

# Law, Religion, and Public Reason

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## Introduction

This chapter proposes that scholars of law and religion can learn much from debates over ‘public reason’ that have preoccupied liberal political philosophers over the last twenty-five years. The often highly abstract and technical character of such debates can make them seem remote from concrete legal questions. We seek to show, however, that they bring to the fore fundamental questions about both the relation between law and religion and the very legitimacy of law in a religiously pluralist yet increasingly secularised society, in which the majority of citizens, and many legal practitioners, lack familiarity with the character of religious belief and practice.

Debates about the significance of ‘public reason’ for law are not, in fact, confined to the academy. Consider the following opinion, delivered by Lord Justice Laws within his judgment on an application for leave to appeal in *McFarlane v Relate Avon Ltd*:<sup>2</sup>

“[T]he conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious be-

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<sup>1</sup> Sections I and II draw on material first appearing in Jonathan Chaplin, ‘Law, Religion and Public Reasoning’, *Oxford Journal of Law and Religion* 1 (2012): 319-337. Billingham has substantially revised that material, and is the primary author of Section III. Chaplin is the primary author of Section IV. Chaplin leans towards what below we call ‘argumentative democracy’; Billingham has sympathies with the ‘convergence view’. Here we present a joint survey of the territory.

<sup>2</sup> [2010] EWCA Civ 880; [2010] IRLR 872. Laws LJ was criticising an impassioned witness statement submitted by former Archbishop of Canterbury Lord Carey in support of the appellant Gary McFarlane.

liefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic” (§23, 24).

This opinion has no legal force and its formulation is problematic in several respects.<sup>3</sup> But it has been cited appreciatively in subsequent cases, suggesting that it captures a much wider British judicial standpoint.<sup>4</sup> Among the claims jostling for attention in the passage is the claim that if the reasons justifying laws are to be rational, objective, conducive to the public good and non-divisive, they must be ‘secular’, or, at least, must not be grounded in only one particular faith. This claim is not identical to the well-established principle of formal judicial neutrality towards religious belief (which we take for granted in this chapter). Instead, it implies the more momentous claim that religious reasoning cannot, by definition, be ‘public’ and so cannot legitimately be presented as the justification for laws. Laws LJ thus inadvertently stumbles into the heart of the public reason debate. This debate does not only, or even primarily, concern issues of religious freedom,<sup>5</sup> or even what Sandberg terms ‘religion law’.<sup>6</sup> It embraces the far wider question of what sorts of public justifications citizens and officials in a liberal democracy must present in order to satisfy core liberal democratic commitments to the very freedom and equality of citizens (thus avoiding leaving some ‘out in the cold’, as Laws LJ puts it).

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<sup>3</sup> For example, it seems to conflate the claim that ‘public reasons’ should justify general applicable laws (which is our focus in this chapter) with the distinct claim that religious citizens should not receive exemptions from such laws (which was the focus in *McFarlane*). Yet advocates of public reason liberalism can consistently endorse religious exemptions. Indeed, Quong, who we discuss below, does so. See Jonathan Quong, ‘Cultural Exemptions, Expensive Tastes, and Equal Opportunities’, *Journal of Applied Philosophy* 23 (2006): 53-71. See also Jonathan Chaplin, ‘Religious Influence on Law: a Response to Lord Justice Laws’, *UKSC Blog*, 11<sup>th</sup> June 2010, available at <http://ukscblog.com/religious-influence-on-law-a-response-to-lord-justice-laws>.

<sup>4</sup> E.g., *R (Johns) v Derby City Council* [2011] EWHC 375 (Admin); [2011] 1 FLR 2094.

<sup>5</sup> For a treatment of how religious freedom cases are, however, substantively impacted by public reason concerns, see Peter Cumper and Tom Lewis, ‘Public Reason’, Judicial Deference and the Right to Freedom of Religion and Belief under the Human Rights Act 1998’, *King’s Law Journal* 22 (2011): 131-156.

<sup>6</sup> Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011), p. 10.

This chapter presents a critical overview of current debates about religion and public justification among advocates of ‘public reason liberalism’ and their critics. Section I sets out the most prominent (Rawlsian-inspired) case against the use of religious public reasoning. Section II examines three of the most significant rejoinders to that case. Section III considers four attempts to move, in different ways, ‘beyond Rawls’ towards more satisfactory accounts of the relation between religion and public reason. The Conclusion suggests possible lines of future research for scholars of law and religion in the light of public reason debates.

## **I. The Case Against Religious Public Reasoning**

In what follows, the term ‘religiously-based reasoning’ will refer to public reasoning about law which is religious in content, explicitly derived from religious belief, appeals to “the pronouncements of a person or institution *qua* religious authority”,<sup>7</sup> or is substantively informed by religious belief (even if such belief is not actually referred to). For public reason liberals, religiously-based reasoning cannot be truly ‘public’. It is necessarily particularistic, and is inaccessible to those who do not share the relevant religious beliefs, and who therefore cannot recognise it as providing *reasons* for laws at all. Political reasoning that can truly pass muster as decisive in justifying laws must appeal to reasons that are (at least in principle) universally accessible to, acceptable to, and/or shareable by all citizens.<sup>8</sup> As Larmore puts it, “we honour public reason when we bring our own reason into accord with the reason of others, espousing a common point of view for settling the terms of our political life.”<sup>9</sup>

The central anxiety among defenders of this view arises over the *public justification* of laws. Public reason liberals set a high bar for what is to count as an acceptable form of public reasoning, due to a particular interpretation of what it is to respect citizens as ‘free and equal’. For them, it is not enough that a law be passed after extensive public consultation and debate and by a democratic

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<sup>7</sup> This phrase is from Robert Audi, ‘Liberal Democracy and the Place of Religion in Politics’, in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Rowman & Littlefield, 1997): 1-66, p. 26.

<sup>8</sup> The description of public reason liberalism in this section exclusively focuses on what has become known as the ‘consensus conception’. We discuss the alternative ‘convergence conception’ below.

<sup>9</sup> Charles Larmore, ‘Public Reason’, in Samuel Freeman (ed.), *The Cambridge Companion to Rawls* (Cambridge University Press, 2003): 368-393, p. 368.

decision-procedure in which every citizen is equally free to speak and participate. It is not only the *constitutional procedure* that must respect citizens' freedom and equality. The *public justification* offered in support of the law also has to meet a test of acceptability: it has to depend on reasons that every citizen could in principle find admissible, or recognise as having normative force. Such reasons are 'public reasons'. As Rawls puts it, in his statement of what he calls the 'liberal principle of legitimacy', an "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."<sup>10</sup> Imposing a law on other citizens whom we know cannot recognise the validity of the justifying reasons behind it is to wield authority over our compatriots arbitrarily (thus violating their freedom) and is a failure of reciprocity (thus treating them unequally).<sup>11</sup> Political power is the shared power of free and equal citizens. Laws that are not publicly justified – i.e. justified by public reasons – force all citizens to abide by the beliefs and standards of some. Such laws use shared power for private ends – ends that some do not endorse. Thus, Quong writes that public reason liberalism's "foundational commitment is to the moral claim that persons (or citizens) are free and equal, and thus the exercise of political power is legitimate only when it can be publicly justified."<sup>12</sup>

Since religious reasons are not public reasons, they cannot play a role within public justification. Religious reasons might not be the *only* kind of non-public reason; controversial secular conceptions of the good also cannot provide proper public justification, on many accounts. Nonetheless, religious reasons are generally taken to be the archetype of reasons that cannot be accepted by all.

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<sup>10</sup> John Rawls, *Political Liberalism*, expanded edition (Columbia University Press, 2005), p. 217.

<sup>11</sup> Many public reason liberals focus this claim on 'coercive' laws, viewing the primary wrong as the *coercion* of others on the basis of reasons they cannot accept. This might mean that non-coercive laws need not meet as stringent standards. However, some theorists believe that all laws are coercive, and clearly all law ultimately rests on the coercive capacity of the state. Further, some public reason liberals have explicitly disavowed the preoccupation with coercion. See Colin Bird, 'Coercion and Public Justification', *Politics, Philosophy & Economics* 13 (2014): 189-214; Jonathan Quong, 'On the Idea of Public Reason', in Jon Mandle and David A. Reidy (eds.), *A Companion to Rawls* (Wiley-Blackwell, 2014): 265-280, pp. 271-273. We set this issue aside here.

<sup>12</sup> Jonathan Quong, *Liberalism Without Perfection* (Oxford University Press, 2011), pp. 2-3.

