

# HUMAN RIGHTS AND THE PROBLEM OF ETHNOCENTRISM

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A myth of the origin of human races, told by the Cherokee Indians of the Great Smoky Mountains gives another instance of this kind of ethnocentrism. These Indians, of course, know whites and Negroes. Like all Indians, they are brown-skinned, and, as in all mythologies, the acts of supernatural beings once performed are irrevocable. As in most mythologies, also, man is the supreme achievement of the Creator, who in this instance went about creating him by first fashioning and firing an oven and then, from the dough he had prepared, shaping three figures in human form. He placed the figures in the oven, and waited for them to get done. But his impatience to see the result of this, his crowning experiment in the work of creation, was so great that he removed the first figure too soon. It was sadly underdone – pale, an unlovely color. But for better or worse, there it was, and from it are descended the white people. His second figure had fared well. The timing was accurate, the form all he had envisaged. Richly browned, it pleased him in every way, this figure that was to be the ancestor of the Indians. He so admired it, indeed, that he neglected to take out of the oven the third form, until he smelt it burning. He threw open the door, only to find this last one charred and black. It was regrettable, but there was nothing to be done; and this was the first Negro.

- Melville J. Herskovits, *Man and His Works: The Science of Cultural Anthropology* (New York: Alfred A. Knopf, Inc., 1947), pp. 68-69.

Now, to return to my argument, I do not believe, from what I have been told about this people [i.e., the cannibals], that there is anything barbarous or savage about them, except that we all call barbarous anything that is contrary to our own habits. Indeed we seem to have no other criterion of truth and reason than the type and kind of opinions and customs current in the land where we live. There we always see the perfect religion, the perfect political system, the perfect and most accomplished way of doing everything.

- Michel de Montaigne, “On Cannibals” in *Essays* (London: Penguin Books, 1580/1993), Translated by J.M. Cohen, pp. 108-109.

# *Abstract*

Despite its prominence as a pejorative term in moral and political philosophy, the phenomenon of ethnocentrism has escaped the focused attention of moral and political philosophers. Little sustained effort has been devoted to its in-depth analysis. This thesis attempts to fill in that gap in the philosophical literature, with a particular focus on the analysis of ethnocentrism as a problem, or rather a set of problems, facing the theory and practice of human rights. The thesis begins by drawing a core distinction between ethnocentrism as a moral phenomenon (i.e., a form of moral partiality), on the one hand, and as an epistemological phenomenon (i.e., a *mode of judgment*), on the other. After singling out the epistemological aspect of ethnocentrism (which I call socially reflexive belief) as its main focus, the thesis argues for four interlocking claims. The first claim is that ethnocentrism represents an unwarranted mode of judgment, and thus an epistemic hazard that ought to be avoided if at all possible (Chapter One, §3). This claim is defended at length against the version of political constructivism advanced by John Rawls, which, by grounding political argument exclusively in ideas and values embedded in a common public culture, implicitly justifies a form of ethnocentrism (Chapter Two). The second claim is that moral argument cannot avoid ethnocentrism by grounding itself, as some have thought, in judgments upon which there is broad moral consensus, or rather by avoiding any appeal to judgments that are the subject of marked dissensus (Chapter Three and Chapter Four). Thirdly, the thesis argues that ethnocentrism is, if avoidable, only so to a limited extent (Chapter Six, §2). And fourthly, it offers an outline of how this limited form of avoidance might work (Chapter Five and Chapter Six, §3).

# Preface

The present work, or rather my interest in it, first came to life in an essay I wrote as an undergraduate student at McGill University. The essay, which was written for an anthropology professor (philosophy was my major; anthropology was my minor), examined the intricacies, mutual suspicions, and philosophical problems involved in the corroboration of evidence in Native American land claim disputes. In particular, it focused on the use of Native American oral history as evidence in such legal confrontations in Canada, a place where, in recent years, the use of such evidence has become increasingly common.

What made the use of oral history in such cases so intriguing to me was its controversial status as courtroom evidence. On the one hand, there was the position of the Federal or Provincial judges who, not unreasonably, feared the worst: unlike textual or “hard” evidence, oral history evidence could possibly be concocted *ad hoc* to suit the interests of the Native American plaintiffs. In the most famous Canadian case involving oral history evidence, *R. v. Delgamuukw* (1987), which involved the Gitksan and Wet’suwet’en peoples’ claim of ownership over a massive 54,000 square kilometres of land in northern British Columbia, some such suspicion led the Provincial judge, Chief Justice McEachern, to rule out oral history evidence as an inadmissible form of “hearsay.” On the other hand, there was the position of the Native Americans themselves, backed by the relativistic vitriol of the anthropologists, who complained that Native American history *was* oral (i.e., based on traditions of storytelling, not texts), that it had always been that way, and that in dismissing oral history as hearsay the court was merely expressing its ethnocentric “Western” textualist prejudices.

In recounting this dilemma, my own take was that no one side was being blamefully ethnocentric in the matter, *both* were. Somewhere in the midst of the squabbling over land, and the obvious raw interests at play, was a genuine confrontation between two cultures, two ways of life, and two ways of doing history that were struggling to understand one another. The Native Americans, baffled and frustrated to find their stories and songs dismissed as unverifiable by the court, were in their own way failing to understand the position of the Canadian judges. And the Canadian judges, for their part, baffled by the Native American presumption that such stories and songs were the sort of thing that a court should take as seriously as, say, a signed, dated, and official land deed, were failing to appreciate the history, traditions, and exceptional position of the Native Americans. In this way, as I saw it, both sides of the confrontation were to some extent entrapped by their life experience and cultural background. And it was this idea – the idea that we are all to some extent inevitably entrapped by cultural prejudice or pre-conviction, and yet are all trying to make sense of the world as it is, while living together with others who are entrapped by different prejudices and pre-convictions – that first drew me into the arms of moral and political philosophy. My ongoing interest in that idea is what has driven me to write the present work.

For help in the creation of this thesis, I owe many debts of various kinds. For crucial instruction, insight, and guidance, I am most indebted to my three supervisors: Professors Jeremy Waldron (primary supervisor since January of 2011), John Tasioulas (primary supervisor until December of 2010) and Roger Crisp (secondary supervisor throughout). For the funding necessary to complete this project, my thanks goes to both the Association of Commonwealth Universities at the British Council, London (for a two-year Commonwealth Scholarship), and to Le Fonds Québécois de la Recherche sur la Société et la Culture, Québec (for a three-year Doctoral Research Grant).

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# *Index of Abbreviations*

## General Lexicon

UDHR – Universal Declaration of Human Rights (1948)  
ICCPR – International Covenant on Civil and Political Rights (1976)  
ICESCR – International Covenant on Economic, Social, and Cultural Rights (1976)  
ECHR – European Convention on Human Rights (1953)  
CRDP – Convention on the Rights of Persons with Disabilities (2008)  
CAT – United Nations Convention Against Torture (1984)  
UN – United Nations  
UNESCO – United Nations Educational, Scientific, and Cultural Organization  
ICC – International Criminal Court  
CCHR – United Nations Human Rights Committee  
CESCR – United Nations Committee on Economic, Social and Cultural Rights  
AAA – American Anthropological Association

## Rawlsian Lexicon

*LP* – *The Law of Peoples* (Cambridge: HUP, 1999)  
*PL* – *Political Liberalism* (New York: CUP, 1996)  
*TJ* – *A Theory of Justice: Revised Edition* (Cambridge: HUP, 1971/1999)  
*JF* – *Justice as Fairness: a Restatement*, E. Kelly, ed. (Cambridge: HUP, 2001)  
*PRR* – “The Idea of Public Reason Revisited,” in *Political Liberalism* (Ibid)

# *Chapter One:*

## What is Ethnocentrism?

### 1. A STATEMENT ON HUMAN RIGHTS

In June of 1947, during the initial drafting stages of the 1948 Universal Declaration of Human Rights (UDHR), the Executive Board of the American Anthropological Association (AAA) issued a statement of concern to the United Nations Commission on Human Rights (UNCHR). They expressed their deepest worry, or what they took to be the primary challenge facing the drafting committee, in the form of a question:

How can the proposed declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?<sup>1</sup>

Today, over sixty years after the drafting of the UDHR, this question continues to haunt both popular and scholarly debates about human rights. Political opposition to human rights is often couched in cultural terms, with many contending that human rights – or rather that certain purported human rights, such as the right to non-discrimination on the basis of gender or sexual orientation – are simply not “Islamic,” “African,” or “Asian,” etc.<sup>2</sup> And scholars of various stripes,

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<sup>1</sup> The Executive Board, American Anthropological Association, “Statement on Human Rights” in

<sup>2</sup> *See*: the debate about the morality and legality of homosexuality in Uganda that I describe below in §3.

both “continental” and “analytic,” and from a variety of disciplines (e.g., philosophy, anthropology, law, history, political science, international relations, literary and cultural studies, etc.), have considered the AAA’s question important and worthy of an answer.<sup>3</sup> Even people who have otherwise given little thought to the modern idea of human rights nevertheless seem to understand and appreciate the basic worry that it expresses. But what is that basic worry?

### 1.1 *An Adjective*

The AAA’s question itself will for many evoke what has come to be known (rather loosely) as the problem of ethnocentrism.<sup>4</sup> This evocation is entirely appropriate, and for at least two reasons. First of all, the question quite literally asks how a declaration like the UDHR can avoid being *ethnocentric* – that is, how it can avoid expressing (or being ‘conceived in terms of’) values that are recognized only in *some* cultures, ethnicities, countries, or parts of the world. In this possibility the AAA foresaw a host of historically-borne-out dangers, among them the stifling or frustration of the “personalities” and freedoms of vast numbers of human beings.<sup>5</sup> That such cultural one-sidedness was something that ought to be avoided, however, was an opinion shared not only by the AAA, but also by the broader United Nations organization itself. Already by March of 1947 the United Nations Educational, Scientific, and Cultural Organization (UNESCO) had assembled a Committee on the Theoretical Bases of Human Rights composed of several eminent intellectuals, the sole purpose of which was to establish whether broad cross-cultural agreement on a single declaration of human rights was in fact

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<sup>3</sup> See, for instance: fn. 19 below. It would make little sense for me to shoot off innumerable references in support of this statement here and right away. Instead, one will find the relevant references placed throughout this thesis at the appropriate points.

<sup>4</sup> Sometimes also called the “parochialism objection” to human rights. See, for instance: Allen Buchanan’s, “Human Rights and the Legitimacy of the International Order” in *Legal Theory*, Vol. 14, No. 1 (2008), pp. 39-70.

<sup>5</sup> The Executive Board, AAA 1947, pp. 540-541, 543.

possible.<sup>6</sup> After querying religious leaders and important thinkers from a wide variety of backgrounds, the UNESCO Committee became convinced that the set of rights enshrined in the UDHR rest on a set of “common convictions” that were shared not only by all 55 members of the United Nations at the time, but by all world cultures.<sup>7</sup> Thus, the UNCHR did have an empirical response to the AAA’s question on hand, or at least by way of appeal to the work of an associated committee. As a declaration grounded in common or perhaps universally shared ethical convictions, the UDHR is not, or at least is not straightforwardly, *ethnocentric*.

### 1.2 *A Mode of Judgment*

There is, however, a second way in which the notion of ethnocentrism can factor in here, and it has less to do with the substantive content or provenance of the grounds of a declaration of rights (be they broadly “Western,” “Eastern,” or non-partisan in nature) than it does the *mode of judgment* in light of which it is endorsed. That the AAA was concerned with ethnocentrism as a particular mode of judgment is clear from its explanation of why there was a real danger of the UDHR expressing a parochial or “Western” set of values in the first place:

If we begin, as we must, with the individual, we find that from the moment of his birth not only his behaviour, but his very thought, his hopes, aspirations, the moral values which direct his action and justify and give meaning to his life in his own eyes and those of his fellows, are shaped by the body of custom of the group of which he becomes a member... Because of the social setting of the learning process, the individual cannot but be convinced that his own way of life is the most desirable one... in

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<sup>6</sup> For a rough idea of the sequence of events, see: “Note” in *Human Rights: Comments and Interpretations* (London: Wingate, 1949), pp. 7-8.

<sup>7</sup> See: “Appendix II: The Grounds of an International Declaration of Human Rights,” in *Human Rights: Comments and Interpretations* (London: Wingate, 1949), pp. 258-259.

the main, other ways than his own, to the degree they differ from it, are less desirable than those to which he is accustomed. Hence valuations arise, that in themselves receive the sanction of accepted belief.<sup>8</sup>

According to William Graham Sumner, the 19<sup>th</sup> Century sociologist who first coined the term, “Ethnocentrism is the technical name for this view of things according to which one’s own group is the center of everything, and all others are scaled with reference to it.”<sup>9</sup> One aspect of this self-centeredness, he goes on, is normative and epistemic: “Each group thinks its own folkways the only right ones, and if it observes that other groups have other folkways, these excite its scorn.”<sup>10</sup> What the AAA does in the quote just above, then, is give an account of how this sort of self-centeredness or “view of things” comes about, i.e., as a result of the “social setting” of the learning process. All of this makes it plausible to interpret the AAA as being concerned with ethnocentrism in at least two senses. In the first sense, as described above, they clearly wanted to avert the possibility of a culturally partisan, parochial, or “Western” declaration of human rights. But, in the process of explaining the likelihood and dangers of that possibility, they also appeal to a more general fact about the way in which the social setting of the learning process can shape human reasoning, judgment, or evaluation in such a way as to rig it in favour of socially sanctioned belief. This introduces ethnocentrism in a second sense, as a kind of social phenomenon. Of course, these two senses are linked. If the UDHR is not *ethnocentric*, then it is less likely to be a product of *ethnocentrism*, but it is

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<sup>8</sup> The Executive Board, AAA 1947, pp. 539-540.

<sup>9</sup> William Graham Sumner, *Folkways: a Study of Mores, Manners, Customs, and Morals* (Mineola: Dover Publications, 1907/2002), p. 13. Also quoted in Stephen Lukes, *Liberals and Cannibals: The Implications of Diversity* (London: Verso Books, 2003), p. 12.

<sup>10</sup> Idem. Herodotus made similar observations about the Persians in particular but also more generally: “For if one were to give all peoples the chance to pick the best customs out of all customs, they would each consider and then choose their own: so much is each accustomed to regard their own customs as by far the best.” Herodotus, *The Histories*, 1.134, p. 62. Also see: John Stuart Mill, who characterizes this tendency as part of the “magical influence of custom” 4 in, *On Liberty and Other Writings*, ed. S. Collini (Cambridge: Cambridge University Press, 1989), p. 9.

nevertheless important to distinguish between the adjective and the broader social phenomenon, because they raise different concerns.<sup>11</sup>

### *1.3 Concerns Raised by the Adjective*

For instance, according to the AAA, the ethnocentric or parochial character of the underlying values of any proposed declaration would have detracted from its “applicability” to human race as a whole.<sup>12</sup> In other words, the AAA suggests that, were a declaration of rights to be grounded in (or “conceived in terms of”) values that were prevalent or respected universally – i.e., in all countries and human cultures – then it would indeed be applicable to all human beings. And of course the implicit suggestion is that the declaration being drafted by the UNCHR at the time was in grave danger of *not* being of that sort, and so not a genuine declaration of *human* rights. But this assumed relation between the cultural origin, prevalence, or currency of the values that inform a declaration of rights and its scope or range of validity is deeply controversial. To take a classic counterexample, very few would argue that the claims of Newton’s theory of Calculus only correctly apply in Europe, the UK, or in the halls of Trinity College, Cambridge, because *that’s* where they were discovered. Similarly, the fact that Calculus is now respected and taught across the world is not a reason to think that it is any more widely applicable now than it was in 1665. Why then wouldn’t the same be true of moral claims and discoveries, including declarations of rights?<sup>13</sup> I don’t mean to suggest that there is

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<sup>11</sup> This is something I stress later on, in Chapter Four, §3.4.iii.

<sup>12</sup> Executive Board, AAA 1947, pp. 539, 542.

<sup>13</sup> Jack Donnelly calls this the “genetic fallacy:” “Let us grant, for the sake of argument, that contemporary national and international human rights values and institutions were in significant measure developed in and shaped by the West. This tells us absolutely nothing about the ‘applicability,’ ‘relevance,’ ‘appropriateness,’ or ‘value’ of these ideas, values, and practices – either inside or outside the West. From a causal or historical account analysis of the genesis of a social practice, we cannot conclude anything about its appropriate range of applicability.” *Universal Human Rights in Theory and Practice: Second Edition* (Ithaca and London: Cornell University Press, 2003), pp. 69-70.

no reason to think that moral claims are any different in this respect. In fact, the AAA may have its own reasons for thinking so, which I will examine later on.<sup>14</sup> The more limited point that I want to make here is simply one about the ambiguity of the broader concerns that are (or ought to be) raised by the ethnocentric character of a given set of rights.

A further ambiguity arises from the multifarious nature of the modern practice of human rights itself, which has important legal, moral, political and institutional dimensions. For instance, before we can begin to answer the question of whether a declaration like the UDHR or a treaty such as the International Covenant on Civil and Political Rights (ICCPR) is in fact ethnocentric in character, we will need to specify which aspect or aspects of these instruments are being assessed. That is, are we referring to (i) formal aspects of the language of such instruments (e.g., including the use of the concept of a *right*), (ii) their employment of certain legal conventions (e.g., references to the legal status and jurisdiction of states), (iii) substantive aspects of their content (e.g., the norms themselves), (iv) aspects related to their background justification (be it theological, moral, or metaphysical),<sup>15</sup> or finally (v) the nature of the institutional mechanisms (e.g., democracy, judicial review, etc.) prescribed as part of their legal implementation and enforcement? It is possible for a single declaration, treaty, or substantive conception of human rights to be ethnocentric along some or one of these dimensions but not others. So, for instance, a set of rights may be substantively ethnocentric (e.g., by heavily prioritizing the right to individual liberty), but justified on ethical grounds (e.g., the notion of human dignity) that enjoy a nearly universal degree of consensus and bipartisan support. In this regard, it is worth noting that, apart from repeated references to the purportedly foundational notion of human dignity,<sup>16</sup> the UDHR was originally crafted so as to be largely silent or ambivalent with regards to issues of both background justification and concrete institutional

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<sup>14</sup> See: §4.3 below.

<sup>15</sup> This aspect touches the explicit concern of the AAA most closely, given that they alerted against a declaration that *is conceived in terms of* (i.e., grounded in) parochial or Western values.

<sup>16</sup> I discuss these in some greater detail in Chapter Five, §4

implementation.<sup>17</sup> This was part of a more comprehensive, deliberate effort on the part of the drafting committee to enhance the declaration's ability to draw global consensus by ensuring its compatibility with a plurality of moral and political traditions.<sup>18</sup> Of course, the ostensible success of their effort may hide important failures; but this is a matter for careful debate, and that is just my point. There are rarely any straightforward answers to questions about the ethnocentric character of human rights, and the preceding distinctions need to be kept in mind if such questions are to remain relevant or sufficiently in touch with reality.<sup>19</sup>

#### *1.4 Concerns Raised by the Mode of Judgment*

Even if we could be sure that a declaration or set of rights like the UDHR was not ethnocentric in several key respects, or else knew that its (full or partial) ethnocentricity was no real cause for concern (e.g., regarding its universal applicability or its moral and political consequences), we might nevertheless find it disturbing to uncover that it was a product of *ethnocentrism* understood as a *mode of judgment*. To tease this intuition out, consider the hypothetical case of a culturally cosmopolitan group – let's call it, “Group X” – that organizes its communal life around a set of moral values and rights that, it so happens, are shared by all world cultures. In other words, Group X's established and favoured social morality fits, to use Rawlsian terminology, like a “module” into the diverse moralities of all

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<sup>17</sup> For more discussion of this, *see*: Chapter Four, §3. In Chapter Five (§6) I offer my own views on the importance of ambivalence at the level of institutional implementation or enforcement.

<sup>18</sup> *See*: Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 281-302.

<sup>19</sup> For two plausible accounts that dismiss any quickly or easily-drawn made assumptions about “Western” moral character of human rights, *see*: Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press 1999), Ch. 10; Thomas M. Franck, “Is Personal Freedom a Western Value?” in *The American Journal of International Law*, Vol. 91, No. 4, (1997), pp. 593-627. For a fine-grained account of both the roots and character of cross-cultural disagreement about human rights, see Charles Taylor's article “Conditions of an Unforced Consensus on Human Rights”, in *The East Asian Challenge to Human Rights*, eds. J.R. Bauer & D.A. Bell (Cambridge: Cambridge University Press, 1999), pp. 124-144.

other cultures. That is, those cultures morally disagree with one another upon matters that lie outside, but not *within*, that modular set.<sup>20</sup> Now, having grown up surrounded by the moral opinions and beliefs of their fellow participants, the members of Group X are now (unknowingly) gripped by ethnocentrism, i.e., axiomatically sympathetic to locally established (Group X) moral opinion and thoroughly dismissive of any moral view that diverges even slightly from that standard. The “social setting” of the learning process has worked its magic on them, so to speak. Now suppose that Group X is tasked with the job of drafting a new Universal Declaration of Human Rights – let’s call it “UDHRX” – and, as expected, they quickly put down in written form the set of rights characteristic of Group X morality, without much if any further thought about the matter. Because of the unique cultural positioning of Group X’s social morality as a kind of global moral module, the resultant declaration will not be ethnocentric in the first adjectival sense, and so that cannot be a source of concern. Nevertheless, something of concern remains, and it can only be tied to the fact that Group X’s proposed declaration remains a product of *ethnocentrism* in the second sense, i.e., understood as a social phenomenon or distinct mode of judgment. What provokes this concern or discomfort in particular is, it seems, the epistemological trajectory of Group X’s endorsement of UDHRX. Rather than rationally deliberate, consider alternative sets of rights, or even respect the possibility of their own fallibility, the members of Group X simply regurgitated a set of moral beliefs that were inculcated in them via the “social setting” of the learning process. *Qua* different, no alternative moral view on the matter could be considered or heard. And so even if something has gone right here, since the UDHRX is not

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<sup>20</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), pp. 12, 145, 347. (Henceforth: *PL*)

straightforwardly ethnocentric, something has also gone wrong, epistemologically speaking. Certain hallmark epistemic virtues have been neglected in Group X's drafting process.<sup>21</sup>

### *1.5 An Outline of this Chapter*

In this chapter, part of my task will be to isolate just what it is that goes wrong here. If it is ever appropriate to refer to *the* problem of ethnocentrism – and thereby to neglect what are, in reality, the *many* problems and concerns that surround this notion or phenomenon – I would argue that it is this one: that of how to avoid the epistemological hazard or pitfall that ethnocentrism represents, i.e., the acceptance of a belief simply because it is *yours* or the *tribe's* or *familiar*, and the rejection of a belief simply because it is *theirs* or *foreign* or *different*, etc. After identifying this hazard more precisely (in §3), and confirming the suspicion that it is just that (i.e., a hazard), I consider different ways of escaping this default assessment. That is, I examine (in §4) the possibility that ethnocentrism may *not* be an epistemological hazard after all, or that there may be some reasons that speak in favour of it. After finding these arguments wanting, I move on (in §5) to situate the problem of ethnocentrism within the broader philosophical debate over realism and anti-realism (especially of the moral kind), to which it is often linked and in which it is often invoked. Before I get to all of this, however, I examine (below in §2) some concerns that surround the idea of ethnocentrism understood as a form of moral devotion or partiality to one's tribe, ethnos, nation, race, family, or kin, etc. In some ways, ethnocentrism of this form – especially at its extremes – is the most obvious and troubling form of all, and so it may surprise some readers that I haven't yet discussed it and that I won't devote much more than the following

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<sup>21</sup> I am by no means suggesting here that the UNHRC itself neglected these same virtues. On the contrary, in §2 below I discuss (to the UNHRC's credit) some of the actual efforts that were made to satisfy these virtues and avert the effects of ethnocentrism among the commission's members and representatives.

short section to it.<sup>22</sup> However, as I explain below, my marginalization of the issue of moral partiality isn't meant to suggest that this issue is itself a marginal one. It is indeed a central, troubling, and deeply important issue, but simply not my main focus.

## 2. ETHNOCENTRISM AS MORAL PARTIALITY

According to Sumner, the term ethnocentrism aptly describes a way of thinking, or a “view of things,” according to which *centrality* is attributed to one's own group. Moreover, implicit in this attribution of centrality to one's group, as Sumner understands it, is a companion ascription of *superiority*: “Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders.”<sup>23</sup> I've already said something about the epistemic and normative dimension of this sense of superiority, i.e., the idea that *our* view is the only right view. But there is patently a moral dimension to it as well. Outsiders are ‘looked on with contempt.’ Thus, insiders are not only epistemically privileged. They are morally privileged too: more deserving of respect, less deserving of contempt, etc.<sup>24</sup> It is this aspect of ethnocentrism – ethnocentrism as a form of moral partiality towards one's group – that I shall consider in this section.

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<sup>22</sup> The issue does come up again in the context of my discussion of *The Law of Peoples* (Cambridge: Harvard University Press, 1999) (Hereafter: *LP*) in Chapter Three (§3). Also, as I suggest in §3 of this Chapter, moral disregard or partiality can manifest itself in epistemic ways which I do discuss in greater detail, i.e., as an outright dismissal of “their” views, where the grounds of dismissal consist in little more than a morally derogatory view of the “others” in question.

<sup>23</sup> Sumner 1906/2002, p. 13.

<sup>24</sup> This is the kind of ethnocentrism intensively discussed, for instance, at the turn of the century by Franz Boas in *The Mind of Primitive Man: Revised Edition* (New York: The MacMillan Company, 1938). More contemporary sociological discussions are in Marylinn B. Brewer and Donald T. Campbell's *Ethnocentrism and Intergroup Attitudes: East African Evidence* (New York: Sage Publications, 1976), and Donald R. Kinder and Cindy D. Kam's *Us Against Them: Ethnocentric Foundations of American Opinion* (Chicago: University of Chicago Press, 2009).

## 2.1 Human Rights and Moral Partiality

It is possible to imagine, without any serious strain, individuals and institutions that show some degree of partiality towards a group (e.g., Canadians, British, Muslims, Jews, etc.) and yet remain fully committed to human rights and basic human equality, i.e., the idea that every person is equally deserving of basic moral respect and basic rights. For instance, although the human rights of others are likely to impose obligations upon us that are more demanding than many of us would like to admit, it's unreasonable to think that those obligations in all cases override any special obligations we might have to those with whom we share a special bond (e.g., of marriage, kinship, friendship, history, culture, nationality, etc.).<sup>25</sup> Human rights, *qua* rights, are merely one part of morality, and must compete with other non-rights-based moral considerations (e.g., virtues of charity, love, loyalty, mercy, beneficence, etc.) for our practical attention. Moreover, human rights are merely one *class* of rights. They coexist, in law, with constitutional, civil, political, and economic rights of various sorts. And they coexist with individual and collective rights that arise from special relationships, transactions, or promises, from non-universal interests, and from less urgent moral concerns than those typically associated with human rights.

There are, in addition to all this, legitimate prudential constraints on our commitment to human rights. For instance, it is not reasonable to demand, as a moral dictate, that all able persons devote their lives to human rights activism. This is in part because, although such sacrifice would undoubtedly bring about a greater satisfaction of human rights in the world, it

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<sup>25</sup> This claim will be especially easy to countenance if we understand human rights, as Thomas Pogge does, to impose obligations on *institutions* rather than individuals, or on individuals only in so far as they uphold such institutions. *See*: Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2008), Second Edition, pp. 50-51. Also, for a discussion of “limiting norms” or a set of values that can plausibly justify some degree of partiality in the face of our cosmopolitan commitments, *see*: Samuel Scheffler, “Egalitarian Liberalism as Moral Pluralism” in *Proceedings of the Aristotelian Society, Supplementary Volumes*, Vol. 79, 2005, pp. 231-233.

would come at considerable cost to the legitimate prudential interests (e.g., in autonomy, achievement, safety, private devotion, and self-fulfillment) of those putatively required to devote their life's energies to helping others. Admittedly, there is a difficult balance between self-interest and moral obligation to be struck here, and it is not always entirely clear where that balance lies. This difficulty notwithstanding, however, it remains silly to think of human rights as requiring the complete abolition of ethnocentrism, understood as a form of moral partiality. There is plenty of room for the latter in a commitment to the former.

Moral partiality, however, can adopt deeply sinister forms, including forms that sit wholly at odds with the cosmopolitan spirit of human rights. Consider, for one, something all too common in human history: the ludicrous denial, by one group, of the rights and humanity of another. Our profoundly reliable ability to convince ourselves, in so many ways, that some individuals (e.g., foreigners, Jews, Muslims, political opponents, women, prisoners, etc.) are unworthy of the basic forms of treatment and respect specified by human rights, is remarkable and depressing.<sup>26</sup> There is no room for such aggressive forms of partiality in any clear-headed commitment to human rights. The staunchly egalitarian spirit of such rights explicitly militates against them.<sup>27</sup>

## 2.2 *The Realist Critique of Human Rights*

Some have rejected this contrast: that is, the suggested contrast between the cosmopolitan spirit or character of human rights, on the one hand, and an aggressive policy of moral partiality or ethnocentrism, on the other. There is a long tradition, dating back at least

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<sup>26</sup> For powerful illustrations of that tendency, see: Jonathan Glover, *Humanity: A Moral History of the Twentieth Century* (London: Pimlico, 2001); Richard Rorty, "Human Rights, Rationality, and Sentimentality" in *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), pp. 112-115.

<sup>27</sup> See: Article 2, UDHR: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..."

to Karl Marx's critique of the rights of man, that questions whether the cosmopolitan pretensions of human rights are just that: mere pretensions. In the case of Marx's critique, a central suspicion was that the human rights proclaimed by 18<sup>th</sup> Century France and America served the interests of the bourgeois capitalist entrepreneur and legitimized the systematic oppression of the proletariat.<sup>28</sup> But there have been a large number of critics that have taken the allegation of partiality in a different direction, arguing on both empirical and theoretical grounds that human rights are guilty of operating as a vehicle for the ethnocentric pursuit of narrow (e.g., European, American, Western) interests. These critics will say, for instance, that the fact that modern human rights doctrine was conceived in the immediate aftermath of the Second World War – a historical context marked by the political and economic supremacy of the allied forces, and particularly that of the United States – is a fact that should not be forgotten. These and other brute political realities have shaped and continue to shape the very content and practice of international human rights. In reality, powerful nations have not only had a disproportionate influence on their character, but have misused and coopted the perceived legitimacy of human rights doctrine in order to provide a moral gloss for unjust, exploitative acts of foreign intervention, or to criticize and isolate less powerful nations under false pretences. As a result, whatever moral weight or validity the international practice of human rights carries is ultimately overshadowed by its use as an instrument of narrow political and economic interests shared only by a select group of influential nations located in the (North) Western hemisphere.<sup>29</sup>

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<sup>28</sup> See: Karl Marx, "On the Jewish Question," and the insightful discussion of that work included in Jeremy Waldron's, *Nonsense upon stilts: Bentham, Burke, and Marx on the rights of man* (New York: Methuen & Co, 1987), pp. 119-136, 137-150, 183-190

<sup>29</sup> Elements of this accusation are already present in the AAA's "Statement on Human Rights" quoted above. There, the AAA expressed concern that the UNHRC's proposed declaration might be used to perpetuate and justify age-old practices of economic expansion on the part of the West, as well as the denial of political autonomy to millions around the globe. Their statement even goes so far as to draw an explicit parallel between the historical doctrine of the "white man's burden" – employed by Europeans and Americans to rationalize their colonial activities among allegedly inferior foreign

Such criticisms have drawn on a variety of disparate theoretical sources: Thrasymachean moral scepticism, Nietzsche's genealogical critique of morality, psychoanalytical theory, Marxist and Hegelian thought, various brands of political "realism," as well as various postmodern critical traditions.<sup>30</sup> And they have drawn on a wide variety of empirical cases, among them: American brutality in the Vietnam War and the Gulf War,<sup>31</sup> the American invasion of Iraq, and the long history of American support for third world dictatorships. I cannot make any serious attempt to address such a panoply of subversive criticisms in this thesis. That would be far too large a task given that my main interest lies elsewhere in another, more epistemological, interpretation of the problem of ethnocentrism. Nevertheless, there are at least two reasons to hesitate before making any quick and easy empirical assumptions about the "West's" political cooptation of human rights.

*(i) A Generic Riposte to the Realist*

Firstly, it is a mistake to think that ethnocentrism and the political (or ideological) hijacking of the drafting process were not serious and explicit concerns of the seventeen-member committee originally assembled to draft the UDHR. Even by today's standards, that committee would be considered broadly representative of the international community and its

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peoples, with disastrous effects – and the proposed declaration of human rights. (The Executive Board, AAA 1947, pp. 540-541)

<sup>30</sup> For a critique of this sort that combines many of these sources (Marxist, Hegelian, psychanalytic, and postmodern among them), see: Slavoj Žižek, "Against Human Rights" in *The New Left Review*, Vol. 34, 2005, pp. 115-133, esp. pp. 125-129. See also: Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), pp. 67-70; Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge-Cavendish, 2007), pp. 180-181; Daniel Zolo, *Cosmopolis: Prospects for World Government* (Cambridge: Polity Press, 1997), Translated by David McKie.

<sup>31</sup> See, for instance, the three contemporary examples taken to support realist interpretations of international politics cited in the "Preamble" by C.A.J. Coady in *Messy Morality: The Challenge of Politics* (Oxford: Oxford University Press, 2008), pp. 1-6.

cultural, religious, and ideological diversity.<sup>32</sup> Great measures were taken, moreover, to ensure that the drafting process was fair and inclusive. For example, not only was the initial draft of the declaration collated with provisions from the constitutions of all fifty-five members of the United Nations at the time, it left all members ample opportunity to comment on and offer alternative drafts of bills under discussion.<sup>33</sup> These comments or alternative drafts were given serious consideration by the drafting committee itself, and when the UDHR was finally accepted by the UN Assembly it won by a decisive margin of forty-eight to zero with eight abstentions.<sup>34</sup>

Secondly, the notion that the modern globalization of human rights culture is at base the proliferation of a uniquely “Western” ideology or, even more extravagantly, the result of a systematic plot designed to promote the interests of Western democracies, is at odds with certain features of the current practice of human rights. For one, the claim is weakened by the independent endorsement of the language and norms of traditional human rights doctrine well beyond the Western hemisphere, as we have witnessed it. At the state level, this is manifest in the regional endorsement of human rights in charters such as the African Charter on Human and Peoples’ Rights (1979), The Cairo Declaration of Human Rights in Islam (1990), The Bangkok Declaration on Human Rights (1993), and the Asian Human Rights Charter (1998), among others. Perhaps even more important, however, is the fact that the language of human rights has quickly found its place in the moral reasoning of individuals and communities residing well beyond the Western hemisphere. Human rights are today the touchstone of a vibrant and increasingly robust institutional culture – comprised of declarations, legal treaties and covenants, mechanisms of enforcement (involving the International Criminal Court), political organizations (including the United Nations and its subsidiary bodies), independent grass roots

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<sup>32</sup> Among the seventeen countries that were originally involved in the drafting of the UDHR were: Australia, Belgium, The Byelorussian Soviet Socialist Republic, Chile, China, Cuba, Egypt, France, India, Iran, Lebanon, Panama, The Philippines, The United Kingdom, The United States, The Soviet Union, Uruguay and Yugoslavia. See Morsink 1999, p. 4.

<sup>33</sup> Morsink 1999, pp. 10-11.

<sup>34</sup> For an illuminating discussion of the reasons for the abstentions, see Morsink 1999, pp. 21-28.

activism and NGOs – that has no cultural or geographical epicentre. The proliferation of this international practice of human rights is today well beyond the dictatorial “control” of the countries of Western Europe and America. Moreover, to interpret the awesome proliferation of this practice as the result of a project of mass indoctrination perpetrated by Western governments or ideologues on a global scale – or as a straightforward process of “the ruled” accepting the ideology of “the ruler” –<sup>35</sup> is therefore, at face value, deeply implausible and, at best, highly speculative.

Suppose we ignore these important empirical points, however, and grant the realist critic her ambitious claim that both the content and practice of human rights reflect international realities of power (rather than any genuine moral considerations) first and foremost; at this juncture, two more theoretical points become pertinent. Firstly, there is the general issue of what relevance the social and political history of a moral norm, concept, or value – however abusive it may be – has to its truth or justification.<sup>36</sup> A thief, for instance, may *pretend* or *claim* to be loyal and to appreciate the value of private property in order to gain your trust. The mere fact that he or she does so only to *fool you*, however, is no reason to reject the moral or legal values of loyalty, privacy, general law-abidingness, and respect altogether. From the abuse of a norm or a value (however severe it may be), it does not follow that such a norm or value ceases to be a *good* thing, or that the moral reasons and demands attached to them cease to validly apply to any or all moral agents. Similarly, even if the realist critic is right to claim that the history of human rights has (mostly, if not entirely) been a history of abuse, manipulation, and political subversion under the state system, it would still not follow that the moral values expressed by human rights – as ideally-understood or perhaps even, to at least some extent, as

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<sup>35</sup> Douzinas 2007, p. 196.

<sup>36</sup> Thanks to John Gardner for stressing this point in a comment on an earlier draft.

we find them characterized in legal and political practice – are themselves less genuine, plausible, true, justified, applicable, or authoritative.<sup>37</sup>

This connects to a second point, which is that, at best, what the political or realist critique seems to establish is that there are certain obvious deficiencies in the current practice of human rights. If this is the right way to interpret the complaint, however, then the realist critic has to confront the increasing likelihood that they are invoking, as premises, the very moral standards that they aim to criticise. For instance, if the realist's grievance against human rights is that such rights provide a disingenuous moral cover (or even justification) for the self-seeking, partial, and unjust behaviour of (usually certain powerful) international political actors, then the realist risks lamenting the fact that such actors are, in effect, *not living up to* the moral standards set by human rights. In other words, what makes the current practice of human rights ethnocentric and unsatisfactory is, to a great extent, its inability to satisfy the ideal norms and standards of human rights themselves.<sup>38</sup> Yet this suggests nothing more than the *insincerity* and *failure* of the political practice of human rights – or its unfortunate tendency to lead to the abuse rather than satisfaction of such rights – but not the moral corruption, in some sense, of human rights themselves.<sup>39</sup> Far from entailing a comprehensive upheaval or even abolition of the current practice of human rights, the logic of the political critique instead

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<sup>37</sup> The story may become more complicated if the human rights norms in question are legally posited ones, and formulated in such a way that their abuse has become systematic or endemic. In that case, perhaps there is a case against legally positing those norms as formulated in such a way.

<sup>38</sup> The denunciation of human rights practice in light of its failure to satisfy the very standards and ideals - i.e. the right to a decent standard of living - it upholds is evident in Douzinas' work as well as that of Jacques Derrida, who is quoted by Douzinas:

Discourse on human rights and democracy remains little more than an obscene alibi so long as it tolerates the terrible plight of so many millions of human beings suffering from malnutrition, disease, and humiliation, grossly deprived not only of bread and water but of equality or freedom. (Derrida 2005, p. 86, quoted in Douzinas 2007, pp. 193, 197).

This sort of hypocrisy is also outlined in The Executive Board's "Statement on Human Rights", which cautions against a UDHR that would licence the continued expansion of the Western World, an expansion "marked by demoralization of the human personality and the *disintegration of human rights* among the peoples over whom hegemony has been established." (The Executive Board, AAA 1947, p. 541, my emphasis)

<sup>39</sup> Again, the cautionary comments in fn. 38 may be relevant here.

prescribes a move towards an international order in which the core standards and ideals of the current practice of human rights would be more faithfully and effectively enforced.

*(ii) Some Permutations of the Realist Critique*

These points still fail to address several permutations of the realist critique. One of these stems from considerations of *feasibility*. For instance, if human rights are to be understood as valid moral norms – that is, as picking out genuine features of our normative reality – then it would seem to follow that they must also be, in an important sense, practicable, i.e., that they be moral norms that are capable of being followed by those to whom they are addressed. On one understanding, it is precisely this feasibility constraint (the familiar maxim of “ought implies can”) that the realist or political critique is appealing to in its challenge to the self-understanding of human rights. If the implementation of human rights by international actors faces ineradicable obstacles (e.g., brute realities of power and unchecked tendencies on the part of states to act strictly on the basis of national interest) deeply embedded in a state system that promises to dominate international relations for both the current and foreseeable future, such that the ideal of an international political order in which the human rights of all individuals are both enforced and respected is (for us) hopelessly utopian, then the relevance of human rights to our current normative reality would be thrown into question. Indeed, according to the feasibility constraint outlined above, the non-practicability of such norms would threaten their very validity or existence.

Another way for the realist to evade the preceding points would be by insisting that the partiality or ethnocentrism of human rights is a result of their form or content (or both), rather than their systematic abuse *in practice*.<sup>40</sup> But critics who follow this route have to be

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<sup>40</sup> This more conceptual style of attack is followed by Marx and Žižek (i.e., *supra*), for example.

wary, on pain of incoherence, of making a different mistake. For it is not entirely unusual, particularly in postmodern literature, to find critics morally condemning the partiality of human rights, on the one hand, and yet scoffing at the possibility of objectively authoritative moral criticism, on the other.<sup>41</sup> The contradiction here is obvious, although I don't mean to suggest that it is insurmountable. There are those who have argued that morality, and its demand for impartiality and equal respect, has an authority that is not derived from its objective truth or justification, but rather from subjective sources.<sup>42</sup> So there may ultimately be scope, in principle, for those who criticise the moral character of human rights while denying the truth or objectivity of moral standards in general. However, in so far as a critic of the partiality of human rights leans on a background belief in some form of moral scepticism (e.g., moral relativism), then they are likely to believe that human rights are ethnocentric in at least two senses.

In the first sense, such a critic believes that human rights are morally *partial* or unfair norms, either in their form, content, or real world observance. This is the kind of ethnocentrism that we have been discussing so far. In addition to this, however, such a critic is also likely to believe, as a result of their scepticism, that human rights (or their advocates) unwarrantedly dress up cultural beliefs, opinions, preoccupations, or concerns in the form of claims to absolute moral truth. To make this kind of mistake is to fall victim to ethnocentrism

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<sup>41</sup> See, for example: Zolo 1997, esp. ch. 3.

<sup>42</sup> The array of theoretical options here is vast: According to Rortian "pragmatism," for instance, morality's impartialist claim on us reduces to a question of identity or loyalty. See: Richard Rorty, "On Ethnocentrism: a reply to Clifford Geertz" in *Objectivity, Relativism, and Truth: Philosophical Papers Vol. I* (Cambridge: Cambridge University Press, 1991), pp. 203-211; Richard Rorty, "Justice as a Larger Loyalty" in *Ethical Perspectives*, 1997, Vol. 4, No. 3, pp. 139-151. According to "quasi-realism," moral judgments possess an authority that is ultimately underwritten by their expression of subjective attitudes, sentiments, or emotions. See: Simon Blackburn, *Essays in Quasi-Realism* (Oxford: Oxford University Press, 1993), esp. Ch. 8 (*Also see below* §5.2.i). There are also various "constructivist" alternatives to standard realist accounts of the authority of morality. According to these, the correctness or incorrectness of some (specified) set of normative judgments depends on whether they "withstand some (specified) procedure of scrutiny from the standpoint of some (specified) set of further normative judgments." Sharon Street, "Constructivism about Reasons" in *Oxford Studies in Metaethics: Volume 3* (Oxford: Oxford University Press, 2008), pp. 208-209. I shall come back to the discussion of these views in §5.2 below.

of a second, epistemological kind – the kind that I want to explore and respond to in the remainder of this chapter. By focussing on this second kind of ethnocentrism, I don't mean to suggest that the problem of partiality is a small one. Far from it. Extreme forms of partiality – racism, sexism, religious fundamentalism, national extremism, etc. – constitute what is most likely the gravest and most rampant social evil facing humankind. Nevertheless, my main concern is elsewhere. And even so: to the extent that some critics of the first-order partiality of human rights tacitly or explicitly allege that human rights are ethnocentric in this second-order sense, I will, in the end, have at least *something* serious to say in response to their criticism. All the more so if their grounds for making that allegation draw on some familiar anthropological considerations, which I will rehearse in what follows (§3.2.ii).

### 3. REASON AND REFLEX

Although ethnocentrism, of the kind I want to discuss here, involves an epistemological hubris of sorts, we have to be very careful in identifying the relevant sort of hubris involved. At its deepest core, I want to suggest, ethnocentrism involves the unwarranted presumption that one's (individual, local, or cultural) belief, perception, opinion, or judgment about *x* provides an adequate account of *how things actually are* with respect to *x*. This reading of ethnocentrism is both the most common and the most philosophically magnetic one. It is implied, for instance, in Richard Rorty's provocative endorsement of a stance of "frank ethnocentrism" towards the norms of liberal political morality – a stance that explicitly eschews the idea that such norms (or *any* norms, for that matter) accurately represent the moral world as it is, i.e., objectively.<sup>43</sup> And, this reading picks up on an

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<sup>43</sup> Rorty 1997, p. 147. For a similar reading, see: John Tasioulas, "International Law and the Limits of Fairness" in *European Journal of International Law*, Vol. 13, No. 4, pp. 995-996. And: Martin Hollis, "Is Universalism Ethnocentric?" in *Multicultural Questions* (Oxford: Oxford University Press,

important normative and epistemic strand of the definition that William G. Sumner originally gave to the term in 1906, when he coined it. This is the notion that: “Each group thinks its own folkways the only right ones, and if it observes that other groups have other folkways, these excite its scorn.”<sup>44</sup>

### 3.1 Reasoned Ethnocentrism

To some extent, Sumner put his finger on a predictable and highly forgivable form of hubris. If we understand the “folkways” of a group – e.g., patterns of kinship, authority, conflict resolution, worship, medicine, education, scientific inquiry, etc. – to represent something akin to that group’s “best answer” to the question of how we ought to live, then it is hardly surprising that a group should see its own folkways as “the only right ones.” If, say, 16<sup>th</sup> Century Protestants thought that Roman Catholicism represented, all things considered, a more appealing and accurate description of the nature of the ethical, spiritual, and physical universe, then it would be difficult to understand or explain their adherence to the alternative set of beliefs and religious practices characteristic of Protestantism. Because social practices are supported by reasons and arguments, however latent these may be, it is not strange for their adherents to view them as superior to, or more correct than, their alternatives; that is exactly what we should expect. And when adherents to a social practice (e.g., punitive incarceration) are presented with an alternative practice (e.g., rehabilitative incarceration) that seems to them more sensible, economical, enjoyable, logical, right, or just, what we typically see – and what we should quite reasonably expect to see – is a shift of allegiance towards the alternate practice. Thus, what Sumner refers to as ethnocentrism is to some extent a

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1999), eds. Christian Joppke & Stephen Lukes, p. 31, where we read: “The charge [of ethnocentrism] is that *the accused did unwarrantedly presume the truth of a universal proposition and/or its applicability to persons of contrary opinion, such presumption being of cultural origin.*”

<sup>44</sup> Idem. Also quoted above in §1.2.

straightforward consequence of (the very sensibly ingrained habit of) holding one's social practices to be supported by good reasons, and this can be a mechanism of social change, transplantation, renewal, and cooptation just as much as one of conservatism.<sup>45</sup> This is an important point that I shall return to later on in the thesis.<sup>46</sup> For now the lesson is that, as a form of reasoned belief in the truth, objectivity, or relative superiority of one's own mores, morals, and social practices, ethnocentric condescension can be an entirely appropriate attitude to take towards the (potentially drastically opposite) folkways of others.

### 3.2 *Reflexive Ethnocentrism*

This is probably too innocuous a reading of the phenomenon that Sumners was trying to pick out however – or rather, too innocuous a reading of the *epistemological strand* of that phenomenon. It is likely that what Sumners had in mind when he referred to ethnocentrism was the human tendency to adopt a *reflexive*, rather than *reasoned*, belief in the superiority of one's cultural opinions and practices. Reflexive belief can take different forms, some of which are more intentional than others.

#### *(i) Intentional Reflex*

On the more intentional side, there is the deliberate choice routinely made by many to denigrate or ignore opinions, beliefs, points of view, social practices and forms of life that are in some way *foreign* to their own. It is likely that we all battle this reflexive tendency to some extent. However, the loss of that battle can become painfully obvious in certain instances. We

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<sup>45</sup> Jeremy Waldron has argued for such an understanding of social practices in his work on cosmopolitanism. In particular, *see*: Jeremy Waldron, "What is Cosmopolitan?" in *The Journal of Political Philosophy*, Vol. 8, No. 2, 2000, pp. 242-243.

<sup>46</sup> *See*: Chapter Six, §2.2.

see this very often in inter-societal debates about some controversial social practice, such as homosexuality. In many African countries, for instance, reasoned debate about the morality and legality of homosexuality has become hijacked, so to speak, by issues of political, religious, and cultural affiliation. Arguments in favour of accepting or at least tolerating homosexuals are routinely stigmatized as “Western” or “Anti-Christian,” and are therefore rejected *outright*, i.e., not on the basis of any demonstrable argumentative flaw or rational counterargument. Similarly, the denunciation of homosexuality as an immoral and illegal act is seen as bound up with being “African” and “Christian.”<sup>47</sup> Framed in this way, the debate is no longer reasonable or rational. It becomes a shallow and in many ways silly game of reflex: that is, of triumphantly and proudly stating one’s religious or cultural allegiance – i.e., “I am African,” “I am Christian,” “I am Western,” etc. – and then, perhaps, following this up with an oversimplified narrative of the scope, history, and ideological benchmarks of one’s self-professed group.<sup>48</sup> In other words, as Aurel Kolnai wrote, moral conviction becomes as conventional as “a patriot’s reverence for the accidental colour-scheme of his respective national flag.”<sup>49</sup> Nor is this, of course, just an African way of distorting or denaturing the debate about homosexuality. Westerners are equally guilty of writing off African intolerance of homosexuality as a form of irrational “backwardness,” refusing to even contemplate the possible force or legitimacy of their stated grievances and concerns. Moreover, Westerners very often frame their own home-grown debates in this distorted and unhelpful way. The ongoing debate in many Western countries (Portugal, Ireland, The United States, Poland)

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<sup>47</sup> See: Adam Daniel Etinson “The Anti-Gay Crusade” in *The Independent* (Uganda), Wednesday, August 25, 2010. For an illustration of the way in which the very same debate about homosexuality is framed in a parallel way in Iran, see: Rahul Rao, *Third World Protest: Between Home and the World* (Oxford: Oxford University Press, 2010), pp. 179-189.

<sup>48</sup> For a critique of this mode of argument or debate, see: Jeremy Waldron 2000, pp. 242-243; Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative” in *The University of Michigan Journal of Law Reform*, 1991-1992, Vol. 25, Nos. 3, 4, pp. 751-794; Jeremy Waldron, “How to Argue for a Universal Claim” in *Columbia Human Rights Law Review*, 1999, Vol. 30, No. 2, pp. 305-314.

<sup>49</sup> Aurel Kolnai, “Moral Consensus” in *Proceedings of the Aristotelian Society*, New Series, Vol. 70, 1969-1970, p. 98.

about the morality and legality of abortion, for instance, is one in which each side tends to understand their own position (and the ‘unconscionable’ position of their opponents) as something like a non-negotiable aspect of their identity, e.g., as a “Christian Conservative,” or a “Secular Liberal,” etc.<sup>50</sup>

*(ii) Unintentional Reflex*

Any thoughtful observer of these debates will remark on how this deliberate and triumphalist form of reflexive belief operates in tandem with a less intentional kind. The less intentional counterpart here is an outcome of the lengthy and largely subconscious process of social learning, inculcation, or acculturation that rigs our moral judgment in favour of certain moral beliefs, opinions, practices, and principled convictions. I’m going to elaborate on this point in greater detail later on, so I don’t want to dwell on it too much here, but the basic idea is familiar and can be put quite succinctly.<sup>51</sup> It is not difficult to explain why your average young Canadian is going to find the zealous stigmatization of homosexuality in some African countries rather baffling, just as it is not difficult to explain why an average Ugandan youth is likely to find the legalization of same-sex marriage in Canada bafflingly permissive. Even in our “global” day and age, human beings tend to imbibe and regurgitate the social morality, customs, and mores of their (more or less) parochial surroundings, and when they (sooner or later) come face to face with a drastically different set of customs, mores, and beliefs, the reaction can often be one of automatic rejection. In this case the rejection is not as much intentional or deliberate as it is instinctive and uncontrolled. Nevertheless, instinctive and intentional reflexive belief can mutually reinforce one another. An initial instinctive rejection of some foreign belief, policy, or practice can fuel its intentional and self-congratulatory

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<sup>50</sup> See: Kinder and Kam 2009, pp. 151-171.

<sup>51</sup> See: Chapter Six, §2.

rejection which, in turn, can reinforce the original instinctive reflex itself, and so on and so forth.

If Sumner was referring to the recurrence of these dual forms of reflexive, rather than *reasoned*, ethnocentric belief, and there is good reason to think that he was,<sup>52</sup> then he did indeed put his finger on something of troubling concern. In either case, the worry here (and this is crucial) is that the foreign practice, policy, or belief, is not being rationally evaluated on the basis of any demonstrable merits or demerits, but rather merely on the basis of its *dissimilarity* to what is familiar or locally accepted. Without some plausible explanation of why such dissimilarity or unfamiliarity can be considered an acceptable or non-arbitrary reason for belief or disbelief, reflexive ethnocentrism represents a characteristically unwarranted mode of judgment. Or at least, the notion that socially reflexive belief is characteristically unwarranted should be our *default* assumption, pending the discovery of any plausible reason to revise that judgment. In the following section (§4), I shall consider some reasons of just that sort: that is, reasons that suggest we ought to abandon this default assumption. After finding these reasons inadequate, I then consider in some more detail the generic realist framework within which the default epistemological verdict on reflexive ethnocentrism, which I endorse, makes the most sense (§5).

#### 4. IS THERE ANY REASON TO BE REFLEXIVE?

Some might argue that I have glossed too quickly over the question of what merit or justification there can be for holding a belief reflexively. Perhaps it is true that reflexive belief characteristically *appears* to lack warrant, but on second glance we may revise that

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<sup>52</sup> Later on in *Folkways*, Sumner devotes a chapter to the discussion of how “The Mores [of a society] Can Make Anything Right and Prevent Condemnation of Anything” (pp. 521-532). That it is some such phenomenon that underlies his earlier discussion of ethnocentrism is quite clear. *See also*: Sumner 1907/2002, pp. 28-30.

opinion. In the following subsections, I examine different grounds for revising that opinion. All of these grounds seem to me to fail for different reasons.

#### 4.1 *A Form of Testimony?*

We hold a large array of judgments to be true, for instance, on the basis of testimony rather than hard evidence. Having recourse to the testimony of others in formulating our judgments is a kind of reflex. It does not involve considering the reasons or evidence that speak in favour of some judgment, but rather involves relying on the second-hand judgment of others. And yet, many philosophers have argued that we are justified in accepting some judgments to be true on the basis of testimony.<sup>53</sup> Perhaps we might think of socially inculcated belief as a form of testimony then. We emerge from the process of social upbringing with a host of implanted (moral and scientific) beliefs, and one plausible way to describe this process is as a testimonial one, i.e., as one of a society handing down its well-considered judgments, via testimonial confession, to its progeny.

