

## **A RAWLSIAN ARGUMENT AGAINST THE DUTY OF CIVILITY**

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**NOTE:** This is the final unpublished draft. For the published version, see

“A Rawlsian Argument Against the Duty of Civility.” *American Journal of Political Science*, vol. 50, no. 3 (July 2006), pp. 676-690.

Please use published version for citation purposes:

<http://www.jstor.org/stable/3694242>

### **Abstract**

In this paper, I show that the assumptions underpinning John Rawls’s so-called “duty of civility” ought to lead one not to affirm the duty but to reject it. I will begin by setting out in its essentials the content and rationale of the “duty of civility” which lies at the heart of Rawls’s ideal of public reason. Secondly, I will argue that the very premises allegedly underpinning the duty of civility—namely, the values of reciprocity and political autonomy, and the burdens of judgment—in fact rule it out. Thirdly, I will suggest that if my argument against the duty of civility is correct, then one recent attempt to salvage political liberalism and reasonableness from the charge of incoherence fails. Finally, I draw some challenging lessons from our discussion for political liberalism and the liberal tradition as a whole.<sup>1</sup>

John Rawls’s ideal of citizenship, and more specifically, his ideal of civic discourse, has become a reference-point for contemporary theorists of citizenship only to be rivaled by Jurgen Habermas’s discourse ethics.<sup>2</sup> While for many, it has held out the promise of a politics stripped of rancor and futile philosophical controversy, a politics of civility and respect, for others Rawls’s consistent emphasis on political agreement and consensus subtly (or not so subtly) undermines freedom of thought, freedom of expression, and even freedom of religion in a constitutional democracy. Rawls has especially come under criticism for the so-called “duty of civility,” which imposes a moral duty upon

citizens to advance publicly accessible arguments for positions bearing on constitutional essentials or matters of basic justice. But these criticisms tend to come either from an alternative strand of liberalism<sup>3</sup>, or from an explicitly religious perspective.<sup>4</sup> I propose to critique Rawls's doctrine of public reason primarily from Rawls's own perspective. That is, I will consider public reason firmly within the terms of political liberalism itself, rather than in the terms of religion, ethics more broadly speaking, or some alternative strand of liberalism.

Arguably, critics have already exposed a serious internal contradiction within Rawls's doctrine of public reason. After all, the accusation that political liberalism presupposes a liberal comprehensive doctrine and thus fails to be "political, not metaphysical," is by now commonplace. I do not wish to take away from the work that has already been done to undermine Rawls's claim to philosophical impartiality.<sup>5</sup> However, in my view insufficient attention has been paid by political theorists to the duty of civility – the cornerstone of Rawls's doctrine of public reason, and the mostly unspoken moral and epistemological assumptions that support it. There has been no systematic attempt, that I am aware of, to trace the philosophical grounding of this duty, and on that basis construct a thoroughly Rawlsian argument against it.<sup>6</sup> This is what I undertake to do here. The central and distinctive claim of this essay is that Rawls's duty of civility not only presupposes deeply controversial or partisan philosophical claims and is thus inconsistent with political liberalism's commitment to "extend the principle of toleration to philosophy itself,"<sup>7</sup> but that the duty of civility is in tension with at least *one other central requirement of reasonableness* as understood by Rawls. In short, a close examination of the duty of civility and its role in Rawls's account of the virtue of reasonableness reveals a tension

*internal to reasonableness itself* that has not yet been sufficiently exposed by Rawls's critics.

I will mount an *internal* case against the duty of civility. By internal, I mean a case that is self-consciously confined to the assumptions of political liberalism, whether in Rawls's writings or reconstructed based on a charitable interpretation. For the purposes of this argument, I have in mind the Rawls of *Political Liberalism* and later, and do not wish to make any judgment about the relationship between the Rawls of *Political Liberalism* and the earlier Rawls of *A Theory of Justice*.<sup>8</sup> The argument will proceed in three main stages. In the first stage, I will set out in its essentials the content (§1.1) and rationale (§1.2) of Rawls's so-called "duty of civility" which lies at the heart of his ideal of public reason. Secondly, I will argue that the duty of civility, given its controversial philosophical presuppositions, cannot be imposed as a requirement of reasonableness without contradicting another central requirement of reasonableness, recognition of the burdens of judgment and their consequences for the use of public reason. (§2). Thirdly, I will argue that if my case against the duty of civility is successful, then Leif Wenar's attempt to salvage political liberalism and reasonableness from the charge of incoherence can be shown to fail (§3). Finally, I draw some challenging lessons from our discussion for political liberalism and the liberal tradition as a whole (§4).

## **§1 The Duty of Civility**

### **§1.1 The Content of the Duty: Public Reason**

The distinction between public and nonpublic reasons is at the very heart of Rawls's ideal of public reason. It finds expression both in his test for the legitimacy of a

democratic political regime—what he calls the “liberal principle of legitimacy”—and in the so-called “duty of civility” which is meant to govern citizens’ political interactions. According to the liberal principle of legitimacy, “our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational” (217). I will explore the notion of reasonable endorsability later in light of Rawls’s “burdens of judgment” (§1.2).

Following close on the heels of Rawls’s liberal principle of legitimacy comes the duty of civility, which (partially) specifies what citizens need to do in order to conform their actions to the liberal principle of legitimacy, that is, in order to ensure that the constitution and the day-to-day operations of the law are such that all citizens “may reasonably be expected to endorse [them] in the light of principles and ideals acceptable to them as reasonable and rational.” The duty of civility specifies at a very general level the sorts of reasons citizens may (and may not) draw upon when arguing for laws and policies that touch upon matters of basic justice and constitutional essentials. It imposes upon citizens “a moral, not a legal, duty...to be able to explain to one another on [certain] fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made” (217).

What, then, are the “political values of public reason”? According to Rawls, liberal political values, or the values of public reason, have three basic features: first, they are

somehow already implicit in our political culture; second, they have a limited scope, applying exclusively to the political domain or the “basic structure” of society; and third, they are “freestanding” from or do not presuppose the truth or validity (or falsehood or invalidity) of any particular comprehensive doctrine (11-15). Political values, according to Rawls, fall into two categories: first, the “values of political justice,” which are supposed to be reflected in the basic structure or fundamental institutions of society, in particular the State and the economy; and second, the “values of public reason,” which provide moral standards for political inquiry and deliberation among citizens (224).

The values of political justice, at least on Rawls’s account, include equal political and civil liberty, equality of opportunity, and social equality. More specifically, they include freedom of conscience and expression, freedom of the press, the right to a fair trial, and the general freedom to pursue one’s favored conception of the good within the limits of justice. The values of public reason, on the other hand, include the virtue of reasonableness, which involves general epistemic responsibility and competence (for example, a willingness to consider relevant evidence and observance of basic logical canons), as well as a moral responsiveness to the interests and rights of others; and a commitment to the so-called duty of civility, i.e. a willingness to offer “political” arguments for conclusions about matters of fundamental law or basic justice. Whether all of these values actually deserve to be included among “the political values of public reason” is a matter of great dispute, and it is the last value mentioned above—a commitment to the duty of civility—whose “political” credentials I hope to bring into question shortly.

### **§1.2 The Grounds of the Duty: Reciprocity**

The reason nonpublic or nonpolitical reasons cannot have justificatory power in the political domain, at least when it comes to matters of fundamental justice, is not that they are *false* (indeed, Rawls goes to some length to avoid making any such controversial claim<sup>9</sup>) but that they run afoul of the value of reciprocity. By this, Rawls means that if I imaginatively reverse roles or positions with another citizen, assuming only that the other citizen is “reasonable,” I will perceive that the other citizen, given his reasonable set of epistemic and moral commitments, simply could not be expected to see the moral-political force or relevance of the reasons I offer.<sup>10</sup> As Rawls puts it, the “criterion of reciprocity” is specified by the proposition that “our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions” (xlvi). Although Rawls does not here spell out that reciprocity only extends to “reasonable persons,” it is clear from other passages that the principle of reciprocity only binds us when we are addressing “reasonable” persons. For example, Rawls explicitly denies that “unreasonable doctrines” (and by implication, unreasonable persons) need be accommodated by political liberalism; on the contrary, such doctrines are to be “contained...so that they do not undermine the unity and justice of society” (xx).

