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JUSTICE AND THE GOOD: HOW SHOULD WE THINK ABOUT POLITICS?

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For my parents

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ABSTRACT

The topic of the three chapters that follow is how we should think about political justice—not the first-order question of what justice is or demands, but the second-order question of what sorts of considerations properly inform our answers to the first-order question. More specifically, the chapters focus on the issue of whether beliefs about the good should inform our deliberations about political justice. The dissertation offers an affirmative answer to that question, but it is offered in a spirit of sympathetic engagement with the alternative view.

This general subject matter is addressed within the framework of liberal political philosophy, specifically the family of views known as *political* liberalism and often distinguished from *comprehensive* or *perfectionist* liberalism. Political liberalisms are set off from liberalisms of the comprehensive or perfectionist variety by their endorsement of the following three claims about political justification:

(1) *The Mutual Acceptability Requirement*: In the context of deliberating about political justice, citizens owe one another justifications that are in some sense mutually acceptable;

(2) *The Bracketing Requirement*: Reasons drawn from one's comprehensive doctrine—roughly, a more or less complete moral-metaphysical view of the world and the good life—are not mutually acceptable. Political action thus needs to be justified by freestanding political reasons which are understandable and acceptable without reliance on any particular comprehensive doctrine; and

(3) *The Sufficiency of Political Reasons*: Freestanding political reasons of the sort

required by (1) and (2) provide adequate resources with which to deliberate well about political justice.

The three chapters that follow are inquiries into each of these claims. The first chapter offers what I take to be the best defense of claim (1). I distinguish between two species of justification of the mutual acceptability requirement—those focused on the value of justifying legislation to citizens *qua* persons affected by legislation and those focused on the value of justifying legislation to citizens *qua* putative co-authors of legislation. I discuss and critique views currently available in the literature and offer a variant of the latter sort of view as the correct approach.

The second chapter takes up claim (2) by querying the viability of arguing from the mutual acceptability requirement discussed in Chapter One to the bracketing requirement. I discuss and critique two competing attempts to make such an argument. The first argument places no epistemic conditions on what it means to say that a reason is not mutually acceptable. I argue that this non-epistemic approach is foreclosed by the justification of the mutual acceptability requirement I offered in Chapter One. The second argument incorporates epistemic conditions into the mutual acceptability requirement such that a reason is not mutually acceptable only if the person who rejects the reason does so for epistemically respectable reasons. I argue that this approach commits political liberals to untenable epistemic claims about the nature of disagreements about the good.

The third chapter leaves behind the question of whether the core political liberal argument from mutual acceptability to the bracketing requirement is sound. It instead takes up claim (3) by asking whether it is possible to adequately deliberate about justice (specifically about the content of constitutional protections for individual liberty) without recourse to thick,

substantive conceptions of the good life. Using John Rawls's political liberal view as set forth in *Political Liberalism* as an exemplar of the political liberal view, I argue that deliberation about individual liberty requires attentiveness to the question of what liberty is good for, which in turn requires incorporating (rather than bracketing) questions about the good life. I argue that a lack of attentiveness to questions about the good of liberty distorts one's conception of what liberties are worthy of constitutional protection, and that this distortion can be seen in Rawls's treatment of the issue of basic liberty in *Political Liberalism*.

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Chapter 1: Why Should Political Justifications Be Mutually Acceptable?

I. Introduction

An influential form of liberalism known as political liberalism is centrally preoccupied with the public, or mutual, acceptability of the justifications of legislation. Political liberals conceive of the class of reasons that can properly, or legitimately, justify legislation as narrower than the class of reasons that can properly justify decisions in other contexts. And as compared with other, non-political forms of liberalism, the class of genuinely justificatory political reasons for political liberals is relatively narrow. All versions of political liberalism share two fundamental components: (1) a demand for mutual acceptability and (2) a conception of what reasons are mutually acceptable.

Different versions of political liberalism are distinguished, in large part, by how they answer several crucial questions. One such question is what the acceptable, narrowed class of reasons includes and what it excludes. This question is very closely linked with the question of how to characterize the demand for mutual acceptability, for one's conception of acceptable reasons will be sensitive to one's account of the meaning of mutual acceptability. These issues will be dealt with in the next chapter.

But political liberals also differ in their answers to a different question: what justifies the demand for mutual acceptability in the first place? The requirement that reasons offered in support of legislation be mutually acceptable is understood as distinct from and irreducible to the more straightforward requirement that reasons be sufficient to rationally justify what they purport to justify. On the political liberal view, the reasons a citizen offers in favor of certain

legislation might rationally justify such legislation but still fail to meet the mutual acceptability requirement. Political liberals owe some explanation as to why, rather than being satisfied when our justifications stand up to ordinary rational scrutiny, it is instead necessary to impose upon them an additional mutual acceptability condition. The goal of this chapter is to provide what I take to be the most promising such explanation.

The justifications of the mutual acceptability requirement currently on offer can be divided into two main groups. First are justifications that focus on the *effects* of legislation on members of the polity (or, perhaps more controversially, on persons more generally). I call these *subject-oriented* approaches, as they are primarily animated by the perspective of the subjects of political rule rather than the sovereigns who wield political power. Or, perhaps more precisely stated, such approaches are primarily animated by the perspective of citizens *qua* subjects of political rule rather than the perspective of citizens *qua* wielders of political power. Such approaches, while differing in their details, advance an argument of the following form: Because legislation has profound effects—and sometimes profoundly negative effects—on members of the political community, they ought to be able to find the reasons on the basis of which the legislation is justified to be acceptable. According to such approaches, the mutual acceptability requirement is an approximation to the ideal of actual consent (and a cousin of hypothetical consent theories of legitimacy), the thought being that in a world in which it is impractical to suppose that the law can be actually endorsed by all, the law should be justifiable on the basis of a shared fund of political principles that are accepted by all (or at least, by all members of the theoretically relevant population).

The second species of justification of the mutual acceptability requirement, which I term *sovereign-oriented* approaches, shift their focus from persons who are affected by legislation and

instead take the perspective of the legislator. I will take as my exemplar of such approaches the view advocated by Colin Bird in his important article "Coercion and Public Justification."[1] Bird's view replaces the subject-oriented approach's concern with the situation of the citizen affected by legislation with a concern about the status of *all* democratic citizens' status as democratic co-authors. In Bird's own words, his approach "is concerned with alienation from the standpoint from which public decisions are adopted, and with the usurpation of individuals' civic standing as equal co-authors of democratic legislation."[2] Such alienation, Bird argues, is an affront to the normative standing of democratic citizens vis-à-vis one another as co-authors of legislation. The point of the mutual acceptability requirement, then, is to avoid such alienation and thereby secure democratic citizens' status as democratic coauthors of legislation.

In this chapter, I will offer a species of the sovereign-oriented approach as the most satisfactory justification of the mutual acceptability requirement. This approach, however, will incorporate an attention to the effects of legislation that is foreign to Bird's sovereign-oriented view and more reminiscent of subject-oriented approaches. I will argue that both Bird's sovereign-oriented view and the more traditional subject-oriented views contain a key insight into the true purpose of the mutual acceptability requirement, but that each misses what the other recognizes. The subject-oriented approaches neglect Bird's insight that, on any plausible account, all citizens have moral standing to demand that legislation be mutually acceptable to them, such that a citizen's being affected by legislation is not a necessary condition of the requirement that the legislation (or, more precisely, the principles justifying the legislation) be justifiable to him. Bird's account, meanwhile, misses the special role played in the generation of the mutual acceptability requirement by the fact that legislation has serious effects on citizens' lives. I will

[1] Colin Bird, "Coercion and Public Justification," *Politics, Philosophy & Economics* 13, no. 3 (July 2014).
[2] Bird, "Coercion and Public Justification," 203.

argue that inattention to the effects of legislation in justifying the demand for mutual acceptability leaves his account with insufficient resources to explain why it is unreasonable for citizens, at least in certain cases, to use their political agency to pursue urgent demands of justice even when doing so requires that they support legislation that is not mutually acceptable.

I will accordingly offer a composite account of the mutual acceptability requirement that incorporates the virtue of subject-oriented views and Bird's view. As with subject-oriented views, on my proposal, a necessary condition of the mutual acceptability requirement applying to a piece of legislation is that it has significant effects on some citizens such that the affected citizens have at least a *prima facie* claim to have been wronged by the legislation. However, unlike the subject-oriented approach, I suggest that the mutual acceptability requirement does not arise directly out of the consequences of legislation on those citizens, but rather out of the fact that *all* democratic citizens—whether they want to or not—participate in the creation of these consequences due to their status as democratic coauthors. My account thus takes inspiration from Bird's approach, but adds a twist: the requirement that I justify myself to my fellow citizens is created not simply because they are democratic coauthors, but rather because their status as democratic coauthors makes them unwilling participants in my coercion (or something similar) of certain citizens. To put the point another way: a special feature of our status as democratic coauthors is that, when I act politically in a way that potentially wrongs others (e.g., by coercing them), I am no longer the only one responsible for my actions—you, my democratic fellow citizen, are too. The purpose of the mutual acceptability requirement, then, is to, as Bird would say, allow you to condone the action I am taking such that, even if you disagree with it, you are at least not reduced to the status of an unwilling accomplice in injustice.

My proposed hybrid view thus explains why the duty to justify legislation publicly is owed to all, not simply those affected by it, while at the same time keeping in view the significance of legislation's consequences and thereby explaining why the mutual acceptability requirement only applies to certain legislation.

II. Subject-oriented and Sovereign-oriented Justifications of the Mutual Acceptability Requirement

The signal characteristic of the forms of liberalism that fall under the umbrella of "political" liberalism is, as noted in the introduction, the claim that even if I, a democratic citizen, believe that a given piece of legislation is fully justified, I may nevertheless stand under a duty to refrain from supporting the legislation. Specifically, I stand under such a duty if the legislation's justification—the one I believe to be sound and adequate—is not in some sense acceptable to my fellow democratic citizens.

Using Bird's terminology, we may distinguish between "correctness-based complaints" about legislation (and such legislation's underlying justifications) and "public justification requirement complaints," or "PJR complaints."[3] (Throughout this chapter, I will use the terms "mutual acceptability requirement" and "public justification requirement" interchangeably.) As Bird explains, "[a] correctness-based complaint against some argument α is one that claims to demonstrate that α is invalid, unsound or implausible and for that reason alone insufficient to justify what it purports to justify."[4] Imagine that I support a piece of legislation increasing criminal penalties for certain crimes because I believe that such penalties would reduce crime through creating a greater deterrence effect. My fellow democratic citizen would lodge a

[3] Bird, "Coercion and Public Justification," 191–92.
[4] Bird, "Coercion and Public Justification," 192.

correctness-based complaint against such legislation (and my support of it) by arguing that the contemplated penalty increase in fact has no enhanced deterrence effect.

PJR complaints, by contrast, "arise specifically when citizens find dissonance between their allegiance to a set of reasonable ethical commitments and the justificatory standpoint from which public decisions are adopted."[5] Bird terms the phenomenology underlying this species of complaint "standpoint-dissonance." It is noteworthy that some awkwardness attends the attempt to give examples of PJR complaints. Such an example would have to go like this: I support a law restricting marriage to opposite-sex couples on the basis of my interpretation of my religion's scripture, whereas my fellow citizen adheres to a secular comprehensive doctrine and rejects the reason-giving status of scripture. To voice a PJR complaint, she would then need to say that I should cease supporting the proposed legislation because she would experience alienating standpoint dissonance between her reasonable ethical commitments and the law if the legislation were enacted. It seems rather more likely that she would critique my position on correctness-based grounds, and that it would even be a bit odd for her not to do so and to articulate a PJR complaint instead. I will return to this somewhat strange feature of PJR complaints later and argue that PJR complaints are, in fact, more closely related to correctness-based complaints than is often made clear. For now, however, I set this matter aside; even if slightly strange, the same-sex marriage example demonstrates what a PJR complaint is supposed to look like.

Political liberals must explain why PJR complaints have significance independent from correctness-based complaints. If I have answered all correctness-based objections to my

[5] Bird, "Coercion and Public Justification," 191.

proposed legislation, the burden is on the objector to explain why I nevertheless ought to withdraw my support.

Attempts to meet this burden largely fall into two categories. In the first category are approaches which adopt the perspective of a citizen who has been or will be affected in some way—usually negatively—by the legislation in question. Consider the following representative example, from Charles Larmore:

> "For consider the basic fact that persons are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a rule of conduct solely by the threat of force, we shall be treating persons merely as means, as objects of coercion, and not also as ends, engaging directly their distinctive capacity as persons … We shall not be engaging their distinctive capacity as persons in the same way we engage our own, making the acceptability of the principle depend on their reason just as we believe it draws upon our own. Thus, to respect another person as an end is to require that coercive or political principles be as justifiable to that person as they presumably are to us."[6]

A similar thought underlies Gerald Gaus's defense of the mutual acceptability requirement. He begins with the claim that "[f]reedom to live one's own life as one chooses is the benchmark or presumption; departures from that condition—where you demand that another live her life according to your judgments—require additional justification."[7] The character of such "additional justification," for Gaus, is that the justification be "not simply a reason from your point of view, but from some shared or impartial point of view."[8] He concludes that "A reason R is a moral, impartial, reason justifying ϕ only if all fully rational moral agents coerced by ϕ-ing would acknowledge R, when presented with it, as a justification for ϕ-ing."[9]

[6] Charles Larmore, "The Moral Basis of Political Liberalism," *The Journal of Philosophy* 96, no. 12 (December 1999): 599.
[7] Gerald Gaus, *Justificatory Liberalism* (Oxford: Oxford Univ. Press, 1996), 165.
[8] Gerald Gaus, "Liberal Neutrality: A Radical and Compelling Principle," in *Perfectionism and Neutrality*, eds. Steven Wall and George Klosko (Lanham: Rowman & Littlefield Publishers, Inc., 2003): 143.
[9] Gaus, "Liberal Neutrality," 143.

Rawls's view is significantly less straightforward, as his formulations are typically both more nebulous and conceptually dense than the examples I have cited. There is, however, certainly material in *Political Liberalism* on which one could build a case that his motivation in advocating a public justification requirement was to ensure that those who are negatively affected by legislation are not disrespected thereby. For example, Rawls writes that the role of the mutual acceptability requirement (which he calls the criterion of reciprocity) is to "specify the nature of the political relation in a constitutional democratic regime as one of civic friendship," such that

> "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 might reasonably also accept. The criterion of reciprocity is normally violated whenever basic liberties are denied. For what reasons can both satisfy the criterion of reciprocity and justify holding some as slaves, or imposing a property qualification on the right to vote, or denying the right of suffrage to women?"[10]

The positions I have briefly canvassed share a concern about the position of a citizen who is coerced (or otherwise affected) by the law. This concern has something to do with the liberty of that citizen being restricted for reasons that are inadequate, and this inadequacy stems from the fact that the reasons are in some way not acceptable to her. The passages I have cited thus envisage PJR complaints as originating in a defective relationship between a coerced (or otherwise negatively affected) citizen and the state. The defective relationship is caused by laws that have two features: (1) they negatively affect the liberty of the citizen and (2) they are not justified by reasons that are cognizable as reasons within the evaluative standpoint of the affected citizen. PJR complaints are thus, in the first instance, complaints *by* negatively affected citizens *against* the state, and their content is that the citizen's liberty has been restricted for reasons he is

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[10] John Rawls, *Political Liberalism* (New York: Columbia Univ. Press, 2005), xlix.

unable to recognize *as* reasons. Political liberals add that this complaint can be directed not only at the state as such, but at citizens who play some role (which can be specified in various ways) in supporting or bringing about the offending legislation.[11]

The second category of justifications of the mutual acceptability requirement, exemplified by the position laid out by Colin Bird, replaces the concern with the status of specific citizens as subjects of coercive legislation with a focus on the status of all citizens as equal democratic coauthors of legislation. On the view he outlines, "citizens in a democratic regime are not bystanders to, but free and equal co-legislators jointly responsible for, public decisions. This formal status is entailed by the idea of democracy itself: democratic decisions are taken in the name of a public of free and equal citizens."[12]

While Bird does not suggest that their status as democratic coauthors means that citizens must be able to support all legislation, he proposes that such status might entail that citizens should be able to condone it.[13] This, in turn, entails that such legislation must be mutually acceptable:

> "Unless the case for the legislation in question can be amicably reconciled with the reasonable ethical standpoints[14] of those who object, the objectors will be unable to condone what the public may be about to do in their name. To obtain their condonation, proponents must provide a reasonable basis on which objectors might waive their complaints against the public enactment of the relevant legislation."[15]

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[11] See, for example, Rawls, *Political Liberalism*, 445–46 (citizens should "think of themselves ideally as if they were legislators following public reason" and thus as standing under a moral duty to abide by the PJR in their political behavior).
[12] Bird, "Coercion and Public Justification," 202.
[13] Bird offers a brief analysis of condonation, which he claims is related to both consent and forgiveness. "[I]n condoning something we signal our willingness to associate ourselves with the actions of another agent on certain terms. At the same time, condoning another's action need not imply that the action in question is the one we would have performed if the matter had been wholly up to us; condoning falls short of wholehearted approval. A refusal to condone something, by contrast, declares complete repudiation, a washing of one's hands with respect to it." Bird, "Coercion and Public Justification," 202.
[14] Bird formulates the mutual acceptability requirement in terms of the law's justification being compatible with the various "reasonable ethical outlooks" held in society. Bird, "Coercion and Public Justification," 191.
[15] Bird, "Coercion and Public Justification," 202.

According to Bird's view, then, citizens who make PJR complaints are protesting their "alienation from the standpoint from which public decisions are adopted, and [] the usurpation of [their] civic standing as equal co-authors of democratic legislation."[16] I will call the interest that Bird's account relies upon the democratic co-authorship interest.

Drawing upon the dual nature of democratic citizens as simultaneously subjects standing under state power and sovereigns wielding it, these two species of political liberalism can be stylized as subject-oriented and sovereign-oriented approaches to the mutual acceptability requirement. The approach typified by a concern about coercion and exemplified by the quotes from Larmore, Gaus, and Rawls above understands the purpose of the mutual acceptability requirement as ensuring that citizens who are affected by legislation are not thereby reduced the status of mere subjects; their ability to accept the reasons justifying the legislation *as* reasons (even if they ultimately think the reasons are insufficient to justify the legislation) means that they are not being treated as mere objects of state coercion or means to state ends.

Bird's democratic co-authorship approach, by contrast, is seemingly unconcerned with the possibility of the reduction of citizens' status to that of mere subjects. The worry is instead that citizens be treated as mere bystanders. Its point of departure is that citizens ought to be able to view themselves as co-sovereigns, jointly participating in the creation of the law. On his account, failure to abide by the mutual acceptability requirement would not necessarily reduce anyone to the status of a mere subject at the mercy of state power, but it would fail to realize the good of democratic coauthorship. While both approaches have in view a form of alienation that the mutual acceptability requirement is supposed to obviate or mitigate, they understand the nature of such alienation very differently.

[16] Bird, "Coercion and Public Justification," 203.

III. Why Bird's Sovereign-Oriented View Is on Its Own Inadequate

I believe that Bird's view gets close to the best explanation of the mutual acceptability requirement, and in fact my own view can be cast as a friendly amendment to it. Nevertheless, Bird's theory cannot provide a fully adequate account of the mutual acceptability requirement.. In brief, my argument is that the notion of democratic coauthorship on which Bird relies in justifying the PJR is either (1) not a weighty enough consideration to do the normative work Bird wants it to, at least in some cases, or else (2) it requires assent to something that resembles what Rawls would call a partially comprehensive doctrine and would thus fail to be mutually acceptable.

Central to Bird's theory is the notion of democratic coauthorship, which refers to the fact that "democratic decisions are inescapably taken in the name of everyone who belongs to the public."[17] Alternatively, it denotes "[t]he involuntary way in which individual citizens are implicated in public decision-making."[18] We should carefully distinguish between two questions that can be asked about this concept. First, one may ask what creates democratic coauthorship—what makes it the case that democratic decisions are necessarily made by all citizens of a democratic political community? Second, one may ask what follows from the fact of democratic coauthorship—given that democratic decisions are made in our name, what duties do citizens have that they would not have if democratic coauthorship did not exist?

I mention the first question only to set it aside, and I (with Bird) proceed on the assumption that some theory of democratic complicity is true or at least is a part of a conception of democracy widespread within democratic societies. Bird's proposal is to answer the second

[17] Bird, "Coercion and Public Justification," 202.
[18] Bird, "Coercion and Public Justification," 202.

question with the mutual acceptability requirement. He thus moves from the premise that "democratic decisions are inescapably taken in the name of everyone who belongs to the public" to the conclusion that "political action must be supported by reasons that can be affirmed from within all 'reasonable' points of view likely to be represented among members of a free society."[19] Although Bird does not spell out the argument connecting democratic coauthorship to the PJR, he does suggest how he thinks it would be filled in: "When a citizen experiences jarring standpoint-dissonance in relation to proposed political action, and the justification offered for it, they may reasonably complain that its enactment would alienate them too far from the public that claims to act in their name."[20]

It is here worth recalling that the PJR is understood by political liberals as binding even when it prohibits one from taking political action that is necessary—from one's own perspective—to prevent a grave injustice. Suppose that the pro-life side of the abortion debate can only be justified by reference to considerations that run afoul of the PJR. A pro-life advocate would then understand the PJR as requiring her to refrain from what, in her view, amounts to a defense of innocent life.[21] If, as Bird maintains, the purpose of the PJR is preventing alienation, the possibility of such alienation must be a sufficiently bad outcome to give the would-be pro-life advocate a sufficient reason to refrain doing what she believes to be defending innocent life.

On Bird's view, then, the pro-life advocate needs the following thoughts to guide her political behavior: (1) Despite the fact that X-ing is the only way to defend innocent life, I ought to refrain from X-ing and (2) the reason that I ought to refrain from X-ing is that X-ing would

[19] Bird, "Coercion and Public Justification," 190.
[20] Bird, "Coercion and Public Justification," 203.
[21] As an alternative example with a different political valence, consider an anti-torture advocate who believes that her view, according to which there is an absolute prohibition against torture, can only be justified by appeal to reasons that run afoul of the PJR.

cause at least some of my fellow citizens to experience alienation from the public that acts in their name. The question, then, is why the value at play in (2)—avoiding causing one's fellow citizens to experience a certain form of political alienation—should be understood to override the value at stake in (1)—defending innocent life. Bird's answer is his normative conception of democratic coauthorship: the fact that political decisions are taken in the name of each and every democratic citizen creates a requirement that those citizens be able to condone the basis of those actions.

I believe that this answer either (1) amounts to an implicit rejection of the pro-life advocate's comprehensive doctrine, or at least that part of it which is relevant to her stance on abortion, or else (2) requires that the pro-life advocate take onboard a controversial ethical commitment about the good—the very sort of commitment upon which the PJR forswears reliance.

I will first explain the first horn of the dilemma—why Bird's answer implicitly denies the pro-life advocate's ethical commitments. Though her discussion is situated in a somewhat different context, Kyla Ebels-Duggan has argued that what Bird calls the PJR is incompatible with certain reasonable ethical positions, and I appeal to her argument here.[22] Her point of departure is the observation that acceptance of the PJR, to the extent it is offered as a shared basis of political deliberation amongst reasonable citizens, must be compatible with the moral outlooks of such citizens. To put the point more emphatically, the value of cooperation on which the PJR rests must be cognizable from within the perspective of citizens' comprehensive moral

[22] Kyla Ebels-Duggan, "The Beginning of Community: Politics in the Face of Disagreement," *The Philosophical Quarterly* 60, no. 238 (January 2010). Ebels-Duggan's terminology is somewhat different, but she is talking about the same issue. Instead of the "public justification requirement," she speaks of "strict political liberalism," which she contrasts with "permissive political liberalism." According to the latter view, public justification is a value to be strived for but does not entail a prohibition on supporting political action that cannot be publicly justified. Strict political liberalism, however, is the view that the PJR creates a prohibition against citizens supporting legislation that they believe cannot be publicly justified.

outlooks—the very same moral outlooks many of whose judgments about morality the PJR disqualifies from the realm of political deliberation. If there are cases in which a reasonable citizen can only abide by the restrictions imposed by the PJR on pain of denying the truth of her more comprehensive moral outlook, the PJR will have failed to provide a workable basis of cooperation between reasonable citizens.

She begins by noting that the abortion controversy centers not on the question of what protections the state should offer to its citizens, but rather on who qualifies for such protections. And this question in turn will hinge on the truth of metaphysical and moral positions reliance on which is prohibited by the PJR because deep disagreement about them exists between reasonable citizens. Of course, none of this sets the abortion debate off from other controversies; it is part and parcel of political liberalism and the PJR that citizens will be prohibited from bringing to bear on certain issues the full complement of reasons that inform their all-things-considered judgments about them. Political liberalism counsels citizens, whatever their all-things-considered judgment about an issue, to resolve the issue for political purposes using only reasons that are publicly justifiable. In the context of abortion, one typical political liberal line is that reliance on such publicly justifiable reasons (respect for women's health and autonomy, for example) decisively favors permissive abortion regulations.

The problem is that, as Ebels-Duggan puts it, "[t]hose who hold that abortion is a grave moral wrong cannot accept the balance of reasons proposed [by abiding by the PJR] without abandoning or contradicting their worldview."[23] She interprets this as showing that public reason is "silent" in a case such as this; a way of reasoning ceases to be public if it entails the rejection of a reasonable citizen's moral outlook, and any resolution of the abortion question will involve

[23] Kyla Ebels-Duggan, "The Beginning of Community," 68.

such a rejection in this case. Translated into the language of the PJR, her claim is that there is no set of reasons that we can use to resolve the abortion question that conforms to the PJR, because every approach will be incompatible with some reasonable outlook. I would prefer to say that public reason is not silent on this issue, but instead that reasonable citizens can reasonably reject constraining their political deliberations about abortion to public reasons, or, what amounts to the same thing, that while it is possible to deliberate about abortion in a way that conforms to the PJR, some reasonable citizens will have insufficient reason to do so, at least unless more is said to explain why the PJR's demands are morally urgent.

The root of this insufficiency as it relates to Bird's view is the fact that the justification of the PJR—the value of democratic coauthorship and the undesirability of causing citizens to feel alienated from exercises of political power—will reasonably appear to many citizens to be outweighed by the urgency of the value that (according to their wider moral outlook) they would have to forswear reliance on by abiding by the PJR, namely the defense of innocent human life. My claim, in other words, is that the following thought is one that a reasonable pro-life advocate may reasonably have and act on: If the defense of innocent human life requires my fellow citizens to feel (or be) alienated from the exercise of political power, so much the worse for democratic coauthorship—destruction of innocent life is worse than such alienation.

Bird is cognizant of this type of worry, acknowledging that the prevention of illegitimate coercion—the point of the PJR on the coercion-based variants of what I termed subject-oriented approaches—may "seem a more impressive reason to refrain from pursuing" political goals that one believes to be worthwhile (and even demanded by justice) but not publicly justifiable.[24] His response is to note that even if illegitimate coercion is more morally urgent than alienation from

[24] Bird, "Coercion and Public Justification," 207.

the standpoint from which democratic decisions are made, this is not an argument in favor of coercion-based accounts of the mutual acceptability requirement unless we have some reason to think that coercion requires mutual justification in order to be legitimate.[25] Bird is here highlighting a virtue of his view, namely that the democratic coauthorship account has a built-in explanation as to why the publicity—rather than mere correctness—of political decisions matters: coauthorship requires condonation, and condonation requires something like the acceptability of reasons. Coercion-based accounts of the PJR, meanwhile, face the burden of showing that, even when all correctness-based objections to coercion have been met (and thus even when there is good all-things-considered reason to use coercion), "there could remain some *further* question about its legitimacy" and that this further question can only be answered using a publicity requirement. Bird suggests coercion-based accounts have not met this burden, and thus that the relatively higher stakes in preventing illegitimate coercion as compared with preventing alienation cannot count against his view in favor of coercion-based views.

I accept Bird's claim that coercion-based views have not met their burden of explaining why coercion needs to be publicly justified rather than merely correctly or sufficiently justified, and thus that the "more impressive" moral force of preventing subjugation does not give a reason to reject his view in favor of coercion-based views. My point, however, is not that coercion-based views are superior to Bird's, but rather that Bird's own view struggles to explain why the prevention of alienation on its own is an impressive enough reason to abide by the PJR even when grave injustices are perceived to be at stake. I suggest that, so long as democratic coauthorship and the avoidance of alienation are all that the PJR has going for it, citizens may in some circumstances reasonably reject the demands of the PJR.

[25] Bird, "Coercion and Public Justification," 205.

Bird can respond to this argument by claiming that the normative conception of democracy that he has in view *does* in fact entail that a citizen's alienation from the public that acts in her name is a weighty enough consideration to trump the pro-life advocate's reasonable ethical belief in the urgency of preventing abortion. Bird could claim, in other words, that his theory has in view a good of such profound value—a democratic polity each of whose citizens can condone the political actions taken in their name—that the ability of the political community to instantiate this good overcomes what, from the perspective of those citizens' comprehensive doctrines, appear to be urgent moral demands. I believe that such a response would make Bird's view vulnerable to the dilemma's other horn, namely that it makes the PJR dependent on endorsement of a partially comprehensive view of the human good, namely as being constituted in significant part by one's ability to identify with the political community.