Unless we belong to a rare breed of what Tony Coady calls “fundamentalists” about the epistemic status of testimony, however, this defense of reflexive belief simply won’t do.<sup>54</sup> This is because all non-fundamentalists about testimony quite reasonably take testimony to be at best a way of *communicating* or *transmitting* justified and/or true belief (wherein lies its merit), but not a fundamental method of justifying belief in the same way that, say, consulting good reasons, using one’s faculties of memory and perception, and carefully drawing inferences are. Non-fundamentalism about testimony is, I take it, the default and most plausible view. But on its account the warrant that we have for taking our socially

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<sup>53</sup> See: C. A. J. Coady, *Testimony: A Philosophical Study* (Oxford: Oxford University Press, 1992), for an overview and analysis of the various candidate philosophical positions on the status of testimony, esp. pp. 21-24.

<sup>54</sup> See: Coady 1992, pp. 120-129 for a discussion of Reid’s fundamentalist theory of testimony.

inherited beliefs to be true is at best *only as good as* the warrant that their original transmitters have or had for doing so. And so, no important question of warrant is solved here. We initially ran from the arms of reflexive belief because it looks like a characteristically unwarranted form thereof. If the reply now offered by the testimonial reading is that reflexively inculcated belief can carry warrant because it is an effective way of *transmitting* warranted belief, then the presumption can only be that the warranted belief being transmitted is not itself reflexive; otherwise, the same worries will repeat themselves. And so the reply defeats itself. On a non-fundamentalist reading of the epistemological status of testimony, which is the only seemingly plausible one, socially testified belief cannot stand on its own two feet.

#### 4.2 External Justification

There are other ways of coming to the defense of reflexive belief. One of these is via an externalist theory of justification, such as reliabilism. Normally we think someone justified in believing that P only if they can cite (and are aware of) good evidence or reasons in favour of that belief. According to a reliabilist conception of justification, however, no such condition of self-disclosure or self-awareness is necessary. One can be justified in believing that P even if one has nothing at all compelling to say in support or explanation of that belief; indeed, they can be justified in believing that P without even being *aware* of the proper grounds of their belief.<sup>55</sup> All that is required for epistemic justification, according to the reliabilist, is that one's belief is formed or caused by a cognitive process (e.g., of memory, perception, or judgment) that is statistically likely to produce true beliefs, or true beliefs of

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<sup>55</sup> For the classic statement of reliabilism, see: Alvin Goldman, "What is Justified Belief?" in *Liaisons: Philosophy Meets the Cognitive and Social Sciences* (Cambridge: MIT Press, 1979/1992), pp. 105-127.

the relevant sort (e.g., moral, scientific, aesthetic, etc.). Because such a statistically efficacious process may have generated a belief in someone without them even being aware of this, it is possible for someone to lack any internally accessible or demonstrably compelling reasons for believing that P and yet to be fully justified in that belief. Perhaps we might defend reflexive ethnocentric belief on these grounds then: that is, as a way of tapping into an epistemologically reliable causal nexus. The lack of warrant displayed by ethnocentric belief from an internal discursive perspective may be irrelevant if the belief-forming process of socialization or social upbringing is itself reliable and therefore sufficient for epistemic justification.

The most difficult challenge for this sort of reliabilist defense of reflexive judgment, quite predictably, is that of demonstrating the epistemic reliability of the social learning process itself. Why should we assume that such a process is reliable? There is no offhand reason to do so. If anything, the natural assumption goes the other way. Given the diversity of the content of social belief across cultures and across historical epochs, and given the sheer volume of socially sanctioned belief that has over the course of time been convincingly shown to be erroneous (e.g. eugenics, geo-centrism, etc.), we should be decidedly suspicious of the reliability of that process. At the very least, there is a long story to be told, and a heavy onus to be fulfilled, by anyone who would defend the epistemic reliability of the subtle process of social acculturation. This consideration on its own is, I think, enough to ward off the externalist reading of reflexive judgment for the present purposes.

### *4.3 Reflex and Relativism*

One way of reviving the externalist reading would be to fiddle with the background understanding of truth against which it was dismissed. The wild temporal, geographical, and

cultural diversity of moral and scientific opinion quite naturally undermines any *prima facie* faith we might have in the epistemic reliability of the empirical process of social learning *providing* we think of (moral and scientific) truth as non-relative or absolute. However, if we think of truth as in some important sense relative (e.g., to cultures, geographic locales, or periods in history) then it becomes easier to countenance the possibility that epistemically reliable processes will yield radically different beliefs about  $x$  across societal divides. For instance, if it is not the case that basic claims of physics (e.g.,  $E = mc^2$ ) are plainly and simply true but only true *relatively* – that is, true for some societies, in some places, or in some time periods, and potentially false in others – then the ostensible diversity of opinion on these matters is exactly what we should expect reliable scientific inquiry to produce. Similarly in the case of morality: if the rightness or wrongness of slavery is relative to culture rather than absolute, then the historical and cultural diversity of opinion on these matters is precisely what we should expect. Epistemologically reliable processes of belief-formation, conducted from different perspectives or contexts, should naturally create such diversity. On this understanding, then, one’s reflexive deference to parochial opinion (whether intentional or not) may be a reliable (and hence justifiable) way of forming beliefs. And this is precisely because “the truth” or the “right answer” itself changes from place to place, society to society, and/or epoch to epoch.

*(i) The Appeal of Relativism about Truth*

Relativism about truth is not a new idea, although it is a testament to the popular influence of new age theology and 20<sup>th</sup> Century anthropology that it has acquired an aura of

acceptability and even vogue in contemporary Western society.<sup>56</sup> That aura is betrayed, it seems to me, by a common willingness to imagine, in a deeply sympathetic way, societies that are culturally and historically very remote from our own (e.g., pre-contact Native Americans, pre-historic Indo-Europeans, Ancient Maoris, etc.). That is, we sometimes appear willing to countenance the possibility that the strange beliefs of the members of distant groups were not merely sustained by misguided groupthink (the individual departure from which would have come at great cost and required great feats of imagination), but rather were somehow appropriate to their *world*, so to speak.<sup>57</sup> In other words, we are sometimes willing to go so far as to seriously contemplate the possibility that the world confronted by such people *actually* was or is governed by the strange norms, laws, forces, and spirits described by their unfamiliar worldview.<sup>58</sup> Of course, we quickly rebound from such imaginative flourishes (some of us more quickly than others) when the imaginative exercise breaks down and we quite sensibly remind ourselves of the implausibility of the notion of relative truth or “multiple realities.” But the initial willingness to experiment is interesting and reveals something about the modern mindset. At bottom, it seems to me, what it reveals is nothing more than the (very healthy and harmless) sceptical doubt that the modern secular worldview, *our* worldview, may somehow fail to capture or acknowledge all aspects of the world. Perhaps there are aspects of reality that other cultures were or are able to access and experience in light of their radically different systems of belief. Even if that were so, however, the conclusion to draw from this would not necessarily be relativism *per se*, but more likely modesty or scepticism about our current capacity to grasp the “whole truth,” as it were.

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<sup>56</sup> For a comprehensive analysis of the impact of relativistic thought on youth and on liberal education in general, see: Allan Bloom, *The Closing of the American Mind* (New York: Simon & Schuster, 1987)

<sup>57</sup> The doctrine of relativism is characterized in a similar way by Steven Lukes and Martin Hollis in their “Introduction” to *Rationality and Relativism* (Oxford: Blackwell Publishers, 1982), pp. 1-21.

<sup>58</sup> See, for instance: Carlos Castaneda (1968/1998) *The Teachings of Don Juan: A Yaqui way of Knowledge*. (London: University of California Press).

I should add two clarificatory points here. Firstly, this relativistic defense of reflexive belief need not be associated with externalism about justification, but could equally well be cashed out in terms of an internalist account of justified belief. For instance, even if we stick with the internalistic idea that having a justified belief about *x* requires that we be able to consciously amass and cite good evidence in favour of that belief, the truth of relativism may only shift our sense of what falls under the heading of good evidence to include (or more prominently include) deference to local judgment and opinion. Secondly, global relativism of the kind I have discussed so far is a much less prevalent doctrine than more restricted versions such as aesthetic relativism or moral relativism. Indeed, the most prominent proponents of moral relativism understand naturalism – a doctrine that affirms the “naturalistic” character of real world properties and that presupposes the absolute truth or falsity of claims about the natural world – to form part of the essential argumentative background to their philosophical rejection of absolute truth in the moral domain.<sup>59</sup>

*(ii) Problems for the Relativist*

Even if we restrict our attention to the relativistic defense of reflexive judgment in the moral domain, however, serious problems emerge. Two main issues stand out. First, as much as naturalism forms the background of contemporary arguments in its favour, moral relativism is still standardly presented as what might be called the “best explanation” of the phenomenon of moral disagreement, especially moral disagreement that appears to be rationally irresolvable.<sup>60</sup> And yet moral relativism is a notoriously poor explanation of one

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<sup>59</sup> See: David B. Wong, *Natural Moralities: A Defense of Pluralistic Relativism* (Oxford: Oxford University Press, 2006), Ch. 2; Gilbert Harman, “Is There a Single True Morality?” in *Explaining Value and Other Essays in Moral Philosophy* (Oxford: Oxford University Press, 2000), pp. 77-99, esp. 86-87.

<sup>60</sup> This is how David B. Wong presents the doctrine of moral relativism in “Relativism” in *A Companion to Ethics* (Oxford: Oxford University Press, 1991), ed. Peter Singer, p. 442; the same

central aspect of such disagreements: the sense in which those on one side of a moral disagreement take themselves to be disagreeing with those on the other side about the *same thing*. Since, on a relativistic account of some fundamental moral disagreement (e.g., about abortion), it turns out that each side is making a relative claim (e.g., abortion is wrong *for conservative Christians*, abortion is right *for secular liberals*, etc.) rather than an absolute claim (e.g., abortion is wrong, abortion is right, etc.), each side's claim is ultimately compatible with that of the other.<sup>61</sup> Both sides are right, in other words. But this is not what we normally think is going on in such disagreements. Standardly, a real disagreement is one in which only one side can be right; one discursive agent makes a claim about the truth of some matter *x* that directly contradicts the claim of another discursive agent about the same matter. If it turns out that each agent is making a claim about *something different*, there is no incompatibility between their views and thus no real disagreement. And so, an absolutist theory of moral truth is *prima facie* less likely to distort our understanding of moral disagreements in this general sense.

This is one difficulty. The second difficulty is, I think, more serious and concerns the extent to which moral relativism appears to beg the question against other ways of interpreting or explaining fundamental and intractable moral disagreements. One explanatory path is that of moral nihilism or error theory: the view that there are no objective moral facts and thus that no moral claims are true (absolutely or relatively). This is roughly the path

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form of presentation is offered by (i) Harman 2000, pp. 86-87, (ii) Alasdair MacIntyre, "Moral Relativism, Truth, and Justification" in *The Tasks of Philosophy: Selected Essays, Volume 1* (Cambridge: Cambridge University Press, 2006), pp. 52-74, (iii) Bernard Williams in *Morality: An Introduction to Ethics* (Cambridge: Cambridge University Press, 1972), pp. 20-25, and (iv) John Tasioulas in "Consequences of Ethical Relativism" in *European Journal of Philosophy*, 1998, Vol. 6, No. 2, pp. 175-177, among others.

<sup>61</sup> This observation is made forcefully by Nicholas Sturgeon, "Moral Disagreement and Moral Relativism" in *Social Philosophy and Policy*, 1994, Vol. 11, No. 1, pp. 80-115, MacIntyre 2006, pp. 56-61, and David Wiggins, *Ethics: Twelve Lectures on the Philosophy of Morality* (London: Penguin Books, 2006), pp. 344-346.

taken by John Mackie, for instance, in response to such disagreements.<sup>62</sup> And so relativists need to explain what sort of explanatory edge they have over nihilists who, rather than responding to persistent and intractable disagreements by concluding that both sides are often right, conclude that both sides are always wrong (provided that they take themselves to be arguing about what is true).<sup>63</sup> On the opposite flank, relativists will also have to explain what interpretive edge they have over moral realists (i.e., moral absolutists) who either (i) deny that the intractability of some moral disagreements is a strong reason to cast doubt on the truth of moral realism or (ii) attempt to show that many if not all cases of rationally irresolvable disagreement can in fact be rationally resolved, or (iii) do both.<sup>64</sup>

In my view, (iii) is the most profitable philosophical path, although I shall only argue for (i) in what follows. Later, in Chapter Six (§2), I discuss three features of moral argument, including the fact of moral disagreement, that can be taken to be evidence of the truth of relativism in particular or moral anti-realism more generally. However, in Chapter Six (§3) I explain why these facts need not force us into the arms of such meta-ethical views. Instead, I argue that the most natural way to accommodate such facts is not to waver from a realist or absolutist conception of moral truth, but rather to acknowledge that the modes of moral justification available to us are imperfect, vague, indeterminate, and highly prone to defects or hazards that include reflexive ethnocentrism itself. These features make moral argument not at all easily conducive to judgments or attitudes of certainty, but nevertheless capable of underwriting some confidence in our ability to approximate moral truth. In other words, against any view that would transform the approximation of moral truth into an almost trivial affair (moral relativism), or a hopeless undertaking (moral nihilism or anti-realism), I try to

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<sup>62</sup> J. L. Mackie, *Ethics: Inventing Right and Wrong* (London: Penguin Books, 1977), pp. 30-36

<sup>63</sup> Nicholas Sturgeon is very good on this point. See: Sturgeon 1994, pp. 82-85, 99-100, 106-108, 113-115.

<sup>64</sup> In category (ii) we find MacIntyre 2006, pp. 52-73, and Charles Taylor, "Explanation and Practical Reason" in *The Quality of Life* (Oxford: Oxford University Press, 1993), eds. Martha Nussbaum & Amartya Sen, pp. 208-232. In category (iii) we find Wiggins 2006, Ch. 11.

stake out something of a fallibilist alternative (modest objectivism), one that affirms the deep indeterminacy, intractability, and uncertainty of moral judgment and yet still leaves some room for hope.<sup>65</sup> So, in a way, then, the discussion to follow later in Chapter Six can be seen as providing an extended response to the present relativistic defense of reflexive belief.

#### 4.4 Luck?

One further attempt to vindicate reflexive judgment against the allegation of epistemic inadequacy appeals to the notion of luck.<sup>66</sup> Part of the crucial background to this strategy is an invocation of Hume's law: the notion that "findings about the causal [or sociological] origins of one's normative judgments cannot by themselves, without the assistance of further normative premises, have any upshot regarding the truth [or justification] of those judgments."<sup>67</sup> On some such grounds, thinkers such as Ronald Dworkin, Simon Blackburn, and Gerald A. Cohen, among others, have asserted what might be called the *autonomy* of first-order moral reasoning.<sup>68</sup> This is the idea that the first-order business of justifying or providing reasons for our moral judgments (e.g., kicking the dog is wrong *because* it causes the dog unnecessary pain) cannot and should not be affected by any second-order theoretical observations about the causal or naturalistic origins (e.g., in emotion, attitude, social

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<sup>65</sup> I acknowledge some debt to the "fallibilism" of Charles Sanders Peirce here. See: *The Collected Papers of Charles Sanders Peirce* (Cambridge: Harvard University Press, 1958), 8 vols. C. Hartshorne, P. Weiss, and A. Burks, eds., pp. 58-59.

<sup>66</sup> The origin of this strategy can be traced back to Ronald Dworkin's 1996 paper, "Objectivity and Truth: You'd Better Believe it," in *Philosophy and Public Affairs*, 1996, Vol. 25, No. 2, pp. 87-139, and it is helpfully identified by Sharon Street in a forthcoming paper entitled, "Objectivity and Truth: You'd Better Rethink it" (DRAFT) forthcoming in *Philosophy and Public Affairs* (revise and resubmit): Available on Google.

<sup>67</sup> Street DRAFT, §8.

<sup>68</sup> See: Dworkin 1996, Blackburn 1993, p. 4, Simon Blackburn, "Commentary," in *Symposium on "Objectivity and Truth: You'd Better Believe it,"* 1996, (available online), Gerald Cohen, "Facts and Principles" in *Philosophy and Public Affairs*, 2003, Vol. 31, No. 3, pp. 211-245. Also discussed in Jeremy Waldron's, "The Irrelevance of Moral Objectivity" in *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992), ed. Rober P. George, pp. 170-171, and Harman 2000, Ch. 5.

circumstance, etc.) of our moral beliefs. Moral justification is an irreducibly normative affair, and so explanatory facts about the sociological causation of any given moral judgment are essentially irrelevant to its justification or lack thereof.

As a thesis about the sort of justification attributable to *reasoned* moral judgment – i.e., moral judgments that we believe true or authoritative on the basis of (what seem to us to be) good moral reasons – this seems to me true enough, albeit well short of a complete theory. However, Dworkin carries the thesis a step further to include examples of characteristically *reflexive* or unreasoned moral judgments. For instance, he writes, confronted with someone who disagrees with us on some moral matter but for which we have no normative or non-normative reason to think that we are right and they are wrong:

All that we can say, by way of explanation of the difference, is that they did not “see” or show sufficient “sensitivity” to what we “see” or “sense,” and these metaphors may have nothing behind them but the bare and unsubstantiated conviction that our capacity for moral judgment functions better than theirs did.<sup>69</sup>

Even here, where we fail to find any compelling reason for endorsing a moral judgment other than that it is simply stated, *our own*, Dworkin seems to suggest that we nevertheless remain fully justified in believing that judgment to be true. The fact that other individuals – most likely, in this case, for sociological or idiosyncratic reasons of upbringing, sympathy, etc. – have come to different or opposite conclusions about the same matter remains irrelevant. The mere fact that we “sense” or “think” something to be morally true is enough to place us in the epistemologically privileged position of being able to claim with confidence that our capacity for moral judgment simply “functions better than” than that of anyone who disagrees with us. If Dworkin is right about this, then his point can be generalized into a vindication of

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<sup>69</sup> Dworkin 1996, pp. 121-122. Discussed and quoted in Street DRAFT, Sec. 9.

unreasoned or reflexive judgment in general. The fact that, in the process of social upbringing, society sometimes inculcates moral judgments and opinions in us that we cannot, did not, or will not find rationally compelling reasons to adopt is not something that should epistemologically concern us. Even in such cases, we remain justified in taking our judgments to be true. Reflexive judgment, or rather reflexive *moral* judgment – since Dworkin’s argument only applies to moral and not to scientific or aesthetic inquiry – is therefore capable of carrying a level of warrant that (at the very least) raises its epistemological rank from that of defective counterpart to that of a legitimate rival to reasoned judgment.

*(i) Problems with Luck*

In Sharon Street’s analysis, which seems to me largely correct, Dworkin’s suggestion essentially amounts to an article of faith.<sup>70</sup> In other words, to assume, in the absence of any substantive moral reasons for taking some particular moral judgment to be true, that it nevertheless *is* true, is to evince a sort of faith comparable to that of a woman who insists that she has won the New York lottery “even though she has no reason to think so apart from the fact that she entered it.”<sup>71</sup> This is because the Humean aura of (non-naturalistic) autonomy that Dworkin imputes to moral justification begins to break down once we come across cases of unreasoned moral judgment. In such cases, the only (remaining) reason for our holding such judgments must be causal, psychological, or broadly naturalistic (because no normative justification is forthcoming). And yet, at the same time, we have to recognize that such naturalistic forces could easily have generated the opposite judgment in us (say, had we been born somewhere else than we were) and that only one of these contradictory judgments can

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<sup>70</sup> See: Street DRAFT, Sec. 9.

<sup>71</sup> *Idem.*

be true. For anyone to assume, in spite of all this blind and unguided causal activity, that the cosmic lottery will consistently or reliably work out in their (epistemic) favour, implanting true beliefs in them but false ones in others, and that they alone are somehow a chosen member of the indifferent universe's normative "elect," is indeed an article of pure faith. It involves wagering the epistemic authority of reflexive moral judgment on what amounts to a "piece of luck."<sup>72</sup>

Surely, however, if we are right to read Dworkin's suggestion in this way,<sup>73</sup> we cannot accept it unless we are prepared to endorse what ultimately amounts to (what Street rightly calls) "a strange form of religion" or "an abandonment of reasoned philosophical argument."<sup>74</sup> There is just so little reason to think that Dworkin's article of faith is one that anyone should endorse. Up to this point, I am in full agreement with Street then. Where we diverge is in the implications that we draw from this conclusion. According to Street, such a blind article of faith is one that any moral realist will ultimately have to adopt on pain of dropping realism's attitude-independent conception of moral truth. She therefore concludes, for this reason and others, that moral realism is false.<sup>75</sup> I do not find her argument plausible, mainly because I do not see why moral realists have to assume, as Dworkin seems to, that reflexive or unreasoned moral judgments should be able to lay any privileged claim to moral truth or justification.<sup>76</sup> Far from it: as I shall explain in the following section (§5), it is precisely because of the justificatory exigencies imposed on moral discourse by the assumption of absolute and belief-independent truth that reflexive argument looks like a poor and unsatisfactory alternative to reasoned moral argument (contrast this with the more lax

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<sup>72</sup> Dworkin 1996, pp. 125-126; Street DRAFT, Sec. 9.

<sup>73</sup> I suggest the possibility of a more innocuous and acceptable reading of Dworkin's suggestion later on in Chapter Six, §3.1, fn. 36.

<sup>74</sup> Street DRAFT, Sec. 9.

<sup>75</sup> See: Sharon Street DRAFT, Sec. 9; Sharon Street, "A Darwinian Dilemma for Realist Theories of Value" in *Philosophical Studies*, 2006, Vol. 127, No. 1, pp. 109-166.

<sup>76</sup> This doesn't mean, as I am keen to insist later on in Chapter Six (§3), that reflexive judgments cannot lay any claim to justification. Rather, as I argue there, reflexive judgments do have *provisional*, but not *privileged*, status as justified or true beliefs.

exigencies of a relativistic account of truth as discussed above). I recognize that these comments alone are not enough to disarm the full range of arguments that Street brings against moral realism, but for the present purposes it is enough to note that we both agree, with good reason, that in its current form Dworkin's luck-based defense of reflexive judgment is simply not going to work.

## 5. ETHNOCENTRISM AND MORAL REALISM

Now that we have examined and dismissed these four attempts to level the epistemic playing field between reflexive and reasoned belief, I want to return (with increased conviction) to my original claim, or what I have called the *default* view: that reflexive ethnocentrism represents a mode of judgment that characteristically lacks warrant and therefore one that we ought to avoid, if at all possible. In particular, what I want to do now is to outline some of the generic metaphysical assumptions that seem to be implicit in the default view. This set of assumptions, I suggest, is realist in character, and this suggestion rests on two observations.

First, it is precisely because we standardly think of truth as something absolute and indifferent to our subjective attitudes or beliefs that ethnocentrism has the aura of unwarrantedness that the default view ascribes to it. For instance, in §3 I described (unintentional) reflexive ethnocentrism as involving two premature (and related) assumptions: (i) that merely familiar or locally accepted judgments have a privileged status vis-à-vis the truth, e.g., “*our* way is the right way!” and (ii) that foreign practices, policies, or beliefs are false merely in virtue of being different from their local and familiar counterparts; thus, such foreign alternatives are not rationally evaluated on the basis of any demonstrable merits or demerits, but rather merely on the basis of their dissimilarity to what is familiar or

locally accepted. Now, what seems to make the best sense of the *prematurity* of these ethnocentric assumptions is the notion that truth itself, as I argued in the last section (§4.4), is not something that can be reliably tracked by reflexive deference to local opinion and judgment. So, the implicit conception of truth operating behind the default epistemological verdict on ethnocentrism is not crudely relativistic, inter-subjective, or one that makes truth in some way dependent upon what we *de facto* believe, here and now.<sup>77</sup> Rather, what that verdict seems to tacitly assume is that truth is itself absolute, object-dependent, and essentially indifferent to what anyone believes about it (hence its disregard for hearsay). The default verdict therefore assumes a generically realist conception of truth.<sup>78</sup>

Second, the default verdict on ethnocentrism invokes a generic form of realism about truth because its negativity implicitly suggests two, more positive claims: (i) that there is some discernable alternative to reflexive judgment, e.g., reasoned judgment, and (ii) that this alternative is capable of carrying the sort of warrant that reflexive judgment cannot, i.e., a warrant that can legitimately underwrite a claim to truth. Clearly, inquiry by reflex is not the way we think things ought to go. Seeking out the truth, on any common-sense account, characteristically involves patient, deliberate, and direct observation, careful reasoning, open-mindedness towards alternative views, and various safety checks on initial opinion or intuition (e.g., hypothetical experiments, counter examples, tests of consistency and coherence with other beliefs, etc.). If there is one thing that all of these epistemic virtues are designed to militate against it is precisely *reflex*, i.e., the automatic or unquestioning acceptance of socially inherited or self-satisfying belief. Ethnocentrism involves the presumption of truth for (what very strikingly appear to be) the wrong reasons. But, in

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<sup>77</sup> This condition obviously excludes cases in which what we are trying to truly or correctly ascertain is, in fact, what we believe about some matter, or cases in which references to what we believe are somehow contained within the judgment in question, e.g., “If Suzie *believes* that John needs to seek out help, then she should tell him so.”

<sup>78</sup> What (the moral version of) the generic thesis of realism entails is defined below (§5.1).

assuming all of this, we surreptitiously imply that there is an alternative to social reflex that is alive and responsive to the *right reasons* for assuming some judgment to be true. Otherwise, a negative epistemological verdict would apply across the board, i.e., to all forms and modes of judgment, and the special case of ethnocentrism would be of little interest. The fact that the default verdict on ethnocentrism singles it out as a special hazard or epistemological pitfall to be avoided, then, means that it implicitly rules in favour of some generic brand of realism, i.e., one that affirms the truth of at least *some* judgments and the justifiability of at least *some* mode(s) of judgment. The default verdict thereby implicitly rejects any generic anti-realism, nihilism, or scepticism.

This is the way I propose to read the problem of ethnocentrism then: it is a problem that arises principally within the framework of certain generically realist assumptions about the nature of truth, and it forms part of a larger account of the many hazards that are characteristically involved in the search for truth of that sort. The default epistemological verdict on ethnocentrism, which I endorse, therefore carries more metaphysical baggage than it might seem to at first glance. Nevertheless, I take this baggage on board without hesitation. Realism about truth, at least in its generic form, seems to me to constitute a *default* view as well. It captures certain core intuitions (e.g., absoluteness, belief-independence) about the nature of truth that, I submit, we would need particularly strong reasons to abandon.<sup>79</sup> I considered some reasons of this sort in §4 above, and I will consider more of them in Chapter Six (§2), in the context of defending a commitment to moral realism. However, in all cases, I find these reasons inadequate. And so my commitment to generic realism (and particularly generic realism as applied to *moral* truth) remains constant throughout the thesis.

This commitment comes with an important qualification of *generality*, however. As far as this thesis goes, I will nowhere endorse a specific conception of realism (moral or non-

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<sup>79</sup> Since Einstein's theory of relativity is about inertial frames of reference, and not cultures or beliefs, I consider its challenge to the intuition of absoluteness irrelevant in this instance.

moral). That is, I will nowhere offer any detailed positive account of how, say, reasoned judgment can attain truth, or even of how such a mode of judgment is more likely to attain truth than its reflexive counterpart. My assumption that reasoned belief constitutes a warranted alternative to reflexive belief, one that is capable of attaining truth, should therefore be understood as just that: an assumption. At base, it is premised on nothing more than the optimistic hope that there must be some warranted alternative to ethnocentric reflex and that reasoned judgment is most likely to be it. Therefore, whatever positive assertions I make (e.g., in Chapter Six, §3.2) regarding the special or privileged warrant that can attach to some reasoned judgments (on certain conditions) should be understood as ultimately premised on the negative claim that, in such cases, there is good reason to think that the presumed hazard of ethnocentrism has been avoided. The ascription of a privileged epistemic status to such judgments is not inferred from some specific or detailed conception of the nature of truth, and a corresponding explanation of how those judgments attain it or might approximate it. None of this is to say that I think such a positive project to be hopeless or somehow not worthwhile. Far from it: it is simply a project for another occasion.

### *5.1 Moral Realism and Human Rights*

In the discussion so far, I have tried to maintain as broad a view of the problem of ethnocentrism as possible, seeing it as a problem that potentially encompasses all domains in which you find people reasoning about what is and is not the case, e.g., morally, scientifically, legally, aesthetically, etc. This means that the problem of ethnocentrism has the potential to become extraordinarily vast in scope. Its potential vastness notwithstanding, however, ethnocentrism takes on a less generic form as a problem encountered by human rights (or their advocates) in particular, and does so in at least two ways. Firstly, along with

being legal norms, human rights are at base moral norms. And so, in the context of normative judgment about such rights, the problem of ethnocentrism is best understood against the backdrop of a generic brand of *moral* realism.<sup>80</sup> For the purposes of this discussion, I will take moral realism to entail the following three claims:

That (i) there are facts in light of which moral judgments are either true or false, that (ii) these facts hold regardless of what anyone's beliefs are about the matter in question, and that (iii) we can be justified or warranted in believing at least some of our moral judgments to be true – that is, conformant to the facts.

(i) and (ii) are highly common elements in philosophical definitions of moral realism.<sup>81</sup> I add (iii) to stress the importance of the epistemological dimension of the moral realist's thesis.<sup>82</sup> This dimension is important since the claim that moral judgments purport to be, and can be, true in light of independent facts [i.e., (i) & (ii)] is no great revelation unless we also have some idea of how we – as in, you and I – can come to ascertain such facts. In other words, it is no good to know that moral judgments can be objectively true or false unless we also have a reasonably clear idea of what circumstances, modes of judgment, or epistemic conditions can justify our feeling confident, or at least more confident, that we *actually have* a true

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<sup>80</sup> According to Gerald Neumann, for instance, one of the distinctive features of human rights as legal rights is that they have a “suprapositive” character: they are “often conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law.” Gerald Neumann, “Human Rights and Constitutional Rights: Harmony and Dissonance” in *Stanford Law Review*, Vol. 55, No. 5, 2003, pp. 1868-1869.

<sup>81</sup> For example, see: Mackie 1977, pp. 30-36; Geoff Sayre-McCord, “Moral Realism” in *The Oxford Handbook of Ethical Theory* (Oxford: Oxford University Press, 2006), ed. David Copp, pp. 40-41; Hollis 1999, pp. 28-29; Jeremy Waldron 1992, pp. 158-159.

<sup>82</sup> On this, see, for instance: James Rachels, “Introduction” in *Ethical Theory 1: The Question of Objectivity* (Oxford: Oxford University Press, 1998), ed. James Rachels, pp. 15-16. Richard L. Kirkham provides an excellent account of the “epistemological enterprise” and its relationship to theories of truth in *Theories of Truth: A Critical Introduction* (Cambridge: MIT Press, 1992), pp. 41-49.

moral judgment in hand.<sup>83</sup> As I have already confessed just above (§5), I will not say anything satisfyingly detailed or forthcoming about what these epistemically favoured circumstances, methods, or conditions are. The limit of my positive contribution here, which will come later on (in Chapter Six, §3.2), will simply be that of specifying some conditions under which we can be confident that a presumably *unfavourable* mode of judgment – i.e., reflexive ethnocentrism – has been avoided.

Now, by understanding the problem of ethnocentrism, as it faces practical reasoning about human rights, against the backdrop of (i), (ii), and (iii), we are not prejudging the truth or falsity of any substantive normative judgments about such rights. For instance, this understanding of the problem does not even presume that there are such things as moral *rights*, objectively speaking. Nor does it presume that we are justified in thinking that there is a special class of moral rights describable as *human* rights. No vindication of moral realism, as such, can guarantee that. It may very well turn out that true moral judgment, as Jeremy Bentham argued, does not count in favour of the existence of rights understood as *suprapositive* or *natural* moral entities.<sup>84</sup> I am not admitting the truth of Bentham's, or anyone else's, critique of rights here. I am simply noting that a generic commitment to moral realism, on its own, will not guarantee that such critiques are false. And as long as they *might be* true, the threat of moral delusion lingers in the case of human rights.

Nevertheless, assuming that it is not delusional to think that there are such things as moral rights in general and human rights in particular, the problem of ethnocentrism will take on a determinate shape depending on one's specific theory of human rights. This is the second sense in which that problem, as it confronts practical reasoning about human rights, is

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<sup>83</sup> It is in part on account of their failure to deliver on this third point that Jeremy Waldron has dismissed theories of moral realism as essentially irrelevant to the practice of law. *See*: Waldron 1992.

<sup>84</sup> *See*: Jeremy Waldron's discussion of Bentham's critique of rights in, *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (London: Methuen & Co., 1987), pp. 29-46, esp. p. 36.

more limited than the problem of ethnocentrism generically understood. For instance, if we follow the orthodox line and assume that human rights are rights that one possesses “simply in virtue of their humanity,” and furthermore assume that such rights are grounded in universal human interests, then it becomes easier to locate the specific points at which moral judgment is likely to go wrong or lack warrant. One of these points will certainly concern the set of interests regarded as universal. So, for instance, one way of reading the East Asian critique of human rights is as a dispute about precisely this – the content of the set of universal interests – with some (perhaps ethnocentrically) claiming that the interest in individual freedom is universal, and others (i.e., East Asian dissenters) claiming that it is not. Or, perhaps the disagreement is about priority rather than universality, with some arguing that individual freedom should not be prioritized over other universal interests (e.g., in communal belonging, or harmony, or “development”) in the way that declarations such as the UDHR suggest.<sup>85</sup> Either way, the point is that the particularity of the topic matters. If it is ethnocentric misjudgement about *human rights* that we are concerned to avoid, then our attention will be directed to specific points of potential error or disagreement.

## 5.2 *Alternative Readings: Quasi-Realism and Constructivism*

I have so far argued that the problem of ethnocentrism (as it confronts reasoning about human rights) should be understood against the backdrop of a default conviction in moral realism of a generic sort. The move to that conclusion may have come too soon, however, since there are ways of making sense of the problem within the context of quasi-

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<sup>85</sup> The argument that socioeconomic rights to “development” or “subsistence” trump civil and political rights to, say, liberty has been a mainstay of the East Asian critique of human rights. *See:* Inoue Tatsuo, “Liberal Democracy and Asian Orientalism” in *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), eds. Joanne R. Bauer & Daniel A. Bell, pp. 34-35. *See also:* Jack Donnelly’s article in that same volume, esp. pp. 72-76.

realism as well as various forms of anti-realism about moral truth. This is perhaps due to the fact that, of the three claims imputed to moral realism, only (i) and (iii) seem absolutely essential to our purposes. (ii), which asserts the objectivity or ontological independence of moral truth, may be dispensable. Let me now consider this possibility in greater detail, taking quasi-realism and constructivism about reasons as my leading examples.

*(i) Quasi-Realism*

According to Blackburn's quasi-realism, the world itself is natural or naturalistic in its composition. It is not made up of, or does not include, ethical properties such as values, virtues, duties, oughts, rights, or reasons of any sort. Rather, it contains, among the physical furniture of the world, dispositional attitudes, stances, conative states, or pressures on choice and action that human beings need if they are to "meet their competing needs in a social, cooperative setting."<sup>86</sup> Against this Darwinian background, Blackburn argues that it is implausible to understand ethical truth as something "out there" in the world that we can "perceive" and, on the basis of such perceptions, about which we can form justified or true beliefs.<sup>87</sup> Rather, in his view, ethical commitments are at bottom expressions of our (entirely natural) dispositional attitudes. Deep down, there is nothing more to ethical commitment than the expression of states of mind and action in accordance with those states; thus, he rejects the realist's second claim that moral facts hold regardless of what anyone's beliefs or attitudes are about the matter in question.<sup>88</sup> And yet, despite all this Blackburn refuses to draw what would seem to be the most logical conclusion: that ethical truth is a rather trivial matter (or at least more trivial than we often think), that we can know what it is in any given

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<sup>86</sup> Blackburn 1993, p. 168.

<sup>87</sup> Ibid, pp. 169-175.

<sup>88</sup> Ibid, p. 168.

case just by monitoring our subjective attitude(s), and that there is no single correct answer to any moral question since different people will inevitably adopt different attitudes towards the same action or supposed ethical demand (e.g., the demand *not* to kick dogs gratuitously).

Blackburn blocks this conclusion by asserting what I referred to earlier as the autonomy of morality. The basic idea is that however causally or foundationally dependent ethical reasoning and commitment may be on subjective attitudes, something like Hume's law makes this essentially irrelevant to the practice of moral *argument, reasoning, or justification*. In fact, there is an "internal" sense in which all three of the generic realist's claims can be vindicated. If we follow the internal grain of moral discourse, so to speak, we can rightly reject the view that moral truth is dependent upon our attitudes. On a first-order level, such a claim is absurd, since, for instance, "our actual responses are inappropriate anchors for the wrongness of cruelty. What makes cruelty abhorrent is not that it offends us, but all those hideous things that make it do so."<sup>89</sup> Because moral reasoning has its own order in which our attitudes play little part, and moral *reasons* (e.g., the wrongfulness of causing gratuitous harm, the importance of being loyal, etc.) play a large part, there is a real sense in which moral judgments report truths that stand independently of our attitudes and a sense in which we can be justified in taking ourselves to have judged correctly about such matters. Thus, Blackburn's position manages to reject moral realism in one sense, whilst entirely granting it (including claims one, two, and three) in another. Hence: *quasi-realism*.

I am not in a position to assess in any comprehensive manner the plausibility or coherence of Blackburn's theory in this chapter, so I will simply take these claims as they stand for now. And as they stand, I see no reason why a quasi-realist could not articulate the very same concerns that I have regarding the need to avoid reflexive arbitrariness in our moral judgment. In fact, on a quasi-realist reading, I am fairly certain that the entire edifice of

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<sup>89</sup> Ibid, p. 172. Also: Ibid., pp. 4, 149-152, 172-174; Waldron 1992, pp. 170-171; and Dworkin 1996, who makes an identical claim.

the philosophical challenge of ethnocentrism, as I have construed it, remains intact. Given that quasi-realism is committed to making sense of (rather than destroying or rendering trivial) “claims asserting our concern to get things right, our fallibility, and some independence of the ethical from what we actually feel,” then the very same worries about reflexivity will crop up for both the moral realist and the quasi-realist. Whether quasi-realism *actually* makes good or adequate sense of these pervasive claims is an interesting question to be pursued on another occasion.

(ii) *Constructivism about Reasons*

According to constructivist views in ethics, broadly construed, the correctness of our normative judgments is not to be understood in terms of some objective or belief-independent criterion of truth. Rather, it is understood, as Street helpfully puts it, “as a question of whether those judgments withstand some (specified) procedure of scrutiny from the standpoint of some (specified) set of further normative judgments.”<sup>90</sup> Now, constructivist views in ethics vary with respect to how thoroughgoing they are. In their more restricted varieties, for instance, such views make this claim about the correctness of only some particular, restricted subset of normative judgments. By contrast, in their more thoroughgoing varieties, constructivism makes this claim about the correctness of *all* normative judgments.<sup>91</sup> In either case, constructivism can make sense of the basic hazard that ethnocentrism represents. This is because, in essence, on either view, we can in any given instance still make mistakes about what is normatively the case, i.e., there is a difference between whether we *think* a normative judgment withstands the relevant procedure of scrutiny and whether it

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<sup>90</sup> Street 2008, p. 208.

<sup>91</sup> Ibid, p. 209.

*does* withstand that procedure.<sup>92</sup> In some cases, it may turn out that we simply haven't properly scrutinized a normative judgment in light of the relevant set of further (scrutinizing) normative judgments, and thus deemed it correct when in fact it is not, i.e., when in fact it fails that test of scrutiny. Or perhaps we have made a mistake about which judgments are or ought to be included in the further scrutinizing set, and so have made an array of scrutinized normative judgments that we think are correct but that are in fact incorrect. All of these subjective mistakes can be possible even if the correctness of our normative judgments ultimately depends upon their relationship to a further set of subjective normative judgments, and not some metaphysically independent criterion of truth. Moreover, there is no reason to think that ethnocentrism cannot be responsible for causing us to make such mistakes.

Despite this general point, the contours of the problem of ethnocentrism will change depending upon the version of constructivism about reasons that one adopts. For instance, on some versions of the more thoroughgoing view, i.e., *metaethical constructivism*,<sup>93</sup> there are certain normative judgments to which any agent who accepts any normative judgment at all is committed. This is, for instance, Christine Korsgaard's view, who holds, in particular, that "if you take anything at all to be valuable, then you must take humanity to be valuable, both in your own person and in that of others."<sup>94</sup> On such a view, ethnocentrism can perhaps lead one astray from realizing this latent implication of their *de facto* normative judgments. For instance, one may have been born into a society where 'humanity' is discursively taken to have no value at all. And despite the fact that this will inevitably turn out to be impossible, on Korsgaard's view – since any society that values anything at all *does*, in fact, value humanity – one may nevertheless ethnocentrically hold onto the socially sanctioned disbelief in the value of humanity. Thus, even if Korsgaard is right (and I am not here in a position to

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<sup>92</sup> Ibid, p. 231.

<sup>93</sup> See: Ibid, pp. 243-245, for an interesting discussion of the array of possibilities here.

<sup>94</sup> The quote is from Street, Ibid, p. 244. But the original assertion can be found in Christine M. Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press, 1996).

formulate any authoritative verdict on this), on her account ethnocentrism can be understood to constitute a serious epistemic hazard.

On restricted versions of constructivism about reasons we can produce similar conclusions, but some new possibilities also open up. Consider, for instance, Rawls' theory of *political* constructivism. According to Rawls, the correctness of our normative judgments about institutional justice (at the level of modern constitutional democracies, on the one hand, and at the level of international political society, on the other)<sup>95</sup> is exclusively a question of whether those judgments withstand scrutiny in light of a further set of ideas, judgments, and values (e.g., regarding the freedom and equality of citizens) that are *de facto* implicit in modern democratic public political culture. On such a view, ethnocentrism can be considered an epistemic hazard if, say, we are socialized into believing a set of judgments that does not include that basic public political set. Or, it may be a hazard in cases where ethnocentrism leads us to formulate normative judgments about institutional justice on the basis of reasons or judgments that in some way *conflict* with the content of that public political set – and this is possible *even if* we also assent to that same content. All of this can be true even though political constructivism understands the correctness of our normative judgments about institutional justice to ultimately depend upon their relationship to a further set of normative judgments that are *de facto* implicit or shared in modern democratic public political culture, and not some metaphysically independent criterion of truth.

However, political constructivism also raises the possibility of adopting other epistemological attitudes towards reflexive ethnocentrism. For instance, in one sense, political constructivism, at least in its Rawlsian variety, has the very same epistemological implication as the relativistic conception of truth considered above (in §4.3). That is, it can be understood to furnish a *justification* of reflexive ethnocentrism as a mode of judgment. In

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<sup>95</sup> See: Chapter Two and Chapter Three for the appropriate references and an in-depth discussion, esp. Chapter Two, §1.

particular, by understanding practical reasoning about institutional justice to be a matter scrutinizing one's normative judgments in light of a further set of judgments that are *de facto* implicit in modern democratic political culture (rather than a matter of seeking out the *truth*), Rawls in effect converts social reflex into something of an epistemic virtue, in this special context. This is especially true given that the reflexive endorsement of that *de facto* public political set of normative judgments is a reasonably likely outcome of the process of socialization for any actual member of a modern democratic society.<sup>96</sup> In this sense, Rawls' theory of political constructivism can provide grounds for reversing or abandoning what I have endorsed as the default epistemological verdict on ethnocentrism, at least with respect to practical reasoning about institutional matters. This is a possibility that I take seriously and that I overturn in the next chapter, Chapter Two.

Apart from its ability, if true, to furnish a reason for abandoning that default verdict, however, political constructivism can also, at the same time, be construed as a means of avoiding the problem of ethnocentrism, (roughly) as I have understood it. That is, political constructivism's basic appeal to established and politically practiced value judgments as a reference point for normative judgment can in some ways serve as a means of avoiding grounding such judgment in objects of dissensus, cultural contestation, and controversy. This benefit of political constructivism is strongly emphasized by Rawls himself, as well as by Joshua Cohen, as we shall see later on. Thus, after dismissing political constructivism as a doctrine that threatens to overturn what I have called the default view of ethnocentrism, in Chapter Two, I shall then consider what prospect there is for appealing to political constructivism as a method of *avoiding* ethnocentrism, roughly as I have understood it. That analysis will carry me through Chapter Three, where I discuss Rawls' international theory of justice, as well as Chapter Four, where I discuss Joshua Cohen's brand of political

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<sup>96</sup> I shall substantiate all of these remarks in the next chapter.

constructivism under the larger theoretical umbrella of agreement theories of human rights. In the end, I find political constructivism implausible on both counts – that is, implausible both as a means of justifying ethnocentrism *and* as a means of avoiding it – and so, in Chapter Five and Chapter Six, I turn to the more positive task of highlighting what I *do* take to be plausible methods of avoiding ethnocentrism.

## *Chapter Two:*

# Truth or Reasonableness?

### 1. REASONABLENESS ACCORDING TO RAWLS

Three interrelated problems occupy a central place in John Rawls' philosophical work. The first of these is that of giving clear and substantive content to basic, yet nebulous, liberal political values, including those of citizenship, justice, and legitimacy. In Rawls' case this was conceived to be a matter of determining, in a principled and ordered manner, the institutionally regulative aims and requirements of such values. In order to accomplish this, however, some thought must be given to the background methodological problem of determining *how* or *by what means* correct substantive conclusions about the content of political values can be reached. And finally, this problem opens up to a further, third one. Support for a given methodology must be underpinned by an account of the sort of scope and validity that its issued conclusions can ultimately lay claim to, and by an explanation of why it is the conclusions derived from *this* methodology, say, as opposed to some alternative set of conclusions derived from an alternative or rival methodology, that are authoritatively correct. In what follows, of the three suggested central preoccupations of Rawls' work – *substantive, methodological, and meta-ethical* – my interest shall be restricted to the second and third.

Rawls' methodological and meta-ethical views are closely bound up with his notion of "public reason,"<sup>1</sup> an idea which became prominent in his later work, and which other contemporary liberal theorists have also taken on board in recent years.<sup>2</sup> According to Rawls, public reason is a form of moral reasoning that can be found concretely practiced by public officials, candidates for public office, legislators, and judges in a modern democratic society. What is most distinctive about it is that it follows a definitive set of normative guidelines and constraints. These constraints are of two basic kinds, encompassing restrictions on either the *scope* of public reasoning, or on its *grounds*.

### 1.1 Scope

In keeping with the overall nature of Rawls' project as I have represented it above, public reason is moral reasoning about the content of basic liberal political values, their demands, aims, and institutionally regulative requirements. However, unlike ordinary moral reasoning, public reason is not free to work this content out for, or apply it to, any evaluative subject matter whatsoever. Instead, according to Rawls, public reason must remain singularly focused on the evaluation of the *basic structure* of a liberal society – i.e. "the main political and social institutions and the way they fit together as one scheme of cooperation."<sup>3</sup> This is how the *scope* of public reason is restricted. But that restriction is somewhat ambiguous,

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<sup>1</sup> See: John Rawls, "The Idea of Public Reason Revisited" (Henceforth: *PRR*) in *PL*, pp. 435-490; Also: John Rawls, *Justice as Fairness: a Restatement*, E. Kelly, ed. (Cambridge: Harvard University Press, 2001), pp. 89-94. (Henceforth: *JF*).

<sup>2</sup> Most notably: Martha Nussbaum, "Perfectionist Liberalism and Political Liberalism" in *Philosophy and Public Affairs*, Vol. 39, No. 1, 2011, pp. 3-45; Joshua Cohen, *Politics, Power, and Public Reason* (Oxford: Oxford University Press, Forthcoming); Amartya Sen, "Dialogue Capabilities, Lists, and Public Reason: Continuing the Conversation" in *Feminist Economics*, Vol. 10, No. 3, 2004, pp. 77-80; Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge: Cambridge University Press, 2010). This is just a small sample of contemporary writings. In what follows, my concern will be almost entirely with those of Rawls.

<sup>3</sup> *JF*, p. 4; *PL*, p. 258.

since Rawls himself admits that there is no sharp criterion – such as an institution’s legally coercive nature – for deciding what is, and what is not, part of the basic structure.<sup>4</sup>

The basic structure is “the background social framework within which the activities and associations of individuals take place,” and something that has “deep” and “pervasive” effects on the aims, aspirations, opportunities, and character of citizens in general.<sup>5</sup> As such, Rawls considers that structure to self-evidently include the following institutions: “The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy..., as well as the family in some form.”<sup>6</sup> Subsidiary associations – i.e., “Firms and labour unions, churches, universities, and the family” – and other voluntary activities are, according to Rawls, *not* part of the basic structure.<sup>7</sup>

Nevertheless, this does not mean that public reason and its findings do not critically bear on the structure and nature of such associations and activities. If not directly, the rules or principles that regulate the basic structure of society *indirectly* restrict all associations, institutions, and behaviour that occur within society.<sup>8</sup> So, for instance, those rules or principles will set limits to the actions of parents towards their children – for instance, by ensuring that parents respect the basic political liberties of their children – but they will not provide an exhaustive guide to the moral and practical question of what makes for good

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<sup>4</sup> *JF*, p. 12.

<sup>5</sup> *Ibid*, pp. 10, 12.

<sup>6</sup> *Ibid*, p. 10; *PL*, p. 258.

<sup>7</sup> *Idem*. It is striking that Rawls includes “the family” in the list of what is part of the basic structure *as well as* the list of what is not. Some interpretation is necessary here, but the source of the dual-placement of the family – that is, its placement both within and without the basic structure – appears to be Rawls’ claim that “many” (but not all) *aspects* of the family are relevant to what he calls the “role” of that structure (*PRR*, pp. 473-474). So, for instance, as an institution that is central to the very reproduction of society and its culture from one generation to the next, the family is part of the basic structure of society (*PRR*, p. 467). But, as an institution that is concerned with the proper rearing of children more generally (i.e., with the rearing of children as persons and not just as citizens), including the nurturing of bonds of love among kin, the family is not part of that structure. Susan Moller Okin has famously argued that Rawls’ ambivalence on this issue prevents his theory from addressing important issues of justice between genders. *See*: Susan Moller Okin, “*Political Liberalism, Justice, and Gender*” in *Ethics*, Vol. 105, No. 1, 1994, pp. 23-43.

<sup>8</sup> *PL*, p. 261.

parenting in general; that question falls outside the direct purview of public reason. Thus, public reason does not aim to develop all-purpose principles of morality, i.e., principles that address the nature of the good life in general, or the nature of good conduct in one's professional, social, and personal conduct, but rather principles that apply to the basic structure of society and only indirectly to all other moral subjects.

Some commentators have found Rawls' treatment of the idea of the basic structure of society to be incoherent. Gerald Cohen, for instance, has argued that the exclusion of the private choices and behaviour of individuals within a market economy from the basic structure is arbitrary given that these have *as* pervasive an effect on the social and economic prospects of citizens in society as any basic coercive institution does.<sup>9</sup> But the difficulty with restricting the scope of public reason to the basic structure alone potentially runs much deeper than this. For, even if Rawls were to explain the narrowness of the basic structure by jettisoning the claims that it has a 'pervasive' impact on the lives of citizens or that it includes informal institutions like the family, he would still be faced with the task of explaining why the job of determining principles of regulation for that structure does not require ruling on a host of other moral subject matter. For instance, why should we assume that the evaluation of something like the basic structure of a society (even when it is narrowly defined to include only legally coercive institutions) is something that can be successfully conducted in isolation from a vast array of moral questions about, say, human flourishing, individual virtue, the collective good, and right conduct in general? At the very least, it would be wrong to simply *presume* that questions about the justice of the basic political structure of a society can be wholly insulated in that way.

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<sup>9</sup> See: Gerald A. Cohen, *If You're an Egalitarian, How come You're so Rich?* (Cambridge: Harvard University Press, 2000), pp. 123-124, 134-147; Reprinted more recently in, Gerald A. Cohen, *Rescuing Justice and Equality* (Cambridge: Harvard University Press, 2008), pp. 116-151.

But Rawls does not make any such presumption. As I see it, his explanation of public reason's ability to maintain its narrow scope comes in two parts. In the first part, he offers a positive and negative account of the *grounds* of public reasoning, i.e., an account of both the justificatory considerations that *can* and *cannot* be appealed to by public reason. And in the second part, he offers two arguments for this entire set of (so far) stipulative restrictions, including the initial restriction on scope. As for the two arguments, I will discuss these at length below in §2 and §3, respectively. Before I get to that, however, let me outline his account of public reason's grounds, which is crucial to understanding Rawls' methodological and meta-ethical views.

## 1.2 *Grounds*

At the level of grounds, or the considerations that may be appealed to in justification or defence of its substantive findings, public reason is governed by additional restrictions. Here, the overarching constraint is that such justificatory considerations fall under the category of what Rawls calls the "political." This has both positive and negative implications.

On the positive side, it means that public reason can appeal to sociological facts, including facts about society and human nature, as well as ideas, concepts, standards, and values that are implicit in the operation of a democratic society's main institutions and public political culture (this is what makes any evaluative standard genuinely "political," according to Rawls).<sup>10</sup> The most fundamental of all liberal political ideas, deeply implicit in liberal

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<sup>10</sup> *PRR*, pp. 453-454. It is worth emphasizing here that Rawls characterizes only the values implicit in a *modern democratic* society as genuinely political. Values similarly implicit in the public political culture of a theocratic regime, for instance, do not appear to qualify under that heading. This is concomitant with the more general interpretation of the idea of public reason as one that sets standards for reasoning about the requirements of justice in *modern democratic* societies, and in those societies alone. In substantiation of that interpretation, see: Joseph Raz, "Facing Diversity: The Case of Epistemic Abstinence" in *Philosophy and Public Affairs*, Vol. 19, No. 1, 1990, pp. 6-7; Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought*

institutions, Rawls argues, is that of society envisaged as a fair system of social cooperation. This idea is accompanied by other fundamental ones, including that of citizens conceived as free and equal, as reasonable and rational, and that of a well-ordered society understood as one that is regulated by a political conception of justice that all such citizens accept in overlapping consensus.<sup>11</sup> In Rawls' view, public reason achieves its epistemic mandate when it articulates principles of institutional justice that both express and cohere well with all of these politically embedded ideas or ideals and, in addition, cohere well with the most brute and unshakable moral-political convictions shared by liberal democratic citizens, e.g., that slavery is unjust, tyranny is unjust, exploitation is unjust, religious persecution is unjust, etc. The goal of such reasoning, then, is the achievement of reflective equilibrium between fundamental political ideas and brute moral-political convictions, on the one hand, and the principles of political justice, on the other.<sup>12</sup> When such coherence or equilibrium is at a maximum, a principled conception of justice is, according to Rawls, maximally *reasonable*.

On the negative side, exclusive reliance on the "political" bars public reason from appealing to, presupposing, or grounding itself in a host of considerations that, under normal circumstances, compete for relevance in our political judgments. Among such excluded considerations are what Rawls calls "comprehensive" doctrines, which address (*in extremis*) the full spectrum of possible moral questions and which Rawls understands to include ideas, beliefs, values, and theories that are religious, moral, or philosophical in character.<sup>13</sup> In one sense, the exclusion of comprehensive doctrines as a basis of justificatory appeal is redundant, since such doctrines are primarily *defined* by their supra-institutional scope; that

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(Oxford: Oxford University Press, 2002), pp. 146-148; and Samuel Freeman, *Rawls* (Abingdon: Routledge, 2007), p. 327.

<sup>11</sup> *PL*, pp. 14-15.

<sup>12</sup> See: *PL*, pp. 150-151, esp. pp. 103-104, regarding the importance of fundamental political ideas, and *PL*, pp. 123-124, regarding the importance of considered convictions.