Public reason liberals (generally<sup>13</sup>) believe that both public officials and citizens are obligated to offer one another public reasons in their public political deliberations. Since only public reasons can justify the exercise of political power, citizens display inadequate respect for one another if they support laws or policies without possessing and offering such reasons. Thus, Klemp and Macedo write that “when seeking to pass a law that will be binding on all, public officials and citizens should offer one another supporting reasons and evidence whose force can be appreciated by all reasonable fellow citizens.”<sup>14</sup> Schwartzman concurs: “when citizens engage in political advocacy, they have a moral duty to justify their decisions according to public reasons that others can reasonably accept.”<sup>15</sup> As Schwartzman suggests, this ‘public-reason-giving requirement’<sup>16</sup> is a moral, rather than a legal, duty.<sup>17</sup> While it should not be coercively enforced, violations of it wrong one’s compatriots.

The duty of restraint is a correlate of the public-reason-giving requirement. If citizens must present their compatriots with public reasons when arguing for laws then they must not support laws for which they lack such reasons. If the only reasons a citizen has for supporting a law are non-public reasons, such as religious reasons, then she should refrain from publicly advocating or voting for that law. This does not mean that religiously-based reasoning is completely barred. Contrary to a widely-held perception, very few public reason liberals have held an ‘exclusionist’ position, according to which religious reasons are completely ruled out of public debate.<sup>18</sup> Most permit citizens to appeal to religious reasons as they engage in political advocacy via public debate, campaigning, lobbying and protesting, and indeed there

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<sup>13</sup> We discuss exceptions to this below.

<sup>14</sup> Nathaniel Klemp and Stephen Macedo, ‘The Christian Right, Public Reason, and American Democracy’, in Brint, Stephen G., and Jean R. Schroedel (eds.), *Evangelicals and Democracy in America, Vol. II: Religion and Politics* (Russell Sage, 2009): 209-245, p. 212.

<sup>15</sup> Micah Schwartzman, ‘The Sincerity of Public Reason’, *The Journal of Political Philosophy* 19 (2011): 375-398, p. 375.

<sup>16</sup> This term is from Marc Stears and Mathew Humphrey, ‘Public Reason and Political Action: Justifying Citizen Behaviour in Actually-Existing Democracies’, *The Review of Politics* 74 (2012): 285-306, p. 287.

<sup>17</sup> See Rawls, *Political Liberalism*, p. 217.

<sup>18</sup> Richard Rorty defends an exclusionist position in his ‘Religion as a Conversation-Stopper’, *Common Knowledge* 3 (1994): 1-6. However, see also Richard Rorty, ‘Religion in the Public Square: A Reconsideration’, *The Journal of Religious Ethics* 31 (2003): 141-149.

might be benefits to citizens doing so.<sup>19</sup> However, such reasons can only ever play a subordinate role. Public reasons must carry the justificatory load.<sup>20</sup> Citizens who rely *exclusively* on religious reasons violate the moral duties of liberal-democratic citizenship.

It is worth noting that the public-reason-giving requirement and duty of restraint apply only in the public political forum.<sup>21</sup> They do not apply within citizens' daily lives, or in their interactions in the 'background culture' of civil society, such as in churches, universities, and other associations. This means that these duties apply more strictly to judges, representatives, and public officials, since they more often operate in the public political forum.<sup>22</sup> Nonetheless, ordinary citizens are also bound by a duty to offer public reasons when advocating for the enactment of a law within the public political forum, and to refrain from supporting laws for which they can provide no such reasons.

Rawls is the most influential public reason liberal, so we will briefly consider some of the features of his view.<sup>23</sup> Rawls starts from the 'fact of reasonable pluralism': under free institutions individuals reasonably come to accept a plurality of competing 'comprehensive doctrines', which offer a more-or-less complete account of values and virtues.<sup>24</sup> These include both religious and non-religious comprehensive worldviews. Given reasonable pluralism, the imposition of laws grounded in a particular comprehensive doctrine necessarily breaches respect for the freedom and equality of all citizens. The reasons that justify laws, then, must be 'political', not comprehensive. They must appeal to a 'political conception of justice', which is freestanding from any particular comprehensive doctrine and draws on values and ideals implicit in the public political culture of liberal democracies. In this way, citizens are offered public reasons for laws – reasons

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<sup>19</sup> On these benefits, see Rawls, *Political Liberalism*, pp. 463-4; James W. Boettcher, 'Public Reason and Religion', in Thom Brooks and Fabian Freyenhagen (eds.), *The Legacy of John Rawls* (Continuum, 2005): 124-151, p. 130.

<sup>20</sup> In Boettcher's terms, most public reason liberals are thus 'weak inclusionists'. James W. Boettcher, 'Strong Inclusionist Accounts of the Role of Religion in Political Decision-Making', *Journal of Social Philosophy* 36:4 (2005): 497-516.

<sup>21</sup> See Rawls, *Political Liberalism*, pp. 215-216.

<sup>22</sup> Ibid., pp. 444-5. For another example, see Aurélia Bardón, 'Religious Arguments and Public Justification', in Jean L. Cohen and Cécile Laborde (eds.), *Religion, Secularism, and Constitutional Democracy* (Columbia University Press, 2016): 273-292, p. 288.

<sup>23</sup> Rawls's position developed over time, in various ways. Here we present what we take to be his final view.

<sup>24</sup> On reasonable pluralism, see *ibid.*, pp. 36-7. On comprehensive doctrines, see pp. 12-13.

that all can reasonably be expected to endorse. Citizens are therefore under a ‘duty of civility’<sup>25</sup> to offer one another “fair terms of cooperation according to what they consider the most reasonable political conception of justice.”<sup>26</sup> The fulfilment of this duty satisfies the ‘criterion of reciprocity’, and enables citizens to enjoy ‘civic friendship’.<sup>27</sup> Again, this does not mean that citizens are never permitted to present non-public reasons to one another. Indeed, “reasonable comprehensive doctrines, religious or non-religious, may be introduced in public political discussion at any time, *provided that* in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support”<sup>28</sup> the law. Religiously-based reasoning is permissible, but must ultimately be superseded by – or, as Chaplin puts it,<sup>29</sup> “chaperoned” by – ‘proper’ public political reasoning.

The fact that political conceptions are freestanding means that acceptance of them does not require the prior acceptance of any particular comprehensive doctrine; political conceptions must not presuppose comprehensive doctrines. But that does not mean that individual citizens’ political conceptions and comprehensive doctrines should be unrelated. Indeed, Rawls holds that citizens’ political conceptions can, and even should, be *subjectively* grounded in their comprehensive doctrine. Citizens may quite properly construe their favoured political conception as grounded in their faith. The political conception thus becomes a ‘module’ within a citizen’s broader worldview.<sup>30</sup> Within a well-ordered society, there is an ‘overlapping consensus’ on the shared values and ideals that make up the content of public reason, with all citizens endorsing those values on the basis of their diverse comprehensive doctrines.

Two further features of Rawls’s view deserve mention. First, Rawls applies public reason restrictions first and foremost to what he calls “constitutional essentials and questions of basic

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<sup>25</sup> Ibid., pp. 444-5.

<sup>26</sup> Ibid., p. 446.

<sup>27</sup> Ibid., pp. 446-7.

<sup>28</sup> Ibid., p. 462. Emphasis added.

<sup>29</sup> Chaplin, ‘Law, Religion’, p. 323.

<sup>30</sup> Ibid., p. 12. This raises the question of whether citizens are permitted to *choose between* competing political conceptions on the basis of their faith. For discussion, see Paul Billingham, ‘Can My Religion Influence My Conception of Justice? Political Liberalism and the Role of Comprehensive Doctrines’, *Critical Review of International Social and Political Philosophy* (forthcoming).

justice,”<sup>31</sup> i.e. to fundamental questions about the structure of political life. This seems to imply that comprehensive considerations can be used in the justification of laws that do not concern these fundamental matters, such that citizens are not bound by the duty of civility with respect to such laws. There is some ambiguity here, however. Rawls never explains *why* he limits the scope of public reason restrictions in this way, and implies that those restrictions *might* also apply more widely, albeit “not in the same way, or so strictly.”<sup>32</sup> Most subsequent public reason liberals, including followers of Rawls, have rejected the limitation in scope, arguing that all laws involve the exercise of political power and therefore all must be justified by appeal to public reason.<sup>33</sup> We will assume this view in the rest of this chapter.