I will present this argument by mirroring it after an argument that Daniel Brudney has offered in a different but related context, namely a discussion of the permissibility of what he calls non-coercive, modest establishment of religion.[26] In his view, prohibition of such establishment would need to be cast in terms of the importance of avoiding the alienation from the polity that such establishment would purportedly cause citizens to experience—whether this experience be understood as their subjective sense of alienation or their objective status as *being* alienated. But, he argues, "[t]o feel alienated from one's political community requires one to believe that one's normal or proper relation to it is a relation of connectedness or intimacy."[27] Likewise, to *be* alienated in a morally relevant way requires it to be *true* that one's normal or proper relation to it is a relation of connectedness or intimacy.[28] More specifically, for alienation

[26] Daniel Brudney, "On Noncoercive Establishment," *Political Theory* 33, no. 6 (December 2005).
[27] Brudney, "On Noncoercive Establishment," 820.
[28] Brudney, "On Noncoercive Establishment," 821.

to do the work it needs to do in prohibiting the sort of benign establishment Brudney contemplates, some idea similar to the following must either be widely endorsed or be true: "One's proper relation to the polity involves a sense of connectedness to the polity, and this relation plays a significant role in one's overall good."[29] He terms this thought the "strong connection to the polity thesis."[30] This thesis, however, is a substantive assertion about the human good. To rely on it is thus "to make the kind of appeal that is precluded by the constraints of public reason" and is thus not publicly justifiable.[31]

Brudney's argument can be used to make similar trouble for Bird's proposed justification of the PJR. Bird's argument, like the argument against modest, non-coercive establishment, relies exclusively on the importance of avoiding alienation because other sources of normative heft—such as the specters of coercion and subjugation—play no role in Bird's theory. For alienation to do the work Bird wants it to do in justifying the PJR, then, his notion of democratic coauthorship must carry with it some idea in the vein of Brudney's strong-connection-to-the-polity thesis. In keeping with my stylized distinction between subject- and sovereign-oriented justifications of the PJR, we may term the operative notion the strong-connection-to-sovereignty thesis and describe it thus: "One's proper relation to the exercise of political power involves a sense of connectedness to exercises of political power, and this relation plays a significant role in one's overall good." This claim, like its polity-focused cousin, is precisely the sort of thesis that the PJR is supposed to rule out. It would be paradoxical indeed if the PJR were justified by a claim reliance on which the PJR itself prohibits.

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[29] Brudney, "On Noncoercive Establishment," 820.
[30] Brudney, "On Noncoercive Establishment," 820.
[31] Brudney, "On Noncoercive Establishment," 830.

I believe that Bird's justification of the PJR is the best interpretation on offer in the literature and that he comes close to offering a satisfactory account of it. The view I ultimately defend in this chapter is in fact a variant of his view. However, as I have argued in this section, the democratic coauthorship interest on which his view turns is not able to bear the heavy burden of justifying the PJR in certain circumstances, namely those in which citizens must choose between abiding by it and respecting what they reasonably (even if incorrectly) view as the urgent demands of justice. In such circumstances, unless more can be said about what makes the PJR morally pressing, citizens can reasonably decline to abide by the strictures of the PJR and instead appeal to comprehensive reasons. The variant of Bird's view I offer in this chapter will attempt to provide the extra bit of normative heft that the democratic coauthorship needs in order to play its role in justifying the PJR even in such scenarios.

IV. Why Coercion-Based Views, and Subject-Oriented Views Generally, Are Inadequate

While there are good reasons to be skeptical that Bird's democratic coauthorship theory provides a complete justification of the mutual acceptability requirement, Bird has argued persuasively that coercion-based accounts—one version of what I terms subject-based accounts—are also inadequate.

Bird's arguments aim to show that coercion-based accounts are underinclusive, and that they are underinclusive in two ways. First, he argues that coercion-based accounts yield the conclusion that some laws that clearly ought to be subjects of valid PJR complaints are in fact not susceptible to such complaints. In a now well-known example, Bird asks us to imagine a nation called Magnesia in which a lottery has been instituted by the state as a means of raising revenue.

> "After free and fair elections, in which party platforms are openly canvassed, a political party committed to a perfectionist conception of the good comes to power. It proposes to use the surplus funds raised from future renditions of the lottery to set up a new ministry dedicated to promoting the way of life recommended by a reasonable conception of the good."[32]

He introduces various stipulations to make the example serve its purpose, such as that the party offers credible assurances that it will not restrict freedom of expression or otherwise coerce citizens into abiding by its comprehensive doctrine. Instead, the party will use revenue generated by the lottery to advance its comprehensive doctrine through a variety of non-coercive means.

> "It proposes … to build a grand building to house the new ministry, prominently displaying iconography celebrating historical figures who pioneered and disseminated the perfectionist ideals involved. The ministry will sponsor a variety of programs, including educational initiatives, the publication of documents advocating its conception of the good life, and the making available of opportunities (fellowships, research support, start-up subsidies, etc.) to those who wish to pursue and explore the conception of the good involved. These are intended (and likely) to lend these views greater visibility and influence in public and private life."[33]

Finally, Bird has us imagine that, though a majority of Magnesian citizens endorses this conception of the good, a significant minority not only rejects it, but finds the justification offered by the dominant political party for its re-purposing of the lottery to be incompatible with its own reasonable ethical views. (The justification, we may assume, is cast in terms that require assent to comprehensive doctrine affirmed by the dominant political party.)

The point of the example is to show that coercion-based accounts of the mutual acceptability requirement imply that it is not triggered by legislation that in fact appears to be one of its appropriate objects. Of course, someone may reject the mutual acceptability requirement in general and thus deny that the case of the Magnesian lottery is one that should be constrained by it. But Bird assumes that, insofar as one is committed to the criterion at all, one

[32] Bird, "Coercion and Public Justification," 195.
[33] Bird, "Coercion and Public Justification," 195.

will think that it appropriately constrains the state's decision to ally itself with a comprehensive doctrine by establishing and administering such a lottery. Because such alliances need not employ the coercive power of the state, coercion-based accounts of criterion of reciprocity conflict with powerful intuitions about its applicability.

Bird's second argument continues in a similar vein. But instead of showing that coercion-based accounts are underinclusive of legislation that is properly the object of the mutual acceptability requirement, it is intended to show that such accounts are underinclusive of the citizens who may legitimately make such complaints. Put another way, while Bird's first argument aimed to show that coercion-based accounts undercount the items of legislation against which PJR complaints are in principle possible, the second argument assumes that some piece of legislation has been enacted that is at least in principle susceptible to a PJR complaint, but then shows that coercion-based accounts exclude some citizens from the population who can voice a PJR complaint.

The argument has two premises. First is the claim that "while public action usually requires some private individuals to be coerced, it almost never requires the coercion of every private individual."[34] Second, Bird observes that some citizens who have a PJR-complaint against a law might not be subject to its coercive effects. In fact, it might be inconceivable that some citizens with PJR-complaints could ever be subjected to the law's coercion—Bird offers the example of men who might find unacceptable the justification of an anti-abortion law. "Even when public action is coercive," Bird writes, "those moved to make PJR-complaints against it may still find themselves in exactly the predicament of the Magnesian minority: uncoerced but unable to affirm the grounds of public action from within their own standpoint."[35]

[34] Bird, "Coercion and Public Justification," 198.
[35] Bird, "Coercion and Public Justification," 198.

This argument targets what may be called the "alignment requirement" that the coercion-based view generates. This requirement is based on that view's construal of the PJR as generated by some type of claim right that coercees have against their coercers, namely a right against being coerced for reasons that they cannot accept. The alignment requirement is that, because PJR complaints are assertions of such a claim right, they must be made by someone who is coerced. Those who stand outside of the coercer-coercee dyadic nexus are moral bystanders insofar as they have no claim right which has been activated by coercion.

For Bird, this second argument shows that coercion-based views are committed to the claim that, even when legislation is coercive, those who are not coerced by it lack "standing" to mount a valid PJR-complaint against it. Bird—in my view fairly—rejects this view as "too peculiar to take seriously."[36] The mutual acceptability criterion would indeed have unacceptably narrow application if only those coerced by legislation could lodge a PJR complaint.

It might be thought that Bird has overestimated what this argument actually demonstrates. One may concede that a necessary condition of anyone raising a PJR complaint against a piece of legislation is that that legislation coerces someone who could raise a PJR complaint against it because of her standpoint dissonance with respect to the legislation's justification. However, once that condition is satisfied, anyone who experiences standpoint dissonance vis-à-vis the legislation—whether they are coerced or not—may then raise a PJR complaint on behalf of the person who is both coerced and experiences such standpoint dissonance. This reply in essence claims that Bird has misappropriated the concept of legal standing; while (generally) P cannot sue D for damages unless D caused injury to P, a bystander is free to argue that the state has committed an injustice even if the state has not committed that

[36] Bird, "Coercion and Public Justification," 195.

injustice against the bystander. Indeed, the experience of vicarious reactive attitudes relies on the notion that one need not be affected by an injustice in order to have a say about it. Injustice, we might say, is everyone's business.

I believe there is something to this response, but that it leaves the heart of Bird's critique of coercion-based accounts intact. It is helpful to make a distinction between PJR *complaints* and PJR arguments. When I make a PJR complaint, I argue that the state has wronged *me* by committing whatever sort of wrong it is that the mutual acceptability requirement is meant to forestall. Such a complaint is a claim that I make on my own behalf. A PJR argument, by contrast, is simply a claim that the mutual acceptability requirement has been violated, and is thus capable of being made by anyone.

The hypothetical reply to Bird's argument, in my view, yields conclusions that are discordant with what I take to be strong intuitions about the conditions under which PJR arguments and complaints can be made. As an initial matter, the reply concedes that PJR arguments cannot be made unless some coerced party experiences standpoint dissonance. This entails that I, a non-coerced citizen, cannot even make a PJR argument (not to speak of a complaint) unless I know that some coerced party experiences standpoint dissonance with respect to the law's justification. This empirical hurdle to my ability to make a PJR argument strikes me as implausibly restrictive and out-of-place.

Even if this were not a problem, however, coercion-based accounts would suffer from needing to frame non-coerced citizens' PJR grievances in third-personal terms (as PJR arguments rather than PJR complaints). It seems untrue to the phenomenology of PJR grievances that they have a purely third-personal character when made by uncoerced parties. An advocate of coercion-based accounts may here simply insist that our phenomenological instincts on this score

need to be adjusted. I will, however, consider coercion-based views' inability to frame the PJR grievances of non-coerced citizens in second-personal terms as a *pro tanto* reason to seek an alternative that has better fit with the intuition that such citizens, when making PJR complaints, are pressing a claim on behalf of themselves no less than on behalf of their coerced fellow citizens.

I thus think that Bird has pointed out a serious difficulty that coercion-based accounts need to address. Because such accounts construe PJR complaints as complaints made by coerced parties, they relegate uncoerced citizens to the role of moral bystanders. I will conclude by noting two features of Bird's argument—one way in which it is more expansive than it first appears, and another way in which it is more limited than it first appears.

The argument is more expansive than would appear on its face because it applies not only to coercion-based views, but to any type of view that conceives of PJR complaints as necessarily made by parties who are affected in some way by legislation. Coercion-based views, of course, fixate on the coercive effects of legislation and thus conceptualize PJR complaints as complaints made by coerced parties. But, as will be discussed later, legislation can affect persons in ways other than by coercing them, such as by impacting their life chances. Insofar as any such effects-based view would face an alignment requirement similar to that which applies to coercion-based views, such views would also reduce non-affected citizens to bystanders and thus undermine their ability to make PJR complaints.

The argument is more limited than it appears in that it does not necessarily have force against all views according to which coercion (or some kind of effect) is a necessary condition of the PJR's application. A view might claim that the justification of the PJR needs to rely on the presence of coercion without being subject to Bird's critique. This is because it is not the mere

presence of coercion in the coercion-based view's justification of the PJR that makes it susceptible to Bird's critique, it is rather the coercion-based view's claim that PJR complaints are claims pressed *by* coerced parties against their coercers. It thus incorporates coercion in a very specific way into its justification of the PJR, namely by construing PJR complaints as based on a claim right held by coercees against coercers. This moral nexus is what creates the alignment requirement that Bird's critique targets. But, as will be seen later, a view can appeal to the presence of coercion in justifying the PJR without construing PJR complaints as claim rights pressed by coercees against coercers. This leaves open the possibility that, even if we grant the force of Bird's argument, the coercive nature of legislation—or some other aspect of its causal impacts on persons—might still be part of the justification of the PJR. The view I defend later in this chapter does in fact make such a claim.

V. PJR Complaints and Correctness-Based Complaints—How Are They Related?

In the next section, I will introduce my theory as to what motivates the public justification requirement. To set the stage, however, I begin in this section by addressing the question of how PJR complaints and correctness-based complaints are related. I suggest that they are more closely related than commentators have recognized, and indeed that PJR complaints are something like a species of correctness-based complaints. Understanding PJR complaints in this way, I will argue, offers a clue as to how to understand their moral motivation.

As Bird notes, those who defend some version of the PJR are committed to the view that PJR complaints are distinct from what he calls "correctness-based complaints."[37] As Bird explains,

[37] Bird, "Coercion and Public Justification," 192.

> "a correctness-based complaint against some argument α is one that claims to demonstrate that is invalid, unsound or implausible and for that reason alone insufficient to justify what it purports to justify. . . . When I point out that [an] argument is unsound because it depends on a demonstrably false premise about the age of the world, I articulate a correctness-based complaint."[38]

Likewise, one makes a correctness-based complaint against a law's justifications when one argues that they "rest on premises that turn out to be factually incorrect, beg the question they claim to settle, appeal to manifestly implausible, irrelevant or vague normative principles, or involve fallacious inferences."[39] Such complaints are supposed to be distinct from PJR complaints because "[t]hey make no essential reference to A's reconcilability with the complainant's own (or someone's) reasonable ethical standpoint."[40]

By contrast, PJR complaints exist at some remove from concerns about whether a law is justified. Instead of claiming that a law's justification is invalid, they claim that a law's justification is inconsistent with one's own reasonable ethical commitments.

There is something puzzling about PJR complaints, as characterized by Bird and elsewhere in the literature. As compared with correctness-based complaints, they would appear to be the moral equivalent of those elements of the periodic table that do not occur in nature, or are only naturally occurring in trace amounts. Commenting on a piece by Jonathan Quong, a political liberal and advocate of the PJR, Joseph Raz related his impression that "[r]eading it I sometimes feel that I live, or think I do, in a different world from the one he inhabits. Or perhaps, that [Quong] believes that people regularly have emotions and attitudes that I think are had only occasionally."[41]

[38] Bird, "Coercion and Public Justification," 192.
[39] Bird, "Coercion and Public Justification," 192.
[40] Bird, "Coercion and Public Justification," 192.
[41] Joseph Raz, "Comments on the Morality of Freedom," *Jerusalem Review of Legal Studies* 14, no. 1 (2016): 178.

Like other political liberals, "[w]hat exercises Quong is the possibility of some people having to live and act under rules that they disagree with."[42] PJR complaints are meant to give expression to what is objectionable about such a situation; the complainant's objection is not that the law's purported justification is incorrect, but instead is that the law's justification is incompatible with his own reasonable ethical outlook. Raz, in my view correctly, perceives this to be an artificial description of the moral phenomenology of citizens who must live under rules they disagree with. As he explains: "[E]ven though they all regret that they live under rules that they think are wrong or unjust, etc. what they regret is being wronged or being subjected to injustice. Compared with that[,] the fact that they personally disagree with the rules is relatively insignificant."[43] Translated into Bird's language, what Raz here points out is that PJR complaints—at least as traditionally described as focusing on the fact of the complainant's disagreement with the law—play a rather minor role in the moral lives even of citizens who are in a position to voice such complaints. They are focused on the wrongness or injustice of the law, not the fact that there is a disconnect between their perspective and the perspective one would need to adopt to find the law justified. While this does not prove that PJR complaints are morally insignificant, it prompts one to wonder whether there is some way of redescribing PJR complaints that brings them in from the periphery of our moral experience.

While I believe that Raz's critique has validity, I also think that it can be incorporated into a political liberal view. Such incorporation, however, requires a subtle reconceptualization of what exactly a PJR complaint is. This reconceptualization's point of departure is an observation implicit in Raz's critique, namely that there is a correctness-based complaint underlying every

[42] Raz, "Comments on the Morality of Freedom," *Jerusalem Review of Legal Studies* 14, no. 1 (2016): 178.
[43] Raz, "Comments on the Morality of Freedom," 180.

PJR complaint. To see this more clearly, consider again Bird's description of PJR complaints: "These are complaints that arise specifically when citizens find dissonance between their allegiance to a set of reasonable ethical commitments and the justificatory standpoint from which public decisions are adopted."[44] Despite the emphasis that PJR theorists tend to put on such citizens' perception of dissonance between their beliefs and the justification of legislation, citizens who are in the position to lodge a PJR complaint might just as well lodge an ordinary correctness-based complaint. I assume that, whatever it means to have ethical commitments, it must mean believing such commitments to be in some sense true or correct. Or, as Rawls might say, it requires one to believe such commitments to be reasonable or at least not unreasonable. If, then, I perceive that legislation can be justified only by reliance on claims that conflict with my own ethical commitments, I *ipso facto* believe that the legislation is vulnerable to ordinary correctness-based reasons. After all, I must believe that the legislation's justification conflicts with the truth, or something like it.

As an attempt to accommodate Raz's intuition about the relatively minor role of PJR complaints (when such complaints are understood as a citizen's complaints about the fact that the law conflicts with his own ethical commitments) I suggest that PJR complaints be reconceptualized as a species of correctness-based complaints. More specifically, I suggest that they be understood—with a proviso, which I will explain—as someone else's correctness-based complaint. The difference between PJR complaints and correctness-based complaints, in other words, is not in the first instance the content of the complaint, but rather its aspect (viz., first- or third-personal).

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[44] Bird, "Coercion and Public Justification," 191.

An example may clarify. Suppose I support a law, but I know that my fellow citizen, Jack, rejects the law's justification and indeed understands his comprehensive doctrine, which I reject, to require opposition to the law. There are two ways of describing Jack's situation. From his perspective, he has a valid correctness-based complaint against the law. As Raz observes, this is likely what matters most to him. If Jack has a typical moral psychology, the notion of a PJR complaint is not likely to figure prominently in his thoughts about the law. Instead, concerns about the existence of a discrepancy between the law's justification and his own commitments will be subordinated in his mind to thoughts about injustice or whatever concrete wrong he believes the law perpetrates. I, however, am unable to describe him as having a valid correctness-based complaint. Instead, I understand him to have a correctness-based complaint which he mistakenly takes to be valid. My suggestion is that the notion of a PJR complaint—fixated as it is on the existence of disagreement and dissonance rather than incorrectness—has its natural home in my thoughts about Jack's situation vis-à-vis the law, not in his own thoughts about it.

As noted, this suggestion comes with one proviso. The difference between ordinary correctness-based and PJR complaints is not only a difference as to who is making the correctness-based complaint, for there is one further distinction. For reasons that will become clearer below, I believe we should hold onto the aspect of traditional formulations of PJR complaints according to which such complaints have something to do with the fundamentality of the objection to the law that is at issue. This is typically described in terms of a law's justification requiring a rejection of one's comprehensive doctrine,[45] or its incompatibility with (as Bird says) one's reasonable ethical commitments. PJR complaints, then, are a particularly serious and deep

[45] *See, e.g.*, Martha Nussbaum, "Perfectionist Liberalism and Political Liberalism," Philosophy and Public Affairs 39, no. 1 (2011): 20.

type of correctness-based complaint; the complaint is not that the law's justification relies upon an incorrect application of one's ethical commitments, but rather that it relies on an implicit or explicit rejection of certain of those commitments. This proviso, however, should not be misunderstood. The point is not that PJR complaints are fundamentally complaints that the law's justification is incompatible with one's own deepest commitments. The point is rather that, in addition to PJR complaints being understood as correctness-based complaints described in a third-personal way, they are also not just any correctness-based complaints, but rather correctness-based complaints rooted in a particularly deep incompatibility between the law's justification and the correctness-based complainant's commitments.

To return to the example of Jack, my fellow citizen who has what he takes to be a valid correctness-based complaint against a law that I support, we can apply this proviso as follows. Jack's correctness-based complaint, viewed from the perspective of someone such as me who does not endorse his complaint, is a PJR complaint if and only if his correctness-based complaint is a complaint that the law's justification is what we may describe loosely as deeply or fundamentally incorrect. Jack must think that the law, to be justified, must require outright rejection—rather than mere misapplication—of the true comprehensive doctrine.

These thoughts are offered as a friendly amendment to the traditional description of PJR complaints, typified by Bird. Indeed, my suggested recharacterization of PJR complaints defuses the critical edge of Raz's observation that citizens care much more about the injustice or incorrectness of laws they disagree than they do about the fact of their disagreement. It does so by recasting PJR complaints as one's own observation that one's fellow citizen has a correctness-based complaint against a law. Stated differently, it recasts PJR complaints as correctness-based complaints viewed from the perspective of someone who does not endorse

those complaints. This excuses PJR advocates from needing to explain why their theory centers a type of moral objection that is rarely found in the moral lives of flesh-and-blood citizens. As I will argue in the next section, it also gives us a clue as to what the true moral motivation of PJR complaints is.

VI. A Hybrid View of the PJR's Motivation

We seek a satisfactory explanation of why I, a democratic citizen, should be concerned not only that political action I support meets all valid correctness-based objections, but also is compatible with the reasonable ethical commitments of my fellow democratic citizens.

As I suggested in the previous section, this question can be reformulated as follows: When, by my own lights, a piece of legislation has survived all correctness-based objections, why should I further concern myself with my fellow citizens' belief that the legislation does not survive all correctness-based objections? Reformulating PJR complaints as correctness-based complaints offers a clue as to how to answer the question: Instead of asking what could motivate a *sui generis* requirement—the PJR—we can instead ask what motivates ordinary correctness-based requirements. Once we know what motivates such requirements in straightforward first-personal cases, we can then ask what might motivate me to care about someone else's beliefs about whether correctness-based requirements have been met.

Why do I care whether or not legislation that I support is vulnerable to correctness-based objections? The primary concern motivating a correctness-based requirement in the political domain with respect to political action is, I propose, the same concern that motivates such a requirement in the non-political domain with respect to coercive actions. This concern is to ensure that I do not wrong those who I coerce. Given that to coerce another person is *prima facie*

to wrong them, I must endeavor to become reasonably confident that my coercive action is properly justified. Following Bird, I suggest that the notion of "proper justification" of coercive action should be understood in terms of an ordinary correctness-based requirement. At least, as far my inquiry into the rightness of my coercive action is restricted to the question of whether I am wronging the person that I coerce, that inquiry begins and ends within an ordinary correctness-based standard of review. Once I have reasonably satisfied myself that my coercive action is vulnerable to no correctness-based objections, I echo Bird's suggestion that there is no leftover question I must answer in order to ensure that I do not wrong the coerced party. Specifically, there is no further worry which can only be addressed by ensuring that the justification of my action is compatible with the ethical commitments of the coercee, which is to say that there is no further worry which can only be addressed by ensuring that that the coercee thinks that my action's justification is vulnerable to no correctness-based objections.

These comments are restricted to one dimension of analysis of coercive action, namely that dimension which focuses on the rightness of my coercive action vis-à-vis the person I am coercing. I note that this proposal takes no stance on what a proper justification of coercive action would look like, e.g., whether it would be consequentialist or not. The point is the limited one that, as far as my moral standing in relation to the person I am coercing is concerned, there is no leftover question to ask once I have determined that my action's justification is vulnerable to no valid correctness-based critique and thus no leftover question that requires me to reason from someone else's perspective in the fashion of the PJR.

What, then, could generate a leftover worry that is not answered by ordinary, first-personal correctness-based analysis and instead requires me to shift into the register of the PJR? As I suggested in the previous suggestion, that question can be translated into the

following: what generates a leftover worry that requires me to attend to the beliefs of third parties as to whether or not my action is subject to correctness-based criticism? I have claimed that the role of correctness-based analysis is to ensure that one's own coercive actions are not wrongful towards those who one coerces. I suggest that correctness-based analysis is playing that very same role whether it be my own correctness-based analysis or someone else's; in both cases, the analysis is morally relevant and the beliefs that it yields are morally pressing because they bear on whether or not the person doing the analysis is implicated as a participant in wrongful coercion. In general, then, a third party's belief that my action fails to a correctness-based argument will be a morally pressing issue—for them as well as for me—when that party's belief bears on the question of whether he has wronged another through my coercive action. This suggests that third parties' beliefs about the correctness of my coercive action towards coercees are morally pressing when those third parties are somehow implicated in my coercive action—not as coercees, but rather as agents who have some degree of complicity in and responsibility for my coercive action.

Here, my account is closely related to Bird's, as it must rely upon some such thought as the following: ". . . citizens in a democratic regime are not bystanders to, but free and equal co-legislators jointly responsible for, public decisions. This formal status is entailed by the idea of democracy itself: democratic decisions are taken in the name of a public of free and equal citizens."[46] But my account is more narrowly focused—and, as a result, less demanding of citizens—than Bird's. Bird suggests that democratic co-authorship as such generates the PJR, which entails that all democratic political action must be justified publicly. By contrast, the account I propose claims only that democratic political action which potentially implicates

[46] Bird, "Coercion and Public Justification," 202.

objecting citizens in wrongful action generates the PJR. The worry is not that their name is attached to legislation to which they object, it is rather that, by their lights, their agency is being used to wrong their fellow citizens.

Now I can explain why I earlier suggested that we should retain a component of the PJR that is sometimes included in formulations of it. The feature I have in mind specifies that a PJR complaint is a particularly deep objection to reasons offered in favor of legislation—the claim is not simply that one disagrees with the offered justification, but that one finds the reasons on which it draws fundamentally unacceptable. I earlier related PJR complaints to correctness-based complaints by suggesting that PJR complaints be understood as correctness-based complaints viewed from a third-personal perspective. I here add an additional way of marking the distinction between PJR complaints and correctness-based complaints; not only are they to be distinguished based on their first-personal versus third-personal aspect, but PJR complaints are also to be understood as particularly deep or fundamental objections to justifications. Some correctness-based complaints have that character of fundamentality, and others do not. On the view I am proposing, only correctness-based complaints in the former category can qualify as PJR complaints.

The purpose of this stipulation is that it marks a distinction between (1) a citizen's forced complicity in the enactment of legislation that she believes to be a merely incorrect application of her most fundamental commitments and (2) a citizen's forced complicity in the enactment of legislation that she believes to be an affront to her most fundamental commitments. My suggestion is that the desire to avoid (2), but not (1), has the requisite moral urgency to justify the PJR in cases like that of the pro-life citizen which I considered above.

Like Bird's, this proposal is meant only as a sketch of a position which deserves further exploration. Chief among the issues that would need to be addressed is what account of democratic complicity is appropriate if such complicity is supposed to generate the PJR. I will limit myself here, however, to addressing an important objection to my suggestion.

Someone may object to the view that democratic complicity in wrongdoing generates the PJR by arguing that I have given no reason for a democratic citizen to care that his fellow citizens believe they are implicated in wrongdoing. This counterargument would go as follows:

1. Imagine that:

   (a) I, a democratic citizen, support some political action because I believe that it is subject to no valid correctness-based objections;
   (b) this action is indeed effectuated, e.g., through legislation; and
   (c) I had some contributory causal role in the effectuation of such action;

2. If the political action I support is subject to no valid correctness-based objection, that political action does not wrong anyone that it coerces;

3. If the political action I support wrongs no one that it coerces, such political action cannot implicate others in wrongdoing against those who are coerced by it. That is, even if the conditions generating democratic complicity are satisfied in this instance and my political action thus implicates my fellow democratic citizens in that action, they are not complicit in any *wrongdoing* because the political action is *ex hypothesi* not wrongful;

4. If my political action does not implicate others in wrongdoing, their *belief* that my action implicates them in wrongdoing cannot function as a valid objection to my political action. It cannot function as a valid objection any more than an invalid correctness-based objection to my political action can function as a valid objection. Indeed, their belief that my action implicates them in wrongdoing is simply a result of their mistaken belief that the political action under consideration is subject to some correctness-based objection.

This objection, in essence, claims that a concern about democratic complicity still does not explain why a democratic political agent should feel a need to shift from his ordinary, first-personal correctness-based standard of review and instead begin to entertain objections based not on his own beliefs but based on those of others. A theory of democratic complicity may give him an extra reason to subject his political justifications to stringent correctness-based

standards, but it does not give him a reason to adopt anything like the PJR. It does this by noting that, at least from his perspective, others' beliefs about being implicated in wrongdoing are false and thus lack relevance in his deliberations about what political action to pursue.

An adequate reply to this challenge must insist that an agent's beliefs about actions in which she is implicated can be a source of moral reasons separate and apart from the question of whether those beliefs are true. Specifically, PJR advocates must argue that alienation from one's own agency is a moral wrong distinct from questions about the moral quality of that agency itself, such that even political action that wrongly coerces no one can nevertheless wrong members of the democratic polity who would be both implicated in and alienated from that action. Sovereign-oriented accounts of the PJR, such as Bird's and mine, can here appeal to the thought that coerced citizens stand in a different relation to the law that coerces them than do objecting citizens who are democratically complicit in the enactment and enforcement of such laws; while the law blocks or inhibits the agency of coercees, the law coopts or commandeers the agency of democratically complicit citizens. Actions that block or inhibit of the agency of others, on my (and Bird's) view, are justified through ordinary, first-personal correctness-based considerations. Action that coopts or commandeers the agency of others, however, requires something different to be justified. Because democratic action, as it were, helps itself to the agency of all democratic citizens, it must address its justification to those citizens rather than merely to the citizens who already support the action. This, so I suggest, is the source of the leftover requirement that is not met by ordinary correctness-based reasons. At least, the leftover requirement is generated by the special way in which democratic political action co-opts the agency of all when this agency is being used in ways that significantly affect the lives of some members of the polity.

VII. Beyond Coercion—Answering the Challenge of Bird's Magnesian Lottery

The account of the PJR I have offered is a sovereign-oriented account closely related to Bird's. Like Bird's, my proposal suggests that the PJR is a duty that citizens owe towards their fellow citizens not out of a concern to avoid creating a relationship of subjugation through unjustified coercion, but rather out of a concern to respect them as co-sovereigns. Our accounts thus converge insofar as they claim that the PJR is not a requirement to be pressed by coerced citizens against supporters or enacters of legislation that coerces them.

It may be a surprise, then, that my account as so far stated is still vulnerable to the main critical thrust of Bird's article. Recall that the centerpiece of Bird's argument is his Magnesian lottery example, the point of which is that coercion-based accounts of the PJR are underinclusive; despite the fact that the Magnesian lottery is (by Bird's lights) clearly the sort of political action to which the PJR applies, if anything is, coercion-based accounts must conclude that the Magensian lottery does not trigger the PJR because it is not coercive. If the Magnesian lottery embarrasses coercion-based accounts of the PJR, it equally causes trouble for the account I have proposed, which, as stated so far, is in its own way as dependent on the presence of coercion as the coercion-based accounts on which Bird focuses his critique. As applied to my view, Bird's critique would be: Because the creation of the Magnesian lottery coerces no one, democratic citizens are unable to complain that their agency is being used to wrongfully coerce their fellow citizens, and they are thus unable to lodge the type of sovereignty-oriented complaint that I have suggested motivates the PJR.

