weight to a principle of toleration. This would only be feasible if I knew that others shared this commitment.[54] So my intention to give weight to toleration depends on your intention to similarly weight the same. Another aspect of reciprocity is an acknowledgement of the other(s) as (an) intentional agent(s). This, too, is modelled in the structure of shared intention, which does not simply treat others with whom we engage in shared activity as objects in the world which need to be accounted for, but also as intentional agents who are partners in a shared activity.[55] This is seen in the way it matters, for shared intention, that we intend for the shared policy to function *via* one another's intention.[56] To pick up on the toleration example, in intending a policy of toleration, we would be intending for a principle of toleration to be worked out *through the intentional activity of others committed to the same principle.*

Notice also that while the intention account does not require it,[57] mutual respect is also not precluded by this view. One of Bratman's examples is that of an academic department with a shared commitment to giving weight to collegiality in making new faculty appointments.[58] This shared commitment does not require agreement in judgements about what makes a good department. Conceivably, some members of the department might think that collegiality ranks quite low on the criteria for hiring, and that the quality and originality of a candidate's research work should be the deciding factor for new hires. Moreover, this disagreement can be out in the open, without undermining the shared policy. Disagreement notwithstanding, members of the department can both share a policy about how to weight collegiality in making hiring decisions, and respect one another as people.

We had started the previous section ("Focussing on the overlap") puzzling about the subset of reasons picked out by the overlapping consensus, asking the question of whether these reasons were *special because they are shared* by reasonable citizens, or whether they were *shared because they are special*. The foregoing exploration of the overlapping consensus via Bratman's shared intention

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[54] Bratman, 91. This is what Bratman calls feasibility-based persistence interdependence.
[55] Bratman, 65.
[56] Bratman, 67. This feature of shared intention, Bratman calls "interlocking".
[57] One might imagine chess masters who in fact despise each other engaged in a chess game together.
[58] Bratman, 175-6.

narrative reveals that the significance of the overlapping consensus is in its being shared; the most helpful way to understand the overlapping consensus is in terms of the first option, and by focussing on the practical task of living together.

Now, this conclusion – that the overlapping consensus should be understood as a shared intention - leads us to a puzzle, which is this: why then does Rawls insist on an overlapping consensus *which is underpinned by shared reasons*? As we have just seen, a Bratman-style account allows us to explain how a group might accept a shared policy of weighting certain considerations in their shared deliberation, in a way that supports reliable, predictable, explanatorily intelligible action by the group.[59] All without any need for shared reasons. In contrast, recall that Rawls's emphasis has been on shared reasons all along – both the formulation of political conceptions (modelled in original position) and the overlapping consensus require sifting out shared reasons. Connected to this, remember that Rawls thinks that public justification depends, albeit indirectly, on *reasonable* comprehensive doctrines,[60] where the definition of reasonableness incorporates the idea of sharing reasons. Observe as well that for Rawls, justifiability *constitutively* involves sharing reasons; the test for the justifiability of principles of justice requires that candidates for principles of justice pass what I have called the reasonableness requirement, that is, that they can be endorsed by reasonable people who do not share your conception of the good.

Given that the practical task of living together seems achievable with something less than the sharing of reasons, what are we missing?

What is missing?

In order to try to pinpoint what lies at the heart of Rawls's insistence on shared reasons, I propose to ask the question, "If we view the overlapping consensus as a Bratman-style set of shared policies on weights rather than a set of shared reasons, do we lose anything?"

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[59] Bratman, 179. Bratman refers to J. David Velleman's and Adam Morton's emphasis on explanatory intelligibility in their work.
[60] *Political Liberalism*, 387.

One way to start to get a grip on what it is we are missing about Rawls's insight into justification, is by comparing accounts of justification and reason-giving across different theories. Consider how the (classical) utilitarian thinks about the issue of justification and reason-giving. Because utilitarianism is a teleological theory, the right policy for a utilitarian government to take is just that policy which maximises the utility of the largest number of people; this policy is justified. The standard against which the legitimacy of a policy decision is measured is the standard of utility. The question of justification is answered with reference to the teleological standard, and is, in principle, separable from any need to give reasons to those affected by the policy. There might be utility-based reasons for offering justification for the policy to those affected by it - for instance, the effectiveness of the policy in maximising utility might be compromised if people become unhappy about not having the policy explained to them, and perhaps such discontent might result in a democratically-elected government being voted out of power which (such a government would consider) would decrease utility overall. But apart from considerations like these, which undermine the maximisation of utility, there is no *independent* reason to offer reasons in justification to those affected. Strictly speaking, Plato's noble lie would not be ruled out by the standard of utility, assuming that it could be promulgated without being found out. Such potentially manipulative results should, *prima facie*, be a source of concern for us.

Now consider Raz's normal justification thesis (NJT). In principle, on Raz's theory, justification on its own does not require that reasons be offered to those affected by a policy. There may be pragmatic, or perhaps autonomy-based considerations in favour of some sort of publicity about reasons, but this is a separate question. Justification, on Raz's account, goes through just on the basis of the existence of dependent reasons which apply to those affected by a policy.

Contrast this with Rawls's account, where his publicity condition effectively mandates transparency of justification to those affected, ruling out 'noble lie' cases. Rawls's well-ordered society is effectively regulated by a *public* conception of justice:

Conceptions that might work out well enough if understood and followed by a few or even by all, as long as this fact were not widely known, are excluded by the publicity condition.[61]

(P)ublicity can be explained as insuring that the process of justification can be perfectly carried through (in the limit so to speak) without untoward effects. For publicity allows that all can justify their conduct to everyone else (when their conduct is justifiable) without self-defeating or other disturbing consequences.[62]

On Rawls's account, publicity about reasons, or a certain transparency in justification, is *intrinsic to the nature of justification* in a way it is not for either the utilitarian or for Raz. The task of the next chapter is to try to pin down Rawls's argument for thinking that justification requires sharing reasons.

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[61] *Theory of Justice,* 397-8.

[62] *Theory of Justice,* 510. A similar passage can be found in *Political Liberalism*, 68.

4

Justification and the Sharing of Reasons

This chapter attempts to pin down Rawls's argument for why justification intrinsically involves the sharing of reasons, or more precisely, the existence of mutually acceptable reasons. In order to do this, I take us through Rawls's argument for the difference principle, which brings us to mutual respect being at the heart of why justification needs to be in the form of reasons others could accept. In contrast with readings of Rawls on which this condition on the mutual acceptability of reasons leads to various forms of epistemic abstinence, I argue that mutual acceptability should be understood as a heuristic device, which helps us to see and to take account of the reasons that others have and thus to respect the moral personality of those with whom we disagree, without needing, as a requirement of justifiability, any sort of epistemic abstinence.[1]

Justification and Rawls's argument for the difference principle

In arguing for his two principles of justice, Rawls takes his readers through two "fundamental comparisons"[2] - with the principle of average utility, and the principle of restricted utility, respectively. The first comparison gives the reasoning for the first principle, and the second comparison gives the reasoning for the difference principle.[3] I want to look closely at the second comparison, by way of getting to the heart of *why Rawls thinks justification constitutively involves being*

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[1] In making my arguments in this chapter, I draw on Rawls's work from a variety of eras. As I have mentioned previously, to my mind, there is no dramatic shift in his position between *Theory of Justice* and *Political Liberalism*; the changes are in response to an internal inconsistency in *Theory* (to which I have earlier referred – see Chapter 2, pages 39-40). Rawls also explicitly states in the Introduction to *Political Liberalism* that "these lectures take the structure and content of *Theory* to remain substantially the same." *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005), xvi.

[2] John Rawls, *Justice as Fairness: A Restatement,* ed. Erin Kelly (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2001), 94. See fn 16, which traces this way of organizing the reasoning for the two principles to Rawls's "Reply to Alexander and Musgrave," *Quarterly Journal of Economics* 88 (November 1974), Sections III-IV, 639-653, reprinted in *Collected Papers*.

[3] *Justice as Fairness*, 95.

able to offer one another mutually acceptable reasons; I believe that Rawls's argument for the difference principle sheds some light on this.[4]

The second comparison compares Rawls's two principles with an alternative formed by substituting for the difference principle the principle of average utility, combined with a stipulated social minimum.[5] According to Rawls, the second comparison is supposed to bring out the advantage of the two principles with respect to reciprocity.[6] Reciprocity is highlighted, it seems, because distribution is arranged such that those who gain more do so "on terms acceptable to those who gain less, and in particular to those who gain the least".[7] The element of reciprocity, then, has to do with justification, and in particular justification to the least advantaged.

Rawls tells us that the difference principle is arrived at by "taking equal division as the starting point, together with an idea of reciprocity".[8] But, first of all, why take equal division as a starting point? Why not start, for instance, with an assessment of needs, or rights, and use that as the benchmark for distribution? Second, one might reasonably ask, why should we be so concerned with the least advantaged? Why is justification owed to this group, particularly?

At this point it is important to clarify that Rawls does not make use of a consequentialist argument to argue for his conclusion that justification is owed to the least advantaged. Rawls is unambiguous about the good for society that would be achieved as a consequence of adopting the difference principle, but it does not constitute his argument for the difference principle. The good in question is the good of fraternity. Rawls says,

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[4] It may seem, at first glance, somewhat odd that a work concerned with public reason should contain an extended discussion of the difference principle. As the reader will discover, I proceed by breaking down Rawls's argument for the difference principle into two parts – what I shall call the Argument from Social Cooperation and the Argument from Mutual Respect. While my concern in this thesis is not distributive justice, I have chosen to work through both parts of Rawls's argument rather than extracting the Argument from Mutual Respect from its context because Rawls presents his second comparison as one argument in which the two strands that I identify are inter-dependent. Rawls's discussion of reciprocity and fraternity in the context of this argument would, as well, I think, lose much of its richness if only the Argument from Mutual Respect were highlighted.

[5] *Justice as Fairness*, 96.

[6] *Justice as Fairness*, 123, *Theory of Justice,* 88.

[7] *Justice as Fairness*, 123.

[8] *Justice as Fairness*, 123.

A further merit of the difference principle is that it provides an interpretation of the principle of fraternity…fraternity is held to represent a certain equality of social esteem manifest in various public conventions and in the absence of manners of deference and servility…The difference principle…does seem to correspond to a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off.[9]

This is closely linked to Rawls's picture of the quality of relationships within a just society. He envisages a just society as being one where "the least advantaged feel that they are a part of political society, and view the public culture with its ideals and principles as of significance to themselves".[10] This means that the least advantaged do not experience excessive strains of commitment which lead them either to become bitter and thus prepared to take violent action against their oppression, or to exhibit the milder symptoms of alienation from one's own society. Rawls describes the latter state as follows:

we grow distant from political society and retreat into our social world. We feel left out; and, withdrawn and cynical, we cannot affirm the principles of justice in our thought and conduct over a complete life. Though we are not hostile or rebellious, those principles are not ours and fail to engage our moral sensibility.[11]

In a just society, the least advantaged feel a sense of ownership of their society and its principles of justice and experience a sense of belonging to the group. Given that political apathy is a malaise that afflicts many actual developed democracies, Rawls is setting a high bar for justice. Indeed his goal is nothing less than "social concord and civic friendship".[12] Despite the winsomeness of the picture Rawls paints of a society regulated by the difference principle, this vision of social unity does not constitute Rawls's argument for it.

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[9] *A Theory of Justice (Revised Edition)* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1999)*,* 90. See also *Theory of Justice,* 91, where Rawls says, "liberty corresponds to the first principle, equality to the idea of equality in the first principle together with equality of fair opportunity, and fraternity to the difference principle."
[10] *Justice as Fairness*, 129.
[11] *Justice as Fairness*, 128.
[12] *Justice as Fairness*, 126.

So what *is* Rawls's argument for why justification is owed to the least advantaged in particular, and why must this justification be in the form of reasons they can accept? I argue that Rawls has a two-pronged argument for this. Call the first prong the Argument from Social Cooperation. This addresses the question of why justification is owed to the least advantaged. The second prong is the Argument from Mutual Respect, which addresses the requirement on the *form* of justification being in terms of reasons others can accept. Both are justificatory arguments, which use only information available to the parties behind the veil of ignorance.

The Argument from Social Cooperation

> The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a *common asset* and to share in the greater social and economic benefits *made possible by the complementarities of this distribution*.[13]

> For even if these assets [viz., capital and scarce natural assets such as land and forests] should fall out of the sky without human effort, they are nevertheless productive in the sense that *when combined with other factors a greater output results*.[14]

> This idea of *reciprocity is implicit* in the idea of regarding the distribution of native endowments as a *common asset*.[15]

> We try to specify an idea of reciprocity appropriate to the relation between citizens as free and equal…namely, that *everyone as a citizen should gain from its policies*.[16]

Justification is owed to the least advantaged because they are materially affected by a departure from equal division of the fruits of social cooperation. To understand why equal division is the appropriate starting point for justice as

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[13] *Theory of Justice,* 87. Italics added.
[14] *Theory of Justice,* 241. Italics added. This quotation is in the context of Rawls demonstrating that his two principles of justice do not rule out socialist institutions.
[15] *Justice as Fairness*, 124. Italics added.
[16] *Justice as Fairness*, 133. Italics added.

fairness, we have to look at Rawls's argument for considering the distribution of natural talents a "common asset".

Here we immediately encounter an exegetical difficulty – what Rawls means by saying that 'the distribution of natural talents/endowments is a common asset' is ambiguous. The first possible reading is that he means to say that the sum total of natural talents/endowments of all the individuals in a society belongs to all members of that society in common, rather than to each individual. A second possible reading is with the following emphasis – 'the *distribution* of natural talents/endowments is a common asset', which would put more weight on (as Rawls puts it), the *complementarities* of the distribution of natural assets rather than the natural assets themselves.

Robert Nozick and Michael Sandel both put pressure on the first reading. Nozick observes that regarding the sum of natural talents as a common asset does not take seriously the distinction between persons, echoing, he notes, Rawls's own charge against utilitarianism that it does not respect the distinction between persons. Nozick thinks that, if Rawls tries to escape this charge by distinguishing between men and their talents and other traits, no coherent conception of a person remains.[17] Sandel picks up on Nozick's objection (which he thinks succeeds), and charges Rawls with thinking of people as "radically disembodied" subjects.[18]

The availability of the second reading removes the need for Rawls to choose between conceding that he has neglected the distinction between persons and admitting that he has a dubious metaphysics of the person. According to the second reading, it is the *complementarity* of natural endowments which is a common asset, rather than the sum total of natural talents. To see how this is so, begin with the fruits of social cooperation. Rawls argues that these are only possible because of the complementary nature of the means of production and human talents. Consider a very basic closed economy. Take the talent and effort of a skilled baker. Without his raw materials – flour, yeast, salt, water – he would be unable to produce any bread, regardless of how talented he was. Moreover, without other people such as the

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[17] Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell reprint, 2006 of 1974 Basic Books), 228.
[18] Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 79. The only way out, Sandel goes on to argue, is if Rawls acquiesces instead to Sandel's "intersubjective conception of the self".

farmer to grow the wheat and the miller to grind it into flour, or the salt-farmer to harvest the salt from the sea, or the whole village to buy and eat his bread, he would not be able to sustain a livelihood from making bread. The argument extends fairly naturally to modern jobs – a lawyer, for instance, depends on the social practice of law as well as numerous transactions between people, to make his livelihood possible.[19] Whatever one may think about whether one owns one's talents and one's labour, it is hard to deny that these would not be as productive on their own as when they are combined with other factors of production, to which we do not stand in any relationship of ownership or entitlement.[20] To the complementarity of talents which makes the fruits of cooperation possible, no individual has title. Rawls thus concludes that the complementarity which makes social cooperation fruitful should be conceived as a "common asset".

At this point one might accept this first step - that we all benefit from the complementarity of talents - but still think that if society is a scheme of cooperation, then it is surely appropriate that the benefits we get from that scheme of cooperation should be proportionate to the talents and effort we put into it – you reap what you sow, so to speak.

This is where Rawls's second step comes in. Rawls argues that no one *deserves* his natural talents or starting position in society. Even the amount of effort we are willing to put into our endeavours is influenced by our natural talents and the options which we have had available to us each step of the way. Rawls observes, as a matter of fact, that "(t)he better endowed are more likely, other things equal, to

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[19] Samuel Scheffler makes similar points about human talents in particular, in arguing for conceiving of distributive justice in holistic terms. He lists three ways in which people's prospects are connected: first, each person's capacity to contribute depends on the contributions of others. Second, the economic value of a person's talents is socially determined – it depends on the supply of people with similar talents and on the needs, preferences and choices of others. Third, any decision to assign benefits to one individual or class will have economic implications for other persons and classes. See his *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), "Justice and Desert in Liberal Theory," 191.

[20] In many cases, they would not be productive *at all* unless combined with other factors – a lawyer's knowledge and ability to apply the law to particular cases, for instance, is of no use when separated from the legal system and the social practice of law.

strive conscientiously",[21] but attributes this to their good fortune in the natural lottery, rather than being due to their intrinsic worth.[22]

This point is modeled in the original position by Rawls's distinction between legitimate expectations and moral desert. Desert, according to Rawls, kicks in only *after* background justice is achieved; *after* the principles of justice are chosen in the original position.[23] It is not possible that parties in the original position would choose a principle of distribution that said the fruits of social cooperation should be distributed according to moral desert, because the idea of moral desert would have no content behind the veil of ignorance, since parties would know neither their place in society nor their fortune in the distribution of natural assets and abilities.[24] In contrast, legitimate expectations are the functional output of a just scheme of social cooperation. Once principles of justice have been chosen behind the veil of ignorance, a citizen can have legitimate expectations of what she can expect to receive from her society, in accordance with those principles of justice. A just scheme "satisfies [men's] legitimate expectations as founded on social institutions."[25] The content of one's legitimate expectations would be one's fair share of the fruits of social cooperation, as defined by the outcome of the operation of the principles of justice.

With these two steps established, Rawls can conclude, against an interlocutor who believes that moral desert should form the basis for distribution, that mere possession of superior talents and/or effort does not entitle a person to a correspondingly larger share of the fruits of social cooperation. In the original position, therefore, the starting point of discussion is equal division of the fruits of social cooperation. Departure from equal division thus requires justification to each person who is materially disadvantaged. In particular, the least well-off, who are

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[21] *Theory of Justice,* 274.

[22] Rawls neatly summarises this at *Theory of Justice,* 89: "We do not deserve our place in the distribution of native endowments, any more than we deserve our initial starting place in society. That we deserve the superior character that enables us to make the effort to cultivate our abilities is also problematic; for such character depends in good part upon fortunate family and social circumstances in early life for which we can claim no credit. The notion of desert does not apply here."

[23] *Theory of Justice,* 275.

[24] *Theory of Justice,* 118. "[A principle of distribution according to moral desert] would not be chosen in the original position. There seems to be no way of defining the requisite criterion in that situation." (*Theory of Justice,* 273, §48 "Legitimate Expectations and Moral Desert")

[25] *Theory of Justice,* 273, §48. Rawls goes on to say, "But what they are entitled to is not proportional to nor dependent on their intrinsic worth."

most adversely affected, are those to whom justification is principally addressed. As we shall see below, the Argument from Mutual Respect provides further elaboration of the form this justification must take, on Rawls's account.

An objection: Nozick's entitlement theory

What of an entitlement theory like Nozick's, which does not rely on the concept of moral desert? Nozick has no problems accepting both Rawls's first step - that the fruits of social cooperation depend on the complementarity of talents - and Rawls's second step, that we do not deserve our natural abilities.[26] But he would certainly reject Rawls's conclusion, viz, that therefore the correct starting point is equal division.

Nozick starts by pointing out that it need not be that "the foundations underlying desert are themselves deserved, *all the way down*". Then, he applies this to entitlement, concluding that people can be entitled to their natural assets even if it is not the case that they can be said to deserve them. What emerges from this is the following argument:[27]

1. People are entitled to their natural assets.

2. If people are entitled to something, they are entitled to whatever flows from it (via specified types of processes).

3. People's holdings flow from their natural assets.

Therefore,

4. People are entitled to their holdings.

5. If people are entitled to something, then they ought to have it (and this overrides any presumption of equality there may be about holdings).

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[26] Nozick, footnote on 194.
[27] Nozick, 225-6.

At first glance, it looks like Rawls could deal with this argument simply by distinguishing between legitimate expectations that kick in after principles of justice are chosen, and any prior conception of entitlement (an analogue of the earlier distinction between moral desert and legitimate expectations).

Rawls can agree with Nozick that the bases of desert need not be themselves deserved, all the way down. He can agree with Nozick's Premise 1 – that people are entitled to their natural assets, on the basis that the right of each to his or her natural assets is covered by his first principle's protection of the integrity of the person.[28] But Rawls would deny Nozick's premise 2 - that if people are entitled to something then they are entitled to whatever flows from it (Nozick's Premise 2), because he has a holistic account of distributive justice. The justice (or lack thereof) of a distributive scheme must be assessed as a whole. In the same way that the justice of a distribution of goods cannot be assessed independently of the institutions of the basic structure, so also the claim of entitlement cannot be assessed independently of the legitimate expectations established by a scheme of social cooperation. Put a different way, entitlement presupposes the existence of an ongoing cooperative scheme.[29] And since it is the precisely the justice of the cooperative scheme that the parties in the original position are trying to work out, there can be no entitlement rights to appeal to, prior to the choice of principles of justice. And Rawls thinks that the parties in the original position would not choose principles of justice that give people title to whatever flows from their natural assets, because they conceive of society as a fair scheme of social cooperation, and allowing the arbitrary distribution of natural assets to determine holdings would not be fair.

Nozick, however, does not think this argument from holism works. At the heart of his criticism of Rawls's difference principle is his charge that the set-up of the original position is biased against historical entitlement theories such as his. The architecture of the original position "*guarantees that end-state principles of justice will be taken as fundamental*",[30] thus ruling out historical views like Nozick's. Because knowledge of one's natural assets is excluded behind the veil of ignorance, the parties in the original position are forced to treat the problem of distribution as a

[28] *Theory of Justice,* 89, §17.
[29] *Theory of Justice,* 89, § 17.
[30] Nozick, 198-9, also 202.

"manna-from-heaven" case, which turns out to be the only reason for the difference principle which Nozick would consider compelling. Nozick says:

> If things fell from heaven like manna, and no one had any special entitlement to any portion of it, and no manna would fall unless all agreed to a particular distribution, and somehow the quantity varied depending on the distribution, then it is plausible to claim that persons placed so that they couldn't make threats, or hold out for specially large shares, would agree to the difference principle rule of distribution.[31]

If this is indeed the case, it means that Rawls is begging the question against Nozick's historical-entitlement theory, by ruling out any historical principle from the get-go.[32]

At this point, I will simply state my agreement with an argument made by Scheffler, to which I do not devote sufficient attention, but which I raise nonetheless because I think it helps us see off the challenge raised to Rawls's argument by Nozick's entitlement theory. Scheffler gives two reasons for thinking Nozick is wrong about Rawls's being an end-state view: [33]

(1) First, Rawls's first principle has lexical priority over his second principle; and

(2) Rawls treats the question of distributive shares as a matter of pure procedural justice.

On (1), Rawls's first principle of justice, even on Nozick's criteria, is not a patterned end-state principle.[34] As for (2), Scheffler seems to be suggesting that because the difference principle allows different distributions to come out 'justified', therefore it is not an end-state view. I take it that some defence along these lines can be made to work, and move on to the second prong of Rawls's argument, which is where I think the payoff for justification lies.

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[31] Nozick, 198.
[32] Nozick, 201-3.
[33] Scheffler, 169, 195.
[34] In particular, the first principle satisfies Nozick's deletion and addition conditions (Nozick 209).

Summary of Argument from Social Cooperation (why justify to the least well-off)

1. The fruits of social cooperation are only possible because of the complementarity of talents. The complementarity of talents is something we own in common in a society, not something to which each individual has a right.

2. We do not deserve our natural abilities. (Modelled in the original position, where, prior to the choice of principles of justice, there is no concept of moral desert.)

3. From (1) and (2), mere possession of a superior set of talents is therefore an insufficient reason for a bigger share of the fruits of social cooperation.

4. Therefore the starting point is equal division, with justification being owed to each for deviation. Because the least well-off are the most disadvantaged, they are the particular targets of justification.

The Argument from Mutual Respect

The second prong of Rawls's argument for the difference principle brings us finally to the question of why justification to the least advantaged must be in the form of reasons they could accept. Call this the Argument from Mutual Respect.

Rawls thinks that there are natural duties, such as the duty of mutual aid, or the duty not to cause unnecessary suffering.[35] Natural duties apply to us regardless of our voluntary acts; there is no need to "opt-in" to these in order for them to bind us.[36] Their content is independent of the existence of institutions or social practices, and they obtain between all as equal moral beings, simply in virtue of our common humanity. On Rawls's account, one important natural duty is the duty of mutual respect. This duty consists in showing a person the respect due to him as a moral being, that is, one with the two moral powers of having the capacity for a sense of justice and a conception of the good.

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[35] *Theory of Justice,* 98, §19, "Principles for Individuals: The Natural Duties".
[36] *Theory of Justice,* 98, § 19.

We are given two ways in which this duty of mutual respect is cashed out –
first, by being willing to see the situation of others from their point of view, from
the perspective of their conception of the good; and second, by "being prepared to
give reasons for our actions whenever the interests of others are materially
affected,"[37] so as to enable them to accept the constraints on their conduct.
Crucially, Rawls thinks that the reasons appropriate to the case must be "sound
reasons as defined by a *mutually acceptable* conception of justice which takes the
good of everyone into account."[38]

Rawls argues that a natural duty of mutual respect would be acknowledged
by the parties in the original position because they recognize the need for the respect
of others in order to support their own self-respect.[39] It is this social utility that
justifies the duty. (This is related to the earlier point made about the Rawls's vision
of the good brought about by the difference principle in the form of relationships of
fraternity and civic friendship among citizens.)

The natural duty of mutual respect is the finishing piece of Rawls's
argument for the difference principle. It explains why it is that justification to the
least advantaged must take the form of mutually acceptable reasons.

Now, suppose we accept that there is a natural duty of mutual respect.
Suppose, further, that we agree with Rawls that this duty is justified because human
well-being requires the social bases of self-respect. Even so, we could disagree with
the details of what such a duty requires - why think that the social bases of self-
respect would only be secured by being given *mutually acceptable* reasons?
Assuming that there are issues on which people are so deeply divided that there
cannot be common ground, surely reason-giving in itself is showing respect
already? Take for instance the contentious issue of abortion. Some of those who
oppose abortion think it is murder. On the other side of the debate, proponents
conceive the issue as one involving the right to bodily integrity. This is a case
where, no matter what policy is chosen (to ban/allow abortion), justification offered
would not be acceptable to the losing side. Disagreement goes all the way down, in
such cases. Yet to acknowledge this is not to give up on the duty of mutual respect,

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[37] *Theory of Justice,* 297.
[38] *Theory of Justice,* 297, italics added.
[39] *Theory of Justice,* 297.

which, whatever else it involves, surely requires the offering of reasons to the losing side.

Rawls gives the example of Calvin burning Servetus at the stake.[40] He says,

> if we argue that the religious liberty of some citizens is to be denied, we must give them reasons they can not only understand – as Servetus could understand why Calvin wanted to burn him at the stake – but reasons we might reasonably expect that they, as free and equal citizens, might reasonably also accept.[41]

This example is intuitively compelling, perhaps because we do not, today, believe that disagreement over religious belief is a sufficient reason to put someone to death. Yet I do not think that even this example rules out mutual respect, unless we accept that killing someone is *constitutive* of disrespect.[42] That, however would be implausible, as there are many examples of killing people which do not necessarily require an attitude of disrespect. Consider the case of war – killing the enemy in war is a human tragedy, but it does not mean that one cannot respect the enemy as a human being. Again, think of the case of the death penalty. One might think that holding someone responsible for his actions in this way is, precisely, treating him as a moral being.

This brings us back to our initial question – what argument might one have for thinking that the duty of mutual respect requires justification in the specific form of giving mutually acceptable reasons?

The path to epistemic abstinence?

There is a way to understand Rawls on justification requiring mutual acceptability such that it results in an extreme form of epistemic abstinence. In this section, I sketch out this interpretative path, by way of fixing ideas about the sort of

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[40] *Political Liberalism,* 447. This refers to John Calvin's Geneva burning Michael Servetus at the stake for blasphemy and heresy. Rawls concedes that he is citing an "easy case".
[41] *Political Liberalism,* 447.
[42] Rawls thinks it would be hard to find justifying reasons for infringing on any of the liberties. He says, "The criterion of reciprocity is normally violated whenever basic liberties are denied." (*Political Liberalism,* 447)

route I think should be avoided. In the sections that follow, I argue that this is not the best way of understanding Rawls's insight about justification, even though there is textual evidence in Rawls's writings to support this reading.

In a recent article on the logical consequences of demanding reciprocity in political justification, R. J. Leland and Han van Wietmarschen suggest that the demand that political decisions should be justifiable to each citizen leads political liberals to a principle of deliberative restraint which commits reasonable citizens to appeal only to considerations they can expect all other reasonable people to accept.[43] This principle leads reasonable citizens to segment their views between "non-public considerations" and "public considerations".[44] Leland and van Wietmarschen argue that in order to support such deliberative restraint, political liberalism must require "a very strong form of intellectual modesty".[45] This is an attitude towards one's non-public convictions which recognises that the most competent reasoners disagree about it.[46] For any given belief, for instance, the belief in the "ensoulment of the unborn,"[47] citizens are supposed to recognise that there is disagreement about it even among the most competent reasoners - that "there is no level of competence above which people converge on a single answer"[48]– and therefore refrain from relying on that belief in political deliberation, because it is not justifiable to others.[49] They claim that views which do not include such strong intellectual modesty "lack a plausible story of why citizens should take the demand to refrain from appeal to nonpublic views seriously when they face high stakes situations where this civic demand conflicts with core nonpublic commitments."[50]

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[43] R. J. Leland and Han van Wietmarschen, "Reasonableness, Intellectual Modesty, and Reciprocity in Political Justification," in *Ethics*, Vol. 122, No. 4 (July 2012), 724. This justificatory principle, which they call *Reciprocity in Justification*, states that "When deliberating about fundamental political issues, each citizen must only appeal to those considerations she can reasonably expect all other reasonable people to accept."