Second, Rawls holds that the United States Supreme Court is the ‘exemplar’ of public reason. This is because “public reason is the sole reason that the court exercises” and the court “is visibly on its face the creature of that reason and of that reason alone.”<sup>34</sup> Further, through its judgments the court articulates what it takes to be the most reasonable understanding of the political values of justice and public reason, which “all citizens as reasonable and rational might reasonably be expected to endorse.”<sup>35</sup> Finally, as exemplar the court gives “public reason vividness and vitality in the public forum,”<sup>36</sup> by clearly interpreting the constitution in a reasonable way. This educates citizens to the use of public reason and the value of political justice. The US Supreme Court, and by extension the judiciary more generally, thus has an important place within Rawls’s account.<sup>37</sup>

Rawls’s theory is complex and sophisticated. He certainly does not endorse a ‘programmatically secularism’ that seeks to impose a secularist faith on the public realm and to privatise religious faith.<sup>38</sup> Nonetheless, he does require religious citizens to recog-

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<sup>31</sup> Rawls, *Political Liberalism*, p. 227

<sup>32</sup> *Ibid.*, p. 215.

<sup>33</sup> See Jonathan Quong, ‘The Scope of Public Reason’, *Political Studies* 52 (2004): 233-250.

<sup>34</sup> Rawls, *Political Liberalism*, p. 231.

<sup>35</sup> *Ibid.*, p. 236.

<sup>36</sup> *Ibid.*, p. 237

<sup>37</sup> For further discussion, see Samuel Freeman, ‘Public Reason and Political Justifications’, *Fordham Law Review* 72 (2004): 2021-2072, pp. 2065-2070. For critique, see Jeremy Waldron, ‘Public Reason and “Justification” in the Courtroom’, *Journal of Law, Philosophy and Culture* 1 (2007): 107-134.

<sup>38</sup> The term ‘programmatically secularism’ is from Rowan Williams, ‘Secularism, Faith and Freedom’, in his *Faith in the Public Square* (Bloomsbury Continuum, 2012), p. 27. For a forthright critique of such secularism in the USA, see Daniel



nise the inadequacy of religiously-based reasoning in justifying the exercise of political power and to abide by a public-reason-giving requirement and a duty of restraint. Many varieties of argument have been developed against such principles of restraint.<sup>39</sup> The next section summarises three of the most compelling objections, which concern empirical impact, integrity, and epistemic symmetry.

## II. Objections to the Principle of Restraint

### A. Empirical Impact Arguments

The first variety of argument against the principle of restraint addresses the *empirical impact* that religiously-based reasoning is thought to have within a liberal democracy. This argument is a response to one of the underlying assumptions of much public reason liberal writing: that religiously-based reasoning is more politically divisive than other forms of public speech. Situations of civil conflict are cited where powerfully-held religious beliefs apparently played a significant contributory role in sowing seeds of division and violence; Eberle calls this ‘the argument from Bosnia’.<sup>40</sup> It is also common to cite the origins of liberalism as lying in the wars of religion, and the resulting realisation that peaceful society is only possible if politics and religion are kept

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O. Conkle, ‘Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America’, in Stephen M. Feldman (ed.), *Law and Religion: A Critical Anthology* (New York University Press, 2000): 317-344.

<sup>39</sup> By no means all religious thinkers have opposed the principle of restraint. For Catholic defences, see Patrick Riordan, ‘Permission to Speak: Religious Arguments in Public Reason’, *The Heythrop Journal* 45 (2004): 178-196; Daniel A. Dombrowski, *Rawls and Religion: The Case for Political Liberalism* (SUNY Press, 2001); Leslie Griffin, ‘Good Catholics Should be Rawlsian Liberals’, *Southern California Interdisciplinary Law Journal* 5 (1997): 297-373. Robert Gascoigne, ‘Christian Hope and Public Reason’, in Nigel Biggar and Linda Hogan (eds.), *Religious Voices in Public Places* (Oxford University Press, 2009): 131-148, also endorses the view. For a Protestant defence, see Christopher J. Insole, *The Politics of Human Frailty: A Theological Defence of Political Liberalism* (SCM Press, 2004). For a discussion of Islam and public reason liberalism, see Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford University Press, 2009). Audi, ‘Liberal Democracy’, pp. 9-24, argues that all theists have good reason to endorse restraint, given their commitment to ‘theo-ethical equilibrium’. For further general discussion, see Boettcher, ‘Public Reason and Religion’; Patrick Neal, ‘Is Political Liberalism Hostile to Religion?’, in Shaun P. Young (ed.), *Reflections on Rawls: An Assessment of his Legacy* (Ashgate, 2009): 153-175.

<sup>40</sup> For examples, see Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge University Press, 2002), pp. 154-5. Dennis C. Mueller proposes a robust version of this argument in his *Reason, Religion, Democracy* (Cambridge University Press, 2009), ch. 13.

apart.<sup>41</sup> In this spirit, Audi writes that “there may be no way on earth to make peace so long as people oppose one another under the banners of their clashing religious doctrines”,<sup>42</sup> and claims that this justifies the principle of restraint. Appeals to religion within political discussion “may be offensive, evasive, or otherwise unacceptable to secular citizens.”<sup>43</sup> They promote “a sense of separation between the speaker and those who do not share his religious convictions and [are] likely to produce both religious and political divisiveness.”<sup>44</sup>

Empirical impact arguments are a rejoinder to these claims. They point out that religiously-based public reasoning in fact contributes to political cohesion at least as often as it fuels conflicts. As Vallier and Eberle put it, “religiously based political action has often provided normative resources that reinforced liberal commitments.”<sup>45</sup> Further, secular public reasoning has historically accompanied and justified at least as serious, and possibly far worse, excesses of division and violence than has religiously-based reasoning.

The claims on both sides of this debate appeal to complex bodies of historical and sociological evidence capable of diverse interpretations. Suffice it to say that there is a growing body of literature that is both mounting considerable challenges to the still widely-assumed ‘modernist’ prejudice that religion *necessarily* causes civil conflict and presenting plausible accounts of how religion sometimes works to mitigate such conflicts.<sup>46</sup> While we cannot review this literature here, it is sufficient to cast serious doubt on divisiveness-based arguments for restraint.

A second variant of the empirical impact argument is that religiously-based public reasoning may after all *strengthen* liberal

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<sup>41</sup> See Rawls, *Political Liberalism*, pp. xxiii-xxv.

<sup>42</sup> Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford University Press, 2011), p. 86.

<sup>43</sup> Ibid., p. 85. See also Audi, ‘Liberal Democracy’, p. 32.

<sup>44</sup> Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford University Press, 1988), p. 219.

<sup>45</sup> Kevin Vallier and Christopher Eberle, ‘Religion in Public Life’, in Gerald Gaus and Fred D’Agostino (eds.), *The Routledge Companion to Social and Political Philosophy* (Routledge, 2013): 800-811, p. 801. See also Eberle, *Religious Conviction*, pp. 152-186; Kevin Vallier, *Liberal Politics and Public Faith: Beyond Separation* (Routledge, 2014), pp. 72-75.

<sup>46</sup> Douglas Johnson (ed.), *Faith-Based Diplomacy: Trumping Realpolitik* (Oxford University Press, 2003); Bryan T. McGraw, *Faith in Politics: Religion and Liberal Democracy* (Cambridge University Press, 2010), ch. 4; Harold Coward and Gordon S. Smith (eds.), *Religion and Peacebuilding* (SUNY, 2004).

democratic debate. For example, such reasoning can bring moral seriousness to public discourse and give voice to important dissenting insights that might otherwise be overlooked. We return to these points when discussing ‘argumentative democracy’, below.