I believe this argument is indeed sound and thus that, to the extent that one wishes to ensure that Magnesian lottery-type cases are subject to the PJR, my account must be modified. Before introducing this modification, however, I note that it is not as clear to me as it is to Bird

that the Magnesian lottery should be subject to the PJR. Nevertheless, I believe that the modified account I am about to introduce provides the correct test to apply to the Magnesian lottery case to determine whether the PJR ought to apply to it, and I would at least agree with Bird that, if the PJR does not apply to the Magnesian lottery case, it is not simply because the lottery can be implemented without state coercion.

The modification I have in mind takes its inspiration from Rawls's preferred political conception, Justice as Fairness. At the center of that view is a conception of citizens' fundamental interests, or the most exigent types of claims citizens may press against the state and one another. There are two such fundamental interests, which Rawls calls interests in the adequate development and full exercise of the two moral powers. These powers are the capacities for a sense of justice and a conception of the good.

In his discussion of Rawls's view in *Religion and the Obligations of Citizenship*, Paul Weithman suggests a connection between the mutual acceptability requirement and the two moral powers. What leads Weithman to make this suggestion is his consideration of a puzzle about why Rawls limited the criterion of reciprocity to "constitutional essentials" "matters of basic justice."[47] Weithman's proposal is that these fundamental types of legislation face a higher bar of legitimacy than ordinary legislation "because of the way they bear on the exercise of those [two moral] powers."[48]

Taking Weithman's suggestion as a guide, I propose that my account be modified to replace the concept of coercion with that of the two moral powers. More precisely, the modification replaces the relatively narrow form of agency that is impinged upon by coercion with the more expansive conception of agency implicated in Rawls's notion of the two moral

[47] Rawls, *Political Liberalism*, 448.
[48] Paul Weithman, *Religion and the Obligations of Citizenship* (Cambridge: Cambridge University Press, 2002), 188.

powers. My proposal as so far stated suggests that the PJR is motivated by the interest that democratic citizens have, as sovereigns, in not being alienated from their own political agency by being made democratically complicit in political actions that (in their view) wrongfully coerce their fellow citizens. The modification I now offer keeps the core of that proposal the same—democratic citizens have an interest in not being complicit in political actions that in their view perpetrate some type of wrong against their fellow citizens—but broadens the sort of wrongdoing at issue from wrongful coercion to wrongful impacts on the ability of citizens to adequately develop and fully exercise their two moral powers. Thus, the idea is that democratic citizens have an interest in not being complicit in political actions that, in their view, negatively affect their fellow citizens' fundamental interests in developing and exercising their two moral powers.

This modification gives my proposed view the resources to, at least potentially, include legislation enacting a Magnesian lottery in the category of state actions requiring public justification. On the moral powers-based view, the question of whether the Magnesian lottery requires public justification will turn on the likely impacts of such a lottery on the ability of Magnesian citizens to fully develop and adequately exercise their moral powers. Importantly, the answer to the question of whether these impacts are significant enough that the PJR should apply to the lottery will be sensitive to empirical analysis of the social and political conditions prevailing in the Magnesian polity. If, for example, creedal differences between Magnesian citizens are a major flashpoint in Magnesian society and adherence to the minority comprehensive doctrine is in danger of being viewed as a form of second-class citizenship, it is likely that the lottery would have serious impacts on citizens' abilities to fully develop and adequately exercise their second moral power. If, however, the typical Magnesian citizen pays

little or no attention to the question of who subscribes to which comprehensive doctrine, and adherents to the minority doctrine are well-integrated and fully respected within society, the Magnesian lottery may have little or no effect on citizens' moral powers.

I believe that this sensitivity to empirical conditions is a virtue rather than a liability of my suggested view, as it locates a plausible middle ground between Bird's treatment of the Magnesian lottery (the PJR automatically applies) and that of the coercion-based view (the PJR does not apply).

VIII. Conclusion

I have in this chapter offered a justification of the core claim of political liberalism, namely that citizens owe one another reasons that are mutually acceptable. I distinguished between sovereign-oriented and subject-oriented approaches to the justification of the mutual acceptability requirement and noted the virtues and deficiencies of Bird's sovereign-oriented view and the more popular coercion-based subject-oriented view. Bird's view has a built-in explanation of why public rather than merely rational justification is appropriate in the context of politics, and his view also accords with the seemingly widespread intuition that all citizens, and not merely those who are coerced by legislation, have standing to make a PJR complaint against the state. His view, however, struggles to imbue the PJR with the moral weight necessary to show that citizens are unreasonable if they fail to abide by it when they believe that grave moral injustice is at stake. The coercion-based view has the inverse strengths and weaknesses, as it centers a morally weighter concern which is in theory capable of justifying stringent requirements on the reasons citizens may give one another, but it yields an underinclusive account of who can voice a PJR complaint and lacked a clear explanation of why coercion

generates a public justification requirement (rather than merely a rational justification requirement) in the first place.

I then proposed a sovereign-oriented view closely related to Bird's which attempts to combine the virtues of his view and the coercion-based view. Like Bird's view, the theory I offered grounds the PJR in the respect that citizens owe one another as co-sovereigns, but adds that the worry is not a generic concern about alienation from the exercise of political power, but rather a concern about making others complicit in what they reasonably (if incorrectly) take to be serious wrongdoing. The PJR, I suggest, is justified by respect for their right, as co-wielders of state power, to not be so implicated in what they take to be collective wrongdoing.

Like the coercion-based view and unlike Bird's view, my proposed justification of the PJR applies only in cases in which legislation has some kind of serious impacts on the lives of citizens. It thus applies in fewer situations than Bird's view. But despite its focus on the consequences of legislation, it does not incur the alignment requirement that caused the coercion-based view to create a class of bystander citizens who cannot voice a PJR complaint. On my view, a PJR complaint is not an articulation of a claim right by citizens *qua* subjects affected by legislation against those who enact it. It is instead the articulation of (what I suppose could be called) a claim right by citizens *qua* co-sovereigns against one another. Because all citizens share such status, PJR complaints are on my view assertable by any citizen, not only those who are affected by legislation.

Chapter 2: From Mutual Acceptability to the Duty of Civility

I. Introduction

In the previous chapter, I identified the moral motivation of political liberalism's criterion of reciprocity, or the claim that democratic citizens owe one another justifications of legislation that are in some sense mutually acceptable.[1] In this chapter, I will critically examine efforts to argue from the criterion of reciprocity to what Rawls calls the duty of civility. According to this duty, citizens must support their favored legislation in terms of reasons that are drawn from "the political values of public reason," which is a pool of values upon which agreement exists in the form of an overlapping consensus.[2] Political liberals contrast this class of reasons with those drawn from comprehensive doctrine, which typically involve metaphysical claims and values drawn from conceptions of the good life. The question on which I will focus is how to justify the negative aspect of the duty of civility—that is, the claim that citizens are obligated to refrain from appealing to comprehensive doctrine in justifying political decisions to one another.

The question of this chapter, then, will be the following: How can political liberals justify the move from the demand for mutual acceptability (the criterion of reciprocity) to the requirement that citizens bracket their comprehensive views in the justification of legislation (the duty of civility)?

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[1] Throughout, I use the terms "criterion of reciprocity" and "mutual acceptability requirement" interchangeably.
[2] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 217, 450–54.

To make the moral stakes of the question vivid, and to give a concrete depiction of the heavy burden that a convincing argument for the duty of civility must carry, I begin with a short hypothetical example.[3] Imagine a democratic citizen, John, who subscribes to a comprehensive doctrine that contains an absolute prohibition on torture. This belief figures centrally in his conception of human dignity, and he finds the idea of being a citizen of a nation that violates this fundamental precept of his comprehensive doctrine to be abhorrent. John further believes that, if he were to abide by the duty of civility and thus forswear appeals to his comprehensive doctrine, he would be unable to offer a good faith argument for the absolute prohibition of torture. Now let us imagine that Mary, one of John's fellow citizens, rejects John's comprehensive doctrine as well as its absolute prohibition of torture. For the sake of simplicity, I will reframe questions about disagreement and pluralism in society writ large in terms of the pairwise disagreement between John and Mary, and I will call John's comprehensive doctrine "CD-J", and Mary's "CD-M."

The challenge political liberals face is to explain why Mary's rejection of CD-J in favor of CD-M makes appeals to CD-J illicit and thus forces John to shelve his objections to torture. According to the position I defended in Chapter 1, we know that the political liberal argument must take the following shape: By offering Mary a justification that she cannot accept, John denies her standing as an equal democratic co-sovereign.

It is helpful to think of the criterion of reciprocity as granting Mary veto power over John's appeals to CD-J, with the proviso that the veto is understood as automatically asserted

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[3] My example is adapted from one given by Jeremy Waldron. See Jeremy Waldron, "Isolating Public Reasons," in *Rawls's* Political Liberalism, eds. Thom Brooks and Martha C. Nussbaum (New York: Columbia University Press, 2015), 130–31.

(rather than requiring Mary to take some action in asserting it). In arguing from the criterion of reciprocity to the duty of civility, then, political liberals must specify the conditions which give Mary such veto power.

Political liberals agree that Mary's belief in CD-M effectively functions as a veto over John's ability to appeal to CD-J only if Mary is reasonable. They also agree that this reasonableness has an ethical component, which is commonly elaborated in terms of a commitment to the criterion of reciprocity. Thus, if Mary herself is unwilling to refrain from offering John reasons that he cannot accept, then she has no standing to object when John offers her reasons that she cannot accept. Political liberals disagree, however, as to whether Mary's reasonableness must have an epistemic component. They disagree, in other words, as to whether or not Mary must display some threshold level of rational competence (insofar as she subscribes to CD-M and thus rejects John's appeal to CD-J) in order to have veto power over John's appeal to CD-J.

I will thus distinguish between non-epistemic and epistemic interpretations of the criterion of reciprocity. Advocates of the non-epistemic interpretation hold that the criterion of reciprocity requires that John refrain from appealing to CD-J in his exchange with Mary regardless of the epistemic credentials of Mary's rejection of those appeals. Crucially, this entails that John must so refrain even if Mary's rejection of John's appeal to CD-J is based on her failure to apply minimal standards of rationality to readily available evidence. I call this a case of epistemically unreasonable disagreement. Advocates of the epistemic interpretation, by contrast, hold that the mutual acceptability requires that John need only refrain from appealing to CD-J (as

far as his disagreement with Mary goes) if Mary has met some threshold level of rational competence in rejecting his reasons.

The main thrust of this chapter is critical—I aim to show that there is no sound route from the criterion of reciprocity to the duty of civility. I do this by examining both epistemic and non-epistemic approaches to the criterion of reciprocity and explaining why I find each unsatisfactory. This chapter is thus divided into two main sections, the first addressing the non-epistemic interpretation of the criterion of reciprocity, and the second addressing the epistemic interpretation.

Section II addresses the non-epistemic approach to the criterion of reciprocity, exemplified by the position laid out by Martha Nussbaum in her important article, "Perfectionist Liberalism and Political Liberalism."[4] I argue that the non-epistemic interpretation of the criterion of reciprocity should be rejected because it is unsupported by the justification of the criterion of reciprocity I defended in Chapter 1. Critics of the non-epistemic interpretation of the criterion of reciprocity such as Steven Wall have argued that the criterion of reciprocity must be interpreted to include an epistemic component such that Mary's unreasonable rejection of CD-J should not prohibit John from appealing to CD-J. If John refrains from appealing to CD-J simply because Mary unreasonably refuses appreciate the force of John's reasons, John would in fact treat Mary disrespectfully by not presenting her with his reasons because he would be treating her as incapable of meeting minimum standards of rationality. Instead, according to critics like Wall, John treats Mary respectfully when he offers her a reason drawing from CD-J—even

[4] Martha Nussbaum, "Perfectionist Liberalism and Political Liberalism," *Philosophy and Public Affairs* 39, no. 1 (March 2011): 3–45.

though she rejects it, John treats her as capable of reasoning well and appreciating the truth. The Nussbaumian rejoinder is that John's offering Mary a justification in terms of CD-J is disrespectful in a different, and more important sense: because his justification presumes the falsity of CD-M, John inevitably denigrates CD-M—and thus Mary herself—by appealing to CD-J.

I spend much of Section II drawing out the competing conceptions of respect upon which Wall's argument and the Nussbaumian rejoinder implicitly rely. I then argue that the conception of respect that Wall's argument implicitly deploys (rather than the rival conception of respect implicit in the Nussbaumian view) is the appropriate one to use in seeking out norms for interpersonal political deliberation. At least, I argue that this is so if one endorses what in Chapter I I termed a sovereignty-oriented understanding of the motivation of the criterion of reciprocity. I thus conclude that the criterion of reciprocity should be interpreted as granting "rejection rights" only to epistemically reasonable citizens.

This objection to the non-epistemic understanding of the criterion of reciprocity suggests that political liberals ought to understand the demand for mutual acceptability in an epistemological way, such that Mary only has veto power on John's appeal to CD-J if her objection is epistemically reasonable. This epistemic interpretation of the criterion of reciprocity is addressed in Section III. According to such an interpretation of the criterion of reciprocity, it is not the *mere fact* that John's justification is incompatible with Mary's comprehensive doctrine that makes appeal to it illicit. What makes the appeal illicit, rather, is that John cannot demonstrate to Mary that her belief in CD-M is defeated by CD-J, where this means that John cannot present Mary with reasons against CD-M that make Mary's continued belief in it

irrational. Crucially, Mary retains rejection rights over John's appeal to CD-J only if John's inability to present Mary with the reasons that defeat CD-M is not due to Mary's epistemic unreasonableness. Working from the text of *Political Liberalism*, I flesh out this epistemological understanding of the criterion of reciprocity in Section III(A).

Section III(B) draws attention to a puzzling feature of the Rawlsian/epistemological view, namely that it is not clear why we should think that the defeat of any given comprehensive doctrine is intransparent in the way that the view requires. If John really believes that CD-J defeats CD-M, why shouldn't he also think that he can demonstrate this to Mary?

The rest of Section III deals with two attempts to solve this puzzle. Both of these attempts rely on Rawls's doctrine of the burdens of judgment, which is his attempt to explain the existence of persistent disagreement about comprehensive doctrine without appealing to irrationality. The first attempt I will look at is that offered by Gerald Gaus, who reads the burdens of judgment as accounting for disagreement in terms of the complexity of comprehensive doctrines combined with our limited cognitive resources. In Section III(C), I give Gaus's reading of the burdens of judgment and explain why I think it cannot resolve the puzzle.

In Section III(D), I give my own reading of the burdens of judgment. Gaus's reading of the burdens of judgment leaves out Rawls's claim that all citizens deliberate about comprehensive doctrine from different standpoints as a result of disparate life experiences, and it is my view that this "life experience" burden is supposed to help explain why John can simultaneously believe that (1) he has presented Mary with reasons showing that CD-J defeats CD-M and yet (2) Mary is not irrational in continuing to maintain her belief in CD-M. In Section III(E), I argue that this understanding of the epistemic effects of life experiences leads to absurd

or skeptical conclusions and so cannot function as an argumentative bridge from the criterion of reciprocity to the duty of civility.

Section IV concludes with some remarks about the consequences for political liberalism of this chapter's argument.

II(A). The Non-Epistemological Understanding of the Criterion of Reciprocity

The signal feature of political liberalism, as distinguished from the varieties of perfectionist liberalism (for example those developed by J.S. Mill and Joseph Raz), is its claim that to be legitimate, the exercise of political power must be based upon reasons that are acceptable to members of the polity. Rawls's term for this criterion, which I have adopted, is the criterion of reciprocity.

Political liberals emphasize the benefit of this restriction on acceptable reasons, namely that it brings the principles governing the political order into some degree of alignment with the beliefs of citizens who must live within that order. This alignment is, on a political liberal view, what is owed to citizens as a matter of respect.

There is, however, a cost imposed by the criterion of reciprocity. In the words of Steven Wall, "accepting the strictures of a political conception of liberalism impedes, or has the potential to impede, the pursuit of justice."[5] Or, as Raz might say, it impedes the state from pursuing its legitimate aim of helping its citizens lead worthwhile lives and thereby securing

[5] Steven Wall, "Perfectionism, Reasonableness, and Respect," *Political Theory* 42, no. 4 (August 2014): 470.

their well-being. At least, it will have this effect if certain legislation which will improve citizens' well-being can only be justified by appeals to reasons that are not mutually acceptable.

This tradeoff between respect *qua* mutual acceptability and justice is not limited to the conflict between political and perfectionist liberalisms, but also asserts itself within political liberalism itself. Even if we grant that the criterion of reciprocity correctly limits the exercise of state power, we still must decide how stringent the requirement is, for we must decide what it means to say that political principles must be acceptable. Perhaps more precisely put, we must decide *to whom* such principles must be acceptable. Using the term "G" to refer to the population of persons to whom principles must be acceptable, Wall puts point like this:

> "A loose specification of G will grant more persons rejection rights over the enforcement of justice, thereby increasing the likelihood that the correct or best conception of justice will be excluded. At the limit, G will include all citizens, thereby ruling out any conception of justice that could not win unanimous support."

One of the main choices political liberals must make about who is included in G is whether they must be epistemically reasonable or not. In this section, I will consider and critique the view that members of G need not be epistemically reasonable in order to have "rejection rights" over principles of justice offered in support of legislation. In terms of the John-Mary disagreement I introduced above, the view I consider in this section claims that even in the epistemically unreasonable version of their disagreement, John has a duty to refrain from drawing upon CD-J when justifying his preferred legislation to Mary.

I will take as my exemplar of such a non-epistemic interpretation of the criterion of reciprocity Martha Nussbaum's political liberal view. Nussbaum expounds her argument for the duty of civility from the criterion of reciprocity through a critical discussion of Rawls's view.

She accepts some of Rawls's argumentative framework, most crucially the idea that the duty of civility rests on a principle of respect for persons. But she wishes to do away with the epistemological components of Rawls's argument.

The conclusion of Rawls's argument, on her reading, is that we, as democratic citizens, have a duty "to try to ground our political principles in a set of 'freestanding' moral ideas that can be accepted by citizens with a wide range of different views concerning the ultimate sources of value."[6] To achieve this goal, citizens must "practice a 'method of avoidance,' refusing to ground [political principles] in controversial metaphysical, religious, or epistemological doctrines, and not even in comprehensive ethical doctrines."[7] This is her formulation of the duty of civility.

Nussbaum distinguishes between what she views as two distinct Rawlsian arguments for the duty of civility. The first argument relies on the burdens of judgment. This account of pluralism maintains that disagreements about comprehensive doctrines "are not based on anything like an easily identifiable mistake" and thus that many "doctrines that citizens hold are in that sense reasonable."[8]

On Nussbaum's reading, Rawls's thought is that the fact that our disagreements about comprehensive doctrine have respectable sources—sources that do not impugn our rationality or motivations—should make us amenable to the claim that we ought to offer one another justifications that are compatible with the various comprehensive doctrines subscribed to in pluralistic polities. If John rejected the burdens of judgment and thought that Mary's failure to

[6] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 16.
[7] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 16.
[8] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 16.

see the truth of CD-J was the result of logical errors, he would be strongly disinclined to accede to the demand that he tailor his political justifications in ways that accommodate Mary's view.

But Nussbaum believes that the burdens of judgment must be excised from political liberalism and thus cannot figure in its argument for the duty of civility. The problem with the burdens of judgment, on her view, is that they place epistemic conditions on which comprehensive doctrines "deserve respect," and she thinks these conditions are wholly out of place because they "run afoul of one of the core ideas of the text [of *Political Liberalism*], the idea of respect for reasonable citizens. So long as people are reasonable in the ethical sense, why should the political conception denigrate them because they believe in astrology, or crystals, or the Trinity?"[9] Similarly, she writes that "[i]t just doesn't seem right for citizens to be looking into other citizens' religions and asking how reasonable they are, provided that the doctrines they hold are reasonable in the ethical sense that is involved in the public political conception."[10]

If John thinks that his disagreement with Mary is due to the burdens of judgment rather than Mary's irrationality, then he must think that Mary's belief in CD-M meets at least some kind of minimum rationality condition. Nussbaum thinks that many comprehensive doctrines fail (and are known to fail) this test, but that this does not mean that it is appropriate for democratic citizens to offer justifications incompatible with them. Her view, then, is that the duty of civility must apply to John whether or not he believes that Mary's comprehensive doctrine is epistemically reasonable, and so whether or not he believes that his disagreement with Mary is caused by the burdens of judgment.

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[9] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 28.
[10] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 31.

Nussbaum thinks, however, that Rawls's argument for the duty of civility that runs through the burdens of judgment is not his only, and not even his most important, argument for the duty of civility. She writes that "Rawls suggests a deeper reason why citizens will endorse political liberalism and its method of avoidance, even though they may believe their own doctrine to be correct and the others incorrect. The reason is that they respect their fellow citizens, and respect them as equals."[11]

Nussbaum elaborates this deeper grounding of the duty of civility as follows:

> "Their reasonableness is an ethical reasonableness: respecting their fellow citizens, they want to give them plenty of space to search in their own way, even though they may believe that the conclusions most people come to are wrong. Respect is for persons, not directly for the doctrines they hold, and yet respect for persons leads to the conclusion that they ought to have liberty to pursue commitments that lie at the core of their identity, provided that they do not violate the rights of others and that no other compelling state interest intervenes."[12]

Nussbuam also describes what, in her view, goes wrong when citizens fail to abide by the duty of civility. She tells us, for example, that "[w]hen the institutions that pervasively govern your life are built on a view that in all conscience you cannot endorse, that means that you are, in effect, in a position of second-class citizenship. Even if you are tolerated … government will state, every day, that a different view, incompatible with yours, is the correct view, and that yours is wrong." This "offends against the equality of citizens" and "tells them, to quote James Madison, that they do not all enter the public square 'on equal conditions'."[13]

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[11] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 17.
[12] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 17.
[13] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 35.

Nussbaum's view is thus that political liberals ought to defend the duty of civility by directly appealing to this principle of respect, cutting out what she views as the needless and problematic detour through the burdens of judgment.

How would Nussbaum, then, explain to John that his appeal to comprehensive doctrine is illicit? The view seems to be that the mere fact that justifications drawn from CD-J are incompatible with Mary's ethically reasonable comprehensive doctrine, CD-M, shows them to fail the mutual acceptability requirement, or criterion of reciprocity. In other words, the fact that John's comprehensive reason R is incompatible with Mary's CD-M is on its own a sufficient condition of R's failing the mutual acceptability test (so long as CD-M is ethically reasonable). Because it does not matter, on Nussbaum's view, whether Mary is epistemically reasonable, she endorses a non-epistemic conception of the mutual acceptability requirement—all that is required of a person in order for them to have rejection rights over a justification cast in terms of comprehensive doctrine is that they are ethically reasonable.

I have glossed the criterion of reciprocity as forbidding John from offering justifications that Mary "cannot" accept. This tracks Rawls's formulations of the demand for mutual acceptability, which are typically cast in the form of modals; he writes that it requires justifications that others "might" or "may" accept.[14] This language leaves open an important possibility, namely that a justification might satisfy the criterion of reciprocity even if Mary in fact finds it unacceptable, given her present beliefs. This possibility will be taken up in Section III, where I discuss epistemological interpretations of the criterion of reciprocity. What is

[14] Rawls, *Political Liberalism*, xliii-xliv.

important to note for now, however, is that the non-epistemic understanding of the criterion of reciprocity makes no use of this possibility, and instead construes the modal language narrowly. For her, to say that Mary "cannot" accept John's justification is nearly equivalent to saying that she "does not" accept it. The criterion of reciprocity is failed by John's justification if Mary cannot accept it given her current, actual beliefs about comprehensive doctrine, for there is no epistemological play in the joints to offer a looser construal of what Mary can accept.

II(B). The Need for an Epistemological Understanding of Mutual Acceptability

Imagine that CD-M can only be believed if one is deliberating irrationally, and that John's arguments demonstrate this. Suppose that the reasons that make CD-M irrational are those that John employs when he makes his case against it. Mary, then, must be exercising her cognitive capacity poorly in order to maintain her belief in the light of John's arguments. Let us imagine Mary simply refuses to carry through an inference. This is what I have called the epistemically unreasonable version of the John-Mary disagreement.

On a non-epistemological interpretation of the criterion of reciprocity like Nussbaum's, John would still be obliged to refrain from using reasons that are drawn from CD-J and incompatible with CD-M even in such a scenario. And this obligation stems from the fact that, on a view like Nussbaum's, John would be failing to respect Mary by offering such reasons to her.

I believe that this is an incorrect understanding of what respect requires—it demands too much of John and too little of Mary—and that appreciation of the defects of this view should compel political liberals to infuse the criterion of reciprocity with epistemic elements, restricting

the population of persons who have rejection rights over appeals to reasons to those whose objections are epistemically respectable. Demonstrating the inadequacy of the non-epistemic understanding of the criterion of reciprocity, however, is no easy matter. The question turns on which of two rival conceptions of respect properly guides John's conduct towards Mary, each of which has something to be said in its favor. In this section, I will attempt to lay out the general contours of these rival conceptions of respect and argue for the superiority of the one that yields an epistemic interpretation of the criterion of reciprocity.

Steven Wall, a perfectionist liberal, has offered perhaps the most sustained critical engagement with Nussbaum's non-epistemic account of the criterion of reciprocity. I do not believe he offers decisive reasons to reject a non-epistemic view, but his discussion is insightful, and one strand of his argument does at least clarify the conception of respect that non-epistemic understandings of the criterion of reciprocity implicitly rely on. It is important to remember that the target of Wall's (and my) argument is the view that the criterion of reciprocity places *no* epistemic requirements whatsoever on Mary's comprehensive doctrine, other than those constitutive of its being a comprehensive doctrine in the first place. Wall states the relevant portion of his argument as follows:

> "We can say, as Larmore does, that we respect a person when we respect her rational powers or rational agency. If we say this, then we have a response to those ethically reasonable citizens who would reject an otherwise sound conception of justice on the grounds that it conflicts with their unreasonable comprehensive beliefs. Given that readily available evidence and minimal demands of rationality dictate that they abandon or revise some of their comprehensive beliefs, and given that if they were to do so they would be able rationally to accept the proposed conception of justice, then they cannot

> reasonably reject it. So when it is imposed in their society, they are not thereby treated disrespectfully."[15]

I believe Wall is fundamentally correct, but more must be said. We must first do some work bridging the gap between the passage's final two sentences. We should ask why the following two propositions yield the conclusion that imposition of CD-J (to return to my John-Mary example) does not treat Mary disrespectfully: (1) Readily available evidence and minimal demands of rationality dictate that Mary abandons or revises some of her comprehensive beliefs and (2) If she were to do so she would find John's justification of his preferred legislation in terms of reasons drawn from CD-J acceptable.

The core of the answer has been suggested by Christopher Bennett. After introducing an example of a sort similar to the epistemically unreasonable version of the John-Mary disagreement, Bennett writes that "in this case the policy has been justified to [Mary] in terms that (were [she] to think about it conscientiously) [she] could accept: the collective has fulfilled its duty to recognise the agent as a rational subject."[16] The important part of Bennett's claim is that Mary could accept the reason John gives her were she to apply what Wall described as the "minimal demands of rationality" to the "readily available evidence." If Mary could accept John's reasons given these minimal requirements, which I will assume she is capable of meeting, then Mary *can* accept John's reasons in the sense that he is offering her reasons that she is able to understand and accept (even if she does not do so). She is able to understand John, in his appeal

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[15] Wall, "Perfectionism, Reasonableness, and Respect," 476.

[16] Christopher Bennett, "A Problem Case for Public Reason," *Critical Review of International Social and Political Philosophy* 6, no. 3 (Autumn 2003): 57. "Imagine a case in which there is a policy for which there is conclusive and universally accessible evidence. If such a policy is enforced on a party in the face of their disagreement, but where the disagreement has arisen because of this party's failure to employ their powers to assess the evidence, it would not constitute an abuse of respect for persons."

to reasons that assume the rejection of CD-M and the acceptance of CD-J, as appealing to an epistemic or rational inequality between those comprehensive doctrines. Mary, in other words, can understand John's reliance on CD-J and rejection of CD-M for political purposes as rooted in an inequality between the rational merits of CD-J and CD-M.

But if Mary can understand John's appeal to CD-J as based on the rational inequality between CD-J and CD-M, she does not need (and in fact it would be irrational for her) to understand his appeal as implicitly asserting a political inequality between him and her. Recall Nussbaum's characterization of the wrongfulness of a reliance on comprehensive doctrine: such reliance "offends against the equality of citizens" and "tells them, to quote James Madison, that they do not all enter the public square 'on equal conditions'."[17] In Nussbaumian terms, the argument advanced by Wall and Bennett is that John's appeal to CD-J does not—even from Mary's perspective—entail that Mary is not John's political equal nor that she does not enter the public square on equal terms as him. Mary does not need to understand John as making such a claim because she is perfectly capable of understanding him as appealing to the disparate epistemic merits of their comprehensive doctrines.

The scenario, as I have described it, differs significantly from one in which the disagreement between John and Mary is not rooted in Mary's failure to apply the minimal demands of rationality to readily available evidence. It differs from a situation in which Mary's and John's disagreement must be explained in terms of something like the burdens of judgment, for example if Mary's and John's life experiences, combined with the complexity of the subject

[17] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 35.

matter of their disagreement, mean that Mary may be deliberating excellently and yet nevertheless continue to reject CD-J. In such a scenario, Mary is not able to understand John as appealing to the relative epistemic or rational superiority of CD-J over CD-M. And if she cannot understand John as appealing to such considerations, it at least could be argued that Mary might interpret John as, in attempting to impose upon her legislation justified by CD-J and incompatible with CD-M, as appealing to something like a claim that Mary is not his political equal. But the non-epistemic interpretation of the criterion of reciprocity rules out such a construal of the John-Mary disagreement, because its prohibition against appeals to comprehensive doctrine must include the epistemically unreasonable version of that disagreement.