[44] Leland and van Wietmarschen, 724.

[45] Leland and van Wietmarschen, 722.

[46] Leland and van Wietmarschen, 733.

[47] Leland and van Wietmarschen, 732.

[48] Leland and van Wietmarschen, 732.

[49] Leland and van Wietmarschen, 732. Their full view is somewhat more complicated, involving a balancing condition which stipulates that considerations are ruled as "nonpublic" whenever "the level of competence at which she believes all reasonable people converge on that view is above the level of competence toward which she idealises when forming expectations about what her fellows should accept." (Leland and van Wietmarschen, 728).

[50] Leland and van Wietmarschen, 738.

Another instance of a reading of Rawls's requirement of mutual acceptability of reasons that leads to epistemic abstinence is made by Jonathan Quong in *Liberalism without Perfection*. Quong's understanding of Rawls's mutual acceptability condition on justification leads him to conclude in favour of a political liberalism that is neutral between conceptions of the good. Quong's chief reason for why neutrality is demanded is that anything else would be, *prima facie*, paternalist. Quong argues that paternalism is wrong because it is "motivated by a *negative judgement* about the ability of others to run their own lives".[51] Such a negative judgement is inconsistent with treating others as their "moral status as a free and equal citizen" requires.[52] Specifically, paternalism denies that the other person/group has "the capacity to plan, revise, and rationally pursue their own conception of the good,"[53] and "thereby diminishes the moral status accorded to citizens".[54]

Reading mutual acceptability/reasonable nonrejectability as a heuristic device

I want to suggest a different way of understanding Rawls's insight into what justification requires, one that takes the focus off the mere fact of agreement or disagreement about reasons. I start with Thomas Scanlon's take on what respecting others requires, which is, I believe, a friendly elaboration of Rawls's natural duty of mutual respect. This runs as follows:

1. Human life is valuable.

2. From Premise 1, we have reason to respond to this value in an appropriate manner, viz., with respect.

3. Human beings are creatures with two capacities – first, the capacity to assess reasons and justifications; and second, the capacity to govern our lives

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[51] Jonathan Quong, *Liberalism Without Perfection* (Oxford: Oxford University Press, 2011), 74, italics added. See also 83. The relevant abilities about which the negative judgment is made are practical reasoning, willpower, and emotion management, Quong, 81.
[52] Quong, 74. Quong states that he understands freedom and equality, following Rawls, as arising from citizens' possession of the two moral powers of (i) a capacity for a sense of justice; and (ii) a capacity for a conception of the good. (Quong 100).
[53] Quong, 101.
[54] Quong, 102.

according to those reasons.[55] (Scanlon's second capacity of self-governance corresponds to Rawls's description of the second moral power of the person, namely, the capacity to have a rational plan of life.[56])

4. Treating human beings with respect involves engaging these two capacities.

5. Substantively, respectful engagement requires treating human beings "only in ways that would be allowed by principles that they could not reasonably reject insofar as they, too, were seeking principles of mutual governance which other rational creatures could not reasonably reject."[57] (Rawls's version is in terms of offering mutually acceptable reasons.)[58]

Premises (3) and (4) provide a helpful elaboration of Rawls's argument from mutual respect. They tell us that reason-giving forms an intrinsic part of respecting others because our conception of our moral personality is tied up with our capacity for reason, which includes both the capacity to assess and respond to reasons. (5) simply states Scanlon's own proposal for how to cash out respectful engagement.

Focus on (5). In order to work out Rawls's and Scanlon's reasons for thinking that respectful engagement with others involves mutually acceptable reasons (Rawls's formulation), or reasonably non-rejectable reasons (Scanlon's version), we need to pause and look at their account of moral motivation.

Rawls's account of moral psychology provides, I think, some explanation of why he considers the natural duty of mutual respect to involve offering others mutually acceptable reasons. Speaking of the three principles of his moral psychology, which together explain how citizens in a well-ordered society come to acquire and affirm a sense of justice, Rawls observes that "The basic idea is one of **reciprocity**, a tendency to answer in kind. Now this tendency is a deep psychological fact."[59] According to Rawls, it is simply part of our nature as human beings that we are hard-wired to respond in kind to how we are treated by others.

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[55] T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2000), 105.
[56] *Theory of Justice,* §4, p17.
[57] Scanlon, *What We Owe*, 106.
[58] *Theory of Justice,* 297.
[59] *Theory of Justice,* 433. Bold font added. Note that this is a different reciprocity from the non-moralised Bratmanian version discussed in the previous chapter.

This claim has the status of an empirical observation. The natural attraction to reciprocity runs so deep that it affects our understanding of the boundaries of the moral community – Rawls says that "one who lacks a sense of justice lacks certain fundamental attitudes and capacities included under the notion of humanity".[60]

Applied to living together with others in political community, this desire for reciprocity expresses itself as wanting "to live with others on terms that everyone would recognize as fair from a perspective that all would accept as reasonable";[61] "to act on principles that rational individuals would consent to in an initial situation which gives everyone equal representation as a moral person."[62] For Rawls, this is nothing other than the sense of justice.

Rawls is not alone in thinking something like a desire for reciprocity is the basis for moral motivation. The appeal to some desire to be in moral community with others is common to Mill, Rawls and Scanlon. Both Rawls and Scanlon make reference to Mill's reliance on the pain we experience when "our feelings are not in union with those of our fellows";[63] and to "the social feelings of mankind; the desire to be in unity with our fellow creatures".[64] Scanlon thinks that the ideal of acting in accord with principles that others could not reasonably reject is an intrinsically valuable "way of living with others,"[65] and that people actually do (whether consciously or not) set value on their "lives and institutions (being) justifiable to others".[66]

Having the desire for reciprocity and hence desiring that the terms on which one lives with others be justifiable to each is a basic fact about human moral psychology. But it is also a normatively significant fact – the capacity to experience

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[60] *Theory of Justice,* 428. Scanlon, in a similar vein, says that the failure of someone to see why the justifiability of his/her actions to others should be of any importance, "affect(s) the range of relations we can have with that person" Scanlon, *What We Owe*, 159.

[61] *Theory of Justice,* 418-9.

[62] *Theory of Justice,* 418.

[63] *Theory of Justice,* 403.

[64] Scanlon, *What We Owe*, 154. See also 162-3. The reference is from Chapter 3 of Mill's *Utilitarianism,* "Of the Ultimate Sanction of the Principle of Utility," where Mill says that the "firm foundation" of the utilitarian morality is the "powerful natural sentiment", the "*social feelings of mankind; the desire to be in unity with our fellow creatures,* which is already a powerful principle in human nature, and happily one of those which tend to become stronger, even without express inculcation, from the influences of advancing civilisation." J.S. Mill, *Utilitarianism*, ed. Roger Crisp (Oxford: Oxford University Press, 1998), 77 (italics added).

[65] Scanlon, *What We Owe*, 162.

[66] Scanlon, *What We Owe*, 163, where he uses the example of the differing responses from Americans to the Vietnam War as an illustration of this.

this desire for reciprocity/justifiability defines the human moral community. Now, what justifiability requires is that we treat other members of the moral community in the way that their moral personality demands. Moral personality in turn connects up with the capacity for rationality - human beings have the capacity for morality in large part because we have a capacity for reason. Consider this - human morality does not simply consist of instinctive desires with benevolent content (for example, "do good to others"); it also involves a reasoned judgement that affirms the desire for reciprocity/justifiability as congruent with our good, as Rawls would put it.[67] In light of this human capacity for reason (which, for Rawls, is worked out in their having a rational plan of life and the capacity for a sense of justice),[68] treating others as members of the moral community requires that we *give others' reasons equal consideration as ours*. Rawls puts it this way: "provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice...*the essential equality is thought to be equality of consideration*".[69]

This does not mean that we must treat every reason the same regardless of its merits – Rawls is not saying that we need to give a trivial reason the same weight as a serious one in figuring out what to think about a given matter. He makes this point in his discussion of conscientious objection:

> These contentions are mistaken if they mean that, having arrived at our moral opinions conscientiously (as we believe), we always have a claim to be allowed to act on them. In discussing conscientious objection, we noted that the problem here is that of deciding how one is to answer those who strive to act as their erring conscience directs them (§56). How do we ascertain that their conscience and not ours is mistaken, and under what circumstances can they be compelled to desist? Now the answer to these questions is found by ascending to the original position: a person's conscience is misguided when he seeks to impose on us conditions that violate the principles to which we would each consent in that situation...*We are not literally to respect the conscience of an individual. Rather we are to respect him as a person* and we do this by

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[67] *Theory of Justice,* 452 Rawls emphasizes that the natural duty of mutual respect requires that educating the young so as to inculcate a sense of justice "is thoughout as reasoned as the development of understanding permits".
[68] *Theory of Justice,* 442.
[69] *Theory of Justice,* 443-4. Italics added.

limiting his actions, when this proves necessary, only as the principles we would both acknowledge permit.[70]

The mere fact that people disagree, even if they do so conscientiously, is not the end of the matter – Rawls does not prescribe that when disagreement is encountered, each party is to abstain from judgement on the matter in question. Rather, the prescription is to take up the original position, *as a heuristic for figuring out what is just or unjust*. Disagreement, on this reading of Rawls, is merely an indicator to alert us to the existence of reasons on the other person's side that we have not sufficiently attended to.

Scanlon applies this approach not only to justice but to the wider question of what we owe to each other. For him, asking the question of 'what principle could a reasonable interlocutor not reasonably reject?'[71] helps us to identify what is right or wrong. For both Rawls and Scanlon, the test of mutual acceptability/reasonable nonrejectability works by getting us to take up the point of view of others so that we treat our own and others' reasons on a par.[72] What emerges from deliberation in the Rawlsian original position, which forces one to use only mutually acceptable reasons,[73] is the correct balance between different persons' interests, representing what is just;[74] on Scanlon's account, finding that a principle of governance could reasonably be rejected by another indicates that it would be wrong to impose it.

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[70] *Theory of Justice,* 455. Italics added.

[71] Scanlon, *What We Owe*, 106.

[72] There are, of course, differences between the two formulations – the tests are not equivalent, as Scanlon emphasizes (see *What We Owe* Chapter 5). At the heart of why Scanlon prefers reasonable *rejection* to reasonable agreement is that the thought that if our concern is with respecting individuals, then any principle which an individual can reasonably reject is one which does not take due account of what matters to them. Take for instance a principle which gives everyone a mildly beneficial result but imposes serious harm on one particular individual. The mildly beneficial results to each give everyone a reason to accept the principle, but only one individual has reason to reject the principle. Since we might have both reason to accept *and* reason to reject a principle (in this scenario, the individual singled out would have both reason to accept the principle, and reason to reject it at the same time), a test of reasonable agreement would not pick up the reasonable objection of that individual, thus not paying due regard to the interests of that individual. A test of reasonable rejection, on the other hand, is able to give us an answer that takes into account *each* individual's concern. For these reasons, when using the heuristic in the chapters that follow, I shall use the formulation of reasonable nonrejectability, rather than mutual acceptability.

[73] *Theory of Justice,* 297.

[74] Rawls says, "For the theory of right and justice is founded on the notion of reciprocity which reconciles the point of view of the self and of others as equal moral persons...Neither concern for others nor for self has priority, for all are equal; and the balance between persons is given by the principles of justice." *Theory of Justice,* 424.

Why do we need this heuristic? Because, as Scanlon puts it, we are biased towards ourselves, often 'underestimating the reasons associated with points of view which we have not occupied', and "overestimating the costs to us of accepting principles that recognise the force of those reasons".[75] Having this heuristic "can help to reveal biases of this kind and press us to overcome them."[76]We can now see Rawls's original position as just the sort of heuristic that corrects for bias – consider how the veil of ignorance operates to help rule out irrelevant considerations which our natural bias would allow us to rule in.[77] As Rawls describes the morality of principles (required for those in a well-ordered society to put the principles of justice into practice), having a sense of justice *just is* taking up the point of view of others for the purpose of striking a reasonable balance between competing claims.[78]

Notice that, without the element of epistemic abstinence, this reading of Rawls is no longer incompatible with Raz's narrative about how the normal justification thesis (NJT) works[79] – we could see this Rawlsian heuristic of putting oneself in others' shoes as a way of coming to a right appreciation of the dependent reasons that exist. It is also entirely compatible with Raz's comments on the attitude of critical rationality being compatible with having confidence in our reasons.[80] The attitude of critical rationality, as Raz describes it, involves the recognition that "fallibility is part of the conditions of ordinary knowledge",[81] and therefore that all ordinary beliefs are corrigible and revisable. It is accompanied by a "readiness to re-

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[75] Scanlon, *What We Owe*, 206. Rawls says, in similar vein, "Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage." (*Theory of Justice,* 118)

[76] Scanlon, *What We Owe*, 206.

[77] *Theory of Justice,* 118. Rawls says, "Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage."

[78] *Theory of Justice,* 414.

[79] Raz, moreover, has developed an account of the duties of respect which I believe is compatible with what I have described as Rawls's and Scanlon's account. See his "Respecting people," in Joseph Raz, *Value, Respect, and Attachment*, (Cambridge: Cambridge University Press, 2001) esp p161-162. To summarise, Raz's account of respecting people involves a) regarding them (in thought, speech, symbolic action and belief) in ways consistent with their intrinsic value as persons; and b) preserving rather than destroying them. Some of the points he makes in the "Respecting people" piece are also found in his essay, "On Frankfurt's Explanation of Respect for People," in *Contours of Agency: Essays on Themes from Harry Frankfurt*, ed.s Sarah Buss and Lee Overton (Cambridge, Massachusetts: The MIT Press, 2002), 299-320.

[80] Raz makes this comments in the context of assessing an argument for toleration based on the premise of fallibility. See his "Liberalism, Scepticism, and Democracy," in *Ethics in the Public Domain*, 101.

[81] Raz, "Liberalism, Scepticism, and Democracy," in *Ethics in the Public Domain*, 101.

examine our beliefs as necessary". In both Raz's picture of critical rationality and Rawls's description of how wide reflective equilibrium is supposed to work, right thinking requires a willingness to revise one's judgements in response to reasons. For Rawls, the method of reflective equilibrium is a method of justification, a way of figuring out what to believe about justice.[82] For Raz, the attitude of critical rationality is an instrument in the service of truth-seeking. Without the obstacle of epistemic abstinence, the two can come together.

A Rawlsian tale, minus epistemic abstinence

We have travelled some distance from our initial concentration on shared reasons. Seeing mutual acceptability/reasonable nonrejectability as an instrument for helping us determine how to treat others in the moral community justly/rightly – what I shall call the "heuristic reading" of Rawlsian justifiability - takes away the need to resort to epistemic abstinence in order to filter out reasons that could not be shared.

To make this vivid, consider Leland and van Wietmarschen's case of Sarah. Sarah is a citizen who endorses *No Abortion*: Human life is ensouled at the moment of conception, and the intentional killing of the ensouled human being is impermissible.[83] On Leland and van Wietmarschen's account, political liberalism asks Sarah not to appeal to *No Abortion* when deliberating and deciding about fundamental political issues. According to them, Sarah considers *No Abortion*, recognises that even the most competent judges among reasonable citizens disagree about it, and this attitude of intellectually modesty towards the view causes her to refrain from appealing to it since she knows that *No Abortion* could not be acceptable to all.[84]

Compare this to how interpreting mutual acceptability/reasonable nonrejectability as a heuristic device would change the Sarah narrative. On the heuristic reading, Sarah, who endorses *No Abortion*, is motivated by a desire for

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[82] Scanlon, "Rawls on Justification," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman (Cambridge: Cambridge University Press, 2003) 142. See also Scanlon's description of how the method of reflective equilibrium works in the two-person case of disagreement, on p152.
[83] Leland and van Wietmarschen, 735.
[84] Leland and van Wietmarschen, 735-7.

reciprocity/justifiability. She recognises that she disagrees with fellow citizens on the matter. Committed to treating her fellow citizens with respect because she believes they form part of the same moral community, Sarah tries to put herself into her interlocutors' shoes and consider why they might not be able to accept/might reasonably reject *No Abortion*. She thinks of an atheist friend who does not share her faith in the existence of God and who thus does not believe that human beings have souls, and considers another person, an acquaintance who had recently had an abortion when she found out that her unborn child had a serious congenital disease. She acknowledges that these people have valid reasons for wanting abortion to be a legal option. At the same time, she thinks they are mistaken as to the truth, because they would in fact be condoning the murder of a human being.

This exercise in perspective, while it may not lead to any sort of substantive consensus between Sarah and her two friends, is, effectively, an exercise in treating them as members of the same moral community. While Rawls's own view, by requiring that reasons be shared, chooses the path of epistemic abstinence (I think unnecessarily), the following comment on public reason applies just as well to my interpretation of mutual acceptability as a heuristic device:

> (c)itizens learn and profit from debate and argument, and when their arguments follow public reason, they instruct society's political culture and *deepen their understanding of one another even when agreement cannot be reached*.[85]

Even when the issue is not (yet) public justification in the form of actual conversations between citizens, but rather individuals trying to think things through for themselves, it is nonetheless true that the device of mutual acceptability/reasonable nonrejectability deepens understanding of the reasons that others have, and embodies an attitude of respect for a fellow human's moral personality.

The learning is not just on Sarah's side. Sarah's atheist friend, should she attempt the exercise of taking up Sarah's perspective, would gain a deeper

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[85] *Political Liberalism,*481, "Public Reason Revisited," italics added.

appreciation of how Sarah's world view is dominated by revealed truth, and might be challenged to explore the internal consistency of such a perspective. The woman who chose abortion might be led to see her decision with Sarah's eyes, as an understandable decision but yet mistaking the value of all human life in the eyes of God, while still believing that she made the right decision for herself and for the unborn child, in order to save it from a life likely to be dominated by the effects of physical or mental disability.

On this reading, 'intellectual modesty' is irrelevant. It simply does not matter who disagrees with Sarah and at what level. Sarah is free to try to persuade her fellow citizens to her point of view. Given what she has gleaned about their reasons for objecting to *No Abortion,* she may find that simply stating her view will not be effective in changing their minds; she may find the need to try to find other supporting reasons for her view which would find purchase with them – for instance, scientific evidence about the foetus's development of a central nervous system and its therefore being able to feel pain at a very early stage, by way of persuading them that the foetus should be considered part of the moral community. But at no point is Sarah constrained to bracket *No Abortion*, simply because others disagree with her.

Where does this leave Sarah? Even if the proposed alternative reading of Rawls does away with the requirement that she bracket any non-public view about the ensoulment of human beings at conception, does my proposed interpretation of Rawls not still mean that Sarah must conclude that *No Abortion* is not justifiable? Well, it depends. Perhaps, in looking for reasons that will speak to her fellow citizens who do not share her religious convictions, Sarah might find one that cannot reasonably be rejected by them. More likely, she will not reach such a happy reconciliation - which leaves her believing that *No Abortion* is true, but at the same time committed to judging that it would be unjust to impose it on others. Admittedly, this leaves Sarah in the grip of a moral dilemma.[86] But it does not involve a "trumping" of comprehensive values by political ones, as an epistemically abstemious reading of Rawls would require; it allows full play to all the reasons

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[86] Raz suggests a way out of this when he says that reasonable disagreement has the moral implication that "One should not criminalise actions undertaken because of a reasonable belief that they are right, if that belief will remain reasonable even if they are prohibited by law." See his "Liberalism, Scepticism and Democracy", in *Ethics in the Public Domain*, 105.

Sarah has. Notice, too, that the question of what law Sarah's society will choose on the matter remains open to debate from all sides – the practical task of living together carries on as usual.

What I have just described as the heuristic reading of Rawlsian justifiability – justification requiring equal consideration of the reasons of those who disagree with you – may sound a lot like the sort of procedural justice espoused by Stuart Hampshire.[87] Indeed, Hampshire's refrain of "*audi alteram partem*" ("hear the other side")[88] being the "necessary condition"[89] of procedural justice resonates with the equal consideration of opposing views which I have suggested is required for justice and justifiability. But the similarities do not go very deep. First, the grounds of the prescription to attend to the other side of the story are different. Hampshire thinks that adversarial reasoning in the human mind is an internalisation of public adversarial discussions which is "grounded... in the nature of human thought,"[90] whereas I find the basis for this injunction in the duty of mutual respect in the moral psychology of reciprocity. Second, my proposed account of Rawlsian justifiability retains a role for justified, substantive political principles, which Hampshire would not. The test of reasonable nonrejectability has some bite – it sets limits on what can be considered a just political principle. By distinguishing between the requirements of justifiability (the subject of this chapter) and the practical task of living together (highlighted in Chapter 3), I propose, in effect, to separate out what Hampshire's proceduralism would run together - as we shall see in Chapter 7, with the Malaysia case study, such a distinction can help us see that even where there is an existing procedure under which opposing views are heard, not just any procedure can count as just.

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[87] Stuart Hampshire, *Justice Is Conflict* (Princeton, New Jersey: Princeton University Press, 2000).
[88] See, for instance, Hampshire, *Justice Is Conflict*, 8.
[89] Hampshire, *Justice Is Conflict*, 8.
[90] Hampshire, *Justice Is Conflict*, 9, 72.

5
Wholehearted Reason-giving
in the Public Sphere

What is the mode of reasoning appropriate to the public sphere? Having seen in Chapter 2 how the different approaches to justification taken by Rawls and Raz result in two quite different answers to this question, this chapter takes the heuristic reading of Rawls's reasonableness requirement, developed in the previous chapter, and draws out its implications for public reason.

The main import of the heuristic reading was that justifiability does not require the sharing of reasons; what it requires is giving others' reasons the same consideration as our own. To do this, we use the heuristic test of justifiability – the test question of "could someone who disagrees with me reasonably reject my position?"[1] – to help us put ourselves in others' shoes, so as to help us appreciate their reasons. One of the key consequences of understanding justifiability in this way is that we see that we do not need epistemic abstinence for justifiability.

Working out the implications of this understanding of justifiability for reasoning in the public sphere, the resulting picture is rather more Razian than Rawlsian. Doing away with the bright line between public and non-public reasons produces a much less structured conception of what reasoning in the public sphere should look like. Nonetheless, it remains, I believe, a conception faithful to Rawls's core concern about justifiability, while avoiding the serious charge of potentially dividing individuals against themselves, to which we saw in Chapter 2 that Rawls's account was vulnerable.

How the heuristic reading of the reasonableness requirement changes the picture

Understanding Rawls's reasonableness requirement as a heuristic has a significant impact on the Rawlsian account of public reason. For a start, because there is no longer a need to filter out 'private' reasons, the term itself, 'public

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[1] See Chapter 4, footnote 72 on page 96, for my reasons for preferring Scanlon's formulation of reasonable nonrejectability rather than Rawls's of mutual acceptability.

reason,' ceases to be fit for purpose, as it has come to be associated with the Rawlsian idea of there being a special sub-set of reasons, uniquely appropriate for public use.

Restoring wholeheartedness

Rawls tells us that the nature of the constraint public reason places on the reasonable citizen is a moral one. Throughout his account, Rawls emphasises that the duty of civility is a moral and not a legal duty. If this were not so, he points out, it would be incompatible with free speech.[2] To this I would add that the problem goes deeper than Rawls acknowledges. As illustrated by our examination of what I have called the "no-conflict" claim in Chapter 2, public reason as Rawls describes it can also come into conflict with the protected liberty of conscience, because it demands, in effect, to be recognised as a trump card. As Raz's negative argument against Rawls's conception of public reason brings out, the necessity for political values to trump comprehensive ones undermines wholeheartedness. Given that Rawls is just as committed as Raz is to individuals and their well-being (recall that one of the original motivations of Rawls's theory of justice was to provide a viable alternative to utilitarianism, which he thought did not rightly account for the separateness of persons), this would be a serious problem for Rawls.

Understanding the requirement of mutual acceptability of reasons as a heuristic, however, allows us to do away with the partitioning of reasons between public and private, since there is no longer any need to bracket what in Rawls's picture would have been private considerations. Once this is so, the threat to wholeheartedness is removed.

One might worry that this allows too much into public debate, to the extent that it makes stability impossible, but remember that even though justification, in and of itself, might not require bracketing reasons that could not be shared, the pragmatic pressures of working out how to get along together still apply, and will help ensure that public debate happens in an orderly manner. In a democracy, these pragmatic pressures are heightened by the need to persuade others to one's point of

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[2]"The Idea of Public Reason Revisited," in John Rawls, *Political Liberalism (Expanded Edition)* (New York: Columbia University Press, 2005), 445.

view so as to obtain their vote. To put Raz's point about public debate centring around well-being in a familiar idiom, citizens would still have to appeal to the 'common good' in order to try to bring fellow citizens round to their point of view.

Standing ready to be transparent about our reasons

Rawls's ideal of public reason demands more than a purely hypothetical test of justifiability. There is a "standing ready" involved, a disposition on the part of citizens in a well-ordered society which means that they are "ready to explain the basis of their actions to one another".[3] Practising the ideal of public reason would sometimes involve actual conversations where citizens explain and justify to other citizens the policies which they support, from within a political conception which they sincerely believe others could reasonably endorse. Further, Rawls specifies that those who seek to practise public reason must also be prepared to defend their political conception, by proposing a criterion for what principles and guidelines other citizens may reasonably be expected to endorse along with them. For example, in defence of his political conception of justice as fairness, Rawls's criterion would be "the values expressed by the principles and guidelines *that would be agreed to in the original position*", where the particular features of the original position would serve to justify to other citizens why they can reasonably be expected to endorse the principles that emerge from it.[4]

How does the understanding of Rawls's reasonableness requirement as a heuristic change this dispositional element of reasoning in the public sphere? The heuristic reading accepts the Rawlsian picture of moral motivation, grounded in the desire for reciprocity and justifiability. As a result, reason-giving remains a crucial part of the justificatory picture - because our conception of others' moral personality is tied up with their capacity for reason, reason-giving forms an intrinsic part of respecting others. Part of this, as with Rawls's duty of civility, would involve attitudes such as willingness to listen to others and fair-mindedness in deciding when accommodations to others' views should reasonably be made.[5] In other words, respectful moral deliberation in the public sphere – the giving and receiving of

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[3] *Political Liberalism* 218. Italics added.
[4] *Political Liberalism* 226-7.
[5] *Political Liberalism* 217.

moral reasons - is entailed by the heuristic reading no less than by Rawls's own account.[6]

However, because the heuristic reading imposes no filter on the type of reasons allowed into public debate, the *content* of what the citizen stands ready to communicate to her fellows changes – she no longer has to defend a *political* conception. Rather, the rules governing the content of debate are contextually determined – each society must come to its own practice on the matter, with historical context being the major determinant of the conventions about what reasons are considered appropriate for public debate. This is the upshot of understanding the overlapping consensus primarily as concerning the practical task of living together,[7] and the original position as a heuristic device that helps us see clearly the reasons that are relevant. The rules governing public debate have to do with the practical task of getting along with one another.

To illustrate how this historical contextuality would work, let us pick up on the example of Sarah's *No Abortion* convictions. One might imagine a conversation between Sarah and the acquaintance who aborted the baby, where Sarah shares both her religious grounds for believing *No Abortion,* and tries to give other, non-religious reasons for thinking that even early-stage foetuses should be considered part of the human moral community. Even if Sarah's interlocutor does not accept any of Sarah's arguments, she could still appreciate Sarah's honesty about the religious grounds of her view. This description of the conversation presumes a certain historical and political context - one with enough of a background of peace that it is ready for reasoned debate about emotive issues.

That the manner of debate should be context-dependent should not be surprising - imagine a different backdrop, where the advocacy against abortion has a history of violence and abortion clinics are routinely bombed by well-organised and self-declared religious groups. It is not hard to see that in this different context, we

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[6] Gutmann and Thompson, to whom Rawls refers (*Political Liberalism* 217), furnish a helpful contrasting sketch of what disrespect would look like – they observe that denying the moral status of an opponent's position (for instance by claiming that a position is politically motivated), and not seeking to conduct the conversation on a moral basis. ("Moral Conflict and Political Consensus," in *Ethics*, Vol. 101, No. 1 (Oct 1990), pages 77 and 80). The heuristic reading, by its very nature – for the heuristic forces us to try to find moral principles which undergird opposition to our own view – tries to resolve disputes via moral deliberation as far as possible, before resorting to procedural methods of deciding matters.

[7] See Chapter 3.

might be less likely to find an open and honest conversation between Sarah and this woman.[8] Perhaps in such a hostile situation there might emerge, through unspoken convention or the recommendation of influential political leaders, that religious reasons in general should be excluded from debates about public policy, so as to avoid stoking an already volatile situation. Such a policy of exclusion of religious reasons may, on the face of it, look very much like the constraint imposed by Rawlsian public reason, but it would be qualitatively different, in that it would be arrived at as a matter of practical necessity rather than a requirement of justification. To see this, imagine that this society does adopt a "no religious reasons" policy. Imagine that by means of this policy the situation becomes calmer and there is a peaceful compromise about abortion law. Picture the same society two generations on, populated with a new generation of citizens who do not have the sort of baggage of violence and who are fully socialised into the need for peaceful discussion of important issues. They may no longer feel the need for the exclusion of religious reasons in order to keep the peace, and one can plausibly picture a new practice evolving which involves citizens sharing with their fellows their grounds of motivation for supporting a policy, including religious grounds.

The rules of engagement, then, are like Bratmanian shared policies in that what matters is that they are shared; it is not a requirement of justifiability that all societies must have the same rules about how to reason together in public. By contrast, the commitment to reason-giving *is* a requirement of justifiability.[9] Notice that on the heuristic reading, the reason for this commitment to reason-giving is a moral reason – it is respect for the moral personality of others. The fact that the commitment to reason-giving is a moral one is important – if it were purely pragmatic, all the way down, then one might imagine the exchange of reasons in public deliberation becoming merely an insincere and possibly manipulative leveraging on reasons. In other words, the reasons for citizens' commitment to reason-giving matters enormously, not least because if this moral commitment is lacking, civic friendship will be undermined.

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[8] Such contextual dependency is a key point made by Kent Greenawalt in *Private Consciences and Public Reasons* (New York, Oxford: Oxford University Press, 1995, Kindle edition).
[9] This is a point of difference from Raz.