It is clear from the above that reciprocity requires us to advance justifications for coercive policies that *could* be accepted by any reasonable person, without abandoning or radically revising her current comprehensive doctrine. But we still have to investigate what Rawls means by a “reasonable” person, and this is no trifling matter. For the way we define the “reasonable” person directly shapes the constituency to whom we must make

ourselves accountable, in speech, for our exercise of power. To put it negatively, those who are excluded from the category of “reasonable persons” become, to that extent, politically invisible or irrelevant, and need not be extended the sort of “reciprocal” political treatment that is extended to “reasonable persons.” Since much of my argument against Rawls (in particular, my interpretation of his principle of reciprocity) turns on how we are to understand his notion of the “reasonable person,” I will later examine this question at some length. But for ease of exposition, for now we can accept Rawls’s twofold characterization of the reasonable person as someone who (a) is willing to offer and abide by fair terms of cooperation; and (b) recognizes the morally innocent sources of disagreement among citizens (the burdens of judgment) and their consequences for the use of public reason in the exercise of power (54).

In order to get at what Rawls’s reciprocity requirement amounts to, we need to steer clear of two errors: on the one hand, to interpret it in such a demanding way that the reasons I offer must be viewed by any reasonable person as true and validly yielding my conclusion; or on the other hand, to interpret reciprocity in such an undemanding way that the reasons I offer need only be acknowledged as validly yielding my conclusions, irrespective of their actual (perceived) epistemic credentials or plausibility. The relation between argument and audience required by reciprocity falls somewhere between full agreement on the one hand and acknowledgement of an argument’s validity at a purely formal level on the other. Roughly, in order for an argument to pass the test of reciprocity, any reasonable person must be able to see that the argument is intelligible, minimally coherent, drawing on reasons that can generally be grasped and assented to by reasonable citizens without some special leap of faith or personal conversion, and are, at least *prima*

facie, consistent with the freedom and equality of all. I need not believe the reasons offered me for such-and-such a law are in fact *true* or conclusive, in order to accept that the reasons are intelligible, politically relevant, and consistent with the freedom and equality of all. To take a current example, if someone argues that we should introduce the death penalty on the grounds that it would act as a serious deterrent to violent crime, that studies show it is in fact administered impartially, and so on, I may vehemently disagree with the substance of his claims yet acknowledge that the argument is politically relevant and does not place any significant strain on my own reasonable view of the world: it is an argument I can engage in a rational way because it is framed in terms that, even if contestable, are accessible to our shared human reason.<sup>11</sup>

Before considering the grounds of Rawls's reciprocity requirement, I would like to clarify the role of reciprocity in the argument for the duty of civility. First of all, like the concept of autonomy, I should emphasize that Rawls's interpretation of the notion of reciprocity is one among many possible interpretations. So, whenever I refer to "the principle of reciprocity," unless I say differently, I am referring to Rawls's peculiar interpretation of the principle, not to the notion of reciprocity in general. Secondly, on Rawls's view, reciprocity is a *very general* normative constraint upon the justification of exercises of political power that significantly impede the autonomy of others. It insists upon the accessibility or availability of our reasons for policies and laws to others differently situated, but it does not specify in greater detail what class of reasons is accessible. The duty of civility, on the other hand, is a more detailed specification of the constraints upon political discourse that follow from the very general constraint of reciprocity. For example, it specifies a class of reasons, "public" or "political" reasons, that

are supposed to meet the reciprocity test, and a class of reasons, “nonpublic” reasons or reasons derived from “comprehensive doctrines,” that do not meet the test. According to the duty of civility, we must offer or be prepared to offer “political” or public reasons<sup>12</sup> for our collective exercise of political power on matters of basic justice. The duty of civility, in short, is a concrete specification of the more general principle of reciprocity.

The reciprocity requirement and the associated duty of civility are motivated by two basic components of political liberalism: first, a moral view that emphasizes the importance of rational consent to laws that coerce citizens, whether directly or by structuring the opportunities and resources available to them; and second, an epistemological view offering a distinctive account of the nature of moral disagreement and its sources. I will begin by summing up the moral view as briefly as possible, and then outline Rawls’s account of moral disagreement. Rawls’s moral theory and (partial) epistemology jointly underpin the reciprocity requirement which is fleshed out, if you will, by the duty of civility.

Let us start with the moral view: Rawls believes that coercive laws must be justified in terms that are rationally accessible to citizens (in a sense that will become clearer in light of his moral epistemology). What would be wrong with coercing a reasonable person based on reasons that he cannot endorse? In other words, why should a citizen confine his arguments for law or public policy to reasons that any reasonable person could endorse? The answer lies in the equal moral status possessed by persons, not as noumenal selves or children of God, but as *citizens*. Citizens are thought to possess an equal moral status, which can be cashed out in terms of an equal right to the opportunity to develop and exercise their two moral powers. The two moral powers are, first, the capacity

to hold and revise a conception of the good; and second, the capacity to have and act upon a sense of justice. Citizens' *freedom* consists precisely in their relatively unimpeded capacity to develop and exercise the two moral powers. Their *equality* consists in their right to an *equal* opportunity to develop and exercise their moral powers.<sup>13</sup>

The basic idea is this: since each of us is free and equal, no one of us has any right to dispose of another or wield control over another's life (special circumstances aside<sup>14</sup>) without providing grounds for that intervention that are accessible to the other, i.e. grounds that are not only intelligible, but cogent and capable in principle of being accepted by the other without stretching his current belief system to a breaking point. In other words, I owe you a *justification* for impeding your freedom to pursue your life goals, and not just any justification, but one you could reasonably and voluntarily accept. Otherwise, I am showing scant regard for your moral status as free and equal to me, and it will appear, from your standpoint, that I am just acting on reasons that I happen to believe (but have no weight for you), rather than appealing to our shared reason, or common sense. I might as well say to you, "You really ought to obey this law, because *I* believe it's good for you to do so."<sup>15</sup> In short, the duty of civility reflects the requirement to respect the political autonomy, i.e. the freedom and equality, of other citizens, by justifying laws on grounds they can at least view as legitimate, understandable, and reasonable, even if mistaken in the case at hand.

Not surprisingly, considering that moral-political justification is at the heart of political liberalism, there is an epistemology, however rudimentary, at work in Rawls's application of the test of reciprocity to political argumentation. Understanding that epistemology is essential in order to understand what the duty of civility and the liberal

principle of legitimacy in fact require.<sup>16</sup> The impetus for Rawls's epistemology is of course not primarily theoretical but practical and political: Rawls is deeply impressed and concerned by the marked differences among apparently benign and conscientious inquirers in political and moral matters, since it seems to bring into question the liberal hope of providing a justification of the political order that is more or less satisfactory to all reasonable citizens.<sup>17</sup> In other words, the wide divergence among apparently reasonable and rational persons on moral matters seems on its face to jeopardize the liberal hope of grounding the political order in citizens' shared reason, or, if you will, their shared "considered moral judgments."<sup>18</sup> How can such a hope be revived in a pluralistic society? The answer, at least for Rawls, lies in the special claims of his epistemology which form the basis of an important moral argument. First, he offers an explanation of moral divergence, in terms of what he calls the "burdens of judgment"—namely, those factors, such as differing life experience and the difficulty of applying general principles to particular cases, that move people to draw different moral conclusions even though they are all basically conscientious, reasonable, and rational inquirers.<sup>19</sup> Reasons infected by the burdens of judgment pertain to "non-public" reason; to be more precise, they are non-public with respect to the society of this or that liberal democracy: examples include religious claims about the revealed nature of Scripture; claims regarding the comparative merits of intellectual and political pursuits; and the claim that autonomy is the most important feature of a morally admirable human life. Second, he claims (or at least implicitly claims) that not all significant moral judgments are infected by the burdens of judgment: at least some reasons will be plausible to all in light of our shared human reason, the burdens of judgment notwithstanding. These reasons pertain to what Rawls calls the