<sup>13</sup> Comprehensive doctrines are primarily defined by their scope; they are addressed to moral questions of "what is of value in human life, ideals of personal character, as well as ideals of friendship and of familial and associational relationships... and in the limit to our [moral] life as a whole." *PL*, p. 13, 175, p. xxxvii, 58-66, 127; *PRR*, p. 441n2.

is, since we already know that the scope of public reason is to be limited (if at all possible) to institutional matters alone, we should hardly be surprised to find that such reasoning is prohibited from appealing to comprehensive doctrines, which by definition pronounce on supra-institutional matters. On the other hand, the exclusion is an informative one:

Firstly, it is informative because it prohibits public reason from appealing to claims, judgments, reasons, ideas or doctrines that have a broad scope of application *qua* grounds. Since it is possible for the substantive practical principles ratified by public reasoning to have a limited (i.e., institutional) scope while nevertheless being grounded in considerations which themselves have a much broader (i.e., supra-institutional) scope, this exclusion adds something to the original restriction on the scope of public reason that is not already there: mainly, that the scope of public reason is limited to institutional matters *all the way down*, so to speak.

Secondly, the exclusion is informative because it says something about the *kind* of reasons that can and cannot be appealed to in support of public reason's substantive practical claims. Rawls often speaks of the political values and ideas described above as ones that "*characteristically apply* to the political and social institutions of basic structure" of a democratic society.<sup>14</sup> Similarly, he also sometimes speaks of the "wider content" that the broad scope of comprehensive doctrines requires.<sup>15</sup> The implicit suggestion here, I take it, is that ideas, values, judgments, reasons, or claims have a *characteristic* range of application. The idea of society envisaged as a fair system of cooperation, for instance, does not characteristically (or conventionally) apply to relations among friends and family, or among superiors and subordinates in the military. If we want to morally evaluate those non-political relationships, we shall have to draw on "content" that either does characteristically apply to them (e.g., notions of loyalty, love, and necessary subordination), or that characteristically

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<sup>14</sup> *JF*, pp. 27, 40 (my emphasis).

<sup>15</sup> *PL*, p. 175.

applies across the board, to all possible subjects of moral evaluation (e.g., the principle of utility, the Ten Commandments, or Platonic form-based moral epistemology). Thus, by prohibiting public reason from grounding itself in comprehensive doctrines, Rawls does not simply prohibit public reason from justifying its institutionally regulative claims in doctrines which themselves have supra-institutional scope; he prohibits public reasoning from grounding itself in the (typically) moral, religious, and philosophical content that the wide range of such doctrines requires. The exclusion therefore tells us something about the *kind* of reasons that public reasoning is barred from appealing to in support of its claims.<sup>16</sup>

These observations lend some plausibility to the idea that the strictures of public reason are, in effect, motivated by considerations of theoretical parsimony. That is, one way to understand those strictures is to see them as premised on the idea that, for the sake of parsimony, the basic structure of a democratic society ought to be evaluated *exclusively* on the basis of reasons and ideas that characteristically or conventionally apply to it and it alone. Why burden such evaluative efforts with the cumbersome philosophical, religious, and moral considerations that typically bear (*in extremis*) on all matters of moral evaluation, when this is theoretically gratuitous?

There is indeed room for this line of reasoning within Rawls' large body of remarks on the idea of public reason, but it alone cannot explain the general enterprise that public reason represents. This is in part because the strictures of public reason go well beyond what we would standardly expect on such a reading. For instance, it is true that certain values, considerations, reasons, and ideas are characteristically operative in a modern democratic political order. Democracies typically hold themselves to certain normative standards of respect towards persons (e.g., as embodied in human rights, civil rights, welfare rights,

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<sup>16</sup> The exception to this is what Rawls calls "the *proviso*," which "allows us to introduce into political discussion at any time our comprehensive doctrine, religious or nonreligious, provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support." (*PRR*, p. 453)

constitutional rights, etc.), and espouse the values of freedom, equality, fairness, etc. But the idea of a democracy (and the normative standards that it enshrines) is also typically taken by its supporters to be something akin to the *best answer we have* to the question of how society ought to be arranged and how our political life ought to be governed and oriented. That is, the idea of democracy is typically anchored in normative truths, or at least the best, most accurate, most exhaustive and authoritative account of what we take those truths to be.<sup>17</sup> And yet, according to Rawls, public reason is barred from understanding its own claims in terms of “religious, philosophical, or metaphysical accounts of the truth of moral judgments and their validity.”<sup>18</sup> Instead of truth, Rawls understands the correctness of public reason’s judgments in terms of the notion of reasonableness, which is meant to invoke nothing more than the coherentist epistemological mandate elaborated above.<sup>19</sup> But this disavowal of the notion of truth in favour of reasonableness cannot be justified on the grounds of theoretical parsimony alone. Although it is true that the notion of truth is of general relevance and not exclusively appropriate to normative inquiry about institutional justice, it is so natural and conventional to such inquiry that the principle of theoretical parsimony does not seem strong enough to deny it relevance thereto. For this, Rawls would need to appeal to stronger reasons than that of parsimony, which he does. Those reasons (of *stability*, on the one hand, and *legitimacy*, on the other) will form the subject of my discussion in what follows (i.e., in §2 and §3, respectively).

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<sup>17</sup> See: Raz 1990, pp. 14-16.

<sup>18</sup> *PL*, p. 127.

<sup>19</sup> In so far as that mandate is not oriented by the idea of truth or correspondence to an objective and metaphysically independent moral order, but rather by the question of whether our normative judgments about the basic structure of a democratic society can withstand scrutiny from the standpoint of a further set of normative judgments that are taken to be implicit in modern democratic culture, Rawls rightly classifies it as a form of *constructivism*. See: Street 2008.

### 1.3 *The Purpose of this Chapter*

My intentions in what follows are largely negative. Towards the end of the last chapter (i.e., in §5.2.ii), I explained that my central motivation for discussing Rawls' theory of political constructivism consists in its potential (if contextually limited) diffusion of the problem of ethnocentrism as I have characterised it. Since political constructivism requires that matters of institutional justice in a modern democratic society be decided on the basis of "political" values – a set of normative judgments that is both implicit in the public political culture of a society and held in common by its members or participants – it establishes a context in which reflexive deference to socially pervasive normative judgments is an entirely justifiable and even essential epistemological practice. Rather than seek out the truth about matters of institutional justice, or make informed judgments about such matters on the basis of what one takes to be the best, truest, or most plausible reasons, political constructivism requires that we reason on the basis of what are in essence *shared* and institutionally *embedded* evaluative judgments. If Rawls is right to think that sound judgment about matters of institutional justice ought to proceed in this way, then it would be wrong to presume, as I have, that socially reflexive judgment is unjustified or epistemologically flawed. Or at least, if such a mode of judgment is generally flawed, political constructivism would seem to present a particular (yet hugely important) context in which that flaw disappears, becomes irrelevant, or is even converted into a virtue. My critical analysis of political constructivism's supporting arguments in the following two sections, then, are part of a more general effort to formulate a verdict on the question of whether political constructivism can indeed diffuse the problem of ethnocentrism in this way. If I am right to argue, as I do below, that the arguments cited in support of political constructivism are porous and inadequate, then this will justify a

negative verdict on that question by way of pulling the rug, as it were, out from underneath the theoretical project of political constructivism as a whole.

## 2. THE ARGUMENT FROM STABILITY

Although it is not the only problem with which *Political Liberalism* is concerned, stability is, according to Rawls, the most serious one of all.<sup>20</sup> And so, one exegetically plausible way of interpreting the later Rawls is as elucidating the conditions for the existence of a *stable* liberal society. One of these conditions, Rawls argues, is the agreement of democratic citizens on a shared conception of institutionally regulative principles of justice; that such agreement is crucial in providing a deep and enduring basis for social unity is nothing less than “a *basic fact* about the political sociology of a democratic regime.”<sup>21</sup> Thus, stability or unity achieved in the form of a *modus vivendi* – i.e., where citizens must be coerced into submission to the state, or accept the social order not for moral reasons but merely as a way of getting by, or because fleeing it would be dangerous or impractical – is unacceptably weak. In order to be genuinely stable, a liberal state must be stable “for the right reasons:” its citizens must agree upon the content of basic political values as well as their realization in society’s institutions.<sup>22</sup>

According to what I will call the argument from stability, the features of public reason described in the last section are explained by their role in facilitating this sociologically motivated form of stability.<sup>23</sup> In other words, by the lights of this argument, the relatively

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<sup>20</sup> *PL*, pp. xvi-xviii, xxxvii-xxxix.

<sup>21</sup> *PL*, p. 390. (my emphasis) *See also: LP*, pp. 122-123; *JF*, p. 34. And, for the same view, *see: Thomas Nagel*, “Moral Conflict and Political Legitimacy” in *Philosophy and Public Affairs*, Vol. 16, No. 3, 1987, pp. 215-240.

<sup>22</sup> *See: PL*, pp. xxxvii-xxxix, 143-144; *Also: The Law of Peoples*, pp. 44-45. (Henceforth: *LP*)

<sup>23</sup> *See: PL*, pp. xvii-xviii, 9-10, 129; *PRR*, p. 445-446; *Also* “Kantian Constructivism in Moral Theory” in *Collected Papers* (1999), p. 305; and “Justice as Fairness: Political not Metaphysical” in *Collected Papers* (1999), p. 395.

limited scope and grounds of public reason are to be understood as means of maximizing its capacity to generate substantive claims that will be the focus of moral agreement among democratic citizens. The negative restrictions on the scope and grounds of public reason do this by guiding its reasoning away from (comprehensive) subject matter and considerations that are likely to be the focus of disagreement among such citizens. Moreover, public reason's positive reliance on political ideas and values ensures that its reasoned principles cohere well with both the most basic moral-political convictions of democratic citizens as well as ideas and values that are embodied in their social institutions and so "at least familiar and intelligible to the educated common sense of citizens generally."<sup>24</sup> In these ways, public reason is a form of reasoning that is suited to moral debate in the *public* domain of a liberal society. It contributes to the stability of that society by providing democratic citizens with a mode of political argument that maximizes reliance on common moral ground while minimizing reliance on disputed premises.

### *2.1 A Sociological Reading*

In assessing this line of argument – which moves, roughly, from the claims that (i) moral consensus on the principles of political justice is necessary for social stability and (ii) that only principles endorsed on the basis of public reason, with its characteristic strictures, can serve as the focus of such a moral consensus, to the claim that (iii) public reason, and its characteristic strictures, are therefore necessary for social stability – it is sensible to start at the beginning. Here, the question to be asked, it seems, is whether or not popular consensus on the requirements of basic political values is indeed *necessary* for the genuine and long-term stability of a liberal state. At the very least, this claim cannot be the basic sociological

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<sup>24</sup> *PL*, p. 14. *See also: PL*, p. 90, 150.

fact that Rawls makes it out to be. This is because the question of what holds political societies together is vastly underdetermined by the phenomenon of moral agreement. It is easy to imagine, for instance, a society afflicted by radical disagreement about the moral character of its shared institutions but that nevertheless remains strongly united and stable in light of the enduring balance of political and economic forces (i.e., a *modus vivendi*), the effective security and happiness of its members, and their chances of having a decent, well-rounded, and economically-viable standard of living. The same could plausibly be said about a society that is universally apathetic about politics, and takes no view at all about the morality of its own institutions.

There does indeed seem to be a minimum background of shared moral belief and practice that is required for social living to be possible; without this, day-to-day living and meaningful social interaction would break down. However, Rawls dramatically overshoots this mark in his assertion that the relevant test of social stability is whether citizens accept, for moral reasons of their own, a common conception of political morality or at least a common family of such conceptions in “overlapping consensus.”<sup>25</sup> Once the minimum background conditions of social life are in place,<sup>26</sup> stability is much more likely to depend on socio-economic factors and the unifying force of cultural artefacts, such as collectively imagined bonds of solidarity or sympathy among compatriots, than on shared belief in institutionally regulative moral principles.<sup>27</sup> That Rawls himself recognizes such sympathies

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<sup>25</sup> On the idea of a “family” of such conceptions, see: *PL*, pp. xlvi-xlvii; *PRR*, p. 442. Also: Freeman 2007b, p. 255-256.

<sup>26</sup> I leave aside the question of the precise nature of these conditions.

<sup>27</sup> See: Raz 1990, pp. 28-32; Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso Books, Revised Edition, 2006), p. 7. In his famous account of early American political life, Tocqueville pinned the source of democratic stability in America on a variety of factors. Only one of these – the fact that Americans were “accustomed” to democratic governance – had something to do with the idea of a moral consensus on political values or principles. Among the many factors included in Tocqueville’s analysis were: (i) the fact that the United States lacked aggressive neighbours, (ii) the division between federal, “municipal,” and judicial powers, (iii) the fact that there was no populous capital city in the United States, (i) that individuals enjoyed happiness and prosperity, and (v) that they were largely Protestant. Alexis de

to be an essential aspect of a liberal people makes his consensus-based conception of stability all the more puzzling.<sup>28</sup>

## 2.2 *An Expanded Reading*

In his elaborate commentary on Rawls, Samuel Freeman has suggested that the role of public reason encompasses more than just social stabilization. Its pragmatic value includes the need to make consistent and effective political decision-making possible. Freeman writes:

A public political justification acceptable to citizens generally is needed for pragmatic reasons, in order that government officials may consistently apply liberal principles of justice in making and applying the political constitution and the laws, and in deciding legislative and judicial disputes. Officials need something other than their own moral, religious, and philosophical views in order to interpret laws, a liberal constitution, and its principles of justice. How otherwise could there be a shared basis for deciding how basic liberties are to be specified at constitutional, legislative, and judicial stages?<sup>29</sup>

Much like a body of law, Freeman argues that public reason affords judges, lawmakers, and other public officials an autonomous framework of reasoning on the basis of which political decisions can coherently and effectively be decided, interpreted, and explained. This may be true, however, why should we assume that public reason is uniquely useful or necessary for

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Tocqueville, *Democracy in America: And Two Essays on America* (London: Penguin Books, 2003), translated by Gerald Bevan, with introduction and notes by Isaac Kramnick, pp. 323-370.

<sup>28</sup> Rawls acknowledges what J.S. Mill called “common sympathies” to be part of the very idea of a liberal people in *The Law of Peoples*. These “sympathies” cover the effects of “identity of race and descent; community of language [and religion]... identity of political antecedents; the possession of national history, and consequent community of recollections; collective pride and humiliation [etc.]” The quote is from Mill’s *Considerations* (1862), in *LP*, p. 23, fn. 17.

<sup>29</sup> Freeman 2007a, pp. 352-353. Rawls gives us ample reason to believe he is concerned with the same pragmatic ends. *See: JF*, p. 32.

these purposes? If the need is to provide public officials with a shared and effective basis for deciding complex moral-political questions, this can be achieved on purely procedural grounds (i.e. through a voting system), and without requiring officials to bracket out their own comprehensive views. Of course, Rawls will reply that the democratic process is objectionably open-ended in terms of the *content* of the principles and decisions it might ratify, e.g., these may very well turn out to be illiberal or unjust. But this brings up moral and meta-ethical (and not merely pragmatic) considerations that I am not yet prepared to discuss and that, in any case, do not uncontroversially condemn a purely procedural alternative.<sup>30</sup>

Public reason is also unexceptional with respect to the consistency or coherency of its substantive moral claims. Rawls himself accepts that the burdens of judgment<sup>31</sup> apply to moral reasoning conducted under the constraints of public reason to no lesser extent than normal.<sup>32</sup> Leaving judges or government officials to reflect on the requirements that follow from the fundamental ideas and values of liberalism (i.e., the idea of society as a fair system of cooperation, citizens seen as free and equal, reasonable and rational, etc.) and *only* such ideas and values, therefore, is unlikely to result in their producing conclusions that will be measurably more consistent or coherent than those produced on so-called comprehensive grounds. This is because the fundamental political ideas and values described by Rawls are deeply indeterminate, and their content is largely up to us to decide. Indeterminacy affects public reason at two major levels:

First, there is by necessity great latitude that must be given to the process of ‘modelling’ both our most basic considered moral-political convictions and the fundamental ideas and values of liberalism into a single coherent package of political principles – that is, a

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<sup>30</sup> See: e.g., Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

<sup>31</sup> See: footnote 38 below.

<sup>32</sup> See: *PL*, pp. 56, 118, 121, 151; *LP*, p. 87; *JF*, p. 36. Thus, Jeremy Waldron’s exegetical attribution to Rawls the belief that “issues of justice are *not* subject to the burdens of judgment” in *Law and Disagreement* (Oxford: Oxford University Press, 1999), pp. 152-153, is incorrect.

single statement of principles defining our basic liberties, opportunities, and their order of priority.<sup>33</sup> In fact, Rawls' belief that a rationally coherent or consistent inference can indeed be made from inarticulate background ideas, values, and convictions, on the one hand, to a clear statement of lexically-ordered principles, on the other, seems to be one of the more strained and vulnerable presuppositions of his account. Why should we expect *principles* to be the natural yield of this process of modelling or articulation, or even assume that political morality can be adequately expressed in a principled form?<sup>34</sup>

Even if we can (or *must*, or just *do*) formulate such principles in order to organize our moral-political thought, however, there remains a second major indeterminacy to be reckoned with. This is that involved in sorting out the practical weight and finer details of these general and abstract principles as applied to particular moral, political, and judicial questions or decisions. The debated status of the right to abortion is one such example.<sup>35</sup> Given that there is a family of reasonable conceptions of the principles of political morality,<sup>36</sup> as well as a plurality of ways of interpreting the implications of any given conception as applied to any given case or particular judgment, we should harbour no illusions about the alleged consistency or coherence of public reason as a framework for political decision-making. Public reason will not always tell a clear and consistent story when it comes to any given political judgment or issue; rather, it is likely to tell many stories and to ratify several different outcomes, some of which will inevitably be incompatible with one another. Thus, properly understood, the pragmatic virtues (i.e., consistency in argument, political effectiveness) of public reason for decision-making at the public political level are far from

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<sup>33</sup> See: Rawls' characterization of the three (other) features of a political conception of justice in *PRR*, p. 450.

<sup>34</sup> See: Joseph Raz 1998, pp. 38-39, and Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge: Harvard University Press, 1985), pp. 100-101, who make similar points.

<sup>35</sup> See: Freeman 2007a, pp. 408-409, where he illustrates the phenomenon of reasonable disagreement about justice in the context of (Rawls' discussion of) the debate over the right to abortion.

<sup>36</sup> See: references in footnote 20 above.

clear and obvious, and certainly not exclusive to public reasoning alone. Moreover, the evident room available for disagreement *within* the terms of public reason should make us sceptical about its alleged consensus-building capacity.

### 2.3 *A Third Reading*

These considerations fail to close out on an alternative understanding of the argument from stability, however. As Freeman comments, Rawls' central methodological aim in *Political Liberalism* is to systematically "unfold" the network of implications that follow from the essentially liberal conception of society as a fair system of social cooperation.<sup>37</sup> Thus, we might plausibly understand Rawls' constructivist project as one of making explicit the values, ideas, and ideals that are characteristically pursued by, and embodied in, a recognizably *liberal* society. If we acknowledge this, and take note of the fact that Rawls "derives" the companion idea of a well-ordered society understood as stable for the right reasons from the idea of society as a fair system of social cooperation itself, then this casts the argument from stability in a different light.<sup>38</sup> For, what Rawls might reply to the preceding objections is that, even if popular consensus on norms of institutional regulation is not crucial to stability as such, or even if public reason is an inept facilitator of such consensus, both these ideals are nevertheless crucial to a *liberal* ideal of political stability, i.e., stability for the right reasons. Perhaps, then, we have misunderstood the nature of the claim being made: that any recognizably *liberal* ideal of political stability is one characterized by popular consensus on the principles and arguments endorsed by public reason.

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<sup>37</sup> Freeman 2007a, pp. 337-338; *PL*, 27.

<sup>38</sup> *Ibid*, pp. 338; *PL*, 35.

This re-interpretation of the argument from stability shifts the discussion onto new territory that I will address in the following section, where I examine the moral case for the strictures of public reason. This is because the claim that public reasoning is part and parcel of a *liberal* social ideal cannot rest exhaustively on analytic, sociological, and historical considerations, but must appeal to normative ones as well. If social unity founded on moral consensus about principles of political justice is part of such an ideal then it must be because such things advance a fundamentally liberal normative or moral agenda. Before I explore the nature of this agenda, however, I want to note some general concerns about the guiding philosophical methodology that supports this re-interpretation of the argument from stability. Among the most serious of these is that it mires Rawls in a circular web of stipulative assumptions about what is and is not a “liberal” idea or value. For, if we ask why it is that the *liberal* ideal of a well-ordered and stable society must be understood in this way – that is, as stable for the right reasons – Rawls’ answer must be that such an ideal is authoritative because it follows from, or coheres well with, *other* liberal ideas. But this requires further stipulation, for any interlocutor will then want to know why we ought to accept these *other* ideas or ideals as fundamental to liberalism, or as necessarily liberal in some sense, and so on and so forth.

To some extent, this is a difficulty that any philosopher attempting to develop a self-consciously liberal political philosophy must face, because the application of that term will always be the subject of contention and debate. Some measure of stipulation is necessary in such an environment. However, by adopting the methodology that he does – that is, of “unfolding” ideas and ideals presumed to be at the foundation of liberalism – Rawls skips over avenues of thought that might be considered crucial to the *normative* character of political philosophy. For, as a normative political concept, or even as a political *movement*, liberalism is in part a placeholder for the set of moral-political practices that it is best for any

society to embody and pursue or most expressive of what is true, normatively speaking. In this sense, liberalism is an answer to the very basic and ancient question of what the ideal political society is like. Rawls' methodology, however, bars him from asking this question and replaces it with the more inbred question of what a *liberal* society looks like, e.g., What the idea of liberalism itself entails, What the most consistently "liberal" society would look like, and How its various commitments fit together, given certain historical assumptions about the meaning and reference of that term. The impression one is left with is that liberal theory has little or nothing to gain from asking the first question about the ideal society, which is certainly not the case. In fact, its systematic avoidance of this question strengthens the complaint, voiced by some, that *Political Liberalism* impairs rather than enriches our understanding of why anyone should aspire to live in a liberal society at all.<sup>39</sup>

### 3. THE ARGUMENT FROM LIBERAL LEGITIMACY

According to Freeman, *Political Liberalism*'s concern with stability is flanked by an equally fundamental concern with the legitimacy of a liberal state.<sup>40</sup> In this section, I examine the argument in light of which the unique strictures and importance of public reason are explained by this second fundamental (and moral) concern. According to this argument, the features of public reason reflect two virtuous commitments that Rawls ascribes to all "reasonable persons."<sup>41</sup> The first such commitment involves a willingness to propose to others terms of social cooperation that one sincerely believes are fair in that others would also accept them as free and equal citizens – and not as a result of any special situational

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<sup>39</sup> See: e.g., Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2002), pp. 146-148; Onora O'Neill, "Ethical Reasoning and Ideological Pluralism" in *Ethics*, Vol. 98, No. 4, pp. 705-722.

<sup>40</sup> Freeman 2007a, pp. 324-325.

<sup>41</sup> See: *PL*, pp. xlv, 53-54; *LP*, p. 14.

disadvantage or duress.<sup>42</sup> The second such commitment consists in recognizing, and accepting the consequences of, the *burdens of judgment*.<sup>43</sup> These burdens describe six epistemological “hazards” or indeterminacies (e.g., in drawing theoretical inferences, weighing evidence, and balancing competing evaluative considerations, etc.) which together explain why reasoning in general, even under the most ideal of circumstances, may fail to converge on a single conclusion, systematic doctrine, or view. Accepting the *consequences* of such hazards therefore involves acknowledging (i) the “reasonableness”<sup>44</sup> of a plurality of (potentially incompatible) religious, philosophical, political, and moral views, as well as (ii) the importance of “tolerating” the range of views that lie within that plurality.<sup>45</sup>

The connection between these two commitments of reasonable persons, on the one hand, the strictures of public reason, on the other, and finally, the liberal principle of legitimacy itself, is not altogether self-evident. But we can start from the following *prima facie* interpretation, and then see what revision is necessary. The strictures of public reason seem to be responsive to the two commitments in the following respects. Firstly, public reason aims to justify and articulate principles of institutional justice (i.e., ‘terms of social cooperation’) that are grounded in abstract political values and basic convictions that those

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<sup>42</sup> This is the *criterion of reciprocity*. See: *PRR*, pp. 446. Such persons are moreover willing to abide by these terms provided that others do too, even if circumstances become such that this would be personally disadvantageous. (*PL*, pp. 49-50)

<sup>43</sup> A shortened list of these ‘hazards’ can be provided as follows: (a) The evidence – empirical and scientific – bearing on a case is often conflicting and complex, and thus hard to assess and evaluate. (b) Even when we fully agree on the kinds of considerations that are relevant to a given case, we may disagree about their weight, and so arrive at different judgments. (c) Because our evaluative concepts are themselves vague, we must rely on interpretations that are often controversial, where reasonable persons may differ. (d) The manner in which we evaluate evidence and rank considerations seems to some extent a function of our total life experiences, which of course differ. (e) Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment. (f) In conflicts between values, there often seems to be no uniquely right answer. See: *PL*, pp. 56-57, where the burdens of judgment are fully listed.

<sup>44</sup> Note that these three notions of reasonableness – (i) the idea of a reasonable person, (ii) of a reasonable conception of justice (described above in §1), and (iii) that of a reasonable comprehensive doctrine – each represent distinct uses of the term. That is, there is no *underlying* notion of reasonableness that governs its meaning as applied to each case; each must be understood, it seems, independently.

<sup>45</sup> *PL*, pp. 58-59.

who live under liberal institutions are likely to share. Thus, its reasoning is guided by considerations that ‘others’ (i.e., other liberal citizens) can be expected to accept freely and as equals. Secondly, by abstaining from reliance on comprehensive doctrines and ideas, public reason at least *minimizes* its dependence on considerations that, because of the burdens of judgment, are not likely to be shared by citizens. In this way, public reason ‘accepts’ the consequences of the burdens of judgment. Not only would it be unrealistic to expect citizens to accept a conception of institutional justice that is partisan to any single reasonable comprehensive view; an institutional order grounded on such a view would also be immoral, unjust, or intolerant in the sense that it would arbitrarily exclude some citizens – i.e., those who hold other incompatible, yet equally reasonable, comprehensive views – from being able to morally accept the social order under which they live.

Now, public reason’s responsiveness to these two moral commitments entails, in turn, its responsiveness to considerations of political legitimacy, or the conditions of legitimate authority. According to Rawls, the exercise of political power is legitimate only if conducted “in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”<sup>46</sup> If we put questions about the possible interpretations of the term ‘common human reason’ to one side for the time being,<sup>47</sup> we can see that this principle deems the state’s use of coercive force to be legitimate provided it is guided by principles of institutional regulation that other citizens can freely and equally accept, and that will not arbitrarily prejudge against their reasonable comprehensive view. In other words, a legitimate political constitution is one that satisfies the two commitments of reasonable persons (and particularly that of reciprocity), as described above. Correspondingly, what reasonable people

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<sup>46</sup> *PL*, p. 137. Also: *PRR*, p. 446-447; *JF*, p. 41, for slightly different iterations.

<sup>47</sup> I will return to this ambiguity shortly, in the next subsection.

are characteristically ready to offer one another are, in effect, *legitimate* terms of social cooperation.<sup>48</sup>

The argument from liberal legitimacy therefore moves, roughly, from the claims that (i) the two commitments of reasonable persons embody a sensitivity to considerations of political legitimacy and (ii) that the strictures of public reason follow from the two commitments of reasonable persons, to the claim that (iii) the strictures of public reason follow from considerations of political legitimacy. In what follows, I want to begin by extending this interpretive discussion of the argument from liberal legitimacy, which is exegetically challenging (§3.1). Thereafter (in §3.2 and §3.3), I shall offer some critical commentary on what I take the central claims of the argument to be, and will conclude with some more general comments on the implications and possible modification of the argument from liberal legitimacy (§3.4 and §3.5).

### *3.1 Interpreting the Liberal Principle of Legitimacy: Hypothetical or Actual Consent?*

Perhaps the most attractive feature of Rawls' conception of legitimacy is its conformity with the history of liberal thought, or at least certain prominent strands thereof. On the basis of that history, for instance, Jeremy Waldron has argued that liberalism is in essence a doctrine committed to the idea that, in order to be legitimate, the social order must be *transparent*: that is, “in principle capable of explaining itself at the tribunal of each individual’s understanding.”<sup>49</sup> In other words, “people should know and understand the

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<sup>48</sup> On the link between public justification and liberal legitimacy, see, for instance, *PRR*, pp. 445-447; *JF*, p. 41; *PL*, p. xlv.

<sup>49</sup> Jeremy Waldron, “Theoretical Foundations of Liberalism” in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) p. 61. *See also*: p. 44.

reasons for the basic distribution of wealth, power, authority, and freedom.”<sup>50</sup> From these considerations, Waldron derives what he understands to be the master thesis of liberalism:

A social and political order is illegitimate unless it is rooted in the consent of all those who have to live under it; the consent or agreement of these people is a condition of its being morally permissible to enforce that order against them.<sup>51</sup>

From which it also follows that:

If there is some individual to whom a justification cannot be given, then so far as *he* is concerned the social order had better be replaced by other arrangements, for the status quo has made out no claim to his allegiance.<sup>52</sup>

These historical generalizations are helpful in understanding the provenance of Rawls’ conception of liberal legitimacy. However, they also raise questions about its proper understanding. The most pressing of these revolves around the nature of the consent that it seeks to extract from liberal citizens. For instance, as I have provisionally interpreted the argument from liberal legitimacy above, it demands that the exercise of political power in a liberal democracy be justified in light of values and ideas that citizens in such a democracy are actually *likely to share*. I adopted this interpretation for explanatory reasons, i.e., because it seems to be the best explanation of the fact that public reason’s own basis of justificatory appeal consists in values and ideas that have just that characteristic. Not every citizen of a modern democratic society can be expected to endorse or share the values and ideas that are implicit in its public political culture, but at the very least they are all *likely* to endorse and

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<sup>50</sup> Ibid, p. 58.

<sup>51</sup> Ibid, p. 50.

<sup>52</sup> Ibid, p. 44.

share such values (even if only because they have simply grown accustomed to them and to appeals to their truth or authority).

But if it is true that the essence of Rawls' conception of the liberal principle of legitimacy is that it demands that the exercise of political power be justified in light of values and ideas (typically expressed in a "constitution") that are *likely* to be shared or endorsed by all democratic citizens, then it would seem to make legitimacy dependent on the *actual* consent of political subjects. After all, why understand the *likelihood* of the acceptance of the justification of some exercise of political power to be the criterion of its legitimacy unless *actual* acceptance is what one is after? There is nothing inherently illiberal about this interpretation of the principle of legitimacy. It represents one possible interpretation of the master thesis of liberalism identified by Waldron, and it has its historical precedents.<sup>53</sup> However, it faces some well-documented objections or difficulties, one of these being that it has the extravagant and disheartening implication that no liberal political order in the world is, or is ever likely to be, fully legitimate. For, as soon as any such order comes to contain as much as one convinced anarchist or radical libertarian – or anyone for whom the norms, values, and ideas of a liberal democratic order could not plausibly be seen as actually accepted by them – its legitimacy would disappear so far as they are concerned.<sup>54</sup>

This is an old and familiar worry about theories of legitimacy based on the idea of actual consent, but it can be put to one side here because the *actualist* interpretation of Rawls' theory of legitimacy does not quite fit. For, despite its value in explaining the strictures of public reason, it conflicts too heavily with other important elements in Rawls' characterization of the liberal principle of legitimacy. In particular, it conflicts with the requirement that the exercise of political power be answerable to norms, values, and reasons

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<sup>53</sup> See, e.g.: John Locke, *Second Treatise on Civil Government* (Indianapolis: Hackett, 1690/1990), ed. C. B MacPherson.

<sup>54</sup> See also: Raz 1998, p. 37, 40.

that are acceptable to citizens *conceived as* reasonable and rational (this is what is effectively meant by the phrase “principles and ideals acceptable to their *common human reason*).<sup>55</sup> To conceive of citizens in this way is to consider them to be (i) reasonable persons in the two senses described above, (ii) to have and pursue a comprehensive conception of the good, and (iii) to have basic powers “of judgment, thought, and inference.”<sup>56</sup> On this understanding, a convinced anarchist or fanatical libertarian is not in principle capable of vetoing the legitimacy of the state. This is because we are no longer dealing with *actual* citizens of a democratic state, and their *de facto* views. Rather, we are dealing with *reasonable* citizens: a hypothetical set of individuals (the idea of which, according to Rawls, lies implicit in the very idea of society as a system of fair cooperation) whose views are theoretically predetermined in the three main ways described just above. Defined as such, reasonable persons are incapable of being radical anarchists, religious fundamentalists, or fanatical libertarians; such views would (presumably) belie their commitment to reciprocity. Thus, properly understood, the legitimacy of a liberal political order can be decided independently of the empirical range of moral and political views currently entertained by the citizens living underneath such an order.

Now, this reading of Rawls’ conception of liberal legitimacy has received support from other commentators,<sup>57</sup> but it is also susceptible to a further objection. This is the worry that the requirements of legitimacy understood as such are *arbitrarily exclusive*.<sup>58</sup> That is, by prohibiting *unreasonable* citizens from being the *kind* of citizens to whom a legitimizing justification of the principles of the political order is owed, Rawls would seem to arbitrarily deny them an important measure of moral concern and respect. Or, rather, we might phrase the objection in another way: by defining the requirements of liberal legitimacy in such a way

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<sup>55</sup> See: *JF*, p. 41.

<sup>56</sup> *PL*, p. 19. In general on this subject, see: *PL*, pp. 18-20; 29-35.

<sup>57</sup> Most notably: Raz 1998, pp. 32-33.

<sup>58</sup> Raz 1989, p. 33; Cohen 1989/2009, pp. 56-58; Freeman 2007b, pp. 238-239.

that the consent or agreement of the very people who are not likely to accept a liberal political order suddenly becomes unnecessary, Rawls would appear to streamline the criterion of legitimacy in a morally dubious way. This objection has been forcefully put forward by Joseph Raz:

A prima facie objection to restricting consent in that way is that every person counts. The life and well-being of those with unreasonable views are just as likely to be affected by the actions of political authorities as the life and well being of other people. Moreover, their life and well-being are of moral consequence. They cannot be ignored, and if the other people's agreement is required, so should theirs be.<sup>59</sup>

Such worries are perhaps exacerbated by the language Rawls himself uses, at times, to describe the sort of treatment owed to “unreasonable” persons. For instance, at one point, he speaks of the practical task of having to contain the views of such persons – “like *war and disease* – so that they do not overturn political justice.”<sup>60</sup> Nevertheless, as Freeman has pointed out, Rawls' conception of legitimacy does not commit him to morally devaluing the lives of unreasonable people, nor of submitting them to grossly inegalitarian treatment. Indeed, such persons are accorded the very same rights and liberties as reasonable and rational people in a liberal political order.<sup>61</sup> But then this raises the further question of whether unreasonable people, by failing to qualify as addressees of a legitimizing, public reason-based justification of the principles underlying their political order, are in the end denied something of any moral consequence at all? Conversely, we might wonder whether those who do qualify – actual reasonable persons – in the end *acquire* anything of real consequence.

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<sup>59</sup> Raz (*idem*).

<sup>60</sup> *PL*, p. 64. (my emphasis)

<sup>61</sup> Freeman 2007b, p. 238; *See also*: Cohen 1989/2009, p. 57.

According to Freeman's studied interpretation, the empirical question of whether there are, or are not, any citizens that in fact qualify as reasonable and rational is entirely irrelevant as far as the legitimacy of a political order is concerned. Thus, whether a citizen can agree on the justice of the rules that govern her political order, or whether she is excluded from doing so, is also morally irrelevant. Properly understood, Rawls' liberal principle of legitimacy does not require, Freeman argues, "agreement on principles by all reasonable views or doctrines, or agreement by all reasonable persons, or even agreement by all persons (even reasonable persons) holding reasonable views or doctrines."<sup>62</sup> What it requires, instead, is a constitution the essentials of which can be accepted in light of principles and ideals acceptable "from a particular standpoint, that of reasonable and rational free and equal citizens (guided by certain fundamental interests)."<sup>63</sup> If what legitimacy requires is an attempt to justify political institutions, decisions, and uses of force from an ideal standpoint of this sort, and not the concrete or actual agreement of political subjects of any sort (reasonable or unreasonable), then this has some important implications for comprehending the conceptual architecture of *Political Liberalism*.

One of those implications is that the idea of an overlapping consensus on norms of institutional regulation, which does characteristically invoke the possibility of actual moral consensus, must be a criterion of social *stability*, not liberal legitimacy.<sup>64</sup> As such, a liberal political order may be unstable if the majority of (reasonable or unreasonable) views in society do not happen to endorse its constitution in overlapping consensus, but nevertheless legitimate if it embodies principles and ideals acceptable from the ideal standpoint of reasonable and rational persons;<sup>65</sup> conversely, such a political order may be stable and its

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<sup>62</sup> Freeman 2007b, p. 236.

<sup>63</sup> *Idem*.

<sup>64</sup> This runs against the standard interpretation of the idea of an overlapping consensus as being a condition of legitimacy. For instance, one such interpreter is G.A. Cohen, *Rescuing Justice and Equality* (Cambridge: Harvard University Press, 2008), pp. 297-298.

<sup>65</sup> Freeman 2007b, p. 237.

core principles subject to an overlapping consensus of reasonable doctrines, but nevertheless *illegitimate*. None of this means that Rawls cannot optimistically hope that a modern democratic society can enjoy both legitimacy *and* stability. Rawls surely thinks that many liberal citizens will in fact turn out to be reasonable and therefore disposed to justify political proposals from such an ideal rational standpoint (and to hold their elected officials to that same standard).<sup>66</sup> In such a case, an overlapping consensus on principles of justice might actually occur, and the relevant liberal society would be both legitimate *and* stable “for the right reasons.” However, the point here is that neither possibility – i.e., that of legitimacy and that of stability – conceptually entails the other. As Rawls understands it, stability is a state of affairs that depends on the actual agreement of citizens on the core principles of a political order (or a family of such principles). Legitimacy, by contrast is a function of whether or not those principles, and the executions of political power conducted in accordance with them, fulfill ideal or hypothetical criteria.

### 3.2 *A Matter of Respect?*

All of this exegetical work still leaves us at a loss in the face of two crucial and interrelated questions. Firstly, we still haven’t adequately identified the guiding concern, or set of concerns, driving or motivating the liberal principle of legitimacy. Now that we have a good formal understanding of what the principle is and what it requires, we need to make some sense of that form, which we haven’t. One way to get at what’s missing here is to reiterate the question that I posed a few paragraphs above, i.e., What, if anything, hangs on the legitimacy of a liberal political order so conceived? What are we *acquiring* by living

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<sup>66</sup> See: *PL*, pp. 14, 71, 85-86, 85n33: “citizens who grow up under reasonable and just institutions – institutions that satisfy any of a family of reasonable liberal political conceptions of justice – will affirm those institutions and act to make sure their social world endures.” (*LP*, p. 7)

under such a state? And what are we being *deprived* of by failing to live under one?

Secondly, and relatedly, we still lack an adequate understanding of the conceptual nexus between the liberal principle of legitimacy as I have exegetically unpacked it, on the one hand, and the strictures of public reason, on the other. For instance, why is it that only *political* values and ideas (or rather only principles justified on their basis) are those judged by Rawls to be acceptable from the ideal standpoint of reasonable and rational persons? Why is it that the liberal principle of legitimacy requires us to appeal to *those* ideas and values, and not ones of comprehensive scope and character, in our reasoning about the requirements of political justice? I made a provisional stab at this link earlier, when I justified the strictures of public reason in light of the two commitments of reasonable persons. But now that attempt has to be deepened as well as revised in light of the intervening exegetical work. In any case, I want to use this subsection and the next (§3.3) both to explain what I (and others) take Rawls' answers to these questions to be, and then to position my own view in critical juxtaposition to that of Rawls, which I think is marked by important oversights.

In a recent article, Martha Nussbaum has argued that the Rawlsian ideals of public reason and liberal legitimacy are best understood as rooted in the idea of “respect for persons.”<sup>67</sup> Since Nussbaum is right that the idea of respect for persons has an important place in Rawls' argument from liberal legitimacy, I shall focus mainly on it here. I will turn to the alternative (epistemological) strand in that argument, which I think is more plausible, in a moment, but will argue that its implications are different from what Rawls suggests.

According to Nussbaum, the animating impetus behind the (positive and negative) strictures of public reason consists in an ideal of respect for persons as free and equal, one that is embodied both in the criterion of reciprocity (to which all reasonable persons are committed) and the liberal principle of legitimacy (which has little that distinguishes it from

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<sup>67</sup> Nussbaum 2011, e.g., p. 18.

the criterion of reciprocity, other than its special focus on the justification of political coercion).<sup>68</sup> Essential to that ideal is the notion that citizens ought to give one another “plenty of space” to seek out the truth in their own way, “even though they may believe that the conclusions most people come to are wrong.”<sup>69</sup> This means, above all, that

Respect for one’s fellow citizens as equals requires not building the state on the ascendancy of any one particular comprehensive doctrine of the purpose and meaning of life, however excellent. Of course it remains the case that respect is for persons, not for their doctrines. But these doctrines are so deeply a part of people’s search for the meaning of life that public governmental denigration of those doctrines puts those people at a disadvantage, suggesting that they are less worthy than other citizens, and, in effect, not treating them as fully equal ends in themselves. Liberals do not need to make such denigrating statements.<sup>70</sup>

Nussbaum characterises such denigration as a form of “expressive subordination,” which is “subordination that consists in being publicly ranked beneath others.”<sup>71</sup> In order to avoid denigrating citizens in such a way, Nussbaum argues that we show them the necessary respect by

... basing our political principles on a thin and abstemious view, one that abstains from controversial metaphysical, epistemological, and comprehensive ethical claims. The view will have a moral content, clearly: but the hope is that its moral content will be acceptable to all the major comprehensive doctrines, a kind of “module,” as Rawls puts it, that they can all attach to their own views of life.<sup>72</sup>

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<sup>68</sup> Ibid, pp. 15, 20, 21, 22, 33-42.

<sup>69</sup> Ibid, p. 17.

<sup>70</sup> Ibid, p. 22.

<sup>71</sup> Ibid, p. 35.

<sup>72</sup> Ibid, p. 36.

Thus, Nussbaum understands the argument from liberal legitimacy to be at base an argument about basic moral worth and equal respect. In order to respect citizens adequately, the principles governing their political order cannot presuppose any single comprehensive (i.e., moral, religious, or philosophical) doctrine. This would be denigrating towards those who hold incompatible comprehensive views that inform their special outlook on the world and that have become bound up with their identity and sense of self-worth. Instead, political principles ought to be grounded in minimally controversial and maximally abstemious values, claims, doctrines, and ideas: i.e., *political* values and ideas. The strictures of public reason are thereby explained as a requirement of respect for persons, and by an accordant desire to avoid controversy in the justification of political principles.

In keeping with the exegetical findings above, it is compatible with Nussbaum's reading of Rawls that none of this means that the criterion of the legitimacy of the state depends upon the *de facto* matter of whether its citizens can *actually* agree on the moral justification underpinning its principles given their current views. That is just the "hope," as Nussbaum puts it. The real criterion of legitimacy is whether or not the state shows adequate respect to its citizens by grounding its principles in appropriately abstemious and uncontroversial views, values, and ideas. Whether or not agreement in the form of an overlapping consensus on political values (and perhaps a family of issuant sets of principles) actually results from this abstemiousness is a separate empirical matter, although its occurrence is perhaps *motivated* by the demand for respect or legitimacy.

This respect-based version of the argument from liberal legitimacy has an undeniable *prima facie* appeal, but it seems to me to overshoot its mark and to make some unwarranted assumptions that muddle the relevant issues at hand. For instance, both Rawls and Nussbaum lump a great variety of reasons, ideas, and views into the justificatorily untouchable category

of “comprehensive doctrines” – including “metaphysical,” “epistemological,” “meta-ethical,” “philosophical,” “secular,” “religious,” and “moral” ones – but this paints with a rather broad brush, and has a sort of guilt by association effect. Relatively uncontroversial moral or philosophical claims (e.g., Raz’s endorsement of the value of autonomy and worthwhile life options) become tainted by their categorical association with, for instance, religious claims, which are, I take it, *characteristically* controversial.<sup>73</sup> This sort of guilt by association technique is clearly practiced by Nussbaum. Consider: “Expressive subordination is a form of religious establishment. The fact that Raz’s view [of liberalism as based on the value of autonomy] is secular makes no difference to that conclusion. And it is wrong for the reason that religious establishment is always wrong: it offends against the equality of citizens.”<sup>74</sup> But Nussbaum is wrong to assume that there is no relevant difference here. Raz’s ideal of autonomy, which I cannot expound in any detail at the moment,<sup>75</sup> offers an account of the value of autonomy and defends its importance in political life. A religious establishment, by contrast, typically seeks to organize society on the basis of the commands and exhortations of a supposed deity (or set of deities) as revealed in certain inherited texts and/or to certain contemporary individuals. Such a political project is significantly more controversial (epistemologically and metaphysically speaking) than Raz’s intuitive argument for the relevance of autonomy to politics. This is not to say that Raz’s view is plainly uncontroversial, and that any religious political view plainly is controversial. The point is that there are different *degrees* of controversy in operation here. And it is obfuscating of Nussbaum to paper over that fact. In any case, let me come back to this in a moment (§3.3).

Perhaps the best vantage point from which to interrogate the respect-based version of the argument from liberal legitimacy is simply to ask, with a little more patience and clarity,

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<sup>73</sup> By “controversial” I by no means imply “false.”

<sup>74</sup> Ibid, p. 35.

<sup>75</sup> See: Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), Chs. 14, 15.

what sort of disrespect it involves or is appealing to. To make the matter concrete, take the example of a convinced Atheist who happens to live under a Christian democratic order. The order is, as I said, democratic, and it extends to its citizens all the rights and liberties that are today commonly expected of a modern liberal democracy (even rights to abortion and to subsidized healthcare). It is Christian, however, in the sense that it publicly and officially justifies its commitment to democracy and civil rights in a theological conception of moral equality and the natural rights of man (e.g., *imago dei*). The Atheist herself is liberal-minded and democratic, she supports the right to abortion and to subsidized healthcare, but she necessarily disagrees with the religious presuppositions of her state. According to Rawls, as Nussbaum persuasively reads him, such an Atheist is undergoing a form of denigration and disrespect. In particular, she is experiencing a form of “expressive subordination,” one that consists in being “publicly ranked beneath others.”

Contrast this case with a parallel one in which the same Atheist belongs to a sufficiently “abstemious” liberal democratic order, one that does not publicly or officially endorse a comprehensive (religious, moral, or philosophical) justification of liberalism, but also one that is filled with religious conservatives who endorse democratic values but who do not endorse the specific rights to abortion or subsidized healthcare.<sup>76</sup> The religious conservatives, moreover, form an overwhelming majority, and so their opinions are inevitably reflected in the legislatively elected laws of the land, many of which the Atheist does not agree with. Now, in this case, according to Rawls and Nussbaum, the Atheist is experiencing no similar form of subordination, denigration, or disrespect. But, if this is so, then there must be some relevant difference between the two cases. What is it?

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<sup>76</sup> Remember, as I pointed out in §2.2, that liberal political values are afflicted by indeterminacies that leave room for a wide range of (potentially conflicting) substantive interpretations of their content.

The difference cannot quite be explained at the level of rights. For if anything, the Atheist enjoys more rights under the imagined Christian democratic order (which protects her rights to subsidized healthcare and abortion) than she does under the politically liberal one. Moreover, let's stipulate that in neither case is she subject to forms of legal, physical, or social abuse and intolerance. In both cases, she has precisely the same legally protected rights, liberties, and entitlements as her (case-relative) compatriots (Christian or not), and these rights are in no way *begrudgingly* handed to her simply because she is an Atheist. Thus, in both cases her rights as such leave her with "plenty of space" to seek out the truth on her own terms. But then, if the suspected subordination borne by the Atheist living under the Christian democratic order cannot be tracked on the level of rights, where can we identify the residual form of disrespect that Nussbaum is alluding to? The only plausible answer here is that, in the former case, the Atheist is confronted with a different sort of disagreement than in the latter. In the latter case, she lives under a democratic social order that is publicly and officially justified in terms of abstemious values and ideas that she finds acceptable, although it is an order that enacts substantive principles, policies, and legislation that she disagrees with. In the former case, she lives under a democratic social order that is publicly justified in terms of ideas and values that she rejects, albeit one that enacts substantive principles and legislation that she deems fully just.

Once we have characterised the difference in this way, the notion that it is a morally significant one begins to appear less obvious. This is because it is unclear why the difference in the *locus* of disagreement here matters as much as Nussbaum suggests it does. Citizens of liberal democracies are regularly required to stomach the reality of living under laws and policies that they deem unjust. According to Nussbaum and Rawls, that requirement doesn't raise any moral red flags, so to speak, at least in part because those laws and policies were enacted on the basis of fair or respectful procedures (e.g., voting, representation, legislation,

etc.). But why, then, is the inverse requirement – i.e., that of citizens living under a democratic regime that enacts (what they take to be just) institutional policies on the basis of fair or respectful procedures, but that nevertheless officially grounds those policies, laws, and procedures on the basis of justificatory reasons that those citizens do not accept – taken to represent such a moral tragedy?

I don't want to claim that there is no relevant moral distinction worth making here, or that the former requirement is undoubtedly on a moral par with the latter. The respect-based version of the argument from liberal legitimacy is clearly on to something, as there is a certain unique discomfort or sense of alienation attached to the prospect of living under a social order that presupposes reasons (or, indeed, an entire worldview) that one does not accept; moreover, it is a discomfort that doesn't as easily attach to the alternative, abstemious case. My point is only that it is not entirely clear what the source or nature of the relevant discomfort is, and more importantly that it is not entirely clear whether that sense of discomfort has the sort of moral significance that Nussbaum suggests it does. For instance, on one reading, the unacceptability of the justification of a social order vis-à-vis some citizens is simply a source of disappointment for those citizens, but not necessarily one that morally requires rectification. Compare, for instance, the disappointment experienced by a teenage girl who fails to grasp or accept her parents' sensible reasons for imposing a (quite reasonable) 10.30pm curfew on her weekday outings (she unreasonably wants no curfew, let's say). In such a case, her disappointment is not symptomatic of a relationship of moral subordination, disrespect, or unequal regard. In fact, a straightforward description of that moral relationship would be one of parental servitude towards *her*, a fact which she is either unable to grasp or perhaps unwilling to admit to herself (or her parents, of course). Either way, there is no real moral infraction taking place here.

If this is a misdiagnosis, and the case of citizens faced with a political authority that is justified on the basis of non-abstemious reasons that they do not accept is morally disanalogous to that of the teenage girl, or involves a form of disappointment that has a moral relevance not captured by the servitude example, then it is up to political liberals like Nussbaum to explain exactly how and why this is so. Perhaps there is such an explanation lurking about. But even if there is, we should harbour no illusions about the severity of the argumentative burden that political liberals such as Nussbaum will place upon it. For, whatever moral demand of respect for persons is violated by a non-abstemiously justified state, that demand will have to be weighed against the costs of abstemiousness itself, i.e., as embodied in the strictures of public reason. Among these costs is the fundamental reorientation of political philosophy (or at least liberal political philosophy and democratic theory) away from its traditional orientation and basis in claims of reason and truth.<sup>77</sup> The notion that the shape and structure of an ideal liberal social order should not be based upon an appeal to normative judgments, claims, and reasons that we take to be the most plausible, true, and convincing available to us, but rather those (politically-embedded judgments) which are maximally abstemious and non-committal, is enormously revisionary. To justify such a radical transformation of the self-understanding of liberal political thought on the basis of a moral reason, or any reason for that matter, we would need a very strong one indeed. And we do not clearly or conclusively have that as of yet.

### *3.3 A Matter of Epistemological Responsibility?*

None of this means that there cannot be additional, non-moral considerations that can weigh in to supplement the moral case for the strictures of public reason, however

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<sup>77</sup> Raz 1990, e.g., p. 32.

inconclusive it may be. One such set of considerations is epistemological. This picks up on a second strand of the argument from liberal legitimacy that was tacit in my provisional reconstruction of that argument at the beginning of this section (§3). According to this strand of the argument, we begin with the observation that moral reasoning in general is affected by what Rawls calls the “burdens of judgment.”<sup>78</sup> These burdens consist in six epistemological “hazards” or indeterminacies (e.g., in drawing theoretical inferences, weighing evidence, and balancing competing evaluative considerations, etc.) that together explain why moral and non-moral inquiry in general, even under the most ideal of circumstances, may fail to converge on a single conclusion, systematic doctrine, or view. According to Rawls, accepting the consequences of such hazards therefore involves acknowledging (i) the epistemic “reasonableness” of a plurality of (potentially incompatible) religious, philosophical, political, and moral views, as well as (ii) the importance of “tolerating” the range of views that lie within that plurality.

The demand for “toleration” that emerges from these considerations, it seems, is less a matter of moral responsibility than it is one of epistemic responsibility, or even *sensibility*. That is, the basic gist of the demand is that one should not treat their moral, political, or religious view as the only plausibly correct one. Or rather, if one sees themselves in specific cases as rationally entitled to hold a certain view as uniquely correct among its alternatives (and I see no reason why the burdens of judgment would rule this out as a justifiable conclusion to draw in some cases), this should be done with an awareness of the inherent difficulties of (or hazards involved in) attaining certainty in the matter, as well as the inexorable room that these difficulties make for reasonable disagreement about what to believe. To me, these are entirely sensible conclusions to draw from the burdens of judgment, which are themselves wholly plausible as a description of epistemological hazards that we all

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<sup>78</sup> See: fn. 43 above, for a description of these burdens.

face.<sup>79</sup> However, while we can generate some reasons for justificatory abstemiousness on their basis, these reasons do not stretch nearly as far as is necessary to support the level of abstemiousness embodied in the strictures of public reason itself.

For instance, we can use something like the burdens of judgment and their accordant demand for epistemic responsibility to explain why there might be an important disanalogy between the case of the disappointed teenager and that of the Atheist living under a Christian democratic order. For, in the latter case, we're (let's stipulate) dealing with a responsible adult who has reasoned on the basis of the evidence available to her (as well as to us all) and has come to the conclusion that Atheism is the correct view. Nevertheless, she recognizes that the matter is a difficult one, fraught with uncertainty and ambiguity, and that some might not implausibly come to a different view about religious matters and embrace Christianity. Moreover, she rightly thinks that those who endorse Christianity should believe the same to be true about her own Atheistic view, i.e., that it is incorrect but not an entirely unreasonable view to endorse given the evidence available to her and to us all. But this is where the Atheist can raise a legitimate grievance against her state that the disappointed teenager cannot raise against her parents. For the teenager is just being unreasonable (in an epistemological sense). She simply isn't able or willing to grasp the good reasons and evidence her parents have for demanding that she be home on weeknights by 10.30pm. It is not as if the teenager and her parents are taking different sides in some intractable controversy. The parents are clearly in the right, or at least clearly within the *realm* of rightness (9pm, 10pm, even 11.30pm might be reasonable but pushing it), while she is not. By contrast, in the case of the Atheistic citizen of the Christian social order, you have someone who clearly endorses a reasonable view, but who is subject to a social order that presupposes the correctness of another reasonable view that is different from and incompatible with her own.

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<sup>79</sup> There is even room in them – particularly hazard (d), *see*: fn. 43 above – for what I have understood as the problem of ethnocentrism (Chapter One, §3).