I believe that the Wall-Bennett line of argument is promising but not decisive, at least as stated so far. Wall himself recognized the basic problem, namely that it "presupposes a divide between a person's rational agency and the comprehensive beliefs he currently affirms."[18] To expand on his thought, the argument assumes not only that such a divide exists, but that when John justifies legislation in terms of CD-J to Mary, he asserts that CD-M is inferior to CD-J without disrespecting Mary's rational agency and that what matters, insofar as we are concerned about respecting one another as political equals, is that John respects Mary's rational agency, not that he respects CD-M.

This position can, in my view, be defended successfully. To do so, however, requires bringing clearly into view the conception of respect that underlies it and explaining why this

[18] Wall, "Perfectionism, Reasonableness, and Respect," 477.

conception of respect is the appropriate one to apply in the context of political discourse and deliberation. Christopher Bennett has termed the operative conception respect as mutual engagement. As he describes it, this conception of respect

> "prizes agreement which comes about through joint appreciation of some truth. On the idea of mutual engagement, honest discussion aims to bring about agreement on the truth of a given claim, agreement which comes about through the joint rational examination of what can be said for and against either side. [It] embodies a notion of respect for persons because dealing honestly with a person in this way is to treat them as having the capacity to recognise and respond appropriately to the relevant issues. It is to treat them as a moral agent, as having a certain authority in moral debate."[19]

As applied to the John-Mary disagreement, the thought is that if Mary's rejection of John's reliance on reasons drawn from CD-J is rooted in her failure to exercise capacities John knows she has and evidence he knows she can access, John's offering Mary those reasons evinces his respect for her rational nature and cognitive capacities by treating her as capable of applying those capacities in a competent way. John refuses to treat her as lacking what Rawls called "common human reason" and instead treats her as capable of appreciating the truth through the exercise of such reason.

As Wall notes, implicit in this conception of respect is the notion that "persons, understood as rational agents, have the rational capacity to revise or abandon any commitment they have, even if it is very unlikely that they will do so.[20] Put more strongly, respect as mutual engagement takes as a constitutive element of the respect-worthiness of persons that they are "not stuck with their commitments, but rather . . . have the capacity to assess, and if called for to

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[19] Bennett, "A Problem Case," 63. See also, Christopher J. Eberle, "What Respect Requires—and What It Does Not," *Wake Forest Law Review* 36, no. 2 (2001): 335–38.

[20] Wall, "Perfectionism, Reasonableness, and Respect," 478.

revise or abandon, their commitments in response to the reasons for having them."[21] On such a view, it would in fact be disrespectful to instead treat Mary as if her irrational commitment to CD-M were a fixed feature of her nature because it would treat her as incapable of engaging in the exchange and appreciation of reasons that lies at the heart of what makes us respect-worthy.

Such is the conception of respect that underlies the view that John's appeal to CD-J in his disagreement with Mary is compatible (or even required by) his duty to respect her. But this is not the only way of conceptualizing the meaning of respect. Bennett terms the alternative conception respect as mutual accommodation.[22] Where respect as mutual engagement focuses on the idea of John addressing Mary as a rational being capable of reasoning well, respect as mutual accommodation fixates on the idea of John accommodating Mary's belief in CD-M by including her *qua* believer in CD-M in the community of citizens who exercise political power; it respects her belief itself rather than her powers of rational agency and deliberation more abstractly considered. This conception of respect understands there to be "a tight connection between a person and his comprehensive commitments," such that "if the state denigrates a person's comprehensive doctrine, it 'inevitably' denigrates the person."[23] It treats as respect-worthy that aspect of Mary which inevitably is denigrated if CD-M is denigrated, namely her endorsement of it.

[21] Wall, "Perfectionism, Reasonableness, and Respect," 478.
[22] Bennett, "A Problem Case," at 62. While I use Bennett's terminology, my elaboration of the notion of respect as mutual accommodation has a somewhat different emphasis than his own, though I think what I say about it is compatible with his own formulations. On my understanding, the main difference between the two conceptions of respect has to do with what aspect of a person's relation to his conception of the good is taken to be respect-worthy—the *capacity* to form such a conception, or the conception the person actually endorses.
[23] Wall, "Perfectionism, Reasonableness, and Respect," 478.

Bennett's use of the word "accommodation" in his name for this second species of respect calls to mind a different, though related, concept, namely the doctrine of accommodation as found in American jurisprudence and constitutional law. While the constitutional doctrine of accommodation has had different content at different points in United States constitutional history, the question it aims to resolve is the extent to which laws should be subject to exceptions on the grounds that their strictly universal application would violate the liberty of conscience of some members of the polity.[24] As Nussbaum notes, this doctrine is motivated by the idea that conscience "needs a protected space around it within which people can pursue their search for life's meaning (or not pursue it, if they choose)," and that this protected space will sometimes require exemptions from laws of general application.[25] Invocation of this constitutional doctrine of accommodation in the context of the criterion of reciprocity contains an important insight, but also invites a misunderstanding.

The insight is that respect as mutual accommodation, like accommodation *qua* exemption from generally applicable law, takes citizens and their comprehensive commitments as they are and eschews examination of the rational credentials of such commitments. In Nussbaum's words, both types of accommodation require that citizens to refrain from "looking over the shoulders of their fellow citizens to ask whether their doctrines contain an acceptably comprehensive and coherent exercise of theoretical reason."[26] This is a genuine affinity between the two sorts of accommodation.

[24] For a synopsis of the evolution of this doctrine in American constitutional law, see Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), 115–64.
[25] Nussbaum, *Liberty of Conscience*, 19.
[26] Nussbaum, "Perfectionist Liberalism and Political Liberalism," 29.

The term invites misunderstanding, however, by suggesting the presence of a different affinity which is in fact absent. The constitutional concept of accommodation, as noted, is motivated by the value of respecting citizens' ability to lawfully live according to the dictates of their conscience. It seeks to achieve this value by creating exemptions which prevent citizens from having to decide between breaking the law or violating their conscience. Respect as mutual accommodation, however, is not related in that way to the value of allowing citizens to pursue their conceptions of the good lawfully. The absence of this connection is illustrated by the fact that John can affirm the importance of liberty of conscience—in the sense that he would oppose laws that prevent Mary from living according to CD-M—and at the same time continue to support legislation by appealing to CD-J. In other words, he may affirm the importance of accommodation understood as a constitutional value while rejecting what Bennett terms respect as mutual accommodation.[27] The point may be put even more sharply: Not only may John highly value constitutional accommodation while continuing to appeal to CD-J to justify his political conception and favored laws, he also might (and even almost certainly would) justify his commitment to constitutional accommodation by appealing to CD-J. Constitutional accommodation and respect as mutual accommodation, then, share a focus on respecting citizens *qua* subscribers to their actual comprehensive doctrines as well as an unwillingness to probe the rational merits of citizens' endorsement of those doctrines. But they clearly are not the same thing.

[27] This point has been made by commentators. For example, see Kyla Ebels-Duggan, "The Beginning of Community: Politics in the Face of Disagreement," *The Philosophical Quarterly* 60, no. 238 (January 2010): 54.

This thread will be picked up again momentarily, but let us return to the question we must decide: Which conception of respect—respect as mutual engagement or respect as mutual accommodation—appropriately guides us in determining what sorts of reasons citizens may give to one another to justify their favored legislation? To begin, we should specify with a bit more precision what, exactly, these conceptions ask us to have respect for. I earlier highlighted their disagreement on this score—one takes the respect-worthy aspect of citizens to be their capacity to reason well, to give and receive reasons, to integrate these reasons into their beliefs, and even to know the truth, while the other focuses instead on citizens' affirmation of whatever particular conception of the good they presently endorse. At the risk of oversimplifying, let us say that this is a disagreement with respect to a distinction between capacity and actual exercise.

There is, however, a second distinction which I have not thematized. It lies on a different axis than the capacity-exercise distinction; it is facially neutral between the capacity-exercise distinction and instead concerns the more fundamental issue of what type of rational capacity (or exercise thereof) is being respected in the first place. All we know so far is that the criterion of reciprocity is supposed to exhibit a respect for some sort of rational capacity (or the exercise of such a capacity), but we do not yet know what capacity it is. The second distinction I have in mind is a distinction between different answers to that question. It is related to (but not identical with) Rawls's distinction between the two moral powers, as it presumes that our cognitive apparatus can be thrown into either a "political" gear or a "pursuit of goodness" gear. The distinction can be stated as a distinction between (1) the capacity to be a full member of and participant in a political community that exercises political power and (2) the capacity to pursue the good. The criterion of reciprocity can be understood as motivated by an imperative to respect

either of these capacities. Importantly, nothing that has been said so far that obviously decides the question of which of these capacities the criterion of reciprocity is supposed to exhibit respect for—both respect as mutual engagement or respect as mutual accommodation can arguably be understood as a form of respect for either of these capacities.

My argument in the remainder of this section has two stages. First, I argue that we should understand the demand for mutual acceptability as motivated by respect for (1) rather than (2). Second, I argue that respect for (1) is better shown via respect as mutual engagement than by respect as mutual accommodation.

I begin by arguing that the mutual acceptability requirement should be understood as motivated by a demand that John respect Mary's capacity to be a full member of and participant in a political community that exercises political power rather than by a demand that he respect her capacity to pursue a conception of the good. Why should this be so? The answer cannot be read off of the criterion of reciprocity itself. Instead, we must first understand what the purpose of its demand for mutual acceptability is. That is the question that I addressed in Chapter 1. In that chapter, I defended a variant of Colin Bird's suggestion that the demand for mutual acceptability should be understood as motivated by a concern that democratic citizens be able to condone exercises of political power that are taken in their name. While I argued, contra Bird, that coercion (or some similar concept) plays an important role in the motivation of the mutual acceptability requirement, I agreed with him that the requirement is not designed to prevent the relation between the coercer and coercee from taking on the character of subjugation. Instead, I argued, its purpose is to ensure that the coercer (for example, John) respects the co-coercer (Mary) as a democratic co-sovereign.

This sovereignty-oriented framework for understanding the mutual acceptability requirement has an important consequence for the manner in which we conceptualize the competing interpretations of respect (accommodation versus engagement). It yields an understanding of respect according to which the capacity (or, to use Rawlsian terminology, the "moral power") that respect is being paid to is a distinctively political capacity—the capacity to mutually engage in collective sovereignty, not the capacity to pursue a conception of the good.

This is a rather abstract formulation. To clarify its content, first consider the rather different light into which the competing conceptions of respect are cast if the motivation of the criterion of reciprocity is not understood in the manner in which Bird recommends, but is instead understood as rooted in a concern about justifying oneself to someone who is coerced by a law that one supports. On the view of Charles Larmore, the deep justification of the mutual acceptability requirement is a thought which takes the following shape:

> "[P]ersons are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a rule of conduct solely by the threat of force, we shall be treating persons merely as means, as objects of coercion, and not also as ends, engaging directly their distinctive capacity as persons. . . Thus, to respect another person as an end is to require that coercive or political principles be as justifiable to that person as they presumably are to us. This is certainly not the only sense we can give to the rich moral notion of respect. But it is the one which liberals must regard as relevant from a political point of view."[28]

For Larmore, respect is in the first instance respect for rational agents as creators and pursuers of ends. This is why coercion figures centrally in his justification of the mutual acceptability requirement—coercion disrupts the ability of rational agents to pursue their own ends. On a coercion-based view like Larmore's, such disruption is, *prima facie*, to not treat

[28] Charles Larmore, "The Moral Basis of Political Liberalism," *The Journal of Philosophy* 96, no. 12: 607–08.

agents as ends in themselves, and the necessity of overcoming this *prima facie* appearance of wrongfulness generates a special justificatory burden which takes the form of the demand for mutual acceptability. To put this in terms of the John-Mary disagreement, the worry (on Larmore's view) is that by justifying his favored legislation in terms of CD-J, John would be attempting to coerce Mary for reasons that are unacceptable to her, and John would thus fail to adequately respect Mary's nature as an end setter and end pursuer.

The crucial upshot of this is that, on a coercion-based view like Larmore's, the capacity respect for which generates the criterion of reciprocity is the capacity to pursue ends that one has set for oneself. That capacity is the same one that animates the constitutional doctrine of accommodation, as well as the broader notion of respect for conscience into which that doctrine fits. Just as Larmore would view John's duty to justify his favored legislation in terms Mary can accept as springing from a duty to respect Mary's capacity to set and pursue ends, constitutional accommodation (and liberty of conscience more broadly) is most naturally understood as motivated by the value of respecting each citizen's capacity to pursue the good. Nussbaum calls this capacity "conscience," which she describes as "the faculty with which each person searches for the ultimate meaning of life."[29]

This linkage between a coercion-based understanding of the demand for mutual acceptability and the constitutional doctrine of accommodation—both ultimately are motivated

[29] Martha C. Nussbaum, *Liberty of Conscience*, 169. I note that constitutional accommodation and coercion-based criterion of reciprocity are nevertheless distinct ideas. The former is concerned with the relatively narrow issue of a person's ability to pursue their conception of the good without violating the law, while the latter is concerned with the more expansive value a person's freedom from coercion justified by reasons they find unacceptable. Nevertheless, both are ultimately rooted in a respect for the nature of persons as beings who have beliefs about the good and who pursue their view of the good.

by respect for our nature as pursuers of the good—suggests that, on a coercion-based view of the demand for mutual acceptability, there is at least some reason to construe respect along the lines of respect as mutual accommodation rather than respect as mutual engagement. The reason would go something like this. In the domain of constitutional accommodation, we respect citizens' beliefs about the good themselves rather than their capacity to reason well about the good because their nature as end setters and end pursuers is disrespected by preventing them from living in accordance with their chosen ends, regardless of whether or not they reasoned well in deciding to pursue those ends.[30] We respect, in Nussbaums' words, the "faculty of inquiring and searching" itself rather than its successful deployment in search of the truth. This explains why we refrain from probing into the epistemic merits of citizens' beliefs about the good when asking whether they are owed accommodation. It is reasonable to think that this argument, or perhaps some similar and closely related argument, applies with equal force to the question of how to operationalize the criterion of reciprocity if that criterion is understood as based on a duty to respect persons' natures as end setters and end pursuers. The thought would be that we disrespect that nature by subjecting citizens to coercion that implicitly denies their conception of the good regardless of whether or not their conception of the good was arrived at in an epistemically respectable way.

What if, however, one adopts the understanding of the motivation of the mutual acceptability requirement that I advocated in Chapter 1 according to which the criterion of

[30] Nussbaum, *Liberty of Conscience*, 169. Nussbuam's formulations here are helpful: "It is the faculty [conscience], not its goal [arriving at the truth], that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is meaning to be found, or what it might be like. . . . We may arrive at a political consensus concerning the need to respect human faculties, without at all agreeing concerning the value of the specific activities that those faculties perform." Id.

reciprocity is motivated not by a concern that John is reducing Mary to the status of a mere subject by unjustifiably coercing her but rather by the worry that John is failing to treat Mary as a full participant in the collective exercise of political power and thereby failing to respect her status as a co-sovereign? We have seen that a coercion-based view yields a conception of respect that is focused on Mary's rational capacity as an end setter and end pursuer, and that respect for this capacity appears a natural fit with the non-epistemically constrained conception of respect as mutual accommodation. We should now see whether a sovereignty-based view of the criterion of reciprocity yields a different understanding of respect.

To understand what it means to respect Mary's capacity to fully participate in the exercise of collective sovereignty, we first need to say something about what the exercise of such sovereignty looks like. I will here draw on Joshua Cohen's suggestion that "the idea that decisions about the exercise of state power are *collective*" can be elucidated in two distinct ways.[31] The first conception of the collective exercise of political power is what he terms the aggregative model. The starting point of this model is "a principle requiring equal consideration for the interests of each member" combined with a presumption "that adult members are the best judges and most vigilant defenders of their own interests."[32] The aggregative model operationalizes these commitments through "a scheme of collective choice—majority or plurality rule, or group bargaining—that gives equal weight to the interests of citizens in part by enabling them to present and advance their interests."[33] The aggregative model thus yields a conception of

[31] Joshua Cohen, "Procedure and Substance in Deliberative Democracy," in *Philosophy and Democracy: An Anthology*, ed. Thomas Christiano (Oxford: Oxford University Press, 2003), 23. At least, I endorse his schema insofar as we restrict our discussion to distinctively democratic conceptions of collective political action, which is the context to which he and I both speak.
[32] Cohen, "Procedure and Substance," 23.
[33] Cohen, "Procedure and Substance," 23.

collective political decision making that Niko Kolodny has described succinctly as "a process that gives everyone subject to it equal or both equal and positive, formal or both formal and informal opportunity for informed influence either over it or over decisions that delegate the making of it."[34]

The aggregative model is, in relative terms, a minimalist conception of democratic decision making. Its institutions are designed to register causal inputs (e.g., votes) and translate them into outputs, as well as to guarantee each citizen an equal potential share of causal input. This is not to say that it is easy to implement even the aggregative model in practice. The equality condition in particular is difficult to attain. What I wish to underscore, however, is the relatively undemanding conception of democratic participation that the aggregative model yields. This conception falls out of the model's notion of what democratic institutions are meant to aggregate, which Kolodny describes aptly in terms of the concept of contributory influence. Such influence, he writes,

> "might be understood on a model of applying a vector of force, which combines with other vectors to determine a result. The result is sensitive to this vector of force, and the vector remains the same in its 'magnitude' and 'direction,' no matter what other vectors are supplied. Images of placing equal weights on scales, or applying equal tension to a rope in a game of tug of war, suggest themselves."[35]

To participate in a democratic decision, on such a view, is to contribute one's equal share of contributory influence. The important point to take from this discussion of the aggregative model is that it does not conceive of the exercise of democratic power as a process of collective

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[34] Niko Kolodny, "Rule Over None I: What Justifies Democracy?" *Philosophy & Public Affairs* 42, no. 3 (December 2014): 197. I would stipulate that a decision is democratic only if those subject to it were given equal positive opportunity for informed influence over it, thereby excluding (contra Kolodny) a lottery as a species of democratic decision.

[35] Kolodny, "Rule Over None I," 200.

reasoning in any deep or substantive way. This is illustrated both by its notion of what participants bring to the decision making process—a mere vector of causal influence—and its conception of the manner in which the process is collective—it is aggregative rather than interactive, for the participants are understood to only be influencing the outcome of the aggregative process rather than reasoning with and thus influencing each other.

Cohen contrasts the aggregative model with the now-familiar deliberative conception of democracy, according to which "the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens."[36] Cohen explains:

> "Not simply a form of politics, democracy, on the deliberative view, is a framework of social and institutional conditions that facilitates free discussion among equal citizens—by providing favorable conditions for participation, association, and expression—and ties the authorization to exercise public power (and the exercise itself) to such discussion. . ."[37]

Political liberalism is, of course, informed by the deliberative rather than merely aggregative model of democratic decision making. Rawls, for example, cites Cohen's view and expressly states that he is "concerned only with a well-ordered constitutional democracy . . . understood also as a deliberative democracy. The definitive idea for deliberative democracy is the idea of deliberation itself."[38] Like Cohen, Rawls emphasizes the fact that a deliberative democracy will call for institutions that facilitate free, ordered, and reasoned deliberation between citizens. These include "a framework of constitutional democratic institutions that specifies the setting for deliberative legislative bodies," "the public financing of elections," and

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[36] Joshua Cohen, "Deliberation and Democratic Legitimacy," in *Deliberative Democracy: Essays on Reason and Politics*, eds. James Bohman and William Rehg (Cambridge: The MIT Press, 1997): 72.
[37] Cohen, "Procedure and Substance," 21.
[38] Rawls, *Political Liberalism*, 448.

"the providing for public occasions of orderly and serious discussion of fundamental questions and issues of public policy."[39] The idea of deliberative democracy, in other words, is not merely a device of representation like the original position occupied by an individual who deliberates on his or her own. Though it is an ideal, it is a description of the manner in which actual, flesh-and-blood citizens are to deliberate with one another. This interpersonal deliberation is, on the deliberative view, a constitutive element of the collective exercise of political power.

The institutional requirements of the deliberative model of democracy highlighted by Cohen and Rawls illustrate an important point about the nature of the deliberation contemplated by it, for they show that it would be a mistake to reduce the concept of deliberation to a negative requirement such as the duty of civility. Such a misunderstanding would be akin to the mistaken view that the American constitution is primarily a list of prohibitions on the exercise of government power, a misapprehension which can be generated by a focus on the Bill of Rights to the exclusion of the bulk of the original document, which outlines the powers (rather than limitations) of the government. Instead, like the constitution, the idea of deliberative democracy is primarily a model of how power is to be wielded. The institutions of deliberative democracy are intended to foster a reasoned exchange of political arguments and to link the exercise of political power to it. John's duty to not offer Mary a reason that she cannot accept is a mere subcomponent of the broader ideal of a reasoned exchange of arguments about politics between them.

[39] Rawls, *Political Liberalism*, 448–9.

Before concluding this section, let us take stock. At issue is the question of whether the notion of "reasonableness" found in the mutual acceptability requirement has an epistemic component. If it does, John may rely on CD-J in justifying his proposed legislation to Mary (if Mary's rejection of CD-J is due to her failure to apply minimal requirements of rationality to readily available evidence). I suggested that the answer to this question turns on which conception of respect the mutual acceptability requirement flows from—respect as mutual engagement (focused on respecting Mary's capacity to reason) or respect as mutual accommodation (focused on respecting Mary's belief in her comprehensive doctrine). I then drew attention to a more fundamental question about the sort of respect that John is supposed to be showing Mary, namely whether it is a respect for her nature as pursuer of the good or respect for her nature as a participant in collective sovereignty. I linked coercion-based interpretations of the mutual acceptability requirement (such as Larmore's) to the idea of respect for Mary's nature as a pursuer of the good, which I suggested had some affinity with the conception of respect as mutual accommodation, which lacks an epistemic component. Finally, I linked the sovereignty-based interpretation of the mutual acceptability requirement (exemplified by Bird's view, as well as the view I proposed in Chapter 1) with the idea of respect for Mary's capacity to participate in political decision making. The question now is whether respect for Mary's capacity to participate in political decision making is better demonstrated through respect as mutual accommodation (yielding a non-epistemic interpretation of the mutual acceptability requirement) or respect as mutual engagement (yielding an epistemic interpretation).

John can best respect Mary's capacity to participate in the collective exercise of sovereignty—if such exercise is understood in accordance with the model of deliberative

democracy—by adopting the posture specified by respect as mutual engagement rather than respect as mutual accommodation. Deliberative democracy clearly contemplates something akin to a recursive dialogic exchange of reasons; the exchanged reasons are supposed to be understood and appreciated by its participants and thus capable of altering the beliefs that its participants have and the reasons they offer. The ideal deliberative scenario is one in which the reasons John offers Mary are capable, at least in principle, of changing Mary's understanding of the reasons she has (and vice versa). This assumes that Mary has some capacity of engaging with the reasons John offers, critically evaluating them, and appraising them rationally. The point is not that she be expected to evaluate them perfectly. It is instead that the deliberative model assumes that some respectable level of rational competence will be brought to bear on the reasons citizens offer one another. That much is required for the interaction between John and Mary to be a species of mutual deliberation between reasoners about justice.

John, then, can respect Mary's nature as full co-participant in the exercise of collective political power by offering her reasons which assume the rejection of CD-M if such reasons can only be rejected by Mary through her failure to apply minimal standards of rationality to evidence available to her. The alternative model of respect—respect as mutual accommodation—picks out the wrong capacity of Mary as the appropriate object of respect, namely her capacity as a pursuer of a conception of the good. While this is certainly an important capacity that is due respect, it is not the capacity respect for which is at issue in the context of the mutual acceptability requirement. At least, this is true if one accepts a sovereignty-oriented understanding of the mutual acceptability requirement of the sort I defended in the previous chapter.

Opponents of the non-epistemic interpretation of the criterion of reciprocity have previously highlighted an apparent lack of fit between that interpretation and the broader notion of public reason into which the criterion of reciprocity is supposed to form a part. Wall, for example, notes that "public reasoning must be committed to some epistemic standards in order to qualify as public reasoning."[40] While such an argument has significant rhetorical appeal, it is vulnerable to the reply that the meaning of "public reasoning" is a guarantee that Mary is not coerced by laws justified by reasons she cannot accept given her commitment to her comprehensive doctrine, and thus that John reasons with Mary in the relevant sense (and Mary with John) just when he refrains from offering her reasons that imply the rejection of her comprehensive doctrine. By distinguishing between coercion-based and sovereignty-based motivations of the mutual acceptability requirement and connecting the latter to a deliberative model of democracy and its attendant relatively robust model of public reasoning, I have attempted to explain why Wall's rhetorically appealing claim is in fact correct.

III(A). Introducing the Epistemological Understanding of the Criterion of Reciprocity

I began this chapter by distinguishing between two interpretations of the criterion of reciprocity—one non-epistemological, the other epistemological. The first, non-epistemological, interpretation holds that John is prohibited from appealing to CD-J so long as Mary, who believes in CD-M, is ethically reasonable. Mary's "rejection right" against John's appeal to CD-J is not contingent upon her belief in CD-M meeting minimal standards of rationality. I have

[40] Wall, "Perfectionism, Reasonableness, and Respect," 476.

argued that this understanding of the criterion of reciprocity is incompatible with the justification of that criterion that I defended in Chapter 1.

This argument suggests we should try to interpret the criterion of reciprocity in the second, epistemological way. Specifically, it should be interpreted as reserving rejection rights to those whose objection to appeals to CD-J are epistemically—and not merely ethically—reasonable. It should be noted that the epistemic reasonableness requirement is not an ad hoc condition artificially imposed upon the criterion of reciprocity. Instead, the criterion can plausibly be read as implicitly containing such a condition. The criterion of reciprocity prohibits appeals to reasons that other citizens "cannot" accept. If Mary is capable of meeting minimal standards of rationality, and her rejection of John's reasons is based on her failure to meet those standards, there is a natural sense in which she can accept his reasons (she can do so if she exercises her cognitive capacities in a minimally competent way, which she is capable of doing). For it to be true that Mary cannot accept John's reasons, then, more is needed than the mere fact that she in fact rejects them. Her rejection must be epistemically reasonable.

The benefit of such a view is that it requires less of John; because it does not require that he shelve his appeal to CD-J even if Mary's objection is epistemically unreasonable, it does not draw on the relatively demanding conception of respect that I argued against in Section II above. The drawback of the epistemic view is that it commits political liberalism to some type of commitment as regards the nature of disagreement about comprehensive doctrine. At least, it does so if the criterion of reciprocity is viewed by them as justifying the duty of civility. For if the prohibition against appeals to comprehensive doctrine is rooted in the fact that such appeals are reasonably rejectable, and if reasonable rejectability is (at least in part) an epistemic concept,

then political liberals are committed to the view that disagreements about comprehensive doctrine are in some sense epistemically reasonable.

This section is devoted to a critical examination of the epistemic interpretation of the criterion of reciprocity. I will argue that the epistemic interpretation, like the non-epistemic interpretation, should be rejected. The problem with the epistemic interpretation, however, is rather different; the issue is not that the sovereignty-oriented justification of the criterion of reciprocity fails to support it, but rather that the epistemic interpretation of the criterion of reciprocity is itself incapable of supporting the duty of civility. The basic argument I will press is that there is no satisfactory explanation for the compatibility of two claims, each of which John must (according to the epistemic interpretation of the criterion of reciprocity) endorse: (1) even after being presented with John's arguments for CD-J and against CD-M, Mary is epistemically reasonable in rejecting CD-J and (2) John's arguments for CD-J and against CD-M justify John's belief in CD-J and rejection of CD-M. We will see that these two claims have been attempted to be reconciled via Rawls's notion of the burdens of judgment, which can be interpreted in different ways. I will argue, however, that these attempts are not successful.

On the epistemological understanding of the criterion of reciprocity, the mere fact that Mary rejects CD-J is not, on its own, a sufficient reason to conclude John violates the criterion of reciprocity by appealing to CD-J. This means that if John must abide by the duty of civility by avoiding appeals to CD-J (and his comprehensive doctrine more generally), Mary's rejection of CD-J must have certain features—features which explain why appeals to CD-J are not ones that she can accept. The disagreement between John and Mary must take a certain epistemic character.

Here is Rawls's account of this special epistemic character — his explanation of why appeals to comprehensive doctrine violate the criterion of reciprocity:

> "Since many [comprehensive] doctrines are seen to be reasonable, those who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so. Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are their beliefs. But this is a claim that all equally could make; it is also a claim that cannot be made good by anyone to citizens generally."[41]

We should focus on the last sentence, which contains two claims, one on each side of the semicolon. (For the sake of simplicity and consistency, I transpose Rawls's formulations into the pairwise disagreement between John and Mary.) The first is the statement that "this is a claim that all equally could make." What is the claim both John and Mary equally can make? For John, it is the claim that, in appealing to CD-J to justify his favored legislation, he is appealing to the truth and not to his mere belief. And for Mary, it is the claim that, in appealing to CD-M to justify her favored legislation, she is appealing to the truth and not to her mere belief.

The second claim is that the distinction which figures in the first claim—that between an appeal to the truth and an appeal to mere belief—is not mutually accessible. John cannot "make good" to Mary his claim that, in appealing to his comprehensive doctrine, he is appealing to the truth and not to mere belief. That description of what he is doing when he appeals to his comprehensive doctrine is unavailable to Mary. The best Mary can do is understand John as appealing to what he believes to be true.

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[41] Rawls, *Political Liberalism*, 61. Similarly, he writes that the reasonableness of various comprehensive doctrines means that we must "recognize that our own doctrine has, and can have, for people generally, no special claims on them beyond their own view of its merits." Id. at 60.

What I have called the first claim—that both Mary and John can claim (in good faith even if mistakenly) to be appealing to the truth—would be undermined if John's reasons defeat CD-M in such a way that Mary could only maintain her belief in CD-M through an exercise of irrationality. For if John could do so, Mary could no longer claim to be appealing to the truth. The first claim thus entails that John cannot so defeat CD-M. Call this corollary of the first claim the intransparency of defeat.