The possibility of civic friendship

Robert Audi makes the helpful point that when citizens hear their fellow citizens' arguments, they listen for *voice*, which comprises not merely the bare content of speech, but also the underlying motivation of the speaker. He points out that civic voice is material in our decision whether or not to accept what is said.[10] Audi's own view is that acceptable civic voice must unite secular rationale with secular motivation.[11] I think the heuristic reading of Rawls's reasonableness requirement points to a different possibility – namely, that a *willingness to be transparent about our reasons*, contingent on favourable historical and political circumstances (the significance of which I touched on above), is sufficient to satisfy the concern about civic voice. If treating others with respect involves engaging with the reasons that apply to them, then when it comes to reasoning in the public sphere, being willing to lay our own reasons on the table in discussion is surely the other side of the coin. On this approach, the historical and political context draws the limits of how much mutual transparency of reasons is possible. Admittedly, this picture is messy. It is messy precisely because it allows full play to *all* our reasons. But I consider this a point in favour of rather than against it, for it reveals that some political decisions (like abortion policy) reflect, of necessity, deep disagreements about moral issues. Moral argument about such issues should not be avoided when reasoning about them in the public sphere.

What is the point of worrying about 'civic voice', one might ask? Why should we be concerned about whether our voice when reasoning in the public sphere is acceptable to others? What purpose does such a concern serve? This concern about civic voice is, I believe, ultimately grounded in the value of civic friendship as a worthwhile goal for political society.

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[10] Robert Audi, *Religious Commitment and Secular Reason* (New York: Cambridge University Press, 2000), 166, and Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Public Debate* (Maryland, USA: Rowman & Littlefield) 34.

[11] Audi's **principle of secular rationale** says that "one has a prima facie obligation not to advocate or support any law or public policy that restricts human conduct, unless one has, and is willing to offer, adequate secular reason for this advocacy or support." His **principle of secular motivation** says that "one has a (prima facie) obligation to abstain from advocacy or support of a law or public policy that restricts human conduct, unless in advocating or supporting it one is sufficiently motivated by (normatively) adequate secular reason." (*Religious Commitment and Secular Reason* (New York: Cambridge University Press, 2000) 86, 89, 92, 96.)

Aristotle classified civic friendship as a special case of advantage-friendship.[12] As with all forms of friendship, the advantage-friend wishes his friend well *for his friend's own sake*. He does this as a consequence of recognising this person as one who regularly benefits him and has done so in the past.[13] Civic friendship is based on the experience and continued expectation, on the part of each citizen, of benefit to himself, in common with other citizens, from membership in their civic association.[14] Where civic friendship exists, citizens wish one another well, and are willing to confer benefits on other citizens for their own sake, in consequence of recognising that they are themselves regularly benefited by the actions of fellow citizens.[15] This mutual well-wishing is, moreover, common knowledge. In a situation of civic friendship, citizens assume that their fellow citizens, even those they may not know personally, are willing supporters of their shared institutions and willing contributors to the common good, from which all derive benefit. They are "accommodating rather than suspicious, anxious to yield a point rather than insisting on the full letter of their rights whenever some dispute arises".[16] On Aristotle's account, where citizens are bound together by bonds of civic friendship, there is a sense in which the good achieved in that city is more than the sum of individual advantages. The good attained by some becomes part of the good of others[17] in the same manner as, within a family, the good fortune or success or good character of one family member is experienced by the others as part of their own good. Civic friendship constitutes that psychological bond that makes it possible for citizens to participate in the good of their fellows.[18] This is why for Aristotle, law-givers are more concerned to foster friendship among citizens than they are to establish justice. Justice, in this context, is understood as respect for fairness and legality, and is compatible with a suspicious, narrow, hard, and

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[12]This account of Aristotle's take on civic friendship is taken from John Cooper's writing on the subject. See John M. Cooper, "Aristotle on the Forms of Friendship" in *The Review of Metaphysics*, Vol. 30, No. 4 (Jun 1977), 645; and his "Political Animals and Civic Friendship" in John M. Cooper, *Reason and Emotion: Essays on Ancient Moral Psychology and Ethical Theory* (New Jersey: Princeton University Press, 1999).

[13] Cooper, "Aristotle on the Forms of Friendship," 633.

[14] Cooper, "Aristotle on the Forms of Friendship," 645-6.

[15] Cooper, "Aristotle on the Forms of Friendship," 646.

[16] Cooper, "Aristotle on the Forms of Friendship," 646.

[17] Cooper, "Political Animals and Civic Friendship," 374.

[18] Cooper, "Political Animals and Civic Friendship", 371-2.

unsympathetic character. Aristotle says that those who are merely just need also friendship, but those who are friends do not need to become just in addition.[19]

In making his argument for his theory of justice, Rawls appropriates and adapts this idea of civic friendship for the purposes of his argument for his two principles of justice. On his account, justice as fairness results in a well-ordered society where citizens can share bonds of civic friendship. Rawls's account of how this happens is found in the third part of *A Theory of Justice*, where he connects up his theory of justice with the good of community.

Rawls argues that his well-ordered society achieves the good of community. He emphasises that the point about the good of community is not merely that human beings are interdependent creatures, but that human beings

> have in fact shared final ends and they value their common institutions and activities as good in themselves. We need one another as partners in ways of life that are engaged in for their own sake, and *the successes and enjoyments of others are necessary for and complementary to our own good.*[20]

As the brief discussion of Aristotle's conception of civic friendship brings out, this is an idea which has Aristotelian roots. Moreover, Rawls's argument for *why* the good of one's community can be experienced as one's own good relies, fittingly, on a companion effect of his Aristotelian Principle.[21] The idea is this: no single person can do everything he might do, nor can he do everything that any other person might do. Each individual's potentialities are greater than he can realise alone. But through cooperation with others in society, "each person can participate in the total sum of the realised natural assets of the others".[22] In this way, for Rawls as for Aristotle, the bonds of civic friendship allow the good achieved by a political society to be held in common in a way that transcends the sum of individual advantages.

Rawls's narrative of the various stages of the individual's acquisition of a sense of justice can be read as an elaborated explanation of Aristotle's core idea of

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[19] Cooper, "Aristotle on the Forms of Friendship," 646.
[20] *Theory of Justice,* 458.
[21] Rawls's Aristotelian Principle states that "other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity." (*Theory of Justice,* 374)
[22] *Theory of Justice,* 459-60. Rawls cites Wilhelm von Humboldt, *The Limits of State Action*, ed. J. W. Burrow (Cambridge: The University Press, 1969), 16 and following, for this idea.

advantage friendship originating as a result of benefits received.[23] Rawls says, "if those engaged in a system of social cooperation regularly act with evident intention to uphold its just (or fair) rules, bonds of friendship and mutual trust tend to develop among them, thereby holding them ever more securely to the scheme."[24] Civic friendship, then, along with a sense of justice, is the natural outcome of the experience of Rawls's well-ordered society. This makes sense of Rawls's claim, that "without a common or overlapping sense of justice civic friendship cannot exist."[25]

The question is, given that Rawls's own picture of the sense of justice and principles of justice involves a significant dose of epistemic abstinence, can there still be civic friendship on the heuristic reading? I answer, quite simply, yes. The proposed heuristic reading of the reasonableness requirement on justification can affirm the value of the ideals of fraternity and civic friendship among citizens that Rawls paints in his argument for the difference principle, since the argument from mutual respect and the natural human desire for reciprocity still stand. Striving for a transparently honest exchange of reasons is part of working towards a relationship of civic friendship, since such exchanges, conducted in the right civic voice, is a means of building up mutual trust.

Voting – a messier picture, contiguous with the rest of morality

On Rawls's account, the citizen must be prepared to back up the readiness to give reasons with action. Action comes in the form of voting in accordance with public reason, and holding government officials and candidates for public office to account for observing public reason in their official speech and conduct.

Leaving aside the question of the appropriate standards to which to hold public officials, I want to consider what the heuristic reading of the reasonableness requirement would say about how citizens should vote. Because the heuristic reading does not call for any partition of reasons, there will be cases where someone like Sarah is caught on the horns of a moral dilemma, thinking that something like outlawing all abortion would be unjust (because having put herself in the position of her interlocutors she cannot find reasonably nonrejectable reasons for her position),

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[23] Cooper, "Aristotle on the Forms of Friendship," 633.
[24] *Theory of Justice,* 412.
[25] *Theory of Justice,* 417.

but at the same time believing it to be true that all abortion is murder and therefore wrong. In such cases, the traditional reading of Rawls on public reason would have Sarah bracket her *No Abortion* conviction and vote only according to the conclusion of deliberation reached from shared reasons. The heuristic reading gives no such prescription, but rather allows Sarah to come to an all-things-considered judgement on her own and to vote according to her conscience and where the balance of reasons lies. Its advantage is that it leaves Sarah free to decide for herself where the balance of reasons lies, without being divided against herself from the get-go, because she feels bound to create a firewall between her 'public' and her 'private' reasons. Should an abortion law with which Sarah disagrees be passed using legitimate procedures, then the heuristic reading is able to say, with Rawls, that Sarah should refrain from forceful resistance to the law, and accept the result of the vote.

Returning to the issues we were left pondering after we surveyed Rawls's and Raz's approaches to reasoning in the public sphere in Chapter 2, we can see now that the heuristic reading allows us to chart a middle ground between Rawls and Raz on the question of what is the appropriate mode of reasoning in the public sphere. With a commitment to mutual respect worked out in the wholehearted giving of reasons, the heuristic reading of the reasonableness requirement on justification allows us to guard against society degenerating into an unprincipled struggle for power. At the same time, removing the need for epistemic abstinence and thus obviating the requirement for segregating public and private reasons, leads us to a restoration of moral argument as properly a part of politics.

Space for moral standards that govern how we disagree in public?

The admirer of Rawls's ideal of public reason might find herself disappointed by the account I have offered above on behalf of the heuristic reading. Part of the attractiveness of Rawls's picture consisted in the thought that public debate could be governed by moral rules of conduct, whereas the heuristic reading seems to provide only a very thin account of the moral reasons we have for reasoning together in public. In this section, I try to show that there is no in-

principle reason why we should not try to come to a policy, as a society, of valuing certain moral standards for how to conduct public deliberation. Of course, whether or not such convergence is possible will be largely a pragmatic issue – the important thing is that the establishment of a moral code of conduct for public reasoning is not ruled out from the start by the heuristic reading.

Rawls, in writing about the attitudes which the duty of civility, and in particular, what "fairmindedness in deciding when accommodations to [others'] views should reasonably be made" might amount to, refers us to a discussion by Amy Gutmann and Dennis Thompson,[26] where they propose a set of principles for governing the manner in which people hold or express positions of moral disagreement in the public sphere.[27] These they call "principles of accommodation." They argue from mutual respect to its expression in two sets of such principles – first, principles which govern how citizens present their own moral positions; and second, principles which govern how citizens regard others' moral positions. The first set of principles lay out standards of integrity for how citizens hold their positions. They say that citizens should be consistent in speech, as a sign of sincerity; positions should be held for moral reasons rather than for reasons of political advantage.[28] Furthermore, citizens should act in a manner consistent with their stated positions, as well as accept the broader implications of their moral positions – so, for instance, those who oppose abortion should equally support measures to feed children properly.[29] The second set of principles calls on citizens to acknowledge their opponents' position as moral, rather than dismissing it as a nonmoral view.[30] This requirement is worked out by engaging with those who disagree with us "in serious and sustained moral discussion".[31] In order to ensure that such discussion is more than a mere formality, Gutmann and Thompson add that citizens should cultivate a "disposition toward openness" which "keep(s) open the possibility that citizens could come to adopt and act on the position of their opponents".[32] Finally, they suggest that citizens should exercise charity in

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[26] Gutmann and Thompson, 64-88.
[27] Gutmann and Thompson, 76.
[28] Gutmann and Thompson, 78.
[29] Gutmann and Thompson, 78-9.
[30] Gutmann and Thompson, 79.
[31] Gutmann and Thompson, 80.
[32] Gutmann and Thompson, 80.

disagreement, by seeking "an economy of moral disagreement", consistently looking for "a common perspective at a deeper level of morality...that could transcend moral differences at the level of policy"[33]

Gutmann and Thompson note that in advocating the establishment of a "public philosophy" of this kind, they are going beyond[34] Rawls's overlapping consensus, because it seeks agreement on substantive moral principles, even comprehensive ones, to guide citizens in public deliberation. While this view oversteps the boundaries set by Rawls's own conception of public reason (as consisting only of political values), however, it is compatible with both Raz's views and with the heuristic reading of Rawlsian justification. With regard to these, Gutmann and Thompson's public philosophy presents just one more moral argument in the public sphere, which is not denied entry simply because it is a comprehensive ideal about how we should reason together. Whether or not it gains traction there will be an issue of history, sociology and other contingencies – the important thing to notice is that the establishment of the public philosophy suggested by Gutmann and Thompson is not ruled out from the start, by the requirements of justification.

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[33] Gutmann and Thompson, 81-2.

[34] Their comments on how their view lines up with Rawls's overlapping consensus involve other aspects which, for my purposes here, I am ignoring. See Gutmann and Thompson, 87, where they explain how the public philosophy they urge "aims at both less and more than" Rawls's overlapping consensus.

6
Toleration: Theory into Practice

This chapter and the two that follow form a linked set which draws the connections between philosophical theory with policy implementation, by examining three case studies which fall, broadly, under the rubric of toleration. This chapter looks at how Raz and Rawls respectively formulate and defend a principle of toleration. It traces the differences in the reasons they give for a principle of toleration to their distinct approaches to justification. I use the heuristic reading of justification developed in Chapter 4 to show how Rawls's and Raz's justification for toleration may be drawn closer together. Chapter 7 looks at the state of religious toleration in Malaysia, highlighting the common ground Rawls and Raz share in emphasising the moral importance of national sovereignty. Chapter 8 lays out the cases of the Muslim veil in France and Turkey, which I use to argue that a commitment to liberal justifiability does not require secularism, nor is such secularism necessarily liberal.

Philosophical approaches – Rawls and Raz on toleration

One of the reasons people find Rawlsian epistemic abstinence attractive is that they view it as the right way to defend a principle of toleration for different ways of life.[1] It is not, of course, the only way to defend toleration by moral argument. Comprehensive liberalism, equally, has moral resources from which to defend a principle of toleration. What is more, if we accept, as I have suggested, the heuristic reading of Rawls's reasonableness requirement on justifiability, then it is possible to defend toleration without epistemic abstinence, in a way that is distinct from Raz's.

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[1] Samuel Scheffler helpfully describes and evaluates four different bases for a principle of toleration, by way of probing Rawls's proposal of the overlapping consensus. Samuel Scheffler, "The Appeal of Political Liberalism," *Ethics*, Vol. 104, No. 1 (Oct 1994), 4-22.

In seeking to defend a principle of toleration, Rawls and Raz share the goal of avoiding the Scylla of scepticism about value,[2] and the Charybdis of providing a merely pragmatic, balance-of-power account of toleration which, devoid of moral ballast, cannot remain stable over time.[3] What is wanted is an account of toleration that takes seriously the deep disagreements about value which exist between reasonable people; an account that fulfils the key function of helping us to get along together without bloodshed and which is based on moral conviction rather than mere convenience; and finally, an account that allows us to be true to ourselves and our deepest convictions.

Rawls

For Rawls, the principle of toleration originates in a historical phenomenon. On his account, before the "successful and peaceful practice of toleration in societies with liberal institutions there was no way of knowing that possibility [viz., that of a reasonably harmonious and stable pluralist society]"[4] Rawls characterises the acceptance of the principle of toleration in as a *modus vivendi* emerging from the Reformation and its aftermath, accepted "at first reluctantly, but nevertheless as providing the only alternative to endless and destructive civil strife".[5]

Fast forward to modern times and the modern problem of political philosophy, characterised by Rawls as how to find fair terms of social cooperation amid conditions of reasonable pluralism. For us today, says Rawls, the historical fact of religious toleration provides one of the "settled convictions"[6] and "fixed

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[2] Skepticism about value claims that "there is no good sense to be made of the idea of objective value or the notion of a good life," and grounds toleration in the thought that there is no legitimate basis, therefore, for *in*tolerance. See Scheffler, "The Appeal of Political Liberalism," 4. This is a highly controversial stance, which many would consider a counsel of despair about the possibility of moral reasoning.

[3] Susan Mendus has a helpful introduction in *Justifying Toleration: Conceptual and Historical Perspectives*, ed. Susan Mendus (Cambridge: Cambridge University Press, 1988), in which she lays out the different strategies for how toleration may be justified (or in the case of Marxist theory, done away with).

[4] John Rawls, *Political Liberalism (Expanded edition)*, (New York: Columbia University Press, 2005), xxv.

[5] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 2001) 192-3; *Political Liberalism* xxiv.

[6] *Political Liberalism* 8.

points of our considered judgements of justice"[7] within our fund of implicitly recognised shared ideas in the public culture.

It is starting from this 'settled conviction', among others, that Rawls seeks to construct principles of justice that are capable of being justified to all. His method is to use the veil of ignorance as a device to sift out a *shared set of reasons* which could be used by all to justify to one another the choice of a set of principles of justice, thus rendering the chosen principles of justice justifiable. A principle of toleration, in the shape of equal liberty of conscience, emerges quite naturally from this procedure. He says,

> The veil of ignorance leads to an agreement on the principle of equal liberty; and the strength of religious and moral obligations as men interpret them seems to require that the two principles be put in serial order, at least when applied to freedom of conscience.[8]

Rawls's procedure involves bracketing any judgement of the truth (or lack thereof) of any of these moral or religious doctrines (another manifestation of what Raz would term Rawls's "epistemic abstinence"). The parties in the original position do not know the particular content of their moral or religious obligations, although they understand in abstract form the importance that such commitments would have for someone who does hold them.[9] For Rawls, this sort of epistemic abstinence is critical to his project of justification. It is *because* the parties in the original position do not know what their religious or moral view is that they are led towards agreement on equal liberty of conscience for the same reasons;[10] Rawls says, "it seems that equal liberty of conscience is the only principle that the persons in the

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[7] John Rawls, *A Theory of Justice (Revised edition)* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 2000) 181.

[8] *Theory of Justice*, §33, 182.

[9] *Theory of Justice*, §33, 181.

[10] In Gerald Dworkin's terms, it is because they do not know their religious or moral view that they are forced to pick a "neutral" rather than a "non-neutral" principle. Dworkin also argues that Rawls's argument for equal liberty of conscience relies on the epistemological assumption that one cannot arrive at justified belief in religious matters. See Gerald Dworkin, "Non-Neutral Principles," *The Journal of Philosophy*, Vol 71, No. 14, Some Problems in Ethics (Aug 15, 1974), 491-506. For his specific argument against Rawls, see 503-505.

original position can acknowledge".[11] Epistemic abstinence, for Rawls, is crucial for achieving this justificatory convergence:

> The characteristic feature of these arguments for liberty of conscience is that they are based solely on a conception of justice. Toleration is not derived from practical necessities or reasons of state. ...Moreover, *the argument does not rely on any special metaphysical or philosophical doctrine.* It does not presuppose that all truths can be established by ways of thought recognised by common sense; nor does it hold that everything is, in some definable sense, a logical construction out of what can be observed or evidenced by rational scientific inquiry. The appeal is indeed to common sense, to generally shared ways of reasoning and plain facts accessible to all, but it is *framed in such a way as to avoid these larger presumptions. Nor, on the other hand, does the case for liberty imply scepticism in philosophy or indifference to religion.*[12]

Rawls is emphatic that, unlike in, for instance, a Millian utilitarian theory where a principle of toleration (such as the harm principle) might be justified on utilitarian grounds, his *basis for toleration is that the principle of toleration passes the test of justifiability*. It fulfils the reasonableness requirement (viz., the requirement that candidates for principles of justice can be endorsed by reasonable people who do not share your conception of the good).[13] That the principle of toleration flows out of Rawls's understanding of justification becomes even clearer in his introduction to *Political Liberalism*, where he describes political liberalism as "appl(ying) the principle of toleration to philosophy itself". This involves attaining a "shared reason" (of a conception of justice) by abstracting from the truth of the "opposing and conflicting philosophical and religious doctrines that citizens affirm".[14]

In *Political Liberalism*, the argument for a principle of toleration proceeds via the burdens of judgement. The burdens of judgement present a general fact about modern democratic societies, namely, that "many of our most important

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[11] *Theory of Justice*, §33, 181.

[12] *Theory of Justice*, §34, 188. Italics added.

[13] Rawls says, "The grounds for this confidence [in the principle of equal liberty], according to the contract view, is that the equal liberties have a different basis altogether. They are not a way of maximising the sum of intrinsic value or of achieving the greatest net balance of satisfaction….Rather these rights are assigned to *fulfil the principles of cooperation that citizens would acknowledge when each is fairly represented as a moral person.*" (*Theory of Justice*, §33, 185, italics mine.)

[14] *Political Liberalism* 10.

judgements are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion."[15] The sources of reasonable disagreement include such things as the complexity of empirical and scientific evidence, disagreements about weighting the relevant considerations to a problem, vagueness of concepts, the influence of individual experience on how we assess evidence and weigh values, fundamental conflicts of normative considerations, as well as limited social space for the realisation of moral and political values.[16] Given that the burdens of judgement exist,

> reasonable persons see that the burdens of judgement set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought.[17]

That is, the burdens of judgement limit the scope of potential candidates for principles of justice in a modern, democratic society. They ensure that a principle of toleration is chosen in the original position. It is worth noting, however, that Rawls does not defend pluralism as such, but only *reasonable* pluralism. Unreasonable doctrines, which given political power, would impose their comprehensive view on others by force, do not fall under the principle of toleration. Unreasonable comprehensive doctrines are to be contained, "so that they do not undermine the unity and justice of society".[18]

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[15] *Political Liberalism* 58.
[16] *Political Liberalism* 56-57.
[17] *Political Liberalism* 61.
[18] *Political Liberalism*, Introduction, xvii. Rawls credits Joshua Cohen with pressing him on this point. Cohen, in an article cited by Rawls cites in *Political Liberalism*, elaborates on the significance of the distinction this way: "...if we did embrace the requirement that a conception of justice be able to bring everyone on board – that it restrict itself to reasons embraced by all understandings of value – then it is hard to see what the response would be to the objection that the requirement of an overlapping consensus simply forces an accommodation to power. (Joshua Cohen, , "Moral Pluralism and Political Consensus," in *Philosophy, Politics, Democracy*: *Selected Essays* (Cambridge, Massachusetts: Harvard University Press, 2009), 55-56).

A very different route – Raz on toleration

Rawls and Raz agree on the observed phenomenon of rational citizens being stably disposed to hold distinct understandings of value.[19] More than that, they each have an explanation for why such disagreement should be accommodated in political life using a principle of toleration. Rawls's explanation, as we have seen, proceeds through the burdens of judgement. In a contrasting route to a principle of toleration, Raz makes the point[20] that value-pluralism is competitive. He starts with a truth-claim about the nature of value – namely, that it is plural. He then goes on to claim that values are, by nature, competitive in that certain valuable ways of life exclude certain other such lives, and moreover, that certain valuable ways of life commit their adherents to disapproving of other, valuable, ways of life. That is, value-pluralism admits the validity of distinct *and incompatible* moral virtues; it accepts the value of virtues "possession of which normally leads to a tendency not to suffer certain limitations in other people which are themselves inevitable if those people possess certain other, equally valid, virtues."[21] Because of its competitive aspect, value-pluralism tends to generate intolerance.

For Raz, it is the link between competitive value-pluralism and autonomous well-being that gives rise to a principle of toleration.[22] On his account, human well-being requires personal autonomy. Personal autonomy in turn presupposes competitive pluralism, because one of the conditions for personal autonomy is the existence of an adequate range of valuable options.[23] But given that competitive pluralism has an inherent tendency towards intolerance, which left unchecked,

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[19] Borrowing from Joshua Cohen ("Moral Pluralism and Political Consensus" in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Massachussetts: Harvard University Press, 2009), 52), I use "stably disposed" here rather than the Rawlsian "reasonably (holding)" in light of the fact that for Rawls (in *Political Liberalism*), accepting the burdens of judgement is partly constitutive of being a reasonable person (*Political Liberalism*, 54). See the extended discussion on this in Leif Wenar's "Political Liberalism: An Internal Critique," in *Ethics*, Vol. 106, No. 1 (Oct. 1995), 37-48.

[20] "Autonomy, toleration, and the harm principle," *in Justifying Toleration: Conceptual and Historical Perspectives*, ed. Susan Mendus (Cambridge: Cambridge University Press, 1988) 174. Raz says, "…people should have available to them many forms and styles of life incorporating incompatible virtues, which not only cannot be all realized in one life but tend to generate mutual intolerance." (underlining added)

[21] *Morality of Freedom*, 404.

[22] In "Autonomy, toleration, and the harm principle,"174, Raz says that "Such an autonomy-valuing pluralistic morality requires a principle of autonomy which will protect people pursuing different styles of life and assure the survival of the options to pursue different forms of life. The principle of autonomy itself generates such a principle of toleration."

[23] See Chapter 14 of *Morality of Freedom*, 372-378. The other two conditions of autonomy are appropriate mental abilities, and independence (freedom from coercion and manipulation).

would destroy the diversity of ways of life, a principle of toleration is required. As Raz puts it, "respect for autonomy by requiring competitive value-pluralism also establishes the necessity for toleration".[24]

Raz's autonomy-based account thus provides the resources for somewhat more than an equal liberty of conscience. In contrast with the Rawlsian framework which requires the government to abstain from making judgements in the realm of the good (as opposed to the domain of the political, or the right), for Raz, a legitimate government's duty to secure the conditions for autonomy "requires *positively encouraging* the flourishing of a plurality of incompatible and competing pursuits, projects and relationships,"[25] provided that the judgement has been made that these belong to valuable ways of life.

Unlike Rawls's principle of toleration which draws the line at unreasonable comprehensive doctrines rather than making any direct judgement on the substance of comprehensive doctrines, Raz's principle of toleration does not protect "morally repugnant activities or forms of life". For Raz, because autonomy is only valuable insofar as the options pursued are valuable, worthless forms of life do not need to be protected. In terms of the limits to government intervention to promote perfectionist ideals, Raz argues that a version of Mill's harm principle should govern the extent of permissible intervention - perfectionist policies are allowed so long as they do not require resort to coercion. This limit is grounded in the third condition of autonomy, viz., independence from coercion and manipulation - because coercion and manipulation invade autonomy, coercive interventions are ruled out unless they are needed to protect autonomy.[26]

Having looked at how Rawls and Raz separately defend a principle of toleration, we can see that this is their disagreement about the nature of justification played out in a different aspect. For Rawls, a principle of toleration and equal liberty of conscience flow out of the fact of reasonable pluralism and the need for justifiability based on shared reasons. For Raz, on the other hand, the principle of

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[24] *Morality of Freedom*, 406.
[25] "Autonomy, toleration, and the harm principle," 174. Italics added.
[26] "Autonomy, toleration, and the harm principle," 175. See John Stanton-Ife, "The Limits of Law" in the *Stanford Encyclopedia of Philosophy* for an argument that Raz's attempt to base the harm principle on considerations of autonomy does not succeed.

toleration emerges from a concern with a fully-fleshed out picture of autonomous well-being and human flourishing.

The heuristic reading of the reasonableness requirement

Before venturing to set out how the heuristic reading of Rawlsian justifiability makes a difference to the defence of a principle of toleration, some preliminaries.

First, any acceptable account of justification must distinguish, with Rawls, between the simple fact of pluralism, and reasonable pluralism. At stake in this distinction is the danger that eliding the two might lead one wrongly to accommodate unreasonable views in an unwarranted caving-in to the ugly realities of political life. The project in which we are engaged is determining the correct account of justifying the implementation of political principles, not discussing the best way for politicians to get re-elected. Establishing a coherent account of how *reasonable* pluralism might exist frames the problem in the correct way, by specifying why it is that we might owe justification to individuals who differ in their conceptions of value. This distinction is a key part of Rawls's project in *Political Liberalism*. And although Raz does not make use of Rawlsian terminology, his claim of value-pluralism serves the same *function* as Rawls's reasonable pluralism. That is, it provides an explanation of why the diversity we observe around us *ought* to be protected by means of a principle of toleration.[27]

Second, notice that both Rawls and Raz would agree that reasonable disagreement should not lead one to scepticism about the truth of one's own beliefs. Rawls is very clear on this – he says, "Above all, [political liberalism] does not argue that we should be hesitant and uncertain, much less skeptical, about our own beliefs."[28] He is especially keen to leave open the possibility of the truth of one of the "affirmations of faith" about which reasonable people disagree[29] - it is this possibility, on his view, which allows the overlapping consensus to dissolve the

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[27] For this, see Chapters 13 and 14 of his *Morality of Freedom*, on Incommensurability and value pluralism particularly. Raz makes the point that while different valuable ways of life might be incommensurable, it is not the case that they are adopted/affirmed without reason.

[28] *Political Liberalism*, 63.

[29] *Political Liberalism*, 63.

"paradox" of public reason by having citizens affirm the ideal of public reason from within their own reasonable doctrines.[30] Raz is equally clear about reasonable disagreement not leading to skepticism.[31] Helpfully, Raz distinguishes between scepticism and fallibility – the realization that our beliefs may be mistaken. Having justified certainty and confidence in our beliefs is grounded, Raz points out, in "a belief that one is not in fact mistaken, that there is no reason to suspect a mistake, and every reason, based on evidence and on one's situation, to trust one's beliefs."[32] Reasonable disagreement in the realm of value should not weaken the trust one has in one's own conception of value, where the above-listed conditions are met. One makes the judgement that others' disagreement is reasonable when

> through no fault of their own, they do not have evidence of the same quality that I have, but their evidence is sufficient for them, given their degree of understanding and expertise in the matter, to base a judgment on, or else when the evaluation of the evidence is sufficiently difficult to make error not really surprising, given normal human capacities.[33]

For the reasons of wholeheartedness earlier elaborated in Chapter 2, I believe, with Rawls and Raz, that the defence of toleration that we are after should allow us to affirm our confidence and certainty in our own conceptions of the good.