“political values” of “public reason,” and include values such as freedom of religion, freedom of speech, rule of law, and national security. Third, Rawls claims that a person who falls on the wrong side of an argument, where the matter is subject to reasonable disagreement because of the burdens of judgment, cannot be considered morally blameworthy for his mistaken beliefs; and that it would furthermore be unreasonable, or out-and-out unjust, to coerce that person for reasons that are vulnerable to the burdens of judgment. Fourth, Rawls argues that fundamental law must be grounded in reasons that escape the burdens of judgment, those “political values” that are “public” or available to any reasonable person.<sup>20</sup> And this fourth claim presupposes, as Rawls recognizes, that “political values” are at least sufficiently determinate and extensive that they can yield reasonably well-grounded conclusions on all or most important matters of fundamental law or basic justice.<sup>21</sup>

## **§2 A Rawlsian Argument against the Duty of Civility**

Having set out in its essentials the content and rationale of the duty of civility, I now want to show that there is a powerful Rawlsian argument against the duty. The argument has three basic steps: (§2.1) first, I argue that the duty of civility, in light of (a) its pivotal role in the lawmaking process, and (b) the social sanctions associated with non-compliance, ought itself be justifiable to citizens in the same way as a fundamental law. (§2.2) Second, I argue that Rawls must justify the duty of civility to citizens who are reasonable in a relatively “thin” or philosophically non-partisan sense of the term, and that even on his own more elaborate account of reasonableness, he cannot legitimately assume that all “reasonable” persons accept the duty of civility. (§2.3) Third, I show that the duty

of civility cannot be justified to “thinly” reasonable citizens, given its epistemological and moral presuppositions, and therefore is not morally credible as a public guide for political deliberation.

### **§2.1 Should we subject the duty of civility to the test of reciprocity?**

The most fundamental grounding for the duty of civility is the protection of the two moral powers (jointly referred to as “political autonomy”) against political-moral violations. The duty of civility rests on the reciprocity requirement, which aims to protect citizens’ autonomy by insisting that political power should have a justification that appeals to our shared reason and could be reasonably accepted by all. The most obvious form of political power is direct enactments of law and policy, so these obviously fall under the reciprocity requirement: they need to pass some test of political justification. But what about other more indirect or subtle forms of political power? For example, what about the moral, not legal, rules that structure and constrain the *justification* of political power? As I will suggest shortly, there does not appear to be any reason to exempt these rules of justification from the reciprocity requirement, or consider them any less an exercise of political power than legal statutes or enactments themselves.

The duty of civility is just this sort of rule: it is a rule that, insofar as it is widely accepted (or at least accepted among the most influential sections of society, such as the mass media), structures justificatory political discourse by constraining or filtering the justification of political power. Of course, the cost of disregarding or violating the rule is not imprisonment or loss of property, but there are at least two reasons for believing that such a rule can have a serious impact on individuals’ political autonomy: first, if the duty

of civility is widely recognized, violators will feel the force of social disapproval, and this sanction will weigh on them and put pressure on them to conform in ways comparable to the operation of legal sanctions, even when their comprehensive doctrines or conceptions of the good mandate that the rule be violated.<sup>22</sup> Second, insofar as the duty of civility is successful in structuring political discourse, those who reject it or whose conception of the good presupposes its rejection, will in general find that the prevailing pattern of justification for law makes it very difficult for them to contribute to that justification in effective and credible ways without disregarding values or beliefs they view as essential to a sound political argument. Thus, the laws they live under will be justified in ways they find they themselves cannot wholeheartedly participate in or endorse.<sup>23</sup>

Because of the central, indeed water-shed, role played by the duty of civility in the process of political justification, and because it is not just a superogatory precept but a *moral requirement* of citizenship, it is tantamount to an exercise of political power and thus must be justified to citizens according to the same standards by which laws themselves are justified: namely, in terms that all citizens could reasonably be expected to endorse. We can unpack this by saying that in justifying the duty of civility, we must be able to imagine the justification having force for a citizen differently situated (the reciprocity test) in spite of, or over and above, the burdens of judgment. In short, the duty of civility not only rests on the reciprocity requirement: *it must conform to that requirement itself on pain of forfeiting its political legitimacy.*

**§2.2 Who are the “reasonable” citizens to whom the duty of civility must be justified?**

Since I will argue that the duty of civility fails Rawls's test of reciprocity, and reciprocity involves a willingness to offer justifications for power that are accessible to "reasonable" persons, one essential ground-clearing exercise for my argument will be to establish *who* these "reasonable" persons are to whom wielders of political power owe a justification. Do they include people who might be skeptical of the duty of civility? Or are reasonable persons already committed, *by definition*, to accepting the duty? If reasonable persons include dissenters from the duty of civility, then my argument might have some chance of getting off the ground, but if reasonable persons *by definition* accept the duty, then it would be hard to argue that the duty of civility is inaccessible to some reasonable persons, without repudiating Rawls's own terminology and thus slipping into an external critique. It is therefore important for me to establish in advance of the main argument that the sense of reasonable I favor is firmly grounded within Rawls's own theory rather than imposed from without. This is the task I set myself here.

The term "reasonable" appears in Rawls's work in more forms and with more frequency than in most contemporary political writings. Unfortunately, the term is notoriously ambiguous and vulnerable to manipulation, and it is not always easy to distinguish between inevitable semantic variation (depending, for example, on the object being described as "reasonable") on the one hand, and avoidable vagueness and equivocation on the other. The two usages of "reasonable" that will concern us here are: first, concerning comprehensive doctrines; and second, concerning persons. We will find that these two usages are intimately linked, and that semantic variation in one application of the term (the reasonableness of comprehensive doctrines) can yield variation in the other application (the reasonableness of persons) and vice versa.

Unfortunately, Rawls says very little about what counts as a “reasonable” or “unreasonable” comprehensive doctrine, and what he does say is internally inconsistent and (at least partially) in tension with other parts of his theory. On the one hand, Rawls asserts in the introduction to *Political Liberalism* that “political liberalism...supposes that a reasonable comprehensive doctrine does not reject the essentials of a democratic regime” (xviii), thus giving some (albeit somewhat vague) normative bite to the concept. But later in the book, he defines reasonableness with respect to comprehensive doctrines so loosely that it could apply to comprehensive doctrines that on most interpretations, including their own, “reject the essentials of a democratic regime.” On this second view, a reasonable doctrine has three features: (a) it is “an exercise of theoretical reason,” covering “the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner”; (b) it is “an exercise of practical reason”; and (c) it normally “belongs to, or draws upon, a tradition of thought and doctrine,” and “tends to evolve slowly in the light of what, from its point of view, it sees as good and sufficient reasons” (59). But this description of reasonable comprehensive doctrines, as Lief Wenar points out, would allow for anti-democratic doctrines including white supremacism and Islamic fundamentalism.<sup>24</sup>

The first definition of reasonable doctrines, requiring that they accept the “essentials of a democratic regime,” is pretty vague, but at least it can cohere with Rawls’s account of the “reasonable person,” and helps us make sense of the distinction between simple pluralism (plurality of comprehensive doctrines) and reasonable pluralism (plurality of “reasonable” comprehensive doctrines) which lies at the very basis of Rawls’s shift to political liberalism. Since Rawls says a lot more about the “reasonable person” than about “reasonable comprehensive doctrines,” I favor Wenar’s strategy of reading the latter as a

“comprehensive doctrine that can be affirmed by a reasonable person,” which makes “reasonable person” the controlling term in the definition.<sup>25</sup>

We are thus driven back to the meaning of a “reasonable person.” Fortunately, Rawls does spell out in some detail what he has in mind. Wenar offers a more extensive interpretation, collecting elements of the “reasonable” scattered throughout *Political Liberalism*.<sup>26</sup> But for our purposes, it is sufficient to highlight the most fundamental aspects of reasonableness. Rawls offers two distinct interpretations of the reasonable person, one as part of his explanation of the burdens of judgment (i.e. those factors that differentially affect our moral judgments without thereby calling into question our bona fides or moral credentials), and the other in his main account of the “reasonable person.” The two interpretations differ in that the latter incorporates more elements than the former. For convenience, I will call these Rawls’s thin and thick accounts respectively. Let’s begin with the thinner account of the reasonable—the account associated with the burdens of judgment.