### **B. Integrity arguments**

The second variety of argument against the imposition of restraints on religious public reasoning appeal to imperatives arising from the moral integrity and cognitive integration of religious citizens. The classic statement of this objection comes from Wolterstorff:

“It belongs to the *religious convictions* of a good many religious people in our society that *they ought to base* their decisions concerning fundamental issues of justice on their religious convictions. They do not view it as an option whether or not to do so. It is their conviction that they ought to strive for wholeness, integrity, integration, in their lives... Their religion is not, for them, about *something other* than their social and political existence; it is *also* about their social and political existence.”<sup>47</sup>

To support this claim, Wolterstorff cites a public statement of the of the Christian Environmental Council lobbying Congress to defend endangered species, which appealed to explicit biblical grounds as justification. The Council stated that “according to the Scriptures, the earth is the Lord’s and all that dwells within it (Psalm 24:12), and the Lord shows concern for every creature (Matthew 6:26)”.<sup>48</sup>

Now, as we have seen, public reason liberals permit citizens to offer religious reasons for laws; they simply insist that public, and thus non-religious, reasons must do the real or ultimate justificatory work. One might suggest that groups like the Christian Environmental Council would *also* have public reasons available to offer as justifications for their positions (such as, perhaps, ‘sentient creatures suffer and flourish and should be preserved’). Why would these not suffice? Wolterstorff’s answer is that such a

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<sup>47</sup> Nicholas Wolterstorff, ‘The Role of Religion in Decision and Discussion of Political Issues’, in Audi and Wolterstorff, *Religion in the Public Square*: 67-120, p. 105

<sup>48</sup> Quoted in *ibid.*, p. 112.

group, because of the way their political beliefs about the environment are so closely integrated with their comprehensive religious convictions, might simply *not be able* to regard such reasons as ‘non-religious’. Indeed, apart from what Audi calls ‘evidential dependence’<sup>49</sup> on the biblical doctrine of creation, they might find themselves with *no* reasons that would be persuasive to them for preserving endangered species. This would not be the result of intellectual failure on their part but rather of the deep coherence of these particular beliefs within their religious convictions. Imposing upon them a restraint on the use of religiously-based public reasoning would effectively bar them from making any contribution to public debate at all.<sup>50</sup>

Public reason liberals might argue that this concern is overblown. Few religious citizens see their political convictions in this way; most could endorse a freestanding political conception of justice, while integrating it within their religious worldview. Even if this were true, however, the duty of restraint could still place strains on the integrity of such citizens. This is because they might encounter cases where they believe that they have a religious obligation to support a particular law, but can find no public reasons in its favour. In such cases, their religious obligation conflicts with the duty of restraint.<sup>51</sup> According to Eberle, “many theists will regard their obligation to obey God as far and away their most important obligation, such that in case of conflict between that obligation and some other... they must opt in favour of obedience to God.”<sup>52</sup> Demanding that citizens comply with the duty of restraint in these cases is to demand that they violate their moral integrity. As Lott puts it, “we would be wrong to expect a person to fulfil her duty of civility by adhering to the limits of public reason if we knew that this duty of civility came into conflict with some weightier and more important duty of hers.”<sup>53</sup> Further, Lott argues, such cases will be common, since it is precisely with respect to matters of justice that people believe that

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<sup>49</sup> Audi, ‘Liberal Democracy’, p. 26.

<sup>50</sup> For related concerns, see Jeremy Waldron, ‘Isolating Public Reasons’, in Thom Brooks and Martha Nussbaum (eds.), *Rawls’s Political Liberalism* (Columbia University Press, 2015): 113-137, especially pp. 124-127.

<sup>51</sup> See Micah Lott, ‘Restraint on Reasons and Reasons for Restraint: A Problem for Rawls’s Ideal of Public Reason’, *Pacific Philosophical Quarterly* 87 (2006): 75-95; Christopher J. Eberle, ‘Basic Human Worth and Restraint’, *Philosophy & Social Criticism* 35 (2009): 151-181.

<sup>52</sup> Eberle, *Religious Conviction*, p. 145.

<sup>53</sup> Lott, ‘Restraint on Reasons’, p. 79.

that they have such weighty duties. If Lott is right, then this poses a fundamental challenge to public reason liberalism.

### **C. Epistemic Symmetry Arguments**

Public reason liberalism seemingly relies on the claim that there is an epistemic asymmetry between two kinds of reason, 'public' and 'non-public'. While public reasons are in some sense accessible to, acceptable to, or shareable by all citizens, non-public reasons, including religious reasons, are inaccessible and particularist. The public reason liberal case for restraint assumes that religious reasons, because of their supposedly idiosyncratic epistemological foundations, are necessarily restricted in appeal, while asserting that we can identify another class of reasons that are somehow inherently available to all. The third variety of objections to restraint challenges this claimed epistemic asymmetry. They claim that public reason liberals cannot successfully fulfil their aim of "separating the public wheat from the private chaff",<sup>54</sup> to use Eberle's memorable phrase. These arguments have been presented by both theologians and philosophers.

Theologian Nigel Biggar argues that there can be religiously-grounded reasoning which is in fact eminently publicly accessible.<sup>55</sup> He illustrates this with an argument he makes against euthanasia, showing how, while this argument is premised upon five theologically-grounded assertions, it should be quite intelligible to any thoughtful non-believer. These assertions include: "the value of the life of a human individual is conceived in terms of responsibility to created goods and to a vocation from God" and "the decision to understand the morality of acts primarily in terms of the will's intending and accepting [rather than in terms of consequences] is strongly encouraged by a view of earthly life as a kind of preparation for the life to come after death."<sup>56</sup> It is indeed hard to see why most thoughtful non-religious citizens, even those with little exposure to theology, would find assertions such as these unintelligible, even though they might reject much of their content. One is entitled to wonder whether the casual assumption among public reasons liberals that religiously-based reasoning is unintelligible and tends to involve bare appeals to authority arises

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<sup>54</sup> Eberle, *Religious Conviction*, p. 14.

<sup>55</sup> Nigel Biggar, "God' in Public Reason', *Studies in Christian Ethics* 19 (2006): 9-19. See also his *Behaving in Public: How to Do Christian Ethics* (Eerdmans, 2011) and 'Saving the Secular: The Public Vocation of Moral Theology', *Journal of Religious Ethics* 37 (2009), 159-178.

<sup>56</sup> Biggar, "God' in Public Reason', p. 15.

more from sheer lack of exposure to the social and professional contexts in which such reasoning routinely operates than from any critical investigation of its contents.

While Biggar teaches us an important lesson, it is not clear that his argument undermines more sophisticated versions of public reason liberalism. Biggar is certainly right that the premises of his argument are intelligible. Non-religious citizens can understand them, and appreciate their force within Biggar's Christian worldview. They can recognise that the premises are epistemically justified for Biggar, according to his evaluative standards. For public reason liberals, this is not sufficient for public justification, however. Laws must be justified by arguments that all citizens can recognise as providing reasons *for them*. Public reasons must be accessible not merely in the sense of 'understandable' but in the stronger sense that they are justified according to common evaluative standards, or grounded in shared premises.<sup>57</sup> To qualify as public reasons, one's reasons have to rest upon principles shared, or at least sharable in principle, by all citizens irrespective of their comprehensive doctrines. Biggar's argument is perfectly intelligible, but it nonetheless does not provide public reasons in this sense. It does not appropriately appeal to a pre-existing epistemic common ground.

This response to Biggar relies on the assumption that there is such common ground readily available within liberal democratic societies, and that it will rule that all religious reasons are 'non-public'. Several philosophers have subjected this idea to rigorous critique.<sup>58</sup> Eberle closely interrogates various possible ways of defining the set of 'public reasons' and finds all of them wanting. He first distinguishes 'populist' from 'epistemic' conceptions. Populist conceptions require that laws be justified by reasons acceptable to all members of the public as they actually are, with their present beliefs and values, or 'evidential sets'.<sup>59</sup> The basic problem with such approaches is that they are too stringent. Given the extent of diversity and disagreement in contemporary societies, populist conceptions rule out not just appeals to religiously-based justifications but also to a much wider range of values and principles that citizens routinely rely on in political debate. Crudely put, they throw the baby out with the bathwater.

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<sup>57</sup> See Vallier's helpful discussion of 'intelligibility', 'accessibility', and 'shareability': Vallier, *Liberal Politics*, pp. 104-110.

<sup>58</sup> See e.g., Wolterstorff, 'The Role of Religion'; Eberle, *Religious Conviction*.

<sup>59</sup> This is Eberle's term. See Eberle, *Religious Conviction*, pp. 61-63.