Third, we now have the tools to separate the issue of the burdens of judgement from the question of how a principle of toleration is to be justified. *The burdens of judgement are, in principle, separable from the demand of justifiability.* In effect, I think that Rawls and Raz can agree on the burdens of judgement – in Raz's terms, these are just the conditions of ordinary, fallible human knowledge, including knowledge about value judgements.[34] Consider again how Rawls describes the "many hazards"[35] involved in the correct use of our reason and judgement, such as conflicting and complex evidence, differing views about the

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[30] For more on Rawls's solution to the paradox of public reason, see Chapter 2. My own view, in a nutshell, is that Rawls's epistemic abstinence prevents him from succeeding in dissolving the paradox.
[31] In particular, Raz has a section specifically dealing with this question in his essay, "Liberalism, Scepticism, and Democracy," in *Ethics in the Public Domain*, 104-106.
[32] Raz, "Liberalism, Scepticism, and Democracy," 100.
[33] Raz, "Liberalism, Scepticism, and Democracy," 104-5.
[34] Raz, "Liberalism, Scepticism, and Democracy," 103-5.
[35] *Political Liberalism*, 56.

weight of various considerations, the indeterminacy of concepts, the ineliminable impact of our experience on how we weigh evidence and assess moral and political values etc.[36] Raz, it seems, does not deny the burdens of judgement.[37] Their disagreement lies elsewhere – namely, in their approach to justifiability; it is only because Rawls's route to justifiability demands shared reasons that the burdens of judgement which lead to reasonable disagreement end up playing the role of limiting factor to what is reasonably justifiable.[38] If justifiability does not require shared reasons, as I am suggesting, then we could accept the burdens of judgement without necessarily relying on them to generate the limits of what can be justified to others.

Now back to the heuristic reading of Rawlsian justifiability. What route does the proposed heuristic reading take to a principle of toleration?

From the first preliminary comment above, we can see that what is required is a certain *kind* of explanation of reasonable pluralism; one that is able to explain why justification is required as a matter of justice, rather than of political expediency. Judged solely against this criterion, both Rawls's burdens of judgement account and Raz's value-pluralist account succeed. But then what happens when the heuristic reading of Rawlsian justifiability removes the requirement of shared reasons? The first immediate consequence is that we find that Razian value-pluralism is not ruled out from the start as a legitimate justification of a principle of toleration – that is, its commitment to a claim about the nature of value does not render it inadmissible as a premise in justification from the very start. Moreover, we find that other (epistemically committed) explanations of reasonable pluralism, which would be ruled out by an epistemically abstemious reading of Rawlsian justification, are also ruled in. For instance, Leif Wenar's Catholic citizen,[39] who, *contra* Rawls, regards the diversity of religious views in our modern democratic

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[36] See *Political Liberalism,* 56-7 for Rawls's list of the "more obvious sources" of disagreement between reasonable persons.

[37] See Raz, "Liberalism, Scepticism, and Democracy," 105, where he explicitly acknowledges the existence of reasonable disagreement due to differences in the assessment of the evidence.

[38] Rawls says that "the burdens of judgement set limits on what can be reasonably justified to others". (*Political Liberalism*, 61.) See also Chapter 4, where I have touched on (but without specific reference to toleration) how the heuristic reading of Rawlsian justifiability brings Rawls's account into harmony with Raz's normal justification thesis.

[39] This example is adapted from Leif Wenar, "Political Liberalism: An Internal Critique," *Ethics*, Vol.106, No. 1 (Oct., 1995), 42-48.

societies as a lamentable descent away from the truth, but who nonetheless affirms the reasonableness of people who hold those false views because the source of their error is spiritual (spiritual blindness due to the work of the devil, for instance), rather than rational, would be able to offer the appropriate sort of explanation for reasonable pluralism.

What is important, from the point of view of the heuristic reading of justifiability, is that all involved acknowledge the duty of mutual respect and accept that the use of the coercive power of the state requires justification. They need to accept that the duty of mutual respect requires them seriously to consider the reasons others have for disagreeing with them, and to have, at the least, an initial presumption against using the coercive power of the state to enforce a principle that cannot be justified to fellow citizens. How different citizens end up accepting these premises could differ significantly; my suggestion in previous chapters has been that the desire for reciprocity is deeply rooted in human psychology, but the reasons individuals might give for agreeing to these premises might look quite different. Take Wenar's Catholic citizen. This person could well have religious reasons which also support allegiance to the duty of mutual respect which would lead her to refrain from coercively imposing religious requirements on non-believers. (These might include both Lockean arguments concerning the nature of faith as being voluntary and thus incapable of coercion, or perhaps, the belief that human beings, even those who erroneously adhere to false religions, have a dignity according to their status as beings created in God's image and should be respected by giving them freedom of conscience.[40])

Once a commitment to justifiability and mutual respect in the form of equal consideration of others' reasons is in place, the heuristic reading is able to make use of a justifiability test à la Rawls, but without bracketing judgements of truth. The argument resembles closely that which Rawls uses to conclude that a principle of equal liberty of conscience would be chosen in the original position.[41] With Rawls, the heuristic reading is able to say that to impose anything less than an equal liberty of conscience would not pass the test of justifiability, understood as reasonable

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[40] This latter argument is cited by Leif Wenar, "Political Liberalism: An Internal Critique," 46, to show that rejecting the burdens of judgement need not be incompatible with supporting liberal toleration.
[41] *Theory of Justice,* 180-183.

nonrejectability. The difference is that on the heuristic reading, there is no need to rule out appeal to the truth of any particular moral or religious doctrine.

A couple of examples might make this clearer. Take Sarah, our citizen from Chapter 4 who believes in *No Abortion*. Let us assume that her beliefs on abortion derive from her Catholic faith. She believes that her God is the only true God, and that life under his rule is the best life any person could lead. She believes, as a result, that all other religious (or anti-religious) beliefs are false. She concludes from this that it would be good for everyone to have the Catholic religion legally enshrined as the national religion, and its observance legally enforced.[42] However, what she comes to see when she runs this proposed policy through the heuristic device of the reasonable non-rejectability test, is that others who do not share the same religious beliefs as she does, might have good reasons to reject her policy. For instance, they might plead that being coerced into observing the religious rituals of another religion would deeply undermine their psychological well-being. Sarah concludes, as a result, that denying others equal liberty of conscience would be unjust. Thus, while Rawls's own formulation of the heuristic (in the form of the original position) depends on shared reasons,[43] we see here that it need not necessarily do so.

Or, to use a case which we shall see in more detail in the next chapter, imagine a conversation in Malaysia about the currently enforced political principle, viz., "allow everyone except Muslims freedom of conscience". A Malay citizen (who under current legislation would automatically be considered Muslim) desiring to convert out of Islam might say to her Muslim compatriots that in denying her the right to convert out of Islam they are imposing an unjustifiable principle, since she has good reason to want to shape her life according to her conception of the good. Where the heuristic reading of justifiability differs from the standard Rawlsian story is that it allows into this conversation about justifiability, reasons on each side which are drawn from comprehensive doctrines. Thus, for instance, on the heuristic reading of justifiability, a legitimate part of this conversation would involve the

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[42] A felicitous conclusion would of course be if Sarah were to come to some religiously-premised argument, such as Locke's argument for toleration, which allowed her to approve a principle granting freedom of conscience for all. I exclude this possibility for the sake of the illustration at hand.

[43] For Rawls's version of the argument for equal liberty of conscience, from the original position, see *Theory of Justice,* 181-183.

Muslim Malay citizen putting forth his reason for supporting the status quo is that Allah's law requires that the Muslim community enforce the Islamic faith on those brought up in it. Admittedly, such a conversation could ultimately still end in practical stalemate, since even if the Muslims all ended up convinced that denying Muslims freedom of conscience was unjustifiable, they could nonetheless decide, all things considered, that their obedience to Allah trumped the need for justifiability. In such a case the result would be that the society fails to practice liberal toleration. Here, the demand for justifiability comes apart from the practical need to find a way of living together in political society – even if the demand for justifiability cannot be met, the practical task of living together goes on; even unjust societies try to get along, somehow.

7
Religious Toleration in Malaysia

This chapter works through a case study of the state of religious toleration in Malaysia, in order to see clearly how the twin concerns of justifiability and of the practical task of living together might shed light on how we assess some real-life situations. I work through how the heuristic reading of Rawlsian justifiability might bring together the Rawlsian and Razian positions on Malaysia, allowing us to discern the reasons why some of the cases discussed might be considered unjust. I also highlight the common ground that Rawls and Raz occupy in their emphasis on the moral importance of national sovereignty.

Malaysia

Malaysia is a majority Muslim nation, with 60.4% Muslims in a population of 23.3 million people. A significant minority subscribe to Buddhism or other traditional Chinese religions (21.8%). Another 9.1% are Christian, 6.3% are Hindus, and there is a smattering of tribal religious believers.[1] The indigenous ethnic Malay population, who make up 50.2% of the population, is by constitutional definition, Muslim.[2] Article 11 of the Malaysian constitution guarantees the right of every individual to profess and practice his religion. Even within the constitution, however, there are built-in limits to the principle of toleration – the right in Article 11 is subject to a provision which allows the restriction of the propagation of any religious doctrine among Muslims. This stems from the status of Islam as "the religion of the Federation", enshrined in Article 3 of the constitution.

Even at a theoretical level, such a constitutional structure poses problems for a policy of toleration. To start with, it raises the question of adherents of the official religion not having an equal liberty of conscience, since (as the cases in this chapter will show) it is not at all clear that there is a right of exit from the Islamic faith. Secondly, friction is also caused by the interface between Muslims and non-

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[1] From the UN Statistics Division, based on the 2000 Malaysian census. http://unstats.un.org/unsd/demographic/sconcerns/popchar/popchar2.htm , accessed on 12 Dec 2011
[2] According to Article 160(2), "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to Malay custom.

Muslims within Malaysian society. Thirdly, religious expression on the part of the non-official religions often runs up against the protection of Islam as the official religion.

Surveying media coverage of race and religion in Malaysia from 2005 to 2010,[3] issues to do with conversions into and out of Islam have dominated the landscape. These can be divided up into three broad categories of cases – those concerning Islamic burials for Muslim converts, custody battles involving one Muslim convert spouse, and finally, cases of Muslims wanting to leave the Islamic faith. In each category, I will give the key facts of the landmark case of the period, along with some comments on the trend of how these cases have been dealt with, both by the Malaysian courts and by the Malaysian government in policy statements. A final section on religious expression illustrates the difficulties religious minorities encounter in practising their religion.

Burial of Muslim converts

The M. Moorthy case

Summary of the case

Maniam Moorthy was a national hero - the former army commando was a member of Malaysia's 1997 Mount Everest climbing team, who were the first Malaysians to reach that summit. On 20 December 2005, Moorthy, who had been born and raised a Hindu, died in a hospital in Kuala Lumpur (KL). He had been paralysed from the waist down since an accident in 1998 and had slipped into a coma after a fall from his wheelchair in November 2005. While he was in the coma, a former army colleague told Moorthy's Hindu wife, Kaliammal Sinnasamy, that her husband had earlier converted to Islam and changed his name to Mohammad Abdullah.

At his death, officials from the Federal Territories Islamic Religious Affairs Council arrived to collect the body, saying that since Moorthy had converted to

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[3] This survey has been done across the English media only, for the period 2005-2010. Given that my focus is on the events themselves rather than the different communities' perception of each event, this should not be a problem for the analysis in this chapter.

Islam, he must be given Muslim burial rites. When Kaliammal objected, the hospital decided to withhold the body until it was ordered to release it by court order.

On 21 December 2005, Kaliammal filed a case in the civil high court, asking for her husband's body to be released to her for a Hindu burial, on the grounds that Moorthy had professed Hinduism as his religion. Her evidence included the following:

(i) That Moorthy had never told Kaliammal or any of his family, relatives or close friends that he had converted to Islam.

(ii) There had been no announcement at the army camp where he stayed that Moorthy had converted to Islam, and his military identity card had never been changed to reflect any such conversion.

(iii) Moorthy publicly took part in Hindu religious rites up to 11 days before he fell into a coma.

(iv) Affadavit evidence showing that Moorthy did not adhere to Muslim religious practices, and that he ate pork, drank alcohol, and had not undergone circumcision.

(v) Kaliammal claimed that if Moorthy had converted, it was not of his own free will, as since his paralysis he had been constantly ill and had lost his powers of concentration, suffering frequent emotional disturbances and forgetting what he was doing.

On 22 December 2005, the *syariah* high court in KL ruled that Moorthy was a Muslim, and ordered his body released to the state Islamic council for Muslim burial. Kaliammal was not named as a party to the suit in the *syariah* court, and she was given no notice of the proceedings there.

On 28 December 2005, the KL high court dismissed Kaliammal's suit, stating that the civil high court did not have any jurisdiction to nullify or ignore the order of the *syariah* court, since Article 121(A) of the Malaysian constitution was interpreted as saying that the *syariah* courts had exclusive jurisdiction to decide on conversions into Islam, and to determine whether or not a person was a Muslim.

Following the dismissal, Moorthy's body was released by the hospital

authorities to the Islamic authorities and Moorthy was buried as a Muslim.

Kaliammal appealed against the decision, and in May 2007, the Court of Appeal ruled that the *syariah* court had sole jurisdiction to determine if an individual is a Muslim.

Reactions

The Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS), a registered body with no Muslim representation, organised a month-long candlelight vigil in from 29 December 2005, protesting against the fact that non-Muslims had no legal recourse over decisions made by the *syariah* court. About a week into the vigil, attendance was between 50 to 100 persons, of various faiths. The vigil was suspended indefinitely on 19 January 2006 on the request of the Chief Secretary to the Government. In a statement to the press, Reverand Wong Kim Kong, spokesman for the MCCBCHS, said, "We want to convey a very strong message to the government that we are uneasy and uncomfortable ...Eventually, slowly, people may assume *syariah* is the supreme law of the land."[4]

In January 2006, 10 non-Muslim Cabinet ministers submitted a joint memorandum to Prime Minister Abdullah Badawi, asking him to review laws pertaining to religious conversion. This was withdrawn following the 21 January 2006 Cabinet meeting.[5] PM Badawi said that Article 121(A) of the Constitution, which gave the *syariah* court the exclusive jurisdiction to decide on conversion into Islam, would not be repealed, but said that provisions within it might be amended for clarificatory purposes. Meanwhile, two marches in the capital took place, comprising opposition party members and university students respectively, calling on the authorities to ensure that changes to the Constitution would not result in limiting the power of the *syariah* courts.[6]

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[4] Quoting the *New Straits Times*, 30 Dec 2005, and cited on the National Evangelical Christian Fellowship website
http://www.necf.org.my/newsmaster.cfm?&menuid=43&action=view&retrieveid=675, retrieved on 8 Dec 2011.
[5] *Malaysiakini*, 21/1/2006.
[6] *Bernama*, 20/1/2006.

In the wake of the Moorthy case, a string of similar so-called "body-snatching" cases were highlighted in the Malaysian media in 2006. In each of these cases, whenever the deceased's non-Muslim family members attempted to appeal to the civil courts, they were told that the civil courts did not have jurisdiction over such cases.

Custody battles involving Muslim converts

The R. Subashini case

A Hindu woman, R. Subashini, battled in the civil courts from 2006 onwards to prevent her estranged Muslim convert husband, T. Saravanan, from dissolving their marriage in the *syariah* courts, and unilaterally converting their younger child, then 2 years old, to Islam (Saravanan had already unilaterally converted their older child, then aged 4). She failed to get the conversion of her younger child declared invalid by the civil courts; the Federal Court ruled that the conversion was valid because consent from one parent is sufficient for conversion of a minor, according to Article 12 (4) of the Constitution. However, the Federal court also ruled that the marriage would still be valid in the civil court even if it had been dissolved under *syariah* law. In addition, the Federal court ruled that Subashini and her husband could initiate custody proceedings in the civil and *syariah* courts respectively.[7]

Due to the (contested) interpretation of Article 12(4) of the Malaysian Constitution,[8] to mean that a minor's religion can be decided by the consent of any one parent, this kind of case is not unusual. Moreover, since the *syariah* courts do not recognise marriages between Muslims and non-Muslims, and since custody of a Muslim child cannot be awarded to a non-Muslim, custody would invariably be awarded to the Muslim party in a case like this.

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[7] *Bernama*, 27/12/2007. http://www.bernama.com/bernama/v3/news_lite.php?id=304754, accessed on 10 Dec 2011.
[8] Article 12(4) states that "the religion of a person under the age of eighteen years shall be decided by his parent or guardian". The interpretation that "parent" means 'any one parent' is contested by those who point to the Eleventh Schedule of the constitution, on interpretation of constitutional provisions, which states, regarding the construction of singular or plural, that "words in the singular include the plural, and words in the plural include the singular".

Muslims (including Muslim converts) seeking to leave Islam

The Lina Joy case

In 2007, the Federal Court ruled that Lina Joy, an ethnic Malay and self-identified ex-Muslim, who had appealed to the civil courts to have her former religion struck off her identity card, would have to appeal to the *syariah* court to approve her conversion. In doing so, the Federal Court confirmed that jurisdiction on the issue of converting out of Islam lay definitively with the *syariah* courts. Since the *syariah* courts almost never grant permission for ethnic Malays to leave the religion, this in effect amounted to refusing to Lina the right to convert to another religion. In this particular case, the ruling also meant that under Malaysian (*syariah*) law, Lina could not legally wed her Catholic fiancé.[9]

In the cases covered by the media over the 2005-2010 period, no living ethnic Malay who tried to convert out of Islam succeeded in doing so.[10] Those who apply to the *syariah* courts to leave Islam would normally be detained for religious rehabilitation.[11] The only successful cases of applications to leave Islam were of non-ethnic Malays – some the product of mixed marriages, who were raised in other

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[9] *The Sun*, 30/5/2007, US Bureau of Democracy, Human Rights, and Labor. 2008 International Religious Freedom Report, http://www.state.gov/g/drl/rls/irf/2008/108413.htm, accessed on 10 Dec 2011.

[10] The exception, if one can even call it that, is the 2006 case of Nyonya Tahir, who was already dead at the time of the court case. Nyonya Tahir, an 89-year old ethnic Malay woman, died of old age in 2006. She had married a Chinese Buddhist man in 1936 and had had 13 children with him. In 1986, she had made a declaration at the Alor Gajah religious office that she wanted to live and be buried as a Chinese. When she died, the Negri Sembilan Religious Affairs Department wanted to bury her as a Muslim as she was of Malay birth and thus Muslim by definition. When the case came to the syariah court, her non-Muslim children were called as witnesses. In the end, the body was handed back to the family for a Buddhist burial. Then-PM Abdullah Badawi used the case to make the point that non-Muslims could get justice in the syariah court. *Bernama*, 24/1/2006, *New Straits Times*, 21/1/2006.

[11] For example, the case of Revathi, who was born to Indian parents who had coverted to Islam. She was registered as a Muslim (under the name Siti Fatimah) but claimed to have been brought up as a Hindu by her grandmother. She married a Hindu man and they had a daughter. She was put into detention and her year-old daughter taken from her and handed to her Muslim mother when she attended a *syariah* court hearing to have her official religious status changed to "Hindu". *Malaysiakini*, 11/7/2007, *The Sun*, 5/4/2007 and 6/7/2007.

religions;[12] or in one case, a Chinese woman who had converted in order to marry a Muslim but who had never practised Islam.[13] Even with these, in the majority of cases the Muslim convert would be sent for religious rehabilitation.

Religious expression

The "*Allah*" controversy

In 2007, the Catholic weekly publication *The Herald* started to encounter problems renewing its yearly publishing permit, due to the use of the word "*Allah*" in its Bahasa Malaysia section to refer to the Christian God. The Internal Security Ministry's stance was that "*Allah*" was to be used only for the Muslim God. Non-Muslims should use the word "*Tuhan*" which is the general term for God.

In end 2009, High Court judge Lau Bee Lan declared the order by the Home Minister banning the use of the word "*Allah*" illegal, as *The Herald* had a constitutional right to use "*Allah*" to propagate the Christian religion, though not to Muslims.

Reactions

Pending the government's appeal (which has still not been heard by the courts), a number of churches, a Sikh temple, mosques and Muslim prayer halls were hit by petrol bombs, arson attacks and vandalism as Muslims protested the decision and others retaliated.

Muslim sentiment on the "*Allah*" issue is driven by the worry that Christians would use confusion over the use of the term to proselytise and convert Muslims out of Islam. The *de facto* minister for Islamic affairs claimed the word "*Allah*" in Christian literature could confuse the country's Muslims and draw them to Christianity. Together with the term "*Allah*" (God), some other terms - "*Baitullah*"

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[12] This was a case of 10 siblings, children of a Muslim man and a Hindu woman, raised as Hindus, who applied to have their religious status on their identity cards changed to "Hindu". *The Star*, 24/2/2007 and *New Straits Times*, 25/2/2007.

[13] This was the case of Tan Ean Huang in Penang, who converted to Islam (taking the Muslim name Siti Fatimah Tan Abdullah) to marry an Iranian man who left her a few months later. *The Star* and *New Straits Times*, 11/8/2007 and *The Straits Times*, 8/5/2008.

(House of God), and "*Solat*" (prayer) are also restricted for use by Muslim groups by the Publications and Al-Quran Texts Control Department under the Home Ministry; the government claims that these words are the sole province of the Muslim community.[14]

Hindu temples – protest and counter-protest

2007 demolition of the Sri Maha Mariamman temple in Padang Jawa, Shah Alam[15]

The demolition of this century-old temple sparked clashes between residents and local council authorities and police. There was violence on both sides, with hundreds involved. Allegedly, the temple committee had only been told verbally the night before the demolition. The demolition sparked historic protests in November 2007 against racial discrimination, organised by the Hindu Rights Action Force (Hindraf),[16] where the demolition of Hindu temples was a key issue.

2009 "Cow head" protests against relocation of Hindu temple

In August 2009, a group of 40 Muslims gathered at the gates of the Selangor State Secretariat, protesting against plans to relocate a Hindu temple to majority-Muslim Section 23 of the city. A severed cow's head was carried by the protestors, and later stomped on and spat upon. The protesters were later arrested and charged with sedition.

The demolition of Hindu temples is a long-running issue. Many of the temples in question would have been constructed on privately owned plantations prior to the country's independence in 1957. After independence, plantation lands along with their temples were transferred to government ownership. As the law allows the state authorities to demolish unregistered religious places of worship, cases like those

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[14] *Malaysiakini*, 20/12/2007 and 21/12/2007, 2008 US International Religious Freedom Report (Malaysia), http://www.state.gov/g/drl/rls/irf/2010/148881.htm, accessed on 10 Dec 2011.

[15] Shah Alam is the state capital of Selangor, and is next to Kuala Lumpur.

[16] Hindraf is an unregistered non-governmental organisation focussed on the concerns of ethnic Indians, which was banned by the Malaysian government in 2008 following the large-scale protests in 2007. US Bureau of Democracy, Human Rights, and Labour, July- Dec 2010 International Religious Freedom Report, dd.13 Sep 2011. www.state.gov/g/drl/rls/irf/2010_5/168363.htm. Accessed on 10 Dec 2011.

described above are not uncommon.[17] In the period reviewed, the media also highlighted the occasional case of a Chinese temple (in Penang) and a church (in Kelantan, a state held by the Islamic opposition party, PAS) being demolished.

Twin concerns

In the discussion at the end of Chapter 4, we started to see how, by reading Rawls's reasonableness requirement on justification as a heuristic device, we could bring together his account of justification with Raz's. Fundamentally, Rawls and Raz share the concern that political principles should be *justifiable* to those who are subject to them. The heuristic reading, we saw, can be understood as a method to help us uncover the dependent reasons that exist in different circumstances. Meanwhile, the exploration in Chapter 3 of the overlapping consensus as a set of shared policies about weights identified a different concern, one that had to do with the practical matter of living together in a political society.

The Malaysia cases tell a story of the interaction between these two concerns – the concern for justifiability on one hand, and of the need for practical convergence in shared policies in order to live together well, on the other. Each set of issues detailed in the stories above – body-snatching, custody and conversion battles, disputes about freedom of expression and places of worship – shows us a breakdown of convergence on how to live together, *because of the failure of justifiability*. What is striking about these cases is that there is ultimately no resolution, no convergence about how to get along together. The practical need to agree on shared policies in order to live successfully together simply is not met. In the body-snatching cases, there is no agreed way to deal with the situation – each new case of body-snatching simply deepens the mistrust between religious groups and breaks the unity of the polity. The custody and conversion cases present particularly acute cases of the failure to converge on a practical resolution resulting in legal limbo for individuals. Similarly, the demolition of Hindu temples is an ongoing sore point, with worshippers living in constant uncertainty about having a place in which to worship. Perhaps only the "*Allah*" case comes close to at least

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[17] US Bureau of Democracy, Human Rights, and Labour, 2008 International Religious Freedom Report. http://www.state.gov/g/drl/rls/irf/2008/108413.htm, accessed on 10 Dec 2011.

having a practical solution for getting by, but even there the looming legal appeal creates uncertainty.

Such failure to live together successfully points back to a failure of justifiability. The priority of the concern for justifiability becomes clear when we ask the question – what caused the practical task of living together to break down, in each of these cases? As we shall go on to look at, in each of these different cases, asking the question of "Could this policy be reasonably rejected?" reveals the underlying reasons for the injustice in each case.

Uncovering reasons, encountering complications

Each of these cases is unjust because it fails the test of justifiability. When we ask the question posed by the heuristic reading of Rawls's reasonableness requirement – "Why might (the person concerned) reasonably reject the (legal or administrative) decision/policy of the authority?", we find that in each case, there are good reasons to reject the situation, reasons based ultimately in the well-being of the individual, which is supposed to be safeguarded by the government.

Let us begin with the conversion and custody cases, which involve, either directly or indirectly, the right to exit the Muslim faith. Lina Joy and Subashini each have a fundamental interest in shaping their life according to their conception of the good; their well-being requires, as a background condition, the freedom to choose between valuable ways of life without coercion. As a result, Lina Joy's situation, where she is prevented from leaving the Muslim faith, undermines her well-being. Moreover, given that the authority of her government is premised on its usefulness as an instrument for serving the interests of its citizens, this is a case where she might reasonably expect her government to step in to guarantee her a right of exit.[18]

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[18] Raz observes that it is to be expected that the relationship between liberal multiculturalism and various non-liberal cultures should be a shifting one. He says, "Since (liberal multiculturalism's) respect of cultures is conditional and granted from a point of view outside many of them, there is little surprise that it finds itself in uneasy alliance with supporters of those cultures, sometimes joining them in a common front while at others turning against them to impose ideals of toleration and mutual respect, or to protect the members of those very cultures against oppression by their own group." (Raz, "Multiculturalism: A Liberal Perspective," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics (Revised Edition)* (Oxford: Clarendon Press, 2001), 183) He also makes the point that being in a multicultural society often makes cultural groups more repressive than they would be were they to exist in relative isolation." (Multiculturalism, 185) – one explanatory

The same criticism would also apply, though indirectly, in the Subashini case, since the gravity of converting minors to Islam with only one parent's consent derives in part from the fact that conversion to Islam in Malaysia at the moment is a one-way street, with no legal right of exit. In both of these cases, not allowing a right of exit from Islam poses a threat to the well-being of citizens who are Muslim. Because the justification for a principle of toleration is based on the good of *individuals*, applying a principle of toleration to a multi-religious society like Malaysia would not extend to allowing any religion the right to deny exit to its members.[19]

As for non-Muslims not getting legal redress in civil courts for cases which involve Muslims, and at the same time not having *locus standi* in the *syariah* court (problems brought out by the Moorthy burial and Subashini custody cases), those affected could very reasonably charge the government with failing to protect the non-Muslim's well-being, because not having access to legal redress frustrates their pursuit of the significant projects and relationships they have set upon.[20] In the Subashini case, I think it would be fair to assume that one of the significant projects of her life was to pursue the valuable activity of being a good mother to her children. The legal limbo in which she finds herself dooms this ambition to failure. Given that her case is but one instance of a systemic bias in the existing legal rules, there is reason to call her predicament, and the rules which permit it, unjust.

In the 'body-snatching' cases, although the dead-person's well-being can no longer be affected,[21] there is a public good argument to be made against such body-snatching practices by the Muslim religious authorities. One of the effects of these body-snatching cases is that they create an atmosphere of uncertainty. Such uncertainty harms all non-Muslims, since the practice of body-snatching gives rise to doubt over whether they will be able to successfully complete their life in their chosen faith (or none), given that their religious status could be subject to dispute

hypothesis for why conversion-related cases are so sensitive in Malaysia is that Malaysian Muslims feel threatened by the presence of a significant minority of adherents of other religions.

[19] "Multiculturalism," 190. Raz calls the right of exit a "limit of toleration". The other limits which he lists are, in denying communities the right to repress their own members, and in discouraging intolerant attitudes to outsiders.

[20] For Raz, frustrating a person's pursuit of the projects and relationships he has set upon constitutes doing harm to that person. (*Morality of Freedom*, 413, Chapter 15, "Freedom and Autonomy")

[21] Harm to well-being, in its ordinary use, is forward-looking - "(t)o harm a person is to diminish his prospects, to affect adversely his possibilities." *Morality of Freedom*, Chapter 15, "Freedom and Autonomy," 413-4.

after their death. This doubt in turn undermines the wholeheartedness necessary to lead a successful life. It could be argued therefore that non-Muslims, therefore, have a collective interest in being assured that their religious status will not be subject to dispute after their death, unless an open hearing in the civil courts can prove that they had indeed been converted.

Moreover, the body-snatching cases have a negative impact on the well-being of the family members left behind, and they can reasonably reject the practice as unjust. Consider Moorthy's wife, Kaliammal. Her well-being is compromised by not being able to obtain legal recourse in the civil courts, because this frustrates her project of living her life as a Hindu woman, married to someone of the same faith and part of a family who practises the same faith. Her assessment of how successful she has been in living a life of faith does not concern herself only but also her family. Judging from the evidence adduced to support her claim that her husband had not in fact converted, she was keen to vindicate the success and integrity of Moorthy's life as a follower of Hinduism, for if he had indeed converted to Islam, he would have failed in the project of being a good Hindu. The fact that in such cases the decision as to a person's religious status lies with the *syariah* courts, the impartiality of which is not beyond doubt in such cases, makes this case one of illegitimate authority on the part of the government.