One of the two “basic aspects” of reasonable citizenship (what I am calling the thick account of reasonableness), as we shall see shortly, is “the willingness to recognize the burdens of judgment and...their consequences for...public reason” (54). But the burdens of judgment are precisely the “sources, or causes, of disagreement between *reasonable persons*” (55, emphasis added). In order to avoid circularity, we should not assume here that Rawls has in mind the thick account of reasonableness which recognition of the burdens of judgment is just one part of. For otherwise, the burdens of judgment would be the sources of disagreement between persons who recognize the burdens of

judgment. Besides, the text seems to point us to a notion of reasonableness that is distinct, though closely related, to that of the main account it is supporting:

Let's say that reasonable disagreement is disagreement between reasonable persons: that is, between persons who have realized their two moral powers to a degree sufficient to be free and equal citizens in a constitutional regime, and who have an enduring desire to honor fair terms of cooperation and to be fully cooperating members of society. Given their moral powers, they share a common human reason, similar powers of thought and judgment: they can draw inferences, weigh evidence, and balance competing considerations... The idea of reasonable disagreement involves an account of the sources, or causes, of disagreement between reasonable persons *so defined* (55, emphasis added).

To sum up the (thin) account of reasonableness associated with the burdens of judgment, we could say that it requires persons to be sufficiently competent reasoners (the epistemic or rational component) and sufficiently responsive to the demands of justice or the interests of others (the moral component) to be free and equal citizens. This does not appear to be a hugely demanding benchmark of reasonableness. Indeed, I believe it would be hard for anyone, at least in a Western democracy, to credibly bring it into question.

The “thick” account of the reasonable is offered in section 1 of Lecture 2. This section is entitled “The Reasonable and the Rational” and it is the most extensive and, judging by the section title, the most self-conscious account of a reasonable person that Rawls has to offer. I am assuming that this captures more adequately Rawls’s considered views on reasonable citizenship than the sparser, nested account of reasonableness discussed above. In the thick account, Rawls points to two “basic aspects” of the reasonable, both of which are “virtues of persons” (48). The reasonable person evinces a

willingness to “propose fair terms of cooperation and to abide by them provided others do” as well as to “recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power.” (54) On Rawls’s interpretation of fairness, “[f]or these terms to be fair terms, citizens offering them must reasonably think that those citizens to whom such terms are offered might also reasonably accept them” (xliv); while on Rawls’s interpretation of the “consequences of the burdens of judgment for the use of public reason,” the permanence and inevitability of morally innocent philosophical and religious disagreement precludes fair-minded citizens from enacting fundamental laws and policies based on their comprehensive doctrines. Thus, Rawls’s thick concept of the reasonable effectively includes within it, via Rawls’s interpretation of “fair terms of cooperation,” the duty of civility, or the duty to offer others reasons for fundamental policies and laws that are accessible to their shared reason—reasons they could accept *in spite of their differing comprehensive doctrines*. On this interpretation—what I am calling the “thick” concept of reasonableness—, it is just *part of the definition* of a reasonable person that he accepts and is prepared to abide by the duty of civility.

It might seem, then, that however questionable the imposition of the duty of civility may be, the duty can be deduced from Rawls’s account of the reasonable person and as such is not vulnerable to an internal critique. This definitional victory, however, proves upon closer inspection to be an illegitimate one. Even if we accept Rawls’s *general* description of reasonableness, viz. the willingness to offer fair terms of cooperation and recognize the burdens of judgment and their consequences for public reason, this does not grant Rawls a *carte blanche* to interpret or apply these general requirements in any way he

wishes. From a strictly internal Rawlsian perspective, any interpretation of reasonableness must meet a test of theoretical coherence, or coherence with other important commitments of political liberalism. Imagine, for example, if Rawls had defined a reasonable person as somebody who, among other things, accepts that the highest life for man is the life of contemplation. This definition of the reasonable would clearly conflict with other central aspects of the reasonable, in particular the need to recognize the burdens of judgment and their consequences for the use of public reason. Thus, Rawls is not entitled to take for granted any specification of reasonableness he pleases, including acceptance of the duty of civility: his specification of the reasonable must conform to other central requirements of reasonableness on pain of internal contradiction. One of these is sensitivity to the burdens of judgment, which requires that the grounds for coercion be accessible to thinly reasonable persons. Indeed, I will argue in the next section that imposing the duty of civility fails to respond to the burdens-of-judgment aspect of reasonableness.

What I have shown so far is not that Rawls's thick conception of reasonableness is flawed or wrongheaded, but that (a) it imposes the duty of civility; and (b) since this duty involves an exercise of power, as I have already shown (§2.2), its acceptance cannot be taken for granted by definitional fiat – on the contrary, arguments for its imposition must be sensitive to the burdens of judgment, or accessible to “thinly” reasonable persons *in spite of* the burdens of judgment. The next stage of the argument will be to show that the duty of civility cannot in fact be justified to (thinly) reasonable persons without disregarding the burdens of judgment. To that extent, neither the duty, nor the thick conception of the reasonable that embodies it, is morally legitimate or reasonable from a Rawlsian perspective.

### **§2.3 Does the duty of civility pass the test of reciprocity?**

If I am right, then the duty of civility is so central to the lawmaking process that it must itself pass Rawls's test of reciprocity, i.e. be justifiable in terms (thinly) reasonable persons could accept without abandoning their comprehensive doctrines. But does it? Perhaps if it were framed vaguely in terms of publicity or accessibility of reasons, it could. But what the duty of civility in fact presupposes is a distinctive interpretation of notions such as reciprocity, publicity and accessibility, that is driven by (a) a neo-Kantian or egalitarian moral epistemology associated with Rawls's account of the burdens of judgment; and (b) a contractarian political morality that emphasizes universal consent to or universal justifiability of coercive rules as a virtually overriding moral requirement. The burden of this stage of the argument is to show that these presuppositions of the duty of civility, *including Rawls's principle of reciprocity*, cannot satisfy the reciprocity requirement. My argument issues in one simple claim: that *Rawls's duty of civility is fundamentally incoherent, because the reciprocity principle underlying it fails to conform to itself, i.e. cannot be justified to epistemically and morally responsible ("thinly reasonable") citizens, and is thus an illegitimate exercise of public reason.*

What lends a certain appeal to the duty of civility, at least initially, is (a) the fact that people do disagree on political and moral matters without any evident malice, irrationality or bad faith and (b) the almost universally accepted norm (at least in Western cultures) that political authority ought to be exercised in ways that can be rationally justified to all concerned. When there is deep disagreement and no way to resolve it rationally, we are naturally reluctant to consider one party to the disagreement justified in

imposing its opinion on the other. This is most obvious in the case of religious doctrines: what sort of argument might we use, for example, to show everyone that the Catholic Church is the one true church and the surest path to salvation? Is this a proposition that can be settled in a rational, public manner, based on reasons that are somehow accessible to all reasonable and rational persons? Most of us think not. And in the absence of any public rational settlement of the issue, any attempt to *enforce* one side of the dispute politically seems arbitrary and violative of the right of citizens to live their lives according to their own lights or at least to (have a reasonable opportunity to) be reconciled through rational principles with the rules under which they live.<sup>27</sup>

The problem is that what seems to be a universally recognized fact stands in need of interpretation. There is no uniquely authoritative or “common-sensical” interpretation of the fact of divergence in political and moral judgment, and certainly no uniquely authoritative or “common-sensical” interpretation of the political implications of that fact. For in order to interpret conflicts in moral judgment and draw out their political implications, we require (a) a moral epistemology—however rudimentary; (b) a political morality or theory of political justification; and (c) a sociology or interpretation of our social practices, however basic. And the Rawlsian hope that all (or indeed *any*) of these can somehow overcome or escape the burdens of judgment, and thus meet the reciprocity requirement, is an empty one, as we shall see.