What I have called the second claim—that neither Mary nor John can "make good" their claim to be appealing to the truth rather than to mere belief—would be undermined if John could show Mary that CD-J can only be denied through an exercise of irrationality. Rawls's view thus entails that John cannot victoriously justify CD-J. Call this corollary of the second claim the thesis of the intransparency of victorious justification.

The core of Rawls's epistemic approach to the criterion of reciprocity thus makes two claims: (1) John cannot show Mary that it is irrational for her to believe in CD-M (the intransparency of defeat) and (2) John cannot show Mary that it is irrational not to believe CD-J (the intransparency of victorious justification). How are these two claims related? And are both really necessary? For one thing, we may note that the first claim entails the second. That is, the fact that John cannot demonstrate to Mary the irrationality of her belief in CD-M entails that he cannot demonstrate to her the irrationality of her refusal to believe CD-J. But the reverse entailment does not hold. The intransparency of victorious justification does not entail the intransparency of defeat, for John could conceivably fail to demonstrate that CD-J is uniquely demanded by reason but succeed in showing that reason demands rejection of CD-M.

The intransparency of defeat, then, is a stronger commitment than the intransparency of victorious justification. An important question is why Rawls saddles himself with this stronger commitment in his exposition of what is wrong with appeals to comprehensive doctrine. Why did he not instead say that such appeals violate reciprocity simply because they cannot be victoriously justified?

My view is that, if Rawls had said this, his position would be that reciprocity is violated when John appeals to CD-J in what I will call the "Asymmetry Without Victory" scenario: John cannot victoriously justify his view to Mary, but he can show that his view defeats Mary's view.

Here is how I intend the word "defeat" (my definition is adapted from Gaus)[42]: Let us say that CD-J defeats CD-M if:

(1) CD-J and CD-M are directly competing; CD-J and CD-M are directly competing if accepting CD-J rationally undermines belief that CD-M.
(2) There is adequate reason to accept CD-J and
(3) better reason to accept CD-J than there is to accept CD-M.

In Asymmetry Without Victory, while John succeeds in showing belief in CD-M to be irrational, he falls short of showing that reason demands assent to CD-J—he only shows that it is not irrational to believe CD-J. My view is that Rawls did not wish to claim that John would be violating reciprocity by appealing to CD-J in such a scenario, and that his intuition here is well-founded.

The reason that this is so should be familiar. We have seen that the criterion of reciprocity is rooted in a certain kind of equality of democratic citizenship, and that violations of it thus amount to a denial of such equality. Violations of this criterion are supposed to demonstrate a

[42] Gerald Gaus, "Public Reason and the Rule of Law," *NOMOS: American Society for Political and Legal Philosophy* 36 (1994): 335.

rejection of democratic equality. In Asymmetry Without Victory, the epistemic merits of CD-J and CD-M are demonstrated to not be equal, and this demonstration occurs in a mutually acceptable way. This means that, in justifying his use of CD-J to Mary, John can appeal to the epistemic inequality between his view and Mary's. But then John's appeal to CD-J does not, at least not obviously, show that he is denying Mary's equal democratic standing. For since even Mary can (whether or not she in fact does) appreciate the defeat of her view and the credibility of John's, Mary can understand John as justifying his use of CD-J by appeal to the superior epistemic merits of CD-J. That is to say, Mary can understand John as making an appeal to epistemic rather than democratic inequality.

Contrast this with the kind of disagreement Rawls has in mind — that is, one in which the defeat of CD-M is intransparent and thus Mary can continue to rationally appeal to the truth of CD-M even after encountering John's arguments. In this case, John cannot demonstrate to Mary that there is a disparity in the epistemic credentials of their respective views. When John nevertheless persists in appealing to CD-J, then, Mary cannot understand him as appealing to a better-justified view. But if John's persistence in appealing to CD-J cannot be understood by Mary as justified via appeal to epistemic asymmetry, then it is at least plausible for Mary to perceive it as grounded in John's denial of Mary's status as a democratic equal.

On my reading of Rawls's view, then, his claim is that appeals to comprehensive doctrine violate the criterion of reciprocity because they cannot be mutually understood as grounded in the superior epistemic merits of the view being appealed to. In my John-Mary example, this plays out as follows: Because John's demonstration of the defeat of Mary's CD-M is intransparent to Mary, Mary can continue to rationally believe CD-M to be true even when

confronted with John's arguments. Each, then, rationally believes their own view to be true and the other to be false, but neither can demonstrate either of these claims in mutually acceptable ways. From the perspective of what can be mutually justified, then, John and Mary stand in a relation of epistemic parity.

This understanding of why appeals to comprehensive doctrine fail the criterion of reciprocity entails what I called the thesis of the intransparency of defeat, for if Mary's CD-M could be demonstrated by John to be defeated by CD-J, the relation of epistemic parity would be lost. The thesis of the intransparency of defeat will be the focus of the rest of this chapter, for it is the lynchpin of argument from the epistemic interpretation of the criterion of reciprocity to the duty of civility.

III(B). A Puzzle about Rawls's View

The epistemic interpretation of the criterion of reciprocity that I have attributed to Rawls generates a puzzle. We have seen that Rawls's view relies on the thesis that, when John appeals to CD-J, he appears to Mary to be appealing to his own mere belief. One thing this obviously means is that Mary cannot understand John as appealing to the truth, and this entails what I called the thesis of the intransparency of victorious justification. But Rawls also seems to mean that Mary cannot even understand John as appealing to a view that defeats CD-M; John cannot demonstrate to Mary that CD-J is both (1) reasonable, or sufficiently credible, and (2) more credible than CD-J. And this entails what I have called the thesis of the intransparency of defeat. The puzzle is why we should think that this latter thesis is true. This issue has been noted by

commentators, and I will give two of their formulations here since I think they clearly draw out what is puzzling about Rawls's view.

Thomas Christiano writes:

> "In order to maintain that one has justified one's own views one must think that one has reason to believe that one's own views are superior to their competitors. And to the extent that one thinks that one's own reasons are superior to those offered by the other, one must think that the other's justification is defeated by considerations that one has adduced for one's own position. But this implies that one must think that the other has reason to believe what one believes as well. And those reasons are the same as the ones one has. This is a requirement of justification. Justification is, for each person, essentially unitary and comparative in this way."[43]

The issue, then, is that absent some special explanation, there seems to be no reason for John to think that Mary should be able to rationally continue to maintain her belief in CD-M.

And here is Gerald Gaus's statement of the problem, with the names transposed to fit my John/Mary example: If John believes he knows that CD-J is true and he has given Mary his arguments, "then he must believe (a) Mary is wrong to reject CD-J since (b) CD-J is better justified and so (c) Mary's belief in CD-M is irrational."[44]

This is a puzzle because, if (c) is true and Mary's belief is necessarily irrational in light of John's reasons, then the defeat of CD-M is mutually accessible and the denial of CD-M is thus consistent with the criterion of reciprocity.

Indeed, on my reading of Rawls, if Mary's belief in CD-M is irrational (because it is transparently defeated) and John can show that it is not irrational to believe CD-J, then appeals to CD-J are consistent with the criterion of reciprocity—at least as against Mary. But Rawls thinks

[43] Thomas Christiano, *The Constitution of Equality* (Oxford: Oxford University Press, 2008), 211.
[44] Gaus, "The Rational, the reasonable and justification," *Journal of Political Philosophy* 3, no. 3 (1995): 255.

that appeals to comprehensive doctrine fail the criterion of reciprocity, and so he needs to prevent this slide from (1) the fact that John knows CD-J defeats Mary and has presented the relevant reasons to Mary to (2) the conclusion that Mary's belief in CD-M is irrational. If this slide is not prevented, John's appeals to CD-J (as against Mary) will not violate the criterion of reciprocity. The puzzle is how to prevent this slide.

III(C). Gaus's Attempt to Solve the Puzzle: The Burdens of Judgment and Complexity

Gaus's discussion unfortunately tends to run together what I have called the theses of the intransparency of victorious justification and the intransparency of defeat. But the general strategy he employs, based on his understanding of the burdens of judgment, can be tailored to defend either thesis. As noted earlier, it is on the latter thesis that I will focus.

Gaus casts his defense of the intransparency theses in terms of the concept of a (merely) "sufficiently credible" belief,[45] which maps onto his concept of an "undefeated but unvictorious justification."[46] These are Gaus's names for the types of beliefs (viz., CD-J) to which John can give credence without attributing irrationality to Mary for withholding her credence in them. How are such beliefs possible?

Gaus claims that because "human belief systems are far too vast, and processing time much too precious" for us to always hold ourselves to a more exacting standard, "[t]he notion of a sufficiently credible belief is fundamental to justification." He then writes that "[t]he idea of a sufficiently credible belief provides a powerful explication and defense of what Rawls calls the

[45] Gaus, "The Rational, The Reasonable and Justification," 211.
[46] Gaus, "Public Reason and the Rule of Law," 337.

‘burdens of judgment’.”[47] The burdens of judgment “lead to the conclusion that, because these matters are so complex and uncertain, different people will reach different, and competing, sufficiently credible conclusions. Consequently, there will be competing reasonable [that is, sufficiently credible] beliefs on these matters.”[48] And, Gaus concludes, to impose one’s (merely) sufficiently credible belief on another, who holds a conflicting sufficiently credible belief, “seems tantamount to proclaiming that our view, just because it is our view, is to be preferred.”[49] And this is why appeals to comprehensive doctrine violate reciprocity.

The appeal to complexity, then, is supposed to give us a way of understanding how John can maintain a belief—say, that CD-M is defeated by CD-J—without attributing irrationality to Mary for rejecting that belief. John’s thought would then be of the following form: Although I can discern that CD-J defeats CD-M, comprehensive doctrine is so complex that Mary can fail to discern this (even after being presented with my reasons) without being faulted for irrationality.

It should be pointed out that if John truly thought CD-J to be merely sufficiently credible and he also thought CD-M to be sufficiently credible to the same degree, then he would take himself to have as much reason to believe CD-M as he has to believe CD-J. He would thus have to give up his belief in CD-J and adopt a stance of agnosticism between it and CD-M. This is why Gaus makes the important concession that John must assume CD-M to be less credible than CD-J.[50] Indeed, this is what generates the puzzle about intransparency Gaus wishes to resolve. For if John could somehow endorse CD-J and believe it to be no better supported by reasons than

[47] Gaus, “The Rational, The Reasonable and Justification,” 253.
[48] Gaus, “The Rational, The Reasonable and Justification,” 253.
[49] Gaus, “The Rational, The Reasonable and Justification,” 253.
[50] Gaus, “The Rational, The Reasonable and Justification,” 256.

CD-M, then he would not believe CD-M to be defeated in the first place. What Gaus is saying, then, is that John can think CD-M is defeated from his perspective, but at the same time think that it is not defeated from Mary's perspective, even after he has given Mary his arguments.

It is worth asking whether complexity is the kind of concept that can make sense of such an appeal to disparate, mutually opaque deliberative standpoints. Unless we have reason to think otherwise, the complexity of comprehensive doctrines (and in this case, the complexity of the question of whether John's reasons defeat CD-M) would appear to be the sort of thing that affects the deliberating parties in the same way and thus leaves them with a shared deliberative standpoint. Complexity can surely help to explain disagreement, but it is unclear why it should explain the intractable type of disagreement entailed by the intransparency of defeat.

In any case, I will assume for the sake of argument that Gaus's appeal to complexity is capable of explaining the intransparency of defeat. But even if we allow this, we will find the appeal unsatisfactory because vulnerable to a dilemma.

We know that John is supposed to think that complexity can make Mary's inability to appreciate CD-M's defeat compatible with Mary's rationality. It can do this in one of two ways. First, it may be that John thinks that complexity universally makes rational deliberators unable to determine when their beliefs about comprehensive doctrine are defeated, and that its effect on Mary is just an instance of this general phenomenon. That is to say, given how complex comprehensive doctrine is and how limited our cognitive resources are, it is always the case that even when we deliberate rationally about the reasons and evidence that in fact defeat our views, we are unable to determine that our views are defeated.

If this thesis applies universally, John must apply it to himself. But if John believes that he would be unable to appreciate the defeat of CD-J even if it were defeated and the reasons that defeat it were presented to him, he could not rationally maintain his belief in CD-J. When confronted with a challenge to his comprehensive beliefs, any attempt on his part to determine the strength of the challenge would be an exercise in futility, since even if the challenge did defeat his view, he would *ex hypothesi* be unable to discern this fact. He would, in effect, be forced to think of himself as unable to assess the rational merits of his view.

The other horn of the dilemma is to attribute to John the belief that the complexity of comprehensive doctrines affects himself and Mary asymmetrically. On such a view, he would think that complexity makes Mary unable to ascertain that CD-M has been defeated, but that it does not make John unable to ascertain whether or not CD-J is defeated.

The difficulty this understanding of the effects of complexity faces is that, unlike the dilemma's first horn, it calls for some special explanation as to why complexity affects deliberators in such a curiously asymmetrical manner. To justify it, John must evidently believe certain things not only about his justification of CD-J, but also about the epistemically relevant circumstances in which he deliberates about CD-J. The asymmetrical application of the consequences of complexity, that is, requires John to have a second-order theory about his and Mary's relative abilities to appreciate reasons.

To see what I mean, consider some examples that would make sense of the asymmetrical application of the effects of complexity. John may believe, for one, that Mary's comprehensive doctrine is much more complex than his own is. According to this explanation of the asymmetry, CD-J is simple enough for John to be able to determine whether or not it has been defeated, but

CD-M is too complex for Mary to be able to determine whether or not it has been defeated. Or, perhaps John thinks both comprehensive doctrines are equally complex but that because he is better at navigating the complexity than Mary, he (and not Mary) is able to see that CD-M is defeated.

While these explanations are strained and *ad hoc*, the unworkability of the asymmetry only comes clearly into view when we remember that this explanation of the intransparency of defeat is supposed to be applied by all reasonable citizens to all reasonable citizens. Every citizen would thus need to have some such second-order theory about why complexity degrades the quality of their deliberations less severely than it does every other citizen.

Gaus's claim that complexity justifies the intransparency of defeat, then, faces a dilemma. On the one hand, John may believe that complexity makes rational deliberators generally, and so himself included, unable to discern whether their comprehensive doctrines have been defeated, even when they have in fact been defeated. This would require John to believe that his attempts to appraise the rational merits of his view are futile because their result is a foregone conclusion: he will continue to find his belief sufficiently credible because he is incapable of recognizing its defeat.

On the other hand, John may think that complexity affects deliberators asymmetrically. But this requires metatheoretical contortions, especially when we remember that the thesis of the intransparency of defeat is supposed to apply to disagreement about comprehensive doctrine universally and not only to the case of John and Mary.

III(D). My Reading of the Burdens of Judgment: Life Experiences and the Private Standpoint

While the appeal to complexity on its own does not explain the intransparency of defeat in a satisfactory way, I believe that Rawls's doctrine of the burdens of judgment cannot be reduced to an appeal to complexity.

Let us take a brief look at what the burdens of judgment are. On my reading, Rawls offers a total of four burdens. The first three may be paraphrased as (1) the complexity of the relevant evidence and the difficulty in evaluating it, (2) the absence of a principled way of determining precisely how much weight to give to conflicting considerations (whether they be empirical, theoretical, or normative), and (3) the vagueness and indeterminacy of our concepts. The first of these corresponds to Gaus's appeal to complexity (and our limited cognitive resources), while the second and third continue in the same vein by giving additional reasons to believe that determining the truth about comprehensive doctrine is especially difficult. I will thus call these three burdens the difficulty burdens.

But Rawls does not stop here. He goes on to include what I am numbering the fourth burden of judgment: "To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ."[51]

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[51] Rawls, *Political Liberalism*, 56-7. Rawls technically lists six burdens. The ones I have left out read: "(e) Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment" and "(f) [A]ny system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realized." Id. at 57. I omit these because (e) reduces to the appeals to complexity and balancing issues, and (f) does not explain why we disagree, but rather explains why disagreement might be important, namely because there is a scarcity of "social space" in which the values of our disputed comprehensive doctrines may be implemented.

This fourth burden differs from the others in several respects. First, it is essentially individuated, for it affects each of us in a unique way. The burden is not, presumably, the fact that we all have life experiences, but is rather that we have different life experiences, and that these differences cause us to evaluate questions related to comprehensive doctrine differently from one another. Second, it is comparative. It is in the first instance a claim about the way two deliberators differ rather than an existential claim about the circumstances under which they, considered individually, deliberate. Third, it does not appear to provide a reason (as all the others do) to think that deliberating about comprehensive doctrine is especially difficult. The effects of my life experiences on my deliberations should not be thought of as problematizing my ability to know the truth in the same way that the complexity of the evidence or the vagueness of concepts do. Whatever the life experience burden does, it does not seem that its purpose is to explain why it is difficult for me to know the truth.

We have seen that the appeal to complexity (and limited cognitive resources) alone does not offer a promising strategy for making sense of the thesis of the intransparency of defeat. The basic reason that such a strategy must fail is that, though such considerations may indeed explain why it is difficult to apprehend the truth in matters of comprehensive doctrine, the claim that it is difficult to know the truth is in principle the kind of thing that affects all deliberators in the same way. If difficulty is used to explain why any particular failure of Mary to know the truth is compatible with her epistemic reasonableness, it can just as well be used to justify the same claim about John. Burdens such as difficulty and complexity leave citizens with a shared deliberative landscape, and so any claims to the effect that John can discern what Mary cannot will need special *ad hoc* explanations that cannot be universally applied.

The life experiences burden appears tailor-made to fill this explanatory gap. If their disparate life experiences cause John and Mary to evaluate the arguments against CD-M in different ways, then there no longer exists a shared, unitary standpoint from which they can both assess the reasons that defeat CD-M. And if John and Mary come at the question of whether or not CD-M is defeated by John's arguments in fundamentally different ways due to their differing life experiences, then it is not difficult to see how it could be that those reasons appear to John to defeat CD-M without Mary sharing the same assessment.

An extreme example will illustrate why. Imagine that (1) John has had a personal revelation from God that CD-M is defeated, (2) John is justified in believing this revelation to be a divine revelation, and not a hallucination or something explicable in naturalistic terms, and (3) John has no other strong reasons for believing CD-M to be defeated. Let us also imagine that CD-M is a naturalistic atheism which is sufficiently credible when considered in light of generally accessible reasons and evidence. In such a case, I take it that (1) John is justified in believing CD-M to be defeated, but that (2) Mary is not irrational to maintain her belief in CD-M in spite of John's reasons.

Special divine revelation is paradigmatic of the class of reasons which could be called private reasons—reasons that are in some strong sense incapable of being presented by those who have them to those who do not.[52] Appeal to such reasons, and to beliefs that rely on such reasons, is generally thought to be prohibited by the criterion of reciprocity. I believe that this is correct, but would add two comments about why this is so. First, when such reasons are at play,

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[52] *See, e.g.*, Thomas Nagel, "Moral Conflict and Political Legitimacy," *Philosophy & Public Affairs* 16, no. 3 (Summer 1987): 232.

the beliefs they justify and defeat are intransparently defeated and justified—the fact that those beliefs are in fact victoriously justified or decisively defeated is not generally accessible. Second, the reason that private reasons lead to the intransparency of justification and defeat is that they destroy the possibility that disagreeing parties may deliberate from a shared perspective. Private reasons create mutually inaccessible deliberative standpoints which make defeat and victory intransparent.

Rawls's claim is not, or at least it should not be, that all justifications of comprehensive doctrine are private reasons. For certainly there is a significant difference between appeals to revelation and appeals to shareable empirical facts and publicly intelligible argumentation that bear on comprehensive doctrine, and it would be a mistake to assimilate the latter to the former simply on the grounds that we all have different life experiences.

Instead, I believe that Rawls intended the life experiences burden to play a role similar to that played by private reasons in creating intransparency. This role is to impute a feature to the standpoint from which John deliberates that makes the deliverances of that standpoint essentially inappreciable from Mary's standpoint, and to foreclose the possibility that their standpoints may be unified. But instead of claiming that it is the reasons themselves that differentiate the standpoints—as a theory of private reasons would—Rawls's idea is that John's and Mary's unique life experiences affect how they assess the reasons that are available to both of them. This is the meaning of what I will call the "life experiences" burden.

III(E). The Life Experiences Burden and the Possibility of Knowledge

The strategy of justifying the thesis of the intransparency of defeat by appealing to the life experiences burden is vulnerable to a similar argumentative strategy as that employed against the appeal to complexity. The basic problem with the appeal to life experiences is that whatever incapacity John attributes to Mary he must also attribute to himself, which leads to skeptical conclusions. The alternative is to claim that the burden affects him less adversely than it does Mary, but this will again require second-order commitments that are unsustainable when applied generally.

How can John justify his belief that his reasons defeat Mary's? Rawls is committed to the view that there is no shared deliberative perspective from which it can be seen that John's reasons defeat Mary's. Insofar as there is a shared perspective from which they may deliberate together about comprehensive doctrine, the most this perspective can do is certify both of their comprehensive doctrines as reasonable, or sufficiently credible.

The only way that John can justify his belief that his reasons defeat Mary's is by appealing to the private standpoint that is uniquely John's in virtue of the life experiences burden. This is the standpoint from which John deliberates about what the true comprehensive doctrine is. From its vantage point, John can compare his reasons with Mary's and see that his reasons defeat hers.

What must John believe about this private standpoint if it is to be capable of justifying his belief that his reasons defeat Mary's? He must believe that, despite the fact that he experiences and assesses Mary's reasons differently from the way Mary does, that he can still analyze them well enough to see that his reasons defeat them. John's thought must be that Mary's viewpoint is opaque in the sense that John cannot assess Mary's reasons from her viewpoint (from which they

justify Mary's belief in the truth of his view), not in the sense that John cannot make sense of Mary's reasons at all. Indeed, John must believe that he is able to make sense of Mary's reasons well enough to allow him to justify his belief that they are defeated by his own reasons. This much, I think, is required if John is to be able to maintain his belief that his view is true and Mary's is false.

John must, then, believe that the private standpoint he occupies as a result of his life experiences justifies his belief that his reasons defeat Mary's. He must believe that his private standpoint provides a genuinely justificatory, knowledge-conferring perspective on the relative merits of his reasons versus Mary's. But if John believes that his private standpoint has this quality, he must believe that Mary's private standpoint does not. Mary's private standpoint yields the conclusion that her reasons defeat John's, and so John must think that her standpoint fails to confer knowledge about their beliefs' relative merits.

John must thus endorse two thoughts about the life experiences burden, as it applies to him and Mary. First is a thought about how the burden affects them in the same way. He must think that the burden makes it impossible for him to experience the force of Mary's reasons in the way that Mary herself does. And since Mary's assessment of her reasons leads her to believe in the truth of CD-M, it follows that John is unable to experience Mary's reasons as justifying the truth of CD-M. And Mary is situated in exactly the same way with regard to John's reasons.

Second is a thought about how the burden affects them differently. John must think that the life experiences burden affects himself in a way that nevertheless allows his private standpoint to confer upon him knowledge about the relative merits of his and Mary's competing justifications. The knowledge it confers upon John is the knowledge that his reasons defeat

Mary's. Despite the fact that he cannot access those reasons from Mary's perspective, John must believe that he can still access them in a way that allows him to know that they are defeated by his own reasons.

But, John must think, that same burden affects Mary in a way that disallows her from being able to know the relative merits of their competing justifications. The life experiences burden makes it impossible for Mary to see John's reasons as justifying the truth of CD-J (and hence the falsity of her own). But John must think that his reasons do in fact show the truth of his view (and hence the falsity of Mary's). He must, then, believe that the life experiences burden affects Mary in a way that prevents her private standpoint from conferring upon her knowledge about the relative merits of their competing justifications. Mary's private standpoint puts knowledge of comprehensive doctrine out of reach for her, but John's private standpoint (by contrast) allows him to know the truth about comprehensive doctrine. And since their private standpoints differ only because of the life experiences burden, John must think that the life experiences burden is responsible for this asymmetry.

What could justify John's belief that the life experiences burden disables Mary from recognizing the truth about the defeat of CD-M, when it does not do this to John? He apparently needs some reason to believe that his life experiences are more conducive to cognition than Mary's are.

It will not do, of course, for him to claim that his life experiences are more auspicious than Mary's on the basis of the fact that, since CD-J is true and CD-M is not, John's life experiences must be more conducive to knowledge since they lead him to believe the truth and Mary to deny it. What is at issue is the reliability of the private standpoint from which John

judges his reasons to be genuinely justificatory and Mary's not. But since an appeal to the supposed fact that his reasons really are justificatory presupposes the reliability of his private standpoint, it begs the question.

In order to properly justify his belief in the superiority of his private standpoint as against Mary's, John must be able to pick out various formal conditions relevant to his ability to acquire knowledge and show that his life experiences fare better along these metrics than Mary's life experiences. The sorts of metrics that might play such a role are things such as an education that fosters critical thinking skills and facilitates imaginative and sympathetic engagement with various comprehensive doctrines, and leisure time which affords one the opportunity to investigate the merits of various ways of making sense of the world.

I doubt much hinges on the specific list of knowledge-conducive life experience metrics we settle upon. Let us assume that there is some sensible list of such metrics on which John fares better than Mary. He can thus justify his belief in the superiority of his private standpoint as against Mary's.

Problems arise, however, when we try to apply this approach generally. The claim I have been able to make sense of is a claim about John's epistemic situation vis-à-vis Mary's. It is thus a two-argument comparative claim, with each argument having an existential quantifier. (There is some person—John—who can justify his belief that his private standpoint is epistemically superior to that of some other person—Mary.) For the solution in the case of Mary versus John to be a complete solution, however, both of these existential quantifiers must be replaced with universal quantifiers. Not only John, but reasonable citizens generally must be able to think they

know the truth. And each must be able to favorably compare his or her life experiences with those of other citizens generally, not simply with unlucky Mary.

Suppose I am a reasonable citizen who wishes to adhere to the duty of civility while maintaining my belief in my comprehensive doctrine. Could I ever be justified in thinking that my life experiences are more propitious than those of every reasonable citizen with whom I disagree? The claim is incredible, both in its content and in what it would take to establish it (even if it were true) with any degree of certainty. So let us imagine the claim is false with regard to one citizen, Jane. Jane believes her reasons defeat mine, and I believe mine defeat hers. But because of the life experiences burden, the perspective from which each of us makes these judgments is inaccessible to the other—the respective judgments cannot be assessed from an objective, impartial perspective. How, then, can we justify our judgments about whose reasons defeat whose? *Ex hypothesi*, I cannot justify my belief in the epistemic superiority of my private standpoint by appealing to my relatively favorable life experiences. In the absence of some other explanation, I would be compelled to give up my belief in the superiority of my private standpoint and thus take a skeptical view of my comprehensive doctrine when confronted with Jane's reasons.

But even if somehow I could justify the asymmetrical application of the life experiences burden in my own case, it would surely be impossible for everyone to do the same for themselves. If we focus on the simple dyadic case of me and Mary and imagine that I justifiably believe that my life experiences are more conducive to knowledge than hers, how could she also be justified in believing that her life experiences are epistemically superior to mine? It is thus

implausible to think that, for every pair of disagreeing citizens, both can justify the belief that their own private standpoint is superior to the other's.

IV. Conclusion

In the previous chapter, I gave what I considered to be the strongest moral argument in favor of Rawls's criterion of reciprocity, which requires that democratic citizens offer one another justifications that are mutually accessible. This justification, I argued, should be understood as rooted in a normative ideal of democratic equality, the idea being that citizens treat one another as something less than democratic co-sovereigns when they offer justifications that are not mutually acceptable.

This chapter critically examined the ability of the criterion of reciprocity to form the basis of an argument for the conclusion that citizens have a duty to refrain from appeals to comprehensive doctrine when justifying their preferred legislation to one another. I first inquired into the prospects of such an argument if the mutual acceptability requirement—and specifically its notion of reasonableness—is understood as not having an epistemic component. I argued that the non-epistemic interpretation of the criterion of reciprocity rests upon a conception of respect (respect as mutual accommodation) that focuses on respecting the actual comprehensive beliefs (whether epistemically reasonable or not) that citizens happen to hold. I then argued that this conception of respect is a poor fit with the underlying normative motivation of the criterion of reciprocity. Instead, I argued that the sovereignty-oriented justification of the criterion of reciprocity supports a conception of respect that focuses on citizens' ability to engage in a mutual, interactive process of reason-giving and reason-understanding. Because respect for such

an ability presumes some epistemic standards, I concluded that the non-epistemic interpretation of the criterion of reciprocity should be rejected in favor of an epistemic interpretation if the sovereignty-oriented interpretation of the criterion of reciprocity is correct.

The difficulty with the epistemic interpretation, I then argued, lies in the connection between it and the duty of civility. The difficulty is that, according to the epistemic interpretation of the mutual acceptability requirement, a person applying it such as my hypothetical John must hold two thoughts in his head at once. First, because John endorses CD-J, he must believe that CD-J is true, and that he knows (at least some of) the reasons that make it true. Second, he must believe that Mary cannot accept reasons drawn from CD-J, even were she to reason well, and that this is because her failure to see the truth of CD-J is not the result of a failure of reason on her part. The difficulty is to explain how John can believe both that his reasons justify the truth of CD-J and that they are unacceptable to (even a properly reasoning) Mary. I argued that the standard political liberal answer to this question, namely the Rawlsian concept of the burdens of judgment, cannot provide a satisfactory answer to this question.

The upshot of this chapter, in combination with the prior chapter, is that it appears that serious difficulties beset the attempt to argue from a commitment to mutual acceptability to the conclusion that political justifications must be cast in ways that avoid reliance on comprehensive doctrines. The lesson for liberals, then, might be that the core political values of tolerance, liberty of conscience, and some degree of state neutrality might best be justified by direct appeal to liberal comprehensive values rather than through purely political concepts such as mutual respect and democratic equality.

Chapter 3: Rawls's Political Liberalism and the Good of Liberty

I. Introduction

The topic of this piece is the place of liberty within Rawls's preferred conception of justice, which he calls Justice as Fairness. My focus will be on Justice as Fairness understood as a political conception of justice—how it is presented in *Political Liberalism* and *Justice as Fairness: A Restatement*—rather than as the application of some broader comprehensive doctrine to the political domain.