Now, that incompatibility alone may not be enough to show that the Atheist has a legitimate grievance against her state, because although Atheism is a plausible doctrine, Christianity might in principle be a *far more* plausible doctrine in light of the evidence available to all. What makes the Atheist's plight a legitimate source of complaint in this instance is that, as things actually stand, the ascription of *relative degrees* of plausibility seems out of place here and, if anything, seems to lean in favour of the plausibility of the Atheistic view. If that is the case, then the Atheist can complain that her state (as an entity, if you will) is, by presupposing the truth of Christianity, irresponsibly or insensibly ignoring the fact that there are other, *equally* plausible views that one can take on the matter of religion. In her defense, the Atheist can appeal to the fact that the beliefs and presuppositions of the state are not a matter of merely private significance (i.e., to the state itself). The fundamental beliefs and presuppositions of the state matter in a way that those of her Christian next-door neighbour do not: this is because, in the former case, we're talking about an institution that deeply affects the lives of potentially millions of individuals, including that of the Atheist herself. The state, by adopting some view, is effectively deciding *for us*. Thus, the bar of epistemic responsibility is raised for the state, or at least the *urgency* of the state's having to meet that standard bar is raised as compared with the less urgent case of a regular citizen deciding what to believe about (say) religious matters on her own terms and for herself. This increased urgency is, at base, fuelled by moral considerations about the potential effects that the beliefs of the state will have on the lives of its subjects. But this doesn't mean that this epistemological strand of the argument from liberal legitimacy is, at base, a mere reiteration of the moral or respect-based strand of that argument. It remains an argument rooted in the demand for epistemic responsibility itself. The moral considerations about the state's pervasive impact on our lives only come in to *reinforce* the urgency or importance of that basic demand in the case of the state.

Thus, there is a way in which these epistemological considerations can generate at least some of the abstemiousness demanded by the ideal of public reason. Because of their intrinsically and intensely controversial status, the state and its principles should not be in the business of pronouncing on matters of religion. To do so would be to beg the question against other, equally plausible but incompatible religious and non-religious views. However, there is nothing in this that rules out the possibility of the state legitimately presupposing some religious view forever more. Powerful evidence (of miracles, deities, or their absence, etc.) may one day arise that changes the epistemic playing field, so to speak, vaulting the plausibility of some specific religious or anti-religious view above the rest. It may then be justifiable – or at least not epistemologically irresponsible – for the state to pronounce on such matters.

But this is where the argument begins to fall short of justifying the timeless and uncompromising strictures of public reason, and why it is so important to keep hold of the idea of *degrees* of controversiality or plausibility, as well as not to succumb to the guilt by association technique, which I stressed at the beginning of the last subsection (§3.2). *Any* kind of claim, view, doctrine, or judgment – be it religious, philosophical, moral, metaphysical, political, what have you – can be deeply controversial or especially prone to reasonable contestation and disagreement. And some (e.g., religious, or ambitiously metaphysical) kinds of claims may be more prone to such controversy than others. But equally true is that *any* kind of claim can also possess a degree of plausibility that, in light of a persuasive body of evidence, vaults it above its counterparts, epistemically speaking.<sup>80</sup> These are the sort of claims that an epistemologically responsible agent will characteristically seek out, and I see no reason why such claims will always turn out to be “political” in character, or non-comprehensive, or implicitly embedded in modern democratic culture.

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<sup>80</sup> I shall try to offer a preliminary account of how we can identify such claims in Chapter Six, §3.2.

Indeed, there is nothing to stop them in principle from being thoroughly philosophical, moral, or religious in character. Nor is there any reason to think that we should not understand the plausibility of these claims in terms of their approximation of the *truth*. On the contrary, the epistemic aspiration towards truth (in the realist's sense of a truth external to us, and difficult to access) is what seems to make sense of the very demand for epistemic responsibility in the first place.

### 3.4 *Mixing Justice with Legitimacy*

Now that I have established a critical take on the argument from liberal legitimacy, I want to offer some more general observations about its overall impact on Rawls' (later) political theory. The first such observation picks out a serious conceptual downside of justifying the strictures of public reason on the basis of a demand for liberal legitimacy, which is that it leaves us in the unfortunate situation of being unable to distinguish between the demands of justice, on the one hand, and the demands of legitimacy, on the other. Indeed, it is no longer clear that *Political Liberalism* is about what it ostensibly purports to be (i.e., *justice*) at all, since the "reasonableness" of a political conception of justice is effectively a criterion for assessing its *legitimacy* (as well as perhaps, in an indirect sense, its *stability*) but is not a measure of its success along any other dimension of assessment.

Freeman asserts that, by leaving room for the possibility that his earlier theory of *Justice as Fairness*<sup>81</sup> remains the "most reasonable" political conception of justice, Rawls is in effect able to preserve his commitment to *Justice as Fairness* as the most just or the only "wholly just" conception thereof.<sup>82</sup> But this claim cannot follow from the idea of reasonableness as applied to conceptions of justice, when properly understood. For, what it

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<sup>81</sup> *See: TJ.*

<sup>82</sup> Freeman 2007a, p. 175.

actually means to say that *Justice as Fairness* is the *most* reasonable conception of justice is that it is best able to provide a basis for the *legitimate* exercise of coercive authority in a liberal democratic state. However, why is it that such considerations of legitimacy should affect our thinking about the demands of justice proper? And how is it that we are meant to understand the distinction or difference, if any, between these two evaluative concepts within the context of Rawls' normative political theory? The answers to these questions remain vague and uncertain. This is unfortunate and unhelpful.

This observation resonates with a broader one recently advanced by G.A. Cohen, who accuses Rawls of mistakenly identifying fundamental principles of justice, on the one hand, with all-things-considered optimal principles or rules of social regulation, on the other.<sup>83</sup> For present purposes, the crucial difference between the former category and the latter is that rules of social regulation must be sensitive to values *other* than justice – including prudential considerations about what sort of rules will be effective and stable – in a way that fundamental principles of justice simply are not: a principle is a principle of justice, according to Cohen, only if it serves or expresses the value of justice, and not some other value or set thereof.<sup>84</sup> The danger of confusing principles of justice with optimal rules of regulation in the way that Rawls allegedly does, then, is that it both inhibits our ability to understand how the value of justice might only be partially satisfied (i.e., compromised) in a given set of institutionally-regulative principles, as well as muddles our understanding of what the value of justice itself (i.e., in ideal or uncompromised form) requires of the world.<sup>85</sup> All of this resonates loudly with the preceding observation that public reason, with its standard of reasonableness, is in essence responsive to considerations of legitimacy (as well as perhaps stability) rather than justice proper. Thus, Rawls' portrayal of public reason as

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<sup>83</sup> See: G.A. Cohen 2008, pp. 274-279.

<sup>84</sup> Ibid, p. 277.

<sup>85</sup> Ibid, pp. 283-284.

devoted to the justification and articulation of principles of institutional *justice* (and not merely optimal principles of institutional regulation), does not seem to be well grounded in his arguments for the strictures of public reason itself. Indeed, in light of those arguments, it is not even clear how considerations of justice play a role in public reasoning.

### 3.5 *A Way Back in for Truth*

My aim in this chapter has been to assess the reasoning behind the rather extravagant claim made by Rawls and others who endorse the idea of public reason. That claim, which supplants the traditional epistemic standard of truth with a more abstemious standard of reasonableness, is one that, for reasons I explained above (§1.3), I understood to justify or vindicate reflexive ethnocentrism at least in the limited context of normative inquiry about the justice of democratic institutions. Now that I have cast a sufficiently critical light on that underlying reasoning, I want to firmly revert back to my default assumption, which is that reflexive ethnocentrism is an epistemic hazard, defect, or problem, much like the burdens of judgment identified by Rawls himself. Furthermore, I want to revert back to the generic realist meta-ethical framework in which the problem of ethnocentrism seems to me to make the most sense. In that framework, truth is the ultimate aim of belief, there are facts in light of which moral judgments are either true or false, and these facts hold regardless of what anyone's beliefs are about the matter in question. It is primarily (although not exclusively)<sup>86</sup> against this background that reflexive belief, or deference to the social status quo, seems inherently suspicious, epistemologically speaking.

Now, it is worth pointing out that the reintroduction of truth that I am arguing for here is rather different from that recently advocated by Joshua Cohen. In a recent article,

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<sup>86</sup> See: Chapter One, §5.1.

Cohen has argued against public reason's adoption of the standard of reasonableness. Arguing from the point of view of *Political Liberalism* itself, Cohen claims that public reason's avoidance of the standard of truth is not justified by its most central aims. Rather, he argues that there is a notion of truth that falls within the category of the "political," and which can be used by public reason to make sense of the validity of its own judgments. This "political conception of truth," Cohen asserts, makes use of the "concept" of truth, but appeals to no "theory" of truth that could be seen as controversial or partisan to a given reasonable philosophical doctrine of truth.<sup>87</sup> Instead, such a conception of truth entails only four "commonplaces" about truth: (i) that believing something involves believing it to be true, (ii) that true beliefs present things as they are, (iii) that truth is different from warrant or justification, and (iv) that truth is important.<sup>88</sup>

The difference between Cohen's plea for the reintroduction of the standard of truth and my own hangs on an ambiguity regarding the former's epistemological significance, an ambiguity that creates a dilemma for Cohen. For, given Cohen's general acceptance of the project of public reason (and its underlying rationale) as a whole, it can be assumed that he intends the concept of truth available to public reason to entail the selfsame coherentist epistemology implied by Rawls' notion of reasonableness. But if that is true, then it is not clear precisely what Cohen has accomplished by reintroducing the notion of truth, or what the real difference between the two standards consists in. On the other hand, if Cohen *really is* talking about reintroducing the standard of truth in the generic realist's sense, then him and I are in agreement. But this also means that Cohen would have to drop the coherentist epistemology implied by the standard of reasonableness, since this makes little sense in light of the generic realist's commitment to truth. In any case, it's not which horn of the dilemma

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<sup>87</sup> Joshua Cohen, "Truth and Public Reason" in *Philosophy, Politics, Democracy: Selected Essays* (Cambridge: Harvard University Press, 2009), pp. 371-373.

<sup>88</sup> *Idem.*

Cohen will impale himself on here. My suspicion is that, as a Rawlsian, he will come down on the first horn, which calls the real significance of his appeal to truth into question.

Now that we are firmly back on the default ground that I set out in the last chapter, one upon which reflexive ethnocentrism is a universal epistemological problem and the nature of that problem is understood against the backdrop of a generic commitment to realism (and especially moral realism), I want to explore a second sense in which the Rawlsian ideal of public reason might be relevant to my analysis. In the *Law of Peoples*, his international theory of justice, Rawls takes up the problem of ethnocentrism as an explicit concern. But the concern there is not, as I have understood it thus far, to somehow epistemically *vindicate* the phenomenon of ethnocentrism, but rather to use the strictures of public reason to *avoid* that phenomenon. Thus, following this lead, I now want to explore the question of whether public reason, and its reliance on shared and politically-embedded ideas and values, can perhaps be seen as a method of *avoiding* the problem of ethnocentrism as I have identified it. The fact that the *Law of Peoples* considers the avoidance of ethnocentrism in relation to human rights to be an important matter, and offers a concrete program of avoidance, only adds to the relevance of this question to my overall analysis. Its exploration will carry us through the next two chapters.

## *Chapter Three:*

# “No, Not Necessarily”: Ethnocentrism in *The Law of Peoples*

### 1. RAWLS ON ETHNOCENTRISM

Surprisingly little attention has been paid to John Rawls’ attempt to escape the charge of ethnocentrism in *The Law of Peoples* (Hereafter: *LP*).<sup>1</sup> This cannot be due to Rawls’ own ambiguity about the importance of answering such a charge. He plainly thought it needed to be answered,<sup>2</sup> so much so that he opens the conclusion of *LP* with a short section entitled, “*Law of Peoples not Ethnocentric.*”<sup>3</sup> Perhaps, then, it is the brevity and obscurity of Rawls’ treatment of this issue that have turned philosophical commentators away. But this only means that valuable work has yet to be done. *Valuable*, in at least two respects: first and foremost, it is of philosophical interest that we understand not only what Rawls took the problem of ethnocentrism to be, but whether his response to it was a failure or a success or both. Secondly, a significant exegetical hole will remain in Rawlsian scholarship until these questions are answered. Rawls’ concern with the problem of ethnocentrism, as will

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<sup>1</sup> Some notable exceptions are: Catherine Audard, “Cultural Imperialism and ‘Democratic Peace’” in *Rawls’s Law of Peoples: a Realistic Utopia?* Eds. R. Martin and D.A. Reidy (Oxford: Blackwell Publishing, 2006), pp. 59-76; John Tasioulas, “From Utopia to Kazanistan: John Rawls and the Law of Peoples” in *Oxford Journal of Legal Studies*, 2002, Vol. 22, No. 2, pp. 367-396 (esp. 390-395).

<sup>2</sup> See: *LP*, pp. 62, 65, 68, 93, 121-122.

<sup>3</sup> *LP*, p. 121.

become evident, illuminates his positions on a variety of issues that have long been at the focus of controversy over his theory of international justice, including the inegalitarian spirit of its distributive principles<sup>4</sup> and its idiosyncratic conception of human rights.<sup>5</sup>

The most obvious starting point for any analysis of Rawls' treatment of the problem of ethnocentrism is his own (explicit) discussion of the matter in *LP*. There, Rawls finds his theory of international justice vulnerable to the charge of being "ethnocentric or merely western" on at least one count: its liberal character.<sup>6</sup> Not only does *LP* apply domestic liberal values and ideas – i.e., those of a modern constitutional democracy – to the international political domain, its principles of justice are primarily addressed to liberal societies and their conduct towards other (liberal and nonliberal) peoples. This is why Rawls repeatedly refers to *LP* as a liberal foreign policy program, or as a foreign policy that advances the fundamental values and interests of a liberal people, rather than as a guide to foreign policy full stop.<sup>7</sup> But this is also why there is strong urgency attached to the question of whether *LP* constitutes a culturally or politically biased account of international justice.

Rawls' answer to this question is indecisive: "no, not necessarily," he writes. However, his response is not indecisive all the way down, so to speak. It rests on a more basic and self-confident claim about what sort of considerations are relevant when deciding on the question at hand. Whether *LP* is indeed ethnocentric, Rawls asserts decisively, ultimately depends on the kind of societies that can affirm its content. If *only* liberal societies

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<sup>4</sup> See: Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian" in *Rawls's Law of Peoples: a Realistic Utopia?* Eds. R. Martin and D.A. Reidy (Oxford: Blackwell Publishing, 2006), pp. 95-115, for a discussion and defence of Rawls' position.

<sup>5</sup> See: Joshua Cohen, "Minimalism about Human Rights: The Most we can Hope for?" in *The Journal of Political Philosophy*, Vol. 12, No. 2, 2004, pp. 190-213; Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), esp. pp. 96-102; Joseph Raz, "Human Rights without Foundations" in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford UniOxford University Press 2010), pp. 321-339; John Tasioulas, "Are Human Rights Essentially Triggers for Intervention?" in *Philosophy Compass*, 2009, Vol. 4, No. 6., pp. 938-950.

<sup>6</sup> *LP*, p. 121.

<sup>7</sup> *LP*, pp. 9-10, 82-83, 92-93.

can find reason to endorse that content, then the charge of ethnocentrism stands, according to Rawls; however, if the content of *LP* can be affirmed not only by liberal societies but also by what Rawls calls “decent” nonliberal societies, even if they do not accept the liberal rationale underlying that content, then the charge falls.<sup>8</sup> Thus, the tentativeness of Rawls’ response to the problem of ethnocentrism – “no, not necessarily” – must be due to an uncertainty on his part about which side of this binary clause turns out to be true.

But why is it that Rawls believes decent nonliberal peoples’ affirmation of the content of *LP* is crucial to answering the charge of ethnocentrism? Here, two separate lines of reasoning come into view. On the one hand, Rawls (at times) casts the multilateral acceptability of the content of *LP* as a condition of its responsiveness to the demands of mutual respect that exist among peoples or nations.<sup>9</sup> On the other hand, Rawls (at other times) understands the acceptability of *LP* from both a liberal *and* decent nonliberal point of view to be a condition of its objective validity, i.e., its satisfaction of the epistemic standards implicit in the “public reason of the Society of liberal and decent Peoples.”<sup>10</sup> In what follows, I evaluate each of these claims in turn. Taken together, I suggest, they constitute an attempt on Rawls’ part to address at least three basic aspects of the problem of ethnocentrism: (i) as one society’s failure to have sufficient respect for the rights of another, (ii) as a failure to propose norms of international justice that are epistemologically justified or authoritative, and (iii) as a failure by one community to offer adequate recognition to another. After elucidating the role of Rawls’ idea of mutual respect among peoples in addressing these three forms of ethnocentrism (§2), I go on to critically evaluate *LP*’s success in avoiding them (in §3, §4, and §5, respectively). Ultimately, I conclude that there are serious weaknesses in Rawls’

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<sup>8</sup> *LP*, pp. 121-122.

<sup>9</sup> *LP*, pp. 62, 121-123.

<sup>10</sup> *LP*, pp. 121.

solution to all three aspects of the problem of ethnocentrism, and that these weaknesses stem in part from the condensed and muddled form in which *LP* discusses that problem.

## 2. THE IDEA OF MUTUAL RESPECT AMONG PEOPLES

Although *The Law of Peoples* is, and is conceived by Rawls to be, an international extension of the main ideas developed in *Political Liberalism* (Hereafter: *PL*),<sup>11</sup> the relationship between these two works is not as straightforward as one might expect; and this, in two important respects. First, *LP* does not abstract away from the bordered democratic nation-state of *PL* to contemplate the content of a political conception of justice that would be agreed to by all reasonable and rational world citizens everywhere, and that should therefore regulate all domestic systems of government, or even that of a cosmopolitan world state.<sup>12</sup> Instead, it recasts the basic ideas of *PL* at an international level by specifying reasonable terms of social cooperation amongst *peoples* (and not *persons*). Thus, using the procedural device of the original position, it formulates the content of a political conception of justice that is to regulate an international confederative Society of Peoples – one that includes reasonable well-ordered liberal as well as decent hierarchical political communities.<sup>13</sup>

Second, along with this structural deviation comes a substantive one. Contrary to what might be expected of a theory so closely related to *PL*, *LP* does not prescribe the universal enforcement of liberal standards of domestic justice. Rather, in order to qualify as a sufficiently just domestic regime or an equal member of the international Society of Peoples

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<sup>11</sup> See: *LP*, pp. 9-10, 12-19.

<sup>12</sup> See: *LP*, pp. 82-83, 119-120. Such theories have been defended by thinkers like Thomas Pogge, for instance: *Realizing Rawls* (Ithaca: Cornell University Press, 1990).

<sup>13</sup> *LP*, pp. 81-82, 122-123.

(and, as such, to be free from coercive political, economic, or military sanction),<sup>14</sup> a society's basic institutions need not be reasonable but only "decent." *Decency* is, like reasonableness, a standard of correct judgment about matters of institutional regulation that Rawls uses to mark out some evaluative ground between those conceptions of justice that are fully reasonable (and thus liberal), on the one hand, and those that are fully unreasonable, on the other.<sup>15</sup>

Decent societies differ from their liberal counterparts in at least four respects: first, they may bestow political authority upon theological figures, principles, and ideas.<sup>16</sup> Thus, their institutional order is not regulated by a political conception of justice, nor is their public political discourse constrained by the norms of public reason. Second, although decent societies guarantee a right to political dissent for all citizens,<sup>17</sup> they do not guarantee a right to full participation in the political process; citizens that happen to be members of certain ethnic, religious, or gender groups may be prohibited from holding positions of public office simply on the basis of that membership. Moreover, there is no right to vote for all citizens; decency does not entail democracy.<sup>18</sup> Third, members of decent regimes are not guaranteed full and equal freedom of thought and religion (or what Rawls calls "full and equal liberty of conscience"). Although it is crucial for decency that no religious group may be "persecuted, or denied civic and social conditions permitting its [religious] practice in peace and without fear,"<sup>19</sup> beyond this it is permissible for one established religious group to enjoy various politically-sanctioned privileges over the others, e.g., enhanced access to public educational resources or control over public space and the media.

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<sup>14</sup> *LP*, p. 59. Immunity from foreign intervention and the right to equal respect as a free people are two of the eight principles of justice that hold between equal members of the Society of Peoples. The principles are fully listed in *LP*, p. 37.

<sup>15</sup> *LP*, pp. 74-75. See also: *LP*, p. 80: human rights "set a limit to the pluralism among peoples."

<sup>16</sup> *LP*, pp. 64, 72, 74.

<sup>17</sup> *LP*, pp. 72, 78.

<sup>18</sup> The full criteria of decency are listed in *LP*, pp. 64-67. The prohibition of certain groups of citizens from holding positions of public authority is one of the features of "Kazanistan" (*LP*, pp. 75-76). Regarding the absence of the right to vote, see *LP*, p. 71.

<sup>19</sup> *LP*, p. 74.

Finally, it is a basic feature of any decent society that it upholds the human rights of its members. But these rights are not only a subset of the full set of rights granted to citizens in a liberal democracy, they exclude many of the human rights already recognized in international law. According to Rawls, human rights exhaustively include:

The right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).<sup>20</sup>

This is Rawls' complete list. It excludes many of the human rights included in the UDHR: for instance, it leaves out Article 1 of that Declaration, which refers to the inherent dignity and equal rights of all human persons;<sup>21</sup> it also omits the human rights to work, to government welfare and social security, education, periodic holidays with pay, and of course the right of equal access to public service and political office in one's country. Regardless of such exclusions, decency is, Rawls asserts, the ultimate target and cut-off point of all international development efforts aimed at ameliorating domestic institutions.<sup>22</sup> Furthermore, *only* a willing failure on the part of any regime to abide by the norms of decency – and, in particular, to respect its citizens' human rights as conceived by *LP* – can provide a *pro tanto* justification for the use of coercive (i.e., political, military, and economic) sanctions against them.<sup>23</sup> None of the enumerated moral deficiencies of a decent (as opposed to liberal or

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<sup>20</sup> *LP*, p. 65.

<sup>21</sup> The most obvious reason for Rawls' exclusion of this Article is that not all persons are guaranteed the same or equal rights in a decent regime. However, Rawls also argues (*LP*, p. 80fn23) that this Article reflects "liberal aspirations," perhaps due to its resemblance to statements in earlier declarations (i.e. the French), and its arguably 'comprehensive' overtones.

<sup>22</sup> See: *LP*, pp. 117-119.

<sup>23</sup> See: *LP*, pp. 79-81, esp. 81.

reasonable) political regime, in other words, constitute even *pro tanto* reasons for taking coercive action against it.

Rawls is aware that the downgrading (from liberal to decent) of internationally enforceable standards of domestic justice represents, at least *prima facie*, a deviation from the reasoning of *PL* that requires explanation.<sup>24</sup> Why should persons conceived of as free and equal, reasonable and rational, accept an international order in which not all persons are entitled to the full rights and freedoms of a liberal citizen? The answer, Rawls argues, is that the acceptance of such an international order is required by the idea of “*mutual respect* among peoples.”<sup>25</sup> The idea or principle of mutual respect, as Rawls conceives it, has two components, one moral and one prudential.

On a moral level, it requires that both liberal *and* decent peoples should be included as full (i.e., non-coercible) members of a just international Society of Peoples because to do otherwise would be to deny decent peoples a measure of respect and tolerance that is *duly owed* to them. Decent peoples genuinely deserve equal membership (a) because, despite their illiberal practices, they are not *fully* unreasonable or intolerable, i.e., not only are they organized around a conception of the common good, they admirably recognize and protect the human rights of their citizens, guarantee such citizens a right to “consultation” in political decision making, and protect the right to political dissent.<sup>26</sup> Moreover, (b) they are ready to peacefully abide by the norms of *LP* and to treat other liberal and decent peoples as equal members of the Society of Peoples.<sup>27</sup> On top of all this, (c) decent peoples possess a “proper pride and sense of honour,” or a sense of “self-respect,” which it would be wrong of liberal peoples to damage by way of coercive interference.<sup>28</sup>

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<sup>24</sup> *LP*, p. 62.

<sup>25</sup> *LP*, pp. 59-62, 78, 82-84, 122-123. The argument is most clearly laid out in *LP*, pp. 61-62, 122.

<sup>26</sup> *LP*, pp. 61, 74-75, 83-84.

<sup>27</sup> *LP*, p. 83-84.

<sup>28</sup> *LP*, pp. 61-62.

On a prudential level, the idea of mutual respect requires that liberal peoples include decent peoples within the coercion-free circle of the Society of Peoples because failing to do so would ultimately prove counterproductive or perhaps even irrational from a liberal point of view. Anyone truly committed to both liberalism and world peace, Rawls argues, must recognize that the best way to achieve these goals is to engage with decent peoples not as moral inferiors subject to coercive sanction but as equals deserving of autonomy and respect. To deprive decent societies of this would be to provoke bitterness, resentment, and would ultimately harden such peoples against both the fundamental values of liberalism as well as the prospect of peacefully cooperating with liberal peoples. In other words, to encourage liberal reform abroad, the best strategy would be to allow decent peoples “to find their own way to honour [liberal] ideals,”<sup>29</sup> rather than to force liberalism upon them. Rawls’ minimalism about human rights – and *LP*’s downgraded conception of universally enforceable standards of domestic justice more generally – is thus in one sense a calculated and cautious element of a long-term plan to globally administer the liberal political ideal. In another sense, his minimalism is born in the recognition that, like religious faith or belief, liberal political culture is simply not suitably promoted by coercive means.<sup>30</sup>

Having laid out the arguments advanced on the basis of Rawls’ idea of mutual respect, it is evident that there are several disparate concerns running through his discussion of the idea. In particular, it is useful to distinguish between the following three (very general) forms of respect, each of which has a prominent position in Rawls’ line of argument:

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<sup>29</sup> *LP*, p. 122.

<sup>30</sup> This parallels Locke’s argument for religious toleration in his “*A Letter Concerning Toleration*” (1685) in *Political Writings*, Edited and with an Introduction by David Wootton. Hackett Publishing 1993. pp. 390-436.

- (i) Respecting the rights of a people both as a collective political entity – i.e., with collective rights to autonomy or self-governance – and as a group of individuals, each of whom has individual rights of their own.
- (ii) Judging the socio-political practices of a community without cultural bias, undue favour, or prejudice.
- (iii) Recognizing the distinct identity or way of life of a political community in a manner consistent with the continued self-respect or pride of its followers.

Success along one of these dimensions of respect does not necessarily entail success along the others. Thus, for instance, it is possible to respect the collective and individual rights of a political community while neither evaluating its practices justifiably (i.e., on the basis of good reasons rather than social reflex) nor adequately recognizing its distinctive identity and way of life. Consider a case in which a secular liberal polity wrongly looks down upon the overtly spiritual practices of a foreign community, i.e., public morning prayer, religious control of social institutions such as marriage, education, etc. Supposing that the liberal polity tolerates such practices (and supposing those practices do not violate the individual rights of the members of such a religious community), the basic rights of that community are respected even though their social, political, and religious practices are both ethnocentrically misjudged and their self-respect damaged in the process. Similarly, it is possible for the socio-political practices of a community to be soundly evaluated by outsiders who at the same time grossly underestimate the duties and recognition owed to that community. While part of bestowing adequate recognition upon a community plausibly involves satisfying both conditions (i) and (ii) – that is, respecting the equal rights of that community and its members and judging its practices in a sound or justifiable way – it also requires that a distinctive community be recognized *as such*, i.e., as distinct. According to Charles Taylor’s seminal essay on

recognition, for instance, bestowing recognition upon a community involves recognizing it as equal but also as distinct in its identity or nature.<sup>31</sup> Although it is on the basis of such an identity that communities formulate special rights claims, i.e., to political autonomy or self-governance, special rights may not always be what is at issue. Symbolic acts of recognition including public declarations, legislative motions, promises, and apologies can potentially take the place of rights as mediums of recognition.<sup>32</sup> Thus, I would think of mutual respect in the form of recognition as requiring both (i) and (ii) but also a third element involving some contextually appropriate form of identity recognition.

Since a failure by one society to respect another society in any one of these three ways can constitute a form of ethnocentrism, Rawls' concern with the idea of mutual respect and its policy of toleration can be read as part of an attempt to avoid three kinds of ethnocentrism. In the following section (§3), I shall measure the success of that attempt in avoiding ethnocentrism of the first kind, i.e., as a form of disrespect (by one community) for the rights of another political community and/or its members. In the subsequent section (§4), I will do the same with regards to ethnocentrism of the second kind, i.e., as a form of socially reflexive judgement. Finally, in §5 I shall offer some reflections about how *LP* fares along the third dimension of this multifaceted problem, i.e., as a failure by one group to offer adequate recognition to another.

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<sup>31</sup> See: Charles Taylor, "The Politics of Recognition" in *Multiculturalism: Examining the Politics of Recognition*, ed. A. Gutmann (Princeton: Princeton University Press, 1994), pp. 25-75 (esp. pp. 37-38).

<sup>32</sup> The importance of such acts is apparent if one looks at examples from Canada, for instance, where the federal government has recently introduced motions that recognize both Native and Quebecois peoples as 'nations' within a nation. Such motions have so far been mostly symbolic, and do not ascribe such communities specific rights over and above their pre-existing set. See newspaper article: "Recognizing nations within strengthens the nation as a whole" in *The Vancouver Sun*, November 28, 2006.

### 3. EQUAL RESPECT FOR RIGHTS

*LP*'s policy of toleration towards decent nonliberal peoples is, as explained so far, part of an attempt to avoid various forms of ethnocentrism: in particular, biased judgment, misrecognition, and violation of the rights of decent peoples. However, the policy incurs serious costs, especially at the level of the individual rights of the members of decent societies. As noted above, members of decent societies are deprived of many rights that are not only guaranteed in liberal societies, but also feature prominently in core international charters and legally-binding covenants on human rights. These include rights to non-discrimination, education, freedom of thought and of the press, work, social security, periodic holidays with pay, and opportunities of access to political office in one's country. The importance of these individual rights is not something that Rawls himself could have failed to appreciate, since he argues for them (or almost all of them) in his domestic theory of justice.<sup>33</sup> But their absence from the list of rights whose violation is a matter grave enough to provoke international remedial action raises the question of whether, far from avoiding ethnocentrism, the liberal toleration of decency actually betrays an ethnocentric *lack of* concern for the rights of individuals who live in decent nonliberal societies or worse – in other words, an unjustified form of moral partiality.<sup>34</sup>

This concern is not allayed by the reasoning behind *LP*'s policy of tolerating decent peoples. That reasoning has at its heart two conditions, which were mentioned above, among others. First, in order to be worthy of toleration and non-interference, a society's basic institutions must be sufficiently just on an internal level, i.e., just vis-à-vis the fundamental interests of its citizens. Second, its basic institutions must be sufficiently just on an external level, i.e., capable of engaging in just and peaceful relations with other peoples. Rawls sums

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<sup>33</sup> See: *TJ*, p. 266.

<sup>34</sup> See: Chapter One, §2.

up these two conditions in the following way: “provided a nonliberal society’s basic institutions meet certain specified conditions of political right and justice and lead its people to honour a reasonable and just law for the Society of Peoples, a liberal people is to tolerate and accept that society.”<sup>35</sup> But these considerations are either vacuous or irrelevant to the issue at hand.

### 3.1 *Sufficient (Internal) Justice*

Firstly, that a society must be sufficiently just in order to merit toleration (in the form of freedom from coercive interference) is clear, but *how* just is sufficiently just? In particular, why should we conclude that decent societies in particular satisfy this description? Merely enumerating, as Rawls sometimes does, the respects in which decent societies are so to speak not *all* that bad, is not enough to answer this question.<sup>36</sup> Neither is the fact that decent societies respect human rights. This is because human rights, on Rawls’ conception of them, are by definition individual rights the violation of which is not to be tolerated by the international community.<sup>37</sup> Since the very content of such rights is fixed by concerns about the limits of international toleration, their observance cannot itself be an *explanation* of the tolerability of a regime. Instead, Rawls’ appeal to human rights as a baseline standard of domestic justice merely raises the same question yet again: why is a regime that observes only the scant list of human rights endorsed by Rawls worthy of freedom from coercive intervention?

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<sup>35</sup> *LP*, pp. 59-60.

<sup>36</sup> *See: LP*, pp. 61, 83.

<sup>37</sup> According to Rawls, human rights specify “limits to a regime’s internal autonomy,” which is just to say that they specify limits to a regime’s freedom from external interference. *See: LP*, pp. 79-80.

The answer, Rawls seems to suggest, is that human rights represent “necessary conditions of any system of social cooperation. When [human rights] are regularly violated, we have command by force, a slave system, and no cooperation of any kind.”<sup>38</sup> Thus, the underlying thought would seem to be this. In order to be worthy of toleration, a people must form a genuinely cooperative social unit of some sort, and the baseline indicator of this is whether that society respects the human rights (as Rawls conceives them) of its members. But this thought glosses over the indeterminacy of the idea of social cooperation. Unlike in *PL*, the idea of social cooperation currently in question cannot be the rich liberal version of that idea, which comes packaged with a host of other liberal political ideas and values – e.g., citizens conceived as free and equal, reasonable persons, etc. – that help to specify its content.<sup>39</sup> Instead, *LP*’s version of this idea, since it is used to describe decent societies as well, must be more general, encompassing “any” system of social cooperation. What the necessary conditions of *any* social system of cooperation are, however, is entirely unclear. Social cooperation can take many forms, and need not involve the institutional apparatus of a state. Country clubs and circles of thieves are potential examples. However, Rawls would likely reply that these examples fail in at least one aspect. Any genuine system of social cooperation, according to Rawls, must advance what it “sees as the fundamental interests of everyone in society.”<sup>40</sup> Decent societies do this by organizing their system of law around what Rawls calls a “common good idea of justice.”<sup>41</sup> Country clubs, by contrast, do not tend to the *fundamental* interests of all members, aside from perhaps the arguably fundamental interest in leisure.

This is as insightful as Rawls’ account of the justice of decent societies gets. Yet we are still confronted with a debilitating plateau of indeterminacy. Why is it that a decent

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<sup>38</sup> *LP*, p. 68.

<sup>39</sup> *LP*, p. 70.

<sup>40</sup> *LP*, p. 67.

<sup>41</sup> *LP*, pp. 65, 71-72.

society (as Rawls conceives of it) *sufficiently* protects the fundamental interests of citizens such that it is to be tolerated by the international community? What are these interests and how does one decide what constitutes sufficient protection of them? How do we know that the fundamental interests of decent citizens do not require *more* protection from their governments and the international community than Rawls suggests? Indeed, without any further guidance here, there is (worryingly) nothing in principle to stop one from concluding that these interests in fact require *less* protection than even Rawls himself imagines. As Joseph Raz notes, for instance, there are comprehensive and consensual social systems of cooperation that do not provide their members with a right to private property, which Rawls nevertheless includes among his list of *bona fide* human rights.<sup>42</sup> Kibbutzim are merely one example.

To be sure, part of Rawls' reticence or vagueness about the grounds of such judgments of sufficiency is due to the fact that he is apparently not interested in developing a full or independent account of the "minimal"<sup>43</sup> (as opposed to fully liberal) cooperative idea of justice implicit in decent institutions. Rather, the idea of a decent society is sketchily introduced in *LP*, it seems, only to show loyal liberals that there plausibly are, or realistically might be,<sup>44</sup> nonliberal societies worthy of both toleration and full membership in international political society. But if, accordingly, Rawls' claim is just that *LP*'s recommended policy of tolerating decent peoples best *fits* with our *prima facie* (liberal) considered judgments about the practical requirements of fundamental individual interests, then his argument stands on shaky ground. The notion that decent peoples, as understood by Rawls, are sufficiently respectful of their citizens' interests so as not to be legitimately subject to coercive (i.e., even diplomatic) interference of any form, is not a self-evident one. It is positively dubious,

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<sup>42</sup> Raz 2010, p. 330.

<sup>43</sup> *LP*, p. 67.

<sup>44</sup> *LP*, p. 78.

moreover, if decent peoples' freedom from coercive interference is understood to include their freedom from public criticism in international political forums.<sup>45</sup> The Chinese government's relentless restriction of its citizens' right to full freedom of expression, for instance, is consistent with the policies of a decent regime but nevertheless merits public international condemnation. Either way, the appeal to brute and undeveloped liberal intuitions or pre-convictions leaves Rawls with too little to say once we question his claim that decent societies are sufficiently just to merit the policy of toleration prescribed by *LP*, whether it precludes public international criticism or not.

### 3.2 *Sufficient (External) Justice*

Perhaps this reticence is intentional in another respect, however. Regardless of their moral inadequacies, it might be that the most important reason for tolerating decent societies, according to Rawls, is that they are *externally* or internationally just, i.e., non-aggressive, law and treaty-abiding, peaceful. If that is so, it would justify the sketchiness of his account of the justice of decency in a different way. That is, since the appropriateness of tolerating decent regimes depends more on our judgments as to their external justice (or good international behaviour) than on our judgments as to their internal justice, there is little need to establish a well-worked out theory of the virtues of decent institutions. This brings us to the second, external argument for *LP*'s policy of toleration.

It is plain, however, that the second argument cannot bear such a heavy burden. Indeed, under proper scrutiny, it is unlikely to be able to bear much burden at all. If the criterion of internal justice suffers from vagueness, the external criterion of toleration – that a

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<sup>45</sup> It is not clear how widely Rawls intends the principle of coercive interference to be understood. But there is good reason to think that even public international criticism of decent societies would be precluded by *LP*'s policy of toleration. See: *LP*, p. 84.

society be able to honour just principles of international relations – suffers from quasi-irrelevance. To be sure, violent, expansionist, and unprovoked international conduct on the part of any state may prove to be sufficient justification for imposing sanctions against them.<sup>46</sup> But this does not mean that peaceful, respectful, and treaty-abiding conduct at an international level can justify a regime's freedom from all external interference. It would be straightforwardly unfair and unjust for the international community to turn a blind eye to a regime's abhorrent treatment of its citizens merely on account of its sparkling record of international cooperation or 'reasonableness.' Thus, decent peoples' stipulated willingness to abide by the international norms of *LP* could not, even if true, justify a blanket policy guaranteeing their freedom from coercive interference, let alone criticism. Neither could the idea that decent peoples, *qua* decent, deserve recognition and self-respect. Whether or not that recognition and self-respect are in fact deserved must depend to a significant extent upon whether or not such peoples adequately respect the fundamental individual rights or interests of their members – a question on which, as just argued, *LP* provides us with little to no guidance.

### 3.3 Analysis

None of this is to say that *LP*'s policy of tolerating decent peoples by granting them freedom from external coercive interference is an obviously bad policy. Providing freedom from coercion is understood *not* to imply freedom from criticism, this policy seems to me, in general, to be a good one, and largely for reasons that Rawls himself is cognizant of. International sanctions and military intervention do indeed have a poor track record as methods of positive socio-political change. Liberal institutions and forms of governance are

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<sup>46</sup> See: principle one of *LP* (*LP*, p. 37, listed below)

less likely to gain support when they are, so to speak, externally imposed on a people, and far more likely to be successful when they are the outcome of a history of indigenous efforts towards liberal political reform.<sup>47</sup> Moreover, in cases where we have societies that are at least what Rawls would call ‘decent,’ and not involved in even more grievous and comprehensive violations of individual rights, political and economic sanctions or humanitarian intervention do indeed seem both imprudent and in many cases morally uncalled for.

But this is not because decent forms of government are not in many ways gravely unjust, nor because they respect human rights. In fact, the only reasonable conclusion, judging from Rawls’ description of decent hierarchical societies, is that they do violate the human rights of their members. Rawls’ denial of this claim seems at least in part to be a result of his narrow conception of the *role* of human rights in *LP*.<sup>48</sup> It is because Rawls understands the violation of human rights to be a (more or less) decisive litmus test of whether a society ought to be subject to external sanction or interference that he prunes the list of genuine human rights down to just those rights that are *not* systematically violated in the case of societies that, all things considered, are tolerable.<sup>49</sup> But why should we understand the content of human rights to be so closely bound to this international role? For one, this understanding suggests that there is something fundamentally incoherent in the very idea of tolerating (via abstention from coercive remedial action) human rights violations, but there is not. It is perfectly plausible to maintain that some regimes violate human rights but are nevertheless worthy of toleration by the international community.<sup>50</sup> A government that denies homosexuals freedom of sexual expression or women the freedom to own private property

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<sup>47</sup> See: for instance, evidence cited in Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2008), Ch. 7.

<sup>48</sup> *LP*, pp. 79-80.

<sup>49</sup> I say ‘more or less’ because, in his discussion of outlaw states and their violations of human rights Rawls relegates the use of forceful sanctions and intervention to “grave cases.” Less grave violations of human rights, it is implied, call for international condemnation rather than coercion. (*LP*, p. 81)

<sup>50</sup> See: Tasioulas 2002, pp. 384-385, for an identical criticism.

may sometimes deserve toleration, in the sense of immunity from coercive interference, yet this is no reason to classify such injustices as something other than human rights violations. Indeed – and this touches on a more insidious aspect of Rawls’ pruned conception of human rights – it is important that the gravity of such injustices is not concealed by refusing to identify them as violations of human rights. As rights that carry great moral weight, human rights are the focus of intense judgments of moral blameworthiness and responsibility. Rawls’ failure to acknowledge the injustices that take place in decent regimes as *bona fide* human rights violations therefore diminishes the sense of moral gravity attached to such violations, and in so doing may lead us to underestimate the duties and responsibilities owed by the international community (and others) to those who live under decent governments. Perhaps this is an unintended consequence of his position, but it is significant, and it risks promoting an ethnocentric partiality or *lack of* moral concern towards the rights and interests of the members of decent nonliberal societies.

#### 4. ETHNOCENTRISM AND POLITICAL OBJECTIVITY

*LP*’s policy of tolerating decent societies is part of a wider constellation of regulatory international norms, which include the following:<sup>51</sup>

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.

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<sup>51</sup> *LP*, p. 37.

5. Peoples have the right of self-defence but no right to instigate war for reasons other than self-defence.
6. Peoples are to honour human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.

None of these principles is especially controversial in its own right. Rawls is seemingly aware of this, as he understands them to be “familiar and traditional principles of justice among free and democratic peoples” (although he does note the special need for argument in the case of principle eight).<sup>52</sup> The uncontroversial nature of these principles, however, is in part purchased at the price of their abstractness. On their own, such principles answer few difficult questions: e.g., What constitutes a “People”? What constitutes “intervention” or “specified restrictions” in the conduct of war? What international actions or reactions count as ones of “self-defence”? What rights are “human rights”? If *LP* is to have a meaningful bearing on the subject of international justice, it needs to give interpretive content to its principles by way of answering these more divisive questions.

One of the most controversial aspects of *LP* is the methodology by which it justifies both its abstract principles and more specific policies, such as the policy of tolerating decent societies. This is where the second aspect of the problem of ethnocentrism again comes into view. For, remember that the source of Rawls’ own (explicit) concern with that problem is the fact that *LP* and its policies are worked out or justified from a so-called liberal “point of view.”<sup>53</sup> Given its employment of fundamentally liberal ideas (e.g., those of society as a fair system of cooperation, free and equal peoples, reasonableness, public reason, etc.), Rawls

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<sup>52</sup> *Idem.*

<sup>53</sup> *LP*, p. 121.

considers *LP* to be a *liberal* conception of just relations among peoples or nations.<sup>54</sup> As such, he recognizes that it articulates a conception of justice that has its origin in the public political culture of a democratic society, and thus also in the liberal moral sensibilities of reasonable members of a modern democratic regime. Not only is *LP* therefore “the foreign policy of a reasonable just liberal people,”<sup>55</sup> its *ultimate* justificatory addressees are reasonable democratic citizens themselves.<sup>56</sup> For instance, *LP*’s policy of tolerating decent societies is addressed, and justified to, the typical mindset and sensibility of a reasonable democratic citizen who already believes in the moral-political superiority of liberal institutions. It is not a policy addressed to any intelligent observer as such, and (it may be assumed) especially not to the members of decent societies, since they are unlikely to hold a firm belief in the superiority of liberalism.<sup>57</sup>

This justificatory bias raises the question of why the (reasonable) character and beliefs of democratic citizens are suited to play this role, however. Is there any deeper justification for making the idea of a reasonable democratic citizen the focus of critical attention in *LP*? Or, does this effectively anchor that work in an *arbitrary* and *reflexive* appeal to ideas and values endorsed in one kind of socio-political culture among others? This is the nature of the worry articulated by Rawls in his own discussion of ethnocentrism, which is largely on par with my understanding of the problem of ethnocentrism in Chapter One, §3. In this case, however, the worry takes on a concrete pertinence given certain features of the content of *LP* itself – in particular, its placement of modern constitutional democracies at the apex of an envisioned normative hierarchy of political communities. Just beneath liberal peoples in this hierarchy are decent nonliberal peoples, who are morally inferior but not so much as to be unworthy of toleration. Further down still, there are the so to speak

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<sup>54</sup> See: *LP*, p. 70.

<sup>55</sup> *LP*, p. 10. See also: *LP*, pp. 9-10, 82-83, 92-93.

<sup>56</sup> See: *LP*, p. 10, 121.

<sup>57</sup> See: fn. 72 below.

*intolerables*, i.e., outlaw states, benevolent dictatorships, and burdened societies.<sup>58</sup> Is this hierarchy justifiable, or is it merely the product of ethnocentric (liberal) reflex or bias?

Rawls' explicit strategy of defending *LP* against this allegation of bias, as I sketched it in the first section, is not to try to justify the liberal justificatory provenance of *LP* on some deeper set of reasons or grounds. Rather, his explicit strategy is to argue that the *content* of *LP* (i.e., its eight principles) would be accepted not only by liberal but also by decent nonliberal peoples. Thus, even though the justification of *LP*, as Rawls conceives it, would not be acceptable to decent nonliberal peoples, its normative content would be. Moreover, if the content of *LP* is supported by both liberal *and* decent socio-political cultures, and so not obviously (or "necessarily") ethnocentric in character,<sup>59</sup> this gives Rawls some ostensible grounds for resisting the charge of ethnocentrism *even if LP* is worked out, as he explicitly acknowledges, from a liberal point of view, or from the point of view of reasonable democratic citizens and their customary convictions.

According to Rawls, decent societies would accept the content of *LP* because (i) they are peaceful and respect the political culture of liberal societies, (ii) because that content (including its list of human rights) is minimal and abstemious enough to gain widespread adherence,<sup>60</sup> and because (iii) they respect the human rights of their members and run a legitimate system of law sincerely guided by an idea of the common good.<sup>61</sup> These internal and external factors, Rawls argues, provide us with a sufficient explanation of decent societies' acceptance of the content of *LP*.<sup>62</sup> We might add to this, however, the additional fact that (iii) decent peoples' liberal counterparts would tolerate them in the sense of both refraining from exercising political sanctions against them and recognizing them as *bona fide*

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<sup>58</sup> See: *LP*, pp. 4, 63.

<sup>59</sup> *LP*, p. 81.

<sup>60</sup> *Idem*.

<sup>61</sup> *LP*, pp. 64-67.

<sup>62</sup> *LP*, pp. 63-64. Although they appeal to the same considerations, and are related, (a) the explanation of decent societies' acceptance of the principles of *LP* is *not the same thing as* (b) the justification of the policy of liberal toleration of decency, as discussed in the last section.

and “equal participating members in good standing of the Society of Peoples.”<sup>63</sup> This third factor, too, would on the face of things seem to enhance the plausibility of the bilateral (i.e., liberal and decent) acceptability of *LP*.

There are two basic questions that need to be addressed here. One is whether or not the claim of bilateral acceptability is in fact true, and I will now state some reasons for thinking that it is not. The other is a deeper question that I will address in the following subsection §4.2 and that asks whether, even if true, the bilateral acceptability of *LP* can provide Rawls with any leverage against the worry that *LP*'s basis in liberal values, sentiments, and ideas is ultimately reflexive, arbitrary, and ethnocentric.

#### *4.1 Doubts about LP's Bilateral Acceptability*

In response to the first question, it is unclear that the three considerations listed above provide a strong enough case for the bilateral acceptability of the content of *LP*. First of all, we might wonder why a decent regime would take upon itself a duty to *globally* enforce human rights, as mandated by principles six and eight. Indeed, it is unclear on Rawls' account why *any* people, liberal or decent, would accept a duty to enforce human rights (whether by interference or assistance) *outside* their own borders, especially given that such a duty would be both costly to their interests and inessential to their moral nature.<sup>64</sup> Without any explanation of why such peoples would be concerned for *every* human individual's well-being, and not just that of their own citizens, there are no grounds for assuming that a consensus on the global duty to intervene in, assist, or even condemn rights-violating regimes will prevail in the Society of Peoples.

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<sup>63</sup> *LP*, pp. 59, 63, 84.

<sup>64</sup> Charles Beitz has also noted this problem. *See*: Beitz, “Rawls's Law of Peoples” in *Ethics*, 2000, Vol. 110, No. 4, pp. 685-6. *Also see*: *LP*, pp. 23-25, on the moral nature of “peoples.”

Secondly, despite their unaggressive character and their respect for liberal political culture, there is reason to think that decent peoples would not respect liberal peoples *enough* to engage with them as *bona fide* “free and equal” peoples in *LP*’s chosen sense. For, remember that, within decent societies, religious, cultural, or ethnic membership can provide one with status from which special social and political advantages (or disadvantages) necessarily follow. Yet, if decent peoples understand a certain identity or characteristic to entitle a group to domestic political dominance, then they would seem just as likely to see that group as entitled to dominance in its political relations with other peoples.<sup>65</sup>

Thirdly, even if decent peoples were capable of regarding other peoples as equals, they are likely to find the equality of their own membership in the Society of Peoples cheapened by the fact that liberals adopt a policy of *toleration* towards them. Toleration standardly implies a stance of moral superiority – one that, according to Rawls, is justified in the case of liberal-decent relations since decent peoples are, unlike liberal peoples, not “fully just.”<sup>66</sup> If this policy of toleration and its implicit judgment of moral superiority are part of the content of *LP*, then there is little reason to assume that decent peoples would accept that content. If, on the other hand, as Rawls seems to suggest, this policy and its rationale are only part of the liberal background justification of *LP*, then this still creates a problem. For, decent peoples are likely to be offended when they find, latent in their liberal counterparts’ commitment to *LP*, a hidden conviction in the moral superiority of liberalism and a concomitant propensity, at least among liberal citizens, to raise critical objections against decent institutions.<sup>67</sup> Moreover, even if such hidden critical convictions are unavoidable and exist on both sides (since decent peoples will presumably need to find *their own* reasons to tolerate liberal peoples, who may come off as immoral and not “fully just” from their own

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<sup>65</sup> See: Farid Abdel-Nour, “From Arm’s Length to Intrusion: Rawls’s ‘Law of Peoples’ and the Problem of Stability” in *The Journal of Politics*, 1999, Vol. 61, No. 2, p. 323.

<sup>66</sup> *LP*, pp. 62, 82-84.

<sup>67</sup> *LP*, p. 84.

point of view), there remains the further question of whether the content of *LP* can be genuinely detached from its liberal justificatory apparatus. If it cannot (or only partially so), and the specific content of *LP* can hardly be made sense of without reference to its liberal justificatory apparatus, then this damages the prospects for bilateral acceptability. At the very least, this last worry about detachability raises a question that needs to be answered.

These are some provisional reasons for doubting the veracity of *LP*'s claim to bilateral acceptability. They could be developed further and into a more robust critique, but that is not my interest or intention here. Instead, I now want to turn to the second question posed above, which seems to me the deeper and more important one.

#### *4.2 The Significance of LP's Bilateral Acceptability*

Even if true, what purchase might the claim of bilateral acceptability have on the problem of ethnocentrism, understood as the socially reflexive endorsement of ideas, beliefs, and values? According to Rawls, the acceptability of (the content of) *LP* from both a liberal and decent point of view allows him to make two immediately relevant claims: First, that the content of *LP* is “universal in reach,” or “includes reasonable political principles for all politically relevant subjects: for free and equal citizens and their governments, and for free and equal peoples.”<sup>68</sup> And second, *LP*'s bilateral acceptability underwrites its claim to “objectivity,” because it means that *LP* “satisfies the criterion of reciprocity and belongs to the public reason of the Society of liberal and decent Peoples.”<sup>69</sup> These claims need to be unpacked.

On the face of it, Rawls' claim that *LP* is “universal in reach” amounts to nothing more interesting than the claim that it covers the subjects of both (liberal) international justice

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<sup>68</sup> *LP*, p. 86.

<sup>69</sup> *LP*, p. 121.

and, if considered in conjunction with *PL*, (liberal) domestic justice. However, in an earlier version of *LP*, Rawls had some more revealing things to say about this idea.<sup>70</sup> There, he distinguishes between two aspects of universality. A set of principles, he argues, can be universal in its “source of authority” and in its “formulation.”<sup>71</sup> By this Rawls meant to distinguish between the justificatory *grounds* of a set of principles – e.g., be it God’s universal authority, or that of divine reason, human reason, or their correspondence with an independent realm of moral values – and its applicative *scope*, i.e., the range of subject matter to which it applies. Classical moral theories, and most modern ones, Rawls argues, aim to be universal in both senses. Furthermore, the universality of their scope (that is, their application to all persons/institutions in all contexts) is naturally underpinned by the universality of their source of authority (e.g., God’s universally binding decree, universal human interests or values, etc.).

By contrast, on Rawls’ own account, political constructivism is universal in neither of these senses. Firstly, its principles are not designed to apply universally; rather, they are tailored to specific (political) subject matter, i.e., the basic structure of a closed democratic society, on the one hand, and the basic structure of an international society of liberal and decent peoples, on the other. Thus, *LP* and *PL*’s principles should not (directly) govern our judgments about the operation of churches and universities, or our relations with animals, family, friends, future generations, and the disabled. Nor do they genuinely apply to the basic structure of nonliberal societies.<sup>72</sup> The “universal reach” of *LP* therefore has to be qualified.

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<sup>70</sup> John Rawls, “The Law of Peoples” in *On Human Rights: The Oxford Amnesty Lectures 1993*, eds. S. Shute and S. Hurley (New York: Basic Books, 1993), pp. 41-83 (esp. pp. 43-47). (Hereafter: *LP 1993*)

<sup>71</sup> *LP 1993*, p. 45.

<sup>72</sup> Rawls writes: “The reason we go on to consider the point of view of decent peoples is not to prescribe principles of justice for *them*, but to assure ourselves that the ideals and principles of the foreign policy of a liberal peoples are also reasonable from a decent nonliberal point of view. The need for such an assurance is a feature inherent in the liberal political conception.” (*LP*, p. 10). This means that *LP* does not pretend to pronounce authoritatively on the question of what duties members of nonliberal societies owe to each other, or that of what duties nondecent and nonliberal societies

*LP*'s reach is universal only in the sense that it prescribes principles for the largest or most inclusive political subject or framework in which *liberal* ideas and values appropriately apply: this being (allegedly), the international cooperative relationship between free and equal peoples.

Secondly, the authority, objectivity, appropriateness, or correctness of *LP* and *PL*'s principles does not rest on a theological or philosophical conception of reason but rather on their responsiveness to "the distinct structure of the social framework [to which they apply, including] the purpose and role of its various parts and how they fit together."<sup>73</sup> Some interpretation is necessary here, but the following can, I think, quite confidently be assumed: the authority-granting characteristic of a set of constructivist principles (i.e., its *political objectivity*) consists in its responsiveness to the moral considerations, judgments, ideas, and values that are most salient in the socio-political practice, context, or relationship that it seeks to regulate. In this sense, Rawls appears to ascribe to what many have called a *practice-based* theory of the scope and authority of principles of justice.<sup>74</sup> In light of Rawls' comments in the earlier version of *LP*, I want to follow these authors in understanding Rawls as adopting a practice-based conception of the scope and authority of *LP*'s international political principles in particular.