The reasons for rejecting the demolition of Hindu temples and the threat of denying the use of "*Allah*" to all but the Muslim community have to do with freedom of expression and how that connects with well-being.[22] We validate our chosen way of life by expressing it in the public sphere. Public expression of a way of life serves to reassure its adherents that they are not alone, that their problems and experiences are known to others, and gives the way of life the stamp of public acceptability. Free expression is thus a public good because it perpetuates the existence of valuable ways of life. By denying public expression to a way of life, "the government restricts and impedes the ability of that way of life...to gain public recognition and acceptability".[23]

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[22] I take these arguments from Raz, "Free Expression and Personal Identification" in *Ethics in the Public Domain*.
[23] "Free Expression," 162.

Given that public worship conducted in religious buildings is an integral part of the exercise of many non-Muslim religions, the demolition of religious buildings denies those communities the validation that public worship enables. The Malaysian government's response that the demolitions are not aimed at the religious buildings *per se* but rather take place because of the buildings' illegal status would be insufficient to deflect the accusation of injustice, if it turned out to be true that the government was not allocating sufficient land for the Hindu community to build places of worship sufficient for their numbers.

As for the "*Allah*" controversy, the Christian and Sikh communities in Malaysia had, as a matter of traditional practice, habitually made use of the term "*Allah*" to describe their respective gods. The government's decision to restrict the use of the term to the Muslim community denied the Christian and Sikh religions the public validation that comes from a community's sharing their faith through the published word. Moreover, precisely because of the role of public expression in validating a way of life, censorship of public expression takes on a wider negative significance, which is to express "official, authoritative disapproval and condemnation of the style of life of which the censored communication is a part".[24] In the "*Allah*" case, denying Christians and Sikhs the right to use the word to refer to their god constitutes a message of disapproval and rejection of their entire way of life.

In addition, the ruling against non-Muslims using the term "*Allah*" also fails adequately to appreciate that the different major religions are not just incompatible but rival ways of life.[25] That is, Islam and Christianity are not just incompatible (meaning they cannot be adopted by the same person at the same time). More than that, they are rival ways of life, meaning that being an adherent of one entails disapproving of some aspects of the other. Fundamentally, Islam and Christianity disagree on whether the man Jesus is God ("*Allah*"), and trying to remove this deep

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[24] "Free Expression," 156-7. Raz emphasises that this account of censorship as insult is not merely of the views or opinions censored but of the whole style of life of which they are a part." ("Free Expression," 153) Raz deems this second argument the more powerful of the two, in some ways. (See "Free Expression," 158).

[25] Raz makes this distinction in "Free Expression," 165-6. He says, "A Christian can approve of the way of life of the Muslim, and vice versa, in that they can and should find each other's way of life valuable and worthwhile. But not without reservations. There are aspects of the other's practices, attitudes, and beliefs that each of them must take exception to, must disagree with. Disagreement, condemnation, and even hostility to certain aspects of rival ways of life is an essential element of each way of life."

disagreement by awarding the word to one party rather than another is to seriously underestimate the problem. To deny the use of "*Allah*" to non-Muslim religious communities would be to demand that these communities make a conceptual shift in their community's understanding of their god. For Christians, the government's suggestion was that they should replace "*Allah*" with the general term for god, "*Tuhan*". However, for Malay-speaking Christians, "*Tuhan*," would not be a satisfactory substitute since the two terms are used to refer to two distinct concepts in the Malay bible. This deep rivalry is precisely why a policy of toleration is needed in the first place. For the state to favour Islam in this matter betrays its responsibility to safeguard the well-being of *all* its citizens by ensuring freedom of expression. The official condemnation conveyed by such censorship alienates people from their society, harming their well-being by making them feel less than a full member of their society.[26]

In each of these cases we have found reasons, grounded in the well-being of individuals, to reject the policies/practices in question. The existence of these reasons helps us make the assessment that each of these situations is unjust, since they demonstrate that the test of justifiability is not met.

While thinking about the issues with a concern for justifiability leads us to the conclusion that these situations are unjust and therefore must be changed, the political realities of Malaysia complicate the picture by pointing us to the considerable obstacles which stand in the way of rectifying some of these. While issues such as the demolition of Hindu temples and the use of "*Allah*" are resolvable given sufficient political will, the issues that touch on *syariah* law are much less tractable. There are, first of all, constitutional impediments to legal reform – Islam is a matter of state law, which means that the federal government in power, even if they had the political will, would not have the power to unilaterally change the situation. As things stand, the federal government has limited wherewithal to impose limits on what *syariah* courts can or cannot do; the Malay *Sultans* (rulers), who are constitutionally designated the guardians of the Islamic faith in the country, have the right of veto for any law touching on *syariah* law. The problem is not merely political or legal, but also a theological problem internal to Islam. At present, the

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[26] See "Free Expression," 157 for Raz's detailed argument for this.

state of Negri Sembilan is the only state in Malaysia whose *syariah* law contains provisions for a Muslim to renounce his/her faith. If a guarantee of a right of exit from any religion is to be put in place for all Malaysians, the Muslim community would also need to engage in serious theological deliberation to ascertain whether they can find a theological basis for allowing conversions out of Islam.

Secondly, the Malaysian population is majority Malay-Muslim. As a matter of political survival, most governments would be chary of alienating Muslim voters by attempting to guarantee a right of conversion out of Islam, unless there were first a shift in Muslim opinion on the matter. In short, the politics of the case tells us that a practical convergence on an alternative, just policy, which guarantees the right of exit from the Muslim faith, is unlikely in the immediate future. Just as Rawls describes the emergence of the practice of toleration in Europe as a fortuitous historical occurrence, so also the establishment of a right of exit from Islam in Malaysia will likely take a significant shift in the political and social realities in order to obtain.

How epistemic abstinence silences the verdict of injustice

Notice how in the previous section we were able to come to an assessment of injustice. Using the heuristic reading of Rawlsian justifiability, we asked, for each set of circumstances, whether it could be reasonably rejected. On the basis of the reasons that emerged, many of which reflected Razian concerns about well-being, we concluded that the various situations were unjust. In this section, I want to draw out the contrast with the standard interpretation of Rawls, which requires epistemic abstinence, and on which a verdict of injustice could not be straightforwardly obtained.

Recall that Rawls's starting point in looking for a shared basis for determining the principles of justice for a constitutional democracy is "the public culture itself as the shared fund of implicitly recognised basic ideas and principles".[27] If Malaysia were to fall under the category of society to which

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[27] *Political Liberalism* 8. In the Preface to the Revised Edition of *A Theory of Justice*, he calls Justice as Fairness as a "philosophical conception for a constitutional democracy". (*A Theory of Justice (Revised Edition)*, xi)

Rawls's arguments in *A Theory of Justice* or *Political Liberalism* should apply, then such judgements of injustice would be straightforward. But Malaysia is not a case where the public culture sees an equal liberty of conscience as a "fixed point" or a "settled conviction".[28] Malaysia may have inherited a policy of toleration from her British colonial rulers, but within the Malaysian public culture, it is not clear that anything like an *equal* liberty of conscience would form a fixed point in the Malaysian citizenry's considered judgements of what is just. Because of this, it is not clear that Rawls's argument justifying an equal liberty of conscience can directly apply.

To see this, consider - to whom is the justification of the principles of justice directed? Rawls distinguishes three points of view as relevant to justification of justice as fairness as a moral conception: that of the parties in the original position, that of citizens in a well-ordered society, and that of us, observers from outside the system.[29] It is from the third point of view – that of you or me – that justice as fairness must be assessed. On Rawls's account, a substantive theory like justice as fairness is only justified when there is "sufficient convergence"; where "a basis is established for political reasoning and understanding within a public culture", enabling the members of that society to "make mutually acceptable to one another their shared institutions and basic arrangements, by citing what are publicly recognized as sufficient reasons, as identified by that conception."[30] This description of justification clearly does not apply to the first viewpoint - that of the parties situated behind the veil of ignorance. That viewpoint is merely the bridging decision mechanism connecting the procedure of justification to its substantive results (viz., the principles of justice); it is not a perspective from which the theory can be assessed as to justification. Rawls tells us that justice as fairness is only justified from the second viewpoint - that of citizens in a well-ordered society. The fact of justification is modelled by the "unanimous agreement of the parties in the original position."[31] This leaves the third viewpoint – ours; the outsider. The argument from the original position is addressed to us, Rawls's readers. And it only succeeds if its

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[28] Note the dis-analogy with Rawls's favoured example of Europe after the wars of religion in the sixteenth and seventeenth centuries.
[29] John Rawls, "Kantian Constructivism in Moral Theory (1980)" in *Collected Papers* (Cambridge, Massachusetts: Harvard University Press, 1999), 320.
[30] "Kantian Constructivism," 305.
[31] "Kantian Constructivism," 339.

premises accord with our considered judgements, implicit in the public culture of our society. For justice as fairness to count as a justified moral conception for us, we must agree with the "model-conceptions"[32] of "freedom" and "equality", and "moral persons" that Rawls outlines. Thus Rawls's theory of justice as fairness, rather than merely stating facts, seeks to convince us of the implications of what our modern, democratic societies already believe.[33] But if justifiability indeed requires shared reasons, then this is also why, for a society where Rawls's model conceptions are *not* implicit in the background culture, the argument for the principles of justice does not go through.[34]

Nonetheless, could Rawls not say that his arguments apply to *any country which* **claims to be democratic**? After all, he does say that "(j)ustice as fairness is a political conception of justice for the special case of the basic structure of a modern democratic society."[35] Since Malaysia would classify itself as a democracy, this would seem to give Rawls some purchase on the Malaysian case. In what follows, I argue that this will not ultimately work, because while Malaysia is a democracy, there is no agreement in Malaysian public culture on the liberal conceptions of freedom and equality needed for Rawls's original position argument for the two principles of justice.

On the proposed approach, what Rawls would need for the argument from the original position to go through is to show that Malaysian public culture contains a conception of itself as a fair system of cooperation between free and equal persons. This can be broken down further into two conceptions – first, a conception of the person as free and equal, and second, its companion conception of society as a scheme of social cooperation over time.

The conception of a person that Rawls needs for the argument from the original position to work is that of a person possessing two moral powers, as follows:

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[32] "Kantian Constructivism," 307.
[33] "Kantian Constructivism,"354.
[34] On this point, see Rawls's explanation of why a hypothetical and nonhistorical agreement such as that in the original position can bind, in John Rawls, *Justice as Fairness: A Restatement,* ed. Erin Kelly (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2001), 17, §6.4, 17.
[35] *Justice as Fairness*, 14.

a. a capacity for a sense of justice – the capacity to understand, apply and act from principles of political justice that specify the fair terms of social cooperation; and

b. a capacity for a conception of the good – the capacity to have, revise and rationally to pursue a conception of the good; what one considers of value in human life.

Such persons are conceived of as equal in virtue of the fact that they possess the above moral powers to the requisite degree of being a fully cooperating member of society over a complete life. This equality is modelled in the original position by the fact that the citizens' representatives are "symmetrically situated" and have equal rights in reaching an agreement about the principles of justice.[36] The persons are considered free because they regard themselves and other citizens as capable of standing apart of their particular conception of the good. This means that their identity as citizens is not affected by changes in their specific conceptions of the good.[37] They also consider themselves as free because they regard themselves as self-authenticating sources of valid claims, meaning that they see themselves as entitled to make claims on their institutions so as to advance their (permissible) conceptions of the good.[38]

We begin to see why the case of Malaysia is problematic. For neither Rawls's conception of freedom nor that of equality seems to have a firm grip. Equality obtains only partially – although citizens are viewed as responsible, cooperating members of society, the full-blown liberal conception of equality is not accepted. In the public understanding, solidified in the constitution, the indigenous peoples are not symmetrically situated with respect to their non-indigenous counterparts. Freedom, too, does not obtain because for Muslims in particular, their identity as indigenous citizens, or "*bumiputera*," is tied to their religious and cultural identity. [39]

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[36] *Justice as Fairness* 20.
[37] *Justice as Fairness* 21.
[38] *Justice as Fairness* 23; Rawls makes the contrast here with a slave society, where slaves are not recognised as self-authenticating sources of valid claims, or indeed, as persons at all.
[39] According to Article 160(2) of the Malaysian Constitution, "Malay" means a person who professes the religion of Islam, habitually speaks the Malay language, and conforms to Malay

Let us turn to the second conception needed for the argument from the original position to work – Rawls's conception of social cooperation. This conception has three essential features:[40]

a. Social cooperation is distinct from merely socially coordinated activity, in that it is guided by publicly recognised rules and procedures which those cooperating accept as appropriate to regulate their conduct.

b. A notion of the fair terms of cooperation, which each participant may reasonably be expected to accept, provided that everyone else likewise accepts them.

c. Cooperation as including the idea of each participant's rational advantage, which is the advancement of their conception of the good.

This second conception arguably exists in Malaysian public culture, though subject to the restrictions arising from the special position of the indigenous peoples and the status of Islam as the official religion.

If we understand justifiability as requiring shared reasons, any attempt to make the argument from the original position to Rawls's two principles of justice would lack bite because of the absence of consensus regarding the fundamental conceptions of freedom and equality. In particular, there is no agreement in Malaysian public culture that certain historical factors are irrelevant to the common good idea of justice. There would not be consensus that these factors should be excluded from the original position. As a result of the distinction made between the original inhabitants of the land (the Malays and other indigenous peoples) and later immigrants (among them the Chinese and Indians), the Malaysian constitution enshrines the "special position" of the Malays and other indigenous peoples. With this special position came the entrenchment of Islam as the official religion of the federation.[41] Thus the nub of the problem is that, while Malaysia might be constitutionally democratic, it is not a liberal society. That is, it is not a society

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custom. As Rawls notes, history offers numerous examples, of which this is one, where basic rights and recognised claims depend on religious affiliation (and social class). (See *Justice as Fairness* 22).

[40] *Justice as Fairness* 6.

[41]See Articles 3 and 153 of the Malaysian Constitution. Other privileges such as quotas in admission to higher education and the civil service are also constitutionally guaranteed.

where the principles of justice governing the basic structure of society are commonly acknowledged to be those chosen by citizens deemed *free and equal*.

Perhaps due in part to such considerations, Rawls in *The Law of Peoples* allows for the Society of Peoples to be extended to what he calls "decent hierarchical peoples".[42] For these, there is no original position argument deriving the form of the basic structure of their society. This is because "(a)s it is used in a social contract conception, an original position argument for domestic justice is a liberal idea, and it does not apply to the domestic justice of a decent hierarchical regime."[43] Further, "(o)nly equal parties can be symmetrically situated in an original position,"[44] and equality is not a shared premise in the Malaysian case. Rawls considers decent peoples one variety of "well-ordered peoples",[45] and they are marked by the following two criteria:[46]

1) They are peaceful, not aggressive; and
2) The second criterion has three parts:
    a. Their law secures human rights – specifically, they have "the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)."[47]
    b. Their law specifies a decent scheme of cooperation. Persons are seen as responsible and cooperating members of their respective groups, without them necessarily being equal citizens.
    c. Legal administrators must believe that the law is guided by a common good idea of justice.

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[42] Rawls, *The Law of Peoples* (Cambridge, Massachusetts: Harvard University Press, 1999), 4.
[43] Rawls goes on to say, "That is why the Law of Peoples uses an original position argument only three times: twice for liberal societies (once at the domestic level and once at the Law of Peoples level), but only once, at the second level, for decent hierarchical societies." (*Law of Peoples* 70)
[44] *Law of Peoples* 70.
[45] *Law of Peoples,* 4.
[46] These are stated in *Law of Peoples*, 64-67.
[47] *Law of Peoples*, 65.

In spelling out the content of the human right to liberty referred to in the second criterion, Rawls makes clear that this would not be the same as the rights to liberty guaranteed by the first principle of justice in a liberal society for which the arguments of justice as fairness would apply. Rather, the right to liberty is a more restricted, "special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide"[48] Rawls further elaborates that a decent hierarchical society must admit

> a sufficient measure of liberty of conscience and freedom of religion and thought, even if these freedoms are not as extensive or as equal for all members of the decent society as they are in liberal societies. Though the established religion may have various privileges, it is essential to the society's being decent that no religion be persecuted, or denied civic and social conditions permitting its practice in peace and without fear.[49]

Once a society is deemed to meet these two criteria, Rawls in *The Law of Peoples* says that the Society of Peoples should accept them as members in good standing. For such societies, he says, forceful intervention by diplomatic and economic sanctions, or military force, cannot be justified.[50]

Malaysia seems to fit well into Rawls's category of a decent hierarchical society. Certainly it is neither a slave society nor one where ethnic groups are systematically butchered. The coalition which has governed the country since independence in 1957, the Barisan Nasional (BN), is organised along communal lines, with each party providing representation for a different ethnic group in the country. Citizens thus have an avenue of participating in the political decision-making of the country, without them having equal rights, since the *bumiputera* (indigenous peoples) of the country have special privileges, safeguarded by the constitution. One might question whether a society where one religious group (in the Malaysian case, Islam), denies a right of exit to its adherents, could still be counted

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[48] *Law of Peoples,* 79.
[49] *Law of Peoples,* 74.
[50] *Law of Peoples,* 80.

as "reasonable".[51] Rawls clarifies, however, that what is required of decent hierarchical societies is not that they are reasonable, but that they are "not fully reasonable".[52] Decent hierarchical societies occupy the gap between the fully unreasonable and the fully reasonable.[53] Whereas full reasonableness, such as is seen in justice as fairness, is concerned with the individual's rights to various freedoms, decency appears to set a lower bar, requiring only the freedom of the religious groupings. Once we allow for the categorisation of Malaysia as a decent hierarchical society, Rawls's recommendation for a liberal people's foreign policy toward Malaysia would be to recognise her as a full member of the Society of Peoples.

Why is Rawls so permissive when it comes to non-liberal societies? The answer is twofold. First, Rawls considers a people's "*amour-propre*" one of the "fundamental interests" of a people. [54] He elaborates:

> This interest is a people's proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments...this interest shows itself in a people's insisting on receiving from other peoples a proper respect and recognition of their equality.[55]

Rawls is clear that such self-respect is a good. He says:

> [it is] a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. In this way political society is expressed and fulfilled.

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[51] For instance, one way of reading Rawls in *The Law of Peoples* where he lists the conditions for a decent hierarchical society, is to think that freedom of religion must include freedom of exit. That is, the "unequal liberty" of conscience Rawls refers to would be something like the UK, where there is an established church, but still the guarantee of a right to exit. My sense is that such a reading of Rawls would set the bar too high for "decent peoples". Given his arguments in favour of taking into account the amour-propre of decent peoples, it would be strange for Rawls to be setting too high a bar at this early stage, since it is likely to rule many peoples out from the outset.

[52] *Law of Peoples,* 74.

[53] *Law of Peoples,* 74.

[54] *Law of Peoples,* 34. Rawls says he follows Rousseau's term.

[55] *Law of Peoples,* 34-5.

This is no small thing. It argues for preserving significant room for the idea of a people's self-determination and for some kind of loose or confederative form of a Society of Peoples.[56]

The argument, it seems, is this:

1. The *amour-propre* of a people is a good.

2. The maintenance of a society's *amour-propre* requires having respect from other peoples.

3. Coercive intervention[57] in a society in the form of political, economic or military sanction or other coercive measure constitutes a denial of respect for that society.

4. Such denial of respect requires strong reasons.

5. An example of a strong reason for intervention would be the society's violation of core human rights.

6. In the case of decent consultation hierarchies, there is no such strong reason to intervene.

7. Therefore decent peoples should be recognised as fully-fledged members of the Society of Peoples.

One might question Rawls's implicit assumption that coercive intervention is the only alternative to recognising a people as a fully-fledged member of the Society of Peoples. As we shall see in the next section, if one can both respect a people and express reservations about their unequal treatment of part of their population in a way that is not coercive, then Rawls's argument would not take him all the way to his conclusion in (7).

Rawls's second reason for recommending full recognition of decent peoples in the Society of Peoples is that decent societies have an internal mechanism for change, which makes it more probable that change in a liberal direction will take

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[56] *Law of Peoples,* 61.
[57] That Rawls has coercive intervention in mind is clear in his writing. He says, for instance, that "Liberal peoples must try to encourage decent peoples and not frustrate their vitality by *coercively insisting* that all societies be liberal" (*Law of Peoples*, 62, italics mine). See also 62, where he abjures "coercively insisting that all societies be liberal".

place. Because decent peoples have a consultation hierarchy which allows citizens both a substantial political role in making decisions and a right of dissent, "the common good conception of justice held by decent peoples may gradually change over time, prodded by the dissents of members of these peoples."[58] Rawls thinks that this internal change is likely to tend in a liberal direction, because of the people of the decent hierarchical society acknowledge the evident superiority of liberal institutions.[59] Rawls therefore urges liberal peoples not to withhold respect from decent peoples by denying them good standing in the Society of Peoples, as this might stifle any organic change in a liberal direction.[60] Rather, Rawls recommends giving decent peoples an equal place in the Society of Peoples, thus maintaining a climate of mutual respect in the Society of Peoples, which will in turn create a supportive environment for liberal reforms to flourish.[61]

While it is a fair observation that internal change can more easily happen in a decent consultation hierarchy than in a system where internal dissent is forbidden (for example, in a dictatorship), the question of whether internal change in a decent hierarchical society is *in fact* likely to favour a liberal slant, remains a question for empirical study. Given the diversity of comprehensive views present in the modern societies, one might argue that change in a decent hierarchical society could just as often tend in the direction of, for example, theocratic government. Much would depend on the composition and background of the decent people in question, and the historical dynamics at play. It is not self-evident that the citizens of a decent hierarchical society are more likely than not to look to liberal democracies and make the judgement that those societies are organised in a superior fashion.

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[58] *Law of Peoples,* 61. There is some analogy to Rawls's discussion of toleration of the intolerant in *Theory of Justice*, where he says that "The liberties of the intolerant may persuade them to a belief in freedom. This persuasion works on the psychological principle that those whose liberties are protected by and who benefit from a just constitution will, other things equal, acquire an allegiance to it over a period of time." (*Theory of Justice*, 192)

[59] *Law of Peoples,* 62. Rawls says that, "if a liberal constitutional democracy is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognise the advantages of liberal institutions and take steps toward becoming more liberal on its own".

[60] *Law of Peoples,* 61.

[61] *Law of Peoples,* 62.

Notice that Rawls's question in *The Law of Peoples* involves a shift in perspective from his question in *A Theory of Justice* or *Political Liberalism*. The question in *The Law of Peoples* is about how a liberal people should run its foreign policy, whereas the focus in his earlier works is solidly domestic. We have just seen Rawls's arguments about the foreign policy stance appropriate for a liberal people to take towards a decent society such as Malaysia. But this was not the question we started this section with. Our initial focus was a domestic one – we wanted to see if the standard understanding of Rawlsian justification would allow us to conclude that the Malaysian cases detailed in the first part of this chapter were cases of injustice. To put the point more sharply, if Rawls were to take the perspective of the Hindu woman Subashini, fighting for her younger child not to be unilaterally converted to Islam but finding herself without recourse in the civil courts, what could he say? Posing the question in this manner reveals why Rawls's answer in *The Law of Peoples* might leave us unsatisfied. Telling Subashini that philosophical investigation reveals that Malaysia is a decent society is neither here nor there; it does not address her plight.

Although none of the following is explicitly mentioned in the Rawls's writings, the standard reading of Rawls on justification leaves him a few things he could say on Subashini's behalf. First, Rawls could affirm her negative judgement of her situation, in the following manner. Insofar as Subashini lives in a world where she can see for herself that there are liberal democracies outside where all citizens have equal legal standing in the courts, she would be making a true judgement that those liberal systems are superior to her own society's basic structure.[62] This is precisely the argument which in *The Law of Peoples*, undergirds Rawls's recommendation of non-interference with decent peoples.

Second, Rawls could encourage Subashini to voice her dissent within her own society's common good idea of justice, so as to start the process of change towards having more liberal institutions. This would be in keeping with Rawls's vision of a decent people "recognis(ing) the advantages of liberal institutions and tak(ing) steps toward becoming more liberal on its own." [63] He could point out that

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[62] This follows from Rawls's claim that the advantages of liberal constitutional democracy are recognizably superior to other forms of society (*Law of Peoples,* 62).
[63] *The Law of Peoples*, 62.

it is entirely within the spirit of Malaysia's rules of social cooperation that Subashini's ethnic political representatives (because Malaysian politics is organised along ethnic lines) should speak out for legal reform on her behalf, and make common cause with other non-Muslim political entities which share the same interest.

That Malaysia is a self-acknowledged democracy, with at least a minimal conception of society as a system of social cooperation, is a place to start, since, as Rawls puts it, for democratic societies, "citizens do not regard their social order as a fixed natural order, or as an institutional structure justified by religious doctrines or hierarchical principles expressing aristocratic values."[64] Malaysia being a democracy, all the political levers of democratic participation are available to Subashini – dissent, voicing of that dissent via political channels, voting against the ruling party if no action is taken on the matter, and so on. Nothing in Rawls's theory requires that Subashini keep silent about how she experiences the impact of her situation. Because a decent people is a well-ordered society, effectively regulated by a publicly recognised common good idea of justice, that common good idea of justice is able to serve as the basis for adjudicating political disputes.[65] And while the specific argument from the original position to the two principles of justice may not be available to the citizen of a decent consultation hierarchy, the method of reflective equilibrium is. Assume for a moment that Malaysia as a decent people had achieved general reflective equilibrium before the Subashini case – that is, citizens affirmed the same public conception of political justice. With Subashini's court case and its manifestly unsatisfactory outcome, there would have been a disturbance in the general reflective equilibrium of the people. This would put in motion forces for change. Because in a non-liberal democracy no less than in a liberal one, "a conception of justice is not fixed once and for all,"[66] but is rather an unfinished project,[67] for a decent people there is always hope for reform in a liberal direction,

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[64] *Justice as Fairness,* 6.

[65] Rawls considers reasonable liberal peoples as well as decent peoples "well-ordered peoples" (*Law of Peoples* 4). Elsewhere, he says that "An essential feature of a well-ordered society is that its public conception of political justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just. This is the meaning of public justification." (*Justice As Fairness*, 27)

[66] *Political Liberalism,* 399.

[67] *Political Liberalism*, 400-403.Rawls refers here to the constitution as an unfinished project.

since each new generation affirms, amends or remakes the legacy of the past in accord with its considered judgements.[68]

At the same time, however, Rawls has forfeited the international community's speaking rights by including decent peoples in the Society of Peoples. The international community's engagement with the reality of Malaysia's imperfect policy of toleration ends at the determination that Malaysia is a decent consultation hierarchy. By Rawls's lights, while Subashini could rightly speak up within her society against her situation, she would not have or feel "the moral support of the whole world", to use the phrase of one of the leading drafters of the Universal Declaration of Human Rights.[69] By his definition of "decent" as including societies which fulfil just a "a special class of urgent rights", and not requiring an equal liberty of conscience,[70] Rawls's theory of international justice assigns the international community the role of the silent observer who watches and hopes for the best. Liberal peoples, *qua* peoples,[71] may wish Subashini luck, but may not speak up or intervene on her behalf.

Speaking out about injustice while affirming the moral importance of national sovereignty

The heuristic reading of Rawlsian justifiability gives us a way to both speak out about injustice *and* to affirm the moral importance of national sovereignty. Because the heuristic reading does not require epistemic abstinence, it does not result in a need to hold back moral criticism of a society, simply because it does not share the liberal conceptions of freedom and equality. As we have seen in the "Uncovering reasons" section above, making use of the heuristic device of reasonable nonrejectability helps us see the reasons there are for thinking a certain situation is unjust, and enables us to call injustice what it is, wherever we find it.

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[68] *Political Liberalism,* 399.
[69] Charles Malik said to the United Nations General Assembly on the day they were to vote on the adoption of the Declaration, "I can agitate against my government, and if she does not fulfil her pledge, I shall have and feel the moral support of the whole world." As quoted in Jonathan Wolff, *The Human Right to Health* (London: WW. Norton & Company, 2012).
[70] *Law of Peoples*, 79.
[71] Individuals, presumably, are free to speak up in their personal capacities.

At the same time, the heuristic reading is able to take on board Rawls's concern about the moral importance of national sovereignty. The heuristic reading, by removing the requirement of epistemic abstinence in Rawls, brings out the common threads in his and Raz's views on the forms of political power. What they share emerges particularly clearly in the case of foreign policy. Both Rawls and Raz are chary of coercive foreign intervention. Their concern about forceful intervention has to do with justifiability; with the reasons that would be needed to justify such intervention. Each thinks that because there are strong moral reasons to value national sovereignty, coercive intervention requires special justification.

The moral case for national sovereignty starts with individual well-being. As we have already seen in the previous section with Rawls's concerns about the "*amour-propre*" of a people, Rawls emphasises that enjoying respect as a people-group is good for individual well-being. Raz is entirely in agreement with Rawls on this point. He notes that the fact that our world is organised in nation-states shapes people's self-perception and hence their well-being. This historical and sociological fact – that individual self-respect is affected by the esteem in which one's nation is held – gives rise to an argument for the moral importance of national self-government: "individual dignity and self-respect require that the groups membership of which contributes to one's sense of identity be generally respected and not made a subject of ridicule, hatred, discrimination, or persecution".[72] Among the behaviours ruled out by the moral importance of national sovereignty would be coercive intervention for anything less than compelling reasons of human well-being. This acknowledgement of the reasons we have to value national sovereignty and to be wary of unjustified, forceful foreign intervention is, I believe, is a virtue of both Rawls's and Raz's accounts. The argument for the moral importance of sovereignty seems to me sound, accurately describing the relationship between individual well-being and the groups to which we belong.