I will attempt to accomplish two goals, one expository, and the other more critical and substantive, both of which focus on certain limitations Rawls placed on how to justify protections for liberty in his later writings. The first limitation grows out of Rawls's alteration of the first principle of justice in his later works; rather than maximizing protections for liberty as in *A Theory of Justice*, the first principle in Rawls's later works only requires that liberty be secured to an "adequate" extent.[1] The second limitation is rooted in the fact that, once it is understood as a political conception of justice, the content of Justice as Fairness—including its doctrine of liberty—must be justified without reliance on comprehensive notions. Specifically, its doctrine of liberty must be justified independently from substantive notions about what liberty is good for, or, as I will call it, the good of liberty. While I will devote significant space to exploring both of these limitations, the primary emphasis of this piece is a critique of the latter limitation. The purpose of my discussion of the former limitation is largely to the groundwork of that critique.

[1] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 291.

My first goal, which focuses on the first limitation, is to clarify the manner in which any argument that a liberty is a properly basic liberty—and thus to be accorded constitutional protection as a matter of basic justice—must proceed within the framework of Justice as Fairness. I approach this task by intervening in a disagreement between two commentators—Andrew Koppelman and Frank Michelman—about the ability of Rawls's political liberalism to justify constitutional protections for sexual liberty. In Rawlsian terms, I seek to use this disagreement to clarify how a Rawlsian political liberal ought to think about the questions of (1) whether or not any given liberty is a basic liberty and (2) what Rawls means when he claims that (basic) liberty has priority over other considerations.

The answers I arrive at with respect to the first question has two components:

> (a) the adequacy criterion: a liberty's status as basic hinges on whether or not that liberty is necessary to ensure the adequate development and full exercise of the two moral powers, and
>
> (b) the actuarial method: to determine whether or not a liberty is necessary in the manner described in (a), a party to the original position should make a risk assessment by asking whether or not the liberty's absence would unacceptably compromise the ability of that party's representee to pursue his or her conception of the good.

With regard to the second question (as to the meaning of the priority of basic liberty), I conclude that the famed Rawlsian doctrine of the priority of liberty is an entailment of the adequacy criterion, and is indeed a mere special case of its application. The doctrine of the priority of liberty, I argue, is a restatement of the lexical priority of the first principle of

justice—the principle of equal basic liberty—over the second principle. The content of the doctrine of the priority of liberty, then, is determined by the content of the first principle of justice. The heart of the first principle is the adequacy criterion, which places limits on acceptable manners in which the scheme of basic liberties may be specified and adjusted. The doctrine of the priority of liberty spells out the way that these limits apply to the relationship between basic liberty and other values, to wit: basic liberty cannot be sacrificed for other values if doing so would violate the adequacy criterion.

With these expository matters out of the way, I proceed to the critical portion of the piece. The goal of the critical portion is to clarify the stakes of the Rawlsian project of political liberalism and, in particular, to foreground a tradeoff that his project occasions. The tradeoff I have in mind is between two desiderata of liberalism. The first of these is the political liberal commitment to what Joseph Raz accurately (though perhaps also somewhat derisively) calls "shallow foundations."[2] This feature of political liberalism is motivated by Rawls's understanding of the purpose of political philosophy, namely that it is a practical tool which can help us locate a reasonable public basis of justification on political questions in the context of intractable disagreement about ultimate questions.[3] To this end, Justice as Fairness is "neither presented as, nor as derived from" one or another comprehensive doctrine "applied to the basic structure of society."[4] Instead, it is theorized and presented as a "freestanding view" worked up from certain "fundamental ideas seen as implicit in the public political culture of a democratic society."[5] The organizing fundamental idea is that of society understood as a fair system of

[2] Joseph Raz, "Facing Diversity," *Philosophy and Public Affairs* 19, no. 1 (Winter 1990): 8.
[3] Rawls, *Political Liberalism*, xxii.
[4] Rawls, *Political Liberalism*, 12.
[5] Rawls, *Political Liberalism*, 13.

cooperation between free and equal citizens effectively regulated by a political conception of justice.[6] Within the political liberal project, this organizing concept replaces comprehensive doctrines as the justification of the content of a political conception.

The second feature of liberalism I have in mind—the one against which I claim the commitment to shallow foundations forces a tradeoff—is a conception of basic liberty and its priority that, when implemented in a social and legal structure, helps people live worthwhile lives by protecting their ability to pursue valuable goals. To be more precise, the type of priority doctrine I have in mind is the liberal idea—endorsed by Rawls—that certain types of activity should not be able to be restricted even when such restriction would result in social gains writ large, such as gains to overall economic productivity or raising the welfare of the worst-off.

The nature of the tradeoff I wish to bring into focus is as follows. The doctrine of shallow foundations places limits on the resources that can be deployed in defense of the claim that any particular liberty deserves constitutional protection; any assertion that a certain liberty is basic and thus enjoys priority over other values must be defensible from within the fundamental organizing idea of justice as fairness and without recourse to some deeper comprehensive view. Likewise, claims about what activities any abstract "basic liberty" actually protects—what concrete forms of behavior fall under its protective umbrella—cannot rely on comprehensive doctrine, but must instead be justifiable from within the fundamental organizing idea. Thus, both the list of protected basic liberties as well as the manner in which these abstract categories get fleshed out concretely must be specified without recourse to comprehensive doctrine, and must instead rely solely on shallow "political" foundations. Within justice as fairness, this

[6] Rawls, *Political Liberalism*, 13.

metatheoretical commitment to shallow foundations takes the form of the actuarial method: the value of liberty is largely reduced to its utility in helping people achieve their goals, *whatever* those may happen to be (so long as they are compatible with the two principles of justice).

My contention is that the shallow foundations Rawls's political project provides are systematically inadequate to protect a certain category of liberties. The category I have in mind is not in the first instance a class of human activity (such as religious exercise or free expression) which people place a high value on being able to engage in. Instead, it is a category of conditions—social, psychological, and physical—the presence or absence of which determines what types of activities people place a high value on being able to engage in. Put another way, while Rawls's view ensures that representees can pursue whatever they happen to value, it provides inadequate assurances that they will be able to deliberate well about what they ought to value.

Committed political liberals will likely be untroubled by what I have to say. They might respond that Rawls's basic liberties are adequate to ensure that citizens can "deliberate well about what they ought to value" if that phrase is understood in a publicly justifiable way. And they would further claim that to the extent that I intend the phrase in a way that is not publicly justifiable but instead reliant on comprehensive doctrine, the ability to "deliberate well about what one ought to value" is not a political value cognizable from within Justice as Fairness. I concede that my critique of political liberalism is not internal. But I conclude this piece by insisting that the political liberal project requires we give up something worth wanting, namely a conception of the value of liberty that comports with the way in which its value appears in the lives of actual human beings *qua* practical reasoners. Drawing on the thought of Joseph Raz, I

suggest that we value liberty not because it helps us achieve whatever goals we happen to have, but because we think that those goals are good. The value of liberty, then—as it appears within practical deliberation—is sensitive to the value of the goals we use it to pursue. A political theory that abstains from scrutinizing the value of the goals we adopt thus yields a truncated account of the good of liberty by severing the connection between liberty and the source of its value.

Political liberals will likely conclude that the values served by the commitment to shallow foundations justifies the adoption of what I call a truncated account of the good of liberty. My aim, however, is to bring clearly into focus the fact that shallow foundations are not free, and to illustrate their cost in the context of how we think about liberty.

II. The Rawlsian Argument for Basic Liberties: The Adequacy Criterion and the Case of Sexual Liberty

The purpose of this section is exegetical. My aim is to illustrate how an argument for the claim that a liberty is a basic liberty must proceed from within Rawls's political liberalism, and thus to lay the groundwork for the critique of Rawls's doctrine of liberty, which appears in § III. I approach this exegetical task by intervening in a dispute between two commentators, Andrew Koppelman and Frank Michelman, about the status of sexual liberty—specifically, a right to engage in homosexual sex and a right against parentally imposed female genital mutilation—as basic liberty *vel non* within Justice as Fairness. Koppelman contends that Rawls's political liberalism lacks the resources to accord these liberties basic status, and he argues that this

deficiency is the consequence of the view's shallow foundations.[7] Michelman argues for the contrary position.[8]

I will divide the laurels between the disputants, but my ultimate purpose is not to adjudicate a narrow disagreement about a particular basic liberty. Instead, I will argue that, while Michelman is correct when he claims that Rawlsian political liberalism can justify the claim that sexual liberty is a basic liberty, the argument providing this justification misses much of the reason that sexual liberty is in fact valuable. To set the scene for this argument, I will spell out in detail the manner in which I think a political liberal would respond to Koppelman's critique and justify the basic status of sexual liberty. I will do this by laying out my understanding of the doctrine of the priority of liberty as it appears in Rawls's later works as well as what I call his "actuarial approach" to liberty. I argue that, while these resources are rather meager, they are luckily adequate to justify protections for sexual liberty. After laying out the Rawlsian argument for the basic status of sexual liberty (the task to which most of this section is devoted) I will proceed in § III to argue that this approach is unsatisfactory because it is seriously incomplete, and that this incompleteness is a result of the shallow foundations of Rawls's political approach to justice.

A. Koppelman's Critique

While Koppelman and Michelman disagree as to whether or not sexual liberty can be adequately protected within a Rawlsian framework, they agree about many of the basic

[7] Andrew Koppelman, "The Limits of Constructivism: Can Rawls Condemn Female Genital Mutilation?" *The Review of Politics* 71, no. 459 (Summer 2009).
[8] Frank Michelman, "The Priority of Liberty: Rawls and 'Tiers of Scrutiny'," in *Rawls's Political Liberalism*, eds. Thom Brooks and Martha Nussbaum (New York: Columbia University Press, 2015).

conceptual elements a Rawlsian framework provides for the purpose of determining whether or not a given liberty should qualify as basic.

First, Rawls relies on a thin, "political" conception of the person as the foundation of his view. According to this conception, citizens are understood as having two "moral powers." One of these, which Rawls calls the reasonable, is the capacity to have a normally effective sense of justice informed by a political conception of justice. The other, called the rational, is the capacity to form, pursue, and revise a conception of the good. Rawls relies exclusively on this thinly political conception of the person in his account of the individual liberties that a liberal society must protect as a matter of basic justice. These liberties Rawls calls the basic liberties.

The move in *Political Liberalism* from the political conception of the person to an account of the basic liberties proceeds in two steps. First is the elaboration of what Rawls calls the "two fundamental cases" of the exercise of the moral powers. The "fundamental case" of the exercise of the first moral power (the reasonable) is a citizen's formulation of a political conception of justice and her ability to apply that conception to her society's basic structure.[9] The fundamental case of the second moral power (the rational) is "the application of the principles of deliberative reason in guiding our conduct over a complete life."[10]

Rawls connects these two fundamental exercises of the two moral powers with the basic liberties through the following claim: "[The basic] liberties and their priority are to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers in what I shall call 'the two fundamental cases.'"[11] The

[9] Rawls, *Political Liberalism*, 332.
[10] Rawls, *Political Liberalism*, 332.
[11] Rawls, *Political Liberalism*, 332.

two fundamental cases are thus the focal point for any argument that a given liberty is basic: a liberty is a basic liberty if and only if its possession by citizens is a necessary condition of either (1) formulating a political conception of justice and applying it to society's basic structure or (2) applying the principles of deliberative reason in guiding one's conduct over a complete life.[12]

These components of Rawls's view—the political conception of the citizen fleshed out in terms of the two moral powers, the role of the basic liberties in safeguarding citizens' abilities to exercise those moral powers, and the special status of the "two fundamental cases" in our assessment of whether citizens can properly exercise the two moral powers—are agreed upon by Michelman and Koppelman as the foundations upon which any Rawlsian argument that a given liberty is basic must be based.

Koppelman contends that this theoretical framework is inadequate because it is underinclusive—that there are liberties which deserve the status of basic liberties (and the constitutional protections that attend such liberties) but which are not related to the adequate development or full exercise of the moral powers. Thus, while these liberties ought to be protected as matters of basic justice, Rawls's view lacks the resources to justify such protection. Koppelman presses this critique by focusing on the human sexual capacity and the forms of agency connected with it. He argues that Rawls's view fails to adequately protect the ability to exercise their sexual capacity in at least two cases.

The first of these is in the area of gay rights, and Koppelman's particular example is a prohibition against homosexual sex.[13] Koppelman thinks that the view laid out in *Political*

[12] Michelman, "The Priority of Liberty," 188–9; Koppelman, "The Limits of Constructivism," 462.
[13] Koppelman, "The Limits of Constructivism," 463–66.

Liberalism is unable to justify the intuition that such a prohibition violates a basic liberty and so is contrary to basic justice.

On Koppelman's reading, a decisive Rawlsian argument against such a prohibition is available in *A Theory of Justice* in the form of its claim that liberty can only be restricted for the sake of liberty. He writes that "In *A Theory of Justice*, [Rawls] argued that justice as fairness 'requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligation or natural duty before they can be restricted.' In particular, ideas 'that certain kinds of sexual relationships are degrading and shameful, and should be prohibited on this basis,' are excluded as legitimate bases upon which the basic liberties may be restricted. Thus, prohibitions of homosexual sex would violate the priority of liberty."[14]

Koppelman reads Rawls as dropping the requirement that liberty can only be restricted for the sake of liberty in *Political Liberalism*. Koppelman next claims that once this stringent rule for restricting liberty is dropped, there is no longer a basis for thinking that the value of a citizen's ability to engage in homosexual sex (or, for that matter, any "particular sex act"[15]) automatically outweighs the religious or moralistic interests of other citizens that would purportedly justify such a ban. A constitutional court might rule the ban unconstitutional, but such a finding is not, according to him, demanded by anything in *Political Liberalism*.

The core of Koppelman's claim is that, within the framework of *Political Liberalism*, an argument for the unconstitutionality of a ban on homosexual sex would be available only if a citizen's ability to exercise his sexual capacities could be understood as a basic liberty. But, according to Rawls's political liberalism, this would only be possible if the ability to exercise

[14] Koppelman, "The Limits of Constructivism," 464–65.
[15] Koppelman, "The Limits of Constructivism," 464.

these capacities were integral to the exercise of the two moral powers in the two fundamental cases. Koppelman thinks that there is no such connection between sexuality and the moral powers, and concludes that "since sexuality is not necessary to the exercise of the moral powers … Rawls's theory offers no basis for regarding gay rights as a matter of basic justice."[16]

The second example Koppelman employs is that of female genital mutilation ("FGM"), specifically when carried out on minors at the request of their parents. He asks us to "consider an immigrant mother who wants to have the operation performed (by a competent surgeon) on her daughter. Is there a basis in political liberalism, as formulated by Rawls, for saying that the state has an obligation to interfere with her decision?"[17]

Crucial to the efficacy of this example is Koppelman's claim that "FGM is not devoid of purpose."[18] These purposes are largely internal to the cultural and religious practices and views of a given community. But this does not make them "unreasonable" in Rawls's sense, and their cumulative effect is such as to make FGM "sometimes indispensable to a woman's marriageability, in societies in which marriage is vital to a woman's status and security."[19]

Koppelman's argument about FGM mirrors his argument about gay rights. He tells us that "in order to reject FGM, one must argue that these ends are outweighed by the harm caused by the loss of sexual capacity," but that it is impossible to do this with the materials afforded us by *Political Liberalism* because "FGM does not deprive its victims of their capacity to exercise their moral powers."[20] He concludes that "[i]n order for the harm of FGM to be recognized, persons have to be represented, not solely as free and equal moral persons, but as sexual beings

[16] Koppelman, "The Limits of Constructivism," 466.
[17] Koppelman, "The Limits of Constructivism," 467.
[18] Koppelman, "The Limits of Constructivism," 467.
[19] Koppelman, "The Limits of Constructivism," 467.
[20] Koppelman, "The Limits of Constructivism," 446.

who have the vulnerabilities specific to such beings. FGM does not deprive its victims of their moral powers or their normal capacities for cooperation. FGM hurts them in other ways."[21] Since Rawls's political liberalism cannot recognize these forms of harm as matters of basic justice, it has no case against parentally imposed FGM.

Koppelman concludes that, in order to get the value of sexual liberty in view and protect it accordingly, political liberalism must appeal to a fuller, partially comprehensive conception of human flourishing, and that once the logic of this type of critique is carried through completely, Rawls's view must transform into something like Martha Nussbaum's capabilities approach.[22] Such a view arguably still qualifies as a political liberal view in that it begins with normative material upon which there is hope for some consensus, but it is thicker than Rawls's view, moving beyond the bare idea of the moral powers as the basis of its account of citizens' most fundamental interests and needs.

B. Michelman's Response

In "The Priority of Liberty: Rawls and 'Tiers of Scrutiny,'" Frank Michelman offers a response to Koppelman's challenge. But Michelman also repurposes Koppelman's critique, using it as an opportunity to examine how *Political Liberalism*'s doctrine of liberty would treat a variety of cases if implemented by a society's judiciary. His strategy is to imagine that a judge on a nation's high court is an originalist who believes his nation's constitution was written to accord with Justice as Fairness as found in *Political Liberalism*, and then to ask how this judge would resolve various cases.

[21] Koppelman, "The Limits of Constructivism," 469.
[22] Koppelman, "The Limits of Constructivism," 480.

One of these cases is Koppelman's FGM case, but Michelman introduces two of his own, one involving the permissibility (under a Rawlsian constitution) of a statutory "insurance mandate provision" along the lines of the Affordable Care Act, and the second involving the permissibility of "a flat, statutory prohibition against provision of assistance to suicide, amounting to a denial to every person, in all circumstances, of freedom to access medical assistance in bringing life to an end at a time and in a manner decided by that individual."[23]

As with Koppelman in the FGM example, Michelman assumes that there is a correct way of resolving these cases: the insurance mandate ought to be permissible and the prohibition on physician-assisted suicide ("PAS") ought to be impermissible. The question is whether a Rawlsian constitution provides the resources to favorably decide the cases.

Michelman's affirmative answer relies on two interpretive claims about Rawls's conception of liberty and its priority. First is an understanding of the sort of priority that the basic liberties have over other values, including not only perfectionist and efficiency-related considerations but also background justice. On Michelman's reading, the priority criterion we find in *Political Liberalism* "demands to be shown a basic liberty … other than the one restricted by the questioned law … whose protection or advancement is served by that law."[24] If a law restricts a basic liberty without that restriction being necessary for the sake of some other basic liberty, it is unconstitutional.

Michelman's reading of the priority doctrine found in *Political Liberalism* is thus equivalent to the one found in *A Theory of Justice*, according to which basic liberty may only be restricted for the sake of basic liberty. Due to the extremely high barrier it places on legitimate

[23] Michelman, "The Priority of Liberty," 182–83.
[24] Michelman, "The Priority of Liberty," 193–94.

limitations on basic liberty, I will call this conception of the priority of liberty the hardline priority doctrine.

The second component of Michelman's reading of *Political Liberalism*'s conception of liberty is his capacious understanding of Rawlsian liberty of conscience. The purpose of the basic liberties is to safeguard citizens' ability to "fully" exercise the two moral powers, especially in the two fundamental cases. As noted above, the "fundamental case" of the exercise of the second moral power "concerns the application of the principles of deliberative reason in guiding our conduct over a complete life."[25] Michelman's thought is that, to fulfill its role in guaranteeing successful agency in this fundamental case, liberty of conscience must be understood as no mere "free exercise clone" limited to "matters of religious faith, creed, and observance."[26] Instead, liberty of conscience "names the right that specifically shelters the moments of the immediate exercise" of the capacity to form, pursue, and revise a conception of the good and "thus assumes a motivic or title-role status in the Rawlsian play of liberties."[27]

Using these resources, Michelman elaborates his view about how a Rawlsian judge would approach the questions of whether a given restriction of a liberty is permissible. First, the judge would ask whether that liberty qualifies as a basic liberty in the first place. He would do this by determining how closely linked with the moral powers that liberty is. If the liberty is not basic, the inquiry comes to an end, and the liberty's restriction—at least as a matter of basic justice and constitutional essentials—is permissible. If the liberty is basic, he applies the hardline priority doctrine: if the basic liberty is being restricted for the sake of another basic liberty, the

[25] Rawls, *Political Liberalism*, 332.
[26] Michelman, "The Priority of Liberty," 189.
[27] Michelman, "The Priority of Liberty," 188.

restriction is *prima facie* permissible. If, on the other hand, the liberty is being restricted for the sake of something that is not a basic liberty, the restriction is impermissible.

With this schema in place, Michelman proceeds to demonstrate how *Political Liberalism*'s doctrine of liberty yields favorable resolutions to the three test cases. The insurance mandate can be ruled constitutional because insurance refusal does not (ordinarily) fall under the ambit of the basic liberties because it is not (ordinarily) an action type that is closely bound up with the exercise of the moral powers. But if insurance refusal is not an exercise of a basic liberty, the limitation of freedom effectuated by the insurance mandate need not be subjected to the strict scrutiny required by the hardline priority doctrine. And since the mandate does not arbitrarily or needlessly restrict liberty but instead does so for reasons that fall in the public interest, the mandate can be found constitutional.[28]

The PAS case, by contrast, does touch on a basic liberty, for it restricts one's ability to make a choice about the end of one's life, which Michelman believes falls under the protection of Rawlsian liberty of conscience. The stringent test required by the hardline priority doctrine thus applies to this case. Michelman thus claims that a Rawlsian judge would "hold that the suicide restriction is unconstitutional because it restricts a basic liberty—liberty of conscience—without adequate necessitation from any basic liberty on the list."[29]

Michelman's resolution of the FGM case is more complex. Because the prohibition on practicing FGM on minors limits a basic liberty (the liberty of conscience of the parents), its justification must show that the prohibition is necessary to safeguard or advance some other

[28] Michelman, "The Priority of Liberty," 192.
[29] Michelman, "The Priority of Liberty," 192. He concedes that "a proper concern for the basic right of liberty and integrity of the person can support regulation of the transactional framework for medical assistance of suicide, but he finds that a "flat prohibition" is incompatible with the priority of liberty.

basic liberty. This test is met, according to Michelman, because the "liberty and integrity of the person" (one of Rawls's basic liberties) of the child clearly looms large in the justification of the ban. There is thus an apparent stand-off between the child's liberty and integrity of the person and the parent's liberty of conscience. And so the question of the constitutionality of the ban turns on the question of "whether a scheme including the prohibition or [a] scheme without it is overall more conducive to everyone's lifetime prospects for full and adequate development and exercise of the moral powers."[30] Michelman concludes that, if the ban's constitutionality turns on this question, then it would be found constitutional because "there is no less restrictive regulatory means, alternative to a flat prohibition of imposition of FGM on a minor, to holding the minor's lifetime options open," where holding the minor's lifetime options open is a necessary condition of securing her "lifetime prospects for development and exercise of the moral powers."[31]

We can thus see how Michelman's reading of *Political Liberalism*'s doctrine of liberty and its priority provides the basis for his sanguine take on Rawlsian political liberalism's ability to provide what he views as the correct liberal response to three test cases. In what follows, I will query this optimism. In Section II.C I will argue that Michelman misinterprets the sort of priority *Political Liberalism* attributes to basic liberty. Instead of Michelman's hardline priority doctrine, I argue that the Rawls of *Political Liberalism* actually endorsed a far less stringent conception of liberty's priority which I call the adequacy criterion. In Section II.D I will offer what I take to be the correct Rawlsian approach—a combination of the adequacy criterion and what I call the actuarial approach to liberty—to the various cases under consideration, with a focus on the cases bearing on sexual liberty.

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[30] Michelman, "The Priority of Liberty," 193.
[31] Michelman, "The Priority of Liberty," 193.

C. The True Meaning of the Priority of Liberty in Political Liberalism*: The Adequacy Criterion*

On Michelman's reading of *Political Liberalism*, basic liberty can only be restricted for the sake of basic liberty.[32] This is what I have called the hardline priority doctrine. In this section I will argue that Rawls in fact endorses a much weaker conception of the priority of liberty in *Political Liberalism*. Because Michelman relies on the hardline priority doctrine in his favorable resolution of the PAS case and FGM cases, we will need some other basis for a Rawlsian argument to resolve them.

Michelman's reading of *Political Liberalism* as endorsing the hardline priority doctrine—basic liberty may only be restricted for the sake of basic liberty—would initially appear to have a solid textual grounding, and Michelman himself cites the supporting passage. Rawls writes that "the priority of liberty means that the first principle of justice assigns the basic liberties, as given by a list, a special status … A basic liberty can be limited or denied solely for the sake of one or more other basic liberties."[33]

A rejection of Michelman's reading faces the disadvantage of running up against this statement of Rawls's and thus taking on board the view that Rawls simply should not have made it (and did not really mean it). But I think we are forced to this conclusion by attending to the broader philosophical context in which the claim occurs.

We should direct our attention to the relation between the content and the derivation of the doctrine of the priority of liberty, beginning in *A Theory of Justice*. The content of the doctrine of the priority of liberty in that work is that "liberty can be restricted only for the sake of

[32] See, for example, Michelman, "The Priority of Liberty," 191–92 (claiming that Rawls's approach "demands to be shown a basic liberty . . . other than the one restricted by the questioned law . . . whose protection or advancement is served by that law.").
[33] Rawls, *Political Liberalism*, 294–95; Michelman, "The Priority of Liberty," 175.

liberty itself."[34] Rawls later made it clear that by "liberty" he was here referring to the enumerated "basic liberties" rather than to freedom of action more generally conceived. This is the hardline priority doctrine.

How is this doctrine derived? It is clear that Rawls did not think of it as a self-standing principle to be placed alongside the two official principles of justice. He instead thought of the hardline priority doctrine as a mere entailment of the content of the first principle of justice combined with the lexical priority of that principle over the second. This is on display in Rawls's official statement of Justice as Fairness's conception of liberty: "First principle: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Priority Rule: The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty."[35] Similarly, after giving some examples of legitimate limitations of basic liberty, Rawls writes that "following the idea of the lexical ordering, the limitations upon the extent of liberty are for the sake of liberty itself."[36]

The reason that the lexical priority of the first principle of justice entails the hardline priority doctrine is never spelled out by Rawls, but it is not difficult to reconstruct. The idea is that if basic liberty is ever limited for the sake of something other than basic liberty, then the scheme of basic liberties will have been adjusted in a way that is less extensive than it could have been. An adjustment that contravenes the hardline priority doctrine will *ipso facto* leave us with a less-than-maximal scheme of basic liberties. But the first principle of justice requires that basic

[34] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 244.
[35] Rawls, *A Theory of Justice*, 250.
[36] Rawls, *A Theory of Justice*, 247; see also, Rawls, *Political Liberalism*, 244 ("By the priority of liberty I mean the precedence of the principle of equal liberty over the second principle of justice. The two principles are in lexical order, and therefore the claims of liberty are to be satisfied first. Until this is achieved no other principle comes into play.").

liberty be as extensive as possible, or maximized. The hardline priority doctrine is thus a mere entailment of the first principle of justice (with its lexical priority). It has no status in Rawls's view independent of the lexical ordering of the two principles of justice, at least as those principles appear in *A Theory of Justice*.

But if the doctrine of the priority of liberty is derived from the first principle of justice and its lexical priority over the second principle, the content of that doctrine must be sensitive to alterations in the content of the first principle of justice. If the content of the first principle changes, there is no guarantee that the priority of liberty will mean the same thing that it meant before the change. I believe that the alteration to the first principle of justice we find in *Political Liberalism* not only weakens the doctrine of the priority of liberty, but that this weakening was in fact part of the motivation of the alteration to the first principle.

Rather than requiring that the scheme of basic liberties be maximized, the first principle of justice is modified in *Political Liberalism* so that it only requires a "fully adequate scheme of equal basic liberties."[37] Rawls writes that he made this change in response to H.L.A. Hart's criticism that *A Theory of Justice* provided no satisfactory criterion regarding how to specify and adjust the basic liberties in the constitutional, legislative, and judicial stages. Hart argued that it simply seems wrong to say that liberty (even basic liberty) should only be limited for the sake of liberty itself. Harm and suffering, he argued, are not always analyzable in terms of the reduction in liberty that the sufferer experiences. And, he continues, there are certainly instances in which we do, and ought to, accept reductions of liberty for the sake of preventing or alleviating harm and suffering. The appropriateness of certain tradeoffs between liberty and non-liberty ought,

[37] Rawls, *Political Liberalism*, 291.

then, to be recognized by a theory of justice, especially one which aspires to be "in general harmony with ordinary considered judgments."[38]

The point of replacing the concept of maximization with that of adequacy is to provide a better criterion for specifying and adjusting the basic liberties—a criterion that accommodates Hart's critique. Rawls tells us that, in *Political Liberalism*, "the scheme of basic liberties is not drawn up so as to maximize anything … Rather, these liberties and their priority are to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers … [T]he criterion at later stages is to specify and adjust the basic liberties so as to allow the adequate development and the full and informed exercise of both moral powers … Such a scheme of liberties I shall call 'a fully adequate scheme.'"[39] Rawls thus contrasts the maximization criterion for the specification and adjustment of the basic liberties with what we may call the "adequacy criterion" and replaces the former with the latter.

But we should understand the adequacy criterion as replacing not only the first principle's maximization criterion, but also the hardline priority doctrine that we saw the maximization criterion entailed. While *Theory*'s liberty principle, because it contains a maximizing criterion, demands that liberty only be restricted for liberty, the modified principle we find in *Political Liberalism* demands no such thing. The modified principle only requires that the scheme of basic liberties be equal and fully adequate. It thus yields a much weaker restriction on limitations of basic liberty; a limitation will be compatible with the first principle (and its lexical priority) so long as it does not restrict a basic liberty in such a way as to render a citizen's ability to exercise

[38] H.L.A. Hart, "Rawls on Liberty and Its Priority," *The University of Chicago Law Review* 40, no. 3 (Spring 1973): 547–50. The examples of such tradeoffs that Hart has in mind are "laws restraining libel or slander, or publications grossly infringing privacy, or restrictions on the use of private property (e.g., automobiles) designed to protect the environment and general social amenities."
[39] Rawls, *Political Liberalism*, 332–33.

the moral powers less than "full" or "adequate." Thus Rawls writes: "So long as what I shall call 'the central range of application' of the basic liberties is provided for, the principles of justice are fulfilled."[40]

I thus think we should discount Rawls's claim that "[t]he priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties," which Michelman quotes in support of his interpretation.[41] The priority doctrine that Rawls really espouses in *Political Liberalism* is the much weaker adequacy criterion.