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owe to *bona fide* members of the Society of Peoples. Such relationships are not cooperative in the liberal sense, and so they can only be addressed *indirectly* by *LP*, i.e., by asking what, by liberal standards, are tolerable forms of international and domestic conduct on the part of foreign non-liberal societies.

<sup>73</sup> Ibid, p. 47. See also: *PL*, 262.

<sup>74</sup> See: Andrea Sangiovanni, "Justice and the Priority of Politics to Morality" in *The Journal of Political Philosophy*, 2008, Vol. 16, No. 2, pp. 137-164; Aaron James, "Constructing Justice for an Existing Practice: Rawls and the status quo" in *Philosophy and Public Affairs*, Vol. 33, No. 3, pp. 281-316; Laura Valentini, "Global Justice and Practice-Dependence: Conventionalism, Institutionalism, and Functionalism" in *The Journal of Political Philosophy*, forthcoming. This reading also fits with some of the observations I made about Rawls' overall methodology in the last chapter, Chapter Two, §2.3.

(i) *The Practice-Dependent Reading*

Now, on this reading, the fact that Rawls understands the bilateral acceptability of the content *LP* to be the litmus test of its “objectivity” must mean that such bilateralism is, at base, an indication that *LP*’s principles give balanced or coherent expression to the ideas and values implicit in global political practice – which is what those principles seek to regulate. How might it be able to serve as such an indicator? Well, one answer that is available to Rawls here is that, as it stands, international political practice is in essence liberal in character – that is, it is a system of social cooperation between free and equal peoples (rather than citizens) – and so it is governed by the same basic values and ideas that govern the political relationship between citizens in a modern constitutional democracy, as specified in *PL*. In particular (if we bracket the criticisms of the last chapter for now), this means that the values of reciprocity, stability for the right reasons, and the principle of liberal legitimacy are all active or embedded in international political practice and will therefore justify the appeal to a parallel form of public reason, with its own standard of reasonableness (not truth), in the context of the Society of Peoples. On some such grounds, Rawls could argue that the bilateral acceptability of the principles of *LP*, which is purchased at the price of their minimalism or abstemiousness,<sup>75</sup> is in effect a test of their *reasonableness* (i.e., their satisfaction of the embedded demands for stability and liberal legitimacy) at the international level. The reasoning here would be identical to that provided for the justificatory abstemiousness of the principles of political justice at the domestic level of *PL*, which we discussed in the last chapter. As such, in a sort of roundabout way, the bilateral acceptability of the content of *LP* could be construed as an indication that such content gives coherent expression to ideas and values (e.g., of stability and legitimacy) that are implicit in international political practice.

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<sup>75</sup> *See*: My summary of Rawls’ stated reasons for the bilateral acceptability of *LP* at §4 above. Also *see*: Tasioulas 2002, pp. 391-395.

And it could hence be considered an indication of that content's "objective," or rather politically objective, character.

There are some features of *LP*, including the fact that its eight principles are understood by Rawls to be "familiar and traditional principles of justice among free and democratic peoples," that indicate that Rawls would understand the significance of the claim of bilateral acceptability along these lines. For one, those eight principles are very different in content from those of a reasonable conception of justice at the domestic level (e.g., that of *A Theory of Justice*). And this is presumably because the principles of *LP* are worked out for a different (albeit similar) political practice or cooperative relationship (i.e., an international one), and govern the relations between different agents (i.e., peoples, and not citizens). The uniqueness of the principles of *LP*, then, and their positive "fit" with international political practice as we know it, again serves as evidence of their conformity to the political practice that they seek to regulate, which in turn serves as an indication of their political objectivity. Furthermore, Rawls makes an effort to show that many of the features that motivate the strictures of public reason at the domestic level, such as the fact of reasonable pluralism, have international analogs,<sup>76</sup> and so justify those same strictures at the international political level. All this adds to the overall sense in which Rawls is trying to, as it were, *work up* his international theory of justice from values, ideas, and features inherent in international political practice itself.

*(ii) How the Practice-Dependent Reading Breaks Down*

Now, if we are right to read Rawls as, in general, trying to give an authentic account of international political practice in *LP*, then there is a slew of objections waiting for him in

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<sup>76</sup> See: *LP*, p. 11.

the wings. Some of these will, understandably, challenge the accuracy of Rawls' account of international political practice as it stands. Others are continuous with (or will expand upon) the objections that I brought against the legitimacy and stability based arguments for the strictures of public reason in the last chapter, since these arguments appear to be presupposed here again as an explanation of the importance of the bilateral acceptability of *LP*. And there are still other, deeper and more general objections about the efficacy of Rawls' practice-dependent theory of the scope and authority of political principles in circumventing worries about reflexive ethnocentrism that I will articulate in the following chapter.<sup>77</sup> But these objections can all be postponed for the time being because, on the whole, the practice-dependent reading of *LP* simply doesn't fit, and so we cannot in full confidence proceed with it. Moreover, some of the ways in which it doesn't fit reveal important difficulties vis-à-vis *LP*'s attempt to avoid reflexive ethnocentrism.

Why doesn't the reading fit? Well, for one, there are fundamental structural aspects of *LP* that make the practice-dependent reading hard to run. Perhaps the most significant of these is the fact that, as I mentioned earlier (in §1 and §4), *LP* is at base a foreign policy program designed to advance or accommodate the interests and values of a liberal state (or a consortium thereof). It is not, or at least it is not *primarily*, a generic foreign policy program for any state, or even a generic theory of international justice. As Rawls himself describes it, *LP* is "the foreign policy of a reasonable just liberal people,"<sup>78</sup> which articulates principles that guide the practical conduct of liberal societies towards other (liberal and nonliberal) peoples. Accordingly, *LP*'s principles are worked out or justified from a so-called liberal "point of view,"<sup>79</sup> by which he means that, *ultimately*, they are worked out from the point of

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<sup>77</sup> See: Chapter Four, §3.4.

<sup>78</sup> *LP*, p. 10. See also: *LP*, pp. 9-10, 82-83, 92-93.

<sup>79</sup> *LP*, p. 121.

view of the moral sensibilities of reasonable democratic citizens themselves.<sup>80</sup> As Rawls writes: “The reason we go on to consider the point of view of decent peoples is not to prescribe principles of justice for *them*, but to assure ourselves that the ideals and principles of the foreign policy of a liberal peoples are also reasonable from a decent nonliberal point of view. The need for such an assurance is a feature inherent in the liberal political conception.”<sup>81</sup>

The acceptability of the content of *LP* from the “point of view” of decent societies, therefore, is not so much a benchmark of its conformity to values and ideas implicit in international political practice as it is a benchmark of its conformity to reasonable democratic citizens’ own commitment, when they imagine themselves as representatives of peoples,<sup>82</sup> to extend fair, just, reasonable, or legitimate terms of cooperation to their international counterparts. As such, *LP* represents a conception of justice that has its origins in the public political culture of a democratic society. Its method is not, so to speak, to begin by looking with open eyes at the normative values and ideas implicit in international political practice and then to work up an appropriate or politically objective set of internationally regulative political principles on that basis. Rather, it starts from ideas and values implicit in the domestic normative context of *PL*, and then effectively works out what anyone *already committed* to those values and ideas would endorse in the form of an internationally just political order. Thus, if anything, the significance of the bilateral acceptability of *LP* has to be understood from within the domestic context of *PL*, since it is there that we find the values, commitments, and ideas that motivate the demand for it.

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<sup>80</sup> See: *LP*, p. 10, 32, 121. For instance, *LP*’s policy of tolerating decent societies is addressed, and justified to, the typical mindset and sensibility of a reasonable democratic citizen who already believes in the moral-political superiority of liberal institutions. It is not a policy addressed to any intelligent observer as such, and (it may be assumed) especially not to the members of decent societies, since they are unlikely to hold a firm belief in the superiority of liberalism.

<sup>81</sup> *LP*, p. 10. Also quoted above in fn. 71.

<sup>82</sup> See: Rawls’ description of the second original position. *LP*, pp. 32-33.

The fact that the significance of the bilateral acceptability of *LP* has to be understood from within the liberal domestic point of view – and cannot (or at least cannot straightforwardly) be seen in terms of an effort to respond to values and ideas inherent in international political practice itself – creates problems for Rawls’ international theory on both an external and an internal level. On an external level – that is, speaking as someone who isn’t himself committed to political constructivism as Rawls understands it – one upshot is that it begins to look as if *LP* consists in a somewhat gerrymandered extension of Rawls’ domestic theory of *PL* to the international political domain. Instead of following through on his self-professed methodological commitment to a practice-based theory of justice to the very end, so to speak, Rawls seems to avoid the hard work by gerrymandering his account of international political practice so that it is made to look like a perfect international parallel to the domestic political context of a modern constitutional democracy, one in which all the same basic values and ideas (as he works them out in *PL*) characteristically apply.

In defense of this lackluster effort, Rawls cannot cryptically appeal to the fact that determining the content of international principles of justice somehow inexorably involves considering what “you and I, here and now”<sup>83</sup> (as *de facto* reasonable democratic citizens) regard as fair terms of cooperation for regulating the basic structure of a society. As I will argue in Chapter Six (§2 and §3), there is a sense in which normative argument is generally constrained in this way: it begins and ends with questions about what normative conclusions are plausible given our current or prevailing normative beliefs. However, Rawls’ practice-based methodology need not be bound by that constraint. All that it in principle requires is an honest look at the salient normative features of a socio-political practice, be it foreign or local, and then a willingness to analyse the “purpose and role of its various parts” and to see

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<sup>83</sup> *LP*, p. 30. Elsewhere, Rawls writes, “We must always start from where we now are, assuming that we have taken all reasonable precautions to review the grounds of our political conception and to guard against bias and error,” *LP*, p. 121; *See also: PL*, p. 259.

“how they fit together.” There is no profound epistemological constraint preventing anyone (even a foreigner) from doing this and doing it well, i.e., without bringing their own (or their own society’s) normative beliefs excessively into the mix. And so, Rawls does not seem to have an easy way out of the allegation that he has to some extent gerrymandered international political practice in order to suit his theoretical enterprise.

But the significance of this last point goes beyond allegations of intellectual convenience or theoretical self-servitude. It opens up to a much larger worry about the reflexive ethnocentricity of *LP* as a whole. For, what’s been made clear in the preceding discussion is that, in effect, *LP* involves the extension of values, judgments, claims, and ideas embedded or salient in one practical-political context (i.e., that of a modern constitutional democracy) to an entirely different practical-political context (i.e., that of international political society) in which their salience is at best uncertain. This means that there is an alternative sense in which the practice-dependent reading of *LP* clearly does work: if, that is, we read *LP* as *internal* to the domestic theory of *PL*, which itself presumably provides an adequate or politically objective account of the values and ideas implicit in the political practice of modern constitutional democracies. But this also means that *LP*, in effect, reflexively extends modern liberal or democratic values and ideas to the international political arena, where it places them in a governing role. That extension would be less worrisome or evocative of the problem of ethnocentrism if it were defended on the basis of *reasons*: that is, on the basis of the alleged truth, importance, plausibility, and appropriateness of those ideas and values as applied to the international political domain. But this is not what Rawls does. And part of the reason for this is that the methodology of *PL* itself, as we saw in the last chapter (Chapter Two, §2.3), involves the *analysis* rather than the *justification* of the values and ideas implicit in the domestic context of a modern constitutional democracy. Thus, even if true, *LP*’s claim to bilateral acceptability does little to address the fundamental

epistemological concerns about social reflexivity that I identified under the heading of the problem of ethnocentrism in Chapter One, §3.

Despite all this, there may be a sense in which Rawls cannot be so easily blamed for failing to address such concerns about ethnocentrism. In particular, we ought to at least consider the possibility that these may not be concerns that he ever intended to address. For instance, we might distinguish between two interpretations of the epistemological problem of ethnocentrism: one is external to Rawls' theory of political constructivism, and the other is internal to that theory. On the *external* reading (as articulated above), ethnocentrism is an epistemic hazard: more specifically, it is a hazard that involves some form of social reflex. Against the charge that *LP* is guilty of falling victim to that hazard – by, say unreflectively endorsing the domestic values of freedom and equality and applying them to the international political domain – without making any noticeable effort to avoid it, Rawls might reply with indifference. He might say, for instance, that ethnocentrism in *that* sense is not something that he ever intended to avoid. Moreover, even if the absence of such an intention is not enough to absolve Rawls of the need to answer such an allegation (one cannot just bury their head in the sand here), he may further reply that the idea of respecting the freedom and equality of a people (if sufficiently just), is so innocuous, self-evident, and widely-recognized that there is simply no need to justify it on reasoned grounds. Indeed, this is one way of reading Rawls' remarks at the end of his discussion of ethnocentrism: “They [nonliberal societies] cannot argue that being in a relation of equality with other peoples is a western idea! In what other relation can a people and its regime reasonably expect to stand?”<sup>84</sup> Another way of putting the point, then, would be to say this: If the self-evident good of regarding other peoples as both free and equal, and treating them accordingly as *LP* and *PL* recommend, amounts to a form of ethnocentric or liberal prejudice, then this diminishes the

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<sup>84</sup> *LP*, p. 122.

sense in which ethnocentrism is really a pertinent philosophical concern to be grappled with in this context.<sup>85</sup> It is perhaps simply not a problem with which Rawls pretends, or feels the need, to seriously engage.

On the latter, internal interpretation, by contrast, avoiding ethnocentrism requires that both liberal and decent peoples subject one another to legitimate or fair terms of cooperation, i.e., terms compatible with the fundamental freedom and equality of liberal and decent peoples. This is a reading of the problem of ethnocentrism that Rawls categorically *does* attempt to address. Indeed, the need to address it is written into the very normative fabric of *LP* and *PL*, so to speak. However, even here Rawls faces difficulties. For, in the domestic case, respect for the freedom and equality of citizens was assured by way of articulating principles of political justice that adhered to the strictures of public reason in so far as they: (i) did not presuppose any single comprehensive doctrine, and (ii) were justified in light of abstemious values and ideas implicit in the public political culture of a modern constitutional democracy. At the international level, however, these same strictures are not fully adhered to. In particular, *LP*'s principles fail to satisfy a fully analogical version of either criterion.

Firstly, rather than justify *LP*'s principles in light of abstemious values and ideas that are implicit in international political practice – which is what one would expect of an international parallel to criterion (ii) – *LP*'s principles are, as already discussed, justified in terms of ideas and values implicit in the domestic political context of *PL*. This is why the question of the bilateral acceptability of *LP* is merely about its *content* and does not extend to its *justification*, which is the primary locus of concern in the domestic case. Secondly, this first failure indicates the inadequacy of *LP*'s ability to satisfy a parallel version of criterion (i) as well. This is because, at the international level, *LP* has to accommodate the fact of

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<sup>85</sup> Indeed, this is one way in which we might see the appeal of Richard Rorty's idea of 'frank ethnocentrism.' See: Richard Rorty, "Justice as a Larger Loyalty" in *Cosmopolitics: Thinking and Feeling beyond the Nation* (Minneapolis: University of Minneapolis Press, 1998) eds. P. Cheah & B. Robbins, p. 56.

reasonable pluralism in two senses: on the one hand, as a pluralism of reasonable comprehensive doctrines, and on the other, as a pluralism of reasonable (or not fully unreasonable) conceptions of justice, both liberal and decent.<sup>86</sup> As such, if *LP*'s principles are to be reasonable, fair, or legitimate (in a sense parallel to that of *PL*) they ought to be abstemious in two ways: (a) they should avoid presupposing any one reasonable comprehensive doctrine and (b) they should avoid presupposing any one reasonable conception of justice. But *LP*'s principles, *qua* justified in terms of values and ideas implicit in liberal or modern democratic political culture, clearly fail to satisfy (b), and so they fail to satisfy a parallel version of criterion (i) as well as criterion (ii).

All of this indicates that *LP* most likely succumbs to its own internal version of the problem of ethnocentrism as much as it succumbs to the external one elaborated above. Or, at least, there is no reason to think that these disanalogies are not an indication that, in the case of *LP*, fair or legitimate terms of cooperation (in Rawls' sense) have *not* been extended to decent peoples – and thus that *LP* succumbs to both the internal and external versions of the problem of ethnocentrism. Nevertheless, while these difficulties may afflict Rawls' politically constructivist theory of international justice and human rights, they need not affect *all* politically constructivist theories thereof, especially if they are structured differently. In particular, while taking inspiration from Rawls, Joshua Cohen's politically constructivist theory of human rights has a rather different structure from that of *LP*, and one that seemingly avoids many of the objections raised above. I shall discuss Cohen's theory of human rights in the next chapter (Chapter Four) under the larger umbrella of what I will call "agreement theories" of human rights.

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<sup>86</sup> See e.g.: *LP*, pp. 54-55.

## 5. RECOGNITION IN *THE LAW OF PEOPLES*

Before I move on to discuss these issues in the context of “agreement theories” of human rights in the next chapter, however, I want to keep my promise of reflecting on *LP*’s success in avoiding the third kind of ethnocentrism identified above in §2 (i.e., ethnocentrism as a failure of recognition), which I have not yet discussed. Given that the adequate recognition of a community, as I have defined it, plausibly requires respect for the rights of its members and the epistemically responsible judgment of its mores and practices – i.e., the avoidance of ethnocentrism of the second kind (as discussed just above) – as preconditions, it should already be clear that *LP*’s prospects for avoiding this third form of ethnocentrism are weak.

But what about *LP*’s ability to satisfy the third stipulated requirement of recognition: the public acknowledgment of a community both as equal and, just as importantly, as different or distinct?<sup>87</sup> In so far as *LP* recognizes both liberal and decent peoples’ right to “freedom,” “independence,” and prescribes a universal duty of “non-intervention” amongst peoples, it does recognize and protect the capacity of peoples to pursue their own distinct way of life, within the specified limits of (external) peacefulness or reasonableness and (internal) respect for human rights. Moreover, *LP* is distinct from *PL* in that it accepts (or at least tolerates) the reasonableness of a plurality of conceptions of justice, both liberal and decent, and not merely a plurality of comprehensive doctrines. Perhaps this is all that the third aspect of recognition should require in this case: or, perhaps not.

What is certain at the very least is that Rawls’ overall treatment of the problem of ethnocentrism in *LP*, including his treatment of the issue of recognition, would have been more effective if it had more carefully attended to some of the core conceptual distinctions

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<sup>87</sup> See: §2 above.

made in the present analysis. If he had done so, then his reply to the general allegation of ethnocentrism, “no, not necessarily,” might have been enough.

## *Chapter Four:*

# Human Rights and Moral Consensus

### 1. DON'T WE ALL AGREE?

It is not uncommon for an interlocutor to try to reverse the sceptical tone of a discussion about human rights by making appeal to a purportedly obvious fact: “but of course, we all agree on the existence of human rights!” Such is the extent to which human rights have become a fixed object of our contemporary moral landscape. Even before they became such a fixed object, however, human rights were long understood as specially marked by their ability to generate moral agreement. As I mentioned earlier in Chapter One (§1), for instance, the 1947 UNESCO Committee on the Theoretical Bases of Human Rights was convinced that human rights rest on a set of “common convictions” that were shared not only by all 55 members of the United Nations at the time, but by all world cultures.<sup>1</sup>

The notion that human rights are accepted across cultures, or that they are in some sense ‘found’ in all cultures, has a long history. What concerns me in this chapter is not that history itself, but rather its theoretical sources. What motivated those who advanced this notion and those who continue to do so today? Presumably, the UNESCO Committee was doing more than simply stating a fact when they gave evidence for the acceptance of human rights across cultures; like the non-sceptical interlocutor, they intended this fact to lend support to an independent belief. In the case of the Committee, this belief was in the realistic

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<sup>1</sup> UNESCO Committee on the Theoretical Bases of Human Rights 1949, pp. 258-259.

possibility of an agreement on a declaration of human rights by the ideologically and culturally diverse membership of the United Nations. Somewhat differently, the non-sceptical interlocutor most likely intends the fact of a moral consensus on human rights to remind us of the profound moral plausibility of the idea of human rights itself. But these are not the only claims about human rights that stand to be bolstered by an appeal to the fact of moral consensus. Moral consensus about the existence of a given human right, or about its grounds, can on some accounts serve as a justification of that right. Or, alternatively, it may indicate that justification is superfluous; for instance, with an agreement on the basic content of a declaration of human rights already in place, the UNESCO Committee argued, it was unnecessary for the UNCHR to wade in on the difficult question of how such rights ought to be justified.<sup>2</sup>

Another interesting possibility is that those who appeal to the fact of a moral consensus on human rights are making something akin to a theoretical statement about such rights. This statement might take one of two basic forms. First, it may be about the *nature* of human rights. That is, we might think of human rights as precisely the sort of rights that enjoy cross-cultural endorsement of some sort. To make such a claim would be to endorse what Charles Beitz has called “agreement theory” about human rights.<sup>3</sup> But there is a second kind of theoretical claim, equally worthy of that same label, that is not given due emphasis by Beitz. This kind of statement is about the *grounds* of human rights. According to it, human rights are the sort of rights that ought to be justified on the basis of claims, beliefs, values, or reasons that are *themselves* objects of cross-cultural agreement. Thus, the UNESCO Committee’s claim that human rights “rest” on a set of shared moral convictions can be interpreted as implying that such rights satisfy, or must satisfy, some such condition. Beitz’s

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<sup>2</sup> Idem.

<sup>3</sup> Beitz 2009. According to “agreement theory,” Beitz explains, human rights are “standards that are or might be objects of agreement among members of cultures whose moral and political values are in various respects dissimilar.” (p. 73)

failure to give due recognition to this ground-based component of agreement theory undermines the broader relevance of his analysis since, as we shall see, it is far more prevalent than its nature-based counterpart.

It is these two different ways of postulating a strong theoretical relationship between human rights and the idea of moral agreement that will interest me in what follows. In §2 below, I try to put more flesh to the bones of agreement theory by providing a brief overview of some of the key variations on its basic conceptual theme. Then, in §3, more critically, I examine several supporting arguments for an agreement theory of human rights, including the argument that agreement theory (or some version of it) is best able to circumvent concerns about ethnocentrism or social reflexivity in human rights claims (§3.4). Ultimately, I find all of these arguments wanting. In §4, I try to make some positive light of this largely negative analysis by identifying what I take to be the grain of truth, so to speak, in agreement theories of human rights.

## 2. VARIETIES OF AGREEMENT

### 2.1 *Nature vs. Grounds*

As I have already suggested, agreement theory can be broken down into two components, each of which responds to a different theoretical question – one about the nature of human rights, and the other about their grounds. Some further comments about this distinction, which has been made most forcefully by John Tasioulas, are in order.<sup>4</sup> Human rights have a *nature* in so far as they have one or more essential features that distinguish them

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<sup>4</sup> See: Tasioulas 2009, p. 938; John Tasioulas, “Human Rights: An Orthodox View” (Unpublished Manuscript); For other examples, see: Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton: Princeton University Press, 2008), pp. 311-32; Taylor 1999, p. 125 (“norms” and “underlying values”); Beitz 2009, pp. 109-110, 137 (“model” and “schema,” respectively).

from other moral rights or norms. Thus, according to an orthodox account of the nature of human rights, these are rights that we have “simply in virtue of being human.”<sup>5</sup> Or, according to Beitz’s own “practical” account, human rights are individual rights that are a matter of both national and international concern.<sup>6</sup> These accounts of the nature of human rights differ, in turn, from that of agreement theory, which is that human rights are moral rights that are objects of cross-cultural agreement.

The question of the *grounds* of human rights is rather different. Here, the issue is one of identifying the considerations that one must appeal to in establishing or justifying the existence of a human right, given the conceptual nature that such rights are already determined to have. Thus, even on an orthodox account of the nature of human rights, radically different accounts of the grounds of human rights are possible. One may, for instance, combine orthodoxy about human rights with the claim that such rights are justified by theological considerations (e.g., *Imago Dei*). Or, one might advance the view that, in order to determine which rights we have “simply in virtue of being human,” we must attend to consequentialist considerations about which set of universal rights best serve overall human welfare.

To be sure, the distinction between the nature and grounds of human rights is not hard and fast. A theory of the nature of human rights will impinge on the question of grounds, and vice-versa. Thus, for instance, if we claim that human rights are moral rights that are objects of cross-cultural agreement, then this narrows the range of interpretation variation available to us at the level of the grounds of human rights. It will be rather clear or easy, that is, to identify the (presumably empirical) considerations that establish the authenticity of a purported human right on such an account. Conversely, if we believe that the best way to ground human rights is via the notion of basic human capabilities, this can exert pressure on

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<sup>5</sup> See: Tasioulas 2009, Vol. 4, No. 7, p. 938.

<sup>6</sup> See: Beitz 2009, §17.

our account of the nature of human rights, e.g., in the direction of viewing them as, in essence, protections of basic human capabilities.

Nevertheless, distinguishing between these two components of agreement theory is important because it allows for the possibility of a piecemeal acceptance of agreement theory. For instance, there may be those who are agreement theorists *only* about the grounds of human rights. Recognizing this latter possibility is especially important since there appear to be very few who endorse agreement theory as an account of the nature of human rights, although there are exceptions to this rule. Anthropologist Alison Dundee Renteln, for instance, has suggested that human rights are “cross-cultural universals” – i.e. moral standards that are universally shared.<sup>7</sup> And other contemporary theorists, including Sissela Bok and Hans Küng, have endorsed similar views.<sup>8</sup>

Agreement theory about the grounds of human rights, by contrast, has recently been championed by preeminent philosophers including Charles Beitz, Joshua Cohen, and John Rawls. Beitz, Cohen, and Rawls all endorse slightly different accounts of the nature of human rights. Beitz, as I noted above, identifies human rights with rights that are a matter of both national and international concern. Cohen understands human rights to delimit a set of “important standards that all political societies are to be held accountable to in their treatment of their members.”<sup>9</sup> And for Rawls, human rights are conceptually defined by their special political function(s) in *LP*.<sup>10</sup> Nevertheless, all three thinkers agree that human rights ought to

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<sup>7</sup> See: Alison Dundes Renteln, “Relativism and the Search for Human Rights” in *American Anthropologist* (New Series, March 1988) Vol. 90, No. 1, esp. p. 68.

<sup>8</sup> See: Sissela Bok, *Common Values* (Columbia: University of Missouri Press, 1995); Hans Küng, “Declaration Toward a Global Ethic” in *Yes to a Global Ethic* (New York: Continuum Publishing Company, 1996), p. 14.

<sup>9</sup> See: Cohen 2004, p. 195; Also: Joshua Cohen, “Is there a Human Right to Democracy?” in *The Egalitarian Conscience: Essays in Honour of G.A. Cohen* (Oxford: Oxford University Press, 2006) ed. C. Sypnowich, pp. 229-230.

<sup>10</sup> See: *LP*, pp. 78-81.

be grounded in values, ideas, or considerations that are shared or shareable across cultures.<sup>11</sup> Thus, while theorists such as Beitz, Cohen, and Rawls are not agreement theorists about the nature of human rights, they nevertheless can be considered piecemeal agreement theorists about the grounds of human rights.

It should be noted that affirming the importance of moral consensus in determining the appropriate grounds of human rights does not commit one to any specific view about the normative authority of such rights. Rather, the normative authority of human rights is, in principle, a question to be settled by theoretically independent considerations. This means that agreement theory is compatible with a range of philosophical sensibilities. For instance, since it does not come packaged with a meta-ethical commitment to (nor a denial of) the truth of moral realism, agreement theory might be considered attractive to those who would wish to defend human rights without committing themselves to that meta-ethical doctrine. Or, it might be considered attractive to those who believe in moral realism but nevertheless understand human rights to be un-authoritative artefacts of international convention.<sup>12</sup> Others may find agreement theory attractive in virtue of a deeper philosophical commitment to constructivism about ethics or political morality, to a certain conception of legitimacy,<sup>13</sup> or to a certain understanding of the nature of objective moral truth. Regardless, while these reasons all bear on the question of the *appeal* of agreement theories, which we will discuss in the following section, they are not part of the core conceptual structure of agreement theory itself.

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<sup>11</sup> This is one way of expressing what Cohen calls “justificatory minimalism.” See: Cohen 2004, pp. 192-193; Cohen 2006, p. 226. See also: Rawls 1999, pp. 65, 68. See: below §3.4.

<sup>12</sup> For an example of the latter, see: Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981), pp. 69, 70, 258.

<sup>13</sup> See the legitimacy-based argument for agreement theory below.

## 2.2 *Actual vs. Potential*

In the last subsection I alluded to a subtle distinction between a value's being *shared* and its being *shareable*. This is a potentially confusing distinction, but it is important and prevalent in the literature, particularly in the work of Joshua Cohen and John Rawls. According to Cohen, what he calls "justificatory minimalism" is not about empirically locating values that lie at the "*de facto* intersection of different ethical traditions,"<sup>14</sup> but about providing a justification of human rights that "is capable of winning broader public allegiance – where the relevant public is global."<sup>15</sup> This means producing a justification of human rights that is deliberately abstemiousness or minimal enough to win broad support, but that does not necessarily appeal to values, ideas, or considerations that are *de facto* currently shared by all. This notion is already familiar from the dense discussion of Rawls in the last two chapters.

Thus, there are two ways of interpreting the requirement that human rights must be grounded in objects of moral agreement, or that human rights themselves are such objects. The relevant agreement may be an *actual* one – that is, it must be a moral agreement that is in some way empirically identifiable – or it may be a *potential* one, in which case judgments about the moral agreement are judgments of possibility. The idea of a *potential* cross-cultural agreement represents an important alternative to its *actualist* counterpart, since it provides agreement theory with much needed leverage against two uncomfortable prospects. The first prospect is one that faces agreement theory about the nature of human rights more obviously than its ground-based counterpart. For, on an actualistic reading, agreement theory about the nature of human rights will most likely ratify a depressingly minimal list of genuine human rights. That is, if all rights that lie outside the scope of an actual cross-cultural agreement fail to qualify as genuine human rights, then we would most likely be forced to give up on such

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<sup>14</sup> Cohen 2004, p. 200.

<sup>15</sup> Ibid, p. 192.

central human rights as the right to non-discrimination on the basis of sex, sexual orientation, or race, as well as the human rights to education, freedom of religion, expression, association, and political participation, among others. Indeed, the first prospect may be even worse than that, since it is an open question whether there are *any* moral rights that fall within the scope of an actual cross-cultural agreement.<sup>16</sup>

Secondly, and relatedly, there is the additional worry that, if human rights are either objects of actual cross-cultural agreement or grounded in such objects, then they can no longer be held up (as they commonly are) as critical moral standards against which current global opinion can be measured; human rights would, by definition, *reflect* rather than *constrain* global moral opinion. There are ways in which an actualistic interpretation of agreement theory may hope to avoid these prospects – say, by making the relevant form of actual agreement a global majoritarian one, or one that involves only *major* world cultures, or certain common interpretations of those cultures – but the notion of a potential cross-cultural agreement is in some ways a more obvious escape route. As we shall see later, however, pressing questions remain about whether the criterion of a “potential” agreement can be non-arbitrarily specified.<sup>17</sup>

### 2.3 *Common Core vs. Overlapping Consensus*

Along with the interpretive leeway as to the relevant *mode* of agreement, there is also room for interpretation when it comes to the *structural* nature of the agreement in question.

For instance, Beitz distinguishes between two governing images that have animated

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<sup>16</sup> In the case of an actualistic reading of agreement theory about the grounds of human rights, the prospect need not be so dim. Providing there is at least one abstract value (e.g., human dignity) actually agreed to across cultures, it is not implausible to assume that a great many human rights may still find justification. (see the discussion of Cohen in §3.4 below).

<sup>17</sup> See: §3.4 below.

agreement theories of human rights. One is the idea of a “common core”<sup>18</sup> of moral standards, i.e., a set of standards that is universally shared or in some way embedded within all moral cultures, despite broader cross-cultural disagreements. Many cite Michael Walzer as a key proponent of this view, with his idea of a global “moral minimum” – that is, a “thin” set of abstract values and negative injunctions that are reiterated in all “thick” moral cultures (barring some extreme anthropological examples).<sup>19</sup>

The main alternative to a “common core” interpretation of agreement theory, according to Beitz, trades on the idea of an “overlapping consensus,” famously popularized by Rawls in *PL*.<sup>20</sup> Unlike common core conceptions, which suggest that human rights are standards already contained within all moral cultures, this alternative conception proposes that human rights are moral principles that are *capable* of being affirmed from a great variety of moral, religious, and philosophical points of view. Thus, the guiding metaphor here, as Beitz has noted, is not one of containment but of inference or *reachability*.<sup>21</sup> Because it conceives of human rights as moral norms that are reachable or inferable from various foundational starting points, the idea of an overlapping consensus would appear to require a potentialist reading of agreement theory. But this ignores the distinction between a norm or value’s being presently affirmable (or reachable, or inferable) and its being affirmable (or reachable, or inferable) under alternative or future circumstances. Those who have taken the idea of an overlapping consensus seriously in relation to human rights often emphasize the future possibility of an overlapping consensus on human rights, given the ways in which

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<sup>18</sup> Beitz 2009, pp. 74-75.

<sup>19</sup> See: Michael Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987), p. 24; Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: Notre Dame University Press, 1994), pp. 9-11. Although Walzer does not explicitly advance the idea of a global moral minimum as a doctrine of human rights, it is clear that he understands these two ideas to be importantly related. See: Walzer 1994, p. 10; Also: Michael Walzer, “Beyond Humanitarian Intervention: Human Rights in Global Society” in *Thinking Politically: Essays in Political Theory* (New Haven: Yale University Press, 2007), ed. D. Miller, pp. 251-263, esp. 251.

<sup>20</sup> See: *PL*, pp. 133-173.

<sup>21</sup> Beitz 2009, pp. 76-77.

different moral traditions of the world may adapt, change, or come to valorize some traditional values over others.<sup>22</sup> Thus, they implicitly recognize a distinction between an actual and a potential overlapping consensus on human rights, or their grounds. And so it would seem that, on an actualistic reading of the idea of an overlapping consensus, the objects of moral consensus are reachable (or affirmable, or inferable) from different cultures or traditions in their current form,<sup>23</sup> on a potentialist reading thereof, the objects of moral consensus are reachable (or affirmable, or inferable) from different cultures or traditions in some future or alternative form.<sup>24</sup>

#### 2.4 Other Ambiguities

Beyond these three centres of interpretative variation in agreement theory, there are other details that inevitably need to be hammered out. One of these concerns the relevant *object* of agreement. For, as suggested in the previous few paragraphs, it may be cross-cultural agreement about *rights* that is relevant to the vindication of any given human rights claim, or cross-cultural agreement about the values, ideas, judgments, claims, reasons, interests, or needs expressed or protected by a right that is crucial. Or, perhaps, *both* may be crucial. Furthermore, if the grounds of human rights are determined by the scope of an actual or potential international moral agreement (whether it be a common core or overlapping consensus sort of agreement), then it may be that only the most minimal procedural values pass muster. And so, this leaves room for agreement theory to claim that the content of

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<sup>22</sup> See: Joshua Cohen 2004, pp. 190-213; Taylor 1999, pp. 124-144; Abdullahi A. An-Na'im, "The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia" in *The East Asian Challenge to Human Rights* (Cambridge: Cambridge University Press, 1999), eds. J.R. Bauer & D.A. Bell, pp. 147-168, esp. 153-154.

<sup>23</sup> Beitz discusses this idea under the heading of "overlapping consensus" versions of agreement theory (p. 76).

<sup>24</sup> This idea is discussed by Beitz under the heading of "progressive convergence" versions of agreement theory (pp. 88-95).

human rights must be determined by some suitable democratic or deliberative decision-making procedure at the international level.

Another important ambiguity, briefly alluded to above, concerns the degree and range of assent required by agreement theory. For instance, is the proposed (actual or potential) agreement on human rights (or their grounds) meant to include *all* human cultures? This may seem overly stringent, since it would potentially mean offering even the most extreme or morally outrageous examples of human culture veto power over the content of human rights. Perhaps then, it would be sensible to more narrowly circumscribe the requisite agents of agreement to include only *major* world cultures or moral, political, and religious traditions. Perhaps the long-term *success* of a culture is the relevant requirement. Or, perhaps it is a majority vote by all world cultures that is the relevant benchmark of cross-cultural agreement, or a majority vote by all *major* world cultures. These are difficult but important details that any adequate agreement theory of human rights will need to address.

Related to this last ambiguity are two further ones. Firstly, there is the notoriously difficult question of how to *individuate* human cultures.<sup>25</sup> Given the historical fluidity of cultural interchange, the resulting lack of clearly defined cultural boundaries in the present day (e.g., between “East” and “West”), and the increasingly cosmopolitan reality of modern life, the prospects for clearly individuating human cultures are becoming increasingly dim. Moreover, cultures are different from nation-states and, in turn, ethical, moral, and religious traditions. Any agreement theory will need to clearly identify the relevant agents of agreement if it is to fully flesh out its basic content.

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<sup>25</sup> See: Jeremy Waldron 1991-1992, pp. 755-756, 777-781; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) ed. A. Gutmann, pp. 92-93; Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), pp. 242-244; Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: W.W. Norton & Company, 2007), pp. 112-113; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), pp. 100-101.

Secondly, even if we settle the difficult questions of Who or What the parties to the relevant agreement are, How to individuate them, and that of How Much agreement is required, there is still the further question of How to determine whether the requisite assent from the requisite parties has actually been obtained. This question is illuminatingly discussed by Beitz, and raises several complex issues.<sup>26</sup> What if, as is often the case, cultures are internally inconsistent or incoherent about the existence of a given human right or the importance of a moral value that is purported to ground that right? How do we determine, in such a case, if the culture in question is or is not a party to an agreement about the existence of that right or the importance of its grounds? Are the subjective beliefs of the *majority* of cultural adherents the relevant criterion here, or is it rather the beliefs of cultural elites who, albeit no more likely to agree, are more familiar with the culture's basic texts and traditions? What about moral dissidents? Are they "part" of the larger culture? Can these questions even be answered generally and in the abstract?

Such difficulties are prone to haunt any proposed agreement theory as persistent problems or grounds for objection. However, the damage done by such difficulties must, in any given case, ultimately be weighed against the considerations that speak in favour of adopting an agreement theory of human rights. That is, we must take stock of the *appeal* of agreement theory before we can make any balanced critical assessment of its plausibility.

### 3. THE CASE FOR AN AGREEMENT THEORY OF HUMAN RIGHTS

The substantial range of interpretive variations of agreement theory do not detract from the basic unity of its guiding idea: that human rights essentially are, or characteristically express, universally shared moral convictions. That basic idea has considerable intuitive

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<sup>26</sup> See: Beitz 2009, pp. 85-86, 92.

appeal, but what accounts for it? In what follows I want to consider roughly five reasons for endorsing such an idea: (a) that human rights must be (or must be grounded in) objects of cross-cultural agreement in order to be stable or legitimate norms (§3.1); (b) that agreement theory is most faithful to the notion of human rights implicit in the modern practice of human rights (§3.2); (c) that agreement theory best captures the moral importance or basicness of human rights (§3.3); and (d) that agreement theory provides us with a satisfactory response to the familiar worry that human rights are ethnocentric or a product of ethnocentrism, e.g., that they are norms that reflect a Western moral and cultural bias (§3.4).

### *3.1 Stability and Legitimacy*

Perhaps not surprisingly, given the overwhelming influence that Rawls has exerted over contemporary moral and political philosophy, two of the most commonly discussed explanations for the appeal of agreement theory are rooted in considerations of legitimacy, on the one hand, and stability, on the other.

#### *(i) Legitimacy*

The legitimacy based argument for agreement theory has several variants, depending on the conception of legitimacy involved, but its central line is to suggest that the legitimacy of human rights (or that of efforts to enforce them) depends upon their being in some sense acceptable or justified vis-à-vis the individuals and institutions to which they apply.<sup>27</sup> Since

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<sup>27</sup> For a straightforward *consent-based* argument of this sort, see: Ignatieff 2001, pp. 56, 58, 71-74; Simon Caney, "Human Rights, Compatibility and Diverse Cultures" in *Human Rights and Global Diversity* (Abingdon: Frank Cass Publishers, 2001), eds. S. Caney & P. Jones, p. 62; and Abdullahi An-Na'im, "Introduction" in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) ed. A. An-Na'im, pp. 3, 5. For an *epistemically-motivated* version of this argument, which casts cross-cultural agreement on human

human rights apply, on a typical understanding, to the behaviour of all human beings and all institutions, the requisite acceptability or justification must be universal in reach.

Because of the intense philosophical complexity of the debate over the nature of legitimacy and the conditions of political legitimation, this kind of argument for agreement theory quickly spirals out into a debate about the correct conception of political legitimacy, which is something that I want to avoid here. Thus, primarily for reasons of space, I will not fully grapple with it. What I will say, as a sort of general note of caution, is that any such legitimacy based argument for *agreement* theory will, inevitably, have to presuppose some controversial consensus-dependent theory of the conditions of legitimacy. Given that there exist highly plausible conceptions of legitimacy that have no such consensus-dependent aspect,<sup>28</sup> the hardest work for a legitimacy based argument for agreement theory will consist in defending its preferred underlying conception of legitimacy. A further point, which is relevant in this context, can be carried forward from my discussion of Rawls' conception of legitimacy in Chapter Two (§3). There I argued that Rawls lacks good reasons for thinking that political principles will only be legitimate if justified on sufficiently abstemious and non-controversial (i.e., broadly acceptable) grounds. That objection is relevant here because Cohen's agreement-based theory of the grounds of human rights, which I will discuss below (§3.4), presupposes a Rawlsian conception of legitimacy. However, rather than elaborate on that objection or press it further against its opponents here, I will let this legitimacy based avenue of generating a case for agreement theory remain as it stands as one possibility,

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rights as a strong indication of their status as "minimum conditions" of legitimacy, *see*: Beitz 2009, p. 79. For a Rawlsian version of this argument, *see*: Cohen 2004, pp. 192-194, 199-202; Cohen 2006, p. 231.

<sup>28</sup> *See e.g.*: Joseph Raz, "The Problem of Authority: Revisiting the Service Conception" in *Minnesota Law Review*, Vol. 90, 2006, pp. 1003-1044.

acknowledging that this avenue has already been insightfully addressed and criticized by other commentators.<sup>29</sup>

*(ii) Stability*

Stability based arguments for agreement theory are at least as common as their legitimacy based counterparts.<sup>30</sup> According to this line of argument, the effectiveness and stability of the modern practice of human rights – in particular, its tendency to be enforced and complied with – depend upon the extent to which the international community finds these rights or the values that they express morally compelling. Since the modern practice of human rights is a global moral-political enterprise, one that requires broad international cooperation, coordination, and compliance, cross-cultural agreement about the existence and importance of human rights is critical to its success. Thus, human rights ought to be the sort of norms that garner such agreement.

Or so the argument goes. As other commentators have noted, deeply rooted cross-cultural moral support for human rights or the values that they express may be a good thing for the global practice of human rights. However, in no way is such broad acceptance critical to securing global compliance with human rights norms or guaranteeing their reliable enforcement.<sup>31</sup> A host of extraneous factors that condition the international political climate – in particular, factors that determine the alignment and objects of international economic and political interest – will surely play a more decisive role in influencing the effectiveness of the

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<sup>29</sup> See: Beitz 2009, pp. 79-80; Allen Buchanan, “Human Rights and the Legitimacy of the International Order” in *Legal Theory*, Vol. 14, No. 1, 2008, pp. 42-43.

<sup>30</sup> See: i.e. Ignatieff 2001, pp. 55-56; Beitz 2009, pp. 80-83; Bok 1995, pp. 25-29; Cohen 2004, p. 200; Donnelly 2003, pp. 99-100; Abdullahi A. An-Na’im, “Problems of Universal Cultural Legitimacy for Human Rights,” in *Human Rights in Africa: Cross-Cultural Perspectives* (Washington: The Brookings Institution, 1990) eds. A. A. An-Na’im & F. M. Deng, pp. 331-368; Peter Jones, “Human Rights and Diverse Cultures” in *Human Rights and Global Diversity* (London: Frank Cass Publishers, 2001), eds. S. Caney & P. Jones, p. 30.

<sup>31</sup> Beitz 2009, pp. 81-82.

global practice of human rights. As we have seen in recent years, for instance, in circumstances where widespread fear of economic collapse make economic cooperation a paramount diplomatic objective, human rights can become a lower priority on the international political agenda. Indeed, as Samuel Moyn has argued, it wasn't until the 1970s when a confluence of political factors, including the end of the Vietnam War and a shift in the tone of American foreign policy, that the phrase "human rights" first entered common parlance in the English language and a genuine social movement around human rights began to form.<sup>32</sup> Moreover, recent research suggests that a significant factor favouring increased international compliance with human rights has little to do with the moral conviction of states or their subjects, but rather involves sociological and psychological phenomena at the state level.<sup>33</sup> In short, because of its broad conventionality and high profile endorsement, human rights compliance has become a condition of socio-political prestige and status in the eyes of the international community; weaker or non-compliant states must inevitably weigh the social costs of non-compliance (disenfranchisement, humiliation, disapproval) against the benefits of compliance (membership, prestige, approval), with the overall balance of social incentives pointing heavily in one direction.

It is also worth noting that, since power and resources are inevitably unequally distributed in the international domain, some national commitments to human rights are more important to secure than others. In perhaps a more ideal world, where power is distributed equally, all nations would agree to protect human rights and coordinate their remedial efforts wherever and whenever human rights are violated. However, in the actual world, it is less important that *all* peoples agree to globally enforce human rights than that the most powerful

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<sup>32</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010), p. 8.

<sup>33</sup> See: Ryan Goodman & Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford: Oxford University Press, Forthcoming); Based on: Ryan Goodman & Derek Jinks, "How to Influence States: Socialization and International Human Rights Law" in *Duke Law Journal*, Vol. 54, No. 3, December 2004, pp. 621-703.

nations do. The real test of the stability or effectiveness of the global practice of human rights is whether or not there is adequate political power behind it, power that reliably imposes real costs on those who would violate human rights. That power can take various shapes, whether it be a single lone superpower standing up for human rights, several powerful nations doing so, most, or a combination of key national commitments, international institutions, a United Nations armed force, and NGOs. The point is that in none of these eligible cases does it even appear *necessary* that all nations or even a broad array of world cultures agree to enforce and comply with human rights, although that would certainly not be a bad thing, and is likely to be a positive indicator of compliance nonetheless.

Thus, the idea that broad moral acceptance of human rights is key to promoting compliance with and enforcement of human rights in the international domain is a greatly exaggerated one. It is unclear whether broad acceptance is even a necessary condition of such stability. Moreover, even if it were a key and necessary factor, this would still give us little reason to accept the precepts of agreement theory. This is because the argument from stability rests on a false inference. What the argument seems to establish, if anything, is that norms that aim to stably regulate international activity and that require extensive international backing in the form of treaties, declarations, and embodiment in international law, should have broad moral appeal. But this is a piece of practical advice worth considering when *implementing* human rights norms in the international political and legal arena; it is not an argument that tells us what human rights are or should be like *as such*, i.e., as moral norms.

The virtues of human rights as legal or institutional norms (e.g., stability, enforceability, effectiveness, interpretive flexibility, etc.) are not necessarily the same as those of human rights conceived as moral norms. If we fail to acknowledge this distinction we will be forced to deny the existence of any human right that would be unfit for legal

embodiment or incapable of being reliably enforced in the international arena.<sup>34</sup> But this seems far too strong a condition. There is room in our ordinary moral thinking for human rights that exist but that, for whatever reason, should not or cannot be legally protected. Consider a woman's right not to be saddled with an unfair burden of domestic labour in the family. Such a right has all the intuitive characteristics of a human right, despite being outside the current purview of protection by law. Or, consider that the current and foreseeable prospects for globally enforcing rights against discrimination on the basis of gender or sexual orientation are incredibly dim. This observation does not diminish our sense of the *wrongness* of such forms of discrimination. Why then, should it undermine our conviction that there is a human right against them?

Some thinkers have defended the view that human rights must be stable or enforceable international norms on the grounds that such an idea of human rights is implicit in the modern practice thereof.<sup>35</sup> I believe such claims to be highly suspect, but in any case, rescuing, or rather attempting to rescue, these stability based considerations on such grounds brings us to a separate meta-theoretical desideratum that might be thought to speak for an agreement theory of human rights on its own terms: *fidelity* to the modern practice of human rights. Leaving the issues of stability and legitimacy aside, then, I now want to examine this fidelity-based rationale for adopting agreement theory.

### *3.2 Fidelity to the Practice*

One reason for endorsing agreement theory, or some version of it, it might be thought, is that such a theory gives the most adequate expression to the basic idea of human rights

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<sup>34</sup> This is an approach followed by Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights," in *Metaphilosophy*, Vol. 41, No. 4, July 2010, p. 470.

<sup>35</sup> See: Beitz 2009, pp. 109-110; Cohen 2004, pp. 194-195.

implicit in the modern practice thereof, or that it remains most faithful to the ways in which we use and have used the term ‘human rights’ today and/or across the centuries. This sort of fidelity based argument for agreement theory – fundamental, because it appeals to the methodological truth that a theory of human rights ought to be reasonably responsive to the historically, socially, and politically conditioned ways in which such rights are ordinarily understood – has two basic varieties.

*(i) Nature*

The first variety takes various features of the modern practice of human rights to recommend an agreement-based conception of the *nature* of human rights. Chief among these features, perhaps, is the fact that the modern practice of human rights is driven by a set of declarations, conventions, and legal bills of human rights that have been comprehensively *agreed* to by (most members of) the international community. The drafting, signing, and preservation of these agreements was and is primarily orchestrated by the United Nations, which today speaks in the name of 193 member states. Not only this, the first draft of the UDHR was an amalgamation of civil and constitutional rights found in domestic constitutions across the world.<sup>36</sup> In the case of countries or cultures that did not already specify citizens’ ‘rights’, or only a meagre set thereof, the 1947 UNESCO Committee on the Theoretical Bases of Human Rights still found broad support for human rights on the basis of values prevalent in such cultural and political contexts.<sup>37</sup> This led to a conception of human rights as a set of “bridging” norms that constitute a kind of common moral denominator

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<sup>36</sup> Glendon 2001, pp. xviii, 226-227; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), pp. 7-8.

<sup>37</sup> In its own survey, the UNESCO committee found that the “principles underlying the draft Declaration were present in many cultural and religious traditions, though not always expressed in terms of rights.” (Glendon 2001, p. 76).

among nations and cultures.<sup>38</sup> Moreover, this bridging status is what many at the time took to underpin the very moral weight or authority of the human rights specified in the UDHR.<sup>39</sup>

The importance of broad international agreement to the historical development of the modern practice of human rights is indisputable. However, this is not the only feature of that practice that plausibly bears on the question of the nature of such rights. Presumably, much more important than the fact that the international community (or a majority of it) *agreed* or *agrees* on human rights are facts about *what* that community took or takes itself to be agreeing on. The overriding purpose of the Universal Declaration, as it is typically understood, was to specify norms that would protect all human beings from the horrific treatment that so many endured during the Second World War, often at the hands of their own government.<sup>40</sup> To that end, the original drafting committee produced a realistic but ambitious list of individual rights (including welfare rights) that, it was hoped, would be emulated in domestic constitutions around the world and eventually ratified by international law.<sup>41</sup> It is highly doubtful that the principal intention of the original drafting committee, composed of representatives from seventeen countries, was to articulate a set of universal individual rights *upon which they could all agree*. That description leaves out the *nature* or *purpose* of the norms that they intended to agree upon, i.e., rights possessed by all human beings simply in virtue of their humanity, and/or rights that protect individuals from standard threats that their states can be held primarily responsible for respecting and that the international community can be held secondarily responsible for guaranteeing.<sup>42</sup>

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<sup>38</sup> Ibid, pp. xix, 77-78, 222-223, 226.

<sup>39</sup> Idem; Morsink 1999, p. 12.

<sup>40</sup> For a thorough account of the influence of the Second World War on the work of the drafting committee, see: Morsink 1999, pp. 36-91.

<sup>41</sup> See Morsink 1999, pp. 12-20, for a historical explanation of why the Universal Declaration took the form of a declaration and not a covenant or bill of rights, as many at the time had hoped it would.

<sup>42</sup> These are the “orthodox” and Beitz’s “practical” conception of the nature of human rights, respectively. See: Tasioulas 2009 and Beitz 2009.

(ii) *Grounds*

If not wholly relevant to the question of the nature of human rights then, perhaps the historical role of international agreement in establishing human rights doctrine is relevant to the question of their grounds. This brings us to the second variety of the fidelity-based argument for agreement theory, which is far more ubiquitous than the first. Very often, those who endorse this argument take inspiration from a statement made by Jacques Maritain, a prominent member of the UNESCO Committee on the Theoretical Bases of Human Rights, when he was asked how adherents to wildly divergent ideologies were able to agree on a single list of fundamental rights: “Yes, we agree about the rights but on condition no one asks why.”<sup>43</sup> The UNESCO Committee’s view of human rights as (somewhat miraculous) points of practical convergence amidst profound moral and ideological disagreement – i.e., as a common “framework within which divergent philosophies, religious, and even economic, social and political theories might be entertained and developed” – <sup>44</sup> can inspire two different claims about the grounds of human rights. Either, (a) a human right is valid providing it can be shown to be affirmed or shared by all moral cultures (in this case, validating a rights claim would be a matter of empirical investigation): *or*, (b) a human right is valid providing it expresses an underlying value, judgment, interest, need, idea, reason, principle, or a set thereof, which itself falls within such an overlap of agreement across cultures (this claim leaves room for reasoning about which rights give best expression to the relevant grounds).<sup>45</sup> These claims are not mutually exclusive; both may be true. In the case of (b), fidelity would

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<sup>43</sup> See: Cohen 2004, pp. 193-194; Taylor 1999, p. 124; Ignatieff 2001, p. 88; Charles Beitz, “What Human Rights Mean?” in *Daedalus*, Vol. 132, No. 1, Winter 2003, pp. 36-37; For direct quote see: Jacques Maritain, “Introduction” in *Human Rights: Comments and Interpretations* (London: Wingate, 1949), p. 9. (Quoted in Glendon 2001, p. 77).

<sup>44</sup> Richard P. McKeon, “Philosophical Bases” in *Human Rights: Comments and Interpretations* (London: Wingate, 1949), p. 35. (Quoted in Glendon 2001, p. 78).

<sup>45</sup> Indeed, the AAA’s 1947 “Statement on Human Rights,” suggests that a valid doctrine of human rights would have to express values that are shared across all cultures, values that include freedom and the full realization of human personality. See: Executive Board, AAA 1947, pp. 539, 543.

most likely point us towards the inherent and equal *dignity* of men and women as the foundational value or idea behind human rights, if only because the value of dignity is so prominent in the UDHR itself.<sup>46</sup> Thus, conjecturally, the main argument here would be that fidelity to the practice shows that human rights are norms worked out on the basis of a cross-cultural value (the inherent and equal dignity of men and women) that is given different elaborations and metaphysical explanations against the background of different cultural, political, philosophical, and religious contexts.