Being able to begin from where our international order currently stands is an advantage. Post-Westphalia, we find ourselves in a world of nation-states, where there are moral norms (respect for national sovereignty, some understanding of the rules of engagement for armed conflict) which allow us to get along together in

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[72] Raz, "National Self-Determination," in *Ethics in the Public Domain*, 133-134.

relative peace and stability. Our situation is akin to Rawls's favourite example of a *modus vivendi* – the emergence of a principle of toleration subsequent to the devastating European wars of religion. While, as Rawls points out, a mere *modus vivendi* is unstable, it is still better than all-out armed conflict. The advantage of the approach to justifiability which I have sketched in the sections above is that it gives us a realistic, non-utopian, account of our current practice of international relations, while at the same time allowing us to level moral criticism where it is due.[73] My proposed approach to justifiability forces us to take seriously the reasons that there are in favour of the status quo, rather than allowing us to bypass those reasons and proceed straight to a reality of our imagining. [74] In doing so, this provides a better basis for change, where it is needed. If, having considered all the reasons there are for the status quo, the balance of reasons lies on the side of change, then we have a better chance of making that change justifiable to those on whom we would impose it. And if the previous chapters are correct about mutual respect for persons requiring justifiability, then we have good reason for choosing this starting point. Thus although, as Leif Wenar observes, Rawls's account in *The Law of Peoples* has attracted "unusually deep misgivings" from his "most sensitive and sympathetic interpreters"[75] for being too conservative, it is this very realism about the world in which we find ourselves, a perspective shared by Rawls and Raz, which we should value as a strength of their common concern with justifiability.

Acknowledging the moral importance of sovereignty is not, however, the same as holding back on calling injustice by its proper name. As Raz rightly points out, there is a gap between the limit of legitimate authority and the limit of

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[73] Leif Wenar argues for Rawls's law of peoples being superior to cosmopolitan theory "both in terms of its resonance with our considered convictions and also in terms of its completeness." (Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," 18). Raz, describing his enterprise, says of his starting point, "We assume that things are roughly as they are, especially that our world is a world of states and of a variety of ethnic, national, tribal and other groups" (Raz, "National Self-Determination," 125).

[74] Leif Wenar has a fascinating argument for the utopian nature of cosmopolitan theory. He refers to this as a proof that "no pure and complete cosmopolitan theory is possible", and it proceeds as follows – 1. A global state with a stable monopoly of coercive power is either impossible or highly undesirable; 2. In the absence of a global state, territorial powers with armed forces that may permissibly protect territorial borders will be a permanent feature of the global order; 3. If territorial powers may permissibly use armed forces to protect territorial borders, then individuals' basic rights and liberties cannot be fully specified without reference to those individuals' territorial affiliation; 4. No complete set of pure cosmopolitan principles is possible. See Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," in *Rawls's Law of Peoples: A Realistic Utopia?*, ed. R. Martin and D. Reidy (Blackwell, 2006), 20-24 for the full elaboration of this argument.

[75] Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," 95-113.

sovereignty.[76] Not every action which exceeds a state's legitimate authority is a reason for other states to interfere in that state's affairs. Thus while the Malaysia cases detailed in the first part of this chapter might be rightly called instances of injustice, *it is a separate question* as to whether there is reason for coercive intervention in a way that infringes Malaysian sovereignty. Moreover, as Raz observes elsewhere,[77] there are many non-coercive forms of government action – offering subsidies for certain activities, rewarding desired activities, etc. This opens up a range of options for governments to take, when they see injustice taking place in a foreign country – if they find themselves in the position of caring about the justifiability of their actions, they are compelled neither to be silent about injustice, nor to stand idly by while it occurs.

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[76] Raz, "Human Rights Without Foundations," *University of Oxford Faculty of Law Legal Studies Research Paper Series*, Working Paper No. 14/2007, March 2007, p11.
[77] *Morality of Freedom*, Chapter 15, "Freedom and Autonomy," 417. Raz makes this point in the context of domestic action by the state, but it applies no less to international relations.

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The Muslim Veil in France and Turkey

This chapter has as its target secularism of a certain sort. Specifically, it examines the French conception of *laïcité* and the Turkish variant of this, *laiklik*, both of which involve a public sphere stripped of all religious symbol and affiliation. By looking at the arguments justifying these forms of secularism, I aim to show that a commitment to liberal justification does not require secularism, nor is such secularism necessarily liberal. The first part of the chapter lays out the background and details of two cases of what might be called 'Secularism v. the Muslim veil', as seen in France and Turkey. In the second part, I proceed to examine these cases through the lens of liberal justifiability, using the different approaches to justification developed in earlier chapters. I conclude that there is no distinctively liberal argument to support the headscarf ban in either France or Turkey, and highlight the need for sensitivity to historical and sociological factors in trying to make policies that are justifiable to citizens.

Turkey

Turkey's 1982 Constitution enshrines secularism as the most important pillar of the state and stipulates that this characteristic of the Turkish state is an "irrevocable" provision and cannot be removed from the Turkish Constitution.[1] Article 2 states, "The Republic of Turkey is a democratic, *secular*, and social state governed by the rule of law…"[2] The overwhelming majority of Turkish citizens - 99.8%[3] - are Muslims, with women in headscarves making up 61.3% of the female

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[1] Article 4 of the 1982 constitution states that the provisions (including secularity) concerning the characteristics of the Republic – which include secularism, "shall not be amended, nor their amendment proposed". From the text of the Turkish constitution, Constitutional Court of the Republic Turkey website, http://www.anayasa.gov.tr/index.php?l=template&id=210&lang=1&c=1, accessed 4 Dec 12.

[2] Taken from the text of the Turkish constitution, Constitutional Court of the Republic Turkey website, http://www.anayasa.gov.tr/index.php?l=template&id=210&lang=1&c=1, accessed 4 Dec 12. Italics added.

[3] CIA factbook, https://www.cia.gov/library/publications/the-world-factbook/geos//tu.html, accessed 4 Dec 2012.

population.[4] In practice, secularism, or *laiklik*, functions as a state ideology in the service of the national effort of development and modernization.

The Turkish understanding of secularism, *laiklik*, is not identical with the French concept. While *laïcité* requires the separation of church and state, *laiklik* is more hands-on about religion, in requiring that the state be the sole custodian of religion, enforcing secularism *by controlling religious matters. Laiklik* allows for the state's encroachment on religion in the public realm, and even in the private realm to the extent that this is deemed necessary to limit the involvement of religion in state affairs. Thus the *Diyanet*, the directorate of religious affairs, oversees religious affairs and education in the name of the state.[5]

Turkey's headscarf ban is justified by Article 2, in spite of the fact that Article 10 of the same Constitution guarantees equality before the law to all citizens, while Article 24 guarantees freedom of conscience and religious belief. Islamic head-covering is viewed by secularists as representing the Ottoman past and religious fundamentalism, and therefore regarded as a threat to the project of Turkish modernization defended by Turkish nationalists.[6]

Legislation prohibiting the wearing of religious garb in public started to appear in the early years of the Turkish republic. The 1925 Hat Law mandated the wearing of western style hats in place of the Islamic *fez*. Those who resisted were severely dealt with.[7] By 1934, Turkey's founding father, Mustafa Kemal Atatürk, had succeeded in implementing strict restrictions on the wearing of religious dress, even by religious authorities such as imams, priests, and rabbis – these were only permitted to wear religious garments during their official duties and in their vocational premises. In contrast with the legislative coercion applied to men to prevent them from wearing religious dress, women were initially only encouraged to

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[4] According to research conducted by TESEV in 2006. Ali Çarkoğlu and Binnaz Toprak, Değişen Türkiye'de Din, Toplum ve Siyaset (Istanbul: TESEV Yayinlari, 2006), 24, cited by Merve Kavakci Islam, *Headscarf Politics in Turkey: A Postcolonial Reading* (New York: Palgrave MacMillan, 2010), 22. Kavakci Islam cites a lower figure later in the book – 61.3%, which I have used, see ibid., 100.

[5] Kavakci Islam 59.

[6] Sabine Berghahn, Gül Çorbacioğlu, Petra Rostock and Maria Eleonora Sanna, "In the Name of Laïcité and Neutrality: Prohibitive Regulations of the Veil in France, Germany, and Turkey", 159. In *Politics, Religion and Gender: Framing and regulating the veil*, ed.s, Sieglinde Rosenberger and Birgit Sauer (Abingdon, Oxon: Routledge, 2012)

[7] Kavakci Islam, 19, mentions İskilipli Mehmed Atıf Hoca, an Islamic scholar, as one of the people who was executed for refusing to wear a hat as mandated by the law.

dress in Western styles. The suggestion to rid themselves of the Islamic headscarf was resisted by the majority of Turkish women.[8] It was the women of the Istanbul elite who were first seen to westernise their appearance by taking off their headscarves. Wives of military officers and federal employees also led the way.

An early case of professional discrimination: In 1972, Emine Aykenar was disbarred from the Ankara Bar Association because "a religious cover could not be compatible with civilized dress and professional outfit." The bar association's president defended the disbarment decision by saying that if they were not removed, then "başörtülü [headscarved women] would fill up every corner."[9]

1980s - Ban on religious head coverings in universities and public service

Following a military coup in 1980, General Evren's government banned the wearing of headscarves for students through a decree of the National Security Council. In 1982, a second headscarf ban followed, this time for government officials. General Evren said, "We will not let *başörtülü* [headscarved women] into the university. We are adamant about that. No one should insist on it. There is no such thing in the religion, anyway." [10] The bans were the culmination of societal changes which took place alongside Turkey's modernisation project. In the late 1960s, a handful of headscarved women began to challenge the stereotype of headscarved women as backward, rural folk who should remain unseen, by moving into the public arena as professionals. These women were middle or upper-middle

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[8] Kavakci Islam, 19. During Turkey's war of independence (1919-1923), headscarved Turkish women from different social strata were very much part of the symbolic discourse, because they represented the struggle of Muslim Turkey and Turkish honour against the Western, non-Muslim, imperialist invasion. The struggles of Turkish women against the harassment of the European enemy, such as pulling off their veil , were used in the war narrative and considered signs of valour by the nation. (Kavakci Islam, 13-14, 31). It was only after the establishment of the Turkish Republic in 1923, that the Turks turned towards Europe to start the project of modernisation. Turkish nationalism became tied up with a belief in a sense of Turkish exceptionalism, distancing Turks from the rest of the Muslim world by making Turkey a unique Muslim-yet-secular country. The urgency to catch up with the developed West found its symbolic expression in the secularisation of a hitherto Islamic society, and the embracing of Western cultural forms, including women's dress. (Kavakci Islam, 16).
[9] Kavakci Islam, 47.
[10] Kavakci Islam, 51.

class, educated, with careers. Their visibility in the public sphere provoked anger in the Kemalists, who had previously been able to relegate headscarved women to the periphery of society.[11]

The 1981 ban was a response to the increasing number of well-educated Turkish women who were wearing the veil and demanding their place in public. The target of the bans was a sub-set of those who wear headscarves. Specifically, it was women who wore headscarves out of religious consciousness and who demanded a legitimate presence in the public sphere.[12] This group tended to be more urban, though they came from diverse backgrounds. Visually, the two groups of headscarved women were distinguished by the pin which the target group used to hold the ends of their headscarf together under the chin. Having a pin under the chin reflected a woman's commitment to following the requirements of Islam strictly, because the pin ensures that the headscarf does not slide back.[13]

On the ground, implementation of the university headscarf ban was uneven, with some universities enforcing it harshly while others took a more light-handed approach.[14] The response was varied. Some veil-clad women transferred between universities. Others chose to suspend their education temporarily. Yet others submitted to the new rules and took off their headscarves. Some wore wigs on top of their headscarves. Others enrolled in online university courses as an alternative method of accessing higher education. [15] The ban extended to government religious schools, with government officials conducting periodic inspections.[16]

1990s – the rise of Islamist politics and secularist pushback

In the mid 1990s, headscarved women became linked with the rise of Islamist politics in Turkey, and in particular with the success of the Islamist Welfare

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[11] Kavakci Islam, 34.

[12] Kavakci Islam, 23.

[13] Kavakci Islam, 27. The other group of headscarved women, deemed by the secular regime as "non-threatening" because they tend to remain within the confines of the private, or not-so-public realms, consists of the rural, or less educated women in low-income jobs, or homemakers.[13] This group wears the headscarf for a variety of reasons, including local culture or tradition and peer pressure, including pressure from male family members.

[14] Kavakci Islam, 51.

[15] Kavakci Islam, 51.

[16] Kavakci Islam, 61, recounts how the headscarved women (*başörtülü kadinlar)* among the school's staff would run and hide during such surprise inspections.

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Party (Refah Party or RP). When the RP came to power in a coalition government in June 1996 and Prime Minister Erbakan publicly stated his aim of expanding freedoms that stifled practising Muslims, including reversing the ban on headscarves in universities, he set the stage for the "post-modern" coup of 1997, which forced RP out of power. The constitutional court subsequently banned Erbakan from politics.

Denial of access to education: The 2005 *Leyla Şahin v. Turkey* case in the European Court of Human Rights (ECHR) is one of the most high-profile cases of the Turkish headscarf ban. Leyla Şahin had completed the first five years of her medical degree (1992-7) at the Cerrahpaşa Medical School of Istanbul University, with headscarf on. In 1998, the headscarf ban was reactivated at her university. As she refused to take off her headscarf, she was unable to complete her education there. She moved to Austria where she was able to complete her degree without taking off her headscarf.[17]

In 2005, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled that Leyla's exclusion from the Faculty of Medicine of Istanbul University did not constitute a violation of Article 9 of the European Convention on Human Rights (ECHR), on freedom of conscience.[18] A main argument in the judgement was that contracting states should have broad discretionary scope in implementing the ECHR, in line with the principle of self-determination. The ECtHR would not intervene unless the interference of the state was not 'justified in principle and proportionate to the aims pursued.' In this case, the Court accepted the overriding importance that the Turkish constitution and political system attributed to secularism, and pronounced that "the interference/violations of fundamental rights

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[17] Kavakci Islam, 83.

[18] Article 9 of the ECHR states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.(as quoted in Sabine Berghahn, "Legal regulations: Responses to the Muslim headscarf in Europe," in *Politics, Religion and Gender: Framing and regulating the veil*, ed.s., Sieglinde Rosenberger and Birgit Sauer (Abingdon, Oxon: Routledge, 2012) 108-9). Violations of Articles 2, 8, 10 and 14 were also denied.

concerning headscarf were acceptable" in Turkey, as part of the legitimate goal of "protecting the rights and freedoms of others and maintaining public order."[19]

The Court assumed the restrictions to have been foreseeable, practised equitably and compatible with the principle of proportionality.[20] In referring to the rights and freedoms of others, the court drew attention to "the impact which wearing such a symbol, which was presented or perceived as a compulsory religious duty, may have on those who chose not to wear it."[21]

Belgian judge Francoise Tulkens dissented, arguing that the aim of the Court was to protect the rights and freedoms of citizens and not in the first place to affirm broad discretionary 'room for maneuver' of states.[22]

The 1997 coup ushered in a difficult time for headscarved women and for religious Muslims in general. The government introduced measures including the "coefficient" system, which made it extremely difficult to graduate from the religious *Imam Hatip* schools to the country's universities. Under this system, the scores of vocational school students, which included *Imam Hatip* students, had to be multiplied by a coefficient of 0.3 rather than 1, resulting in the scores being lower and thus making it much harder for them to enter state universities compared to other candidates not from vocational/religious schools. The government also banned the teaching of the *Qur'an* to children under the age of 12, both in private and in public.[23]

Denial of access to political office: At the 1999 elections, Merve Kavakci Islam was one of two headscarved women elected to the Turkish Parliament as a member of the Virtue Party (the successor to the RP). She refused to take off her headscarf to be sworn in, and as a result was not allowed to take her oath of office. She was

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[19] Fatma Benli, *Legal Evaluation of the Ban Imposed on the University Students Who Wear Headscarf Subsequent to the ECHR's Ruling in Leyla Sahin v. Turkey* (Istanbul: AKDER, 2005), 1-2. Quoted in Kavakci Islam, 83.
[20] Berghahn 109.
[21] Kavakci Islam, 83.
[22] Berghahn 110.
[23] Kavakci Islam 73.

stripped of her Turkish citizenship, and charged with inciting hatred, discriminating against people, insulting the dignity of the state, and attempting to overthrow the regime.[24]

In 2007, in *Kavakci v. Turkey*, the ECtHR ruled against Turkey, stating that Turkey had violated Article 3 of Protocol 1 of the ECHR, which guarantees the right to fair elections. The Court affirmed the Turkish state's concern for protecting the secular character of the state as being within its rights; it only judged that the state's response to Kavakci's action of entering the parliamentary sitting in her headscarf was disproportionate.[25]

In addition, headscarved women were subject to verbal and physical abuse, expulsions, investigations and suspensions.[26] For instance, at the universities, humiliation began at the school gates, where they had to take off their veils at a public site, which these women dubbed the *turban duvari* (turban wall).

During this post-1997 period, the restrictions on headscarved women in public space were tightened, by expanding the boundaries of what was considered public space. Turkey's secularist President Sezer banned headscarved women from his residence, justifying this by saying that because the President represented the Republic, and secularism was the basis of the Republic, the presidential residence constituted a public space, where wearing the headscarf could not be permitted. During Sezer's term as president (2000-2007), he broke with past practice in not inviting the headscarved wives of the prime minister, speaker of parliament, cabinet ministers and parliamentarians to the national holiday celebrations.[27] In universities, the ban on headscarves expanded beyond students themselves to their families. Starting in 1997, Atatürk University in Erzurum did not permit parents who wore the headscarf to attend their children's graduation ceremonies unless they wore wigs in lieu of headscarves.[28] Similarly, federal employees' private lives and that of their spouses became the object of scrutiny. Female federal employees who wore

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[24] Kavakci Islam, 78.
[25] Kavakci Islam 144.
[26] For examples, see Kavakci Islam, 100-102.
[27] Kavakci Islam 87.
[28] Kavakci Islam, 106.

headscarves outside of working hours, or male federal employees whose wives wore the headscarf, were penalised professionally. In the military, particularly in the aftermath of the 1997 coup, having a wife who wore the headscarf was perceived as sufficient for discharging one from the military establishment.[29]

Headscarved women who were neither students nor public servants also suffered under the ban, as they would run into difficulties when trying to access public services. In 2003, Hatice Hasdemir Şahin was prevented from testifying before an Ankara court where she appeared as a defendant. The judge "defined the courtroom as public space" where one has to be "in a demeanor, behaviour and outfit that is in accordance with the regulations."[30] In 2005, Sultan Ozkan was not allowed to take her driving test in Ankara, after being verbally harassed by the officials.[31] Other headscarved women and their families were denied health care at hospitals. In 2006, one woman was denied health care twice by the attending physician at Istanbul University's hospital because she wore a headscarf, with the delay resulting in her ovaries having to be removed.[32] In another case, a five-year old boy was denied treatment at the paediatrics department at Zeynep Kamil Hospital in Istanbul because his mother wore a headscarf.

2000s – the rise of the AKP

The Justice and Development Party (AKP) came to power in 2002 on the back of economic crisis, in a landslide victory which was read as a backlash against Kemalist interventions. In tacit recognition of the fate of its two Islamist governing predecessors, the AKP did not address the headscarf issue during its first term in office, choosing instead a policy of avoidance.

In 2008, the AKP, led by Prime Minister Recep Tayyip Erdoğan, tried to lift the headscarf ban for university students. On 9 Feb 2008, the AKP pushed through amendments to the Constitution to create the legal framework for lifting the university headscarf ban. Two articles were changed – Article 10, which guarantees

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[29] Kavakci Islam, 113.
[30] Kavakci Islam 89, quoting E. Fuat Keyman, "Turban-demokrasi iliskisi," *Radikal2*, November 16, 2003.
[31] Kavakci Islam, 107-8. She refers to *Milli Gazete*, August 28, 2005. Also *Vakit*, August 28, 2005.
[32] Kavakci Islam, 108. She refers to Ertugrul Ozkok, Yumurtaliklari alinan turbanli," *Hurriyet*, December 21, 2006.

equality before the law irrespective of language, race, colour, sex, political opinion, philosophical belief, religion or sect, was amended to include a commitment to ensure that all citizens have equal access to public services. Article 42, on the right to education, was changed to include a phrase preventing anyone from being denied access to education except for a reason openly stated in law. This was significant, because there was no written law preventing headscarved students from entering the university; it was an implicit regulation of the Higher Education Council (YÖK) through which the ban was implemented.[33] The opposition Republican People's Party (CHP) quickly applied to the Constitutional Court for the annulment of the Constitutional amendments. On 5 June 2008 the Constitutional Court, by nine votes to two, declared the constitutional amendments invalid because they violated the principle of secularism which was enshrined in the Constitution as an unchangeable characteristic of the Turkish Republic.[34]

Since that initial knockback, the AKP has systematically tackled the secularist forces ranged against it. In September 2010, the party won a constitutional referendum which gave the president and parliament greater say over the appointments of senior judges and prosecutors, paving the way for a judiciary more amenable to its Islamist agenda in the future.[35] Soon after, in October 2010, YÖK sent a circular to universities advising teachers that they could no longer send students out of class for violating the dress code.[36] While this contradicted the 2008 Constitutional Court ruling, and constitutional amendments would be needed to definitively lift the ban, the reality on the ground has already started to change - most universities have already started permitting students to wear the headscarf on

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[33] In 1989, the Constitutional Court had decided that 'headscarves in universities are against the principle of secularism that is the most important pillar of the Turkish state and constitution'. (Berghahn et al, 152).

[34] Berghahn et al, 152.

[35] The Economist, 13 Sep 2010, "Turkey's constitutional referendum: Erdoğan pulls it off," http://www.economist.com/blogs/newsbook/2010/09/turkeys_constitutional_referendum.

[36] In October 2010, the YOK ruled that a student at Istanbul University had been unfairly dismissed from class for hiding her hair under a hat (a common measure taken by students wishing to circumvent the headscarf ban).The YOK told officials at the university that they had no right to punish students for violations of disciplinary rules by throwing them out of the classroom. Although the ruling did not mention the veil, the implication was that students in headscarves could attend classes. See *The National*, 13 Oct 2010, Thomas Seibert, "Headscarf ban fizzles out in Turkey," http://www.thenational.ae/news/world/europe/headscarf-ban-fizzles-out-in-turkey#full, accessed on 5 Dec 2012. Also *Today's Zaman*, 11 Nov 2010, "YÖK considers headscarf and coefficient issues solved", http://www.sundayszaman.com/sunday/newsDetail_getNewsById.action?newsId=226875, accessed on 5 Dec 2012.

campus. Earlier, in March 2010, the YÖK had moved to deal with the "coefficient problem", easing the way for graduates of religious high schools to enter the university programmes of their choice.[37] In 2011, the ban on *Qur'an* instruction for children under 12 was also lifted.[38]

There are indications that the AKP is making progress in taming the zealously secularist military. At a reception at the president's mansion to celebrate Turkey's Republic Day on 29 Oct 12, the country's top military commander stood alongside the headscarved wives of the president and prime minister.[39] This would have been inconceivable in years past; since 2007, the military top brass had refused to attend presidential gatherings hosted by President Abdullah Gül, in protest against First Lady Hayrunnisa's wearing a headscarf.[40]

The latest loosening of secularist restrictions has been the lifting of the headscarf ban in schools below university level, announced on 27 Nov 12. Beginning from the 2013-14 academic year, pupils at schools providing religious education, and during *Qur'an* lessons at regular schools, would be able to wear headscarves. Earlier, in March 2012, Erdoğan pushed through a reform of the education system which boosted the role of religious schools.[41]

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[37] After a series of decisions were blocked by the Council of State, YÖK decided on March 17 that the new coefficients would now be 0.12 and 0.15 instead of the previously proposed 0.3 and 0.8. *Today's Zaman*, 11 Nov 2010, "YÖK considers headscarf and coefficient issues solved", http://www.sundayszaman.com/sunday/newsDetail_getNewsById.action?newsId=226875, accessed on 5 Dec 2012.

[38] 20 Sep 2011, "New amendments allow Turkish children to attend Quran courses," http://en.iqraa.com/en/newsdetails.aspx?NewsID=87, citing www.hurriyetdaily news.com

[39] The manner of celebrating Republic Day -- which marks the anniversary of the founding of the Turkish Republic on 29 October-- and other national days was changed after a directive was adopted by the Cabinet in May 2012. According to the new directive, only one reception for Republic Day will be held at the Çankaya presidential palace. This event with spouses was initially planned for Victory Day celebrations on 30 August, but the reception was cancelled as Gül, was undergoing medical treatment for a recurring ear problem at that time. In the earlier years of Gül's presidency, in order to avoid conflicts, the Presidency held two separate receptions for Republic Day in 2007, 2008 and 2009; one held during the day without spouses and one at night with spouses. If the commanders wanted to avoid shaking hands with the first lady in the reception line, they could attend the daytime reception. In 2010, the Presidency held only one reception at night, but the commanders did not attend due to another reception being held on the same day. In 2011, heavy losses as a result of terrorist activities led to the cancellation of all receptions in government institutions. *Today's Zaman*, 29 Oct 12, "Republic Day reception marks normalization in Turkish politics", http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=296570

[40] *New York Times,* 29 Oct 12, Tim Arango,"In Turkey, a Break from the Past Plays Out in the Streets," http://www.nytimes.com/2012/10/30/world/europe/in-turkey-protests-reveal-break-from-the-past.html?pagewanted=all, accessed on 7 Nov 12

[41] Among other things, religious "imam hatip" schools would be permitted to take in children from the age of 11 instead of 15. *Reuters*, Daren Butler, 28 Nov 2012, "Turkey lifts headscarf ban in

Following the AKP's re-election in 2011, it only remains for these changes to be protected by law through requisite amendments to the Constitution. Turkey is currently in the process of drafting a new Constitution to replace the one that was imposed by the military after the 1980 coup.[42] In the process of giving substance to the religious freedom of the majority Muslims, it remains to be seen whether the AKP government will also act to give legal protection to the interests of the non-Muslim religious minorities.[43] These minorities, which make up less than 1% of the population, have suffered disproportionately from the secularist policies – restrictions on the non-Muslim minorities included denial of the right to train clergy, offer religious education, and to own and maintain places of worship.

France

France is home to Europe's biggest Muslim population. The Interior Ministry estimates that 8 to 10% of the population, or five to six million people, are Muslim, 25% of whom attend Friday prayers. The Muslim population is primarily made up of immigrants from former French North African and sub-Saharan colonies and their descendents. French Islam is diverse and fragmented due to ethnic, linguistic and national divisions, comprising a spectrum of diverse practices and levels of commitment, ranging from a strictly observant minority to the merely culturally Muslim.[44] On the whole, French society is not very religious - according to a poll published in *Le Parisien* in February 2011, only 36% believe in God, 34%

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religious schools," http://www.reuters.com/article/2012/11/28/us-turkey-headscarf-idUSBRE8AR0JW20121128, accessed on 5 Dec 2012. This effectively rolls back changes introduced after the 1997 secularist coup, by raising compulsory primary education from five years to eight, prevented students from entering imam hatip schools after fifth grade. *Today's Zaman*, Mon, 27 Feb 2012, Nicole Pope, "Education in the spotlight" http://www.todayszaman.com/columnist-272668-education-in-the-spotlight.html, accessed on 5 Dec 2012.

[42] *New York Times*, 29 Oct 12, Tim Arango, "In Turkey, a Break from the Past Plays Out in the Streets," http://www.nytimes.com/2012/10/30/world/europe/in-turkey-protests-reveal-break-from-the-past.html?pagewanted=all, accessed on 7 Nov 12

[43] According to estimates by the State Department, in 2010, Turkey's non-Muslim religious minority population included: 65,000 Armenian Orthodox Christians; 23,000 Jews; 15,000 Syriac Christians; 10,000 Baha'is; 5,000 Yezidis; 3,300 Jehovah's Witnesses; 3,000 Protestant Christians; and 1,700 Greek Orthodox Christians, as well as small Georgian Orthodox, Bulgarian Orthodox, Maronite, Chaldean, Nestorian Assyrian, and Roman Catholic communities. United States Commission on International Religious Freedom, *USCIRF Annual Report 2012 - Countries of Particular Concern: Turkey*, 20 March 2012, available at: http://www.unhcr.org/refworld/docid/4f71a67011.html [accessed 10 December 2012]

[44] Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Oxford, Hart Publishing, 2006), Chapter 2, "The Islamic Headscarf-Hijab Debate in France", 54.

do not, and 30% are uncertain.[45] Nonetheless, around 64% of the French population identify themselves as Roman Catholic, although only 4.5% of those are observant.[46] All other religious groups combined constitute less than 7% of the population.[47]

The French government's approach to issues of religion can be summarised in a word - '*laïcité*'. This is the uniquely French conception of the proper place and function of religion within the state. It unites the ideals of state neutrality toward religion, the autonomy of the individual citizen, and the community of French citizens *qua* citizens.[48] The roots of *laïcité* can be traced to the 1789 Revolution, where the right to religious freedom was asserted in Article 10 of the Declaration of the Rights of Man: 'no one should be persecuted for their opinions, even religious ones'.[49]

In 1905, the Third Republic put an end to the official recognition of religion[50] with the Law of Separation between Church and State:[51]

> Article 1: The Republic ensures freedom of conscience. It guarantees the free exercise of religion, under restrictions prescribed by the interest in public order.
>
> Article 2: The Republic does not recognise, remunerate, or subsidise any religion.

The 1905 law linked religious freedom with state neutrality - Article 2 protects freedom of conscience (Article 1) by guaranteeing that the state will remain neutral between religions. The principle of separation between church and state has since been recognised as a quasi-constitutional principle, and is implicitly referenced in

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[45] In accordance with its understanding of separation of state and religion, elaborated below, the French government does not keep statistics on religious affiliation.

[46] December 2009 poll in the Catholic daily *La Croix*.

[47] International Religious Freedom Report 2011, France country report, US Bureau of Democracy, Human Rights and Labour, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper, accessed 29 Dec 12.

[48] This analysis of *laïcité* is Laborde's, quoted in McGoldrick, 38.

[49] Laborde, 34.

[50] Laborde, 34. The Concordat of 1801 had forged an uneasy truce between the Vatican and the new republican government. It recognised Catholicism as the 'religion of the great majority of the French people',[50] and officially recognised the social utility of religion.[50]

[51] Laborde 33, McGoldrick, 36.