What, then, are the specific epistemological, sociological, and moral assumptions underlying the duty of civility? Let us start with Rawls’s moral epistemology: notice that he goes to great lengths to preserve the bona fides and good intentions of the various parties to political disputes. When a deep moral dispute arises among ostensibly

cooperative citizens, Rawls favors an epistemological explanation for the divergence that does not in any way undermine the moral credentials or competency of the various parties to the dispute. Where an Aristotelian or Thomist might look to passion, vice, and rationalization (and not *just* the burdens of judgment) as an explanation for moral disagreement, Rawls privileges the “burdens of judgment” and seems decidedly reluctant to give a major explanatory role to moral defectiveness, bad faith, self-interest, or rationalization.<sup>28</sup> Where an Aristotelian assumes that some moral agents are wiser and more competent moral judges than others on account of their superior virtue, Rawls assumes with most neo-Kantians that most of us are equally competent moral judges whose moral qualifications cannot credibly be brought into question, unless perhaps we deliberately flout universally recognized moral rules. In other words, one of the premises driving Rawls’s account of moral divergence is a kind of moral egalitarianism that is distinctive of neo-Kantian morality.<sup>29</sup>

In order to get from a presumption of good faith and equal competency in moral disagreement to the primacy of political over comprehensive justifications, Rawls needs to rely, at least implicitly, upon a reasonably contestable contractarian political morality in addition to some controversial claims of fact about our society. Start with the controversial sociological claims: Rawls claims that there is, *in fact*, a commonly-accepted political morality, or at least the elements of a political morality, already implicit in our society’s political traditions and practices, significant or ‘thick’ enough to do the work of public reason, i.e. to meaningfully adjudicate disputes that arise over basic justice and constitutional essentials; and that what he calls the “political values of public reason,” as specified in political liberalism, constitute a reasonable interpretation of this political

morality that any reasonable person could endorse. But the practices of our democracy consistently belie this claim. Time and time again, constitutional disputes and disputes over basic justice are cast in terms of different fundamental moral considerations by different parties to the dispute, all claiming to espouse the same democratic heritage, none claiming to reject the traditional values of constitutional democracy such as liberty, equality, due process, and rule of law. For example, while ostensibly disputants all subscribe to the value of liberty, their interpretations of liberty diverge so dramatically that people seem to be talking past each other rather than engaging in a meaningful exchange of arguments.<sup>30</sup> Examples of this abound, but we need only mention a few here: whether polygamy is sanctioned by freedom of religion; whether euthanasia is an act of compassion or of irresponsible killing; whether there is a constitutional right to, permission of, or prohibition of, same-sex marriage; whether school prayer is a violation of the first amendment; whether there is a constitutional or moral entitlement to, permission of, or prohibition of, abortion.<sup>31</sup> In short, most of us affirm the same basic concepts (liberty, equality, etc.) at a certain level of abstraction, but espouse substantially different interpretations of those concepts and what they entail in practice. The sociological preconditions for public reason, at least as Rawls envisages it, are at best highly questionable—though I would be inclined to say they are simply unsustainable. For the purposes of my argument, all I need to show is that they are highly questionable.

Aside from some controversial claims of fact (a basic sociology, if you will), the primacy of the political is grounded in at least one crucial normative assumption associated with a contractarian political morality. This assumption is not always fully spelt out by Rawls, but deserves more attention than it receives. The assumption is that any minimally

competent, cooperative, epistemically responsible, moral agent ought to be capable in principle of consenting to the laws that govern his conduct, where “in principle” does not mean “as a human being,” but in his present moral condition—assuming only participation in a liberal democratic political culture and some minimal moral requisites such as cooperativeness. And this is not just one desideratum to be weighed against many others, but central and primary in the justification of law. Political liberalism, in other words, places a premium on consent to law that is in keeping with a vision of society as a contract among equals. Where consent comes into conflict with other values or goods such as the moral ecology of society<sup>32</sup>, unborn life, or the stability of family life, consent tends to win out, since it is very difficult to secure, or even imagine, the unanimous agreement of minimally reasonable people on those other values.

Once we assume the centrality of consent to political justification, it then makes sense to seek out a category of reasons that are or can be persuasive to any reasonable person, reasons that can function as a resource for justifying law to all reasonable citizens: what Rawls calls “political” reasons. Furthermore, granting the centrality of consent to justification, it makes sense to withhold coercive measures to the extent that they fail to secure a suitably “political” justification.

I want to argue that the moral primacy or virtually overriding weight attached to reasonable consent by political liberalism is itself something that is subject to reasonable disagreement, and is eminently susceptible to the burdens of judgment. In the event that I am right on this point, the reciprocity requirement grounding the duty of civility is itself reasonably contestable and therefore fails the reciprocity test. It is literally self-defeating.

In order to show that the moral primacy of consent presupposed by the duty of civility is subject to reasonable disagreement, I will show how this disagreement is subject to the burdens of judgment in a dispute among (thinly) reasonable persons. Once this is established, the duty of civility, insofar as it occupies a central and weighty place in the political justificatory process, can be seen to violate citizens' political autonomy, and as such, is best dispensed with if we are to be faithful to Rawls's own principles.

Reasonable—that is, thoughtful, epistemically and morally responsible—citizens may use their rational and moral powers to reach different conclusions, in good faith, about (i) how we are to understand consent (whether hypothetically, tacitly, actually, or otherwise) and (ii) the weight to be attached to consent vis-à-vis other moral desiderata in the justification of law and policy. There is nothing rationally self-evident or obvious about how to either (i) specify the desideratum of consent or (ii) weigh it against other desiderata such as justice, human well-being, rational autonomy, etc. One might be inclined to agree with certain cases where social justice was furthered by acts that apparently overrode the consent of (some) reasonable persons, e.g. the American civil war and *Brown v. Board of Education*.<sup>33</sup> However, it seems more debatable whether or not we should override the consent of drug addicts (not guilty of other crimes such as theft), viewers of pornographic films, parents who educate their children in unconventional values, parents who fail to provide adequate parenting to their children, etc., for the sake of some other good, or for the sake of the well-being of the coerced. To the argument that these cases do not fall under constitutional essentials and basic justice and therefore are not affected by the requirement of reciprocity, I would reply that very great interests of persons are at stake in such cases, including personal autonomy and integration into society. To the extent that

such cases (or other cases like them) implicate constitutional essentials and basic justice, there is no reason from Rawls's perspective to exempt arguments about them from the duty of civility.

To demand that the principles settling these problems meet a reciprocity requirement is effectively to take sides in a dispute among reasonable persons about a complex issue that is subject to the burdens of judgment. Imposing a reciprocity requirement prior to political discourse preemptively settles the problem of how much weight to attach to consent vis-à-vis other moral desiderata. But this is a problem subject to the burdens of judgment enumerated by Rawls himself: (i) different considerations, even assuming their relevance is accepted by all, may be weighted differently by different persons. The autonomy of the person does not obviously trump his physical and psychological health and well-being, nor does it obviously trump common goods such as public order and the stability of family life, except in the eyes of some; (ii) our moral and political judgments are influenced by our total life experience, which necessarily differs across persons. How we judge the problem of consent is obviously affected by the political and religious beliefs of our parents and friends, and the ways in which we have experienced our own freedom and the freedom of others in our lives, the goods or evils we have seen flowing from acts overriding consent, etc. (iii) Normative considerations may be advanced in favor of both sides of an issue, producing a conflict of values difficult to mediate: clearly, there is a normative argument for weighing consent very heavily in our political judgments deriving from the value of political autonomy; but there is also an argument for weighing the common good and the well-being of individuals more heavily than autonomy, derived from a more substantive or positive ideal of freedom. (iv) A hard

choice between many possible goods must be made in social and political policy-making—there is a limited social space which cannot instantiate the full range of values. If we reflect upon what kind of social goods we wish to instantiate, we are forced to choose between some goods associated with individual freedom to experiment with one's life free from coercion, and other goods associated with a social environment structured by shared expectations of non-destructive behavior (e.g. the expectation that members of the society not devote their lives to the consumption of drugs).