This is true even if we narrow the scope of ‘the public’, by requiring only acceptability to all (rather than actual acceptance by all), or acceptability to a suitably restricted section of the public, or acceptability to those citizens possessing adequate information about the matter at hand.<sup>60</sup>

Epistemic conceptions of public reason are distinguished from populist ones by their explicit appeal to forms of epistemic idealisation in defining the set of public reasons.<sup>61</sup> Eberle considers eight such conceptions, and finds them all to be inadequate.<sup>62</sup> All such conceptions face a dilemma. Either they are too weak, such that they fail to rule out many kinds of religious reasons, because religious reasons often meet the relevant epistemic standard, or they are too strong, such that they follow populist conceptions in narrowing the set of public reasons in an unacceptably severe way. As Eberle puts it, “epistemic constraints that are sufficiently powerful to rule out reliance on religious grounds *also* rule out reliance on grounds that are essential to healthy political decision making and advocacy”.<sup>63</sup>

Vallier supports Eberle’s claims using an argument against abortion rooted in natural theology.<sup>64</sup> According to this argument, the existence of God can be rationally demonstrated, God gives each human a soul that endows her life with intrinsic worth, the least arbitrary candidate for the union of soul and body is conception, and therefore persons with intrinsic moral worth exist from conception. Like all natural theological arguments, the premises here rest on natural reason rather than special revelation. Vallier argues that this makes it accessible to all citizens; while the argument is religious, all can come to appreciate its force using pure reason. If this argument was deemed inaccessible then all

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<sup>60</sup> Ibid., pp. 198-233.

<sup>61</sup> For critique of the use of idealisation within public reason theories, see Nicholas Wolterstorff, ‘The Paradoxical Role of Coercion in the Theory of Political Liberalism’, *Journal of Law, Philosophy and Culture* 1 (2007): 135-158; David Enoch, ‘Against Public Reason’, in David Sobel, Peter Vallentyne, and Steven Wall (eds.), *Oxford Studies in Political Philosophy: Volume 1* (Oxford University Press, 2015): 112-140. For replies, see Kevin Vallier, ‘In Defense of Idealization in Public Reason’, working paper; Andrew Lister, ‘The Coherence of Public Reason’, in Jeremy Williams and Kevin Vallier (eds.), *New Directions in Public Reason* (forthcoming).

<sup>62</sup> These are: intelligibility, public accessibility, replicability, rejection of inerrancy, external criticisability, independent confirmability, and provability. See Eberle, *Religious Conviction*, pp. 234-293.

<sup>63</sup> Ibid., p. 240. Eberle uses the example of ‘Christian mystical perception’ to make this argument.

<sup>64</sup> Vallier, *Liberal Politics*, pp. 113-116. See also Kent Greenawalt, ‘Natural Law and Public Reasons’, *Villanova Law Review* 47 (2002): 531-552.

kinds of moral arguments that rely on natural reason – such as those that appeal to equality, fairness, and justice – would also be ruled out from political deliberation.

This brief review of three varieties of argument against public reason liberalism, and particularly the duty of restraint is, of course, not itself decisive. It does, however, at least show that there are serious doubts about the view's credibility. This should be troubling for its defenders. Imposing moral restraints on the public reasoning of citizens in a liberal democracy cherishing free expression, open debate, and democratic deliberation is a very serious matter, requiring a high threshold of justification. The objections we have surveyed suggest that this threshold might well not be met by public reason liberalism. In the remainder of this chapter we will sketch four positions within the literature that try to evade or respond to these objections, by clarifying, modifying, or simply abandoning public reason liberalism. We will briefly explain each view, note how each responds to the arguments in this section, and sketch remaining objections to these alternatives.

### **III. Beyond Public Reason Liberalism?**

#### **A. Revising Rawls**

Many theorists continue to develop and defend a Rawlsian public reason liberal view. One prominent recent defence comes from Quong, who advances what he calls the 'internal conception' of public reason liberalism.<sup>65</sup> According to this view, public reason liberalism is not a response to disagreement in the actual world, but to the reasonable disagreement that would exist in a well-ordered liberal society. Such a society is (partly) defined by citizens' acceptance of a set of basic liberal values and ideals, including freedom, equality, fairness, and the idea of public reason itself. It is therefore a mistake to think of public reasons as being defined by the beliefs of actual citizens, or even of idealised versions of those citizens. Instead, public reasons are those acceptable to the hypothetical members of the well-ordered society, who by construction share a common set of values and principles. In other words, public reasons are defined based on a *normative* conception of democratic citizenship, rather than based on finding some *epistemic* feature that distinguishes public and non-public reasons within present liberal democracies. Further,

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<sup>65</sup> Quong, *Liberalism Without Perfection*, especially pp. 137-160.



one of the defining features of reasonable citizens is that they *prioritise* public reasons over their non-public reasons. In order to be reasonable, one must recognise the great value realised by justification using reasons that all can accept, and thus endorse the duty of restraint. Reasonable citizens do not experience that duty as placing an undue burden on their integrity, so the integrity objection is ill-founded.<sup>66</sup>

Quong's internal conception successfully evades the three objections we considered above, through its normative definition of reasonableness. This comes at a cost, however. The primary objection to Quong's theory is that it relies upon an objectionably thick, or even 'sectarian', conception of reasonableness.<sup>67</sup> Quong initially presents his view as simply requiring that reasonable citizens "accept that political society is a fair system of cooperation for mutual benefit among free and equal people"<sup>68</sup> and accept the fact of reasonable pluralism. However, the idea of 'fair cooperation' is interpreted as requiring cooperation on the basis of public reason, such that citizens must accept that ideal, and its associated duty of restraint, in order to be reasonable. Further, they must also accept a set of liberal egalitarian values as defining the content of public reason, and give these values absolute priority in their political justifications. Those who hold to less-than-fully liberal views, or who believe that they must be directly guided by their comprehensive doctrine within their political advocacy, are simply deemed unreasonable and excluded from the justificatory constituency. The same is true of those who do not interpret the idea of 'fair cooperation among free and equals' as requiring justification using public reasons. While Quong elegantly shows how one can develop a robust and internally consistent theory of Rawlsian public reason liberalism, it is unclear why we should be attracted to a theory that ultimately works by presupposing such a demanding and constricted conception of reasonableness.<sup>69</sup>

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<sup>66</sup> See Quong, 'On the Idea', pp. 275-278; Jonathan Quong, 'What Do Citizens Need to Share? Citizenship as Reasonableness', in David Laycock (ed.), *Representation and Democratic Theory* (UBC Press, 2004): 141-158, pp. 151-155.

<sup>67</sup> Gerald Gaus, 'Sectarianism Without Perfection? Quong's Political Liberalism', *Philosophy and Public Issues (New Series)* 2 (2012): 7-15; Kevin Vallier, 'On Jonathan Quong's Sectarian Political Liberalism', *Criminal Law and Philosophy* (forthcoming).

<sup>68</sup> Quong, *Liberalism Without Perfection*, p. 38.

<sup>69</sup> Another important recent articulation of Rawlsian public reason liberalism, which we unfortunately lack space to discuss here, is Paul Weithman, *Why Political Liberalism? On John Rawls's Political Turn* (Oxford University Press,

## B. Convergence, not Consensus

Some of the most strident critics of Quong's internal conception believe that the lesson is not that we should abandon the ideal of achieving justification to all citizens by reasons that they can accept, but should fundamentally alter our understanding of this ideal. Advocates of the 'convergence conception' of public reason liberalism understand this ideal to require *not* justification by appeal to a set of reasons that are accessible or acceptable to all citizens, but justification to each and every citizen on the basis of their own complete evidential set (or 'belief-value set').<sup>70</sup> Legitimate law is law that can be accepted as justified by each citizen based on her full set of beliefs and values – including her comprehensive doctrines. This means that all intelligible reasons play an equal role within public justification; the convergence view does not rely on any epistemic asymmetry between accessible and non-accessible reasons. Further, religious citizens are permitted to support, and object to, laws solely on the basis of their religious reasons.<sup>71</sup> The integrity objection thus does not apply. Indeed, religious reasons can act as 'defeaters' for (i.e. conclusive arguments against) proposed laws, since laws cannot be permissibly imposed on religious citizens if they have decisive religious reasons to reject them.<sup>72</sup> Of course, this also means that laws cannot be permissibly imposed on non-religious citizens if they lack sufficient reason to accept them; while religious citizens can permissibly support a law for religious reasons, that law can only be enacted if non-religious citizens also have reason to accept it, such that there is convergence on the law.

The convergence conception has much less restrictive implications for religiously-based reasoning than the mainstream 'consensus' version of public reason liberalism. Indeed, Vallier, one of

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2010). For discussion, see James W. Boettcher, 'Review of Paul Weithman, *Why Political Liberalism?*', *Public Reason* 5:1 (2013): 137-150.

<sup>70</sup> See Gerald Gaus and Kevin Vallier, 'The Roles of Religious Conviction in a Publicly Justified Polity: The Implications of Convergence, Asymmetry and Political Institutions', *Philosophy & Social Criticism* 35 (2009): 51-76; Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge University Press, 2011); Vallier, *Liberal Politics*.