Article 1 of the 1946 Constitution, which states that 'France is an indivisible, *laïque*, democratic and social republic.'[52]

Subsequent detailed provisions of the Law of Separation expropriated all religious property, resulting in all religious buildings built before 1905 coming under state ownership. Ironically, although the Law of Separation made it illegal for the state to 'remunerate or subsidise' any religion, in reality, the French government funds the maintenance of Roman Catholic and Protestant churches as well as Jewish synagogues and allows the respective religious communities to use them. Given that Muslim immigration has occurred only after 1905, this has resulted in a disparity for the Muslim population – while Christian and Jewish places of worship are supported by public funds, mosques are not.[53] Today, Islam has taken the place of Catholicism as the main target of the secularists. In addition to the inevitable conflict between the doctrine of *laïcité* and a religion which denies any separation of private and public spheres, there is an overlay of xenophobia, due to the relatively recent vintage of France's Muslim minority.

Public vs Private spheres: schools as the locus of dispute

The Revolution started a century-long process of dis-entangling civil government from the Catholic Church.[54] From the 1880s onwards, the republican government undertook measures to secularise the public sphere. Chief among these[55] were new education laws establishing secular state primary education, removing this from the hands of the Catholic Church. In 1884 primary education

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[52] Laborde, 33. However, more than a half-century after the demise of the Concordat, the Vatican has not forgotten its special relationship with France, its "firstborn daughter" ("fille aînée de l'Eglise," a phrase born during the lifetime of the Concordat). In a speech in France in 1980, Pope Jean-Paul II issued the following rallying cry to French Catholics: "France, firstborn daughter of the Church, are you faithful to the promises of your baptism?" («France, fille aînée de l'Eglise, es-tu fidèle aux promesses de ton baptême? ») *Le Figaro*, 30 Apr 2011, "Pourquoi Jean-Paul II aimait la France", http://www.lefigaro.fr/actualite-france/2011/04/30/01016-20110430ARTFIG00002-pourquoi-jean-paul-ii-aimait-la-france.php?cmtpage=0, accessed 29 May 2013.

[53] McGoldrick, 37, and Sabine Berghahn, Gul Corbactoglu, Petra Rostock and Maria Eleonara Sanna, "In the name of laïcité and neutrality: Prohibitive regulations of the veil in France, Germany and Turkey," in *Politics, Religion and Gender: Framing and regulating the veil*, ed.s, Sieglinde Rosenberger and Birgit Sauer (New York: Routledge, 2012) 160.

[54] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008) 7.

[55] Other measures taken included secularising communal cemeteries - religious signs such as crosses were removed, with only discreet symbols allowed on individual tombstones.

was made free and compulsory both for boys and girls; all were to be taught a nation-wide uniform curriculum.[56] The mission of the new state schools was to teach future citizens how to be French.[57] To this end, schools had to be neutral towards religious and other particular allegiances;[58] 'moral and *civic* instruction' was substituted for traditional 'moral and *religious* instruction'.[59] Civic education was a new subject: children were to be taught basic principles of universal morality, the principles of the 1789 Revolution, and their rights and responsibilities as citizens of the Republic. The religious neutrality of schools was insured by scrupulously avoiding any reference to religion in the content of education, and by removing all religious signs such as Christian crosses from classrooms. While schools are meant to be religiously neutral, they are by no means politically neutral;[60] they are unabashedly used to transmit patriotic values such as republicanism, individualism, equality and democratic citizenship.[61]

Laïcité understands religion as an essentially private matter in relation to which each individual exercises free choice. It concludes that the public sphere should be secularised, and that citizens must be citizens in the public sphere while being religious believers (if they so choose) in private. Proselytisation is thus taboo in public institutions,[62] and especially in schools where future citizens must be taught to use their faculty of reason and exercise freedom of thought.

Following 15 years of controversy about the *hijab* in schools (see boxed story on the headscarf affair, below), a 2004 law, voted explicitly in the name of the

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[56] The equal right to education was construed as the right to a rigorously identical provision of education goods to all children, with few accommodations for variations in language, culture, religion, and even gender. As a result, official republican educational philosophy gives little scope for parents' choice and involvement in the education of their children. Schools are seen as paradigmatically public spaces, not as extensions of the family or local community. (Laborde, 49-50)

[57] McGoldrick, 78, citing E Weber, *Peasants into Frenchmen* (Stanford, Stanford University Press, 1976), 303-38.

[58] Laborde, 49.

[59] In 1882, by Jules Ferry, the main inspirer, with Ferdinand Buisson, of the laique educational laws.

[60] McGoldrick, 79.

[61] McGoldrick, 78. These values are not confined to Rawlsian "political" ones. In teaching the value of autonomy and individuality, French schools transmit what in Rawlsian terms would be termed "comprehensive liberal" values.

[62] McGoldrick, 76. For instance, a 1937 Education Circular stated that 'No form of proselytism will be tolerated.

republican principle of *laïcité,*[63] was passed, stipulating that 'in primary and secondary public schools, the wearing of signs or clothes through which pupils *ostensibly express/overtly manifest* a religious allegiance is forbidden.'[64]

A neutral public sphere

French government employees are not permitted to wear religious symbols at work, although the number of cases challenging this prohibition is growing. The theory behind this goes back to the doctrine of *laïcité,* with its assumption that only if the public sphere is free of religious symbols, can all citizens can be treated equally within it. On this logic, civil servants must be seen to be neutral.[65] The duty of embodying this neutrality of the state was understood to apply especially strictly to teachers, because of the special place of education in forming new citizens. The ban on civil servants wearing religious symbols seems to apply whether or not the particular officials wear official uniforms or not. For instance, a Muslim tax inspector was prevented from wearing a headscarf while on duty. Public service is expansively construed to cover postal services, public transport systems, etc.[66]

This affects citizens, when they are performing or trying to access public services. Women wearing the *hijab* have been excluded from juries. Personal photographs required for the issuance of aliens' residence permits and national identity cards must be taken full-face and bare-headed. Mayors have in some cases refused to allow women in *hijab* to be married or to witness a marriage unless they remove their *hijab* so that their identities can be confirmed.[67] The official line

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[63] The law was entitled Loi encadrant, en application du principe de *laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les ecoles, colleges et lycees publics.*(McGoldrick, 90)

[64] Laborde, 32, McGoldrick, 90. (italics added). In the Education ministry's circular to guide schools in the application of the 2004 law, Muslim headscarves, Jewish yarmulkes and large Christian crosses were explicitly mentioned.

[65] McGoldrick, 73. In a 2003 speech, President Jacques Chirac stressed that public servants represented the face of the state: "We must forcefully reaffirm the neutrality and secularism of the public services. That of all public sector employees, serving the whole community and the general interest, who are forbidden to display publicly their own beliefs or opinions. For us, this is a rule of law, since no French citizens must be able to suspect a public official, because of his or her personal beliefs, of either according them special treatment or discriminating against them. Likewise, on no account must citizens be allowed to challenge a public sector employee on account of their beliefs."

[66] Laborde, 48.

[67] McGoldrick, 75.

common to all these cases is that citizens need to be able to function *as citizens* in public space.

In 2010, the French passed a law prohibiting the covering of one's face in public. This came into effect in April 2011. It is widely recognized that the law was intended to prohibit Muslim women from wearing the *burqa* or *niqab* (Islamic dress forms that cover the whole face except for the eyes) in public places.[68] The law imposes a fine of 150 euros on violators or requires attendance at a course in citizenship. In addition, those who coerce another person on account of gender, by threat, violence, force, or abuse of power or authority, to cover his or her face, are subject to a fine of 30,000 euros and could receive a sentence of up to one year in prison; the fine and sentence is doubled if the victim is a minor. In December 2011, a woman wearing a *niqab* was fined 35 euros for unsafe driving, on the grounds that the *niqab* limited her vision and presented a safety hazard.[69] From April 2011, when the law went into effect, to December of that year, 231 women were given warnings by police. Six were convicted and fined, and several were sentenced to attend citizenship classes.[70]

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[68] According to an Interior Ministry circular sent to officials prior to the start-date of the law, police are only to enforce the law in public places, including public transportation, government buildings, and other public spaces such as restaurants and movie theatres. The circular specifically instructed police not to enforce the law in private locations, or around places of worship, where the law's application would unduly interfere with the free exercise of religion. If the police encounter someone in a public space wearing a face-covering garment such as a mask or *burqa*, they are instructed to ask the individual to remove it to verify the individual's identity. Police officials are not allowed to remove it themselves. If individuals refuse to remove the garment, police may detain them and take them to the local police station to verify their identity. However, an individual may not be questioned or held for more than four hours.

[69] While this chapter in the main argues *against* the justifiability of a ban against headscarves in the context of schools, this particular case gives us an example of where the need for practical solutions for living together (in this case, living *safely* together), provides a compelling reason to justify outlawing religious garb which compromises the safety of oneself and others. See Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2001) for other examples, notably the case of turbaned Sikh motorcyclists, whom, he argues, should not be exempt from motorcycle helmet-wearing laws. Given that my main concern in this thesis is to argue against the need for epistemic abstinence, I would highlight one key aspect of how my justification for a political principle permitting a ban on the niqab/turban while driving/riding a motorcycle would differ from Barry's – it would not require the scepticism about one's conception of the good which Barry thinks necessary to ground his idea of a second-order impartiality. See Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995) Chapter 7.

[70] International Religious Freedom Report 2011, France country report, US Bureau of Democracy, Human Rights and Labour, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper, accessed 29 Dec 12.

Blurring the boundaries – laïcité in the private sector

The treatment of veiled women in the French private sector varies widely. Legal cases against employers who forbid veiling are focussed on discrimination and whether there is sufficient justification for employers to regulate veiling. Justifications offered by employers include business needs, the lack of any deliberate intention to discriminate, and the employees' refusal to respect disciplinary rules. One academic suggests that many of these justifications would not survive a rigorous discrimination analysis – for instance, an intention to discriminate is usually irrelevant.[71]

On 27 October 2011, a Versailles appeals court ruled that a privately owned daycare center in a Paris suburb could ban its employees from wearing religious symbols at work. This case is expected to set a precedent for other private educational establishments to enforce the principle of "religious neutrality," a term defined by the 2004 law banning "ostentatious signs of religion" in public schools. The court's decision reinforces a previous ruling in December 2010 that a nursery in Mantes-la-Jolie, a Paris suburb, was within its rights to fire a female employee in 2008 after she refused to remove her headscarf. [72]

What appears to be happening in these cases is a bleeding of the ideology of *laïcité* into the private sector. There is also considerable murkiness as to whether *laïcité* applies when it comes to areas where some state functions are partially or completely privatised but still subject to extensive government regulation.

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[71] McGoldrick, 80-81, citing K Berthou, 'The Issue of the Voile in the Workplace in France: Unveiling Discrimination' 21(2) *International Journal of Comparative Labour Law and Industrial Relations* (2005) 281-320.

[72] International Religious Freedom Report 2011, France country report, US Bureau of Democracy, Human Rights and Labour, http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper, accessed 29 Dec 12.

An untidy reality

In schools, the implementation of the 2004 ban has been messy. Distinguishing the 'ostentatious' from the 'discreet', and religious from non-religious ornamentation, has remained a matter for the judgement of individual school authorities, leading to uneven implementation[73] and a multitude of unintended consequences, such as Catholic chaplains being turned away from schools because they were wearing cassocks. More importantly, it has resulted in schoolchildren being excluded from state education, the very instrument of republican integration.

Concern has also been voiced about the ban's negative impact on the psychological well-being of individual Muslims. In 2005, the United Nations Human Rights Commission's Special Rapporteur on Freedom of Religion expressed concern at the law's impact on the psychological well-being of young Muslim women who felt stigmatised for wearing the headscarf, as well as the attitude of intolerance towards headscarf-donning Muslim women, even where they wore the veil legally.

The debate about *laïcité* cannot be isolated from the wider realities of direct and indirect discrimination against France's Muslim population in education, jobs and housing. Around a third of France's Muslims live in deprived council housing estates where there is a high immigrant population, disproportionately high unemployment (three times the national average), an extensive underground economy, and a culture of gangs, drugs and criminality. This has resulted in growing disaffection and social problems amongst suburban Muslim youth.[74] This socio-economic cleavage overlaps with the religious divide, resulting in a toxic mix that erupted briefly in October/November 2005 with riots in the Paris suburbs.

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[73] For instance, what to do with non-Muslim pupils who wore the *hijab* as a fashion statement.
[74] McGoldrick, 55.

The headscarf affair (*L'affaire du foulard*)

In 1989, three pupils in the Parisian suburb of Creil arrived in class wearing the *hijab*.[75] (Prior to this case, it had been considered acceptable to wear *hijab* in this school but not when in the classroom; the girls would drop the headscarf to their shoulders when entering the classroom.) Two of the three pupils were sisters, Leila and Fatima Achaboun, whose father was from Morocco. The third girl, Samira Saidini, was the daughter of a local Islamic activist from Tunisia. The three were initially suspended. Following negotiations between school officials, the girls' parents, Islamic religious leaders, Islamic organisations and representatives of the respective immigrant communities, the third girl, Samira Saidini, was persuaded to revert to previous practice. The sisters were not initially willing to do so, but eventually relented, following the intercession of the King of Morocco, Hassan II, spiritual leader of Moroccan Muslims.[76]

The College Gabriel Havez, where these events took place, was an increasingly crowded public middle school (pupils aged 11-15),[77] located in a poor neighbourhood in the industrial city of Criel. It had a reputation for being a difficult place to teach at and a very high staff turnover. Its student cohort was multi-national, comprising some 26 national groups. Two thirds of the non-French pupils were from the Mahgreb, mainly from Morocco, and the principal had become concerned that the school was developing into a series of religious ghettoes which would bring religious and political conflicts into the school environment.[78]

When it arose, this case posed a challenge for *laïcité*, because French state schools have no school uniform policy, and it was unclear that there was an explicit rule preventing *pupils* from wearing religious symbols. The case attracted national

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[75] Laborde, 7. Laborde notes in endnote 28 on p 262, that she uses "Muslim headscarf" and "hijab" and "veiling" interchangeably, and she means by this the wearing of a scarf covering the hair and neck. She does not refer to the *jilbab* (=headscarf and gown that leave only the face and hands exposed), nor to the *niqab* (=which covers the face), nor to the *burka* (= which additionally covers the eyes), since these latter 3 are not commonly worn by Muslims in France.

[76] McGoldrick, 66-67.

[77] McGoldrick, 65.

[78] Some of the Jewish students had failed to attend school on Saturday, the Jewish Sabbath, and also on Friday afternoons in the winter, when the sun set earlier. In the summer of 1989, just before the headscarf incident, there was a student petition for a mosque in Criel.

publicity and a prolonged national debate ensued. Asked by the Education Minister[79] to provide legal advice, the Council of State laid out general principles and guidelines in its November 1989 *avis (opinion)*:[80]

- Headscarves were not in themselves in breach of *laïcité*.[81] International law supported the protection of religious liberty.[82] Schoolchildren should have 'the freedom to express and manifest their religious beliefs within educational institutions.'[83]

- The exercise of religious freedoms by pupils could be limited only when it was an obstacle to carrying out the statutory mission of education,[84] such as when the display of religious insignia involved pressure, proselytism, propaganda, or provocation, when it disturbed the good order of the school, or posed a threat to health and safety.[85]

- This was consistent with the neutrality mandated by *laïcité*, because neutrality in schools was meant to apply to teachers,[86] the content of teaching, and school buildings, not pupils themselves.[87]

This nuanced ruling proved difficult to implement. Individual headmasters were left to settle issues on a case by case basis. In the years following this case, increasing numbers of cases were brought to court as the boundaries of secularism were challenged in schools and beyond. Beyond donning the headscarf, there was a growing trend of Muslim girls refusing to take part in sport in schools.[88]

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[79] At the time, this was Lionel Jospin.
[80] Laborde, fn 77 see Conseil d'Etat, Section de l'interieur, 27 novembre 1989, no. 346893, Avis, 'Port du foulard islamique,' at http://www.rajf.org/article.php3?id_article=1065 last accessed 17 Jul 2007.
[81] Laborde 52.
[82] Laborde 58. Notably it referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 9 esp), the International Covenant on Civil and Political Rights (Article 18 esp), Convention against Discrimination in Education.
[83] Laborde, 59.
[84] Laborde, 52.
[85] Laborde, 52.
[86] The Haut Conseil a l'Integration's 2001 report on 'Islam in the Republic' noted that teachers and pupils were in a "radically different position" vis-a-vis *laïcité* in schools. The former had a duty to guarantee the neutrality of the public service they provided, so that the latter could benefit from such a guarantee, as it was there precisely to protect their own freedom of conscience. (Laborde, 60)
[87] Laborde, 60.
[88] McGoldrick, 70-72, has helpful examples of the cases that came up for review by the Council of State during this period.

In 1994, Education Minister Francois Bayrou published more specific instructions banning all 'ostentatious' signs in schools, which provided the inspiration for the 2004 law. The instructions stated:

> The school is the space which more than any other involves education and integration, where all children and all youth are to be found, learning to live together and respect one another. If, in the school, there are signs of behaviour which show that they cannot conform to the same obligations, or attend the same courses and follow the same programs, it negates this mission. All discrimination should stop at the school gates, whether it is sexual, cultural, or religious discrimination...In schools, freedom of conscience, combined with respect of pluralism and the neutrality of public service, requires that the 'educational community' be insulated from any ideological or religious pressure...It is not possible to accept the presence and multiplication of *ostentatious* signs in school, signs whose meaning involves the separation of certain students from the rules of the common life of the school...*Such signs are in themselves part of proselytism.*[89]

Bayrou's circular contained the idea that because schools are special places where pupils learn the principles of public citizenship, the principles of toleration of civil society do not apply with full force in them, and *laïcité* demands religious restraint on the part of pupils too.[90] Bayrou's 1994 circular banned only "ostentatious" religious signs in schools, with the result that Muslim headscarves but not Jewish yarmulkes, nor Christian crosses, fell into that category. This measure was nullified by the Council of State on the grounds that it established too absolute a prohibition. Yet till 2004, it was left to headmasters to decide whether particular instances of headscarf wearing were "ostentatious" or not.[91]

The Stasi Commission[92] was convened in 2003 by President Jacques Chirac, to give advice on whether Muslim schoolgirls should be allowed to wear

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[89] Laborde, 52-53. Italics added.
[90] Laborde, 53.
[91] Laborde, 63.
[92] The Stasi Commission was named after its president, the mediateur de la republique (ombudsman) Bernard Stasi. Made up of 20 experts (mostly academics and lawyers) and interviewed, between Sep and Dec 2003, a number of political, religious, educational and associational reps. For full report, see Bernard Stasi, *Laicite et Republique. Rapport de la commission de reflexion sur l'application du principe de laicite dans la Republique remis au President de la Republique le 11 decembre 2003* (Paris: La Documentation Francaise, 2004), thereafter 'Stasi Report'. Available at http://www.iesr.ephe.sorbonne.fr/docannexe/file/3112/rapport_laicite.Stasi.pdf (last accessed 27 Jul 2007. Fn 3 on Laborde p32

headscarves in state schools. The Stasi Report articulated the following three values as providing the central values of *laïcité*: freedom of religion, equal respect, and state neutrality.[93] The Report reaffirmed that French public schools should be neutral grounds that protected students from discrimination based on race and religion. On the specific issue of the *hijab*, the Report expressed concern about pressure exerted by elements in the Muslim community on Muslim girls to don the *hijab* against their will. The Commission however considered that at university level precedence should be given to students' right to express their religious and other convictions.[94]

The March 2004 law, which stipulated that 'in primary and secondary public schools, the wearing of signs or clothes through which pupils *ostensibly express/overtly manifest* ("manifestent ostensiblement")* a religious allegiance is forbidden,'[95] was voted explicitly in the name of *laïcité*.[96] The bill's preface says 'while pupils...are naturally free to practise their religion, they must do so while respecting the *laïcité* of the schools of the republic. *It is precisely the neutrality of the school which guarantees the freedom of conscience of pupils, and equal respect for all beliefs*.'[97]

The decision to draw the line at "ostensible" signs was deliberately designed to avoid a violation of Article 9 of the ECHR, since the law, as phrased, would still allow very small, discreet religious displays.[98] In an Education ministry circular to guide schools in the application of the 2004 law, Muslim headscarves, Jewish yarmulkes and large Christian crosses were explicitly mentioned as falling under the law. The 2004 law was intended to put an end to the longstanding headscarf debate, but has since led to a host of unintended consequences. Practically speaking, distinguishing the 'ostentatious' from the 'discreet' remained the task of individual school authorities. Since the coming into effect of the 2004 law, unforeseen

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[93] Laborde, 32.

[94] McGoldrick, 89, cites the Stasi Report p.60, which refers to a 1996 case where the Council of State declared against the University of Lille II that denying university access to young women wearing the veil was without legal basis.

[95] Laborde, 32, McGoldrick, 90. Italics added.

[96] The law was entitled Loi encadrant, en application du principe de *laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les ecoles, colleges et lycees publics.*(McGoldrick, 90)

[97] Laborde, 53. Italics added.

[98] McGoldrick, 90-91.

possibilities have emerged:

- Sikh turbans. It appears that this was a case which was simply overlooked by the French government, given that there are only an estimated 7,000 Sikhs in France. In March 2005, a French court upheld the expulsion of three Sikh boys, aged 15 to 18, for wearing to school under-turbans (the Sikh *keski*, which is like an invisible hair net), since their continued wearing made the boys 'immediately recognisable as Sikhs'. In most other French schools with Sikh pupils, a compromise was reached that allowed them to wear the under-turban to control their hair.[99]

- Non-Muslim pupils wearing the *hijab* as a fashion statement.[100]

- Male pupils wearing a beard for religious purposes.[101]

- Principals in state schools in southern France turning away Catholic chaplains, because they were wearing cassocks.[102]

During the first full year of the 2004 law's implementation, 626 girls arrived for lessons wearing the *hijab*. Of these, 44 were eventually expelled. Leaving the state education system, the students affected either enrolled in correspondence courses, switched to private religious schools, or went abroad to places where wearing the *hijab* would not be an issue.[103] In 2005, the United Nations Human Rights Commission's (UNHRC) Special Rapporteur on Freedom of Religion visited France and expressed concern at the indirect effects of the law. One of the issues he raised was that "The implementation of the law by school establishments has in a number of cases led to abuses that provoked feelings of humiliation, in particular amongst young Muslim women....Moreover, the stigmatization of the so-called Islamic headscarf has triggered a wave of religious intolerance when women wear it outside school, at university or at their workplace."[104]

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[99] McGoldrick, 93-94.
[100] McGoldrick, 94
[101] McGoldrick, 95.
[102] McGoldrick, 95.
[103] McGoldrick, 92-93.
[104] McGoldrick, 101.

Liberalism and secularism

The first thing to notice is that in both the French and Turkish cases, the argument for secularism takes place within a larger framework that already assumes a principle of toleration. It is precisely this acknowledgement of the principle of toleration that gives rise to the tension that we experience when reading about the specific policy decisions and their outcomes in the French and Turkish cases above.

Recall our conclusion from Chapter 6 that epistemic abstinence was not required in order to obtain a principle of toleration. I suggested there that the heuristic reading of the Rawlsian reasonableness requirement was able to ground toleration in a demand for liberal justifiability, which constrains us to coercively impose on others only those principles that we can justify to them using reasons they could not reasonably reject.[105]

Taking as a given a basic commitment to a principle of toleration, secularism (in the specific forms of French *laïcité* and Turkish *laiklik*)[106] raise the following two questions:

a. *Is secularism required for respecting persons?*

Recall that the motivation for a principle of toleration is a desire for justifiability that is grounded in the duty to respect persons. If one thinks that secularism, too, is needed in order to respect persons, that would be reason to think that secularism is the right policy to adopt.

b. *Is secularism needed for toleration?*

One argument for the French and Turkish forms of secularism is that a principle of toleration entails it. The claim is that secularism, in the form of the emptying of the public sphere of religious symbols/affiliation, is necessary

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[105] I referred to this earlier in Chapter 4, footnote 86 on page 100, where I cite Raz in "Liberalism, Scepticism and Democracy", p.105, where he suggests that the correct, and limited, conclusion to draw from reasonable disagreement is that "One should not criminalise actions undertaken because of a reasonable belief that they are right, if that belief will remain reasonable even if they are prohibited by law."

[106] One way to understand the debate in Turkey between the Kemalists and the AKP is as a debate between two different interpretations of secularism – one which requires a 'neutral' public sphere, and a more inclusive version which allows for some religious expression. (See Semiha Topal, "Everybody Wants Secularism – But Which One? Contesting Definitions of Secularism in Contemporary Turkey," in the *International Journal of Politics, Culture, and Society*, September 2012, Volume 25, Issue 1-3, 1-14. Further references to secularism in this section are to the specific forms of French *laïcité* and Turkish *laiklik*.

in order to maintain the neutrality of public space, to prevent discrimination based on religious affiliation, *so that* individuals can freely exercise their liberty of conscience, which is the goal of a principle of toleration.

By way of addressing these questions, I wish to critically examine a view that would answer "yes" to both questions (a) and (b).

Laborde's critical republicanism

In what she terms a "critical republican" response to the French *hijab* debate, Cécile Laborde articulates a middle course between the official French republican position and its multiculturalist critics. Here, I propose to examine just one specific part of her position – her claim that equal respect for citizens requires secularism, or "secular impartiality"[107]/"secularist neutrality"[108] as she calls it. To summarise her position in a nutshell, Laborde argues that "members of religious minorities would benefit from more rather than less secularism, if this is understood as the construction of a less Christian-biased, genuinely neutral public sphere showing respect to all citizens."[109] In the case of the *hijab*, Laborde defends the official republican ideal of secularism, but opposes the ban on religious symbols as being self-defeating, because it results in the exclusion of Muslim schoolgirls from civic education, thus undermining the republican ideals of religious freedom, inclusion, and equal respect. She also agrees with multiculturalist critics of the ban that secularism, rightly understood, is compatible with the wearing of religious signs by pupils.

Stated in general form, Laborde's critical republican standard of impartiality is stated as follows:[110]

The state should not support religion, *unless* such abstention

    (i)   unreasonably burdens the exercise of basic religious freedoms [the "basic free exercise" proviso]; or

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[107] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008) 9.
[108] Laborde, 25.
[109] Laborde, 19.
[110] Laborde, 88, 90.

(ii)   legitimizes status quo entitlements which unduly disadvantage minority religious groups [the "contextual parity" proviso]

In specifying these provisos, Laborde emphasises that the free exercise right must be basic,[111] and that the 'undue disadvantage' referred to by the contextual parity proviso must be "exorbitant"[112] for the provisos to kick in.

Laborde's justification for the default secularity of the main clause of her critical republican standard of impartiality ("the state should not support religion") is that this is the best way of treating citizens with equal respect. She says,

> A non-sectarian, non-confessional public space best embodies the ideal of democratic impartiality by showing respect to, and thus motivating the allegiance of, all citizens regardless of their particular beliefs.[113]

In concrete terms, this default secularity requires that institutions be neutral with respect to religion. For Laborde, this entails non-establishment. Drilling down a little further, this means that the constitution must not be "theologically inspired", and that public policies must be justified without reference to religious views.[114] This is a restriction on the reasons that can be appealed to (by public officials, public documents, etc) to justify state action. On questions of religion, the state is supposed to remain agnostic,[115] neither affirming nor repudiating any religious creed. In terms of state action, Laborde's account of neutrality requires that the state not seek to confer either special benefits or burdens to citizens in view of their affirming a religious creed (or none). [116] In Laborde's view, schools fall into the public sphere and thus should adhere to this default secularity. What this means in practice is that school buildings should not display religious symbols, and the content of teaching should not affirm any religion.

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[111] Laborde, 89.
[112] Laborde, 89. Laborde does not explain why the benchmark for this proviso is exorbitance.
[113] Laborde, 87.
[114] Laborde, 86.
[115] Laborde, 81.
[116] Laborde, 81.

For Laborde, this main clause applies even where establishment puts no one at any serious disadvantage. In such cases, she argues that establishment alienates citizens not belonging to the established religion, and interferes with their basic identification with their institutions. She says, "Just as Muslims are likely to be alienated by the distinctively Christian religiosity permeating public institutions, so non-religious citizens are likely to be alienated by any official display of religiosity by institutions."[117] Citizens thus have, says Laborde, an interest "in maintaining the secular character of the public sphere".[118] She acknowledges that a secular public order will not be equally suited to religious and non-religious citizens alike, but insists that "it is the closest we can get to being an order that most, if not all, citizens can endorse".[119]

The basic free exercise proviso establishes a limit to the default secularity where it comes into conflict with the protection of the religious liberty. The idea is that, one of the reasons for having a secular order in the first place is that it is the best way of protecting religious liberty. Thus it cannot be that the state should enforce strict secularity where it interferes with religious liberty, understood as the basic free exercise of religion. Thus, in addition to being *constitutive* of an attitude of equal respect for all, the default secularity of the public sphere is also *instrumental* to protecting freedom of conscience of individuals. Laborde says,

> (T)he basic insight of critical republicanism is clear enough: secularism is primarily an *institutional* doctrine of separation, prescribing the extent to which state institutions, and the public sphere more generally, must remain secular *so that* citizens can freely follow their conscience. A tough institutional doctrine is therefore the condition for a tolerant doctrine of conscience.[120]

Applied to the case of *hijab*-wearing in schools, the argument would run as follows: schools should be a secular space (that is, where no religious creed is affirmed or denied by the curriculum, and teachers adhere to a duty of religious restraint), *so*

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[117] Laborde, 91.
[118] Laborde, 91.
[119] Laborde, 85.
[120] Laborde, 87. Italics in the original.

that pupils can freely practise their religion, which includes choosing to wear the veil.