I have argued that the duty of civility, given the significant psychological and social constraint it imposes on citizens' participation in the political process and on the laws and policies emerging from that process, must itself be justified in a way that meets Rawls's reciprocity test, on pain of violating citizens' political autonomy. I have argued that the reciprocity requirement or test ought to be interpreted, from a Rawlsian perspective, as imposing upon citizens the duty to justify legal limitations of others' autonomy in terms any *thinly* reasonable person (i.e. anyone both epistemically responsible and competent, and prepared to offer and abide by fair terms of cooperation) could accept, notwithstanding differences in their reasonable comprehensive doctrines. But as I have shown, the reciprocity requirement itself, which forms a central part of the justification for the duty of civility, attaches a high and often overriding priority to consent. Given that the weight attached to consent as a moral-political desideratum is a matter over which (thinly) reasonable persons can reasonably disagree, the justification for the duty of civility, viz. the reciprocity requirement, is literally self-defeating, i.e. it fails its own test of reciprocity. In other words, the duty of civility and its underlying reciprocity requirement are not justified in terms any reasonable person could accept, and thus violate citizens' autonomy.

### **§3 Why Wenar's Attempt to Salvage Political Liberalism from the Charge of Incoherence Fails**

I would now like to consider a proposal by Leif Wenar to reform Rawls's concept of reasonableness and thus salvage Rawls's ideal of public reason from internal incoherence. Ten years ago, Wenar published an article entitled "Political Liberalism: An Internal Critique"<sup>34</sup> in which he argued that Rawls's account of reasonableness is in violation of his commitment to advance an account that is "political, not metaphysical." Upon this general proposition Wenar and I are in perfect agreement. However, Wenar also argued that political liberalism "might live up to Rawls's image of a political conception" (34) if stripped of certain controversial elements, namely the burdens of judgment, the reasonable moral psychology, and political constructivism. The claim that is of principal interest to me, and strikes me as highly problematic, is that the reciprocity requirement can be preserved pretty much as is within political liberalism without vitiating its claim to be "political, not metaphysical." Whereas my argument seeks to problematize Rawls's reciprocity requirement and thus effectively undermine the whole apparatus of Rawlsian public reason, Wenar's critique of political liberalism leaves the reciprocity requirement untouched in its essentials, and is thus considerably less radical or far-reaching than mine with respect to public reason.

I shall argue that Wenar's attempt to reformulate political liberalism in a way that is compatible with the principle of reciprocity is unsuccessful, for two reasons: first, by eliminating the burdens of judgment component of reasonableness, Wenar removes an essential rationale for the reciprocity requirement. Secondly, even if we concede that the

reciprocity requirement survives Wenar's reformulation of reasonableness, Wenar's attempt to derive it from the sense of fairness can only work against the backdrop of unspoken moral assumptions that are too philosophically partisan to support an overlapping consensus of reasonable comprehensive doctrines.

According to Wenar, the burdens of judgment can be reasonably rejected as an explanation of moral disagreement and are likely to be rejected by many citizens across different religious faiths, in particular Christianity and Judaism. In addition, Wenar argues that the reason Rawls insists upon recognition of the burdens of judgment as a criterion of reasonableness is that the burdens of judgment enable him to explain how an overlapping consensus among diverse comprehensive doctrines might come about. But explaining the evolution of an overlapping consensus is inessential to public reason, which aims principally to mediate our practical political disagreements. Consequently, Wenar suggests that we purge political liberalism of the burdens of judgment (in addition to the reasonable moral psychology and political constructivism), so that it can ground an overlapping consensus among society's main comprehensive doctrines.<sup>35</sup>

I agree with Wenar that the burdens of judgment are reasonably contestable as an account of moral disagreement (see §2.3 above). However, they not only serve the function of explaining the emergence of an overlapping consensus: they also form an essential element of the argument for the principle of reciprocity as understood by Rawls. Without the burdens-of-judgment explanation of moral disagreement, the principle of reciprocity is much less compelling. According to the burdens of judgment, our political-moral disagreements are frequently the result of differences in the perspectives and backgrounds of the parties (e.g. diverse life histories and the difficulties associated with complex

judgments) that are in no way attributable to moral malice, irresponsibility, or irrationality. This explanation of disagreement preserves the *bona fides* of the parties to the disagreement and thus pre-empts any attempt to argue that moral and religious disagreements are due to the willful, stubborn, or irrational adherence of individuals to immoral or wrong-headed views. If we could explain disagreement in terms of the moral irresponsibility or irrationality of one of the parties, the case for respecting that party's judgment in political decisions would be substantially weakened, while the case for disregarding her opinion and overriding her autonomy would be substantially strengthened. In short, without the burdens-of-judgment explanation of moral disagreement, Rawls's principle of reciprocity would be much less compelling as a norm of political engagement.

Supposing we concede that the reciprocity requirement can indeed survive Wenar's reformulation of political liberalism: It still presupposes, as I have already argued, a deeply controversial contractarian worldview that adherents of many of society's principal comprehensive doctrines, including (to take Wenar's examples) Christianity and Judaism, and (to take an example of my own) neo-Aristotelian ethics cannot affirm in good conscience. On Wenar's limited reconstruction of reasonableness, "reasonable persons have the two moral powers and the powers of thought and judgment, have a determinate conception of the good, are able to be normally cooperating members of society, and are ready to abide by fair terms of cooperation" (38). Wenar argues that "the sense of justice" (one of the two moral powers attributed to reasonable persons) and especially the "desire to propose and abide by fair terms of cooperation" imply "a willingness 'to act in relation to others on terms that they also can publicly endorse'."<sup>36</sup> In other words, Wenar, like Rawls, derives the principle of reciprocity directly from the requirements of reasonableness.

But this derivation cannot be taken for granted. It is not self-evident that possessing a sense of justice or a willingness to propose and abide by fair terms of cooperation imply acceptance of the principle of reciprocity as a constraint upon one's political participation. Only by silently assuming a contractarian morality that puts consent and autonomy at the center of political legitimacy can Wenar move from the sense of fairness to adherence to the principle of reciprocity. And this sort of contractarian moral theory, as I have already shown (§2.3 above), can be contested by reasonable persons and thus cannot undergird an overlapping consensus of conscientiously and responsibly held comprehensive doctrines in our society, such as Christianity, Judaism, and neo-Aristotelian ethics. I need not rehearse my earlier argument for this conclusion, but I would like to give a few examples to illustrate the point further.

Citizens who believe that marriage and family life can only be properly regulated in light of a "thick" understanding of human nature, using the tradition of natural law as a guide, and who wish to restrict the definition of marriage to marriage between a man and a woman on that basis, will likely find that their political perspective falls foul of public reason, since its presuppositions are not sufficiently "mainstream" or implicit in our political culture to count as a "political conception" of justice. Similarly, those citizens who wish to argue against abortion based on the sacredness of human life will likely fall foul of public reason, given the readily identifiable derivation of notions such as sacredness from Christian or other religious "comprehensive doctrines." Such citizens may be committed to honoring fair terms of cooperation, respectfully and peacefully engaging the democratic process, respecting the rights of other citizens, and abiding by the outcome, yet view the duty of civility and its underlying reciprocity requirement as an exaggerated

construal of the principle of consent and an undue burden on their integrity. Citizens, on the other hand, who wish to extend the definition of marriage to same-sex unions or argue for the legitimacy of legalized abortion, will likely find that the centrality of consent embodied in the principle of reciprocity, combined with the relative pervasiveness of the language of liberty and autonomy in the public culture of liberal democracies, will virtually guarantee the political legitimacy of their arguments.