<sup>71</sup> Gerald Gaus, 'The Place of Religious Belief in Public Reason Liberalism', in Maria Dimovia-Cookson and P. M. R. Stirk (eds.), *Multiculturalism and Moral Conflict* (Routledge, 2009): 19-37. Stronger duties apply to public officials and judges, according to Vallier, *Liberal Politics*, pp. 190-196.

<sup>72</sup> Such laws either should not be enacted at all or should be enacted with exemptions. See Kevin Vallier, 'The Moral Basis of Religious Exemptions', *Law and Philosophy* 35 (2016): 1-28.

its main advocates, has argued that the convergence view is able to reconcile citizens of faith with public reason liberalism, by avoiding all of the religiously-based objections that have been presented to public reason views.<sup>73</sup>

Nonetheless, the convergence conception is subject to other criticisms. Some have argued that it undermines the sincerity and importance of political deliberation and underestimates the importance of shared values within public life.<sup>74</sup> The most troubling objection, however, is that it involves an unwarranted level of deference to the beliefs of citizens – including citizens who might be deeply misguided or endorse objectionable values. It thus makes public justification too hard to achieve, and might well undermine the legitimacy of morally necessary policies.<sup>75</sup> Convergence theorists have developed sophisticated accounts of what it means to say that a law is justified to an individual. They argue that we should ‘moderately idealise’ citizens’ belief-value sets, to remove obvious errors in reasoning and correct for any lack of easily attainable empirical information.<sup>76</sup> Further, a law is justified to a citizen as long as she considers it better than having no law within the relevant policy area; she need not consider it the best possible law.<sup>77</sup> Nonetheless, the concern remains that the convergence view sets an implausibly high bar for the justification of state action. It is certainly more restrictive than the consensus view, and might imply that little more than a minimal state is legitimate. For many, this shows that it rests upon an implausibly strong notion of the kind of justification to each citizen that state action needs in order to be legitimate.

### **C. Role-differentiation**

A third response to the arguments we considered in Section II accepts the force of these objections, but points out that they primarily apply to the duties that consensus public reason liberal-

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<sup>73</sup> This is the central argument of Vallier, *Liberal Politics*. For discussion, see Paul Billingham, ‘Review Essay: Consensus, Convergence, Restraint, and Religion’, *Journal of Moral Philosophy* (forthcoming).

<sup>74</sup> For discussion of, and responses to, these objections see Paul Billingham, ‘Convergence Justifications Within Political Liberalism: A Defence’, *Res Publica* 22 (2016): 135-153.

<sup>75</sup> See Christopher J. Eberle, ‘Consensus, Convergence, and Religiously Justified Coercion’, *Public Affairs Quarterly* 25 (2011): 281-303; Jonathan Quong, ‘What is the Point of Public Reason?’, *Philosophical Studies* 170 (2014): 545-553; Richard J. Arneson, ‘Rejecting *The Order of Public Reason*’, *Philosophical Studies* 170 (2014): 537-544.

<sup>76</sup> Vallier, *Liberal Politics*, pp. 160-177.

<sup>77</sup> Gaus, *Order of Public Reason*, pp. 303-332.

ism places on ordinary citizens, rather than to the view's account of public justification itself. Further, we can accept the consensus view of public justification while rejecting the public-reason-giving requirement and the duty of restraint. For example, Habermas endorses the integrity objection, noting that religious citizens legitimately resist separating out a class of 'public' or 'secular' reasons from their wider religious worldview, since they "would not be able to undertake such an artificial division within their own minds without jeopardising their existence as pious persons."<sup>78</sup> However, this should not lead us to reject the idea that laws must be justified using non-religious reasons. Instead, we should endorse that idea, but recognise that it does not necessarily imply "a direct obligation for all citizens personally to supplement their public statements of religious convictions by equivalents in a generally accessible language."<sup>79</sup> Such an obligation represents an "undue *mental* and *psychological* burden for... citizens who follow a faith."<sup>80</sup> Ordinary citizens should be permitted to present any reasons that they wish within their political advocacy, and indeed they should be expected to respectfully engage with all of one another's reasons and arguments, even those they cannot share. There is no obligation to provide universally accessible reasons. Nonetheless, an important "*institutional* separation of religion and politics"<sup>81</sup> remains. Laws themselves must be justified by secular reasons. Thus, religious reasons cannot enter into the *formal* sphere of democratic politics, which takes place within legislatures, ministries, and courts. Only generally accessible reasons can enter that sphere. Members of parliament, officials and judges are thus under a duty to present only secular reasons, and only those reasons can ultimately influence law. Religious reasons must be 'translated' into secular reasons before they can play any role in the formal sphere.<sup>82</sup>

Several objections can be pressed against this view. First, while Habermas strives to place symmetrical burdens on religious and

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<sup>78</sup> Jürgen Habermas, 'Religion in the Public Sphere', *European Journal of Philosophy* 14 (2006): 1-25, p. 8.

<sup>79</sup> *Ibid.*, p. 9

<sup>80</sup> *Ibid.*, p. 9.

<sup>81</sup> *Ibid.*, p. 9.

<sup>82</sup> For other versions of this role-differentiation view, see Cécile Laborde, 'Justificatory Secularism', in Gavin D'Costa, Malcolm Evans, Tariq Modood, and Julian Rivers (eds.), *Religion in a Liberal State* (Cambridge University Press, 2013): 164-186; Richard North, 'Public Reason, Religious Restraint and Respect', *Philosophia* 40 (2012): 179-193; Anke Schuster, *Public Reason and Religious Arguments* (Ph.D thesis, University of Groningen, 2009).

non-religious citizens, it is unclear that he succeeds in doing so.<sup>83</sup> Religious citizens must recognise that religious reasons cannot enter into the formal sphere without being ‘translated’, while secular reasons have free entry. Habermas insists that all citizens share the responsibility to find generally accessible insights within religious argumentation, but this translation requirement inevitably weighs more heavily upon the religious. Further, it is rather unclear what constitutes a ‘translation’ of a religious reason in any case. Second, role-differentiation views still require an account of public reasons, in order to identify the reasons that can permissibly play a role within the formal sphere. They thus still face the epistemic symmetry objection. Habermas somewhat bypasses this objection by insisting that the relevant distinction is simply between ‘religious’ and ‘secular’ reasons. However, this means that he faces the further objection that it is unfair to exclude religious reasons from public justification while admitting equally controversial and comprehensive secular reasons; Rawls’s exclusion of all comprehensive reasons was motivated by the desire to avoid exactly this unfairness. Third, it is unclear how *representation* functions within role-differentiation accounts, since citizens are permitted to rely politically upon reasons that their parliamentary representatives are prohibited from acting upon.<sup>84</sup> We might wonder how Members of Parliament can effectively represent their constituents if they cannot present the reasons that motivate those constituents.

A final objection to the role-differentiation view is that it mistakenly assumes that the duty of restraint within public reason liberalism is merely derivative from a more basic requirement that laws be publicly justified. Role-differentiation accounts hold that it is permissible for ordinary citizens not to provide public reasons because those citizens have very little actual influence on political outcomes, so their unrestrained advocacy will not lead to laws that lack support from public reason from being enacted. The duty of restraint lacks *instrumental* justification, since it is not necessary in order ensure that laws are justified to all. This view misses the *intrinsic* role that some public reason liberals believe is

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<sup>83</sup> See Nigel Biggar, ‘Not Translation, but Conversation’, in Biggar and Hogan (eds.), *Religious Voices in Public Places*: 152-193; Luke Bretherton, ‘Translation, Conversation, or Hospitality?’, in Biggar and Hogan, eds., *Religious Voices in Public Places*: 85-109; Maeve Cooke, ‘A Secular State for a Postsecular Society? Postmetaphysical Political Theory and the Place of Religion’, *Constellations* 14 (2007): 224-238.