Much like the first variety of the argument from fidelity, however, the second variety relies on an incomplete vision of the modern practice of human rights. While the original drafting committee of the UDHR agreed on a list of rights and on a provisional justification of those rights (i.e., that they protect human dignity) – having, in addition, placed great value on the fact that they were able to come to such an agreement – none of this would have made any sense had they not also believed that they agreed on a (more or less) *correct* list of human rights *and* on a (more or less) *correct* justification for them. The idea of human dignity was proposed as an explanation of the list of human rights because it captured the idea “that every human being is worthy of respect.”<sup>47</sup> This basic egalitarian idea was attractive to the committee not simply because they all agreed with it, but presumably because they took it to carry a heavy dose of independent moral credibility, self-evidence, truth, authority, or correctness. Yet it is precisely this generic realist dimension of the UNCHR’s proposed justification of the content of the UDHR that is excluded from agreement theory’s positivist conception of the grounds of human rights. An overall more faithful account of the grounds of human rights would be one that incorporates it.<sup>48</sup>

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<sup>46</sup> See: “Preamble” and “Article One” of the UDHR. The dignity of persons was also understood by many members of the original drafting committee to be an explanation of *why* human beings had rights in the first place. (see: Glendon 2001, p. 78, 146)

<sup>47</sup> Glendon 2001, p. 146.

<sup>48</sup> Moreover, capturing this objectivist aspiration in a theory of the grounds of human rights need not preclude openness to the possibility of their being multiple (culturally distinct) ways of justifying

These last considerations speak to a broader difficulty. Often, the theoretical desideratum of fidelity to the modern practice of human rights is too narrowly interpreted. The highly institutionalized nature of the modern practice of human rights will often lead those who take fidelity seriously to incorporate some of the juridically or institutionally-sensible aspects of human rights practice into their theoretical conception of human rights itself. But this tendency should be resisted, and the desideratum of fidelity should be more generously understood. For instance, as a set of universally prescriptive standards of domestic governance destined for embodiment in international law, it was sensible for the original drafting committee to go to great lengths to secure mutual understanding and international agreement on human rights. But the need to secure broad international agreement may very well fade away when the issue becomes one of formulating the best theoretical account of human rights that we can, especially if this involves being faithful to other aspects of the modern practice of human rights, including its indebtedness to the medieval philosophical tradition of natural law and Enlightenment moral and political thought. Given such indebtedness, fidelity to the modern practice should not *solely* be equated with fidelity to the highly institutionalized practice of human rights as we know it today.

### 3.3 Basicness

Agreement theory might be thought to be the best way of capturing two other common ideas about human rights. According to these ideas, which tend to go hand in hand,

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human rights, as the committee insisted. *See, for example:* John Tasioulas, “Human Rights, Universality, and the Values of Personhood: Retracing Griffin’s Steps” in *European Journal of Philosophy*, Vol. 10, No. 1, p. 94.

human rights are both *self-evident* and *basic* moral norms.<sup>49</sup> It is difficult to give much substance to these vague notions. Nevertheless, we can plausibly stipulate the following: firstly, human rights are self-evident in that, unlike other moral rights, we (i.e., all reflective human adults) are ineluctably impressed by their validity. Secondly, human rights are basic in the sense that they specify not *all* the requirements of morality, and not even all the rights-based requirements of morality, but rather a minimal set of supremely important rights-based constraints on our actions.

Now, it's quite reasonable to suspect that there will tend to be a natural overlap between those norms that are self-evident and those that are basic in the sense described above.<sup>50</sup> One evolutionary way of explaining the correlation would be to claim that the society-wide endorsement of basic rights is and has been a matter crucial to the long-term *survival* of any human group, and so all extant human cultures incorporate an appreciation for such rights in some form, one that is reflected in our judgments of self-evidence.<sup>51</sup> Leaving that empirical claim aside, however, we might simply claim a connection, as Michael Walzer does, between the self-evidence of a moral norm and its basicness: the universally compelling negative injunctions of the global "moral minimum" – "murder, deceit, torture, oppression, and tyranny" –<sup>52</sup> he argues, are morality "close to the bone."<sup>53</sup> If we accept this connection to be true, then this furnishes us with an interesting argument for agreement theory. By placing primary emphasis on the self-evidence of human rights – i.e., on their nature as objects of cross-cultural agreement or expressions thereof – agreement theory, *ipso facto*, becomes a natural way of accounting for the basicness or special importance of human rights.

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<sup>49</sup> See: Glendon 2001, pp. 225-226, 230.

<sup>50</sup> Beitz 2009, p. 73.

<sup>51</sup> Bok 1995, pp. 19-23.

<sup>52</sup> Walzer 1994, p. 10.

<sup>53</sup> Ibid, p. 6.

This is a fragile argument, but it's worth discussing because of its strong intuitive appeal. The most glaring weakness lies, not surprisingly, in its asserted connection between the basicness or supreme importance of a moral norm and its cross-cultural self-evidence. For instance, there are general moral norms such as, "it is good to be polite," which, precisely because they are so abstract, will likely appear self-evident to all, but that are not supremely important. However, even if we accept that there is a positive correlation between a moral norm or right's being supremely important and its being self-evident, the independent claim that human rights are *basic* or *supremely important* rights shouldn't simply be taken for granted. For one, human rights, as we have come to know them, do not address *all* moral issues that are of supreme importance; e.g., questions about the treatment of the planet and its organisms, about the proper distribution of wealth, and as well as intricate questions of loyalty, family, friendship, and other personal priorities, often fall outside the relevant purview of human rights. Moreover, some of the human rights currently ratified by international law – rights that include holidays with pay and the right to be loved –<sup>54</sup> are less aptly described as basic than others.

The more serious issue with this argument is its disingenuous sleight of hand. Granted, the argument is my own, so I have to take responsibility for this, but it seems to me that any argument for agreement theory that is premised on the basicness of human rights would have to make a similar kind of move. If it is the basicness or supreme importance of human rights that agreement theorists hope to capture in their conception of human rights, then it is not at all clear why they should look to agreement theory to do this. A less circuitous strategy would be to model this basicness more saliently in one's theory of human rights itself, for instance, by understanding human rights as rights that protect basic

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<sup>54</sup> See: "Article 24" of the UDHR, and "Right 1" of the Declaration of the Psychological Rights of the Child (1979), respectively.

interests,<sup>55</sup> or basic human capabilities,<sup>56</sup> or the supremely important value of personhood or agency.<sup>57</sup> Indeed, following this course would still leave room for the notion of broad acceptability to play the role of epistemic consultant, i.e., the more self-evident and widely accepted a right, interest, or value is across cultures, then the more reason we might have for believing that it is indeed basic and thus either a human right or the proper ground of a human right. But this role would not, in such case, be a conceptual one; rather, it would be that of an indicator that tells us when the relevant conceptual features of human rights (i.e., their basicness) are fulfilled in any given case. This is a possibility that I elaborate in §4 below.

### 3.4 *Ethnocentrism*

Along with the stability and legitimacy based arguments discussed above, perhaps the next most common rationale for endorsing agreement theory arises from concerns about the ethnocentricity or parochialism of human rights. The potential for agreement theory to assuage such concerns is, at first glance, obvious;<sup>58</sup> indeed, agreement theory would appear to stem them by conceptual *fiat*. If we isolate the relevant worry here to that of a schedule of human rights narrowly endorsing rights or values that are prevalent or esteemed only in some culture(s), but not in others, then agreement theory recommends itself as a natural solution. For what better insurance could there be against this form of parochialism than to understand human rights as the very kind of rights that are, or that express, objects of cross-cultural moral agreement? On such a view, rights that are not prevalent, or that do not express moral

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<sup>55</sup> See: Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), pp. 124-125.

<sup>56</sup> See: Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), pp. 96-101.

<sup>57</sup> See: James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

<sup>58</sup> See: Buchanan 2008, p. 42.

considerations that are prevalent, across a broad array of cultures could not even satisfy the description of a human right. Thus, we appear here to have a powerful case for agreement theory.

Whether or not agreement theory can deliver on this promise partly depends, however, on if it consists in a workable theory of human rights. And one reason for thinking that it does not do so is that agreement theory's method of avoiding the problem of ethnocentrism is liable to leave it unable to ratify anything more than a depressingly minimal list of human rights (and this is assuming that it is able to ratify any human rights at all). As mentioned early on (above in §2.2), if agreement theory is interpreted along actualist lines – i.e., as a theory that locates human rights in the empirical overlap between all moral cultures as they actually are – then it is doubtful that it will license anything like the rich list of human rights familiar from the current international practice, including the UDHR. Central rights to non-discrimination on the basis of sex, race, and sexual orientation, for one, are routinely violated, and their violation is routinely sanctioned by established moral codes in cultures across the world. Moreover, unless an actualist version of agreement theory incorporates arbitrary stipulations about the requisite agents or degree of cross-cultural agreement, extreme anthropological examples threaten to reduce its list of genuine human rights to zero. What I want to consider in what follows is one potentialist version of agreement theory (that of Joshua Cohen),<sup>59</sup> which promises to avoid this substantive downside of actualism, on the one hand, while reaping the benefits of agreement theory's basic theoretical appeal to consensus in countering worries about ethnocentrism, on the other.

*(i) Justificatory Minimalism*

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<sup>59</sup> Mentioned above in §2.2.

According to Cohen, the feared prospect of “substantive minimalism” with respect to human rights need not follow if what we want is to avoid an ethnocentric conception thereof. Instead, all that is necessary for such avoidance is that we enable the possibility of cross-cultural agreement at the level of the *grounds* of human rights via a policy of “justificatory minimalism.” The notion of justificatory minimalism is already familiar to us from the two previous chapters on political constructivism. As Cohen is keen to insist in his own politically constructivist account, justificatory minimalism does not involve understanding human rights as norms that are “accepted” by, or that lie at the *de facto* intersection of, different cultural and ethical traditions.<sup>60</sup> Rather, it involves understanding such rights as moral norms that are grounded in ideas and values embedded in the political practice that they seek to regulate, and in particular ones that are sufficiently minimal or abstemious so as to be considered “acceptable” from a variety of religious, philosophical, and moral points of view.<sup>61</sup> What distinguishes Cohen’s take on this idea from that of Rawls’, however, is that, unlike Rawls, Cohen is not bound to the cumbersome justificatory apparatus of *LP*. And so, on Cohen’s account, the ideas and values that ground human rights are not ultimately (or necessarily) liberal in provenance; they are *sui generis* to the global political domain itself. Thus, Cohen follows through on Rawls’ practice-dependent methodology to the end, as it were.<sup>62</sup> And as such, his theory is structured in such a way as to avoid many of the objections levelled at *LP* towards the end of Chapter Three (§4.2.ii). The present discussion of Cohen’s theory of human rights, then, provides me with an opportunity to assess the possible ethnocentrism-avoiding strengths of the idea of justificatory minimalism (which is closely related to *LP*’s

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<sup>60</sup> That is a position he imputes to Michael Walzer. Cohen 2004, p. 200.

<sup>61</sup> *Idem*; Cohen 2006, p. 226. *Also*: Joshua Cohen, *Power, Reason, and Politics* (Oxford: Oxford University Press, Forthcoming). These two conditions model the general strictures of public reason. (Chapter Two, §1)

<sup>62</sup> *See* my complaint against Rawls at Chapter Three, §4.2.ii

claim to bilateral acceptability) when it is genuinely undergirded by the practice-dependent methodology that Rawls seems to abort in the case of *LP*.<sup>63</sup>

Now, Cohen does not only identify the role that human rights play in global political practice – which is to set “important standards that all political societies are to be held accountable to in their treatment of their members.”<sup>64</sup> – he also identifies a particular value, concern, or idea implicit in that practice which grounds (and which he thinks ought to ground) our substantive judgments about human rights. According to Cohen, this governing concern is “not with a failure to treat people as equals, owed equal concern, status, and opportunity, but with *inclusion*,”<sup>65</sup> which essentially involves having one’s interests given “due consideration.”<sup>66</sup> Thus, on Cohen’s account, justificatory minimalism involves grounding our substantive judgments about human rights in minimalistic considerations about the conditions of inclusion, membership, or of having one’s interests given due consideration. If we ground our thinking about human rights in that way, he suggests, our reasoning will be sufficiently abstemious so as to be “acceptable” from a variety of religious, philosophical, and moral points of view. That is one sense in which ethnocentrism will be avoided. But furthermore, such justificatory minimalism will not, as in the case of *LP*, involve the reflexive endorsement of values and ideas implicit in the political practice of modern constitutional democracies (however minimal such values and ideas may be). It will

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<sup>63</sup> The bilateral acceptability of the content of *LP*, as I explained in the last chapter (at Chapter Three, §4), is understood by Rawls to be dependent on both its justificatory and substantive minimalism, just in the same way that the multilateral acceptability of the grounds of human rights are, in Cohen’s case, dependent upon their justificatory minimalism – hence, the close relationship between the two notions. My complaint against the plausibility of *LP*’s attempt to avoid ethnocentrism (at Chapter Three, §4.2.ii) was that its justification essentially wasn’t minimal enough (i.e., it was too liberal) to avoid the spectre of ethnocentrism in both an internal and external sense, and that this was precisely because it had aborted political constructivism’s practice-dependent methodology in the international political context. Now, in the case of Cohen’s work, I can effectively examine how much *more* leverage Rawls might have gained against the problem of ethnocentrism had he stuck to that methodology, or had his justification of *LP* been adequately “minimal,” as it were.

<sup>64</sup> See: Cohen 2004, p. 195.

<sup>65</sup> Cohen 2004, p. 197; Also: Cohen (Forthcoming), “Lecture one: On Public Reason”

<sup>66</sup> Cohen 2004, p. 197.

rather invoke values embedded in global political practice *itself*, and so Cohen's account can stem the worries about ethnocentrism that we raised against *LP* in the last chapter as well.

Finally, none of this means that we need to prune back our substantive list of human rights in the way that Rawls does. Since the avoidance of ethnocentrism, on Cohen's account, only requires that we anchor substantive reflection about the content of human rights in the sufficiently abstemiousness *grounding* idea of inclusion or membership, this leaves open the possibility that a rich set of human rights may ultimately be ratified by the process of derivation or justification that moves from grounds to norms. Given that Cohen's proposal gains some leverage against the uncomfortable prospect of substantive minimalism while preserving the ethnocentrism-avoiding criterion of broad acceptability or consensus, it outlines a natural path along which agreement theory might avoid the present impasse between substantive minimalism, on the one hand, and ethnocentrism, on the other. Now let me examine some difficulties facing Cohen's account.

*(ii) Interpretive Arbitration*

One initial worry that faces Cohen's account is that its proposed justification of human rights may be, as it were, *too* minimal to avoid co-option by socially reflexive interpreters. For, despite the broad acceptability of the value of membership from a variety of political and ideological perspectives, such a value is bound to receive different elaborations and interpretations by diverse ideological parties. Indeed, a Confucian account of the basic conditions of membership in a society is bound to differ at least in some significant ways from an Islamic one, and so adherents of these different ideologies are bound to derive or justify *different* lists of human rights from the selfsame criterion. The same would be true if the grounding value in question was not membership but that of human dignity, for instance,

and so the objection is a general one. How does Cohen's *brand* of agreement theory address the possibility of ethnocentrism or reflexive bias at the level of deriving or justifying human rights norms from their underlying value(s)? How are competing or even incompatible interpretations of the grounding value(s) of human rights to be non-ethnocentrically arbitrated?

The most immediately obvious solution to this problem would be to standardize the content of the grounds of human rights. James Griffin's personhood account of human rights, for example, very carefully outlines the components of personhood or agency, thereby lending some determinacy to the justificatory process that moves from the value of personhood to the norms of human rights.<sup>67</sup> However, following this course would threaten to undermine the crucial ambition of broad acceptability that is central to the sort of agreement theory proposed by Cohen. The more specificity and content is built into the idea or value of membership, for instance, the less plausible it becomes to assert that such a value is acceptable from a variety of cultural, political, philosophical, moral, and religious perspectives. Indeed, it is partly because the idea of membership is vague enough to serve as an open framework for diverse and contested interpretations of its meaning that it is proposed as a ground of human rights.<sup>68</sup> For this very reason, it would appear, Cohen opts out of saying anything more about membership than that it involves having one's interests given due consideration.

Cohen's solution to this difficulty of interpretive bias seems to consist in a reassuring article of faith. A shared elaboration or interpretation of the conditions of membership – and thus a common account of the grounds of human rights – sits at the convergence of the “most compelling statement” of a variety of disparate ethical traditions.<sup>69</sup> Thus, even if a diversity of

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<sup>67</sup> See: Griffin 2008, pp. 8-9.

<sup>68</sup> Cohen 2004, p. 199.

<sup>69</sup> Ibid, p. 201.

ethical traditions would not converge on a common interpretation of the idea of membership in their actual forms, providing all (or many) such traditions with their *most compelling statement* would yield a common understanding of the value membership that is shared by all. Cohen's proposal is thus a potentialist agreement theory of the grounds of human rights, where the *potential* agreement on human rights has a special character. Human rights are grounded in a particular substantive conception of membership that lies at the convergence of the "most compelling" or "best" interpretation of all major ethical traditions.<sup>70</sup>

Cohen makes some effort to demonstrate, using the case studies of Islam and Confucianism as an example, that his assertion about the convergence of the best interpretations of all ethical traditions on a single account of membership and human rights is indeed true.<sup>71</sup> But even if these case studies were flawless, they would be unable to give credence to Cohen's assertion as a general truth. The very notion that there is a best or most compelling interpretation of any longstanding ethical tradition is inherently dubious. And even if there were, it is unlikely that we would be able to agree, in general terms, on *how* to arrive at such an interpretation or *whose* job this should be.<sup>72</sup> Cohen's case studies, in any event, do not provide any promising methodological insights of this sort. Thus, there doesn't appear to be much promise in the idea of arbitrating interpretive disputes about the grounds of human rights by having recourse to the notion of the "best" or "most compelling statement" of all (or all major) ethical traditions.<sup>73</sup> The very vacuity of that concept leaves too much room for ethnocentric or socially reflexive interpretations of its content to govern such arbitrations.

An alternative proposal would be to take seriously the role of international institutions in settling such interpretive conflicts or disputes, an idea recently endorsed by Allen

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<sup>70</sup> Ibid, p. 202.

<sup>71</sup> Ibid, p. 202-210.

<sup>72</sup> This point recalls some of the ambiguities I highlighted in §2.4, above.

<sup>73</sup> See also: Beitz 2009, p. 93.

Buchanan.<sup>74</sup> One way of understanding the relevant contribution of international institutions is as providers of an inclusive procedure of deliberation in which the views of diverse ideological adherents are heard and, perhaps in virtue of being provided with an equal right to vote on or veto a proposed schedule of human rights, respected. The fluidity of the interface between an agreement theory of human rights and such an institutional deliberative process would be enhanced if we understand this process to embody deliberative or procedural values (e.g., inclusiveness, fairness) that form part of the very content of the requisite international (potential or actual) agreement on the grounds of human rights. In any case, such an interpretation of agreement theory as a theory of the grounds of human rights, it seems to me, is not an implausible one. Human rights, on this view, are grounded in a value (or a set of values) acceptable to a diverse array of moral, religious, and cultural traditions, and their specific content is determined by procedural mechanisms that presuppose values (e.g., fairness, inclusiveness) on which all parties also agree. If we incorporate this procedural element into Cohen's account, we now have, then, what looks to be a workable version of justificatory minimalism that promises to assuage the stated concern about its interpretive ambivalence.

*(iii) A Deeper Worry*

Early on, in Chapter One (§1.4), I drew a distinction between some set of rights being ethnocentric, on the one hand, and it being a product of *ethnocentrism* (understood as a *mode of judgment*), on the other. In order to help articulate what I take to be the deepest worry facing Cohen's theory of justificatory minimalism (procedurally modified or not) vis-à-vis the problem of ethnocentrism, it will be useful to recall the example I used to tease out that

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<sup>74</sup> See: Buchanan 2008.

distinction early on. In it, I considered the hypothetical case of a culturally cosmopolitan group – “Group X” – that organizes its communal life around a set of moral values and rights that, it so happens, are shared by all world cultures. In other words, Group X’s established and favoured social morality fits, to use Rawlsian terminology, like a “module” into the diverse moralities of all other cultures, i.e., those cultures morally disagree with one another upon matters that lie outside, but not *within*, that modular set.<sup>75</sup> Now, having grown up surrounded by the moral opinions and beliefs of their fellow participants, the members of Group X are now (unknowingly) gripped by ethnocentrism in that they are axiomatically sympathetic to locally established (Group X) moral opinion and thoroughly dismissive of any moral view that diverges even slightly from that standard. The “social setting” of the learning process has worked its magic on them, so to speak. Now suppose that Group X is tasked with the job of drafting a new UDHR – let’s call it “UDHRX” – and, as expected, they quickly put down in written form the set of rights characteristic of Group X morality, without much if any further thought about the matter. Because of the unique cultural positioning of Group X’s social morality as a kind of global moral module, the resultant declaration will not be ethnocentric in the sense of expressing values that are prevalent only in some societies and not in others, and so that cannot be a relevant source of concern. Nevertheless, something of concern remains, and it can only be tied to the fact that Group X’s proposed declaration remains a product of *ethnocentrism* in the second sense, i.e., when understood as a social phenomenon or distinct mode of judgment. What provokes this concern or discomfort in particular, it seems, is the epistemological trajectory of Group X’s endorsement of UDHRX. Rather than rationally deliberate, consider alternative sets of rights, or even respect the possibility of their own fallibility, the members of Group X simply regurgitated a set of moral beliefs that were inculcated in them via the circumstances of their upbringing. *Qua* different,

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<sup>75</sup> *PL*, pp. 12, 145, 347.

no alternative moral view on the matter could be considered or heard. And so even if something has gone right here, since the UDHRX is not straightforwardly ethnocentric, something has also gone wrong, epistemologically speaking. Certain hallmark epistemic virtues have been neglected in Group X's drafting process.

Now, this example is pertinent here because it expresses a worry that applies both in the case of UDHRX and that of justificatory minimalism itself. The reason that the worry applies in the latter case has not as much to do with the minimalistic character of the grounding value or idea of inclusion *per se* (such minimalism can be seen as part of its non-ethnocentric character) as it does with its *origin* or *provenance*. That is, because justificatory minimalism, in its practice-dependent spirit, requires that human rights be grounded in an idea or value that has *de facto* currency in global political practice, such minimalism in effect *introduces* a form of social reflex into normative reflection about human rights. It doesn't matter that the variety of social reflex involved in this case picks out a grounding value or idea that has *global* (and not, as in the case of *LP*, merely liberal democratic) political currency, just in the same way that it doesn't matter in the example above that Group X's UDHRX picks out rights that have currency in all world cultures. In both cases, we are presented with an underlying *mode of judgment* (i.e., *ethnocentrism*) that, as I have argued at length, we should regard with epistemological suspicion.

Part of what makes that mode of judgment suspicious is its inherent conservatism. For instance, there is a distinct close-mindedness inherent in Cohen's claim that practical conclusions about human rights must be grounded in value judgments that are implicit in global political culture and shareable across all (or even most) cultures. This close-mindedness is made evident in the fact that, on such a view, an enormously vast array of otherwise available normative judgments, convictions, reasons, ideas, and grounding beliefs – i.e., those that are *not* universally shareable or *not* somehow already embedded in global

political culture – are made theoretically irrelevant or ancillary to normative reflection about human rights. This conservatism could be made tolerable if there were sufficient independent reason to understand the grounds of human rights as linked to global moral consensus or political practice in this conceptually intimate way. But, as I argue above, these reasons are lacking. Among others, considerations about the basicness of human rights or the meta-theoretical importance of fidelity to the modern practice of human rights, which I considered as alternatives to Rawls’ vexed stability and legitimacy based arguments, are not able to plausibly underwrite an identification of the grounds of human rights with normative judgments that are the focus of universal consensus and/or implicit in global political culture. Thus, without the support of any adequate reasons, the stain of an arbitrary conservatism hangs heavily over that identificatory claim and should move us to reject it in favour of less conservative alternatives. As a theory of the grounds of human rights, then, justificatory minimalism looks to be inadequate.<sup>76</sup>

This point can be generalized, in fact, against most if not all varieties of agreement theory of human rights, particularly in so far as such theories are motivated by a concern to avoid ethnocentrism. For, the gains that agreement theories make against the problem of ethnocentrism are characteristically shallow. Their main benefit in this respect, it seems, is their ability to cast human rights as global standards that, to the least extent possible, rely on or embody standards prevalent only in a certain *ethnos*. But agreement theories achieve this in the wrong way. Rather than liberate normative reflection about human rights so that it can proceed on the basis of reasoned judgments of maximal credibility,<sup>77</sup> agreement theory reflexively anchors such reflection in values and ideas prevalent or embedded in the *overlap* among all world cultures, or in global political practice, or even in an emergent world culture

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<sup>76</sup> For a persuasive attack on political constructivist theories of the nature of human rights, see: Tasioulas 2009.

<sup>77</sup> I shall explain in a bit more detail what I mean by this in Chapter Six, §3.

itself. To be sure, the standards used to validate human rights claims would, on any such account, be furnished by a larger, potentially world-encompassing ethnos. However, the reflexive endorsement of those standards would be arbitrary and epistemically suspicious all the same.<sup>78</sup> Most importantly, our conception of human rights and the global values that they protect would, on such an account, remain ridden by a form of *ethnocentrism*.

#### 4. A MORE PLAUSIBLE ALTERNATIVE

This discussion finally concludes my protracted engagement with political constructivism that began long ago in Chapter One. After introducing the idea in Chapter One (§5.2.ii), I then turned, in Chapter Two, to the question of whether political constructivism might be able to reverse (at least in some contexts) what I take to be the standardly negative epistemological verdict that we ought to assign to ethnocentrism. The result of that inquiry was that the arguments supporting political constructivism in general, and the strictures of public reason in particular, were found to be wanting – and so, in turn, was the plausibility of their attendant vindication of ethnocentrism. But this conclusion still left room for political constructivism to be considered relevant to the problem of ethnocentrism in a different way, i.e., as a means of *avoiding* that problem rather than as a means of denying its existence. The examination of the prospects of political constructivism as a means of avoidance carried us through the discussion of *LP* in the last chapter (Chapter Three) and, under a larger theoretical umbrella, it has carried us through the discussion of Cohen’s related theory of justificatory minimalism here in Chapter Four. Now that the results of that examination have turned out to be negative as well, I shall leave the discussion of political constructivism behind. My next chapter, Chapter Five, will argue for the positive role of abstraction as a

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<sup>78</sup> For a parallel point, see: John Tasioulas, “International Law and the Limits of Fairness” in *The European Journal of International Law*, Vol. 13, No. 4, 2002, pp. 1002-1003.

(partial) means of avoiding ethnocentrism in normative reflection about human rights. And finally, in Chapter Six, I shall offer an outline of how I think ethnocentrism can, if at all, be avoided in moral argument in general.

Before I move on to those more positive discussions, however, I want to suggest a modified form in which global political constructivism's claim about the grounds of human rights might be able to survive. As I had understood that claim throughout, it treats the truth or correctness of a normative judgment about human rights as a *simple function of* (i.e., *constitutively dependent upon*) whether or not it withstands scrutiny in light of abstemious normative judgments implicit and/or prevalent in global political society. However, if, by contrast, global political constructivism were to treat the question of whether or not our normative judgments about human rights withstand such scrutiny merely as something of *epistemological relevance* – i.e., something that, if answered positively, would *count in favour of* the truth or correctness of such judgments – then the doctrine seems more promising.<sup>79</sup>

This is because, on the latter *indicative* or *justificatory* reading, we can accept that it is a good thing to consult globally shared and practiced normative convictions when formulating judgments about the nature, content, and requirements of human rights without going so far as to say that such convictions exhaust *all* the relevant normative considerations in such matters, which is what we would have to say on the former constitutive reading. For instance, on the indicative reading, it remains possible that in any given case the most plausible reasons (say, reasons of autonomy) for considering some purported human right to be genuine turn out *not* to be globally shared, appreciated, or implicit in global political society. The fact that this is so will weaken the case for endorsing such a right but it may not defeat it. Thus, depending on how strongly this modified form of political constructivism

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<sup>79</sup> Street discusses this interpretative ambiguity in an illuminating way in Street 2008, pp. 216-217.

about human rights rates the epistemological or justificatory relevance of its prescribed evaluative procedure, there is in principle room for understanding it as a doctrine that simply urges us to consult widely held reasons and politically practiced value judgments before deciding on the authenticity of any given human right.<sup>80</sup> This, I think, is a highly plausible doctrine, and one that, in my estimation, highlights the most intimate link that we can sensibly postulate between human rights, on the one hand, and the idea of moral consensus on the other.<sup>81</sup> It constitutes a form of global political constructivism that actual political constructivists, such as Rawls and Cohen, would almost certainly reject. Nevertheless, it is the only form in which political constructivism about the grounds of human rights seems to me able to survive.

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<sup>80</sup> On such a view, it may be sensible, in some settings, to counteract the prospect of ethnocentrism by allowing such rights to be interpreted and elaborated by fair and inclusive deliberative procedures in international institutions, as Buchanan suggests (*See: Buchanan 2008*). Such procedures may very well have the effect of weeding out false judgments about human rights that are borne in cultural bias. However, it is equally possible that a well-informed individual without the aid of such institutions could avoid making biased judgments on her own. Indeed, given the propensity of international institutions to be commandeered by narrow interests and political posturing, this latter prospect may seem more plausible than the former.

<sup>81</sup> It is also a doctrine that I shall return to and develop in Chapter Six (§3).

## *Chapter Five:*

# Human Rights, Claimability, and the Uses of Abstraction

### 1. THE DEMAND FOR CLAIMABILITY

There is a longstanding tradition that laments the abstractness of human rights. Part of the force of that tradition lies in its inclusion of diverse theoretical camps. For instance, some critiques of abstract rights have been advanced from the point of view of Marxist critical theory,<sup>1</sup> others from a communitarian starting point,<sup>2</sup> and still others have been advanced on the basis of a belief in moral particularism or contextualism.<sup>3</sup>

Of late, however, a new line of criticism has been pressed against the idea of abstract rights, and it is one that starts from considerations internal to the theory of rights itself. In particular, it starts from the widely accepted idea that rights are logically correlated to duties or obligations.<sup>4</sup> Thus, while it is not necessary for every obligation to be matched to some

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<sup>1</sup> See: Karl Marx, “On the Jewish Question” and the discussion of that work included in Jeremy Waldron’s, *Nonsense upon stilts: Bentham, Burke, and Marx on the rights of man* (New York: Methuen & Co, 1987), pp. 137-150, 183-190.

<sup>2</sup> See: Charles Taylor, “Atomism” in his *Philosophy and the Human Sciences: Philosophical Papers Vol. 2* (Cambridge: Cambridge University Press, 1985), pp. 187-211; Michael Sandel, *Liberalism and the Limits of Justice: Second Edition* (Cambridge: Cambridge University Press, 1998), esp. pp. 178-183.

<sup>3</sup> See: Wiggins 2006, pp. 347-356.

<sup>4</sup> This understanding of rights is implicit in Joseph Raz’s influential account of the nature of rights: “‘X has a right’ if and only if... an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.” Raz, *The Morality of Freedom* (Oxford: Oxford

specifiable right – since we can have imperfect obligations (of mercy, charity, kindness, etc.) to no one in particular and irrespective of anyone’s ‘rights’ – it is part of the nature of rights that they be matched to some obligation, or set thereof. Understood properly, a right is a type of claim or entitlement; it therefore ought to be *claimable*. This would seem to require that, for any genuine right, it be possible to specify at least three things: first, the holder(s) of the right; second, the bearer(s) of the right’s corresponding duties or obligation(s); and finally, none of this will be any good if we don’t also have a clear (or at least sufficient clear) idea of what the content of the corollary obligation(s) is.

These formal reflections set the bar of specificity for rights claims quite high already. At the same time, the three conditions seem like reasonable criteria. It is not on the face of it unreasonable to expect anyone who defends a given right to then say something informative about who (or who else) holds it, who is required to respect or protect it, and what respecting or protecting that right actually involves. Nevertheless, it is evident from a moment’s reflection that rights advocates are often deeply reticent about such details. And this is granting that, when it is a *human* right to X that is asserted, the set of rights-holders is standardly more or less clear, barring some difficult limit cases (e.g., do infant, comatose, or psychotic individuals have a right to an adequate standard of living?).<sup>5</sup>

Such reticence is not only common among activists, advocates, and fans of human rights. It is also pervasive in human rights declarations and covenants. For instance, in her powerful exposition of this new line of criticism, Onora O’Neill draws attention to the ambiguities of Article 12 of the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which proclaims “the right of everyone to the enjoyment of the

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University Press, 1986), p. 166. *See also*: Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), p. 67; Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), pp. 45-46.

<sup>5</sup> I say “standardly” because, as I suggest below, we should consider the possibility that there are human rights that are not held by all persons and perhaps not even all normal and healthy adult individuals. (*See*: below §4?)

highest attainable standard of physical and mental health.”<sup>6</sup> As O’Neill observes, in proclaiming a right to the *highest attainable standard of health*, many questions are begged. For one, according to what measure is the index of attainability to be understood? Is this a local standard, in which case the right may turn out (in the context of severely impoverished states) to yield little in the way of claimable healthcare? Or, is the relevant standard of attainability a global one, in which case the right may seem too demanding? Furthermore, on either interpretation, what would such a right require on the ground, e.g., on the part of those (farmers, physicians, psychologists, and others) who are in possession of the goods demanded by the right? These deep indeterminacies at the level of duties or obligations, O’Neill claims, are not just details to be filled in. Their pervasiveness indicates that human rights claims are often little more than smokescreen for what are, at base, “noble aspirations” or “manifesto rights,” rather than bona fide rights.<sup>7</sup> A human rights culture that habitually abstracts from questions of concrete obligation risks denaturing its subject matter by failing to specify the duties that give rights claims their characteristic shape.

### *1.1 O’Neill’s Critique of Welfare Rights*

In fairness to O’Neill, her stated grievance against human rights culture isn’t directed at its abstractness per se, but rather at the inherent indeterminacy of *one side* of human rights discourse: “welfare rights,” i.e., rights to goods or services. According to O’Neill, liberty rights – or rights that demand “non-interference” – are different from welfare rights in that the latter demand a “specific performance”<sup>8</sup> on the part of obligation holders. Moreover, this

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<sup>6</sup> See: Onora O’Neill, “The Dark Side of Human Rights,” in *International Affairs*, 2005, Vol. 81, No. 2, pp. 427-439. The ICESCR is available at: [www2.ohchr.org/english/law/cescr.htm](http://www2.ohchr.org/english/law/cescr.htm)

<sup>7</sup> O’Neill 2005, pp. 429-433; See also: Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996) pp. 128-136.

<sup>8</sup> O’Neill 1996, pp. 130, fn. 4.

performance-demanding feature of welfare rights creates difficulties of coordination and duty allocation that are not present (or at least not present in the same way) in the case of liberty rights. For instance, the protection of liberty rights will require governments to assign and institutionally coordinate (e.g., through policing, legislating, judging, prosecuting, jailing, etc.) the allocation of second-order duties to *enforce* the first-order duty of citizens not to infringe upon one another's liberty. But this takes for granted that, in the case of such rights, we can know *a priori* 'who' is responsible for respecting them and 'what' that first-order respect involves: the 'who' includes everyone and the 'what' involves non-interference. The government steps in to enforce (however elaborately) a straightforward normative relationship. By contrast, in the case of welfare rights, O'Neill argues, it becomes impossible to claim that institutions similarly *enforce* a set of known first-order requirements. This is because, in the case of rights to, say, adequate food, clothing, shelter, medical care, and so on, there seems to be little if anything that we can know about their corresponding obligations before these have been organized and allocated under an institutional system (e.g., through welfare legislation, a healthcare program, social security provisions, council housing projects, etc.). Only *once* these overarching institutions are in place can we know the shape of the positive obligations – e.g., *who* owes *what* to *whom* – that hold between agents in light of their welfare rights; hence the asymmetry with liberty rights.<sup>9</sup>

One uncomfortable consequence of these observations, according to O'Neill, is that we cannot claim, as we commonly do, that welfare rights are *both* rights and independently valid moral norms at the same time; one of these claims has to give. For, on the one hand, if we want to hold on to our understanding of welfare rights as *rights*, then we can only do so in the case of welfare rights that have been rendered claimable by an existing institutional scheme. But this undercuts the sense in which such rights are pre-institutional, supra-positive,

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<sup>9</sup> O'Neill 2005, p. 432; O'Neill 1996, pp. 132-136.

or *affirmed* by a state that seeks to institutionally embody them; rather, in that case welfare rights would look more like creatures of convention that are, in effect, institutionally *created*.<sup>10</sup> On the other hand, if this is intolerable, and we want to preserve our belief in the “suprapositive” character of welfare rights,<sup>11</sup> then their inherent (pre-institutional) normative indeterminacy will undermine their status as natural *rights*; instead, we will have to admit that such rights are more like natural *aspirations*, or, at best, manifesto rights. This doesn’t mean that declarations and covenants that proclaim welfare rights will have no political effect, but only that such documents use the language and rhetoric of rights to refer to something else: e.g., an aspiration, a noble goal, or vision, etc.<sup>12</sup>

## *1.2 An Outline of this Chapter*

In this chapter, I defend the idea of *abstract rights* against Onora O’Neill’s objection from claimability. In the two sections that follow (§2 and §3), I explain why its target is broader than O’Neill thinks it is, covering not only welfare rights but abstract rights more generally. Next, I turn to the multi-faceted legal practice of human rights, and argue that it possesses more resources for the practical specification of rights than critics such as O’Neill have acknowledged (§4). Then, following John Tasioulas, I argue for an alternative, interest-based account of rights that makes the existence of a human right dependent on its protection or promotion of universal interests, not its claimability (§5). Having disarmed O’Neill’s negative critique of abstract rights, I then fill in the story from the other side, so to speak. That is, by illustrating some of the positive features of abstract rights, and how they accommodate pressures that push us towards abstraction in the first place, I hope to show that

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<sup>10</sup> O’Neill 2005, pp. 432-433; O’Neill 1996, pp. 133-134.

<sup>11</sup> *See*: fn. 33 below for reference.

<sup>12</sup> *Idem*.

abstract rights are not only coherent but also useful and important. In particular, I highlight two important uses of abstraction in rights claims, and especially in human rights claims (§6).

The first important use of abstract human rights, I argue, resides in the variable nature of their normative content across temporal, geographical, institutional, and even (I suggest) *cultural* contexts. This variability makes such rights, paradoxically, more plausibly universal, since any human right that has a rather fixed and specific normative content is likely to be inappropriate in some cultural, historical, and contemporaneous institutional circumstances. Moreover, such variability lends plausibility to the idea that there is a distinction to be drawn between human rights that are (i) abstract and universally applicable and (ii) specific and merely locally applicable.

The second use of abstract human rights consists in their ability to accommodate and make sense of a more delegative approach to practical reasoning about human rights. In particular, I argue that they form a crucial part of a larger case for the existence of a *pro tanto* reason to delegate the authority to interpret the specific content and practical requirements of human rights to locally positioned agents and institutions. That *pro tanto* reason is generated, I argue, both by the enhanced epistemic insight of locally positioned agents, as well as by the general right to self-determination of political communities. Finally, both of these uses of abstraction in rights claims, I suggest, are relevant to answering concerns about ethnocentrism in practical reasoning about human rights. For instance, once we understand the application of a human right to require a process of specification – i.e., deriving a specific and locally-applicable moral or legal norm from an abstract and universally-applicable one – it becomes easier to see how human rights discourse can avoid ethnocentrically normalizing a single (e.g., Western) political culture or set of institutions.

## 2. CLAIMABILITY AND ABSTRACTION

There are some reasons to think that O'Neill is unfair or unduly lopsided in her critique of welfare rights. For one, her depiction of liberty rights as generating clear (and universal) first-order obligations of non-interference glosses over many difficult questions regarding the content and implications of such obligations. For instance, what constitutes an interference with my "privacy, family, home, or correspondence"?<sup>13</sup> If a neighbour builds a mansion next to my house, blocking my access to sunlight, does he or she interfere with my 'home'? Does the government's conscription of young men and women, sons and daughters, constitute an interference with 'family'? These normative uncertainties are no less severe than those that afflict rights-based claims to goods and services. Moreover, if it is the action-guiding character of rights that is crucial, as O'Neill suggests, then this would seem to imply that, in claiming a right, we need to know something not only about the bearer(s) and content but also its *weight* or *significance*, or the weight and significance of its corollary obligation(s). For rights frequently conflict, and reasoning through such conflicts will, at least in part, involve weighting or ranking the rights and their related obligations. For instance, in assessing the Abortion Reform Act of 1974, the German Constitutional Court wavered between prioritizing the duty to protect the unborn (i.e., its right to life) over the duty to protect the woman's right to the "free development of her personality," and vice versa.<sup>14</sup> In the end, it decided in favour of the liberty right of the mother, but the point is that the *weight* of a mother's right to autonomy, when tested against a foetus' right to life, is a complex matter that has to be carefully decided. Yet these difficulties of judgment can affect the

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<sup>13</sup> See Article 12 of the UDHR: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

<sup>14</sup> See the *First Abortion Case* and the *Second Abortion Case*, discussed in: Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" in *The European Journal of International Law*, 2008, Vol. 19, No. 4, pp. 716-718.

claimability of liberty rights. A mother cannot *claim* that a legal prohibition on abortion constitutes a wrongful legislative interference unless there is a good case for prioritizing her right to autonomy (and/or privacy) over her foetus' right to life.

Such uncertainties do not undermine O'Neill's central point. I mention them only to stress that her claimability-based critique of welfare rights, if it holds at all, extends to liberty rights as well. If claimability is a condition of the existence of a right, then it must be recognized that claimability requires not only the identification of duty-bearers, as important as this is, but also the specification of the content of those duties as well as their relative weight or significance. Yet these details are omitted in the case of liberty rights just as often as in the case of welfare rights.

### *2.1 The True Breadth of O'Neill's Critique*

These reflections bring us back to the initial concern with abstractness. They suggest, regardless of her explicit preoccupation with welfare rights, that the proper objects of O'Neill's critique are neither welfare rights *per se*, nor even liberty and welfare rights, understood as a group. Rather, O'Neill's critique naturally targets formulations of rights that are abstract in the sense of *omitting* crucial details about the practical requirements and specific implications of the right in question. This is what I shall mean by "abstractness" here, i.e., a form of omission.<sup>15</sup> Thus, a right to healthcare is more abstract than a right to, say, a single-payer healthcare system, since the latter right does not omit reference to the specific *form* of healthcare picked out by the right or entitlement. Similarly, a right to liberty is more

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<sup>15</sup> This is also how O'Neill herself understands the notion of abstraction: "Abstraction, taken straightforwardly, is a matter of *bracketing*, but not of *denying*, predicates that are true of the matter under discussion... Reasoning that abstracts from a predicate makes claims that do not depend on that predicate holding, *or* on its not holding." O'Neill 1996, p. 40; *See also*: Onora O'Neill, "Ethical Reasoning and Ideological Pluralism" in *Ethics*, Vol. 98, No. 4, 1988, p. 711.

abstract than the related right to freedom from arbitrary arrest, since the latter is a right to freedom from a specific *form* of coercive interference. Properly understood, then, O'Neill's critique of welfare rights naturally generalizes into a wholesale critique of abstractness in rights discourse. This is because the claimability of a right can be undermined not only by omissions about its duty-bearers, but also by omissions vis-à-vis its content, bearers, weight, and wider practical requirements. Moreover, these sorts of omissions, considered as a whole, can afflict "liberty" rights just as much as "welfare" rights.

In a moment, I shall list various practical details about which a right, or the formulation of a right, can either be specific or general and abstract. Before I do that, however, it is important to distinguish abstract rights, which I am now claiming are the proper object of O'Neill's critique, from other varieties of rights with which they can easily be confused. For the purposes of this discussion, it's worth distinguishing abstract rights from (i) *vague* rights, (ii) *ambiguous* rights, and (iii) rights that appeal to *contestable or contested* normative concepts. In addition, it should be noted that I consider all four notions – abstractness, vagueness, ambiguity, and contestability – to be forms of *indeterminacy*.<sup>16</sup>

#### (i) *Vague Rights*

According to the philosophical literature, and as I shall understand it here, vagueness is a label for the phenomenon of borderline cases, i.e., cases in which a concept or predicate neither clearly applies nor clearly fails to apply. A classic example of a vague predicate is the term 'tall.' Because there are so many cases in which it will be unclear whether or not the

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<sup>16</sup> Here and in the subsequent discussion I am following two works: Firstly, Timothy Williamson's characterization of vagueness, unspecificity, and ambiguity in "Vagueness, Indeterminacy, and Social Meaning" in *Critical Studies*, Vol. 16, p. 61-76; and secondly, Jeremy Waldron's discussion of vagueness, ambiguity, indeterminacy, and contestability in "Vagueness in Law and Language: Some Philosophical Issues" in *California Law Review*, Vol. 82, No. 3, 1994, pp. 509-540.

term applies (for instance, is a person standing in front of me at 5'9 inches 'tall?'), the term or predicate can be called vague. All terms or predicates are to some extent vague, in that they will generate borderline cases, but the more prone a term is to such borderline cases, the vaguer or less precise it is.

Although a right can be both vague and abstract, there is an important distinction between the two. An abstract right is general or unspecific (just as the term whale is more general than the term Beluga), which allows it to cover a wider variety of cases. For instance, a right to healthcare is abstract in that it can accommodate a wide variety of different forms of healthcare. Such a right, however, is not vague, or at least not characteristically so. This is because the notion of healthcare is not especially prone to the phenomenon of borderline cases. There won't be very many cases in which it will be unclear whether or not a given institution or social service actually qualifies as a form of healthcare. And just as a right can be abstract but precise (i.e., non-vague), the inverse is also true; a right can be specific but vague. Consider the imaginary case of a right to be provided with red gloves. Such a right can be, for all intents and purposes, quite specific (providing we know, among other things, who in particular is responsible for obeying the duties associated with the right and how comparatively important those duties are), but also vague in that its object is prone to borderline cases, e.g., redness is a vague property.

### *(ii) Ambiguous Rights*

A term or statement is ambiguous if it has more than one meaning. Thus, if I say 'John is fencing,' the statement is ambiguous. It could very well mean that John is playing a sport with swords or that he is building a fence of some kind. An abstract right, then, is ambiguous in its own way. That is, it admits of rival meanings, just as the right to healthcare

can be interpreted as a right to a nearby doctor's care, to public institutional healthcare, or to a mixed public-private system. However, this is the sort of ambiguity one should expect from the process of abstraction or generalization; it is part of the nature of an abstract or general concept that it can embrace different instances or variations of the same thing.

By contrast, some rights are ambiguous in a more thoroughgoing sense in that they commit homonymy. That is, they pick out categorically different, though possibly overlapping, objects or sets of objects. An extreme example would be a right to 'fence.' Since it is unclear, out of context, whether this is a right to engage in an Olympic sport or to engage in the activity of marking boundaries between properties, the right is strikingly ambiguous. But there are less theatrical examples of ambiguous rights. Inspired by the UDHR, for instance, some jurisdictions have incorporated the notion of human dignity into positive law not just for the purposes of explicating or justifying a particular right,<sup>17</sup> but as a *right* itself.<sup>18</sup> Yet, the notion of dignity has a categorically diverse array of meanings, making the right to dignity characteristically ambiguous. Human dignity can plausibly be understood as requiring, (i) a wealth of protected freedoms as well as goods and services, (ii) a minimal set of protected freedoms, (iii) some form of social recognition or appropriate behaviour on the part of others, or potentially (iv) no external conditions at all, since dignity has sometimes been conceived purely as a state of the soul.<sup>19</sup> Thus, I shall understand ambiguous rights to include only those rights that achieve a certain threshold level of ambiguity as exemplified, *in extremis*, by the right to dignity. Below that level, it is possible for a right to be abstract but

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<sup>17</sup> The UDHR refers to human dignity as a foundational idea in the Preamble and uses the notion to help explicate Articles 1, 22, and 23.

<sup>18</sup> See: Article 10 of the Constitution of the Republic of South Africa: "Everyone has inherent dignity and the right to have their dignity respected and protected." For discussion, *see also*: McCrudden 2008, p. 675; Jeremy Waldron, "Dignity and Rank" in *European Journal of Sociology*, 2007, Vol. 48, No. 2, pp. 201-237.

<sup>19</sup> See, for instance: Martha Nussbaum, "Compassion & Terror" in *Daedalus*, Vol. 132, No. 1, 2003, pp. 10-26.

not obviously ambiguous (as in the right to healthcare), and even for an ambiguous right to be specific (as in a right to ‘fence’).

### *(iii) Contestable Rights*

A contestable moral or political concept is one that can be given rival but equally plausible interpretations. Contestability too, then, is a form of ambiguity. However, what distinguishes it from just any old case of ambiguity is that the concept in question will usually have an inherent element of normative or evaluative force attached to it, and there will often be a history of competing interpretations of the meaning of the concept.<sup>20</sup> Thus, democracy, to use an example offered by Jeremy Waldron, is a contested concept. Not only is it plausible to interpret the concept as meaning both representative government or direct participation in government, democracy also has a favourable evaluative meaning, and as a consequence there is “a history of using the term ‘democracy’ to embody rival political principles such as ‘Every political system should have a representative structure’ and ‘We ought to encourage direct popular participation in government.’”<sup>21</sup> Such debates are not about the evaluative desirability of democracy *per se*; that desirability is not what is contested. Rather, what is contested and recognized as *contestable* is the question of what democracy actually entails.

From this definition of contestability it should be clear that, while some abstract rights will have an element of contestability, not all will. One example of a right where contestability and abstractness coexist is, predictably, the case of the right to democracy, since the abstract notion of democracy, it so happens, is also a contested one. There is a long tradition of debate about – and well-developed alternative answers to – the question of what

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<sup>20</sup> See: Waldron 1994, p. 513.

<sup>21</sup> *Idem.*

the commitment to democracy actually involves. A right to work,<sup>22</sup> by contrast, is abstract but contains no striking element of contestability. The concept of work embraces a wide variety of forms of work, but there are not rival and historically contested interpretations of its meaning in the same way that there are in the case of the concept of democracy.

While the ambiguity, contestability, or vagueness of a right can certainly undermine its claimability, what I want to concentrate on in what follows is the challenge that abstraction itself poses to claimability. This is in part because – unlike vagueness, contestability, and ambiguity, which are unavoidably endemic to ethical reasoning and to language in general – abstractness or generality performs a specialized and much-relied-upon function in moral and legal reasoning. Morality and the law depend upon generalizations and abstractions to formulate rules and imperatives that apply across a range of cases (e.g., even the notion of ‘theft’ is abstract). Moreover, this function becomes particularly salient in the case of human rights, where the range of cases to be covered is exceedingly vast and varied. Human rights are (*prima facie*) rights ascribed to all persons and owed to each of us by our governments, other governments, international institutions, corporations, NGOs, and by other persons, etc. It is therefore of special importance that we understand, first, how the abstraction that so naturally afflicts human rights discourse can undermine the claimability of the rights proclaimed therein, and second, whether claimability is a necessary characteristic of rights, as O’Neill suggests. In the following section (§3), I shall demonstrate various ways in which the omissions involved in abstraction and generalization can undermine the claimability of rights. Later, in §5, I shall defend such forms of abstraction by arguing that claimability need not be understood as a necessary feature of rights in the way that O’Neill suggests.

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<sup>22</sup> UDHR, Article 23 (1): “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

### 3. ASPECTS OF RIGHTS

There are many dimensions along which the formulation of a right can be either general or specific:

(A) Firstly, in keeping with the ordinary understanding of rights as claims or entitlements, an abstract formulation of a right may omit details about one or more of three core aspects:

- (i) *The holder(s) of the right*
- (ii) *The content of the right*
- (iii) *The bearer(s) of the right's corollary – first and second-order – obligations*

(B) Secondly, even if a rights claim is reasonably forthcoming with respect to all three facts, omissions and abstract indeterminacies may persist along subsidiary dimensions. Suppose we take Article 3 of the UDHR (ostensibly a “liberty” right) as an example: “Everyone has the right to life, liberty and security of person,” where it is stipulated that (i) the bearers of the right are all members of the biological species *homo sapiens*,<sup>23</sup> (ii) the first-order duties not to violate the right are assigned universally, and (iii) the second-order duties to protect, promote, or enforce the right are assigned, in all cases, to the government of the individual to whom the right belongs. This stipulated interpretation of Article 3 is not implausible, and it is reasonably specific. Nevertheless, there is copious room for indeterminacy even within the

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<sup>23</sup> This is not a preordained interpretation of (i) in the case of Article 3. James Griffin, for instance, argues that the bearers of human rights are only normative agents – with “*no exceptions*: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on.” Griffin 2008, p. 92. *Also see*: my contemplated distinction between universal and non-universal human rights below in §6.

bounds of such an interpretation. For instance, consider how the stated interpretation fails to come clean on the following facts:

- (iv) *The grounds of the right and its corollary obligations, e.g., what values, reasons, interests, capacities, or moral and practical considerations ground or justify the allocation of the right to life, liberty, and security of person. How do these considerations generate its specific content and how do they justify imposing duties on other agents?*
  
- (v) *The temporal, geographical, social, and material circumstances under which the corollary obligations come into effect, e.g., Can I always claim protection of my life, liberty, and security from my government? What if my government is weak, faced with a debilitating crisis, dispossessed of the necessary resources, or too far away from me?*
  
- (vi) *The conditions under which the bearer of the obligations may change, e.g., How poor, weak, inept, or disposed of resources must my own government be in order for my claim for protection to become effective against other more able governments, organizations, or individuals?*
  
- (vii) *The conditions under which (primary and secondary) bearers of the right's corresponding obligations may legitimately be exempt from their duty, e.g. If the cost of a system of adequate law enforcement becomes excessive, or if the demand for such a system must be weighed against other essential governmental duties (i.e. to provide healthcare, employment, an educational system, etc.) to*

what extent can a government be justifiably relieved of its duty to protect Article 3? Can that duty be tempered or relaxed?

- (viii) *The cases of emergency or conflict (with other obligations) in which the corollary obligations can be defeated*, e.g. Does a state's duty to protect the right to life and security of many sometimes defeat its duty to protect the right to liberty of a few? Under what circumstances might this be so?<sup>24</sup>
  
- (ix) *The standards of adequate satisfaction of the right or obligations*, e.g., *What* does interference with my life, liberty, and security consist in and how *much* protection against such interference can I demand from third parties?
  
- (x) *The specific mode or means of fulfillment of the relevant obligations*, e.g., *How* is the duty to enforce Article 3 to be carried out on the part of its bearers? Will it involve the instruments of domestic and international law, or the informal instruments of custom and social convention, or both? Will it require a formal policing system, courts, judges, jails, etc. Or, will it require a less robust institutional scheme of enforcement?

The point of setting out these difficulties is not to unearth the underlying abstractness of all rights claims – since it would indeed be hard to find a right that is specific along all such dimensions – thereby securing the wide application of O'Neill's critique. Rather, the point is to demonstrate that although all rights claims are, to some extent, abstract, abstraction can come in varying degrees. The human right to an 'adequate' standard of living is both

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<sup>24</sup> See: Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), pp. 20-48, for an illuminating discussion of such questions.

vague and abstract.<sup>25</sup> By contrast, Article 9(4) of the *International Covenant on Civil and Political Rights* (ICCPR), which proclaims a human right to *habeas corpus*, is relatively precise and specific in its content.<sup>26</sup> The various aspects or questions set out above can serve as a metric of abstractness. The fewer aspects or questions covered by the formulation of a given right, or the less informative its answers are, the more abstract it will be. And, a right may be abstract or silent on some issues (i.e., pertaining to its abrogation in circumstances of emergency) but nevertheless remain specific and claimable under ordinary circumstances of daily life.

Still, this may not bring very much comfort to those who take O’Neill’s critique seriously. For one, the wealth of positive and negative duties associated with liberty and welfare rights are impossible to allocate comprehensively in the abstract. Rather, O’Neill is right that it is only in reference to an extant institutional scheme (e.g., a modern constitutional democracy with its typical institutional powers) or at least a world historical epoch (e.g., Post-1948 Modernity) that we can begin to give clear shape to such obligations.<sup>27</sup> Yet, if claimability is a necessary feature of rights, this raises some *prima facie* doubts about the supra-positive validity of any such right.