In Michelman's analysis, the flat ban on PAS "restricts a basic liberty—liberty of conscience—without adequate necessitation from any basic liberty on the list."[42] If basic liberty may only be legitimately restricted for the sake of basic liberty, we have a straightforward argument for the unconstitutionality of the ban. But once we drop the hardline priority doctrine in favor of the adequacy criterion, this straightforward argument is no longer available. To demonstrate the unconstitutionality of the ban, we need an argument to the effect that the ban on PAS renders some citizens unable to "adequately develop" or "fully exercise" their second moral power.

Michelman's conclusion that Rawls's doctrine of liberty would justify a constitutional ban on parentally imposed FGM also relied on a maximizing logic. Observing that the case involved an apparent "standoff" between two basic liberties—the parent's liberty of conscience in the form of raising children and the child's liberty of conscience (in the capacious sense in which that liberty is connected to the notion of a full menu of life options) and integrity of the

[40] Rawls, *Political Liberalism*, 295.
[41] Rawls, *Political Liberalism*, 295.
[42] Michelman, "The Priority of Liberty," 192.

person—Michelman resolved the issue by asking whether a constitutional scheme would be "overall more conducive" if it included the prohibition against FGM. In other words, he resolved the issue by asking which constitutional scheme would maximize the amount of basic liberty enjoyed by citizens, concluding that a scheme with the prohibition would guarantee more basic liberty than a scheme without it.

Michelman's solution to these cases thus uses resources not available within *Political Liberalism*—namely, the rule that basic liberty must be maximized and the associated hardline priority doctrine. To see if the liberal solutions to these cases that are favored by both Michelman and Koppelman are available from within Rawls's political view, we must take a closer look at the adequacy criterion to see what sorts of arguments it enables us to make.

D. The Adequacy Criterion and the Actuarial Approach to Liberty

We have established a few basic propositions about basic liberty within the Rawlsian schema. First, the purpose of the doctrine of basic liberty and its priority is to ensure that citizens can adequately develop and fully exercise their two moral powers. This means that the status of a given liberty as basic or not hinges on the question of whether possession of that liberty is a necessary condition of adequately developing and fully exercising the two moral powers. This is what I called the adequacy criterion.

Second, within *Political Liberalism*, the doctrine of the priority of liberty simply falls out of the adequacy condition and has no content independent from it. (As we saw, within *Theory*, the doctrine of the priority simply fell out of the maximization criterion. The guiding thread is that the priority of liberty is nothing other than the priority of the first principle of justice over the second.) The priority doctrine states that any given basic liberty may not be abrogated in a

manner that would violate the adequacy criterion, even if doing so would yield gains to other political values such as efficiency or background justice. The priority doctrine can, in fact, be understood as a special case of the adequacy criterion, namely as applied to the relationship between basic liberties and other values. (The adequacy criterion also applies between basic liberties by forbidding tradeoffs of one basic liberty for another if doing so would render citizens unable to adequately develop and fully exercise one or both of the moral powers.)

Third, in assessing whether or not any given basic liberty is actually necessary to satisfy the adequacy criterion, we are to focus on the two "fundamental cases" of the exercise of the two moral powers, specifically (1) the formulation and application of a conception of justice to society and (2) application of the principles of deliberative reason over a complete life.

Are these resources sufficient to establish a constitutional right to PAS, to engage in homosexual sexual activity, or against parentally imposed FGM? In this subsection I argue that they are sufficient by elaborating what I call the actuarial approach to basic liberty. But I will conclude by noting something strange about the way this approach resolves these cases, especially the FGM case. This will open the way for a more critical assessment of the Rawlsian approach to liberty in the next section.

Rawls's suggestion that we focus on the two fundamental cases when applying the adequacy criterion gives a helpful start in the inquiry into a liberty's status as basic, but his formulations are highly abstract. While this abstractness characterizes both fundamental cases, it is particularly prominent in the second fundamental case, namely the "application of the principles of deliberative reason in guiding our conduct over a complete life."[43] This is the

[43] Rawls, *Political Liberalism*, 332.

fundamental case that is relevant for the putative basic liberties at issue here, which are much more closely connected with the second moral power than the first.

Rawls's formulation of the second fundamental case is stated at such a high level of abstraction that it is arguably flexible enough to encompass nearly any activity or pursuit that citizens so happen to highly value in significant numbers. John Tomasi, for example, has made a strong case from within a Rawlsian political liberal framework for the inclusion of the robust economic liberties of classical liberalism, specifically the liberties of contract ("freedom to sell, trade, and donate one's labor") and capital ownership.[44] Such liberties, Tomasi rightly notes, play for many "a profound role in the formation and maintenance of self-authored lives."[45]

If Rawlsian political liberalism is unable to exclude Tomasi-style economic liberties from the list of basic liberties, it begins to seem as though we have embarked on a slippery slope which terminates in the conclusion that the Rawlsian political liberal cannot exclude even seemingly trivial forms of agency from also qualifying as basic. The following example, developed by Jessica Flanigan, illustrates the type of *reductio* I have in mind:

> *Football*: Owen has been a Green Bay Packers fan his entire life. He wears some form of Packers apparel daily. He owns shares in the team and has not missed a game in ten years. During football season, Owen plans every weekend around game day, he reads about the Packers every morning, and has found a community of fellow Packer-fans that he talks to every day. Owen understands statistics because he follows the Packers. Participating in an offseason fantasy league taught Owen important management skills. Friendships have ended over disputes about the Packers. Owen placed his son Vince on the season tickets waiting list at birth. Owen plans his family's vacations around the Packer's season. He wishes to be buried in Green Bay in a dark green and gold casket, wearing a Packers jersey and a Cheesehead. Packers fans like Owen have a collective ethos, and a set of values and a shared history that informs their everyday decisions. Owen identifies as a Packers fan above all else.[46]

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[44] John Tomasi, *Free Market Fairness* (Princeton: Princeton University Press, 2012), 15–16.
[45] Tomasi, *Free Market Fairness*, 16.
[46] Jessica Flanigan, "All Liberty Is Basic," *Res Publica* 24 (2018): 466.

How can Rawlsians avoid this opening of the floodgates and conceding that all liberty is basic? There are two complementary approaches for how to do this, corresponding to two adjustable parameters built into the adequacy criterion. The first parameter is one of extension, and it concerns the number of citizens, or the percentage of the population, whose development and exercise of the two moral powers would be damaged by the exclusion of a liberty from the list of basic liberties. Samuel Freeman has toggled this parameter in responding to Tomasi, arguing that a liberty qualifies as basic if and only if it is an essential social condition for *all* people to adequately develop and fully exercise the two moral powers.[47] While this way of setting the parameter would exclude Tomasi's robust economic liberties from the list of basic liberties, it is far too strong of a requirement. For example, as Freeman himself has noted, a peripatetic ascetic may well be able to pursue his life plan highly successfully in the absence of a right to own personal property, one of Rawls's basic liberties.[48] If we allow "psychologically unusual" individuals to set the benchmark as to what liberties are required to adequately develop and exercise the two moral powers, we run the risk of paring the list of basic liberties down to almost nothing, at least as far as the second fundamental case is concerned.[49]

A more plausible way of setting this extensional parameter is by holding that a liberty qualifies as basic if and only if it is an essential social condition for most people to adequately develop and fully exercise the two moral powers.[50] This approach, however, falls prey to

[47] Samuel Freeman, *Can Economic Liberties Be Basic Liberties?* (2012). Retrieved from http://bleedingheartlibertarians.com/2012/06/can-economic-liberties-be-basic-liberties/.
[48] Samuel Freeman, *Rawls* (New York: Routledge Press, 2006), 56.
[49] Jason Brennan, "Against the Moral Powers Test of Basic Liberty," *European Journal of Philosophy* 28 (November 2019): 495.
[50] Brennan, "Against the Moral Powers Test of Basic Liberty," 496.

Koppelman’s critique: most citizens do not have a desire to engage in homosexual intercourse, and so such activity would not be protected if we set the extensional parameter to require that “most” citizens must be harmed by a liberty’s exclusion. And in general, it seems that this construal will be a poor fit for any liberal view that aspires to provide robust protections to minorities of various sorts.

As a rough cut, then, perhaps the extensional parameter should be set thus: a liberty qualifies as basic if and only if it is an essential social condition for a significant and enduring, though not necessarily large, percentage of the population to adequately develop and fully exercise the two moral powers. This construal, at least, has the benefit of sweeping in rights for gay people and other minorities while at the same time not holding any liberty’s status as basic hostage to highly unusual psychologies.

The second parameter that may be toggled is one of intensity—focusing on the degree of harm that a liberty’s absence would cause—rather than extension. The adequacy criterion requires some notion of what degree of exercise of the moral powers qualifies as adequate. It requires, that is, the concept of a threshold above which one is able to adequately apply the principles of deliberative reason in guiding one’s conduct over a complete life and below which one is unable to do so. The higher one sets this threshold, the more liberties will be basic, and the more forms of agency will be included under the basic liberties. The lower one sets it, the less lengthy will one’s list of basic liberties be, and the less demanding will those liberties be in terms of the concrete action types they protect.

As with the extensional parameter, Rawls gave no precise formulation as to how the intensity parameter should be set. He did, however, offer a helpful example of a case in which

the adequacy criterion is failed due to a liberty's exclusion from the list of basic liberties. The example sheds some light on the threshold of adequacy operative in Rawls's adequacy criterion, and is thus helpful in ascertaining the degree of intensity of harm to the second moral power that must be caused by a liberty's exclusion from the list of basic liberties in order for that liberty to be accorded basic status.

The example I have in mind is Rawls's argument for the basic status of liberty of conscience, understood as "applied to religious, philosophical, and moral views of our relation to the world."[51] Rawls begins by noting that the parties to the original position may assume that the persons they represent will normally affirm one or another such view, and further that no party will know whether their representee adheres to a majority or minority view. The parties' choice between including equal liberty of conscience as a basic liberty and excluding it thus turns into an actuarial question: the party must assess the risks he would impose on his representee by opting for exclusion of equal liberty of conscience and weigh those risks against the potential benefits of such a scheme for his representee, and in particular the potential benefits that would be gained as a result of the second principle of justice (e.g., increasing the amount of primary goods received by the worst-off).

But Rawls believes that no complex probability assessments are required for the parties to resolve this actuarial question. The reason for this is that equal liberty of conscience protects something that is "recognized as non-negotiable," namely the ability to affirm comprehensive doctrines and "the conceptions of the good to which they give rise."[52] Liberty of conscience, in other words, protects what "are understood to be forms of belief and conduct the protection of

[51] Rawls, *Political Liberalism*, 311.
[52] Rawls, *Political Liberalism*, 311.

which we cannot properly abandon or be persuaded to jeopardize for the kinds of considerations covered by the second principle of justice."[53] Were the parties to bargain away these forms of agency for a higher share of primary goods, they would show that they "did not know what a religious, philosophical, or moral conviction was."[54] Such reasoning requires protection of what Rawls calls the "central range" of liberty of conscience. I take this to mean that liberty of conscience is basic to the extent that it protects forms of conduct and beliefs that would be recognized as nonnegotiable, but that its status as basic does not extend to other forms of conduct and belief that lack such a high status.

Rawls's reasoning is not premised on the notion that liberty of conscience protects forms of agency that are inherently valuable or constitutive of the human good. Instead, his argument simply "calls attention to the special place of such beliefs and convictions, and to the fact that for those who affirm them, they are regarded as nonnegotiable."[55]

This, I take it, it is the core of Rawls's argument for liberty of conscience, and it makes clear that non-negotiability is the standard of adequacy; liberty of conscience is basic because a failure to protect it would result in an amount of damage to people's ability to exercise their second moral power that would be, by their lights, completely unacceptable. The intensity parameter, then, is turned up rather high: a liberty may be excluded from the list of basic liberties unless its exclusion would compromise people's ability to pursue goals viewed by those who have those goals as non-negotiable.

[53] Rawls, *Political Liberalism*, 311–12.
[54] Rawls, *Political Liberalism*, 311.
[55] John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001), 105.

Rawls supplements this core argument for the basic status of liberty of conscience with two other related arguments. While the core argument is centered on the assumption that representees will affirm a variety of non-negotiable conceptions of the good and focuses on what is necessary for the pursuit of such conceptions, the second and third arguments center on the value to the representees of the ability to revise whatever comprehensive doctrine they happen to affirm and to "form[] other and more rational conceptions of the good."[56] The second argument notes that this ability is instrumentally valuable in one's attainment of one's good; because "there is no guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor if not major revision," we need to be able to critically evaluate our present practices and commitments to see if there isn't some better way of conducting our lives.[57] And liberty of conscience is necessary to effectuate this ability to critically assess our present ways. The third argument, like the second, focuses on the ability to revise our conception of the good and formulate new ones, but emphasizes that this very practice of critical reflection may be constitutively (rather than merely instrumentally) valuable for a person in achieving his good. Specifically, this may be the case when one's conception of the good places a premium on the reflective endorsement that may be attained after one subjects one's commitments to critical scrutiny as in Mill's ideal of individuality.[58] If our conception of the good requires that we "strive to appreciate *why* our beliefs are true, our actions right, and our ends good and suitable for us" rather than satisfy ourselves that they are true, right, and good, then the forms of inquiry and

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[56] Rawls, *Political Liberalism*, 312–13.
[57] Rawls, *Political Liberalism*, 313.
[58] Rawls, *Political Liberalism*, 313.

criticism that liberty of conscience protects will be not only instrumentally but also constitutively valuable.

Rawls defines the second moral power as the ability to form, revise, and pursue a conception of the good. I think it is helpful to understand this definition as specifying three distinct fundamental interests citizens have that are connected with this moral power: a fundamental interest in pursuing their determinate conception of the good (what I call the "pursuit interest," which forms the core of Rawls's argument for liberty of conscience), a fundamental interest in revising their conception of the good (the "revision interest"), and a fundamental interest in forming a conception of the good (the "formation interest"). These latter two interests are closely related, as they concern the application of critical rationality to one's present commitments. This taxonomy can be neatly applied to the above three arguments for liberty of conscience: the first argument concludes that a denial of liberty of conscience (as far as that liberty's "central range" is concerned) would infringe the pursuit interest, and the second and third arguments conclude that its denial would have a tendency to infringe on the formation and revision interests.

I believe that these three arguments for liberty of conscience's status as basic have different weights. By their own terms, the first argument purports to show that liberty of conscience protects non-negotiable forms of agency, while the second and third arguments merely demonstrate that liberty of conscience is conducive to representee's ability to attain their basic interests. If we want an argument showing that one's ability to engage in a form of agency should under no circumstances be restricted for the sake of achieving efficiency or background justice, it is clearly an argument of the first sort that we want; we need an argument showing that

any such tradeoff would be viewed as irrational, not an argument that the ability to engage in a particular form of agency is conducive to one's good. The mere fact that a form of agency is conducive to one's good invites a case-by-case assessment of whether it is rational to trade it off for gains to efficiency or background justice—precisely the sort of tradeoff that a liberty's status as basic forecloses. Furthermore, the fact that a form of agency is conducive to one's exercise of the second moral power merely shows that its inclusion in the list of basic liberties would *maximize* persons' ability to exercise second moral power. But we have already seen that Rawls eschewed such maximizing logic in *Political Liberalism*. If the goal were to maximize persons' ability to exercise the second moral power, Tomasi-style economic liberties would arguably qualify as basic, as he convincingly argues that such liberties contribute to one's exercise of that power.[59]

E. Applying the Actuarial Approach to the Question of Sexual Liberty

Does this actuarial approach—in particular, the non-negotiability test grounded in the pursuit interest—give us enough material to favorably resolve the PAS, FGM, and gay rights cases? I will not say much about the PAS case except to note that the application of the approach appears radically dependent on the society to which we apply the test. Such a liberty may be understood as non-negotiable by a significant percentage of the citizenry of nations such as Switzerland or the Netherlands, while only a miniscule percentage of Americans may have a similar view.

Much more can be said about the application of the actuarial approach to sexual liberty, and the approach allows a very strong case to be made that the two liberties in question are basic.

[59] Jeppe von Platz, "Are Economic Liberties Basic Rights," *Politics, Philosophy & Economics* 13, no. 1 (2014): 34–6.

I will first give an argument that sexual liberty as a general matter should be considered basic. I then proceed to address the question of whether the right to homosexual sex and the right against parentally imposed FGM should be regarded as within the "central range" of application of this general right.

As noted above, Rawls's core argument for the basic status of liberty of conscience was cast in terms of what I called the pursuit interest. Rawls summarized that argument as follows: "conceptions of the good are regarded as given and firmly rooted; and since there is a plurality of such conceptions, each, as it were, non-negotiable, the parties recognize that behind the veil of ignorance the principles of justice which guarantee equal liberty of conscience are the only principles which they can adopt."[60] With only slight modifications, this language can be recast as an argument for the basic status of sexual liberty: Sexualities are regarded as given and firmly rooted; and since there is a plurality of sexualities, each, as it were, non-negotiable, the parties recognize that behind the veil of ignorance the principles of justice which guarantee sexual liberty are the only principles which they can adopt.

Like the argument in favor of liberty of conscience, this argument for sexual liberty is not based on any moral claim about the true value of sexuality. It is instead premised on nothing other than the high value that persons tend to place on sexual liberty. In other words, it is grounded in nothing other than facts about the interests that people tend to regard as fundamental. From the perspective of parties in the original position, the argument would be cast in terms of probabilistic predictions about what their representees will likely highly (non-negotiably) value.

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[60] Rawls, *Political Liberalism*, 314.

Koppelman, if I read him correctly, would here respond that the parties' knowledge about the importance of sexuality in human life is not enough to make sexual liberty basic: Rawls must show that the parties believe that citizens' sexuality is connected with the exercise of the moral powers, for such is the only basis upon which the parties in the original position (or at the constitutional convention) are to formulate their list of basic liberties. The parties in the original position, that is, do not formulate their account of the basic liberties on the basis of their beliefs about representees' interests in general. They instead formulate their account of the basic liberties through a consideration of their representees' fundamental interests in the adequate development and full exercise of the two moral powers over the course of a complete life. And even if the parties knew that "[t]he control of one's sexual intimacy is part of nearly everyone's conception of the good," as Koppelman concedes that it is, this would still not be enough to get sexual liberty on the list of basic liberties. The reason is that the "value [of sexual liberty] cannot be deduced from the moral powers. It is simply something that most people happen to value highly."[61]

My recommended fix is thus too simple, for the problem is not reducible to a purported lack of empirical knowledge on the part of the parties. The problem is that sexuality is not connected with the moral powers in the requisite way, and it remains so disconnected even if the parties know that their representees will highly value the control of their sexual capacities. The parties thus have no reason to believe that an absence of sexual liberty would compromise the ability of the basic structure to meet the adequacy requirement. This, I think, is the heart of Koppelman's critique.

[61] Koppelman, "The Limits of Constructivism," 465.

Koppelman's argument here seems to rest on a somewhat mysterious reading of what Rawls thinks qualifies something as an exercise of the second moral power. On Koppelman's reading, the ability to (for example) believe Christian doctrine and live according to one's interpretation of it qualifies as an exercise of the second moral power, but the ability to regulate one's sexuality as one chooses does not. The crucial difference between religious exercise and sexuality, on Koppelman's reading of Rawls, is that "[sexuality's] value cannot be deduced from the moral powers. It is simply something that most people happen to value highly."[62] His idea is that an exercise of agency must be able to be "deduced from the moral powers" (or "derived"[63] from them) to qualify as a protected exercise of them. Religious exercise is so deducible, but sexuality is not.

Koppelman's reading of Rawls is mysterious because it is unclear what Koppelman has in mind when he speaks of the deducibility or derivability of religious exercise from the concept of the second moral power. But his thought would appear to be something of the following form: "Religious exercise is nothing other than the exercise of one's ability to form, pursue, and revise one's conception of the good (or, more precisely speaking, one's comprehensive doctrine, within which one's conception of the good is one component). As such, religious exercise is part and parcel of the exercise of the second moral power—it is internally connected with it in a way that entails that it must be protected if the second moral power is to be exercised. Sexuality, on the other hand, is related to the second moral power only incidentally and contingently, for it is a matter of brute empirical fact (rather than conceptual necessity) that humans highly value sexuality. As such, religious exercise is internally connected with the idea of the second moral

[62] Koppelman, "The Limits of Constructivism," 465.
[63] Koppelman, "The Limits of Constructivism," 475.

power, but sexuality is connected with that power only in an empirically contingent, accidental way."

Koppelman's view could be filled in like this: "A theorist's understanding of the person's fundamental interests must be internally or conceptually connected with the conception of the person the theorist works with. Thus, if the theorist starts with a bloodless and thin conception of the person, his list of fundamental interests will be concordantly bloodless and thin. Rawls's political conception of the person is thus too meager to support a fully human list of fundamental interests." Koppelman's solution is to thicken the operative conception of the person to something more like the one deployed by Martha Nussbaum in her capabilities approach. Such a thick conception of the person can simply claim outright that sexual functioning—or the capability for such functioning—is a part of the human good. Within such a view, the gap Koppelman finds between Rawls's conception of the person and the value of sexuality never opens up.

Koppelman's intuition that there is something wrong about the thin Rawlsian conception of the person—and that whatever is wrong with it comes out in Rawls's treatment of the basic liberties—is correct, and I will argue for this point in Section III. But Koppelman misunderstands Rawls's argument for the basic liberties in a way that causes his critique as stated to fail. Specifically, Koppelman misses what I called Rawls's actuarial method and how it is rooted in the brute facts about what interests people happen to care about. That is, a basic liberty need, on Rawls's view, not be related in any conceptual or internal way to the notion of the two moral powers. Instead, it need only encompass a form of activity the possibility of which people tend to think of as non-negotiable. The parties know the "commonsense facts of human psychology"[64]

[64] Rawls, *Justice as Fairness*, 101.

and they accordingly assume that "citizens have, among other interests, certain religious, philosophical, and moral interests, and that the fulfillment of these interests must, if possible, be guaranteed."[65] Another "commonsense fact[] of human psychology" is that they highly value sexuality and view it as non-negotiable. As such, the very same logic that requires protection for liberty of conscience requires that sexual liberty be accorded basic status.

But this is only a partial response to Koppelman's critique. For the ability of Rawls's moral powers-based view to get sexual liberty in view does not in itself entail that it provides adequate protections in cases such as those that Koppelman considers, namely the prohibition of homosexual sex and the practice of parentally imposed FGM. We must turn now to an examination of these two examples to see if Rawls's view can yield the desired conclusions about them.

Koppelman thinks that the legislature in a society well-ordered by *Political Liberalism* could ban "private consensual homosexual sex … on the basis of its comprehensive views."[66] He offers two arguments for this conclusion that do not depend on his view, which I rejected above, that a moral powers-based view is categorically blind to the value of sexual liberty. Each of these independent arguments is based on a claim that the liberty restricted by the ban on homosexual sex is particular in a way that prevents its exercise from being a matter of basic justice.

According to the first argument, "the ability to engage in a particular sex act is not necessary" for the full and adequate exercise of the moral powers, and thus a ban on homosexual sex cannot violate the adequacy criterion.[67] The adequacy criterion requires that "one must have

[65] Rawls*, Justice as Fairness*, 104.
[66] Koppelman, "The Limits of Constructivism," 466.
[67] Koppelman, "The Limits of Constructivism," 464.

a menu of choices. But this does not entail the right to have any particular option appear on the menu."[68]

Koppelman's second argument levels the charge of particularity in a different way. He writes that "Rawls's conception of the moral powers excludes any interest that is specific to some citizens and not others."[69] Because only a minority of citizens will have an interest in exercising the liberty limited by a ban on homosexual sex, such a ban cannot be recognized as a matter of basic justice on Rawls's view.

The problem with these arguments is that they fixate on an inappropriately narrow description of the liberty being restricted. As regards his first argument, while a ban on homosexual sex is officially cast in particularistic terms, what such a ban comes to in practice is a severely restrictive limitation on freedom of association. One of the ways in which citizens will exercise the second moral power is in the choice of sexual partners. The ability to exercise choice in this area is fundamental enough that it is difficult to see how a citizen's exercise of the second moral power could be deemed full or adequate if such choice is denied them—the ability is surely regarded by many in contemporary liberal societies as "non-negotiable" no less than their ability to choose a religion. But the denial of such a choice is precisely what a ban on homosexual sex accomplishes. The wrong of a ban on homosexual sex, then, can apparently be straightforwardly registered from within the actuarial approach as the denial of a non-negotiable form of agency.

Koppelman's second particularity objection—that a ban on a given liberty could only be a matter of basic justice if all citizens have an interest in exercising that liberty—fares no better. I

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[68] Koppelman, "The Limits of Constructivism," 464.
[69] Koppelman, "The Limits of Constructivism," 464.

earlier discussed and rejected the notion that to be basic, a liberty must be necessary for all citizens to adequately develop and fully exercise their moral powers. Applied rigorously, this interpretation of the adequacy criterion would pare down the list of basic liberties to almost nothing, as Freeman's peripatetic ascetic demonstrated. According to my preferred interpretation of the extensional parameter of the moral powers test, a liberty is basic even if only a small (yet significant and persistent) minority of citizens would find that liberty necessary to adequately develop and fully exercise the two moral powers.

Rawls's political liberalism, then, has the resources to justify a constitutional right to engage in homosexual sexual activity. Specifically, Rawls's actuarial method would cognize a statutory ban on such activity as infringing upon a "non-negotiable" interest held by gay citizens.

Koppelman also thinks that Rawls's view is incapable of justifying a prohibition of parentally imposed FGM. In contrast to his treatment of gay rights, his claim about the inadequacy of Rawls's view on this issue appears to rest wholly on his belief that a moral powers-based view is incapable of recognizing the status of sexual liberty as properly basic. I have argued that he is wrong about this, and thus have provided a good reason to doubt his claim that Rawls's view cannot prohibit parentally imposed FGM. But it is nevertheless worthwhile to sketch how I think a Rawlsian justification of a prohibition of parentally imposed FGM would proceed. This will set the ground for my suggestion that, while Rawls can resolve these cases in a properly "liberal" manner, there is nevertheless something amiss in the way in which he resolves them.

At issue is whether FGM, when imposed by parents upon minors, violates the adequacy criterion. The bare fact that it limits the child's "liberty and integrity of the person" (one of the

basic liberties) is not decisive on its own. Other practices do so as well, such as vaccinations and ear piercings. And Michelman and Koppelman rightly recognize that this limitation cannot be deemed contrary to basic justice on the grounds that it has no justification; though they are internal to the reasonable comprehensive doctrines endorsed by the parents, justifications of FGM exist. And what stands on the side of allowing parental imposition of FGM on children is parents' liberty of conscience as exercised through their ability to "make value choices on behalf of their own children."[70] To make the case against parental imposition of FGM on minors, we need to conceptualize the case as involving more than a conflict between parental liberty of conscience and the child's liberty and integrity of the person. Unless we move beyond this simple dichotomy, the case appears to be a matter of intuitive balancing subject to reasonable disagreement.

If parentally imposed FGM violates the adequacy condition, the reason it does so will have to do with the effects the practice has on the person the child becomes. A decisive anti-FGM argument will thus focus on the consequences of the practice for the ability of adult citizens to adequately develop and fully exercise their second moral power. Accordingly, such an argument must show that parentally imposed FGM damages what I called the child's pursuit interest, formation interest, or revision interest, in a non-negotiable way.

A straightforward Rawlsian argument for the prohibition of parentally imposed FGM is available if we focus on the pursuit interest. Koppelman recognizes that FGM involves some loss of sexual capacity.[71] I understand this to entail that those on whom FGM is practiced cannot have the full experience of human sexuality, and that the diminishment in their capacity is in some

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[70] Koppelman, "The Limits of Constructivism," 468.
[71] Koppelman, "The Limits of Constructivism," 468.

cases significant. But, the argument continues, it is reasonable to conjecture that the possibility of such experience is likely to be a non-negotiable feature of many citizens' conceptions of the good. The significant (or potentially significant) diminishment of sexual capacity, then, is (from within the original condition) reasonably conjectured to be violative of the adequacy condition due to its effects on citizens' ability to adequately exercise the second moral power.

III. The Formation and Revision Interests and the Good of Liberty

In this section I give my account of what is inadequate about the Rawlsian treatment of the FGM and gay rights issues (§III.A below) and suggest how my critique could be extended to other liberties (§III.B below). At the heart of my argument is the tripartite division, introduced above, between the fundamental interests that, on Rawls's view, are connected with the second moral power. These interests are what I call the pursuit interest (one's interest in successfully pursuing one's conception of the good), the formation interest (one's interest in forming a conception of the good), and the revision interest (one's interest in revising one's conception of the good in light of critical reflection upon it). My argument, in short, is that a full account of why sexual liberty is basic should rely on all three of these fundamental interests, but that Rawls's view can in fact only do so by appealing to the pursuit interest.

The reason for this is that, while Rawls's pursuit interest is a powerful mechanism for justifying basic liberties, the formation and revision interests are, as they appear in Rawls's theory, relatively weak and lacking in content. I suggest that this unevenness in Rawls's conceptualization of these three fundamental interests is a direct result of his theory's shallow foundations. While an account of the pursuit interest can be adequately filled in by empirical

considerations about what people can be expected to highly value (Rawls's actuarial approach), the formation and revision interests go to the question of the background conditions under which people decide *what* to highly value in the first place. As such, the question of the content of the formation and revision interests is relatively impervious to empirical conjecture and will thus have little content unless they are filled in by an account of the good of liberty, i.e., an understanding of what a worthwhile exercise of liberty—one that helps us achieve the good—looks like. Because Rawls's theory is premised upon bracketing such questions about substantive goods, it will necessarily have a relatively weak conception of the formation and revision interests.

A. The Incompleteness of the Rawlsian Treatment of Sexual Liberty

Despite my conclusion that Koppelman is wrong to claim that Rawls's moral powers-based approach is incapable of protecting fundamental interests in the examples of homosexual sex and parentally imposed FGM, I will now attempt to vindicate his intuition that there is something unsatisfactory about Rawls's treatment of these cases. My argument will be that Rawls gives us an incomplete story about what is wrong about these restrictions of liberty and why they are matters of basic justice.