<sup>84</sup> Chaplin, ‘Law, Religion’, pp. 331-332, presses this objection against Habermas.

played by the public-reason-giving requirement and the duty of restraint. For these theorists, restraint is intrinsically justified, as part of what it means for citizens to display respect for one another as free and equal members of the political community within their political deliberation and reason-giving. Andrew Lister, for example, argues that the practice of appealing to shared reasons when justifying laws to one another *itself* constitutes citizens' relationships as relations of civic friendship.<sup>85</sup> Citizens show mutual respect by offering one another reasons that can have public justificatory weight, thereby engaging in interpersonal justification and displaying reciprocity. Now, one might doubt this picture of what respectful political deliberation involves.<sup>86</sup> Nonetheless, this argument points to a potential internal inconsistency within the role-differentiation view. If political power within a liberal democratic polity is the joint power of citizens and the exercise of that power can only be justified by public reasons, then it might be inconsistent to hold that citizens can nonetheless solely rely on non-public reasons, which can bear no ultimate justificatory weight, in their own political advocacy.

#### **D. Argumentative Democracy**

Wolterstorff and Eberle both argue that public reason liberals are mistaken about what respectful political deliberation and decision-making involves.<sup>87</sup> We should endorse deliberative democratic procedures that give each citizen an equal voice and vote – an equal right to participation within the decision-making process – without placing restrictions on the reasons, values or principles that citizens and officials are permitted to appeal to in public deliberation, and to base their votes on. True respect is shown when citizens openly and honestly deliberate with one another on the basis of their full belief-value sets, before voting on the basis of their best judgment of the overall balance of (moral) reasons. Such deliberation includes seeking to understand and respond to others' reasons and arguments, and trying to persuade others of the merits of one's position, while being open to persuasion. Citizens should comply with an 'ideal of conscientious engage-

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<sup>85</sup> Andrew Lister, *Public Reason and Political Community* (Bloomsbury Academic, 2013), ch. 5.

<sup>86</sup> For example, one might endorse the 'argumentative democrat' view of respectful deliberation, sketched below.

<sup>87</sup> Nicholas Wolterstorff, *Understanding Liberal Democracy: Essays in Political Philosophy*, ed. Terence Cuneo (Oxford University Press, 2012), chs. 1-6; Eberle, *Religious Conviction*.

ment', so are obligated to seek rational justification for laws they advocate and to engage with others' perspectives.<sup>88</sup> But they are free to vote for whatever laws they consider morally appropriate, for whatever reasons they consider sufficient. The same applies to elected politicians, whose reason-giving should be unconstrained because this enables them both to appropriately represent their constituents' religious reasons in political debates and to freely exercise their independent judgment when evaluating legislative proposals.<sup>89</sup> Open deliberation and democratic decision-making by both citizens and officials itself realises the values of civic respect, reciprocity, and civic friendship.<sup>90</sup> Further, this conception of 'argumentative democracy'<sup>91</sup> enables individuals to act politically on their most deeply-held reasons and motivations, avoids objectionable strains upon their cognitive integration and moral integrity, and does not require any epistemologically questionable distinction between 'public' and 'non-public' reasons.<sup>92</sup>

Chaplin bolsters the case for argumentative democracy by arguing that there is no reason to think that it will permit a destabilising rhetorical free-for-all in which political debate lapses into religiously-charged acrimony.<sup>93</sup> Religiously-based public reasoning is already pervasively present in many liberal democracies without posing any threat to their cohesion or stability. Indeed, religiously-motivated political action often provides citizens with the social and political practices necessary to sustain a healthy liberal democracy.<sup>94</sup> At its best, religiously-based reasoning can

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<sup>88</sup> Eberle, *Religious Conviction*, pp. 84-108.

<sup>89</sup> Chaplin, 'Law, Religion', pp. 331-332.

<sup>90</sup> See Paul Billingham, 'Does Political Community Require Public Reason? On Lister's Defence of Political Liberalism', *Politics, Philosophy & Economics* 15 (2016): 20-41, pp. 23-31.

<sup>91</sup> This term is coined by Williams in his *Faith in the Public Square*, p. 135. We use it rather than the more familiar 'deliberative democracy', because many theorists associate deliberative democracy very closely with the kind of public reason restrictions that Wolterstorff and Eberle reject. Thomas Christiano, 'Must Democracy be Reasonable?', *Canadian Journal of Philosophy* 39 (2009): 1-34 defends a similar view, which he calls 'wide deliberative democracy', in contrast to 'narrow deliberative democracy', which includes public reason restrictions.

<sup>92</sup> For another variant of argumentative democracy, see Veit Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (University of Amsterdam Press, 2007); 'Religious Pluralism: Secularism or Priority for Democracy', *Political Theory* 27 (1999), 597-633.

<sup>93</sup> For detailed articulations of the arguments in this paragraph, see Chaplin, 'Law, Religion', pp. 333-335.

<sup>94</sup> For defence of this claim, see Paul J. Weithman, *Religion and the Obligations of Citizenship* (Cambridge University Press, 2002); McGraw, *Faith in Politics*.

bring moral seriousness to a public discourse that might otherwise be subordinated to merely technical or managerial concerns. Further, in practice religious citizens and representatives will often judge it unnecessary to make the religious foundations of their political reasoning *explicit*, taking up the chain of such reasoning in public settings ‘downstream’ of those ultimate convictions.<sup>95</sup> This is an example of what we described at the start of Section I as public reasoning “substantively informed by religious belief (even if such belief is not actually referred to).” Finally, we should remember that political debate is not merely intended to secure political agreement but also to provide an open forum for the honest articulation of serious political differences. Such a forum allows minorities whose voices might easily be muted or excluded to express their views, and encourages a robust form of civility based on good-faith engagement with one another’s views and concerns.

Public reason liberals might well respond by arguing that the most attractive features of argumentative democracy can be accommodated within their view. For example, public reason liberals can accept the benefits of open deliberation and of citizens’ engagement with all of one another’s reasons and values. On Rawls’s view, such engagement can and should occur within civil society, and also within citizens’ public political deliberations – subject to the proviso. Further, as we have already seen, most public reason liberals are motivated by a concern with respect for citizens as free and equal rather than necessarily believing that religiously-grounded reasoning is divisive or leads to acrimony. Arguably, therefore, they can accept many of the points in the previous paragraph while still insisting on the duty of restraint. Of course, argumentative democrats would see an insistence on that duty as a significant qualification on public reason liberals’ acceptance of those points.

An important further question for argumentative democrats, which Wolterstorff and Eberle do not address, is whether religious reasons can permissibly be offered as the *official* justification for legislation. Employing a version of the role-differentiation argument, Chaplin argues that they cannot.<sup>96</sup> Importantly, however, this is not in order to fulfil an ideal of justification to all citizens by reasons they can accept. Instead, it is because the state lacks

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<sup>95</sup> See Jonathan Chaplin, *Talking God: The Legitimacy of Religious Public Reasoning* (Theos, 2008), pp. 38-46.

<sup>96</sup> Chaplin, ‘Law, Religion’, pp. 336-337. See also Chaplin, *Talking God*.



the competence or right to assess the legitimacy of religious beliefs, so must not offer authoritative endorsements (or rejections) of the truth of those beliefs. In this sense, the state must be neutral toward religion. The official public justification for executive, legislative and judicial decisions must thus be confined to 'public good reasoning'. While the deliberation of citizens, representatives and even government ministers should be unconstrained, official justifications of legislation should adopt religious restraint. This does not mean that reasons 'acceptable to all' must be offered, but that official justifications should appeal to justice and the common good, rather than to religious (or other metaphysical) claims.

Two objections might be pressed against Chaplin's view. First, one might be concerned about the sincerity of the official 'public good' justification for laws that have been substantively shaped by religiously-based reasoning. The official justification of laws that have been supported for religious reasons at all levels of deliberation might at times seem ad hoc or insincere. Chaplin rejects this, on the grounds that the public good arguments in these cases would quite visibly be recognisable as the outworking of the underlying comprehensive reasons, so that no veiling of underlying religious reasons would occur. Religiously-based reasoning rarely involves mere appeals to authority; it almost always seeks to show that a law is required by justice or the common good. The official public good justification for the law can then consist in this claim regarding justice or the common good, which is neither ad hoc nor insincere. This leads to the second objection, however, which is that Chaplin's view permits religiously-grounded legislation in disguise. While the state does not officially endorse any religious view, he recognises that it might *de facto* do so by enacting laws that have been significantly shaped by religiously-based reasoning and that are officially justified using a public good argument that derives from such reasoning. But some might argue that a thoroughgoing rejection of the state's competence with respect to religion requires that restraint is extended beyond official justifications, to also encompass the arguments used at the deliberative stage by representatives and officials – and perhaps even ordinary citizens, as the ultimate bearers of political power.