Secondly, reckoning with the ten desiderata above can (and should) undermine our confidence in the claimability of many of the fundamental rights we hold dear. No (human or constitutional) right familiar from domestic or international law is worded in such great detail as to be informative along all nine of the aspectual dimensions of rights highlighted above,

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<sup>25</sup> Article 25 (1) of the UDHR: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

<sup>26</sup> Article 9(4) of the ICCPR: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Available at: [www2.ohchr.org/English/law/ccpr.htm](http://www2.ohchr.org/English/law/ccpr.htm)

<sup>27</sup> See: John Tasioulas, “The Moral Reality of Human Rights” in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor* (Oxford: Oxford University Press & UNESCO: 2007), ed. T. Pogge, pp. 76-77, for an example of this latter strategy.

and the popular human rights culture in which we all participate willy-nilly is entirely unaccustomed to handling rights claims in such high-resolution. Does this mean that local, regional, and international bills of (human or constitutional) rights, influential declarations, and the popular culture of rights that surround these documents are infected by abstract indeterminacies that inevitably corrupt their subject matter? Are rights more often than not blunt instruments that only thinly (and cynically) conceal vague and conflicting aspirations with no clear practical implications? Might we make less “bitter mockery”<sup>28</sup> of the poor, needy, and systematically oppressed if we cease to endow them with rights and instead simply confess our (no doubt worthy, but more minimal) aspiration to help them, if indeed we have one? In the remainder of the chapter, I will argue that these concerns are unwarranted and overblown.

#### 4. SPECIFICATION THROUGH LAW

One facet of modern human rights practice that can stem at least some of these concerns is the legal culture of human rights. It is important not to overlook the fact that, barring major declarations such as the UDHR, human rights have been expressed and articulated largely through the medium of law. The practical requirements of such rights have, moreover, been given their most elaborate and detailed specifications through domestic, regional, and institutional legal systems. This is not to say that philosophical theories of human rights cannot make their own important contributions to practical questions about such rights, or that there isn't a relevant distinction between human rights conceived as strictly moral rights and human rights conceived as legal rights. Rather, the point is simply

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<sup>28</sup> O'Neill 1996, p. 133.

that legal positivism is a powerful way of *specifying* human rights and a focal aspect of the modern culture of human rights.

#### *4.1 Methods of Specification*

Perhaps the single most important way in which the law specifies human rights is through judicial efforts to *apply* abstract rights to individual cases or judgments, a process which inevitably involves interpretation and which produces a body of case history or precedent that can be referred to in the future. Taken on its own, an individual article in a bill of rights may be normatively opaque, but the explicit wording of that article is only the tip of a much larger legal iceberg, so to speak. The background history of judicial attempts to apply, interpret, and specify the requirements of the article constitutes a vast body of legal and practical information (which includes moral reasoning about individual cases) that lend the article implicit specificity. Of course, the case histories of a given right may not add up to anything very coherent. Previous interpretations of a right may conflict, be mistaken, or suffer from internal contradictions, and it is always open to judges and legislators to break away from past interpretations of a right. Nevertheless, case histories do give important content to human rights as legally embodied norms.

##### *(i) Multiple Positivism*

One of the difficulties of looking to case history as a source of content for human rights is that there is no single legislative and judicial body in charge of drafting, interpreting, and applying such rights. The International Criminal Court (ICC) as well as various United Nations Committees – including the Human Rights Committee (CCHR) and the Committee

on Economic, Social and Cultural Rights (CESCR) – are tasked with the jobs of interpreting and hearing individual complaints that fall under the purview of the *International Bill of Human Rights* (comprised of: the ICCPR, the ICESCR, and the non-binding UDHR). But such international tribunals are designed to complement existing national and regional judicial systems as backups, so to speak. That is, aside from monitoring state behaviour and unilaterally interpreting the content of human rights provisions, such tribunals generally do not hear individual complaints unless national or regional courts are unwilling or unable to do so.<sup>29</sup>

Alongside these international schemes, human rights have also been given regional legal formulation, for instance, in the *European Convention on Human Rights* (ECHR), which is binding for all members of the European Union and is interpreted and monitored by the European Court of Human Rights.<sup>30</sup> Furthermore, human rights have independent presence at the domestic level in the form of constitutional rights. All this makes the case history of any particular human right a complicated affair since, in effect, a right may have parallel but disjointed legal formulations and histories. So, for instance, the right to freedom of expression has been given a far more demanding interpretation in the First Amendment law of the United States than it has in the ICCPR, where that right has been balanced against equality rights in the form of explicit prohibitions on hate speech.<sup>31</sup> Or, to take another example, the Constitutional Court of South Africa has declined to adopt a CESCR-recommended “minimum core” interpretation of the rights to adequate housing and healthcare proclaimed under the South African constitution, which would require that the

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<sup>29</sup> See, for instance: Articles 17 & 20 of the *Rome Statute*. Available online at: [http://untreaty.un.org/cod/icc/statute/99\\_corr/cstatute.htm](http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm)

<sup>30</sup> Similarly, the *American Convention on Human Rights*, which has been ratified by 24 countries across Central and South America, is monitored and interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. There is also an African parallel to this.

<sup>31</sup> See: Gerald L. Neuman, “Human Rights and Constitutional Rights: Harmony and Dissonance” in *Stanford Law Review*, Vol. 55, No. 5 (May, 2003), p. 1879.

court decide on a clear and enforceable (minimum) standard of adequacy. The court instead opted for a progressive interpretation of those rights, reviewing only the “reasonableness” of the government’s steps towards the progressive realization of the rights under the current circumstances.<sup>32</sup>

Despite these tendencies towards divergence, there is also a great deal of mutual accommodation and sharing across the domestic, regional, and international structures of human rights law. The International Bill of Human Rights allows countries to sign and ratify subject to special reservations or savings clauses. And, from the other direction, constitutional systems will sometimes accommodate international law through a principle of interpretive conformity. Or, they may give outright constitutional status to international or regional human rights treaties, as in the case of Argentina.<sup>33</sup> Still, however important and interesting these methods of harmonizing human rights law are, they do not change the fact that the multiple or parallel positivisation of human rights leads to a disjointed cacophony of interpretation and case histories. Under such circumstances, it makes more sense to talk of plural legal specifications of human rights norms – with no guarantee of convergence or even of efforts towards convergence – rather than a sustained and coordinated legal effort to interpret human rights.<sup>34</sup>

*(ii) Harmony and Dissonance*

One no doubt unintended upside of the heterogeneity of human rights law is the occasion it provides for thoughtful contemplation of the meaning and substance of an abstract human right. The repeated embodiment of a right in domestic constitutions across the world,

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<sup>32</sup> See: Neuman 2003, p. 1878, for a discussion of this case.

<sup>33</sup> See: Ibid, pp. 1891-1892, and the whole article for a comprehensive discussion of these issues.

<sup>34</sup> Despite its inherent frustrations, this sort of interpretive pluralism has, I think, an important moral upside, which I shall return to later on.

and then across domestic, regional, and international forms of law, for instance, naturally reinforces and reflects our sense of the fundamental moral importance of that right and the protections it requires. In other words, the recurrence of a right, or the recurrence of a given interpretation of a right across jurisdictions, can serve as an indication of the considerable stake of global moral opinion that stands behind it.

Conversely, diverse interpretations of a given right (i.e. in the case of the right to freedom of expression) can serve as an occasion for productive comparison. For instance, by examining the way in which a right is given a stronger interpretation here, a more lax interpretation there, or how it is balanced against other rights or obligations somewhere else, one can gain a clearer understanding of the practical, moral, and political “contours” of a right, so to speak: i.e., its most basic practical requirements, its standing in relation to other rights, the kind of important moral considerations that undergird it, and the political or institutional factors that tend to work for and against it. Or, by consulting and comparing the ways in which a fundamental moral idea reappears, albeit in subtly different guises, across different domains of human rights law, one can gain insight into the core meaning or significance of that idea. In an article footnoted above, for instance, Christopher McCrudden finds that although there is little common understanding of what human dignity requires across or even within legal jurisdictions, the repeated use of ‘human dignity’ in human rights discourse does betray a minimum core of conceptual uniformity, which he proceeds to elaborate.<sup>35</sup> Thus, the heterogeneity or disjointed positivity of human rights can itself provide occasions for insight into the moral sources and practical intricacies of human rights claims, which can help us, in turn, to see past their superficial abstractness.

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<sup>35</sup> See: McCrudden 2008, pp. 679-670.

(i) *Special Conventions*

A third way in which the legal culture of human rights contributes to their specificity is through the drafting and signing of special conventions, i.e., on the rights of the child, the rights of persons with disabilities, against racial discrimination or discrimination towards women, etc. These subject-specific treaties provide crucial supplements to the main instruments of human rights law. They do this firstly by addressing issues that core human rights instruments (i.e. the ICESCR, & ICCPR) have left entirely unaddressed. This sort of supplementation is most evident in the case of the *Convention on the Rights of Disabled Persons* (CRDP), for instance, which establishes a set of rights that address the specific needs and circumstances of disabled persons, something that the core instruments make no attempt to do. Secondly, a special convention may explore a topic that is only superficially addressed by the core conventions and declarations. So, the International Bill of Rights proclaims a human right “not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>36</sup> But definitions of torture, cruelty, inhumanity, and degradation are lacking here. And so are clear guidelines as to the steps to be taken in order to enforce and promote such a right. The *United Nations Convention Against Torture* (CAT) explicitly addresses both outstanding issues in far greater detail.<sup>37</sup>

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<sup>36</sup> Article 5 of the UDHR.

<sup>37</sup> For instance, consider the detailed wording of Article 1 of CAT: “For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

#### 4.2 *Relevance to O'Neill's Critique*

At the very least, this brief excursus into the legal culture of human rights should make us hesitate before imputing the modern practice of human rights with any general disregard for detailed questions of content and obligation. The loose talk of activists and popular proponents of human rights notwithstanding, it's clear that the formidably diverse international network of human rights law is at the vanguard of efforts to make human rights meaningful, practicable, claimable, and readily enforceable norms.

Although it may help to eviscerate human rights culture of any blanket charge of cynicism or "bitter mockery" of the vulnerable and needy, this observation on its own, however, can easily play into O'Neill's hands. This is because the legal specification of human rights, at least on one understanding, is a matter of *institutionalization*. That is, positivism through law can be understood as the assignment and allocation of rights-based duties in accordance with an extant institutional scheme. Or, even more radically (although not all that implausibly), we might understand the legal expression of human rights as part of the *creation of* an institutional scheme (i.e., a treaty system, a healthcare system) that gives practicable and claimable shape to human rights. Human rights law may sometimes be institutional in the first sense and sometimes in the second, depending on the case. Yet all of this is entirely compatible with O'Neill's thesis that, before legal or institutional specification takes place, some (or perhaps very many) human rights will remain abstract to the point of non-claimability and thus non-existence. This only bolsters her claim that such rights are not *affirmed* but rather *created* by the law, and that, once created, such rights cannot impose obligations universally but only on those who are proper parties to the law, i.e., in the case of

international human rights treaties, signatory states;<sup>38</sup> and in the case of national constitutions, citizens and domestic institutions.<sup>39</sup>

One tempting response, at this juncture, is to give ground to O’Neill’s critique. How much stake, after all, ought we to place on our standard intuition that human rights, even in abstract and unclaimable form, have a moral existence independent of their recognition through law or institutional practice? Is it conceptually intolerable for us to allow that intuition to give way in the face of an equally standard belief in the claimability of rights? If a right is abstract to the point of being unclaimable, what ultimately hinges on continuing to call it a ‘right,’ and not simply a worthy aspiration? Or perhaps we might distinguish, as some have, between weaker and stronger notions of a right, with the former embracing goal-oriented or unclaimable rights.<sup>40</sup> None of this, it would appear, can be decided by what Gerald Neuman has referred to as the “suprapositive” aspect of legally embodied human rights, which refers to the fact that such rights are “often conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law.”<sup>41</sup> For, presumably, legally embodied human rights can have a suprapositive aspect without expressing or specifying *bona fide* rights. Rather, it may be enough that they give robust form to important moral aspirations or even weak (i.e., pseudo) rights.

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<sup>38</sup> Exceptions to this include those human rights treaties, or those elements of such treaties, which have become part of customary international law.

<sup>39</sup> This is why O’Neill refers to legally-created rights as *special*, rather than *universal*. See: O’Neill 2005, p. 430; O’Neill 1996, p. 129.

<sup>40</sup> See: James Nickel, “Human Rights” in *The Stanford Encyclopaedia of Philosophy*, 2010, Sec. 1, Para. 10, available at: <http://plato.stanford.edu/entries/rights-human/>: “rights are usually mandatory in the sense of imposing duties on their addressees, but they sometimes do little more than declare high-priority goals and assign responsibility for their progressive realization. It is possible to argue, of course, that goal-like rights are not real rights, but it may be better simply to recognize that they comprise a weaker but useful notion of a right.”

<sup>41</sup> Neuman 2003, p. 1868. See: pp. 1868-1869 for a general overview of the suprapositive aspect of fundamental rights.

*(i) Merely Noble Aspirations?*

It is difficult to unearth knockdown arguments here. Claimability is indeed a desirable feature of rights and O'Neill's position, broadly speaking, is a coherent one. However, one of the considerations that weighs against her suggestion is its potential to contradict our sense of the profound moral importance of human rights activism, including efforts to legally protect human rights. Part of what underlies efforts to secure the global (or local) enforcement of human rights is a strong prior belief in the importance of the protections, entitlements, goods, and obligations that such rights demand. Thus, when a human right is given legal form in international or constitutional instruments, it matters whether the right being expressed, specified, or interpreted reflects a noble goal, a pseudo right, or a *bona fide* right. Only the latter would seem to carry a moral charge powerful enough to match the full pretensions of those who have worked tirelessly to make human rights a legal reality. Of course, the noble pretensions of such efforts are not self-validating. And, it remains open to O'Neill to insist on (a) the profound moral importance of a human right *once* it is suitably specified by law so as to be claimable and/or (b) the profound moral importance of the originating aspirations to help the poor, suffering, vulnerable, and needy. Nevertheless, there is something important that we lose by walking away from the claim that the legal specification of human rights can indeed be a matter of specifying abstract and unclaimable *rights*, rather than noble aspirations or pseudo rights. This is something I shall come back to in §5 below.

*(ii) Fact-Sensitive Reasoning*

The legal specification of human rights has other features that sit awkwardly with O'Neill's critique. One of them quickly becomes apparent if we are more cautious about

equivocating between the legal specification of human rights and their *institutionalization*, in the two senses described above. There is an important difference between legally specifying human rights in accordance with a given institutional scheme (whether that scheme is extant or effectively created in the process of legalization), on the one hand, and specifying human rights in accordance with general or pervasive facts of socio-political practice, institutional feasibility, and human nature, on the other. The latter project is quite different from the first. In particular, unlike the first, it doesn't involve direct appeal to specific institutional arrangements or circumstances (i.e., a single-payer healthcare system, an affluent liberal democracy) that obtain at any particular time and place.<sup>42</sup> Instead, it involves the sort of thinking that lies behind the human rights to nationality,<sup>43</sup> to a fair trial,<sup>44</sup> asylum,<sup>45</sup> marriage,<sup>46</sup> private property,<sup>47</sup> and many others: thinking that takes account not only of basic human needs, but also of pervasive social practices (e.g., organization into nationhood, marital pairs) that satisfy those needs as well as general facts of institutional feasibility. The criterion of feasibility is an important one since it incorporates the intuitive 'ought implies can' constraint on rights claims. States or individuals cannot reasonably be held to an obligation that it is simply not in their (current or foreseeable) power to perform or fulfill. For instance, there is little sense in proclaiming a human right to *health* as such, since health (unlike healthcare) is not something that anyone or anything can currently guarantee to anyone else.<sup>48</sup>

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<sup>42</sup> See: Tasioulas' temporally constrained interpretation of the universality of human rights. Tasioulas 2007, pp. 76-77.

<sup>43</sup> Article 15, UDHR.

<sup>44</sup> Articles 9, 10, & 11, UDHR.

<sup>45</sup> Article 14, UDHR.

<sup>46</sup> Article 16, UDHR.

<sup>47</sup> Article 17, UDHR.

<sup>48</sup> Strangely, Article 12 of the ICESCR (quoted above) does lend itself to such an interpretation by appealing to the highest attainable standard of "health" rather than the highest attainable standard of *healthcare*. O'Neill notes this mockingly at 2005, p. 429.

The relevant upshot of drawing this distinction is that it highlights a third way, so to speak, between the two modes of reasoning about rights that O'Neill uses to frame her original dilemma. Taking welfare rights as her paradigmatic example, O'Neill suggests that our thinking about rights is caught, in effect, between the two extremes of abstract or *a priori* reasoning (where we can know little if anything about corresponding obligations), on the one hand, and institutionally specific reasoning (where we can know far more, or at least *enough*), on the other. Yet, it's clear from the preceding paragraph that these alternatives do not exhaust our options, and that, when factually informed, abstract practical reasoning can discern far more about human needs, their likely means of satisfaction, and those who are (or are likely to be) required to guarantee those means than O'Neill's austere depiction of abstract reasoning would seem to suggest. Moreover, it's clear that the most common form of practical reasoning employed by those behind the legal realisation of human rights is of precisely this abstract yet factually augmented kind.

The rights articulated in major human rights instruments do not prescribe a comprehensive domestic or international institutional program of clear and specific form. Nor do they aim to satisfy needs that are not of current global priority (e.g., for unrestricted interplanetary travel). And they do not, in general, prescribe remedial measures that are currently infeasible. Instead, they are rights that satisfy and address the basic needs and vulnerabilities of individuals living in conditions of modernity, as characterized by certain general social, institutional, and remedial regularities or facts.<sup>49</sup> Rights of this form are prone to be abstract and equivocal with respect to both their content as well as the distribution of their corollary duties, for reasons I shall explain more thoroughly in the next section. Nevertheless, this doesn't mean that abstract practical reasoning cannot say something more

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<sup>49</sup> To this extent, the human rights familiar to us from international and domestic law are not necessarily 'timeless' rights, although some may be. *See*: John Tasioulas, "Taking the Rights out of Human Rights" in *Ethics*, 2010, Vol. 120, No. 4, pp. 671-672.

informative about such matters given the chance. This is, in effect, what happens in the case of special treaties or conventions (e.g., CAT), where constraints of space are not as pressing as in the case of a comprehensive bill of rights. In such cases, abstract reasoning focuses in on a phenomenon or practice (e.g., torture) which it seeks to prescribe or prohibit, identifies it with added clarity, and specifies a sensible and tolerably determinate distribution of corollary obligations given modern circumstances – or, perhaps, acknowledges various plausible or equally eligible schemes of duty-allocation. The judicial application of human rights is another context in which abstract reasoning can adopt this kind of concentrated focus.

The point here is that we are not faced, as O'Neill would have it, with the austere alternatives of a radically uninformative and abstract form of moral reasoning about rights, on the one hand, and an informative but institutionally hidebound form of reasoning, on the other. The legal practice of human rights illustrates a productive middle path, so to speak, between abstraction and institutionalism that is reflected in the content of the human rights familiar to us from the law. Moreover, as I shall argue below in §5, following John Tasioulas, there is good reason to think that such a (middle) form of reasoning can ascertain the existence of a right *even if* it is incapable of specifying its normative implications so as to render it claimable.

### *(iii) The Complementarity of Philosophy and Law*

All of this raises an additional point about the complementarity of philosophical and legal efforts to articulate and understand human rights. Often philosophers approach extant human rights law with the condescension of an epistemic authority armed with a logical distinction between what *has been* or *is* legally recognized as a human right and what *ought*

to be recognized as such.<sup>50</sup> It is important that we draw such a distinction, and it is healthy to aspire towards conceptual rigour and shared criteria in our attributions of human rights. Nevertheless, philosophers ought to guard against the excessive condescension that these distinctions and aspirations can naturally arouse. One reason for this is that, despite occasional squabbles with the content of the law, philosophers generally tend to work up their theories of human rights in close consultation with that content.<sup>51</sup> Another is that there is little reason to think that the forms of practical reasoning employed by the legal authors of human rights are very different from those employed under more philosophically rigorous auspices.<sup>52</sup> This is especially true given that the lawyers, scholars, judges, activists, and politicians behind the design and implementation of human rights law naturally tend to see themselves as giving legal expression to norms that have independent moral validity.

Unlike the *Convention on International Civil Aviation*, which mostly solves coordination problems, the International Bill of Human Rights has a distinctly moral mandate, one that is powerfully described in the preamble to the UDHR.<sup>53</sup> Obviously, it is important, and perhaps more important than usual, to distinguish between the content of international treaties, covenants, and declarations of human rights – which is heavily constrained by consensus and weakened by explicit signatory reservations – and the content of the moral norms that such treaties purport to embody. I am also not suggesting that human

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<sup>50</sup> See, for instance: James Griffin, “Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights” in *Proceedings of the Aristotelian Society*, 2001, Vol. 101, No. 1, pp. 1-28.

<sup>51</sup> See: e.g. Griffin’s “bottom-up” approach to human rights (Griffin 2008, pp. 29-30) Tasioulas’ concern with “fidelity” to the post-1948 culture of human rights (Tasioulas 2009, pp. 938-950), and Raz and Beitz’s explicit theoretical focus on the modern political “practice” of human rights (i.e., Joseph Raz 2010, esp. pp. 323-324, 334-337; Beitz 2009, pp. 7-13).

<sup>52</sup> Tasioulas, in particular, outlines a theory according to which precisely such general features of modernity, of humanity (i.e. universal human interests), and feasibility are to guide our thinking about rights. (see: Tasioulas 2007, pp. 76-79; Tasioulas 2010, i.e. pp. 671-672). Beitz and Raz’s theories are not very different in this respect. (i.e. see: Beitz 2009, pp. 136-141; Raz 2010, pp. 334-337)

<sup>53</sup> To take one snippet: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

rights are norms that are necessarily (i.e. as a matter of *conceptual* necessity) destined for embodiment in law.<sup>54</sup> All of this notwithstanding, it remains unreasonable to view the authors and practitioners of human rights law as engaged in a task hopelessly detached from philosophy. Rather, it seems more accurate to see them as taking on the lion's share of the moral-practical-philosophical burden: giving abstract but practicable expression to human rights in conditions of modernity, specifying them where necessary, and applying them to individual cases in ways that philosophical theory (later) plumbs for inspiration.

## 5. IN DEFENSE OF ABSTRACT AND UNCLAIMABLE RIGHTS

Rights tend to take abstract form on account of their demanding scope. Most often, a right is ascribed not just to one individual but to a group thereof. We speak, for instance, of the rights of citizens (e.g., civil or constitutional rights), the rights of a cultural or religious group within a larger polity, or the rights of workers, ministers of parliament, etc. These are rights assigned on the basis of generic features, roles, and capacities that many individuals share – although this doesn't mean that a lone individual cannot have special or additional rights on account of a unique achievement, such as being elected president.

In the case of *human* rights, we are referring *prima facie* to rights that belong to all (or at the very least *almost* all) human beings.<sup>55</sup> Thus, the pressure towards abstraction is immense. For one, if human rights are to be ascribed generically to all human individuals, then the bases of that ascription must be present in each individual human case. So, for instance, if rights protect interests or capacities, the interests or capacities protected by *human* rights must be *universal*, or nearly so. Or, if rights are ascribed on the basis of the moral or

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<sup>54</sup> For a version of this kind of claim, *see*: Habermas 2010, pp. 469-470.

<sup>55</sup> Let me for the moment bracket the debate over how to accurately circumscribe the proper bearers of human rights. As I shall explain below, there are reasons to think that not *all* human rights belong to *all* human beings, but only a special subclass thereof. *See*: §6 below.

ontological status of individuals, then human rights must be grounded in a status shared by human beings *as such*. My particular status as a university student, then, or my particular interest in being good at basketball, will not be universal (let alone important) enough to ground a human right. Instead, my human rights will have to be grounded in interests and/or a status that I share with all or nearly all others: possessing dignity, being created in the eyes of God, having an interest in autonomy, friendship, achievement, health, leisure, family, etc. But the very fact that these grounds must be generically shared means that, in justifying human rights, we must step back from the specifics of individual cases to look at general features of humanity, a process that requires some degree of abstraction and that yields abstract formulae.

The same pattern applies not just to the bases of human rights, but also to their content and deontic implications. The more specific we are about the content of a right, or about its duty-bearers, the less plausible it will be to ascribe that right universally. For instance, we may agree on a human right to education,<sup>56</sup> but disagree on the *form* that such education should take. Although it may be plausible to ascribe a right to SAT education to all American students, since a high score on one's SATs is a pre-condition of admission to a good American university, it would not be equally plausible to ascribe such a right to students in Britain or Denmark, where SAT scores are not considered by institutions of higher education. Similarly, one way to interpret the human right to adequate food is as imposing obligations on local governments to ensure that the necessary means of subsistence are distributed by the right hands to the right people living under their jurisdiction. However, such an interpretation of the right may not stand, or the abstract right itself may not even

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<sup>56</sup> Article 26, UDHR.

apply at all, in cases of egalitarian hunter-gatherer or agrarian communities that do not have ‘governments’ that can be assigned such duties.<sup>57</sup>

Thus, there is a *conceptual* pressure, so to speak, generated by the demanding scope of human rights, which favours abstract formulations of their content, duty-bearers, and grounds. But does this mean that human rights are inexorably vulnerable to O’Neill’s claimability-based critique of rights? Are human rights, because of their universal scope (and concomitant abstraction), always at risk of falling short of being *rights*? I now want to offer two direct replies to this objection. The first reply suggests that we adopt an interest-based account of rights, which assigns far less significance to the claimability of a right than O’Neill does (§5.1). As a second reply, in the following section (§6), I counter O’Neill’s critique by highlighting some of the important uses of abstract (and unclaimable) rights. These uses suggest that such rights can play a crucial role in practical reasoning about human rights, particularly if such reasoning seeks to avoid the moral and epistemological pitfall of ethnocentrism.

### 5.1 *The Interest-Based Account*

O’Neill exaggerates the role of claimability in establishing the validity or existence of a right: and this, in two senses. On the one hand, as I explained earlier on (§2.1), O’Neill’s interpretation of claimability is too narrow. That is, if claimability is O’Neill’s main concern then her worry is best cast as a wholesale attack on abstraction in rights claims, rather than an attack on the non-specification of duty-bearers as such. A right may fail to be claimable for reasons that go beyond the non-specification of duty-bearers. In order to be claimable, for

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<sup>57</sup> Whether such a right applies in such a case at all, I suppose, will depend on whether it is feasible and justifiable to hold *other* governments under an obligation to provide the egalitarian community with adequate food should it find itself in dire straits.

instance, a right must have reasonably determinate content, we must know who can legitimately bear it, and we must have some idea of the normative standing or weight of its corollary obligations in relation to other rights, obligations, and values. In principle, any sort of indeterminacy can undermine the claimability of a right, precisely because potentially important deontic information is thereby left out. Yet, if the worry about claimability is understood in this broader way, then what it demands regarding the corroboration of any right is reasonable specificity along an array of dimensions (perhaps all ten described above), and not just that of duty-allocation.

O'Neill may concede these points but reply that the specification of the *addressees* of a right still has special importance over and above the specification of other rights-related details. But this seems arbitrary and, as Tasioulas and Raz have convincingly argued, at odds with a broadly interest-based account of rights, the contemporary influence of which is formidable. According to an interest-based theory of rights, a right exists in cases where there is an individual interest that it would be justifiable to hold other people to be under a duty to respect and/or promote.<sup>58</sup> But making good on that judgment of importance is different from answering the further question of *who* or *what* ought to be assigned those duties.<sup>59</sup> In fact, these two questions are highly independent. It is possible to know, given general facts of human nature, institutional feasibility, and social practice, that a certain interest (e.g., in health) is important enough to ground duties on the part of others (e.g., governments, doctors, casual bystanders) without knowing exactly who these others are or will be under any given circumstance.<sup>60</sup> This is not to say that answering this designative question is unimportant. It is extremely important, and it is crucial to the allocation of blame in instances of human rights violations that we know something about its answer. Nevertheless, it seems arbitrary and at

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<sup>58</sup> See: Raz 1986, p. 166.

<sup>59</sup> See: Tasioulas 2007, esp. pp. 92-95; Raz 1986, pp. 184-185.

<sup>60</sup> Tasioulas 2007, pp. 92-93.

best idiosyncratic to make the existence of a right depend on our knowledge of *who* should be blamed in cases of its violation rather than our knowledge of *why* they should be blamed or of *what* they are violating in the first place. The interest-based theory of rights is a more natural alternative in this respect, and helps us grasp part of what we lose by denying that an unclaimable right can exist; this, I think, is the idea that a human interest can be *important enough* to ground a right even though we remain unsure of what the full deontic implications of that right presently are or will be. As I see it, far from prioritizing a culture of blame, as O'Neill would have it,<sup>61</sup> the vindication of such a claim shows that a discourse of rights prioritizes the protection of individual well being above all else.

This brings me to the second sense in which O'Neill exaggerates the importance of claimability in rights theory. For, it would now appear that, even on the broader understanding of claimability that I have sought to force on her account, claimability remains peripheral to the establishment of a right. The basic criterion of a right, according to the interest-based theory, is whether or not it protects an interest that is important enough to generate duties (of respect and/or protection) that apply to others. This places the onus of determinacy at the level of the *grounds* of a right – that is, dimension (iv), above – as opposed to at the level of its content, bearers, duty-bearers, or deontic implications in general. Indeed, providing we have some clarity about the importance of a universal individual interest (or a set thereof) and the contemporary feasibility of assigning duties on its basis, we can establish the existence of a right whilst tolerating a great deal of indeterminacy regarding its practical aspects. The suggestion here then is that, supposing we have some essential knowledge about the grounds of a right, indeterminacy (or even radical indeterminacy) along other practical dimensions of a right is a sign of *incomplete knowledge* rather than *conceptual*

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<sup>61</sup> See: O'Neill 2005, pp. 438-439.

*insufficiency*. We can have knowledge of a right without knowing precisely how its existence will normatively play out in the world and across varying circumstances.

One powerful implication of this line of thought is that a single right can generate different deontic implications in different contexts – or even within the same context – without thereby becoming a different right. This is something that both Raz and Tasioulas have referred to as the “dynamicity” of rights.<sup>62</sup> In what follows, I want to explore what I take to be some of the positive consequences of this dynamicity or variability. In particular, as a second way of responding to O’Neill’s objection from claimability, I want to show how abstract rights can play an important role in our moral and legal reasoning by allowing us to formulate universal rights, on the one hand, while holding open the possibility that such rights may have widely divergent implications in different social, cultural, economic, and political circumstances, on the other. Elaborating on this role, I believe, is crucial to defending human rights discourse against any blanket charge of ethnocentrism, since it shows how that discourse, centered as it is on the notion of a universal right, can generously accommodate the diversity of social practices. Thus, having disarmed O’Neill’s negative critique of abstract rights, I now want to fill in the story from the other side, so to speak. That is, by illustrating some of the positive features or uses of abstract rights, and how they accommodate pressures that push us towards abstraction in the first place, I hope to show that abstract rights are not only coherent but also useful and important.

## 6. THE USES OF ABSTRACTION

If we look carefully at the human rights articulated even in a document as celebrated as the UDHR, it quickly becomes apparent that many of its proclaimed rights are too specific

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<sup>62</sup> Tasioulas 2007, pp. 92-98, esp. p. 94; Raz 1986, pp. 185-186.

to be universal. For instance, the right to work and to protection against unemployment, and the right to form and to join trade unions, clearly presuppose a modern market economy and a welfare state.<sup>63</sup> Such rights would make little sense as applied to, say, a remote hunter-gatherer society (rare as they may be) with no shared notion of ‘employment.’ The right to “periodic and genuine elections”<sup>64</sup> presupposes a political culture characteristic of modern states but not of all politically autonomous communities. Without knowledge of how such communities function politically, for instance, members of tribes buried deep in the Brazilian Amazon forest cannot plausibly be said to have such a right to vote – that is, in so far as they are considered truly isolated and not, say, as citizens of Brazil. The right to own private property<sup>65</sup> is not always granted in communal societies (e.g., Kibbutzim), rare as they are these days, where everything is held in common. Does it make sense for us to continue to ascribe such a right to persons living in such communities, i.e., to criticise their communal social practices and argue that a right to private property should be acknowledged among them? That seems dubious. Similarly, it is implausible to ascribe a right to the institution of marriage to all persons.<sup>66</sup> The Mosuo people of China, for instance, do not practice the institution of marriage as traditionally understood, i.e., as a union between “husbands” and “wives.” Yet, it would be shameful and absurd to criticize their culture in light of its ignorance of the *human right* to “marriage,” as it is commonly understood.

### *6.1 The Bifurcation of Human Rights*

What then, do we make of these purported human rights? One solution is to deny that they are genuine human rights. Perhaps such rights apply in most cases, so this solution

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<sup>63</sup> Article 23, UDHR.

<sup>64</sup> Article 21, UDHR.

<sup>65</sup> Article 17, UDHR.

<sup>66</sup> Article 16, UDHR.

would go, but they do not apply universally, and so cannot be human rights. Another solution, and one suggested by the preceding considerations, however, is to interpret such rights as generally applicable specifications of higher-level or more abstract rights that are indeed universal.<sup>67</sup> For instance, the right to work can be understood as a generally applicable specification (in modern times) of a more abstract right to, say, participate in the productive and/or subsistence-related activities of one's community. Precisely because it is more abstract, that right can apply to non market-based societies, where it may issue in a more specific parallel to the right to work: e.g., a right to be *involved*, providing one is able, in shared pursuits and to remedial *support*, if and when one becomes too fragile to participate. Similarly, the right to general elections, or to vote, can be understood as a specification of a higher-order right to political participation or to have one's opinions heard and respected by one's political authorities. In some communities, the abstract right may not plausibly issue in a voting requirement but rather a requirement of consultation or collective deliberation. The right to marriage, too, is most likely a specification of a more abstract right to engage, should one choose and be (physically and emotionally) able to, in meaningful conjugal relations of some form, whether these are monogamous, polygamous, polyandrous, group-based, or Mosuo-style, etc.<sup>68</sup>

It's clear that, on the sort of picture I am trying to offer here, abstraction can provide a way of reformulating a right in light of the main interests or considerations that underlie it. So, for instance, when we reformulate the right to work as a right to *involvement*, or social *participation*, or even *achievement*, we appeal to the central interests that underlie the right to

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<sup>67</sup> See: Raz 1986, p. 184, who distinguishes between "general" rights and "particular" rights, with the former providing a *prima facie* ground for the existence of the latter. Also see: Griffin 2008, p. 50, on the distinction between "basic" and "applied or derived" rights.

<sup>68</sup> Given the accommodating nature of such a right, it is more likely to require a principle of non-interference with one's access to prevailing conjugal practices, rather than the provision, by say the state, of institutions that support a preordained marital form. It is possible that "non-interference" with some conjugal practices will require positive institutional support from the state. However, I leave that difficult question aside.

work. What is crucial in such a process of abstract reformulation, however, is that one keeps tabs on the capacity of the right, as stated, to ground feasible duties (of compliance and protection) that apply to others. The chain of abstraction must end at the point where it issues in a right that cannot generate feasible duties in this way. Otherwise, one risks substituting talk of interests, capacities, or values for talk of rights.<sup>69</sup>

Distinguishing between an abstract, universal right, on the one hand, and its generally or locally applicable specifications, on the other, may seem like more of a puzzle than a solution in one respect. For, as noted above, many of the human rights with which we are familiar are too specific to be genuinely universal. How then does the bifurcation of rights into abstract and specific varieties help us avoid the conclusion that most legally posited human rights, *qua* specific and non-universal, are *not* human rights? The most natural solution to this difficulty, and the one I've been building towards here, is to suggest that there are essentially two varieties of human rights. On the one hand, there are *bona fide* and consummately abstract human rights: rights that apply to all individuals in all cases, even though their deontic implications may vary.<sup>70</sup> And, on the other hand, there are derivative or specific human rights: rights that are generated by the application of a universal or *bona fide* human right to a specific context, taking into account the salient political, practical, social, cultural, and geographical features of that context, but that are not themselves universal in scope. In this sort of picture, many of the rights posited by international and domestic law are indeed human rights, although they are so in light of being *specifications* or *applications* of universally applicable human rights, not in virtue of being universal human rights themselves. This does not mean that many specific human rights, such as the right to general

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<sup>69</sup> See: Tasioulas 2010, pp. 670-672.

<sup>70</sup> An example might well be the right to life, liberty, and security of person. But there are many other plausible candidates: i.e. the right to political participation, to non-arbitrary arrest, to freedom from torture or cruel and degrading treatment, and to adequate food, housing, and shelter, among others.

elections, do not apply in a great many cases. In fact, given the current uniformities among political cultures, that right will apply in almost every case we are likely to come across. But because there will be some salient exceptions to this (illustrated above) we ought to withhold the attribution of full universality to such a right.<sup>71</sup>

## 6.2 *The Uses of Bifurcation*

Now, aside from providing us with a lens to analyze some differences among familiar or legally posited human rights, this bifurcated understanding of rights can play a very useful and important role in our moral and legal reasoning. Firstly, it has an epistemic function, in so far as it sustains the important conviction that there may be many different ways to satisfy a human right. Unless we recognize, for instance, that there are many different ways to ensure ‘political participation’ – or to satisfy the interests that underlie the universal demand for it – we risk missing the fact that people can (and have) lived perfectly decent, dignified, and politically satisfying lives *without*, say, being privy to periodic general elections by secret ballot, or to equal access to public service. But this is exactly the sort of oversight that reflexive ethnocentrism (e.g., growing up in a democracy where general elections are standard) is likely to lead to. Thus, part of the appeal of abstract rights is that they facilitate this acknowledgment of pluralism and caution against the ethnocentric interpretation or narrow cooption of human rights.

Secondly, abstract rights can have an important moral-political function. They do so by being universally applicable but endlessly incomplete. For any given application of an abstract human right, there will be an array of questions regarding the specific content and deontic implications of the right that will need to be sorted out, but that cannot be sorted out

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<sup>71</sup> *General applicability*, is, I think, an appropriate substitute.

solely in the abstract. Instead, a rich array of locally salient empirical matters will have to be consulted, e.g., vis-à-vis locally available resources, the nature of the local institutions, the primary political actors, informed observers, abusers, and the specific grievances of those vulnerable and/or in need, etc. This raises the question of how to *delegate* authority to interpret and implement the local application or specification of an abstract right.<sup>72</sup> But it also suggests a *prima facie* (negative and positive) answer to this delegative question. On the one hand, foreign governments and even international institutions should not simply assume that they know what the detailed human rights-related responsibilities of a national government are towards its people. There is often a great deal of local information that they would need to know, and that they usually do not, in order to be legitimately confident about such assertions. Secondly, providing that a national government is reasonably responsible (and I grant that this is a big *if*), primary interpretative authority should provisionally rest with the local government or some other locally invested institution, since these are the agents who are likely to know the most about the relevant circumstances of the application of the right, and therefore, about its local deontic implications.<sup>73</sup> One way to see the function of abstract rights in this case, then, is as promoting sensitivity, in human rights discourse, to the demand for national or political self-determination.

Thus, not only are there inherent conceptual reasons for adopting abstract formulations of human rights (i.e., related to the universality of such rights), there are epistemological and moral reasons for emphasizing their importance as well. Both of these reasons speak, ultimately, to the uses of abstraction in deflating concerns about the

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<sup>72</sup> See: Diane F. Orentlicher, “Relativism and Religion” in *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), p. 144.

<sup>73</sup> This parallels the justification for the allowance of a “margin of appreciation” by the European Court of Human Rights – in other words, interpretative license – in national interpretations of the ECHR among EU members. See: Neuman 2003, pp. 1881-1886; Also: Burleigh Wilkins, “International Human Rights and National Discretion” in *The Journal of Ethics*, 2002, No. 6, pp. 373-382.

ethnocentricity of human rights,<sup>74</sup> since they illustrate how such rights can accommodate and respect the often innocuous diversity of social, cultural, political and economic practices in the world. As a strategy for dealing with such diversity in human rights claims, the solution presented by abstract rights differs markedly from that of other prevalent solutions. For instance, guided by the notion of abstract rights, we can affirm the ability of human rights to accommodate cultural diversity without resorting to a substantively minimalist interpretation of human rights as protecting, say, only the “minimum conditions for any kind of life at all.”<sup>75</sup> Abstraction is not about narrowing the purposes of human rights, and paring down their content so that they protect only the most minimal and basic of interests. Rather, abstraction is simply a way of articulating or reformulating, for any given rights claim, the generic underlying interests or considerations that sustain it. Furthermore, abstraction is similarly unlike the “justificatory minimalism” proposed by thinkers such as Joshua Cohen.<sup>76</sup> For, again, it is not about justifying human rights claims in light of abstemious values or considerations that are practically embedded at the global political level, but about identifying a higher-level order of rights in human rights discourse that can help guide us in the application of human rights to specific circumstances.

All of this is compatible with O’Neill’s objection from claimability surviving in a different form than the one she adopts. For instance, if a right is unclaimable, we may hold that it is to that extent incomplete or rather that our knowledge of it is to that extent incomplete. Something like this thesis has been defended by Henry Shue, who argues for the importance of spelling out, “at least a little bit, what it would actually mean for a certain right to be fulfilled and enjoyed” in more detail than we are accustomed to.<sup>77</sup> Similarly, James

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<sup>74</sup> See: Chapter One, §3.

<sup>75</sup> Ignatieff 2001, p. 56.

<sup>76</sup> Cohen 2004.

<sup>77</sup> See: Henry Shue, “Thickening Convergence” in *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 1996), ed. D.K. Chatterjee, pp. 217-241, esp. pp. 226-227.

Griffin has argued that an unclaimable right may exist providing we know that *someone* is responsible for respecting and/or protecting it, even though we may not know *who* that someone is.<sup>78</sup> These are much more palatable suggestions than the one advanced by O'Neill, and I hope that I have already said enough to explain why that is so.

Finally, as I have argued, striving for abstraction can be one way to avoid ethnocentrism in our practical judgments about human rights. However, abstraction can also become excessive to the point of voiding such rights of all practical meaning and significance. This is, of course, not what we want. But if our goal is to make normative judgments about human rights that carry adequate content, they will have to demonstrate some suitable level of specificity, and this means that other ethnocentrism-correcting mechanisms beyond that of abstraction will have to feature in our normative reasoning about such rights. In the next chapter, Chapter Six (esp. §3), I offer an account of a further corrective mechanism of this sort.

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<sup>78</sup> See: Griffin 2008, p. 109-110.

## *Chapter Six:*

# Avoiding Ethnocentrism

### 1. AN OUTSTANDING QUESTION

The preceding chapters raise an important and rather obvious question. I began, in Chapter One, by distinguishing between the moral and epistemological aspects of ethnocentrism, a contrast that has often been neglected by those who have written on the subject. I then went on to isolate its epistemological aspect (i.e., what I called *socially reflexive* belief) as my chief concern. In that initial discussion, I looked at various ways of vindicating socially reflexive belief as a mode of judgment. As a way of appealing to social testimony (i.e., the second-hand judgment of others), or of tapping into an externally reliable belief-forming process, or as a consequence of relativism about truth, for instance, socially reflexive judgment can be made sense of as a reasonable and acceptable epistemic option. However, those vindicatory explanations did not stand up to scrutiny, and so I argued that the default view of social reflex, which emphasizes its strikingly arbitrary and question-begging character, is the one that we are most justified in adopting.

Chapter Two was, in essence, a prolongation of that initial argument. One important vindicatory account of social reflex – political constructivism – was not among those fully considered in Chapter One, and Chapter Two dutifully makes up for this. According to political constructivism, as John Rawls develops it in *PL*, the demands of social stability and legitimacy require that matters of institutional justice be decided on the basis of “political”

values: a set of normative judgments that is both implicit in the public political culture of a society and held in common by its members or participants. Thus, according to political constructivism, reflexive deference to socially pervasive normative judgments is an entirely justifiable and even essential epistemological practice in the context of judging questions of political justice. Rather than seek out the truth about matters of institutional justice, or make informed judgments about such matters on the basis of what one takes to be the best, truest, or most plausible reasons (however these notions are exactly understood), political constructivism requires that we reason on the basis of what are in essence *shared* and institutionally *embedded* evaluative judgments. In this way, we can arrive at judgments that are not necessarily true but rather “reasonable,” the latter being the relevant standard of correctness in determining whether or not a judgment about justice authoritatively applies to its subject matter.<sup>1</sup> If Rawls is right to think that correct judgment about matters of institutional justice ought to proceed in this way, then it would be wrong to presume, as I have, that socially reflexive judgment is unjustified or epistemologically flawed. Or at least, if such a mode of judgment is generally flawed, political constructivism would seem to present a particular (and hugely important) context in which that flaw disappears, becomes irrelevant, or is even converted into a virtue.

Chapter Two challenges Rawls’ constructivist vindication of social reflex by revealing important infirmities and porous gaps in his stability and legitimacy based arguments for bestowing “political” values with incontrovertible status in normative inquiry about matters of institutional justice. But this challenge failed to close out on a further motivation that has been cited in favour of bestowing political values with such status: the

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<sup>1</sup> Of course, Rawls is fully open to the idea that persons will seek out true beliefs about justice, or beliefs that are worked out on the basis of a “comprehensive doctrine” of some sort. Rawls even encourages individuals to present these beliefs and their (potentially philosophical, moral, or religious) grounding reasons in public debate – see, “the proviso” (*PRR*, p. 453) discussed in Chapter 2, §1. Despite all this, however, the truth or soundness of a judgment about justice cannot speak to its correct, valid, or authoritative application to the question at hand. Only its *reasonableness*, i.e., its basis in shared political values, can do this.

*avoidance* of ethnocentrism. Thus, in Chapter Three, I turned my analysis of political constructivism on its head, so to speak. Rather than assess that doctrine on the basis of its ability to furnish a *justification* for the phenomenon of ethnocentrism, I assessed it as a possible means of *avoiding* that same phenomenon, while reverting to what I have called the default view.

But here we encountered problems as well, since Rawls' explicit attempt to avoid both moral and epistemological ethnocentrism in his theory of international justice (*LP*) is marked by important failures. One of these is its axiomatic basis in value judgments characteristic of liberal or modern democratic political culture. Even if, despite all reservations, we accept the central claim of political constructivism – that judgments about matters of institutional justice ought to be grounded in a shared and institutionally practiced set of further normative judgments – it is puzzling that the international principles of *LP* (including its conception of human rights) are ultimately grounded in values and ideals shared primarily by those sympathetic to liberal political morality. This moral-political partisanship raises worries that *LP* is afflicted by a form of social reflex that would not be tolerated on the grounds of political constructivism itself: the reflexive ethnocentrism of liberals who, in their efforts to conceive of norms that should govern international relations between them and other non-liberal peoples (and that should therefore be grounded in normative judgments that are shared and politically practiced *internationally*), instinctively ground their political conceptions in judgments shared principally by liberals themselves.<sup>2</sup>

In Chapter Four I honed more directly in on the topic of human rights and considered whether political constructivism as applied to such rights might be tweaked in such a way as

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<sup>2</sup> Of course, these criticisms of Rawls' *political* brand of constructivism do not necessarily hold in the case of other forms of constructivism about reasons (e.g., Thomas Scanlon's), or even a general form of constructivism that holds across the domains of both morality and science – See, for example, the discussion of constructivism in Paul Boghossian, *Fear of Knowledge: Against Relativism and Constructivism* (Oxford: Oxford University Press, 2006), p. 22. I offer a broader treatment of constructivism about reasons in Chapter One, §5.2.ii.

to thwart this last criticism. Under the umbrella of what, following Charles Beitz, I called “agreement theories” of human rights – theories that conceive of human rights either as objects of universal moral agreement or as grounded in such objects – I considered how Joshua Cohen’s decidedly *global* version of political constructivism about human rights fares as an alternative to that of Rawls himself. Rather than anchor our normative judgments about human rights, as Rawls does in *LP*, to a further set of value judgments implicit in liberal or modern democratic culture – and, in so doing, court the risk of ethnocentrism – Cohen’s tweaked form of political constructivism about human rights defines that further set as composed of normative judgments implicit in *global* political society and shared by its (presumably more diverse) participants. In this way, Chapter Three’s complaint about the liberal bias of Rawls’ conception of human rights might be sidestepped.

This adjustment is not enough to safeguard the plausibility of political constructivism about human rights, however. In addition to the weaknesses afflicting political constructivism’s main supporting arguments as a whole (as pointed out in Chapter Two), there is a deeply unattractive conservatism inherent in the political constructivist’s claim that practical conclusions about human rights must be grounded in value judgments that are implicit in global political culture or shared/shareable across all (or even most) cultures. This conservatism is a direct consequence of the fact that, on such a view, an enormously vast array of otherwise available normative judgments, convictions, reasons, ideas, and grounding beliefs – i.e., those that are *not* universally shared or *not* somehow already embedded in global political culture – are made theoretically irrelevant to normative reflection about human rights. This conservatism – which, I argue, itself constitutes a kind of ethnocentrism –<sup>3</sup> could be made tolerable if there were sufficient independent reason to understand the grounds of human rights as linked to global moral consensus or political practice in this

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<sup>3</sup> See: Chapter Four, §3.4.iii.

conceptually intimate way. But, as I argue in Chapter Four (§3), these reasons are lacking. Among others, considerations about the basicness of human rights or the meta-theoretical importance of fidelity to the modern practice of human rights, which I considered as alternatives to Rawls' stability and legitimacy based arguments, are not able to plausibly underwrite an identification of the grounds of human rights with normative judgments that are the focus of universal consensus and/or implicit in global political culture. Thus, without the support of any adequate reasons, the stain of an arbitrary conservatism hangs heavily over that identificatory claim and should move us to reject it in favour of less conservative alternatives. But which alternative(s) should we accept? How should we ground judgments about the nature, content, and priority of human rights, especially if we want to do so in a way that avoids the epistemological pitfall of ethnocentrism? This is the important (and, by this point, rather obvious) outstanding question that I alluded to at the start of this section.

### *1.1 The Emerging Picture*

Towards the end of Chapter Four (in §4), I suggested a modified form in which global political constructivism's claim about the grounds of human rights might be able to survive. As I had understood that claim throughout, it treats the truth or correctness of a normative judgment about human rights as a *simple function of* (i.e., *constitutively dependent upon*) whether or not it withstands scrutiny in light of normative judgments implicit and prevalent in global political society. However, if, by contrast, global political constructivism were to treat the question of whether or not our normative judgments about human rights withstand such scrutiny merely as something of *epistemological relevance* – i.e., something that, if answered positively, would *count in favour of* the truth or correctness of such judgments –

then the doctrine seems more promising.<sup>4</sup> This is because, on the latter *indicative* or *justificatory* reading, we can accept that (for a variety of reasons, including fidelity) it is a good thing to consult globally shared and practiced normative convictions when formulating judgments about the nature, content, and requirements of human rights without going so far as to say that such convictions exhaust *all* the relevant normative considerations in such matters, which is what we would have to say on the former constitutive reading. For instance, on the indicative reading, it remains possible that in any given case the most plausible reasons (say, reasons of autonomy) for considering some purported human right to be genuine turn out *not* to be globally shared, appreciated, or implicit in global political society. The fact that this is so will weaken the case for endorsing such a right but it may not defeat it. Thus, depending on how strongly this modified form of political constructivism about human rights rates the epistemological or justificatory relevance of its prescribed evaluative procedure, there is in principle room for understanding it as a doctrine that simply urges us to consult widely held reasons and politically practiced value judgments before deciding on the authenticity of any given human right. This, I think, is a highly plausible doctrine. It constitutes a form of global political constructivism that actual political constructivists, such as Rawls and Cohen, would almost certainly reject. Nevertheless, it is the only form in which political constructivism about the grounds of human rights seems able to survive.

These reflections closed the door on (non-modified) political constructivism both as a means of avoiding and as a justification of social reflex. But they also brought me part of the way towards answering the outstanding question of how to address that ill, i.e., towards offering a positive account of how ethnocentric reflex can be avoided in normative reflection about human rights. They fell decidedly short of a full offering, but I now want to say more about the broader picture in which I believe they fit.

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<sup>4</sup> Street discusses this interpretative ambiguity in an illuminating way in Street 2008, pp. 212, 216-217, 238-239.

Chapter Five developed that picture somewhat, by illustrating the pivotal role that abstraction can play in averting ethnocentric and contextually inappropriate ascriptions of human rights. Striving for abstraction can be one way to avoid ethnocentrism in our judgments about human rights. Still, abstraction can become excessive to the point of voiding such rights of all practical meaning and significance. This is, of course, not what we want. But if our goal is to make normative judgments about human rights that carry adequate content, they will have to demonstrate some suitable level of specificity, and this means that other ethnocentrism-correcting mechanisms beyond that of abstraction will have to feature in our normative reasoning about such rights. It is now time for me to offer a clearer picture of what I take those additional mechanisms to be. In what follows (§3), I will only highlight one of potentially several such mechanisms, albeit an important one.

## 2. THE ENDEMIC REFLEXIVITY OF MORAL REASONING

My goal, in this chapter, is positive. I want to make constructive progress on the outstanding question that my thesis has both posed and given clear meaning to, i.e., the question of how to avoid ethnocentrism in normative reflection about human rights. To that end, however, it is important that I first give an account not only of the object to be avoided (this I did in Chapter One, §3), but also of its pervasiveness (this I did only partly in Chapter One, §3). Unless one knows where social reflex tends to afflict moral reasoning, and how it does so, one's strategy of avoidance will not be sensitive enough to the reality on the ground, so to speak. As I shall argue below (in §2.1, §2.2, and §2.3), there are good reasons for drawing the gravest of conclusions in this respect, i.e., that social reflex is *so* pervasive that it is, in effect, an *unavoidable* feature of reasoned belief about human rights, or even reasoned normative judgment in general, and that the latter is in some ways irredeemably infected by

(or perhaps a mere cover for) the former. Despite this, I will argue that there remains room for avoiding ethnocentrism nonetheless.

The genre of reasons that I will discuss below, then, excludes other reasons we might have for drawing the less grave conclusion that ethnocentrism is prevalent, if not unavoidable. For instance, mere *loyalty* to a specific group or ethnos can often get in the way of clear-headed or justified moral judgment. It may cause us to minimize, exaggerate, or ignore the seriousness of a wrongdoing that involves individuals that we care about, are loyal to, or love. But however great an obstacle to clear-headed moral thinking loyalty or love might be, we still reasonably imagine ourselves at least capable (if not always willing) to wrest ourselves free from its distortive influence and to contemplate moral issues and disputes fairly, or without showing any obvious partiality towards the individuals involved. Thus, the prevalence of group loyalties is not the sort of obstacle that should cause us to doubt the very possibility of undistorted, impartial, or justified moral belief itself.