Whether those citizens whose ethical convictions put them at odds with the duty of civility openly flout the duty or reluctantly conform to it, they are likely to experience a substantial degree of resentment and alienation towards a political culture so hostile to their ethical outlooks, and some degree of resentment towards those whose ethical outlooks are unfairly advantaged by such a culture. In short, whether they have chosen to comply with the duty of civility or not, many citizens who engage the political process will feel disadvantaged and marginalized by the process, and may frequently assess the legitimacy of the outcome with suspicion or at least with significant reservations.

Of course, there will also be those for whom the price of political participation, whether in the role of rebel or in the role of reluctant conformist, is too high. They may feel the strain of opposing commitments, or the stress of societal disapproval and marginalization, is not worth the benefits of participation. In that case, they will simply disengage from the political process, or only enter it occasionally, in skirmish-like fashion. Their allegiance to the wider polity will be weakened as they form their own communities and adopt a stance of stoic resistance or detachment towards the wider political culture.

#### **§4 Conclusion**

The bulk of my argument has been devoted to showing that there is no reason to believe that Rawls's duty of civility, given its philosophical and moral presuppositions, could be accepted by any "reasonable person" as a constraint on political justification, except by an arbitrary stipulation of the "reasonable" that itself violates a central aspect of the reasonable: recognition of the burdens of judgment (i.e. morally innocent sources of moral disagreement) and their consequences for the use of public reason. I began by setting out in its essentials the Rawlsian rationale for the duty of civility. I then showed this rationale, viz. the reciprocity requirement, to be self-defeating as a political norm, given the assumptions that animate it. Thirdly, I argued that my case against the duty of civility, if successful, renders ineffectual Leif Wenar's attempt to salvage reasonableness and public reason from internal incoherence.

The incoherence and extreme impracticality of the reciprocity requirement at the heart of political liberalism suggest the need for liberal theorists, and political liberals in particular, to radically re-think the notion of reciprocity in such a way that it is internally coherent and has some chance of (morally) regulating the actual political practices of our world. As I have shown, such a re-examination is not prompted by illiberal considerations, but by considerations internal to the liberal project itself. Insofar as the principle of reciprocity is the core idea of political liberalism, my critique of reciprocity strikes at the very heart of political liberalism. However, my critique in no way precludes the possibility of a reformed liberalism grounded in a suitably chastened concept of reciprocity. For example, even if we concede the incoherence of Rawls's principle of reciprocity, it is hard to deny that politics in a pluralistic society demands of us the capacity to identify with, or imaginatively appropriate, the perspectives and interests of persons with very different

worldviews and social and religious backgrounds from our own. What exact shape a reformed concept of reciprocity would take is not the concern of this essay, but that *some such concept* is required seems undeniable.

Because of the centrality of reciprocity to liberalism's attempt to render the social world justifiable to all of its members, a radical revision of our understanding of this concept would have far-reaching implications for the liberal justificatory project<sup>37</sup> as a whole. It would require us to re-think a rich network of concepts within the liberal tradition, including public reason, autonomy, respect, legitimacy, reasonableness, freedom of conscience, and freedom of speech. Until this more constructive work is undertaken, the implications of the demise of Rawlsian reciprocity for liberalism remain unclear or suggestive at best. While this paper has been mainly critical rather than constructive in scope, it does aim to give political liberals pause to re-examine the direction Rawls has taken the liberal project, and consider possibilities for serious and far-reaching reform.

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## Endnotes

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<sup>1</sup> This article could not have been written without some very fruitful exchanges with peers and mentors. I am grateful for having had the opportunity to present versions of the paper to the *Association for Political Theory* (Calvin College, Grand Rapids, October 17, 2003), the *Political Science Graduate Conference* (Marquette University, Milwaukee, March 19, 2005), and the Notre Dame graduate ethics forum (University of Notre Dame, Indiana, April 28, 2005). But special thanks are due to my advisor, Prof. Michael Zuckert, for his unfailing advice, encouragement, and critical feedback, and to Professor Paul Weithman for his thoughtful comments on an early draft. Last but by no means least, I must give credit to AJPS's editors and reviewers, who pushed me to clarify my arguments and helped me identify and repair serious weaknesses in earlier drafts of the article. The article is much stronger due to their input.

<sup>2</sup> See Jurgen Habermas, *The Theory of Communicative Action*, Vols. 1 & 2, trans. Thomas McCarthy (Boston: Beacon Press, 1984, 1987).

<sup>3</sup> See, for example, Ronald Dworkin, "Foundations of Liberal Equality", in *The Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1990), 1-120; Christopher Eberle, *Religious Convictions in Liberal Politics* (Cambridge: Cambridge University Press, 2002); and Michael J. Perry, "Why Political Reliance on Religiously Grounded Morality is not Illegitimate in a Liberal Democracy", *Wake Forest Law Review* 36 (Summer 2001): 217-249.

<sup>4</sup> See, for example, Wolterstorff's contributions to Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (London: Rowman & Littlefield Publishers, Inc., 1997); and Patrick Neal, "Political

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Liberalism, Public Reason, and the Citizen of Faith", in *Natural Law and Public Reason* (Washington, D.C.: Georgetown University Press, 2000), ed. Robert P. George and Christopher Wolfe, 171-201.

<sup>5</sup> See, for example, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); George Sher, *Beyond Neutrality: Perfectionism and Politics* (Cambridge: Cambridge University Press, 1997); and Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988). For a particularly astute and broad-ranging critique of Rawls's efforts to remain "political, not metaphysical," see Leif Wenar, "Political Liberalism: An Internal Critique", *Ethics* 106, 1 (October 1995): 32-62.

<sup>6</sup> For a loosely Rawlsian argument against the duty of civility, drawing on Korsgaard's notion of a "practical identity," see Paul Weithman, "Citizenship, Reflective Endorsement and Political Autonomy", *The Modern Schoolman* LXXVIII, 2 & 3 (January/March 2001): 135-149. A good propositional summary of Rawls's argument can be found in Thomas Christiano, "Is There Any Basis for Rawls's Duty of Civility? (A Commentary on Weithman)", *The Modern Schoolman* LXXVIII, 2 & 3 (January/March 2001): 151-161.

<sup>7</sup> See John Rawls, *Political Liberalism*, *The John Dewey Essays in Philosophy* (New York: Columbia University Press, 1996 [1993]), 10. From now on, references to *Political Liberalism* will be given as page numbers in parentheses in the main text. *Political Liberalism* will be abbreviated to PL in the endnotes.

<sup>8</sup> John Rawls, *A Theory of Justice*, 2nd ed (Cambridge, MA: The Belknap Press of Harvard University Press, 1999 [1971]).

<sup>9</sup> "We try, so far as we can, neither to assert nor to deny any particular comprehensive religious, philosophical, or moral view, or its associated theory of truth and the status of

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values. Since we assume each citizen to affirm some such view, we hope to make it possible for all to accept the political conception as true or reasonable from the standpoint of their own comprehensive view, whatever it may be” (PL, 150).

<sup>10</sup> Unfortunately, Rawls is never quite this explicit about what he means by reciprocity and the notion of “reasonable acceptability.” However, I believe this is a plausible interpretation of reciprocity, given that Rawls himself identifies as the “criterion of reciprocity” the proposition that “our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions” (introduction to PL, xlv). Clearly, reciprocity involves a sense of fairness, but fair terms of cooperation are precisely those that every participant “may reasonably accept, provided that everyone else likewise accepts them” (PL, 16). It thus turns out that a basic orientation towards *reasonable acceptance by all* is at the heart of the virtue of reciprocity.