I earlier highlighted Rawls's tripartite taxonomy of fundamental interests citizens have with respect to the second moral power: the pursuit interest (one's fundamental interest in freely pursuing one's conception of the good, which is, for purpose of this interest, treated as given and fixed); the formation interest (one's fundamental interest in formulating, receiving, developing, or in some other way adopting a conception of the good); and the revision interest (one's

fundamental interest in being able to evaluate one's current conception of the good and revising or indeed replacing it in favor of a more rational one).

For the purposes of the discussion that follows, I will collapse this tripartite division into a simpler two-part distinction, with the pursuit interest forming its own heading and the formation and revision interests falling under a separate heading. The pursuit interest, as noted, treats one's conception of the good as given and fixed, meaning that what is good for a person is defined by whatever conception of the good she presently endorses. To put the point in slightly different terms, it focuses on her ability to achieve (or at least rationally pursue) the values and ultimate goals that she endorses, whatever those may happen to be, and thus brackets questions concerning how she adopted those values, whether she can review them, and whether she can come to endorse new sets of values and ultimate goals.

By contrast, the formation and revision interests are concerned precisely with such questions, namely questions about (1) one's ability to adopt or endorse an initial conception of the good (ultimate values and goals), (2) one's ability to subject one's conception of the good to critical scrutiny, and (3) one's ability to revise or replace one's conception of the good if it does not stand up to scrutiny. All of these activities—these forms of practical reason constitutive of the formation and revision of a conception of the good—take as their subject matter the worthiness of the values, goals, and life plans contained within various conceptions of the good, including the one that one currently endorses. They are unified in that each requires the ability to reason about matters such as what pursuits are valuable and what the source of their value is, what ultimate goals are worthy of one's pursuit and devotion, and what the good life is. Rawls's inclusion of the formation-revision interest in his conception of the adequate development and

full exercise of the second moral power signals his recognition that citizens have a fundamental interest in being able to engage in the forms of practical reasoning that address these questions.

The adequacy criterion as applied to the second moral power is thus not exhausted by the requirement that citizens be able to pursue some conception of the good, assumed to be fixed and given, whatever it happens to be. It also contains requirements as to the conditions within which persons must form and evaluate conceptions of the good. Violations of the requirement that persons be able to pursue some conception of the good I will call pursuit infringements. Violations of the requirements that pertain to the conditions within which persons form and evaluate conceptions of the good I will call formation-revision infringements.

The incompleteness of the Rawlsian resolution of the sexual liberties cases is this: sexual liberties are basic largely because their absence amounts to what should be conceptualized as a formation-revision infringement, but Rawls's moral powers-based approach only gives us the material to conceptualize their absence as amounting to a pursuit infringement. Rawls's view, in other words, is inattentive to the formation-revision interest at stake with regard to those liberties. I will later argue that Rawls's view is systematically insensitive to formation-revision interests, and that this is due to his theory's shallow foundations.

Why think that an adequate account of the wrongs at issue in either the gay rights case or the FGM case relies on the notion of a formation-revision infringement? I will focus on the case of FGM, and then include a brief treatment of the gay rights case. Let us imagine that a woman who is a member of a religious minority which practices parentally imposed FGM does not feel her diminished sexual capacity to be a cause for regret. We may imagine that the ubiquity of the practice and the insularity of her subculture makes her unable or unwilling to seriously question

the morality of the practice, and the relevant religious dogma purportedly mandating FGM may be accepted wholeheartedly by her in such a way as to preclude her from placing value on the option she has lost.

Does an appeal to the pursuit infringement give us a satisfactory analysis of the wrong at play in this example? I take it that an adequate account of the wrong in this case would have to yield the conclusion that she herself is wronged. What I mean by this is that an account of the wrong according to which, although the practice is wrong in general, this particular woman is not wronged, would be an unsatisfactory account. But how can it be the case that she is the victim of a pursuit infringement despite the fact that she has not been prevented from pursuing anything she highly values?

I believe that an analysis that relies solely on the concept of pursuit infringement is in fact capable of recognizing a wrong against her, but that its analysis is still unsatisfactory because it is incapable of accounting for our intuition that she is not only wronged, but harmed. A pursuit infringement is at play in this case because the fact that she was not prevented from pursuing anything she highly values is a matter of chance that could not have been foreseen when the practice was inflicted upon her. The wrong at issue, then, is a disregard for the possibility of harm. This is as far as an analysis that limits itself to pursuit infringement can go.

The problem with this account of the wrong of parentally imposed FGM—when taken to be a complete account of it—is that it forces us to deny that the woman actually experiences any moral powers-based harm. Since she is not prevented from pursuing anything she highly values, there is no damage to her ability to exercise the second power. Though she is wronged, the wrong depends entirely on the possibility that she might have strongly valued the full sexual

functioning which has been denied her. That is to say, the wrong only exists because the harm might have existed.

The claim that the woman is not harmed is intuitively implausible. But this means that the analysis of the wrong of FGM that limits itself to the concept of pursuit infringement is *prima facie* incomplete and thus unsatisfactory. How, though, can we make sense of the claim that the woman is actually harmed? My view is that we can only justify the claim that the woman in my example is actually harmed by thinking of parentally imposed FGM as a formation-revision (and not only a pursuit) infringement of the fundamental right to adequately develop and fully exercise the second moral power.

The harm that the woman actually experiences is that she was not given the chance to assess for herself the value of full sexual functioning in the light of her experience of (or at least in the light of her potential to experience) this functioning. The harm, that is, has to do with the conditions under which she had to decide what goods to highly value. On this view, the fact that she has been wronged does not depend on the possibility that she might have strongly valued the full sexual functioning which has been denied her. The wrong is a part of her actual experience. But to make the harm concrete and realized in this manner, we must rely on the idea that she had a formation-revision interest in deciding about the value of full sexual functioning within a context in which such functioning was an option. In other words, the possibility of full sexual functioning is a background condition against which her decision about the value of such functioning should have been made. Absence of this condition amounts to a formation-revision infringement, not a pursuit infringement.

The case of the right to homosexual sexual activity also requires reliance on the notion of a formation-revision infringement, though admittedly the pursuit infringement is relatively more important. A statutory ban on gay sex would amount to a formation-revision infringement insofar as it would tend to distort gay citizens' assessment of what is valuable and worth pursuing. This becomes clear if we imagine the effect of such a law on a gay citizen who has internalized his society's anti-gay animus and decided on that basis to live a celibate life. He would be harmed by the legislation even though it doesn't prevent him from pursuing anything he highly values or views as non-negotiable, for it would distort the social background against which he decides *what* is highly valuable. As in the FGM case, the harm at issue is not (only) that one is unable to pursue a good one highly values, but is instead that one's assessments of what is highly valuable are made within the context of background conditions that precludes (or at least imposes a high cost on) one's valuing a particular option. Because this type of harm concerns the conditions under which one develops a set of ultimate values and goals—a conception of the good—it implicates the formation-revision interest, not the pursuit interest.

There is, then, something lacking in the Rawlsian argument for the basic status of these two sexual liberties insofar as it is cast solely in terms of the pursuit interest. But why can't Rawls offer a fuller account of these liberties' basic status by appealing to the formation-revision interest? Rawls was clearly concerned about the conditions under which persons form and revise conceptions of the good, or else he would not have included the formation-revision interest in his formulation of the adequacy criterion.

The reason is that Rawls's political conception of the citizen is—as Koppelman says—too thin and abstract to justify the robust formation-revision interest that is required. With

regard to the formation-infringement interest specifically, Koppelman's critique has real force. To see why Koppelman's argument works when applied to the formation-revision interest but not when applied generally to Rawls's moral powers-based view, let us review why his general argument did not work.

Koppelman assumed that a given exercise of agency (e.g., religious exercise or sexuality) had to be in some way "deducible" or "derivable" from a conception of the person in order to fall under the protections of the basic liberties. I interpreted him as claiming that forms of agency had to be connected in some internal or particularly intimate way with a given conception of the person in order to be protected. On his view, religious exercise stands in such a relation with the second moral power, while sexuality does not. This led him to conclude that sexuality was not a basic liberty. I rejected Koppelman's "deducibility" test in favor of what I called the actuarial approach to basic liberty. The actuarial approach helps itself to empirical facts about human beings and, because of its access to these facts, can make judgments about what would likely be non-negotiable for representees. The actuarial approach runs on an abstract and political conception of the person with a helping of empiricism. This allows Rawls's thin and bloodless political conception of the person (framed as it is in terms of "moral powers") to register interests that are not related to those powers in the way Koppelman gestures at with his talk of derivability or deducibility.

Rawls's political conception of the person abjures reliance on comprehensive doctrine and the conceptions of the good contained within such doctrines. This means that Rawls's notion of basic liberty must be developed without reliance on a thickly normative notion of the *value* of liberty—some deeper conception of what liberty is good *for*. Instead, his doctrine of liberty is

elaborated by relying exclusively on a few fundamental political ideas—central among them society as a fair system of cooperation among free equals conceived of in terms of the two moral powers. Happily, empirical considerations inform Rawls's doctrine of liberty and help fill out its content (this is what Koppelman seems to have missed). And the route by which Rawls's political conception accesses such empirical considerations via the parties' deliberations about what their representees would consider "non-negotiable." This inquiry into non-negotiability, in turn, depends on predictions about what conditions would be necessary to help them achieve their good as defined by some unknown conception of the good the parties endorse. For example, the importance of sexual liberty is registered within Rawls's view through the parties' knowledge that its absence would create a significant risk of severely impairing their representees' pursuit of goals they highly value. The inquiry into non-negotiability, then, turns on empirical conjectures about conditions necessary for the pursuit interest to be adequately protected.

Once the parties leave the domain of the pursuit interest and deliberate instead in terms of the formation-revision interest, they are thrown back on the relatively meager resources of Rawls's thin, political conception of the person and society. Empirical conjectures about non-negotiability can tell us what people will likely tend to highly value, but it cannot tell us how they ought to decide what to highly value. Stated otherwise, empiricism can show us what would tend to infringe the pursuit interest, but it is a far less helpful guide in telling us what would infringe the formation-revision interest. This is because the idea of the pursuit interest reduces to the empirical question of what goals people will tend to place a high value on pursuing, whereas the formation-revision interest resists such empirical reduction, as it addresses the normative

question of what background conditions ought to shape persons' assessment and adoption of such goals.

The problem, then, is that the content of the formation-revision interest cannot be filled in robustly by empirical considerations in the way that the pursuit interest can be. And Rawls's commitment to shallow foundations forecloses reliance on a thick conception of the good to give the formation-revision interest content. Koppelman's general critique fails because Koppelman missed the ability of Rawls's view to draw on empirical conjectures through its actuarial method. But once the Koppelman-style critique is narrowed to focus on the formation-revision interest, it has serious bite.

What content, though, does the formation-revision interest have on Rawls's view? Rawls expressly included this interest in his formulation of the adequacy criterion, so before concluding that Rawls's view is inadequate in the way I have argued it is, we must investigate whether his understanding of that interest nevertheless gives him the resources to argue that parentally-imposed FGM violates that interest.

Rawls includes three primary background conditions bearing on the formation-revision interest that must be in place in order for this interest to be respected. First, we have seen that the well-ordered society must guarantee liberty of conscience, understood as "applied to religious, philosophical, and moral views of our relation to the world."[72] Without this basic liberty, citizens would be unable to revise their conceptions of the good and formulate better, more rational ones.

Second, Rawls's view requires that citizens know that their liberty of conscience is protected. "Political liberalism," Rawls writes,

[72] Rawls, *Political Liberalism*, 311.

> "will ask that children's education include such things as knowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to insure that their continued membership when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist."[73]

Finally, children's "education should also prepare them to be fully cooperating members of society and enable them to be self-supporting."[74]

Cumulatively, then, Rawls's view seems to be that the formation-revision interest is adequately protected so long as citizens possess (1) legal guarantees of liberty of conscience that allow them to deliberate openly about the good without fear of reprisal, (2) the knowledge that these legal guarantees exist and that their own status as full citizens is independent of their identification with any particular conception of the good, and (3) an education that allows citizens to become self-supporting participants in society.

These protections, while surely important, are minimal. Specifically, they are compatible with both parentally-imposed FGM and statutory bans on homosexual sex. They thus fail to justify the intuition that the formation-revision interests of the two citizens in my examples above (the victim of parentally imposed FGM and the closeted homosexual living in a repressive society) have been infringed.

It is worth underscoring the reason that the protections Rawls's view offers for the formation-revision interest are so thin, as they are weak by design rather than by accident. The logic behind the weakness of the Rawlsian protections is nicely captured by Jeppe von Platz's discussion of the contrast between the guiding ideals of Rawls's and Tomasi's conceptions of

[73] Rawls, *Political Liberalism*, 199.
[74] Rawls, *Political Liberalism*, 199.

justice. Where Tomasi centers his political view on an “ideal of responsible self-authorship,” Rawls’s guiding ideal is expressly not autonomy centered. Instead, it is guided by an ideal of fair social cooperation between free and equal citizens. This means that “where Rawls’s focus is on securing the status of citizens as ‘free equals’, Tomasi’s focus is on the agency of persons.”[75] Von Platz goes on:

> For Rawls, “[f]rom the standpoint of justice, the development and exercise of the moral powers that matters is the realization of this potential for free and equal citizenship and this defines what their adequate development is and explains the satisficing interpretation of the modality of the relation between moral powers and basic rights [(what I have called the adequacy criterion)]. For Tomasi, by contrast, the moral powers are the capacities for responsible self-authorship and what matters from the standpoint of justice is the realization of responsible self-authorship.”[76]

Rawls’s relatively weak protections for the formation-revision interest, then, flow from the thin political ideal that lies at the center of his political conception. And this thin political ideal is, in turn, demanded by his commitment to shallow foundations which in turn is required by his conception of the purpose of political theory—to find a shareable basis of cooperation in the context of intractable pluralism.

Rawls’s moral power-based approach, then, apparently lacks the ability to yield a complete picture of the wrong of both parentally imposed FGM and a legislative ban on homosexual sex. What his view cannot account for is our intuition that citizens have a fundamental interest in deciding what value to place on full sexual functioning within a context in which such functioning is a live option—biologically, legally, and socially. This interest is not covered by the Rawlsian pursuit interest, for it falls within the purview of the formation-revision

[75] Von Platz, “Are Economic Liberties Basic Rights?” 34.
[76] Von Platz, “Are Economic Liberties Basic Rights?” 34.

interest. And the Rawlsian formation-revision interest is (by design) too formal to be able to justify such a thick, substantive requirement.

B. Generalizing the Problem

I have argued that Rawls's moral powers-based conception of the person has ample resources to defend basic liberties when their defense can be cast in terms of what I labeled the pursuit interest, but that his view tends to miss the value of liberties when that value is rooted in what I termed the formation-revision interest. As an example of this tendency, I showed how Rawls's view can, *contra* Koppleman, justify certain sexual liberties as basic, but that it does so in a theoretically incomplete manner; it can only justify them in terms of the pursuit interest, whereas a more adequate account of their value would draw attention to their importance as background conditions that must be in place for one's formation-revision interest to be fully respected. The source of this incompleteness, I argued, is Rawls's actuarial approach to basic liberty, according to which parties in the original position are primarily guided by the question of what their representees would find non-negotiable from within the perspective of whatever (reasonable) conception of the good they happen to endorse. The approach thus takes representees' conceptions of the good at face value and refuses to, as it were, look behind the curtain to scrutinize the conditions under which those conceptions were arrived at.

Further, this is a feature, not a bug, of Rawls's view. To look behind the curtain in the way that he refuses to do, Rawls would need some criterion by which to gauge whether the absence of a given social condition distorted, warped, or otherwise damaged a citizen's formation-revision capacity. But this would require a more substantive account of the good than Rawls is willing to give—it would require an account of what liberty is good for. While Rawls is

not completely mute on the question of what constitutes an adequate development of the formation-revision power, the threshold he sets is, as we have seen, very low. The low bar is a direct result of his metatheoretical commitment to shallow foundations.

But we have yet to see whether this feature of Rawls's view disables him from justifying as basic any liberties that ought to be viewed as basic. The sexual liberties discussed above, after all, are (or so I argued) able to be accorded basic status on the basis of their centrality to the pursuit interest alone. It is thus possible that the theoretical deficiency I have identified has no actual consequences in terms of what liberties are considered basic within a Rawlsian constitutional order. I believe, however, that the problem is not merely theoretical.

It is not difficult to conjure thought experiments in which Rawls's actuarial approach fails to protect liberties that should be considered basic. The domain of sexual liberty provides an example. Consider a society in which a government health agency possessed, and was authorized to utilize, a technology that effectively prevented those on whom it was used from developing a sex drive, and perhaps even created in them an aversion to the very idea of sexuality. This technology is deployed on a widespread basis as a population control measure. The technology could be targeted at certain segments of the population, for example on the offspring of parents in the bottom quintile of the income distribution or those who live in regions in which overpopulation could strain local resources. Assume that its use generates benefits to society as a whole, for example by freeing up resources so that they can be used in ways that improve the condition of the worst-off.

Does Rawls's view have the resources to condemn the use of such a technology as a violation of a basic liberty? The example is designed to make it difficult to cognize the injustice

at play in terms of the pursuit interest. Insofar as persons highly value goals involving sexuality, their adoption of such goals stems from the fact that their biological nature includes a sex drive. Without such a drive, then, it would be unusual (though of course not impossible) for someone to adopt life plans in which sexuality has a central place. It is unclear, at least, why parties in the original position would view sexuality as a non-negotiable good for those on whom the technology was used.

But if the pursuit interest cannot justify the claim that a basic liberty is infringed by this example, surely no other fundamental interest recognized by Rawls's moral powers-based view can fill the gap. Rawls's formation-revision interest is, as described above, far too thin and abstract to do any work here; the example does not involve absence or ignorance of the right to switch one's comprehensive doctrine, nor does it implicate the ability to be a self-supporting member of the political community. The first moral power is even less relevant; the imaginary technology would in no way prevent one from developing a conception of justice and applying it to one's society.

Even if this example is far-fetched, it would seem that any theory of liberty incapable of condemning the use of such a technology as a violation of basic justice would be worse on that account. And what is far-fetched today may not always be so.

For a much less far-fetched example (though one that will likely not trouble committed political liberals), consider the subject of the education of children as it arose in the landmark U.S. Supreme Case Wisconsin v. Yoder.[77] *Yoder* involved three parents—two Old Order Amish and one Amish Mennonite—who defied Wisconsin's compulsory school-attendance law.[78] That

[77] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[78] Wisconsin v. Yoder, 207.

law required children to attend public or private school until age 16, but the parents withdrew their children from school at the ages of 14 and 15.[79]

The parents argued that the compulsory attendance law violated their right to free religious exercise, guaranteed by the First Amendment.[80] The Court credited the parents' attestation that they "object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs."[81] The parents thus believed that compliance with the compulsory attendance law would "endanger their own salvation and that of their children."[82]

Of special importance is the Court's characterization of the nature of the conflict between the education that the children would receive at a school and the education that the parents wished to impart to their children. The incompatibility stemmed from the fact that the school-based education would "take[] [the children] away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. . . . And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. . . . [T]he modern high school is not equipped, in curriculum or environment, to impart the values promoted by Amish society."[83] At stake, then, was not merely

[79] Wisconsin v. Yoder, 207.
[80] Wisconsin v. Yoder, 209.
[81] Wisconsin v. Yoder, 210–11.
[82] Wisconsin v. Yoder, 209.
[83] Wisconsin v. Yoder, 211–12.

the parents' liberty of conscience, but also the ability of the Amish community to reproduce itself in anything like the form in which it existed at the time. "[C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[84]

The logic of this argument makes it clear that the function of Amish education was, to put it tendentiously, lock children into an Amish way of life—into one specific comprehensive doctrine and its attendant conception of the good. The only way to keep the children from leaving the fold was to impose on them a very specific type of education beginning at around the age of 14. From the Amish perspective, of course, the desired goal would be described as saving their children from subjection to irresistible temptation into a false, worldly conception of the good. But the desired result could evidently only be accomplished by, in practical terms, eliminating any realistic possibility that the children would ultimately come to adopt any conception of the good other than the Amish one.

The Court decided in favor of the parents, holding that no interest on the part of the state or the children justified the abridgment of the parents' First Amendment rights that enforcement of the compulsory attendance law would create.[85] In dissent, however, Justice Douglas identified precisely the basic liberty that the decision ignored: "It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that it is the preferred

[84] Wisconsin v. Yoder, 218.
[85] Wisconsin v. Yoder, 221–36.

course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed."[86]

I agree with Justice Douglas that the Court's decision was inadequately attentive to the children's right to receive an education that placed the shape of their future in their own hands, at least to some minimum threshold degree. But the Court's decision also seems required by Rawls's moral powers-based conception of the citizen's fundamental interests. Much of the Court's reasoning, in fact, directly tracks Rawls's moral powers-based conception of the person.

In Rawlsian terms, the question before the court was whether or not children are owed—as a matter of basic liberty—an education that grants them a degree of personal autonomy greater than that afforded by the education the Amish parents wished to impose upon their children. A Rawlsian analysis would thus run through the various moral powers-based interests to check if the Amish education fails to allow the children to adequately develop or fully exercise any of them. This analysis could begin with the pursuit interest, with the relevant question being whether a child who received an at-home Amish education in lieu of a school-based education beginning before age 16 would risk a significant chance of being prevented from pursuing something that he highly values. In other words, the Rawlsian would assess "the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life."[87] The Court, reasonably, rejected this argument as "highly speculative," first noting the absence of evidence of the loss of Amish

[86] Wisconsin v. Yoder, 245–46.
[87] Wisconsin v. Yoder, 224.

adherents by attrition and then suggesting that, even if such attrition did exist in significant numbers, there is no reason to believe that "the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society."[88] If children who receive the Amish education do wish to pursue a conception of the good beyond the Amish community, then, there is little reason to think that their education would disable them from doing so. There is thus no pursuit interest violation.

Nor is there a violation of Rawls's minimal formation-revision interest. There is no indication that the Amish education would keep children ignorant about their constitutional rights to leave the Amish faith. And the Court expressly rejected the suggestion that such an education would prevent its recipients from becoming self-supporting members of society; if the children stayed in the Amish community, they would become members of a "productive" community that "reject[s] public welfare in any of its usual modern forms," and if they left, they would find themselves in possession of marketable skills and character traits that would enable them to support themselves in the wider society.[89]

The Court also addressed considerations that would fall under the heading of Rawls's first moral power. While the Court agreed that citizens have a fundamental interest in an education that would prepare them "to participate effectively and intelligently in our open political system," it rejected the argument that the Amish education the parents favored failed this standard.[90]

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[88] Wisconsin v. Yoder, 224.
[89] Wisconsin v. Yoder, 222–23.
[90] Wisconsin v. Yoder, 221–22.

Rawls himself appeared to have had something like the *Yoder* case in mind, observing that "various religious sects oppose the culture of the modern world and wish to lead their common life apart from its unwanted influences" and that this generates a "problem" regarding "their children's education and the requirements the state can impose."[91] Noting that comprehensive liberalisms might lead to requirements that foster children's personal autonomy, Rawls writes that

> "political liberalism has a different aim and requires far less. It will ask that children's education include such things as knowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime. . . . Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation."[92]

Reasonable liberal minds may differ as to the outcome of *Yoder*. It is possible to think that some children have a right to learn to exercise some (perhaps minimal) degree of personal autonomy, and that school attendance through the age of 14 is sufficient to achieve this threshold exercise, even if it is followed up by a *Yoder*-style education. The crucial point, however, is that Rawls's approach lacks the resources to assign any value to a person's interest in receiving an education that exposes them to a multiplicity of conceptions of the good and gives them even some small ability to choose between them. The explanation for this feature of his view should by now be clear: Rawls's two routes to justifying the status of any given liberty as basic are (1) its importance to the pursuit interest and (2) its necessity as a component within a conception of social cooperation between free equals. Almost entirely lacking from this justificatory mechanism is a concern about the significance of a liberty as a background condition that shapes

[91] Rawls, *Political Liberalism*, 199.
[92] Rawls, *Political Liberalism*, 199.

the manner in which citizens come to endorse values, goals, and life plans. The education of children falls directly into this blind spot; no other social condition more greatly influences one's ability to form and revise a conception of the good, and the spare Rawlsian conception of the formation-revision interest will generate a concordantly undemanding account of the sort of education to which children are entitled as a matter of basic justice.

IV. Conclusion—Razian Reflections on the Value of Liberty

One of the crucial planks of the perfectionist political philosophy laid out by Joseph Raz in *The Morality of Freedom*[93] is a claim that is not in the first instance about political philosophy, but instead about personal well-being, where this term is understood as the overall success of a persons' life. The claim is that the successful pursuit of goals that are not valuable does not contribute positively towards a person's well-being. My critique of Rawls's actuarial conception of liberty should, I think, be understood as an application of Raz's argument for his claim about well-being.

Raz begins with the observation that goals are pursued for reasons. They are pursued, in other words, under the guise of their contribution towards or embodiment of achievements, activities, or states of affairs that we believe to be valuable.[94] Raz's claim is not primarily an empirical one, but is instead a claim about the structure of practical reason: the accomplishment of a goal is something we care about to the extent that the goal serves the reasons we have for

[93] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
[94] Raz's claim here is closely related to, or perhaps an instance of, the "guise of the good" thesis, which Raz defends in "On the Guise of the Good," in *From Normativity to Responsibility*, ed. Joseph Raz ((Oxford Univ. Press 2011).

pursuing the goal, and we have the goals that we have only on condition that the reasons supporting them are "valid" and "valuable."[95]

Raz applies this thesis both to local, instrumental goals, as well as to "ultimate" goals. In the case of instrumental goals, the reasons for pursuing the goal will be some further goal—I am trying to catch the bus so that I can make it to the airport on time to catch my flight. In the case of ultimate goals, Raz concedes that it may be that "no reasoning of any complex kind will be forthcoming" by which I justify my belief that the goal is valuable. "The belief that the goal is valuable may amount to little more than that one would describe ones goals by expressions which ascribe desirability to them." But the crucial point is that the connection between goals and reasons remains just as strong in the case of ultimate goals as it was in the case of instrumental goals—we pursue the goals we do only on condition that we believe them to serve some value.

From this thesis, Raz moves to the claim that success in pursuit of goals that are not in fact supported by such reasons does not contribute to well-being. This move is easy to understand where the goals under consideration are instrumental goals. If I aim to catch a bus to make it to the airport on time and my only reason for doing this is to make it to the airport on time, but my flight has in fact been canceled, my success in catching the bus is a part of a broader failure—the failure to make my flight. I have failed to accomplish my goal even if I in fact have caught my bus. There is thus a mismatch between the goal I intended to achieve and what I actually did, and it is in this mismatch that the failure consists. But because I have failed to achieve my goal, my successful catching of the bus does not contribute to my well-being.

[95] Raz, *The Morality of Freedom*, 300–01.

What I find striking and interesting about Raz's argument—and what connects it to my critique of Rawls—is that he applies this same reasoning to the pursuit of ultimate goals to argue that successful pursuit of valueless ultimate goals fails to serve one's well-being. For Raz, my successful pursuit of valueless ultimate goals also amounts to a mismatch between what I did and what I intended to do: I pursued the goal under the guise of it being a valuable pursuit, but I in fact achieved something that is not valuable. I did not accomplish what I set out to accomplish, and so I failed. Successful pursuit of valueless ultimate goals thus constitutes failure for the same reason that successful pursuit of instrumental goals that do not contribute to further goals constitutes failure. And both are failures for the same reason that more ordinary examples of failure—e.g., I try to catch my bus but am too late, or I try to become an excellent chess player but become only mediocre—are failures, namely that I failed to achieve the thing that I set out to do. And because failed pursuit of goals does not contribute to well-being, none of these types of failure to contribute to well-being.

What I wish to take from Raz's argument is a claim about the relationship, from within any person's perspective, between (1) his successful pursuit of his ultimate goals and (2) his understanding of those goals as valuable. The relationship is that a person only cares about (1) because he believes (2). One upshot of this is that, to adapt a quote from Waldron about Raz's view: "[I]f one neglects the aspiration to value implicit in the [pursuits] of an autonomous person, then one is likely to misrepresent what it is that she values in [her ability to engage in such pursuits and why success in them] matters. . . One does violence to the self-understanding

of people aspiring to [goals] if one advises them that the [worth] of their [goals] is unimportant so far as the value of their [ability to successfully pursue them] is concerned."[96]

The bridge that connects this Razian thesis to Rawls's doctrine of liberty is the fact that Rawls primarily thinks of basic liberty as a means of enabling people to successfully pursue their ultimate goals. If Raz's thesis is correct, people care about success in their ultimate pursuits on condition of those pursuits being valuable. Indeed, this interrelationship is so strong that the very concept of "success in one's ultimate pursuits" cannot be disentangled from the question of whether those ultimate pursuits are valuable. If, then, we are to theorize liberty as valuable primarily because of its utility in enabling successful pursuit of ultimate goals, we need to think of success in the thick, substantive way that Raz recommends, namely as encompassing (rather than bracketing) the question of the value of the ultimate goals that we pursue. But Rawls, as we have seen, intentionally refuses to allow his conception of basic liberty to be shaped by considerations about what Raz calls ultimate goals and Rawls calls conceptions of the good.

The modest conclusion I would like to press, then, is that this feature of Rawls's view puts its conception of basic liberty at odds with the internal, first-person perspective that all people inevitably take towards the questions of what liberty should be considered basic and why liberty is valuable. It may be that this cost is worth bearing if it is necessary to achieve what Rawls considers to be the aim of political philosophy, namely the discovery of a set of political values that can serve as a basis for public justification. But it is a cost that is nevertheless worth acknowledging forthrightly.

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[96] Jeremy Waldron, "Autonomy and Perfectionism in Raz's *The Morality of Freedom*," *Southern California Law Review* 62, nos. 3 and 4 (March/May 1989): 1128–29. Waldron's original quote is about the value of autonomy in choice of goals, not success in pursuit of goals.

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