On Laborde's account, the free exercise proviso allows the state to act in support of religion where this involves enabling religious citizens to practise the basic tenets of their religion (provided that these do not impose unreasonable burdens on other citizens). For instance, Laborde tells us that the state has a duty to provide chaplaincy services in enclosed public institutions such as prisons, boarding schools, hospitals, and the armed forces.[121]

The interaction of the free exercise proviso and the default secularity main clause becomes more complicated when it comes to the basic religious exercise of public officials when on duty. Here, Laborde says:

> In a critical republican view, such prohibitions can never be general in form, and should be a function of the importance of the public function and of the vulnerability of the users of the service.[122]

She concludes that government ministers and primary school teachers may be subjected to an obligation of religious restraint while on duty, but tax inspectors and university lecturers need not be. This duty of restraint ("devoir de réserve") includes refraining from display of any sign of religious allegiance while on duty, so as to respect citizens as users of public services. In making reference to tax inspectors, Laborde has in mind the case of a Muslim tax inspector who was prevented from wearing a headscarf while on duty.[123]

Meanwhile, the contextual parity proviso gives Laborde a way of making an assessment about the justice (or lack thereof) of the status quo, and to allow for government action to correct for gross inequalities arising from, for example, historical legacies. It seems that what Laborde has in mind is that only those inequalities which affect the basic free exercise of religion would be compensated for, rather than any inequality whatsoever.[124] Thus she supports state support for the

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[121] Laborde, 89.
[122] Laborde, 87.
[123] Laborde, 48, 51.
[124] Laborde, 97.

building of mosques in France, on the grounds that this is a part of the basic exercise of religious freedom, combined with the fact that the status quo condemns Muslim to a situation of "blatant" inequality where unlike church buildings, which for historical reasons are in plentiful supply, Muslims have insufficient places of worship.

The possibility of an inclusive public sphere: the multiple instantiations of equal respect

I wish to question Laborde's main clause of default secularism. I argue that neither a concern for justifiability nor a concern for respecting persons requires secularism, and further, that secularism is not needed for the protection of the effective implementation of a principle of toleration which allows for the exercise of freedom of conscience. In the process, I hope to draw out one of the implications of the discussion so far of justifiability, namely, that it is compatible with a variety of different practical arrangements.

Boiled down to its essentials, I think Laborde's view on what why equality requires secular neutrality can be summarised in the following claims, which I will examine in turn:

Claim 1: Secular neutrality is **constitutive** of equal respect to all citizens, religious and non-religious. (This corresponds to the main clause of the critical republican standard of impartiality.)

Claim 2: Secular neutrality is the **best instrument** to protect freedom of conscience of every individual. (This corresponds to the basic free exercise proviso.)

Claim 3: The default should be secular neutrality unless exorbitant inequalities need to be corrected for. (This corresponds to the contextual parity proviso.)

Begin with Claim 1, which asserts that secular neutrality is **constitutive** of equal respect for citizens. One might share Laborde's emphasis on the need for equal respect for all citizens, regardless of religion, without agreeing with her conclusion

that equal respect therefore requires a secular public sphere that is devoid of religious symbols and other signs of affiliation.

Let us accept, for the sake of argument, that something like the Rawlsian account of the state's neutrality between conceptions of the good is required in order to respect all citizens. The Rawlsian account of "neutrality", if one wants to call it that, is ultimately concerned with justification. It says that, in order to respect persons, the principles on which one structures society should be justifiable to other citizens. The previous chapters allow us to specify this more precisely - the principles of justice must pass the justifiability test; they must be capable of being endorsed by reasonable people who do not share the same conception of the good. From this principle of justifiability, Laborde's requirement that the constitution must not be "theologically inspired", and that public policies must be justified without reference to religious views,[125] might follow. I propose that something like this Rawlsian account is what Laborde means by "justificatory neutrality".[126]

But notice that Laborde's main clause does not yet follow – agreeing that state policies should be justifiable to all citizens in non-religious terms does not logically entail that the state should not provide support for any religion. Assuming that some non-religious argument could be made for providing support for a religion (take, for instance, the 1905 Concordat's acknowledgement of the social utility of religion), there would be no reason to rule out such support.

Moreover, it does not follow that a unique picture of the public sphere – one "free of religion"[127] emerges from this concern with justifiability. Certainly it does not mean that the physical face of institutions (such as schools) should be devoid of religious symbols. This account of justifiability is equally consistent with schools where the teachers wear crosses, turbans *and* headscarves, each in accordance with their religious beliefs.

Recall Laborde's argument that because establishment alienates citizens who do not belong to the established religion and prevents them from identifying with their institutions, the state has a compelling interest in maintaining a secular public

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[125] Laborde, 86.
[126] Laborde, 83.
[127] Laborde, 95.

sphere. If we accept that what equal respect requires is justifiability, this argument loses its force. If we think that justifiability (a constraint on the reasons that there are for coercive state action) suffices for respecting citizens, we would need further reasons to think that such feelings of offence are any more morally significant than some citizens' disapproval of their neighbours walking around naked in their own homes.

Now consider Claim 2, that secularism is the best instrument to protect freedom of conscience. I take it that the value Laborde is trying to protect with her basic free exercise proviso is that of religious liberty. Laborde does not elaborate on *why* religious liberty and thus basic free exercise should be valuable and thus deserve protection by the state. However, one can easily fill this in, for instance, with a Razian account of how religious ways of life are instances of valuable ways of life which contribute to the well-being of their adherents. Individual well-being, being intrinsically valuable, is what gives rise to the state's duty to protect and promote the conditions which allow citizens to flourish. Or, if one prefers the less committal Rawlsian account, one could say that freedom of religion (along with the freedom to choose not to have a religion) is one of the liberties which, no matter what one's position in society, one has reason to want to secure.

Having filled in the account of why religious liberty is valuable, it still makes sense to ask: is it true that secular neutrality is the best instrument to protect religious liberty? Laborde claims that that institutional separation of the state from religion will allow citizens freely to follow their conscience. Her reading is backed up by official pronouncements on the issue, as seen in the details of the French case – the Stasi Report, for instance, explains the link in the following manner – neutrality, understood as a space where no religion is recognised, prevents the state from discriminating against individuals based on religion, which therefore protects the individual's freedom of religion and treats each individual with respect.

But I think Laborde generalises too easily from the French experience to secularism as the best instrument for protection of religious liberty. Depending on one's assessment of French (or for that matter, the European experience of the wars of religion in the 16th and 17th centuries), one might

even grant her that secular government turned out to be the best instrument for protecting religious liberty in France, without conceding that her critical republican principles are generalisable across historical contexts. Yet Laborde seems keen to extend the application of her theory of citizenship beyond French borders.

To see the crucial role that history is playing in Laborde's critical republican conclusions, imagine a country where, historically, secular government has *not* been the means through which free basic exercise of religion by citizens of different faiths has come about. Perhaps this country started out as a direct democracy where a doctrine of toleration became enshrined in the constitution. Notice that such a constitutional principle of toleration would be justifiable and thus meet Laborde's condition of equal respect. The government of such a country could freely support multiple faiths in free basic exercise without needing to claim to be secular in the way that Laborde describes.

Turkey provides a counter-example to secularism necessarily being a good instrument to protect freedom of conscience. Particularly in the case of the university headscarf ban, it can be plausibly argued that secularism is being wielded *against* freedom of conscience.

The fancy footwork Laborde finds is necessary to get around the question of public officials' basic exercise of religious freedom when on duty[128] may be a symptom of the problem created by positing that secularism is the best instrument for protecting religious freedom. Apart from the fact that the "function-of-importance-and-vulnerability" test does not yield determinate answers, my suspicion is that it may not be needed. The values that Laborde seeks to protect – equal respect for citizens regardless of religion, and religious liberty – can be safeguarded using the test of justifiability and by direct appeal to the requirement for basic exercise of religious freedom. The paradigm case for which Laborde thinks there is a need for a "devoir de réserve" can be explained without recourse to secularism - consider Laborde's

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[128] By fancy footwork, I refer to Laborde's suggestion that the solution to the problem of basic free exercise by public officials be a 'function of the importance of the public function and of the vulnerability of the users of the service', see page 87.

conclusion that government ministers should justify public policy in non-religious terms. This could quite coherently be explained by respect for persons requiring that policies be justifiable to all citizens regardless of religion. Presumably, Laborde would not want to say that government ministers should not be allowed to wear religious symbols such as crosses, turbans or headscarves while on duty, so this case does not raise the issue of basic free exercise in the shape of wearing religious symbols.

Admittedly, direct appeal to the value of religious freedom seems to give a different result from Laborde's in the case of the religious restraint for teachers. (Laborde affirms religious restraint for teachers on the grounds that young minds are particularly vulnerable.) This, I think, points to a tension within Laborde's own framework. She would allow pupils to practise their religion by wearing the *hijab* in school and affirms encountering religious difference 'in the flesh' as aiding civic integration, while at the same time forbidding teachers to exercise their religious freedom in the same context – it may end up that the more consistent solution to the problem is to allow teachers, too, to demonstrate their religious allegiance freely, at least when it comes to dress.

As for Claim 3, which is concerned with the possible need for rectification of exorbitant inequalities, this can be folded into the basic free exercise proviso, given that what Laborde is concerned with is not parity in and of itself, but rather protecting free basic exercise.

Having answered our initial questions (a) and (b) in the negative – secularism is neither conceptually necessitated by the duty of mutual respect, nor is it entailed by a principle of toleration, to protect freedom of conscience - we are now in a position to proceed to a discussion of the specific issue of the Muslim veil.

Seeking a liberal argument, finding empirical complications

Raz, speaking in defence of multiculturalism, lists three liberal doubts about it,[129] which I propose to adapt to treat the issue of the Muslim veil, using them to frame our thinking about the issue in France and Turkey. Looking at the French and Turkish cases of the Muslim veil side by side, what is immediately apparent are the striking similarities between them. Notwithstanding their different starting points – France is usually regarded as belonging to the select group of undisputed liberal democracies, whereas Turkey's membership in the club of liberal nations is still a matter of dispute – the two countries' treatment of citizens wearing the Muslim veil has much in common; and it is not clear that what they share in common can rightly be characterised as a liberal commitment. In this section, I also highlight the importance of considering historical, sociological, psychological and other factors which have a practical impact on policy decisions, since we all have reason to care about living together successfully.

Liberal doubt #1: Liberalism is committed to individual freedom. The fear is that allowing women in public places/ students/schoolgirls to wear the veil would support the power of communities to hold on to reluctant members against their will. [130]

That this doubt has a motivating role in the various headscarf bans comes across clearly in the French case. The Stasi Report voiced concern about pressure exerted by elements in the Muslim community on Muslim girls to don the *hijab* against their will. An attempt to respond to this worry is also seen in the differential penalties stipulated by the 2010 French law prohibiting face-covering in public - the

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[129] Joseph Raz, "Multiculturalism: A Liberal Perspective," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics (Revised edition)* 174-5. These three doubts are: first, the view of liberalism as the bastion of individual freedom, and the corresponding fear that multiculturalism supports the power of communities to hold on to reluctant members against their will; second, the view of the superiority of the secular, democratic, European culture, and reluctance to admit equal rights to inferior, oppressive, religious cultures, or ones whose cultural values tend to be limited and less developed. This feeds the fear that flirting with multiculturalism leads liberals to contradict their own fundamental values. Third, the fear that without a common culture, society will fall apart. (Phrasing is from the original, as far as possible.)

[130] Raz, "Multiculturalism: A Liberal Perspective,"174. Adapted from Raz's first liberal doubt about multiculturalism.

punitive fine (30,000 euros) to which those found to have coerced another to cover his/her face is subject, compared with the relatively light fine of 150 euros for those who themselves break the law on public face covering. This was clearly meant as a warning against those who would exercise inappropriate pressure on members of their own family/community to conform to a strict religious dress-code against their will.

Asking the question of whether the ban could be reasonably rejected immediately brings out reasons for rejecting this liberal doubt as a motivation for the ban. Taking societies as they currently are, we commonly acknowledge that parents have a legitimate interest in transmitting their cultural and religious values to their children. Moreover, it is a legitimate interest grounded in the well-being of the very children whom the liberals are trying to protect - it is important for a child's well-being to be brought up in the culture and traditions of his or her family. Those who oppose the headscarf bans could claim that the bans interfere with this legitimate interest on the part of parents who are acting as custodians of their children's well-being.

Of course, the liberal doubt, as described above, would draw a distinction between this legitimate interest of cultural and religious transmission and undue pressure amounting to oppression. However, the recalcitrant reality of how the various bans have worked out in practice suggests that simple conclusions at the level of principle can rarely be straightforwardly translated into effective policy solutions. The tool of policy (in this case, the ban on headscarves in schools), is simply too blunt to achieve the nuanced objective of protecting only those children who would count as being unduly pressured into wearing the *hijab*. Consider the effect of the French headscarf ban, which was to exclude those who persisted in wearing the *hijab* from the state education system. Clearly for those who were expelled, the objective of helping reluctant, oppressed members of the culture to break free was not met. So long as the state chooses to allow families decision-making power over the schooling choices of their children, and so long as families have options outside of the state education system, such a policy is likely to fail to affect at least some of its target audience.

In the Turkish case, the ECtHR referred this same liberal doubt in its judgement on Leyla Sahin, when it drew attention to the impact which wearing the headscarf might have on others who chose not to wear it. However, in the domestic debate on the headscarf ban in Turkey, this concern does not seem to have been at issue. There are, of course, differences in the bans in Turkey as compared to France. One significant difference is that in Turkey, the ban extends to university students. Compared to the younger schoolgirls in the French case, these grown women would seem to be less at risk of being pressured into wearing the headscarf, and better able to reason clearly about and articulate their allegiance to religious values as being the source of their desire to don the headscarf. As a result, this first liberal doubt has less force in the Turkish case than in the French one. When the test of justifiability is used for the Turkish case, we find that Turkish students could reasonably reject the headscarf ban in universities because it undermines their well-being by hampering their ability to manifest their freely-chosen faith in public.

What this brings out is that understanding of the policy context is crucial. We might start with a concern with the justifiability of a policy, but the arguments may not be conclusive – on the one hand, the liberal doubt is a genuine and well-founded one; but so are the reasons there are to reject the bans. Whether or one thinks a ban on headscarf-wearing is, on balance, justified, would depend on many factors, many practical rather than at the level of principle. For instance, looking at these cases, the empirical details clearly make a difference to our all-things-considered judgement of whether the bans were the right policy. First, human ingenuity being what it is, the target of a policy does not always remain static – non-Muslim pupils wearing the *hijab* as a fashion statement,[131] or Turkish students wearing wigs on top of their headscarves - are an object lesson that the real target of the policy – oppression – may not be effectively dealt with by the blunt instrument of a ban. Secondly, if we have a desire for justifiability grounded in the natural duty of mutual respect, then this very concern entails that we cannot ignore the wider consequences of such headscarf bans on psychological well-being. The UNHRC's Special Rapporteur's comment on the humiliation caused by the ban in France, and

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[131] McGoldrick, 94

the dispersal of these effects even outside of schools, cannot be dismissed as irrelevant.

In any case, perhaps the more direct way of dealing with the possibility of internal oppression is to ensure that there is a legal right of exit from any cultural or religious group, and to ensure that the knowledge of such a right is conveyed to every citizen.[132] Given that participation in national education system is, arguably, be the best way to ensure that children come to understand that they have a legal right of exit from their religious or cultural community, the fact that the headscarf ban has the consequence of excluding children from education, becomes a stronger argument against the ban.

Liberal doubt #2: Liberalism is committed to secularism. This secular, democratic culture is superior, and should rightly be reluctant to give equal rights to inferior cultures like Islam, which do not give equal rights to women. There is the fear that allowing the veil to be worn in public places/in schools and universities will lead to a contradiction of fundamental liberal values.[133]

This second doubt is a strong thread in the Turkish case, on the part of the Kemalists. Consider what the Chief Prosecutor said in the case brought against the AKP in 2008, calling for its closure. The case to shut down the AKP was triggered by the party's attempt to lift the headscarf ban in universities. The Chief Prosecutor distinguished between Christianity and Islam as threats to secularism, and claimed that whilst Christian identity did not pose a threat to secularism, political Islam did, because it had a religious law, the *syariah*, which claimed to regulate all aspects of life according to divine command and brooked no opposition to its authority. In contrast, he praised secularism which "achieved modernisation with the leadership of reason and science". He added that "thanks to the democratic and secular Republic, which are the foundations of democracy and modernity, Turkish people

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[132] Raz points out in the context of defending the affirmation of different cultural groups, that the liberal worry about oppression can be dealt with by ensuring a right of exit from the religious community in question Joseph Raz, "Multiculturalism," in *Ethics in the Public Domain: Essays in the Morality of Law and Politics (Revised edition)* (Oxford: Oxford University Press, 2001), 181, 187.

[133] Raz, "Multiculturalism,"174. Adapted from Raz's second liberal doubt about multiculturalism.

were finally able to move up from *ummah* to nation, [and] slavery to citizenship."[134]
The argument of the Kemalists, which I attempt to cast in a liberal form, seems to be
the following:

1. Being committed to liberal values involves being committed to secularism.
2. Parties which support the wearing of headscarves in universities represent
   political Islam. Political Islam accepts no division between public and
   private spheres, and aims to replace secularism with an imposition of *syariah*
   law for everyone.
3. The success of political Islam will mean the demise of liberal values,
   including secularism and freedom of religion for all.
4. Therefore, in order to safeguard the survival of liberal values, parties which
   support political Islam should be shut down.

We have already seen (in the previous section examining Laborde's defence of
French republicanism) that liberalism is not, in principle, committed to secularism.
This makes premise 1 invalid.

But could we remove the factor of secularism from the mix, and amend the
Kemalist argument to say that drastic measures (such as shutting down the AKP) are
required to safeguard the survival of liberal institutions? Given that the trigger for
the constitutional court case was the AKP's passing of legislation to reverse the
headscarf ban, this might have a measure of plausibility. The revised argument
would appeal to the well-known caveat in liberal theory about tolerating the
intolerant, which states that where the survival of liberal institutions themselves are
at stake, illiberal measures can sometimes be justified.[135] The trouble is, even with
this revised argument, the link between reversing a headscarf ban and the demise of
the liberal right of freedom of religion is not a tightly coupled one. Saying that a

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[134] Topal, 8.

[135] Rawls comments that a situation where intolerant sect is so strong or growing so fast that the
forces making for stability cannot convert it to liberty presents a "practical dilemma which
philosophy alone cannot resolve". In such a case, he says, it "depends on the circumstances" whether
the liberty of the intolerant should be limited to preserve freedom under a just constitution. ToJ 193.
The Turkish case is complicated by the fact that even if we grant the Kemalists that the proponents of
lifting the headscarf ban are an "intolerant sect", this sect encompasses the vast majority of Turkish
citizens.

group would be intolerant if it came into power is not normally sufficient grounds for limiting their liberty.[136]

Also, whether or not the AKP in fact lifts the ban on the headscarf in universities is not a good test of whether it is liberal in its commitments, as it claims to be. The key indicator might be instead what the AKP government chooses to do with Turkey's tiny proportion of non-Muslim religious minorities. Given that the restrictions on non-Muslim minorities (denial of the right to train clergy, offer religious education, to own and maintain places of worship) cannot be justified by any plausible principle of toleration which is underwritten by a liberal concern for justifiability, what the AKP chooses to do here might be a better indication of the AKP's real attitude towards those who differ from them in religious conviction.

Turn now to the French case. There, it would be much harder to make the case that liberal institutions are under any immediate threat; the self-preservation-of-liberal-institutions argument for banning headscarf-wearing is not available to French republicans.

Recall that the core liberal argument for valuing cultures is grounded in the good of individuals. Cultures should be protected because individuals need cultures within which they can exercise their individual freedom. Or as Raz puts it, cultures have a moral claim to respect only insofar as they serve the well-being of their individual members.[137] Because for most, membership in their cultural group plays a major role in their sense of their own identity, therefore slighting that culture, ridiculing it, persecuting it, hurts individuals and offends their dignity.[138] This is the domestic analogue of Rawls's "amour-propre" argument for why respecting national sovereignty is morally important, which we saw in Chapter 7. The importance of culture to individual well-being gives us reason to be wary of "organised campaigns of assimilation and discrimination"[139] – one thinks of the forcible removal of aboriginal children from their families in Australia throughout a large part of the

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[136] Rawls, in *A Theory of Justice*, argues that this is the case even if the intolerant group has "no title to complain when it is denied an equal liberty" (*Theory of Justice,* 190-191).
[137] Raz, "Multiculturalism," 178.
[138] Raz, "Multiculturalism," 178. Raz highlights also other contributions of culture to individual well-being, namely shaping the horizon of opportunities and facilitating social relationships, which I do not elaborate on here. See Raz, "Multiculturalism," 177.
[139] Raz, "Multiculturalism," 185.

20th century.[140] But the same concern is applicable to policies like the headscarf ban – it gives policy-makers reason to be mindful of the symbolic message conveyed by policies such as the headscarf ban. The same reason we have for valuing cultures at all, also gives us reason to be wary of suppressing or discriminating against cultures on the basis that they are "inferior". Thus even if we granted French republicans the premise that their immigrant Muslim population had an inferior and oppressive culture, it would still not be a straightforward deduction to the conclusion that headscarves should therefore be banned from schools. If we add into the mix that the net result of the ban has been to exclude girls from the state school system and to stigmatise the wearing of the headscarf even outside schools, then the ban seems to be both illiberal and perverse in its effects.

This does not mean that we need shy away from criticising cultures which oppress either their own members or outsiders. No epistemic abstinence is required by our concern for justifiability. In fact, the heuristic reading of justifiability can help uncover the reasons why certain aspects of a culture might rightly be considered oppressive – for instance, a culture which condones child brides might legitimately be prevented from marrying off their twelve- and thirteen-year-old children, because when we ask why the practice might be reasonably rejected, we find reasons to think that humans of that age may not yet be physically, emotionally, or intellectually prepared to take on the responsibilities of marriage and childbearing.[141] An acknowledgement of the role played by cultures as the necessary context in which individual freedom can be exercised is compatible with criticising that culture's unsavoury aspects. But the *means* of doing so need to be carefully considered, precisely to avoid compromising the very individual well-being which governments are meant to be protecting and promoting.

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[140] For details, see the Australian Government's Report of the National Inquiry into the Separation of Aboriginal
and Torres Strait Islander Children from Their Families, "Bringing Them Home," at
http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf, accessed on 27 May 2013.
[141] Even here, much would depend on the empirical facts surrounding the practice. For instance, it would make a difference to the practice if there were a custom preventing the consummation of a child marriage till the bride was sufficiently physically mature, etc.

Liberal doubt #3: A successful, stable liberal society relies on having a common culture united in liberal values. The fear is that allowing the veil to be worn in public and in educational institutions will cause the fragmentation of society, dooming the possibility of creating the common culture which is the cement of society.[142]

There is a liberal argument to be made for civic education of a sort that is distinctively liberal. Broadly speaking, if one believes that the liberal way of life, with its commitment to a set of protected individual liberties, and to a principle of toleration, is valuable, then one has reason to safeguard its transmission across generations. Rawls and Raz share a considerable amount of common ground on this count.[143] If we look at the lists they each have for what should be taught to children as part of civic education, both include knowledge of their rights, including the right to liberty of conscience and the right of exit from the culture they are brought up in; inculcation of toleration and mutual respect,[144] which presumably would require some awareness of the other cultures that exist within the political society in question.[145] In addition, both Rawls and Raz include the requisite preparation for participation in the economy and in the politics of their society.[146]

Does such a civic education necessitate a school space that is free from religious affiliation? Certainly that was Bayrou's claim in the French case. The argument was that in order to achieve the civic function of schools, they need to be a space where religious differences are not apparent. Bayrou's is an empirical claim – I know of no purely conceptual argument that will prove that this is so. But even if empirical studies showed that pupils would learn (for instance) the principle of toleration better in a school space emptied of all religious insignia, this consideration would still have to be weighed against the objective of trying to retain

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[142] Raz, "Multiculturalism,"175. Adapted from Raz's third liberal doubt about multiculturalism.
[143] For my present purposes, I need only draw attention to the (rather long) list of items that the comprehensive and the political liberal both have on their list. On the differences, Rawls says that "justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality, or indeed of any other comprehensive doctrine." (*Political Liberalism*, 200)
[144] *Political Liberalism*,195, also 123. Rawls classes toleration and mutual trust as political virtues; Raz, "Multiculturalism," 187.
[145] Raz states this explicitly as a requirement. See Raz, , "Multiculturalism," 181, 185, 188.
[146] *Political Liberalism* 199, Raz, "Multiculturalism," 188.

as many as possible in the national education system, so that they could benefit from being taught their basic rights and responsibilities as citizens.

Returning to the question of the justifiability of liberal civic education – is an education policy with such liberal civic content justifiable to citizens who might belong to illiberal sub-cultures? To put this in terms of an objection raised by Thomas Nagel against Rawls's theory of justice as fairness,[147] could a citizen not object that insisting on a liberal civic education would not be fair to her conception of the good? Such a citizen might object that the imposition of a liberal civic education incorporating the elements listed in common by Rawls and Raz, would inevitably erode the viability of her conception of the good. One can without difficulty see how this might happen – Rawls uses the example of "various religious sects (which) oppose the culture of the modern world and wish to lead their common life apart from its unwanted influences".[148] For such groups, requiring their children to learn that there are different ways of life in their society which contradict the values they have been brought up to believe are true, and telling these children that they have the (legal) freedom to leave their religion if they so choose, might indeed make it more likely that they would indeed do so.

To respond to this citizen, we need to remember that our concern for justifiability is ultimately based in a desire to respect people, not their conceptions of the good.[149] Our respect for cultures (just like our respect for countries), is derivative. What is fundamental is respect for individuals. Thus while a liberal education policy could indeed have the consequences described in her worry, our primary concern must be whether such an education policy would be justifiable *to citizens*. To *this* question, the answer is affirmative – because each person has a compelling interest in enjoying freedom of conscience, an education that informs citizens of their right of exit from any culture or religion is justifiable.

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[147] Thomas Nagel, "Rawls on Justice," *The Philosophical Review*, Vol. 82, No. 2 (Apr., 1973), 220-234. Rawls addresses this objection in "Fairness to Goodness," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 2001), 267-285.
[148] *Political Liberalism* 199.
[149] Rawls puts the distinction this way: "We should not speak of fairness to conceptions of the good, but of fairness to moral persons with a capacity for adopting these conceptions and caring about the conditions under which they are formed." (John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 2001),"Fairness to Goodness," 284-5)

I have searched in vain for a successful liberal argument for the headscarf bans in France and Turkey. From the discussion above, I think it is clear that the same fundamental liberal concern with individual liberty and well-being which motivates the three liberal doubts, also undermines the justifiability of the headscarf bans. In addition, what has emerged is that much of the deliberation about the justifiability of the headscarf bans does not, in fact, take place at the level of principle. Applying the heuristic device of liberal justification can help us identify the reasons that bear on each of the cases at hand, with all their idiosyncrasies. It can push us to take account of other perspectives, and to clarify our understanding of the values involved - those of mutual respect, freedom of religion (including the free exercise thereof), and the value of political community, for which children need to be educated for participation in their political community. But it cannot resolve the practical compromises that need to be made in order for people to live together. Thus, for instance, no justifiability test will yield a determinate result for whether Muslim schoolgirls should be allowed to be exempted from physical education classes – in such cases, the practical matter of figuring out how to live together must play a deciding role in figuring out what policy to adopt.[150]

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[150] Once the big questions of principle are settled, these practical questions remain, and there is much to be said for taking a pragmatic approach to these. I take Stephen Macedo's suggestion for a "second stage of principled exception making" to be along these lines, when he suggests that "So long as most people accept political liberal values and strictures with regard to most basic matters of principle, we can safely proceed to consider comprehensively based pleas for exceptions and accommodations, as indeed we do." See Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?" in *Ethics*, Vol. 105, No. 3 (April 1995), 490.

Conclusion

A modest place for philosophy...

Reasons are the daily truck of the human animal. It is an unavoidable fact of life that humans are the sorts of beings that act for reasons. Most would say this is not something to be lamented. Philosophers, as a group, have a special affinity for reasons. They are the tools of our trade, built into arguments, jointed together with distinctions. Whether or not that makes us better at wielding reasons rightly is a judgement perhaps best left to others. The task of the philosopher, in societies indelibly marked by reasonable pluralism, is to help uncover the reasons that make possible living together on terms that are justifiable to each.

The case studies on Malaysia, Turkey and France contain a caution for the philosopher engaged in this task. Unearthing the reasons why some policy may or may not be justifiable is extremely important, but it is only the beginning of trying to figure out what to do. Finding a principle or policy that is justifiable is no guarantee that, practically speaking, we will succeed in moving past the deep disagreements that divide us. History, sociology, and politics, are just as necessary for living well together, and philosophers would benefit from a good dose of modesty about the place of conceptual argument in the real world.[1]

Intellectual modesty, to reclaim the term used by Leland and van Wietmarschen, should mean that philosophers try to think rightly of their role in a complex world. To start cordoning off classes of reasons in an attempt to achieve agreement would be a false modesty, and a harmful one, to boot. If reasons are why we act, we want to act in view of all the reasons that we have. What I hope to have shown in the preceding chapters is that one common route people take to epistemic abstinence - the desire for justifiability – does not, in fact, need to lead that way.

Philosophical argument of the nature I have been describing is not meant to be the exclusive province of the political philosopher. These investigations have, I hope, reminded us that the desire for justifiability runs deep in all of us. Asking the question of justifiability – "How could X reasonably reject this policy?"- is

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[1] For a far more detailed study which supports, I believe, the same conclusion, see Jonathan Wolff, *Ethics and Public Policy: A Philosophical Inquiry* (London: Routledge, 2011).

something each of us tends instinctively to do. Making use of this motivational impulse, made concrete in what I have called the heuristic device of justifiability, helps us, individually and together, to uncover the dependent reasons which justify political power. If we ask these questions as we reason together in the public sphere, then even if we do not succeed in resolving our moral disagreements, we will at least emerge with a deeper understanding of the people with whom we share a political society.

...in a philosophically-informed politics

Most politicians and policy-makers give short shrift to philosophy. Like the general, their focus tends to be on action rather than reflection. The preceding chapters suggest that they ignore reasons of justifiability at their peril. If the desire for justifiability is indeed deeply rooted in human moral psychology and motivation, then flouting the demands of justifiability will ultimately lead to a break-down of the ability to live successfully together.

The hope is that seeing clearly these two things we have reason to care about – namely, living together on terms *justifiable to each*, and living *together* in peace - will give us a better chance of living well together. It will allow us to face down our deep moral disagreements with a clear mind and try to resolve them. And where resolution proves impossible, we will be able to say, with a clear conscience, that we respect the people with whom we live. With some historical good fortune, we might even be able to aspire to that ancient ideal of counting fellow citizens as friends.

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