Whether or not these objections to Chaplin's specific view succeed, those who find the idea underlying public reason liberalism compelling will insist that the form of justification for laws that citizens are offered under all versions of argumentative democra-

cy misses something of great normative significance.<sup>97</sup> Public reason liberalism is grounded in what many find to be an attractive ideal of justification to all – of state power, the shared power of all citizens, being exercised on the basis of values and principles that all can reasonably be expected to endorse. Many do feel that there is something wrong with religiously-based (or other comprehensive) reasoning shaping laws, and that it is a failure of reciprocity and respect if citizens and/or officials do not justify the terms of our common lives together using reasons acceptable to all. For all its merits, argumentative democracy ultimately might allow laws to be enacted for which the only supporting reasons are ones that some citizens see as having no normative force. Those citizens will have been able to have their say through deliberation and recognise the procedural justification afforded by the law's democratic provenance. But they will nonetheless be forced by their compatriots to live under a law for which they recognise no substantive justification. There is, many believe, something attractive about the idea that we could avoid this situation, and live under laws justified by reasons that all can recognise as having normative force.

In light of this, perhaps one of the other views surveyed in this chapter can be defended from the objections we have pressed, and shown to be an achievable ideal of justification to all. Perhaps, however, this is an ideal that cannot be realised within diverse liberal democracies, where our disagreements are too deep and wide for a view that is “still looking for a politics that is the politics of a community with a shared perspective.”<sup>98</sup>

#### IV. Conclusion

The debate about public reason is a vital one for liberal democracy, impinging, as noted earlier, on the very legitimacy of law itself in a complexly pluralising and secularising society that can no longer take for granted a widely-shared normative foundation for its political and judicial decisions. To conclude, we briefly identify three specific areas – legal reasoning, law reform, and religious literacy – where, in the light of public reason controversies, law

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<sup>97</sup> See Robert B. Talisse, ‘Religion, Respect and Eberle’s Agapic Pacifist’, *Philosophy and Social Criticism* 38 (2012): 213-325; John Chandler, ‘Religious Reasons and Public Policy’, *Pacific Philosophy Quarterly* 91 (2010): 137-152.

<sup>98</sup> Wolterstorff, ‘Role of Religion’, p. 109. In a similar vein, Jeffrey Stout calls public reason liberalism a “poor man’s communitarianism”. See his *Democracy and Tradition* (Princeton University Press, 2004), pp. 73-74.

and religion scholars might contribute to a clarification of the place of religious reasoning in law. In each area, both empirical research and normative evaluation are called for.

First, further investigation into how religious claims actually are, and might properly be, treated at the various stages and levels of legal reasoning could reap valuable benefits. Here, questions evoked by the role-differentiation model, in which a principle of restraint is imposed not on citizens but only on state officials, whether all or just some of them, come to the fore. Consider specifically the reasoning of courts (which other forms of legal reasoning, such as arguments advanced by legal representatives, ultimately seek to shape). Religious claims might be treated by courts in at least three ways. They might simply be *described*, as among the relevant facts of the case (a task that might be performed well or badly<sup>99</sup>); they might be *deployed*, such as in cases where ‘religious law’ (e.g. Jewish or Islamic rules on divorce) is properly deferred to as the law by which parties have consented to be bound; or they might be *endorsed* by the court as valid steps in a chain of legal reasoning towards a judgment.

The challenge regarding the reliability of *description* we address below under ‘religious literacy’. The issue of whether the judicial *deployment* of ‘religious law’ in judicial reasoning is at all legitimate is increasingly contested today, especially in view of mounting public concern over the extent to which aspects of sharia law might be gaining ‘recognition’ in the legal system. It is not, however strictly a matter regarding the role of religious belief in public reasoning but rather of the legitimacy of ‘legal pluralism’.

The question of judicial *endorsement* of religious belief, however, pertains immediately to public reason. Consider two cases of such endorsement. A hypothetical one might be: ‘because “the earth is the Lord’s,” company X must pay damages to plaintiff Y for polluting their land’. A real one is this:

“Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see Leviti-

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<sup>99</sup> A poor example would be Laws LJ’s unqualified description of religious belief as “necessarily subjective, being incommunicable by any kind of proof or evidence.” Laws LJ, *op cit*, §25. Good examples, of courts sensitively discerning the meaning and force of religious claims in key religious freedom cases, are cited in Cumper and Lewis, “Public Reason”.

cus 18:22), she should be totally estopped from contaminating these children.”<sup>100</sup>

There is a wide consensus that overt judicial endorsements of explicitly religious claims (in these examples, involving the authoritative citation of a sacred text) are inadmissible in view of the requirement of judicial religious neutrality. But this does not put the question entirely to rest. Consider this passage from the opinion of Laws LJ cited earlier:

“The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy.”<sup>101</sup>

But can an established religious tradition properly “exert a profound influence” on lawmakers’ views of the “objective merits” of a law while entirely avoiding the public reason liberal charge that, as we put it above, such an outcome might “permit religiously-grounded legislation in disguise”? Consider an example of more recent religious influence: is the recent legal recognition of ‘sharia-compliant financial instruments’ an example of a permissible influence on lawmakers’ construal of the objective merits of such instruments, or rather of, in effect, a judicial ‘endorsement’ of sharia law? The precise relationship between the operative religious belief and the construal of “objective merits” deserves closer scrutiny by law and religion scholars – not least because the requisite “objectivity” might not be available in a society marked by deepening moral and religious dissensus. The public

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<sup>100</sup> Concurring opinion of Justice Henderson, South Dakota Supreme Court, in a 1992 case involving a child custody dispute between former spouses. The father had objected to a court order allowing the mother, a lesbian, to have unsupervised overnight visitations with her daughter. The Court took the father’s side, overturning the order and requiring an investigation of the home circumstances. Cited in Sanford Levinson, ‘Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?’, in Paul J. Weithman (ed.), *Religion and Contemporary Liberalism* (University of Notre Dame Press, 1997): 76-92, p. 81.

<sup>101</sup> Laws LJ, *op cit*, para 23.

reason debates surveyed here could be highly instructive in clarifying this increasingly controversial question.

Second, there is a growing need for more systematic knowledge of how religious public reasoning already operates in proposals for law reform, not only on issues of 'religion law' but on any area of law where religiously-based arguments have been operative (e.g. commercial law, family law, human rights law, constitutional law, etc.). Various questions arise: how far do religious campaigners for law reform actually invoke explicitly religious claims at all, and how are these received by various audiences? If they do not make explicitly religious arguments, then how far do the arguments they do invoke meet some suitable desiderata for 'public reason' (assuming they are needed), while also avoiding the possible charges (noted above) of insincerity or even concealment? Are religious campaigners more likely to invoke explicit religious reasons on some issues than others, and with what effect? Do such campaigners perform 'better' or 'worse' than campaigners motivated by some secular comprehensive doctrine? How do – and how should – elected officials (MPs, MEPs, councillors, etc.) respond to requests from such campaigners to represent not only their policy objectives but also their religious rationales for such objectives? Again, the debates considered above would provide an essential resource in clarifying such questions.

Third, wherever legal scholars themselves come down in the public reason debates surveyed above, the course of that debate, and the challenge of addressing the previous two issues, underline the importance of improving religious literacy among legal practitioners at every level. The UK Foreign and Commonwealth Office recently initiated a programme of religious literacy for diplomats in view of their need for a more assured grasp of the increasingly significant religious dimensions to foreign policy challenges. Law and religion scholars would be well placed to examine the current levels of religious literacy in the legal profession and how they might be enhanced, in order that religiously-motivated calls for law reform and 'religion law' cases might be handled more felicitously and less anxiously by relevant stakeholders.

Yet it takes two to tango: if legal practitioners need greater religious literacy, religious campaigners and litigants likely need greater political and legal literacy. If the 'convergence', 'role-differentiation' and 'argumentative democracy' models have some validity, we might expect to see an increase in the incidence of

religious public reasoning by citizens and their representatives. If so, some such reasoners – especially recent entrants – may need better schooling in appropriate forms of public reasoning in wide public fora, in the ‘public political sphere’ and (via their legal representatives) in judicial settings. This could assist them in aspiring to meet what Eberle proposes as the ‘ideal of conscientious engagement’. Law and religion scholars might profitably investigate how conducive conditions for such schooling might be promoted by a range of stakeholders. One salutary outcome of this might be to allay popular (and philosophical) anxieties about excessive deference, within a more religiously receptive democratic system, to unacceptable or oppressive religious demands. Familiarity with public reason debates would aid them in that investigatory task.