Nor are many of the reasons – group pride and loyalty included – for which people tend to affirm the norms and practices of their culture on the grounds of identity (e.g., the toleration of homosexuality is “un-African,” the idea of helping the poor is “un-American,” etc.), rather than on the basis of substantive justificatory arguments.<sup>5</sup> This is because social reflex of such a self-conscious variety is almost always *intentional* to at least some extent, and so, under our control. In a more isolated and homogeneous social context, where a group is not constantly forced to reckon or come to terms with the differences between its own mores, beliefs, or social practices and those of its proximate neighbours or co-citizens, such self-conscious social reflex would almost certainly never arise; mores and beliefs would be held reflectively for what are thought to be good reasons (e.g., the poor should be helped because *God himself commands it*), or else, in extreme and supremely delicate cases, they

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<sup>5</sup> This is the intentional form of social reflex that was discussed in Chapter One, §3.2.i.

might be endorsed in a spirit of naïve credulity, where prevailing mores, beliefs, and customs are somehow not seen as appropriately subject to critical assessment.<sup>6</sup> In our modern context, however, where close and extensive contact between groups is practically inescapable, such extreme cases rarely if ever arise, and the question of whether one adopts a cultural norm or belief on the basis of reasons or on the basis of mere identity is to a significant extent up to them. Or, at the very least, there is no inexorable force of nature forcing them one way or another on the matter.

Thus, in what follows here, I am not interested in such intentional forms of social reflex. Rather, I want to fixate exclusively on the pervasiveness of social reflex of the less intentional, more inexorable variety, i.e., the forms of reflex that infuse our moral judgment whether we like it or not. This is what, it seems to me, the AAA was alluding to in speaking of the “social setting” of the learning process and its inevitable influence on our normative judgment.<sup>7</sup> My exact question (to be answered below in §3) will therefore be that of how, in the midst of such *inexorable* forces, non-ethnocentric moral judgment about human rights might be possible. Although I ultimately argue that it is possible, the optimism that attends that verdict is a qualified one. This is because my argument in no way hinges on the claim that the background forces of acculturation that press our moral judgment in favour of local norms and beliefs are somehow less potent and pervasive than they might seem, or that they are merely *apparent* rather than real phenomena. Nor is my strategy one that acknowledges the anthropological importance of acculturation but denies it any philosophical relevance by claiming that there are ways in which philosophically guided moral reasoning can wholly transcend its anthropological context. Instead, I accept that our epistemic situation is inexorably affected by its cultural circumstances, which is to say that there are ways in which

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<sup>6</sup> This is what Jeremy Waldron calls “unreflective normativity” in his essay, “Tribalism and the Myth of the Framework” in *Karl Popper: Critical Appraisals* (New York: Routledge, 2004), ed. Philip Catton and Graham MacDonald, p. 211.

<sup>7</sup> See: Chapter One, §1.

moral reasoning will forever remain endemically reflexive and ethnocentric (mainly, in the three ways suggested below).

The solution that I will offer in §3, therefore, is little more than a ‘surface patch’ on this non-ideal, somewhat broken state of affairs, or rather an instructive and optimistic suggestion about how best to cope with our challenging epistemic reality. It is not an ‘escape ladder’ through which we are guaranteed to track independent moral reality and purify our moral reasoning of its socially reflexive underpinnings.<sup>8</sup> Although true moral judgment is its aim, my solution is far more modest than that. But it is modest only because it (and any plausible realist epistemology, for that matter) *has to be* given the three features of moral reasoning that I recount in what follows.

### *2.1 Social Dependence and Reflective Equilibrium*

The first and most overarching way in which moral reasoning is endemically reflexive is via its *socially dependent* character. The manners in which moral reasoning is socially dependent are various.<sup>9</sup> There is, for one, a *causal* or *productive* form of dependence. We need upbringing in a society in order to develop the very psychological capacities necessary to engage in moral reasoning and to be motivated by its conclusions. It is difficult to imagine how an individual could develop anything that resembles that capacity without having learned it from others, or without the basic tools of language, imagination, reflection that society inculcates in us, and the incentives/disincentives that society attaches to moral/immoral actions and attitudes. In addition to this, there is an *interpretive* form of dependence: moral reasoning seems to require the hermeneutic context of a society – with its

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<sup>8</sup> Rorty uses the metaphor of a “skyhook” to illustrate a similar point. Rorty 1991, p. 3.

<sup>9</sup> In this paragraph, I am following John Tasioulas’ valuable discussion of the “facts of immanence” in Tasioulas 1998, pp. 175-176.

shared patterns of language, thought, behaviour, and common historical reference points – in order for it to be rendered meaningful and intelligible to others and even to ourselves. Finally, ethical reasoning is *constitutively* dependent upon society. The moral standards, sensibilities, and intuitions that moral judgment brings to bear on its objects of evaluation (e.g., character traits, actions, state of affairs, etc.), and uses to justify its conclusions, are socially inculcated. This is the most controversial form of social dependence, but it is compelling and the most important of all, so let me devote some more time to it.

*(i) Constitutive Dependence*

The claim of constitutive dependence appears to beg the question against (recently fashionable) evolutionary explanations of morality, on the one hand, and (some varieties of) rationalist, theological, or constructivist accounts of morality, on the other. Evolutionary theories of morality, for instance, typically identify naturally selective pressures towards psychological altruism – the essentially moral tendency for one to *care* about the welfare of others and to act accordingly, i.e., unselfishly. And they have produced evolutionary explanations of a wide range of moral sentiments and phenomena: the widespread emphasis on loyalty, common dispositions towards social conformity, our innate concern with reputation and social standing, and the universal power of moral emotions such as resentment, guilt, and shame.<sup>10</sup> I cannot engage these views fully here, but at least two interrelated remarks are in order. Firstly, even those who defend such evolutionary accounts of morality admit that naturally adapted moral norms and reactive attitudes require culture, and in particular millennia of cultural evolution, to give them full-blooded shape and

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<sup>10</sup> See, for instance: P. Kitcher, “Biology and Ethics” in *The Oxford Handbook of Ethical Theory* (Oxford: Oxford University Press, 2006), ed. D. Copp, pp. 159-177; William Fitzpatrick, “Morality and Evolutionary Biology” in *The Stanford Encyclopaedia of Philosophy*, 2008, sec., 2.3.

expression.<sup>11</sup> But this admission opens up onto a larger point. On their own, these biologically endowed moral sentiments and capacities have little focus, direction, or content. That is, we cannot know *who* to feel loyal to, *what sort of behaviour* we should feel ashamed/proud of, or *what* reputation to strive after, without the guidance of a rich and full-blooded world of cultural meaning and shared or established moral practice. Thus, these biologically adapted moral norms and sentiments, if they are indeed evolutionary adaptations, cannot themselves furnish moral reasoning with any substantive content (although they may impact its form); we need socially pervasive and everyday moral sentiments, practices, directives, beliefs, and intuitions – or what I shall call standards of *social morality* – for this. Secondly, and relatedly, the rich empirical diversity of moral standards of character, treatment, reputation, and behaviour across cultures should serve to confirm the suspicion that biologically adapted moral norms and attitudes, *if* there are any such things, can be culturally co-opted in a tremendous panoply of ways.

Still, even if evolutionary accounts of morality do not in the end pose a necessary challenge to the constitutive social dependence of moral reasoning, how can that dependence be asserted in a non-question-begging way against accounts of morality that ground its content and authority in universal dictates of reason (e.g., Kantian, Hobbesian, Utilitarian accounts), on the one hand, or in the commands or intentions of God, on the other? Standards of *social morality* may play no role in such accounts. Again, I am not here in a position to debunk any such rationalist, constructivist, or theological account of morality with full conviction. All I can achieve here is to shift the burden of proof, as I see it, rather firmly onto the side of those who would deny the constitutive claim. For that denial would have to be made in the face of certain phenomenological features of ethical reasoning in general (i.e., what it's like to make, question, argue, reason, and defend moral judgments in everyday life),

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<sup>11</sup> Kitcher 2006, pp. 173-174.

and certain methodological features of academic moral philosophy in particular, which suggest that moral reasoning will never be taken seriously *unless* it conforms to the standards of some social morality.

For one, substantive theories of morality (e.g., Kantian, Utilitarian, Aristotelian, etc.) are inevitably evaluated on the basis of their accordance with the form and content of social morality as it stands – and this, regardless of their purported claim to rational or objective validity. For instance, on pain of implausibility, Kantian deontologists have struggled to accommodate consequentialist features of everyday moral thinking, e.g., the fact that we commonly think it OK to lie under certain circumstances. Conversely, utilitarian consequentialists have struggled to accommodate equally pervasive deontological moral intuitions, e.g., that we commonly think that some trade-offs which enhance overall utility are nevertheless wrong in themselves. Perhaps these accommodations are successful, or perhaps not. The point is that such theories are not self-validating, but are treated by both laypersons and philosophers alike as having to answer to social morality as it stands.<sup>12</sup> If such theories can lay claim to a form of validity independent of their conformity to social morality, it is not one that we seem willing or perhaps even able to recognize.

Something like the Rawlsian method of reflective equilibrium appears to be the best description of how the philosophical and everyday evaluation of substantive moral theories of whatever sort inevitably proceeds, then. As Rawls puts it, we begin with a set of moral convictions that span all levels of generality, from particular judgments to general principles, that we already hold to be true, correct, or authoritative.<sup>13</sup> The plausibility of any general moral theory or principle that we might contemplate then seems to depend on its ability to cohere as broadly as possible with the content of that pre-given set. In order to gain our

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<sup>12</sup> For a different way of stating what, I think, amounts to the same point, *see*: Walzer 1987, pp. 5-8; and Kolnai 1969-1970, pp. 102-103.

<sup>13</sup> *See*: *TJ*, p. 18.

assent, for instance, such a theory or principle will (a) need to generate case-specific judgments that hold up well against those that we would already intuitively affirm, and (b) hold up against other general principles to which we already find ourselves committed. As Rawls is keen to insist, none of this requires that the starting set of moral judgments must remain unchanged throughout this process. No general principle will cohere perfectly well with all other general principles and specific judgments that we already hold. And that can sometimes be a reason to relinquish belief in some of our pre-considered (general and/or specific) judgments rather than to reject the contemplated principle itself.<sup>14</sup> Additionally, none of this requires, it seems to me, that moral reasoning be understood as a matter of seeking out *coherence* among a set of pre-given moral judgments *per se*. Coherence might be one way to describe it, but a better word is probably that of *soundness*. The method of reflective equilibrium is essentially Socratic, which is to say little more than that it involves making assertions and then considering counterexamples. Another way to describe it is as a technique of evaluating the soundness of some claim *x* on the basis of other claims we already hold to be true, correct, or authoritative. Anyone who engages in such a process is, on some broad descriptive level, seeking out coherence among their beliefs. But in their own eyes, or on a more subjective level of description (which is no less pertinent), what they are doing is plainly and simply seeking out the truth about some matter *x*, whilst being attentive to the best reasons or evidence at hand.

For my purposes, the key relevance of the method of reflective equilibrium consists in its acceptance of the idea that moral reasoning begins with and is guided by a starting set of moral convictions, as it were. Although it may change, this starting set doesn't come from nowhere. It consists in judgments that we already hold to be true, and therefore ones that, in

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<sup>14</sup> See, for instance: Scanlon's valuable discussion of Rawls in "Rawls on Justification" in *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003), ed. Samuel Freeman, pp. 139-167.

all likelihood, we were *socialized* into believing. Since the method of reflective acknowledges that, at its most profound level, moral reasoning is guided by this pre-given and socially contingent set of judgments, it also acknowledges the claim of constitutive social dependence that I am arguing for here. Again, the argument that I am making is not ironclad. It simply tries to shift the burden of proof against those who would deny the constitutive claim. Perhaps some version of metaethical constructivism is correct, and, say, the substantive value of humanity is in some way built into all of our *de facto* normative judgments, and should be given a grounding status in all normative reflection about the reasons that we have.<sup>15</sup> Or, perhaps we can, much like Plato imagined, philosophically contemplate the metaphysical form of the good and derive true substantive principles of morality from there. I am not presently in a position to deny any of these claims. Rather, all I am suggesting is that, as things stand, such philosophical exercises will not be taken seriously (by laymen or by philosophers) unless the substantive moral principles that they issue are sufficiently compatible or adequately engage with our *de facto* set of pre-given and socially contingent moral convictions. Perhaps things were not always this way (although I suspect that they were), or perhaps they may one day change (although I suspect that they won't). Either way, this is the way things are now.

*(ii) The Religious Alternative*

Defending the constitutive claim against those who would contest it from a theological point of view is slightly more challenging. This is because the case of religious or theological accounts of morality introduces the epistemological possibility of moral knowledge through revelation. However, there is no reason to assume that theological

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<sup>15</sup> I briefly discussed such a constructivist theory in Chapter One, §5.2.ii.

accounts are for that reason not accountable to the standards of social morality just the same. For instance, as Michael Walzer has suggested, if we look at actual examples of purported revelation, “the prophetic message depends upon previous messages. It is not something radically new; the prophet is not the first to find, nor does he make, the morality he expounds.”<sup>16</sup> The prophets of old undoubtedly made use of, and gave articulate formulation to, moral standards that were prevalent and salient in their temporal and social context. And even if such references to social morality were instrumentally justified as a means of *communicating* divinely authoritative truth to a socially and historically situated audience,<sup>17</sup> there remains the fact that, once laid down or communicated, the meaning of revelation becomes a subject of endless dispute and interpretation.<sup>18</sup> In any such interpretative dispute, some deference will be given to notions of “what makes sense” or “what is believable” *to us*, as individuals under the sway or inertia of a social morality of some kind. These reflections suggest that moral, religious, and theoretical *traditions* (e.g., Confucianism, Thomism, Islam, etc.) – that is, rival intellectual “points of view,” as Alasdair MacIntyre calls them – are not the ultimate basis of appeal in moral judgment.<sup>19</sup> Rather, such traditions are themselves answerable to standards, intuitions, and sentiments embodied in social morality. These traditions can certainly shape, influence, and instigate reflection that leads to the revision of the form and content of social morality, but they must, in practice, also answer to that form and content as it stands.

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<sup>16</sup> Walzer 1987, p. 71.

<sup>17</sup> This is the sort of account of prophecy that we get, for instance, in Baruch Spinoza’s *Theological-Political Treatise* (1670). See: *Spinoza: Complete Works* (Indianapolis: Hackett Publishing, 1670/2002), p. 394.

<sup>18</sup> Walzer 1987, p. 5. See also: Charles Sanders Peirce, *Philosophical Writings of Peirce* (New York: Dover, 1955), ed. Justus Buchler, pp. 56-57, for some similar reflections.

<sup>19</sup> Alasdair MacIntyre, *The Tasks of Philosophy: Selected Essays, Volume I* (Cambridge: Cambridge University Press, 2006), pp. 52-53; *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* (Notre Dame: University of Notre Dame Press, 1990), e.g., pp. 101-102.

## 2.2 *Moral Diversity*

Now, an important addendum to the constitutive claim defended above is that social moralities differ from one another. As a boy raised in Uganda, for instance, I would be much more likely to find homosexuality an unpardonable and intolerable moral outrage than I would as a boy raised in Canada, where homosexuality is far less stigmatised. Similarly, the relegation of religious belief to the private sphere is an established practice in modern democratic political cultures, but it is unlikely to carry the same aura of self-evidence for participants of a theocratic political culture like that of Iran. As a woman raised in Saudi Arabia, with its public enforcement of a strict interpretation of sharia law, I would be far more likely to think of myself as generically less worthy of moral, political, and legal respect and social entitlements than a man is; whereas, in the UK, for instance, women have the benefit of a public political culture which, for the most part, militates against gender inequality and the inculcation of morally demeaning conceptions of women. If we try to locate the grounds of these contrasting attitudes or policies towards women, moreover, we are likely to discover more disagreement, and disagreement of a more theoretical sort. A typical defender of the UK's egalitarian policy is likely to cite human rights, or women's basic rights, and the self-evident principle of moral and political equality, as the grounds of their convictions. By contrast, a typical defender of Saudi Arabia's inegalitarian policy will cite the authority of sharia or God's law, or an established Salafi interpretation of that law and the exegetical, historical, and moral reasons for adopting it.

Considered in and of itself, it isn't quite clear what sort of meta-ethical conclusions to draw from this fact about moral diversity, or rather the diversity of social moralities. It is always possible that, in some socially engendered disagreements (e.g., about the moral status of women), one side simply gets things wrong. Or, in some cases, it may be that both sides

get things right, and the disagreement is only apparent. If we accept some form of value pluralism, for instance, then it is plausible to think that there can be identical situations in which it is wrong for person A to do *x* but right for person B to do *x*, precisely in light of A and B's disparate history and cultural membership.<sup>20</sup> On the reading that I think is most plausible, however, the fact of moral diversity serves as an effective illustration of how social practice can influence and shape the substantive character of moral reasoning itself; thus, the fact of moral diversity is in essence an illustration of the claim of constitutive social dependence that I defended in the last section. This is roughly the conclusion drawn, for instance, by John Mackie's "argument from relativity," which claims that it is *primarily* one's proximity to and participation in a given set of social practices or an entire way of life that governs the substantive character of one's moral reasoning. Mackie articulates the argument in the following way:

Disagreement about moral codes seems to reflect people's adherence to and participation in different ways of life. The causal connection seems to be mainly that way round: it is that people approve of monogamy because they participate in a monogamous way of life rather than that they participate in a monogamous way of life because they approve of monogamy [...] In short... the actual variations in the moral codes are more readily explained by the hypothesis that they reflect ways of life than by the hypothesis that they express perceptions, most of them seriously inadequate and badly distorted, of objective values.<sup>21</sup>

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<sup>20</sup> See: Susan Wolf, "Two Levels of Pluralism" in *Ethics*, Vol. 102, No. 4, 1992, pp. 785-798. In Wolf's article, the example is that of an American undercover agent (Person A) and an Amish boy (Person B). Given the legitimacy of the values of retribution and pacifism, and the lack of an objectively authoritative way of ranking them, Wolf argues that it is in some situations right for person A to react by prioritizing retributive action, while it is also right for person B to react to that same situation by prioritizing pacifist avoidance.

<sup>21</sup> Mackie 1977, pp. 36-37.

Mackie's argument is, I think, right to point out the orienting effect that participation in a given way of life can have on one's moral judgment. However, what his argument leaves out, or at least downplays, and this is critical, is the rationally intelligible structure of a way of life. Mackie speaks of a social practice or a "way of life" (e.g., monogamy) as if it were a social fact of nature with its own rationally impenetrable inertia. This may be true in some cases. But recently, an array of commentators have stressed, rightly in my opinion, the existential dependence of a way of life upon the reasons, rationalizations, and intelligible justifications that are customarily offered in support of it.<sup>22</sup> The enforcement of sharia law in Saudi Arabia would be unlikely to continue of its own accord if the foundations of Muslim religious conviction in that country were to suddenly erode, just as the practice of denying women the right to vote collapsed after the rational credentials of practices of male chauvinism were successfully challenged in modern constitutional democracies. Social practices and ways of life are ultimately accountable to the rational arguments that they presuppose, e.g., just as the practice of slavery was to some extent accountable to its implicit and abhorrent assumption that, say, blacks are inferior to whites. Deprived of the support of such values, ideas, and theoretical premises, their participants will have difficulty *making any sense* of what they are doing.

Thus, Mackie seems to jump to his hypothesis too quickly. We participate in a monogamous way of life at least in part because we take there to be good reasons for doing so. We may be wrong about those reasons, or we may be wrong about the comparative advantage of monogamy over other forms of marital practice – and we may or may not change *our* practice even if such mistakes are successfully brought to our attention – but the very fact that there is a rational structure to such social behaviour is important. For one, it means that social practices do not just crudely influence our moral judgments and beliefs, but

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<sup>22</sup> Wiggins 2006, pp. 325-357; Waldron 2000, pp. 242-243.

rather come packaged with a set of supporting reasons and arguments to which we hold them accountable. In other words, although social practices and forms of life do undoubtedly exert a reflexive impact on our moral reasoning – e.g., it is no surprise that I happen to find representative democracy and monogamy two highly plausible, meaningful, and worthwhile (if unrelated) social practices – there is equally a sense in which social practices are at *our* mercy: that is, at the mercy of reasons and arguments that we either take to be true or false, sound or unsound, plausible or implausible.

### 2.3 *The Opacity of Moral Judgment*

The optimistic tone of the preceding observations is likely to fade rather quickly into the background once we consider a third (and, for our purposes, final) sense in which moral reasoning is endemically reflexive. This has to do with what I shall call the *opacity* of moral judgment. We often bump up (in reflection or in conversation) against moral beliefs, judgments, convictions, sentiments, or intuitions that we take to be true but for which we nevertheless cannot provide any further reasons or evidence. Unlike ordinary empirical judgments (e.g., the cat to my left is brown and furry), which can be tested against reality by experiment or observation, these brute or opaque normative judgments just sit there, so to speak, offering us no opportunity or recourse for further verification. Consider, for instance, the basic belief in moral equality. Many of us, at least nowadays, simply take such a belief to be self-evident. But that appeal to self-evidence seems at least in part a cover-up for the uncomfortable fact that we are frequently stumped and fall silent when faced with the question of *why* the principle of moral equality is important, or why a belief in it is true, or just plainly why it is plausible to think of every person as worthy of equal moral regard. “It just is!” we frustratedly respond. But this is evidence that we’ve bumped against an epistemic

horizon, so to speak. Although we are confident in the truth and importance of the idea of moral equality, we are simply not sure how to go about substantiating it. Not all moral judgments are like this, but some are, and they are often those in which our conviction is strongest.

Though I am certain that there are parallels to this phenomenon in scientific or empirical judgment, opacity of this sort is something that afflicts moral reasoning in particular, and this is in part because of what I referred to earlier as the autonomy of morality: the idea that moral justification is an irreducibly normative affair.<sup>23</sup> We cannot simply go out into the world and, by empirical observation, discover a new moral principle, deriving an *ought* strictly from an *is*. Rather, the justification of some normative belief or principle (e.g., an egalitarian principle of distributive justice), however fact-sensitive it might be, always requires the invocation of some further normative belief or principle (e.g., the principle of moral equality itself).<sup>24</sup> But this means that justification often bottoms out in some basic normative belief about which there appears to be nothing more to say.<sup>25</sup> In this way, moral reasoning is often more naturally comparable to the work of a string theorist than that of an experimental physicist. The string theorist works in the shadows of certain brute stipulated assumptions (say, about the number of dimensions in space, etc.), tries to come up with a coherent theory that generates interesting predictions, but remains dispossessed of the epistemological advantage of being able to go out into the world and test those predictions against reality.

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<sup>23</sup> Chapter One, §4.4, §5.2.i.

<sup>24</sup> *See*: Cohen 2003, for a famous defense of this view.

<sup>25</sup> This claim applies even in the case of theological justifications of morality. For instance, the mere fact that God made some commandment is not enough to give normativity to that commandment. For that, we would need to invoke some further normative judgment, e.g., that disobeying God is likely to lead to punishment, and that one has a reason to avoid punishment. The chain will then go on: why do we have such a reason to avoid punishment? Because punishment involves suffering, and we have a reason to avoid suffering; why is that? Well, because suffering is *painful*, and we don't like pain, and we ought to do what we like, within reasonable and respectful constraints, etc.

This element of opacity in moral reasoning further illustrates the appeal of the method of reflective equilibrium as a description of how such reasoning *de facto* operates. This is because, given the non-verifiability or opacity of many of our (most cherished) moral judgments, moral reasoning is often best described as a search for what we can plausibly believe *given* what else we already believe to be morally plausible or true. Since, again, we cannot go out into the world, like the archetypal scientist can, to test or verify all of our (most basic) moral judgments, moral reasoning, in effect, takes those convictions for granted. That is, they form part of the starting set from which the process of reflective equilibrium departs. None of this, again, means that the starting set cannot change, or that we cannot abandon a basic and opaque moral conviction in the process of normative reflection, but it does mean that moral reasoning is so to speak ‘rigged’ in favour of certain moral judgments, intuitions, beliefs, and convictions that we are unable (or not readily able) to defend on the basis of further reasons.

Moreover, there is an important element of social contingency here, and in two respects. In the first, crude respect, and in accordance with what I have argued so far (in §2.1 and §2.2), opaque moral judgments are instilled in us via the processes of socialization and acculturation. Someone who has grown up under the Indian caste system, for instance, is not nearly as likely to hold an opaque moral belief in moral equality as a typical citizen born under a modern liberal democracy is. In another, more subtle respect, however, the fact of opacity seemingly forces moral reasoners to appeal to a background sense of what *others* morally think, and whether *they* would agree with a given moral assertion, in order to confirm their own moral findings. That is, when we reason morally we seem to implicitly appeal to a larger (imagined) audience that holds a set of basic convictions very much like our own and that, we imagine, would assent to the conclusions that we have drawn on the basis of such

convictions.<sup>26</sup> The appeal to such an imagined moral consensus, I think, is a result of the fact of opacity itself; since there is, at times, no easily available manner of justifying a deeply held moral judgment, we appeal to the fact that *others believe it too* in order to buttress our conviction. But such an appeal is not merely self-serving, nor is it highly critical or regimenting. It constrains moral reasoning in a definite but limited way in that it typically or unwittingly tends to include audience members of a certain social stereotypical, i.e., usually members who are subject to the same social morality as that of the reasoner herself. Ultimately then, this more subtle socially contingent element in moral reasoning can be seen as a consequence of its more crude counterpart. Regardless, once we understand our most opaque moral judgments to be socially contingent in these ways, it becomes evident that there is an inextricable element of social reflex endemic in moral reasoning.

Despite this, the conclusion to draw here is not that moral reasoning is, on the whole, *largely* opaque and thus subject to social reflex. Far from it: frequently, the content of our moral principles, policies, and action-guiding beliefs will be determined by a complex network of rational and factual claims that are transparent and verifiable. This means that reason will often have a lot to say, and that there is often a great deal that is rationally and transparently contestable in any given moral claim.<sup>27</sup> To take an extreme and rather grim example, the Nazi ideology of hatred against the Jews was not some opaque basic moral belief into which Germans at the time were inexorably socialized or acculturated (although I don't want to deny the important influence of social pressures here). Rather, that ideology was shrewdly concocted to exploit longstanding undercurrents of anti-Semitism in Germany and made an array of absurd moral and factual assumptions (e.g., about the evil spiritedness of Jews, their genetic or innate deficiencies, and the threat that they posed to Arian racial

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<sup>26</sup> See: Kolnai 1969-1970, for a fascinating discussion of this consensual element in moral reasoning.

<sup>27</sup> See: Taylor 1993.

supremacy, etc.) that were meant to support its policy of hatred, subordination, violence, and ultimately mass murder. Anyone who takes even a minimal amount of care in examining the evidence for these assumptions (now or then) would find them utterly unsustainable.<sup>28</sup> And yet, on their basis, the otherwise standardly liberal moral convictions of 20<sup>th</sup> Century Germans (e.g., in moral equality, in liberty, in fairness, etc.) were stifled and abandoned, or simply not extended in the case of Jews (as well as that of Poles, Homosexuals, blacks, etc.). Thus, the most significant site of action in moral reasoning (which involves the fact-sensitive *application* of general and perhaps opaque moral principles to specific cases, policies, and circumstances) is largely non-opaque and open to reasoned argument. Although moral reasoning is endemically infused with socially reflexive elements, it would be an exaggeration to suggest that it is entirely at their mercy.

### 3. MODEST OBJECTIVISM

Now that I have laid out the respects in which I take reflexive ethnocentrism to be inexorably present in its counterpart, *reasoned* moral judgment, I want to outline the main conclusions that I think we ought to draw from this. One such conclusion is immediately evident. Ethnocentrism is, if avoidable at all, only so to a *limited* extent. In so far as moral reasoning itself is constitutively dependent upon the social morality (or moralities) that the process of social upbringing impresses upon us as moral reasoners, and in so far as moral justification often bottoms out at the level of opaque moral judgments that we cannot rationally defend but that are inevitably instilled in us via that same process, we are all, and will always be, to some extent ethnocentric. Nevertheless, while that is indeed an important

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<sup>28</sup> R. M. Hare provides an interesting analysis of how far reasoned judgment can take us in debunking the assumptions of Nazi ideology in, *Freedom and Reason* (Oxford: Oxford University Press, 1963), Ch. 9.

conclusion on its own, much more important, it seems to me, is the wider set of meta-ethical implications that we deduce both from it and from the preceding observations. That is, we can take this main conclusion and run with it in several different meta-ethical directions, but only some of these are justified or appropriate.

*(i) Epistemic Modesty*

The appropriate (and next most immediate) implication to draw from the preceding observations (in §2.1, §2.2, and §2.3), it seems to me, is this: given the social contingency of moral judgment in general, we should be hesitant to adopt an attitude of *certainty* towards our particular moral beliefs and judgments as individuals. Such hesitancy is the most natural reaction to our epistemic circumstances. Given that one's moral judgment is often governed by factors that are outside of their control (e.g., factors involving their upbringing, social milieu, etc.), and moreover, given that these factors are essentially random and not necessarily conducive to one's approximation of moral truth,<sup>29</sup> we should be cautious before investing our own moral judgments with any high degree of certainty. This is what I shall call the notion of *epistemic modesty*.<sup>30</sup>

The basic notion is similar to the demand of epistemic responsibility that I understood to be implicit in Rawls' discussion of the burdens of judgment earlier on (in Chapter Two, §3.3). There, the idea was that, if one sees themselves in specific cases as rationally entitled to hold a certain view as uniquely correct among its alternatives – and I see no reason why the burdens of judgment *nor* the preceding observations about the unavoidability of

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<sup>29</sup> *See:* my arguments in Chapter One, §4.1, §4.2, §4.3, and §4.4.

<sup>30</sup> I am borrowing here, to some extent, from the doctrine of fallibilism endorsed by Peirce. *See:* Peirce 1965, pp. 56: “All positive reasoning is of the nature of judging the proportion of something in a whole collection by the proportion found in a sample. Accordingly, there are three things to which we can never hope to attain by reasoning, namely absolute certainty, absolute exactitude, absolute universality. We cannot be absolutely certain that our conclusions are even approximately true; for the sample may be utterly unlike the unsampled part of the collection...”

ethnocentrism would rule this out as a justifiable conclusion to draw in some cases – this should be done with an awareness of the inherent difficulties of (or hazards involved in) attaining certainty in the matter, as well as the inexorable room that these difficulties make for reasonable disagreement about what to believe. Here I am, in essence, reiterating this point in light of the preceding observations about the unavoidability of ethnocentrism in the context of moral judgment in particular. Ethnocentrism can be understood as one epistemic hazard, burden of judgment, or source of error among many; and its discussion should be included as one element within any exhaustive error theory of moral judgment. But note this: the reason for adopting an attitude of epistemic modesty towards our moral judgments has nothing to do with the claim that moral truth is itself generally unattainable (moral nihilism), or non-absolute (moral relativism). Rather, the reason for adopting such an attitude and concomitantly embracing moral uncertainty, in this case, is derived from the more minimal (moral realist) assumption that approximating truth in moral judgment is most likely to require *more* than just sticking by the moral convictions (at all levels of generality) that are handed to us by social reflex and imbricated in our moral reasoning. That is, the notion of epistemic modesty recognizes that moral reasoning is constantly faced with epistemic obstacles (including ethnocentrism) that the pursuit of moral truth will require it to both avoid and acknowledge, however difficult or even impossible this might be in our day-to-day judgment. But that means, as I argued similarly in Chapter One (in §5 and §5.1), that such a notion is in part derived from an implicit commitment to some generic form of moral realism.

Thus, one of the wrong, or at least highly premature, implications to draw from the preceding observations is that some form of relativism or nihilism about moral truth is the correct meta-ethical view. In fact, the temptation to endorse either of those views on the preceding grounds seems to be due mostly to an irrational unwillingness to countenance the notion of epistemic modesty itself, i.e., the possibility that moral judgment is

characteristically uncertain, but nevertheless viable or capable of approximating moral truth. For instance, part of what leads some into the arms of relativism or nihilism, it seems, is that they begin with the naïve assumption that our faculty of moral reasoning, if viable, must be capable of licensing an attitude of certainty towards the moral judgments that it issues. Then, when they are faced with the preceding observations about the social dependency, opacity, and contingency of moral reasoning *as it is* (including its *de facto* inability to rationally resolve important moral disagreements), they see that certainty and confidence in the objective truth of the judgments generated by *de facto* moral reasoning seems unwarranted or out of place and, *therefore*, they conclude that moral reasoning itself is unviable, i.e., incapable of approximating moral truth. Once this conclusion of non-viability is in place, the abandonment of the notion of moral truth as an epistemic standard (moral nihilism), or the abandonment of the default understanding of moral truth as absolute and unqualified (moral relativism), suddenly become plausible meta-ethical options.<sup>31</sup>

But this whole line of reasoning should be stemmed at the start. There is no good reason to assume that moral reasoning, if viable (in the sense described above), should be able to reliably issue in judgments of certain truth. Perhaps it can do so at times, or in certain instances, but to assume that, in general, epistemic certainty is what we should expect from a viable faculty of judgment is plain silliness. In this sense, relativists and nihilists are like disillusioned or naïve realists. Truth is the ultimate aim of moral inquiry and justification. And, to be sure, the social contingency of moral reasoning, or its inexorable entanglement with social reflex, is a burden in that quest. But that moral reasoning is *burdened*, and its judgments consequently subject to doubt and uncertainty, is not on its own a reason to drop

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<sup>31</sup> It is debatable whether Mackie himself is guilty of this premature line of reasoning because he supplements his argument from relativity (quoted above), which he takes to justify a version of moral nihilism (i.e., error theory), with the argument from queerness, which starts from different considerations. *See*: Mackie 1977. Also *see*: Wiggins 2006, pp. 325-357, for a powerful refutation of Mackie's argument from queerness.

the epistemological enterprise as a whole, or to radically reinterpret its end aim by understanding truth itself to be multiplicitous. Rather, the right conclusion to draw from the socially contingent nature of moral reasoning is just that: that it is burdened, and that its judgments ought to be held in a spirit of modesty, but that it is in principle capable of attaining its end goal of approximating absolute and belief-independent moral truth.<sup>32</sup> At least, that is the meta-ethical view that I am endorsing here.

But these remarks cut both ways. There are those firmly in the camp of moral realism itself (as well as constructivism) who will refuse to accept the viability of moral reasoning in its *de facto* form, i.e., as a method of reflective equilibrium, as I described it above. They will argue that any method of moral reasoning that is so deeply rigged in favour of what we subjectively believe, or moral judgments that we subjectively take to be true, here and now, is too conservative to approximate moral truth (or correctness) in its absolute and objective form. It therefore must be supplanted by a more viable and less socially contingent methodological alternative. To the extent that such a judgment of non-viability is premised on a prior demand for epistemic certainty, however, such realist (or constructivist) arguments are misconceived. Moral reasoning may be incapable (or rarely capable) of licensing an attitude of certainty towards its judgments, precisely because of its social contingency, but nevertheless constitute a viable epistemological enterprise on the whole, i.e., one capable of approximating moral truth. Moreover, this brings us back to the argument that I offered against rationalist, constructivist, and theological conceptions of moral veracity above (§2.1.i). There is nothing to stop anyone from developing and proposing an epistemological alternative to the *de facto* method of reflective equilibrium. However, any such alternative is

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<sup>32</sup> As I stressed earlier (in Chapter One, §5), I am not here in a position to defend a specific conception of moral realism that can positively explain how moral reasoning can approximate moral truth. That is a project for a different occasion. All I am pointing out here is that the socially contingent nature of moral reasoning is not in itself a reason to abandon all hope that such approximation, or epistemic viability, is possible for such reasoning.

unlikely to be taken seriously unless it too issues in substantive principles and judgments that comport well with the moral judgments and convictions that we already hold to be true as the socialized and acculturated beings that we are. Thus, if the base complaint offered by such realists (or constructivists) is that the method of reflective equilibrium is too conservative to be capable of attaining an adequate level of certainty, and that it should therefore be abandoned in favour of an alternative method of reasoning, then it is up to them to show us an alternative that is both capable of generating (adequate levels of) epistemic certainty *and* capable of being taken seriously by human beings as they are. Perhaps this is possible. But for now, we can borrow from Thomas Scanlon's nifty reply to those who would reject the method of reflective equilibrium on the basis of its conservatism: "Conservative as opposed to what?"<sup>33</sup>

Now, in the subsequent sections, I want to outline what I think some of the direct consequences of these general meta-ethical considerations are for the way in which moral argument should proceed in practice, with a particular focus on their implications for moral argument about human rights. Just below, in §3.1, I shall tease out the consequences of the notion of epistemic modesty in particular. And then, as a conclusion, in §3.2, I shall consider a manner in which moral argument about human rights may hope to avoid its ethnocentric and socially reflexive underpinnings, to the extent that this is possible.

### *3.1 Modesty*

To illustrate what I think the consequences of epistemic modesty will be for moral argument about human rights, it helps to use a particular case of moral disagreement as an example. Take, for instance, the so-called East Asian critique of human rights. Earlier (in

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<sup>33</sup> Scanlon 2003, p. 150.

Chapter One, §5.1), I briefly distinguished between two ways in which we could read that critique. On the one hand, it can be read as a disagreement about the content of the set of universal human interests, with some (e.g., Western liberals) claiming that the interest in individual freedom is universal, and others (e.g., East Asian dissenters) claiming that it is not. On the other hand, I suggested that the disagreement can be understood as one about priority rather than universality, with some (e.g., East Asians) arguing that individual freedom should not be prioritized over other universal interests (e.g., in communal belonging, or harmony, or “development”) in the way that human rights declarations such as the UDHR suggest.

Let’s assume, for the present purposes, that the second reading of the problem is the right one, since the East Asian critique is not customarily understood to be one that challenges the universality of the human interest in freedom *per se*.<sup>34</sup> Now, often, when we are confronted with a disagreement of this sort (i.e., a fundamental disagreement about moral priority that straddles a cultural-political divide), and we find ourselves clearly on one side (let’s imagine that we find ourselves on the Western liberal side, in this particular instance), we instinctively look for some epistemological criterion that will quickly let us know for certain whether we are right, or at least for certain whether the opposition is wrong. That is, we want to know whether or not *our* understanding of the matter is correct or wholly credible, and whether we can therefore proceed accordingly, e.g., by criticising East Asian public policies that advance the moral prioritization we revile, by condemning its political leaders, potentially imposing economic and political sanctions against East Asian governments, publicly legitimizing the actions of internal East Asian dissidents, etc. It is precisely this expectation of a quick and easy pathway towards moral certainty or self-

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<sup>34</sup> The argument that socioeconomic rights to “development” or “subsistence” *trump* civil and political rights to, say, liberty has been a mainstay of the East Asian critique of human rights. The fact that the claim is about development rights *trumping* liberty rights suggests that there is already some weight given to the latter. *See*: Tatsuo 1999, pp. 34-35.

confidence, however, that the preceding reflections in general, and the notion of epistemic modesty in particular, caution against.

Now, there may, in practice, be several considerations that lend immediate credibility to our own view, or that serve as dead giveaways that the opposing view is incredible. For instance, at times, in the case of contested human rights violations, we are dealing with a tyrannical or irresponsible government that disingenuously justifies its brutality on the grounds of identity or ‘cultural difference.’ This may be part of a deliberate effort to stunt all reasoned moral criticism of the brutal regime, and to make it *seem* as if all reasoned opposition to their policies itself amounts to a form of socially reflexive opposition, i.e., the regurgitation of ‘Western’ moral prejudices. Sometimes it is painfully obvious that this sort of disingenuous ploy is what is at hand. And one very strong (but not necessarily fully conclusive) indication that this so might be that the brutalized subjects of the regime (many of whom are most probably of the same culture and identity) are doing everything in their power to voice and express their dissent, suffering, and frustration with the way that they have been treated by their government.

But, at other times (and I suspect that the East Asian example falls more naturally into this category), it may not be so easy to tell whether a brutal regime’s defensive appeal to cultural difference or religious identity is but a political ploy. In the case of the Taliban, for instance, we have an instance of a brutal regime that appears genuinely convinced by a set of religious convictions about the truth of Islam, the truth of a certain strict interpretation of Sharia law, and the importance of enforcing it, etc. Under such circumstances, are we, *qua* liberals who instinctively recoil at the thought of living under the Taliban’s authoritarian brutality, and who have little to no intellectual sympathy for the complex network of religious convictions that undergirds their authoritarianism, *thereby* entitled to dismiss the Taliban’s political project as immoral or unjust with full conviction and absolute certainty? Certainly

not: to do so would be, if not shamefully arrogant, presumptuous and premature. For one, there is, barring a great deal of further study, little more that we can conclusively say in judgment of the Taliban's religious convictions themselves apart from the fact that, like most religious claims, they are steeped in controversy, and furthermore contested by the millions of Muslims who would adopt a less strict interpretation of Sharia law.<sup>35</sup>

Secondly, our instinctive sense of moral outrage at the Taliban's political policies, and the brutality with which these are implemented, is not on its own enough to warrant our morally condemning those policies in a spirit of certainty or complete confidence. This is not to say that our patent sense of moral outrage against those policies does not contribute to the veracity of our reasoned case against them. On the contrary, that sense of outrage is a central element in our case, perhaps even its starting point, and it generates a provisional justification for its truth. But that justification is, I suggest, only *provisional*, and so requires further substantiation.<sup>36</sup> In particular, if it is the brutality and oppressiveness of the Taliban's political policies that is outraging us, then one thing we will want to verify is that we are not the *only* ones who see those policies in that way, i.e., as brutal and oppressive. This may involve consulting local and regional opinion on the matter, and it is very likely going to involve finding out if those who are themselves subjected to the Taliban's policies cast them in the same moral light as we do. But again, even if they do see those policies in such a light, or do

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<sup>35</sup> We could add to this the notion that it seems wrong to try to politically actualize (and enforce upon others) such a deeply controversial set of religious axioms, as I argued earlier in reconstruction of Rawls' argument from legitimacy (Chapter Two, §3.3). Let me leave that argument aside for the moment, however.

<sup>36</sup> This suggestion takes us back to the discussion of Dworkin's supposed luck-based justification of ethnocentrism (in Chapter One, §4.4). If it turns out that all that Dworkin was suggesting was that, when we are faced with someone who disagrees with us on some moral matter but nevertheless cannot uncover a rational fault in their position, that we remain *provisionally* justified in continuing to endorse our own view on the matter (indeed, we have to give *some* prima facie credit to our moral convictions), then I am in agreement with him. But, in that case, his argument would not quite be a justification of ethnocentrism. Rather, it would be a description of how reasoned moral judgment should respond in cases where it cannot (or cannot yet) substantiate its own convictions.

not, none of this will automatically clinch the case one way or the other.<sup>37</sup> The process of substantiating our brute moral intuitions is often tedious and difficult. Only very rarely is it easy. And regardless, the point is that such substantiation is necessary if we are going to adequately compensate for the fact that, in judging any social practice (including our own), we will be bringing our own socially contingent moral prejudices, history, experiences, and unique cultural baggage to the table. Acknowledging this continuous need for further substantiation, and abstaining from adopting an attitude of certainty towards our moral judgments and convictions until the tedious work is done (or at least is closer to being done), then, is part of what is entailed by the notion of epistemic modesty.

Returning now to the original example, and setting to one side the possibility that the East Asian critique is a disingenuous ploy on behalf of a patently immoral government, what we seem to have is a genuine disagreement about the moral priority of different sets of interests or different sets of human rights. Moreover, it is a disagreement that straddles a cultural-political divide. The East Asians – with their unique historical experience, social morality, cultural heritage, and institutional forms – judge, perhaps opaquely, that there are cases in which the interests of the whole (e.g., rights to development, community, subsistence, or welfare) trump the interests of the individual (e.g., rights to freedom, liberty, or security). By contrast, we liberals – with our own counterpart history, culture, institutional forms, and social morality – perhaps equally opaquely judge oppositely: that there are no cases (or at least far fewer ones) in which the interests of the whole trump the interests of the individual or few. I have already said something about the sort of hard justificatory work that will be necessary in order to increase the credibility or epistemic privilege of either side's view in this disagreement, and I'll say more about that in the concluding section below

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<sup>37</sup> Thus, *contra* Ignatieff, the absence of the “victim’s consent” is not the ultimate litmus test of the existence of a human rights violation. *See*: Ignatieff 2001, p. 56.

(§3.2). But for now, I simply want to comment on the way in which we ought to understand or, as it were, frame this disagreement.

On the modest brand of moral epistemology that I have been trying to argue for here, the East Asian critique is a competing universal claim about the content or priority of human rights.<sup>38</sup> The disagreement is not, therefore, about what is true *for East Asians*, on the one hand, and what is true *for Western liberals*, on the other. On such a relativistic account, the disagreement disappears, since their claims are not incompatible.<sup>39</sup> Nor is the disagreement one for which we should prematurely assume that there is no objectively correct answer. Rather, what we have are two incompatible claims about what is morally the case. Both claims purport to offer ‘the right answer,’ but given the patently reflexive underpinnings of both competing claims in the moral disagreement as it stands, we have to accept the lack of certainty about which side is correct. As much as we, on the liberal side, would like to have certainty and self-confidence in the moral truth of our claim of moral priority, we ought to recognize that such certainty is likely to remain elusive. We therefore cannot simply (or ethnocentrically) presume that our view “applies,” or that it is true, for that is precisely what is subject to debate. Rather, all that we can initially say is that we *believe* that our view applies, or is true. In fact, this will be all that we can say at the end as well. In any moral judgment, we are reporting a belief, and hopefully citing good evidence. Thus, in order to raise the credibility of our professed belief, we will have to make every effort to unearth, substantiate, and confirm the rationality in our own view and the irrationality of its incompatible counterpart. And the same goes for our East Asian, or Muslim, or liberal counterparts. They ought to recognize and do the same.

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<sup>38</sup> See: Waldron 1999, for some similar observations.

<sup>39</sup> See: Chapter One, §3.3. There are ways of getting this conclusion to run on a morally pluralistic objectivist account as well (see fn. 20 above), but I shall ignore that consideration for the moment.

### 3.2 *Privilege*

Now, what I have in mind as far as a method of, so to speak, ‘raising the credibility’ of our side (or any one side) in such disagreements is largely captured by the notion of *wide* reflective equilibrium advanced by Rawls. Earlier (above in §2.1) I described the method of reflective equilibrium as one that involves scrutinizing proposed moral judgments (at whatever level of generality) in light of the body of moral judgments (also at all levels of generality) and the set of relevant non-moral facts that we already take to be true. Some such method, I take it, describes in more complex terms the basic Socratic exercise of making an assertion and then examining it in light of everything else we believe to be true, in the form of plausible counterexamples. Now, it is possible for a moral reasoner following this method to scrutinize a proposed moral judgment, or even a substantive moral theory or set of moral principles, in light of what I earlier called their ‘starting set’ of moral convictions, i.e., the *de facto* set of moral convictions that they currently hold to be true. In the process of such scrutiny, they might find that the proposed moral judgment or theory conforms quite well with that starting set, is subject to few obvious counterexamples (or at least none that the reasoner wouldn’t consider abandoning), and is therefore ratified by a state of reflective equilibrium.

That state, however, would only be *narrow*, according to Rawls, and this is partly because the reasoner, in such an instance, has failed to consider two things: (i) *alternative* moral judgments or theories that compete with the original proposal as objects of reflective equilibrium, and (ii) the “force of the various arguments” and convictions that speak in favour of those alternatives.<sup>40</sup> That is, in order for a moral judgment or theory to be ratified

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<sup>40</sup> See: *JF*, pp. 30-31. See also: Scanlon 2003, pp. 150-151, for a useful discussion, and Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (Cambridge: Cambridge University Press, 1996), pp. 22-26, for the same.

by a state of *wide* reflective equilibrium, it would (i) have to win out against an array of considered alternatives, as well as (ii) rest upon arguments the cumulative force of which wins out against the various arguments that speak in favour of those alternatives. This sort of augmented version of reflective equilibrium is what I am proposing as a minimally ethnocentric way of arguing for our moral claims, including our claims about human rights. In order to sharpen the proposal, it will help if I clarify three ways in which it is different from, and goes beyond, the somewhat primitive notion endorsed by Rawls himself.

*(i) Supra-Political*

First, at least in his later work, Rawls understands the notion of wide reflective equilibrium to be one that is implicit in the idea of free and equal persons itself, and one that is designed primarily to assess the reasonableness of various liberal conceptions of justice on the basis of ideas and values implicit in modern democratic public political culture.<sup>41</sup> I am carrying over none of those assumptions here. For one, as I see it, wide reflective equilibrium is a method designed to help us discern what is morally the case, i.e., true.<sup>42</sup> And it is not bound by the strictures of public reason. I am thus borrowing the idea of a wide reflective equilibrium in a purely abstract sense, leaving behind its associations with the ideas of *PL* and *LP*, which I addressed earlier in Chapters Two and Three.

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<sup>41</sup> See: *JF*, pp. 29-31.

<sup>42</sup> This doesn't mean that I am defending its efficacy as a device for attaining moral truth. Rather, I am defending its efficacy as a device for avoiding ethnocentrism, to the extent that this is possible. See: Chapter One, §5.

(ii) *Framing a Disagreement*

Second, Rawls does not devote enough explicit attention to the question of how disagreements are framed within the method of wide reflective equilibrium. And this seems to me an important matter if we are to expect the method to have any success or determinacy. For instance, in any moral disagreement it is urgent that we establish some sort of background hypothesis about what the disagreement is about. And preferably, that background hypothesis ought to be cashed out in terms of shared human constants or universally acknowledged problems that require some solution. Thus, in the case of a disagreement over, say, the morality of monogamy vs. polygamy, it is important that we keep in view the fact that the disagreement here is one about how best to organize the basic reproductive institution of human society, especially given the endemic dangers, benefits, and potentially harmful emotions that humans involved in that institution characteristically become exposed to. Once the disagreement is framed in that way – i.e., as one of competing solutions to a common human problem – it becomes easier to weigh up the arguments on either side and determinately establish their force.<sup>43</sup> Of course, there is no guarantee that it will always be obvious exactly how to frame any given moral disagreement or debate, and so the content of the frame will itself be an issue of contention.

In the case of human rights these difficulties are particularly evident, since, for example, it is not at first glance entirely clear what we are disagreeing about when we contest the status of some right as a *human* right. Moreover, to answer that this is a matter of deciding whether such a right is one that belongs to all human beings “simply in virtue of

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<sup>43</sup> Rawls frames debates about justice in his own way by conceiving of liberal conceptions of justice as answers to the question of what a society that is a system of social cooperation among free and equal persons should look like. On the importance of this framing effect in moral disagreement in general, see: Waldron 1987, p. 170; Waldron 2000, pp. 242, 243; Waldron 2004, pp. 219-220; Charles Taylor, “Understanding and Ethnocentricity” in *Philosophy and the Human Sciences: Philosophical Papers, Volume 2* (Cambridge: Cambridge University Press, 1985), pp. 125-130.

their humanity” is equally uninformative unless we have some background understanding of (i) the criteria in light of which a right may qualify under that heading, and (ii) the unique practical implications that characteristically follow from a right’s being of that sort. Thus, we need to make an effort to frame such disagreements in a way that gets at something more substantive, e.g., if  $x$  is a human right, then it is a matter of national and international concern, or, if  $x$  is a human right, then its protection is a matter of great moral importance, etc. Such a framing process can sometimes become a complete task unto itself.<sup>44</sup> It is rarely easy or non-contentious. But it is nevertheless part of what has to be done if the alternative views (e.g.,  $x$  is a human right vs.  $x$  is not a human right) are to be determinately assessed. And this is especially true if what we want is to determinately and authoritatively assign one view with a greater degree of credibility than the other.

*(iii) Widening our Starting Set*

Third, part of what defines the narrowness and epistemic deficiency of narrow reflective equilibrium, it seems to me, is that it involves the evaluation of some proposed moral judgment or theory on the basis of one’s starting set of moral convictions (at all levels of generality), and *nothing* more. What Rawls fails to emphasize enough, however, is that widening things out by considering the force of alternative moral judgments or theories, as well as “the force of the various arguments” that support them, will require a corresponding widening or deepening of that starting set as well. And this is particularly true, for instance, if we are contemplating an alternative moral judgment or theory, incompatible with our own, that is supported by arguments that find currency in a foreign culture, as imagined in the East

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<sup>44</sup> Indeed, there is a recent philosophical industry that has developed around the question of how to define the notion of a human rights, and establish its existential criteria. *See, for instance:* Beitz 2009, Griffin 2008, Raz 2010, Tasioulas 2009.

Asian case. In such a case, weighing up both views in the argument will require that we in some sense ‘get into the head’ of our opponents and consider the moral arguments that they cite (or might cite) in support of their case.

This isn’t merely a dialectical exercise, it is part of establishing the truth or justification of either view. And it will require that we do our best to not only give a charitable account of our opponent’s arguments, but to make a genuine and concerted effort to grasp the underlying moral convictions, judgments, and concerns that are operating within those arguments, even if these are ones that we do not ourselves readily share, or that are not part of our own socially contingent ‘starting set.’ It is here, in this sympathetic and imaginative effort, that the so to speak ‘widening’ of our starting set is demanded and takes place. Such an imaginative effort will never be complete, and we will always recoil back to our own established and ingrained moral convictions to some extent. But such an effort, it seems to me, is the best hope we have for avoiding ethnocentrism. That is, it is the best hope we have for evaluating culturally contested moral claims on the basis of their reasoned merits, rather than on the basis of social reflex. Making such an effort, therefore, is part of what is involved in adequately compensating for the fact that, in judging any social practice or moral view (including our own), we will be bringing our own socially contingent moral prejudices, history, experiences, and unique cultural baggage to the table.

One positive upshot of this effort is that, by sympathetically engaging in the imaginative or studied reconstruction of our opponents’ moral arguments and their underlying convictions, we are likely to contribute to our understanding of how best to frame the debate itself. For instance, if we discover, in the East Asian case, that underlying their stance on the moral priority of welfare or subsistence rights over liberty rights is an alternative conception of, say, the minimal components or conditions of human dignity – i.e., one that is different from the one that we tacitly adopt – then this can help frame the

argument further and bring it into sharper relief. We will have discovered that the argument is ultimately one about the minimal conditions of human dignity, and this can make rational resolution a more palpable (if not guaranteed) possibility. Furthermore, such investigation can indirectly force us to deepen our own starting set of convictions, for instance, by obliging us to examine our own reasons for adopting the alternative conception of human dignity that we do. In fact, it is only by seeking out such reasons that we can enhance our understanding of the moral appeal of the liberal view on this matter, and make a good and persuasive case to those who do not currently appreciate it.

None of this, again, means that establishing the credibility or epistemic privilege of our own view in this way is going to be easy. On the contrary, chances are that it will likely result in further uncertainties and indeterminacies, i.e., more than we started out with. Moreover, nothing is really gained in this effort by examining in detail how culturally engendered moral disagreements are often exaggerated or peripheral and that, by and large, we all morally agree.<sup>45</sup> Indeed, on the view I am trying to articulate here, we stand to benefit most from seeking out and even exaggerating culturally engendered moral disagreements. Those are the disagreements that force us to widen our epistemic horizons beyond their present limits, so to speak, and to consider the plausibility of arguments, judgments, reasons and convictions that we are not customarily exposed to. Epistemologically speaking, that cannot but be a good thing. Finally, there is a moral dimension to all this.<sup>46</sup> Being open minded and intellectually flexible in our encounters with cultural disagreement is a matter of respect. In particular, doing our best to assess the views of our cultural counterparts on the basis of their reasoned merits, rather than on the basis of social reflex, is a way of paying respect to such peoples. And if we want to proceed *as if* our inherently uncertain moral views

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<sup>45</sup> For this strategy, *see*: Griffin 2008, pp. 140-142; Sen 1999, pp. 242-244; Sen 2007, pp. 112-113

<sup>46</sup> *See*: Farid Abdel-Nour, "Liberalism and Ethnocentrism" in *The Journal of Political Philosophy*, Vol. 8, No. 2, 2000, pp. 207-226, for an interesting discussion of this point.

are true, and act in the world accordingly, then it is incumbent upon us to sincerely make such an effort, and in so doing to latch on to our best hope for avoiding the epistemological burden that besets us.

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