<sup>11</sup> Although the term “accessibility” can be misleading, it does capture an important dimension of the reciprocity requirement. Even a reason whose application or role in an argument I ultimately reject may, in an important sense, be accessible to me: after all, people disagree all the time about political outcomes while acknowledging that the reasons motivating their adversaries do have some weight in political matters, and are not inconsistent, as such, with the freedom and equality of all.

<sup>12</sup> See §1.1 above on the distinction between public and nonpublic reasons.

<sup>13</sup> It is important to note that Rawls views this account of liberty and equality as specifying the conditions of *political autonomy*, not moral autonomy as understood by any particular comprehensive doctrine, say Kantian morality or natural law theory (PL, xlv-xlv).

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<sup>14</sup> For example, the relation between adults and children, as well as between adults and the mentally incompetent, are not relations between equally competent and responsible agents, and as such, respect here takes on a different hue.

<sup>15</sup> See PL, 247: “In recognizing others’ comprehensive views as reasonable, citizens also recognize that, in the absence of a public basis of establishing the truth of their beliefs, to insist on their comprehensive view must be seen by others as their insisting on their own beliefs. If we do so insist, others in self-defense can oppose us as using upon them unreasonable force.” For a neat summary of the broadly Rawlsian understanding of the relation between respect and public reason, see Eberle, *Religious Convictions in Liberal Politics*, 52-54.

<sup>16</sup> One interesting attempt to outline a full-blown epistemology of public reason, that initially takes its bearings from Rawls but rejects Rawls’s philosophical minimalism, is Gerald F. Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford and New York: Oxford University Press, 1996).

<sup>17</sup> The differences that consistently arise in political and moral argumentation are also noted by Hobbes, and he too attempts to ground the political order in ways that will be persuasive to all, notwithstanding these differences. But whereas Rawls appeals to “shared truths” or “intuitions” of our political culture, Hobbes appeals primarily to the passions, and most fundamentally, the passion for self-preservation. See Hobbes’s *Epistle Dedicatory* “To the Right Honourable William, Earle of Devonshire, My most honoured Lord,” in Hobbes, *Philosophical Rudiments Concerning Government and Society [De Cive]*, ed. Howard Warrender (Oxford: Clarendon Press, 1983), esp. xv.

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<sup>18</sup> Rawls embraces a moderately optimistic anthropology, which insists that “[w]e must start with the assumption that a reasonably just political society is possible, and for it to be possible, human beings must have a moral nature, not of course a perfect such nature, yet one that can understand, act on, and be sufficiently moved by a reasonable political conception of right and justice to support a society guided by its ideals and principles” (lxii).

<sup>19</sup> For a more detailed explanation of the burdens of judgment, see PL, 56-57. The burdens of judgment include conflicting empirical evidence, vagueness and indeterminacy of concepts with respect to hard cases, diversity of life experience, and conflicting normative considerations.

<sup>20</sup> Rawls is not quite this explicit in his argument, but it seems to me to be the only plausible reading of his claim that “reasonable persons see that the burdens of judgment set limits on what can be reasonably justified to others...It is unreasonable for us to use political power, should we possess it, or share it, with others, to repress comprehensive views that are not unreasonable” (PL, 61).

<sup>21</sup> As Rawls puts it, “the substantive content and the guidelines of inquiry of a political conception” should be “complete,” meaning that “the values specified by that conception can be suitably balanced or combined, or otherwise united, as the case may be, so that those values alone give a reasonable public answer to all, or to nearly all, questions involving the constitutional essentials and basic questions of justice” (PL, 225).

<sup>22</sup> One of the most famous descriptions of the subtle and powerful effects of non-legal, social rules on people’s lives is to be found in John Stuart Mill, *On Liberty* [1859], ch. 1, pp. 8-9, in *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), ed. John

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Gray: “Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant—society collectively, over the separate individuals who compose it—its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating more deeply into the details of life, and enslaving the soul itself....”

<sup>23</sup> For examples, see my discussion of same-sex marriage and abortion on pp. 32-33 below.

<sup>24</sup> See Leif Wenar, "Political Liberalism: An Internal Critique", *Ethics* 106, 1 (October 1995): 32-62, 35-36.

<sup>25</sup> See *Ibid.*, 36, n. 6.

<sup>26</sup> *Ibid.*, 37.

<sup>27</sup> This is captured by the third role Rawls identifies for political philosophy in John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Massachusetts and London, England: The Belknap Press of Harvard University Press, 2001): “political philosophy may try to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form” (3). Cf. Jeremy Waldron, who traces the social contract back to a view he believes “most liberals...share: that the social order must be one that can be

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justified to the people who have to live under it” (“Theoretical Foundations of Liberalism,” in Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), 57-58.

<sup>28</sup> Thus, Rawls insists that “[t]he account of [the sources, or causes, of disagreement among reasonable persons] must be such that it is fully compatible with, and so does not impugn, the reasonableness of those who disagree” (55). But even if we grant (as I readily do) that many moral disagreements are of this kind, it does not follow that all are, or that the most salient issues in political morality are of this kind. This would need to be argued, yet Rawls does not offer us reasons for this position. Instead, he simply asserts that this is the “right kind” of explanation for moral disagreement in a democratic culture (55).

<sup>29</sup> The alternative view of ethics, which distinguishes more from less mature moral agents, is cogently put by Hursthouse, who points out that virtue ethics (unlike Kantian ethics) “takes seriously Aristotle’s point that moral knowledge, unlike mathematical knowledge, cannot be acquired merely by attending lectures and is not characteristically to be found in people too young to have much experience of life. A normative ethics should not aim to provide a decision procedure which any reasonably clever adolescent could apply” (Rosalind Hursthouse, *On Virtue Ethics* (Oxford and New York: Oxford University Press, 1999), 18. For an Aristotelian/Thomistic treatment of moral divergence, see Robert P. George, *Making Men Moral* (Oxford: Clarendon Press, 1993).

<sup>30</sup> See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Duckworth, 1981), for a good case for the apparent futility and incommensurability of moral argumentation in contemporary Western societies such as the United States.

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<sup>31</sup> George Klosko undertakes an empirical study of American public opinion to determine whether, or to what extent, there is evidence of an “overlapping consensus” on political values, and not surprisingly, he finds that though there is a rough consensus (somewhere around 70%) on constitutional values stated in the abstract, and on certain procedural values such as due process and rule of law, the consensus quickly dissipates as soon as those values are applied to individual cases (George Klosko, *Democratic Procedures and Liberal Consensus* (Oxford: Oxford University Press, 2000)).

<sup>32</sup> For the notion of a “moral ecology” to be protected by law, see George, *Making Men Moral*.

<sup>33</sup> *Brown v. Board of Education*, 344 U.S. 1 (1952). I am not suggesting that the case for coercing dissenters is self-evident or that no plausible counter-argument can be advanced. These cases are rather meant to illustrate that people ordinarily committed to upholding the principle of consent are often willing to make exceptions to it on moral grounds or on grounds of justice.

<sup>34</sup> *Ethics* 106, no. 1 (1995): 32-62. I have benefited greatly from Wenar’s painstaking analysis and critique of Rawls’s concept of reasonableness. My critique of his position should not be allowed to obscure how much I have learnt from his essay.

<sup>35</sup> The argument summarized in this paragraph occurs on pp. 41-48 of Wenar’s essay.

<sup>36</sup> Leif Wenar, “Political Liberalism: An Internal Critique”, 40. The text enclosed in single quotations is a citation of *Political Liberalism*, 19.

<sup>37</sup> Liberalism is fundamentally a *justificatory* project in the sense that it aims to rationally *justify* our social and political institutions to each and every individual. This may be cashed out in a variety of ways, ranging from actual consent (this is so impractical that it is rarely

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a serious contender) to rational justification available in principle to all. One book that focuses on the justificatory aspirations of liberalism is Gaus, *Justificatory Liberalism*.